9355

FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**CAM/34UF/LDC/2013/0015**
Property	:	**Northampton House, Wellington Street, Northampton NN1 3NB**
Applicant	:	**Northampton House RTM Company Limited**
Representative	:	**Geoffrey Leaver, Solicitors LLP**
Respondents	:	**Leaseholders of Northampton House**
Freeholder and Landlord and Tenant	:	**Palacemews Properties Limited**
Date of Application	:	**18th July 2013**
Type of Application	:	**To dispense with the consultation requirements set out in section 20 of the Landlord and Tenant Act 1985 (Section 20ZA Landlord and Tenant Act 1985)**
Tribunal	:	**Judge JR Morris** **Roland Thomas MRICS** **David S Reeve MVO, MBE**
Date of Hearing	:	**15th October 2013**
Attendance	:	**Applicants:** **Mr D Madigan, Property Manager** **Mrs H Harman, Secretary, RTM Company** **Mr A Phillips, Geoffrey Leaver, Solicitors** **Ms S Sachdev, Geoffrey Leaver, Solicitors** **Mr Piers Hill, Counsel** **Respondents:** **Mr Sheppard** **Mr Stephen Bishop, Counsel**

DECISION

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Decision

- The Tribunal determines that it is reasonable to dispense with the requirement to make available all the estimates obtained for inspection contrary to paragraphs 4(5) (c) and (10) of Schedule 4 Part 2 of the Service Charges (Consultation etc) (England) Regulations 2003 (SI 2003/1987) under the consultation requirements of section 20 Landlord and Tenant Act 1985

Reasons

Application

1. On the 18th July 2013, the Tribunal received an application under Section 20ZA of the Landlord and Tenant Act 1985 for dispensation from all or any of the consultation requirements contained in Section 20 in relation to the replacement of two lifts at the Property.

Documents

2. Documents received were:
   - Application Form
   - Copy of the Lease
   - Witness Statement of Donogh Madigan and copies of supporting documents including quotations from Mid Western and Otis
   - Copy of the Leasehold Valuation Tribunal Decision number CAM/34UF/ LSC/2012/0021 in which it was determined that the consultation requirements set out in section 20 of the Landlord and Tenant Act 1985 had not been complied with in relation to specified qualifying works.
   - Witness Statement by Robert Sheppard
   - Quotations from Ennis and Landmark Lifts Limited

The Law

3. Section 20 of the Landlord and Tenant Act 1985 as amended by the Housing Act 1996 and Commonhold and Leasehold Reform Act 2002 limits the amount which tenants can be charged for major works unless the consultation requirements have been either complied with, or dispensed with by a Leasehold Valuation Tribunal, now subsumed into the First-tier Tribunal (Property Chamber). Section 20 applies to qualifying works if the relevant costs incurred in carrying out the works exceed an amount, which results in the relevant contribution of any tenant being more than £250.The consultation provisions are set out in the Schedules to the Service Charges (Consultation etc) (England) Regulations 2003 (SI 2003/1987) (the 2003 Regulations).

4. The Procedure appropriate to the present case is in Schedule 4 Part 2 of the Regulations and may be summarised as being in 4 stages as follows:

A Notice of Intention to carry out qualifying works must be served on all the tenants. The Notice must describe the works and give an opportunity for tenants to view the schedule of works to be carried out and invite observations to be made and the nomination of contractors with a time limit for responding of no less than 30 days.

Estimates must be obtained from contractors identified by the landlord (if these have not already been obtained) and any contractors nominated by the Tenants.

A Notice of the Landlord's Proposals must be served on all tenants in which an opportunity is given to view the estimates for the works to be carried out. At least two estimates must be set out in the Proposal and an invitation must be made to the tenants to make observations with a time limit of no less than 30 days. This is for tenants to check that the works to be carried out conform to the schedule of works, are appropriately guaranteed and so on.

A Notice of Works must be given if the contractor to be employed is not a nominated contractor or is not the lowest estimate submitted. The Landlord must within 21 days of entering into the contract give notice in writing to each tenant giving the reasons for awarding the contract and, where the tenants made observations, to summarise those observations and set out the Landlord's response to them.

5. Section 20ZA of the Act allows a Leasehold Valuation Tribunal to make a determination to dispense with the consultation requirements if it is satisfied that it is reasonable, as follows –

   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.

Description of the Property

6. From previous decisions the Tribunal found that Northampton House comprises 187 flats and car parking over 11 floors plus a roof space, which the Applicant retains, and which is not part of the common parts and no access is available to the Tenants. A metal gate prevents unauthorised access to the roof. Car parking is on the lower ground floor and ground floor levels. On the ground floor there is a foyer with reception and a Leisure Centre. The Common parts comprise the foyer and Leisure Centre, the stairwells, lifts (of which there are four shafts, two containing operating lifts) and corridors giving access to the flats and the pathways to the car parking spaces.

Issues

7. Whether the non-compliance with the consultation requirements set out in section 20 of the Landlord and Tenant Act 1985 namely the failure to make available all the estimates obtained for inspection contrary to paragraphs 4(5)

(c) and (10) of Schedule 4 Part 2 of the Service Charges (Consultation etc) (England) Regulations 2003 (SI 2003/1987) was prejudicial to the Tenants.

Extract from Decision number CAM/34UF/ LSC/2012/0021

8. Reference was made to the Leasehold Valuation Tribunal Decision number CAM/34UF/ LSC/2012/0021 in which it was determined that the consultation requirements set out in section 20 of the Landlord and Tenant Act 1985 had not been complied with in relation to specified qualifying works and the relevant extract is as follows:

   102. However, the Second Notice did not comply with paragraphs 4(5) (c) and (10) of Schedule 4 Part 2 the 2003 Regulations in that all the estimates were not made available for inspection.

   103. A Third Notice was served on 22nd June 2011 with responses required by 24th July. In the Notice the Respondent sought to explain why Mid-Western Lifts (which since the placing of the order had been taken over by Orona UK Limited) was awarded the contract. Reference was made to the two quotations other than from Otis and Mid-Western Lifts/Orona UK Limited although these had not been made available.

   104. The Tribunal determined that the consultation procedure pursuant to section 20 Landlord and Tenant Act and Schedule 4 Part 2 of the Service Charges (Consultation etc) (England) Regulations 2003 (SI 2003/1987) had not been complied with because there had been no express invitation for observations and all the estimates had not been made available to the Leaseholders as required by paragraphs 4(5) (c) and (10).

   105. The Tribunal informed the parties that if the Tribunal found that the section 20 procedure had not been followed an application could be made under section 20ZA of the Landlord and Tenant Act 1985 for dispensation from the requirements. The Tribunal was of the opinion that the issue of whether the document headed Order Confirmation, which was signed on behalf of John Horgan of Mid-Western Lifts and dated 20th April 2011 pre-empted the procedure would be a matter that could be considered in relation to any 20ZA Application if made.

Evidence

Applicant's Case

9. The witness statement of Donogh Madigan addressed the Notices served under the section 20 procedure as follows:

10. The First Notice served 15th February 2011 advised the leaseholders of the works to be undertaken and gave 30 days, until 17th March 2011 to make observations.

11. The Second Notice served on 9th May 2011 advised the Leaseholders that 5 companies had been asked to provide a quote for the works however only 4 companies did provide quotes. The Applicant provided what were said to be the 2 most relevant quotes to the Leaseholders as on their reading of the guidelines on the section 20 process, they believed that only the most relevant quotes needed to be provided to the Leaseholders. LCG Lift Consultancy Limited reviewed these quotes and provided a report recommending that Mid Western Lifts be used to carry out the works. A copy of this report was sent to Leaseholders. All Leaseholders were invited to make observations by 9th June 2011. This Second Notice also contained a summary of the observations received by the Leaseholders following the First Notice.

12. The Third Notice was sent to all Leaseholders on 22nd June 2011. This Notice included a review of the First and Second Notices and contained a summary of the observations received following the Second Notice. It advised the Leaseholders that based on the report of LCG Lift Consultancy Limited and the Leaseholders feedback the contract had been awarded to Mid Western Lifts/Orona UK Limited. The Leaseholders were invited to make observations by 24th July 2011.

13. It was acknowledged that the First Notice had been incorrectly dated 15th March 2011 instead of 15th February 2011 when it was sent out. It was also acknowledged that none of the Notices expressly invited the Leaseholders to make observations but it was said that the tenant clearly understood that they were being given the opportunity to respond and provide their observations and that they did in fact actively engage in the Section 20 consultation process.

14. In respect of the previous Tribunal's finding that all the estimates had not been made available to the Leaseholders as required by paragraphs 4(5) (c) and (10) it was stated the Second Notice did inform the tenants that four estimates had been obtained and reviewed by an independent consultant.

15. It was said that in the decision of the previous tribunal a reference was made to a document headed Order Confirmation, which was signed on behalf of John Horgan of Mid-Western Lifts and dated 20th December 2010, which it was submitted by the Respondent to pre-empt the section 20 procedure. It was said that this should be addressed in the event of a section 20ZA application.

16. The statement addressed the issue by saying that the Applicant had approached a number of lift companies including Mid Western Lifts around December 2010. This was simply an inquiry at this stage and therefore no consultation procedure was carried out. There was a large variance in the quotes obtained and therefore, the Applicant instructed a lift consultant for their expertise. The lift consultant recommended a major refurbishment to the lifts and so the Applicant returned to the lift companies with a new specification requesting revised quotations. A further quotation was received from Mid-Western/Orona Limited dated 20th April 2011. This was obtained subsequent to the issue of the First Notice, although the sum quoted remained the same and the covering letter was dated December 2010 when the

preliminary scoping exercise had been carried out. They had clearly re-submitted the quotation that had been provided following that preliminary request.

17. The statement also said that it had been submitted that the Applicant had accepted the Mid Western quotation on 20th April 2011 after the service of the First Notice but before the service of the Second and Third Notices. This was refuted. It was said that Mid Western were not instructed to carry out the works until 16th September 2011 after the end of the consultation period.

18. It was added that the Health and Safety Authority telephoned the Managing Agent of the Property on 2nd March 2012 advising them that they had received the insurer's' report on the old lifts 1 and 2 and were instructed to immediately remove them from service and this was done within 20 minutes of the call showing the precarious state of the old lifts. The refurbishment had taken place on lifts 3 and 4.

19. At the hearing Counsel for the Applicant examined Mr Madigan in chief about his statement. Mr Madigan confirmed the content of his written statement identifying the three Notices and confirming that the preliminary exercise of obtaining quotations in December 2010 was a discrete process outside the section 20 procedure. He said that it was because the quotations ranged from £35,000 to £117,000 that the Applicant engaged a consultant. He said that the contractors responded to the consultants separately and the consultants evaluated the response. In cross-examination by the Respondent's Counsel Mr Madigan said that this had not been a 'stitch up'. Mid Western had not been pre-selected for the work. Counsel for the Respondent submitted that a discarded preliminary scoping exercise disbars the landlord from then carrying out a section 20 procedure.

20. Mr Madigan in examination in chief said that no other leaseholder had objected to the section 20 procedure or the section 20ZA application. At no time did the Respondent request to see the two additional quotations and at no stage did they seek to instruct their own expert or obtain quotations. Counsel for the Applicant submitted that there was no evidence of prejudice. The Respondent had not put forward any questions to the consultant.

21. Counsel for the Respondent submitted that the Respondent had not been able to ask questions in the course of the consultation process about quotations that the Respondent had not had sight of until this hearing.

22. The Applicant produced the two quotations referred to in the Second Notice, although not previously made available, from Ennis and Landmark Lifts Limited. In response to questions from both Counsel and the Tribunal Mr Madigan made the following response.

23. An Engineers Report, as required for insurance purposes, was obtained in September 2010. A copy of the report had not been provided to the Leaseholders or the Tribunal. This report was sent to number of lift companies who were asked to provide quotations to carry out refurbishment of the lifts to meet the requirements of the report. Mr Madigan said this was a

preliminary speculative exercise to assess what works would need to be carried out and the likely cost and were not part of a consultation process. Three contractors provided quotations on the basis of works that would need to be done to comply with the Engineer's Report as follows:

- Landmark quoted £35,000 per lift on 26th October 2010
- Ennis quoted £28,000 per lift on 23rd November 2010
- Mid-Western/Orona quoted £68,457 per lift on 11th December 2010

In addition to the amount for installation each contractor provided a quotation for maintenance contracts.

24. Mr Madigan said that due to the very significant variation between the quotations LCG Lift Consultancy Limited were engaged to advise on the action to take. He said that after the First Notice LCG provided a new specification against which the contractors were asked again to provide a quotation. Otis was an additional contractor who was asked to bid together with DAB lifts who was a contractor nominated by the Respondent. The three contractors who had provided earlier quotations in the course of the preliminary exercise confirmed their previous quotations. Otis quoted £98,000 per lift. No quotation for a maintenance contract was provided. DAB did not provide a quotation.

25. Mr Madigan referred to the Report by LCG following this process a copy of which was provided to the Leaseholders and the Tribunal. It was noted that the LCG Report only referred to the quotations from Mid-Western/Orona and Otis. It was asked why the Report only refers to these two estimates. Mr Madigan said that LCG had discounted the estimates from Ennis and Landmark. It was not clear why these were discounted by LCG and it appeared that the Applicant relied upon the expertise of LCG in doing this.

26. The LCG Report dated 29th April 2011 was provided and stated that:

...it appears that the quotations from both Companies [Mid Western Lifts and Otis PLC] address the works required that is the replacement of major components of the installations due to age and condition.

The Mid Western quotation includes for the modernisation of the existing installations and includes for all aspects of the works required as a refurbishment and therefore reduces any builders requirements, whereas the Otis quotation is for full replacement of the lifts which would require builders works which had not been included for within the quotation and could add considerable cost and time to the project.

The materials offered by Otis are from their standard range and could prove difficult to service unless the contract remained with Otis...

27. The Report went on to state that the cost of maintenance could be higher and the maintenance contract longer with Otis. In addition it was said that Otis have their own specialist tools

...which are not readily available on the open market, thereby restricting the maintenance of the lifts by any other contractor.

28. The Report said:

The equipment offered by Mid Western is of robust, more readily available type and maintenance in the long term can be carried out by any reputable contractor with the spares available on the open market.

The solution offered by Mid Western Lifts is to modernise the existing installation retaining the more robust unaffected aspects of the installation such as the guides which are of the heavy duty type, as was used at the time of the original installation.

29. LCG also provided a letter dated 9th October 2013 which added little other than to say that:

It did not appear that the other quotations covered anything of actual operation but the costs were still quite high.

30. Mr Madigan was asked what was in the new specification against which the contractors were asked to provide a quotation in March/April by LCG Lift Consultancy Limited and whether there was a tender document. Mr Madigan stated that as far as he knew the only additional information to the Engineer's Report that was provided to the contractors by LGC when they were asked to quote again was that the lifts were to be completely refurbished and in the light of this did the contractor think the quote they had given was adequate. Ennis and Landmark said their quotation was adequate and Mid Western Lifts re-submitted the quotation they had made in December 2010. He said there was no tender document or specification other than the Engineer's Report.

31. Counsel for the Applicant quoted Lord Neuberger in *Daejan Investments v Benson* [2013] UKSC 14 in which he said that the main issue and often the only issue is whether the tenants have been prejudiced by the failure to comply:

Given that the purpose of the requirements is to ensure that the tenants are protected from (i) paying for inappropriate works or (ii) paying more than would be appropriate, it seems to me that the issue on the LVT should focus when entertaining an application by a landlord under section 20ZA(1) must be the extent, if any, to which the tenants were prejudiced in either respect by the failure of the landlord to comply with the requirements. [44]

In their respective judgements, the LVT, the Upper Tribunal and the Court of Appeal also emphasised the importance of real prejudice to the tenants flowing from the landlord's breach of requirements, and in that they are right. That is the main, indeed normally the sole question for the LVT when considering how to exercise its jurisdiction in accordance with section 20ZA(1). [50]

32. Whilst the formal proof is on the applicant to prove entitlement to dispensation, the factual burden is on the respondent to establish what prejudice has resulted from the failure to comply [67]

It is worth remembering that the tenants' complaint will normally be, as in this case, that they were not given the requisite opportunity to make representations about proposed works to the landlord. Accordingly, it does not appear onerous to suggest that the tenants have an obligation to identify what they would have said, given that their complaint is that they have been deprived of the opportunity to say it. Indeed, in most cases, they will be better off, as, knowing how the works have progressed, they will have the added benefit of wisdom of hindsight to assist them before the LVT, and they are likely to have their costs of consulting a surveyor and/or solicitor paid by the landlord. [69]

33. Counsel for the Applicant submitted that the three Notices were clear. Notwithstanding the incorrect date on the Notice of 15th March 2011 when it was actually sent on 15th February 2011 the date for when the making of observations were to be received was correct. Also although none of the Notices expressly invited the Leaseholders to make observations they knew that they were able to do so and did. The Respondent nominated DAB lifts as a contractor. The Second Notice did not say that all four estimates were available but it was clear that there were four estimates and the Tenants including the Respondent were able to request them. The Applicants correctly under the legislation provided the two most relevant quotations. The Respondent made no observations. Counsel quoted the Notices in his written skeleton and in oral submissions stating that it was obvious that observations were being sought and many tenants did in fact respond with observations.

34. Counsel of the Applicant referred to Lord Neuberger's judgement and submitted that if there had been prejudice because the Respondent had not had the opportunity of making representations about the proposed works then it is for the Respondent to identify what representations they would have made. However they have not done so.

35. Counsel submitted that following the consultant's report the Mid Western quotation provided the best value and the Respondent had not been able to show that they had been prejudiced by the omission in the Second Notice with regard to the consolation process and therefore dispensation should be granted.

Respondent's Case

Submission as to the correct lift shafts

36. Mr Robert Sheppard submitted a statement on behalf of the Respondent. He said that the description of the works in the First Notice had been to repair or replace the existing lifts. He said that this was erroneous because the existing lifts were within shafts 1 and 2 whereas the new lifts were installed in shafts 3 and 4. He submitted that these have in effect been made common areas whereas they are actually retained by the Landlord.

37. Counsel for the Respondent at the hearing also made this point and submitted that it prejudiced the Respondent. In addition he said that the quotation, particularly those that were provided by Ennis and Landmark were in respect of lift shafts 3 and 4 whereas the work was carried out in shafts 1 and 2 and therefore they were not providing like for like quotations.

38. In cross examination by Counsel for the Respondent Mr Madigan stated that the lifts were installed in shafts 3 and 4 to provide a lift service by the continued use of the old lifts in shafts 1 and 2. The old lifts did not have a shaft-dividing screen between the two lift shafts and this was now a requirement. In order to install the screen in shafts 1 and 2 would have meant the lifts could not be used and so no lift service would have been available until the work was complete. By installing the new lifts in shafts 3 and 4 a lift service could be provided using the old lifts until the new were operational.

39. Counsel for the Applicant submitted in respect of this point raised by the Respondent that there are four lifts in the Building.

- Paragraph 1.2(c) of Schedule 3 to the Lease grants the Leaseholders a right of way on foot over "the entrances entrance halls staircases lifts landings and passages forming part of the Building"
- Paragraph 9 of part 2 to Schedule 7 of the Lease includes as part of the service obligations the duty of "maintaining repairing renewing surveying insuring inspecting and cleaning any lifts in the building".

40. He said the quotes received and provided to the tenants as part of the consultation exercise referred to the provision of two new lifts. The previous LVT found that the description of the works in the Notices was sufficient to describe the works that were actually carried out. There was no restriction or representation as to whether they would be installed in shafts 1 and 2 or 3 and 4. He submitted the suggestion that the Landlords had retained two shafts and excluded them from use by the Tenants is nonsense.

Submission as to the HSE communication

41. Mr Sheppard in written representations and Counsel on his behalf at the hearing questioned the veracity of the statement made by Mr Madigan in relation to the call from the Health and Safety Executive on the 2nd March 2012 requiring the removal of the old lifts from service when he recalled that members of the tribunal had been offered a ride either in the new lifts or the old lifts prior to another hearing on 12th April 2012 showing the old lift was still operational but that the new lifts were not fully commissioned.

42. Counsel for the Applicant submitted that question as to what advice or notice or requirement was given by the Health and Safety Executive in March 2012 in respect of the two lifts that had been in use before the refurbished lifts had been installed is irrelevant because dispensation is not being sought on the grounds that the works were carried out in an emergency because of health and safety issues. By March 2012 the qualifying works had been completed, in September 2011.

Submission as to the compromising of the consultant's report

43. Mr Sheppard submitted in written representations that the independence of the Consultants was compromised and their decision to appoint Mid Western as the contractor was predicated upon a predetermined decision. He said the Consultants only comment on two quotations and yet four quotes were obtained. It was submitted that from the Consultants report it appears that they were only provided with two quotes, which made the arrangement appear to be a 'sweetheart' deal between Mid Western and the Applicant. Reference was also made to the contract being made with the company in Ireland as opposed to the UK. It was suggested that there was a link between Mid Western and the Managing Agent and the McNamara family who had been involved in the development of the Property. Mr Sheppard also expressed incredulity in DAB Lifts, which was a contractor nominated by the Respondent, not having submitted a quotation for the work.

44. Counsel for the Applicant noted in his skeleton argument that the objectivity of LCG Lift Consultancy Limited had been challenged on the grounds of bias, lack of objectivity and breach of duty of care. He also noted that it had been alleged that the contract between Mid Western and the Applicant was a 'sweetheart' deal on the basis that the contract was given to a company based in Ireland. These allegations have already been dismissed by the previous LVT on the basis that there was no evidence of this. It was submitted that the works were in fact carried out by Orana which is a related UK company.

Submission as to the failure to make all four estimates available

45. In his written statement Mr Sheppard said that all the quotations referred to in the Second Notice were not made available during the course of the consultation and Counsel at the Hearing said that they had only been provided just before the Hearing.

46. Counsel for the Respondent submitted that the failure to make all four estimates available showed a lack of transparency. He said that the preliminary exercise could not be seen as such but was an invalid section 20 procedure. He said that the Engineer's Report which formed the basis of the estimates had not been provided. The only specification added by the consultants, LCG, in contacting the contractors again was to say that the lifts were to be refurbished. It was submitted by the Applicants as being two processes but in fact was one. Nothing had changed between the obtaining of the supposed preliminary estimates and those provided for the later section 20 procedure. In fact the same quotations were used for the procedure to the extent that Mid Western did not even change the date. There was no evidence of a new specification or re-assessment of the quotations by LCG in March/April 2012

47. Counsel for the Respondent submitted that LCG, having viewed in January 2011 the estimates obtained in October, November and December 2010, had already pre-selected Mid Western. He said that in their Report dated 29th April 2011 LCG only refer to two quotations and there is no evidence in that Report that they saw the quotations from Ennis and Landmark Lifts. If they did why did they not state why they had discounted them?

48. Counsel submitted that there was clear prejudice in that if the Ennis and Landmark quotations had been made available the Respondent would have questioned the LCG Report for not having explained why two estimates that were half the price of the estimate that was accepted, had been completely discounted. The Report states that the Mid Western Lifts quotation was the most comprehensive whereas in act the Otis quotation was even more comprehensive. It was therefore submitted that this could not have been the ground for selecting Mid Western. Nor could the reason have been that it was the cheapest because the two cheapest were not even referred to in the Report.

49. Counsel for the Respondent therefore submitted that the Respondent had been prejudiced by the failure to make all four quotations available and that dispensation should not be granted or if granted should be done so on terms to take account of the prejudice suffered.

Decision

50. The Tribunal considered the legislation and the most recent cases with particular reference to the statements by Lord Neuberger in *Daejan Investments v Benson* [2013] UKSC 14 quoted by Counsel for the Applicant and set out above.

51. The Application was to seek dispensation from non-compliance with the consultation requirements set out in section 20 of the Landlord and Tenant Act 1985 namely the failure to make available all the estimates obtained for inspection contrary to paragraphs 4(5) (c) and (10) of Schedule 4 Part 2 of the Service Charges (Consultation etc) (England) Regulations 2003 (SI 2003/1987). It had been determined in an earlier tribunal decision, number CAM/34UF/ LSC/2012/0021 that these consultation requirements had not been complied with. In determining whether it is reasonable to dispense with this requirement the Tribunal considered whether it was prejudicial to the Tenants.

52. The previous tribunal had found that paragraphs 4(5) (c) and (10) of Schedule 4 Part 2 of the Service Charges (Consultation etc) (England) Regulations 2003 (SI 2003/1987) were the only requirements that had not been complied with. The Applicants submitted that the non-compliance had not been prejudicial in that the Respondent was aware that four quotations had been obtained and could have made representations with regard to seeing them but had not done so and yet had made other observations including nominating a contractor.

53. The Applicant had also engaged a specialist consultant who had selected the contractor employed as being best value which it was suggested further removed any prejudice.

54. The Respondent made a number of submissions which it said impacted on the issue of prejudice and these were considered by the Tribunal as follows:

Submission as to the correct lift shafts

55. The Respondent submitted that the lifts were installed in the 'wrong' shafts which, it was submitted, had two effects. First, the Applicant was trespassing on a part of the Property that was retained by the Landlord under the Lease and second, the quotations were not like for like because Mid Western and Otis had quoted for shafts 1 and 2 whereas Ennis and Landmark had quoted for shafts 3 and 4.

56. With regard to the first point the Tribunal stated at the hearing and confirm in its decision that this is not a matter that is within either the remit of the Application or the jurisdiction of the Tribunal. The Tribunal is of the opinion that whether or not the four shafts were within the common parts under the Leases or retained by the Respondent and whether or not the Applicant as a Right to Manage Company was entitled to install new lifts in shafts 1 and 2 as opposed to replacing the lifts in 3 and 4 and therefore trespassed on the property retained by the Respondent, was not a matter for the Tribunal.

57. With regard to the second point the Tribunal finds that all the quotations are based on the Engineer's Report and their inspection of the lift shaft. There was no evidence to suggest that one contractor was told the lifts were to be installed in shafts 3 and 4 and another told that they were to be in 1 and 2. Nor was there any evidence to suggest that it made any difference to the cost in which shafts the lifts were to be installed.

Submission as to the HSE Communication

58. The Respondent cast doubt upon the account of when the Applicant received a communication from the Health and Safety Executive stating that the old lifts were no longer fit for use and must not be used. The Tribunal agreed with the Applicant that the Respondent's comments would be relevant if the Applicant was submitting that the reason for non-compliance with and request for dispensation from the procedures required by section 20 Landlord and Tenant Act 1985 had been that the works were urgent. Therefore the comments made by both Mr Madigan and Mr Sheppard with regard to the urgency or otherwise of taking the old lifts out of commission were not taken in to account in considering whether dispensation should be granted.

Submission as to the compromising of the consultant's report

59. The Respondent submitted that the consultant's report was compromised in that the Consultant's recommendation to appoint Mid Western as the contractor was predicated upon a predetermined decision. He said the Consultants only commented on two quotations and yet four quotes were obtained. It was submitted that from the Consultants report it appears that they were only provided with two quotes, which made the arrangement appear to be a 'sweetheart' deal between Mid Western and the Applicant. Reference

was also made to the contract being made with the company in Ireland as opposed to the UK. It was suggested that there was a link between Mid Western and the Managing Agent and the McNamara family who had been involved in the development of the Property. Mr Sheppard also expressed incredulity in DAB Lifts, which was a contractor nominated by the Respondent, not having submitted a quotation for the work.

60. The Tribunal agreed that that the consultant's report only commented on two quotations and yet the Applicant stated that four quotations for the work had been obtained and at the hearing four were produced. The Tribunal also agreed that it appeared from the Report as if only two quotations had been provided to the Consultants although the Tribunal noted the Applicant's statement that all quotations had been shown to the Consultants.

61. The Tribunal considered the Respondent's suggestion that the withholding from, or arbitrary discounting by, LCG of the two lowest quotations together with the alleged link between Mid-Western and the Managing Agent and the McNamara, family who had been involved in the development of the Property, was evidence of a 'sweetheart' deal. The Tribunal took into account the statement by the Applicant that all the quotations had been shown to the Consultants, LCG, and that some evidence to support this had been provided by the letter from LCG to the Applicant dated 9th October 2013 which stated that:

It did not appear that the other quotations covered anything of actual operation but the costs were still quite high.

62. The letter specifically mentioned the Mid-Western and Otis quotations and therefore it was reasonable to suppose that the reference to the other quotations was in relation to those form Ennis and Landmark. No evidence was adduced to show that LCG were anything other than independent consultants. In addition the previous tribunal had not considered that there was sufficient evidence to show a link between Mid-Western and the Managing Agent and the McNamara family and no new evidence to prove that there was such a link had been adduced for this hearing.

63. The Tribunal therefore found that there was no evidence that the contract for the installation of the lift was influenced by any connection between the contractor and the Applicant or persons related to the Applicant which might compromise the agreement and the need to obtain best value for the tenants. The Tribunal also found that there was no evidence to show that DAB lifts had submitted a quotation at all.

Submission as to the failure to make all four estimates available

64. The Respondent submitted that the failure to make all four estimates available meant that it was prejudiced. Counsel for the Respondent said that the section 20 process was fundamentally flawed by having what the Applicant said was a preliminary process of obtaining quotations followed a section 20 process but what the Respondent's Counsel submitted was really a single process spread over several months. He said the process commenced with the collection of

quotations in October to December, the selection of one quotation in February followed by a section 20 procedure where the contractor had been pre-selected as Mid-Western. It was submitted that evidence of this pre-selection was the failure to make available all the estimates and therefore the prejudicial prevention of the Respondent from raising questions about the two excluded quotations. These quotations were notable in that they were half the cost of the Mid-Western quotation which had been selected.

65. The previous tribunal found that the consultation requirements set out in section 20 of the Landlord and Tenant Act 1985 had not been complied with, namely the failure to make available all the estimates obtained for inspection contrary to paragraphs 4(5) (c) and (10) of Schedule 4 Part 2 of the Service Charges (Consultation etc) (England) Regulations 2003 (SI 2003/1987). The present Tribunal on examining the process agreed with this finding.

66. The Tribunal considered the submission by Counsel for the Respondent whether what the Applicant described as a preliminary exercise was in fact really a part of a single process. The Tribunal found that it was not. The Tribunal did not think it unreasonable in this case that on receipt of the Engineer's Report it should ask for quotations to assess the scope of what needed to be done to comply with the Engineer's recommendations both in terms of work to be carried out and cost to be incurred. Tenants would need to be informed of both of these matters in the first notice of a section 20 procedure.

67. If following such exercise the Applicant had then selected a contractor and carried out a predetermined section 20 process, as suggested by the Respondent, the Tribunal would agree the process would not have been transparent and would have been flawed. However on completion of the initial obtaining of quotations the technical nature of the work was appreciated and the Applicants employed LCG Lift Consultancy Limited, the Consultant. There then began what the Tribunal was satisfied was a section 20 procedure.

68. The Tribunal found that, based on the statement of Mr Madigan and the date of the Otis quotation and DAB e mails, between the First Notice and the Second Notice the Consultant approached all the contractors. There was no reason to suppose that those who had already submitted quotations were not approached at this time to see if they wished to amend or re-submit those quotations on the basis that the work was to refurbish the lifts. It also found that both Otis and DAB were asked to submit quotations. The Tribunal determined that that this was within the section 20 procedure. There was no reason to suppose that if any one of the contractors had submitted a fresh quotation that was comprehensive and better value for money than the Mid-Western quotation the Consultants would not have recommended it.

69. The Tribunal also found that, based on the letter of the 9th October 2013, the Consultants had seen all four quotations, had selected the two they considered the most appropriate and written their report accordingly.

70. The Tribunal then considered whether the Respondent had been prejudiced by all four quotations not having been made available. The Tribunal found

that the existence of four quotations was mentioned in the Second Notice and, notwithstanding only two were referred to in the Consultant's Report the Respondent had been alerted to their existence. The Tribunal noted that the Respondent could have sought a copy of the omitted quotations even though they were not expressly said to be available but did not do so. If the Respondent had obtained copies of the quotations of Ennis and Landmark it would probably have asked why there was such a discrepancy between the quotations and why they were not addressed in the Consultant's Report considering that they were half the cost of the Mid-Western quotation, which had been selected as the preferred contractor?

71. Considering the matter as at the day of the hearing, the Tribunal found that if the questions had been asked the Consultant's letter of 9th October 2013 shows that the Consultant would have answered that the Ennis and Landmark quotations did not cover anything of the actual operation and so were rejected and therefore the Report only considered the Otis and Mid Western quotations.

72. The Tribunal was of the opinion that the Applicant was entitled to rely upon the report of an independent consultant in selecting the contractor for the work. The Tribunal found that the Consultant had taken into account all four quotations and stated, if belatedly and curtly, why the lowest two quotations were rejected and only two were considered in its Report. Therefore even if the Respondent had seen and questioned the Ennis and Landmark quotations the outcome of the selection process would not have been altered and therefore the Respondent was not prejudiced.

Decision on issue

73. The Tribunal determined that the Respondent was not prejudiced because:
    - the existence of four quotations was mentioned in the Second Notice alerting the Respondent to their existence and the Respondent could, but did not, ask for copies even though they were not expressly made available;
    - the independent Consultant was engaged to evaluate the quotations and recommend one and the Applicant was entitled to rely upon such recommendation;
    - the Consultant had seen all four quotations;
    - the Consultant had in its letter of 9th October 2013 stated why it had rejected two of the quotations and therefore only referred to two in its Report.

74. Therefore the Tribunal determined it reasonable to dispense with the requirement to make available all the estimates obtained for inspection contrary to paragraphs 4(5) (c) and (10) of Schedule 4 Part 2 of the Service Charges (Consultation etc) (England) Regulations 2003 (SI 2003/1987) under the consultation requirements of section 20 Landlord and Tenant Act 1985

Judge JR Morris

Date: 27th November 2013