IN THE LEASEHOLD VALUATION TRIBUNAL
IN THE MATTER OF SECTIONS 19 AND 20ZA LANDLORD & TENANT ACT 1985

Application Nos	CHI/00ML/LDC/2008/0001 CHI/00ML/LDC/2008/0002 CHI/00ML/LIS/2008/0002
Properties	Flats at Blackdown, Brockhurst, Linchmere, Lodsworth and Tillington, Swanborough Drive, Brighton
Applicant	Brighton & Hove City Council Rep by Thomas Eggar Solicitors
Respondents	The Lessees (see Schedule 1 attached)
Members of the Tribunal	Ms H Clarke (Barrister) (Chair) Mr N Cleverton FRICS Ms J Morris
Date of hearing	2-3 April 2008

1. **THE APPLICATIONS**
The Applicant Landlord brought three applications before the Tribunal. Two applications were concerned with the requirement to consult tenants before carrying out major works. In the first of these the Applicant asked the Tribunal to dispense with the requirement to give notice to 6 of the tenants of its intention to carry out works and/or the requirement to serve Notice of Estimates. In the second application the Applicant asked the Tribunal to dispense with the consultation requirements in respect of all the Respondents on the basis that the work in question was urgently required. The third Application was concerned with service charges and the Applicant Landlord asked the Tribunal to determine that the sums demanded as service charges were reasonably incurred and/or that the work for which the costs were incurred was carried out to a reasonable standard.

2. **THE DECISIONS**
The Tribunal decided to dispense with the consultation requirements under the first and the second applications, insofar as they were not met.

3. The Tribunal decided that the work was not done to a reasonable standard and that certain of the costs were not reasonably incurred.

4. The Tribunal therefore made the following deductions from the costs upon which service charge demands were based:
For each block:
- external decorations:
10% of the contract price for external redecorations plus 7% consultant supervision fees on that figure;
- supervision of works costs under the contract:
15% of the contract price for supervision plus 7% consultant supervision fees on that figure;
- site accommodation:
100% of the contract price for site accommodation plus 7% consultant supervision fees on that figure.

5. **THE BACKGROUND & THE PARTIES**
The Applicant was the freehold owner of 5 blocks of flats located in the Whitehawk area of Brighton. The blocks contained a total of 54 flats, some comprising 14 and some comprising 6 flats. Each of the blocks was constructed in a similar style with a flat roof and individual balconies. 27 of the flats were held on long leases to which the Applicant was the reversioner. The leasehold tenants of those flats were the Respondents to the applications. The remainder of the flats remained in the Applicant's ownership.

6. The Applicant formed the intention to carry out works to the roofs of the blocks and redecoration externally and internally. It also wished to carry out works to another block of flats at Whitehawk and a number of houses located in the Moulsecoomb area of Brighton.

7. In 2004 the Applicant entered into a contract with Quadric Ltd ("Quadric") to carry out all the said works both at Whitehawk and at Moulsecoomb. It engaged Haywards Property Services ("Haywards"), later known as Dunlop Haywards and later as Erinaceous plc, as consultant on the project. The total cost of the project for the blocks containing leaseholder flats was in the region of £380,000 and the costs of the entire contract were in excess of £800,000. Work commenced at Moulscoomb in November 2004 and was substantially carried out to the Whitehawk blocks between January – July 2005, although further matters continued to be raised between the parties during the following 18 months.

8. In September 2006 service charge demands were sent to the Respondents including sums in respect of the said works.

9. The disputes between the parties were concerned with consultation before and during the performance of the contract, and with the provisions of the contract and the standard of the work.

10. **THE LEASES**

The Tribunal were shown 2 forms of standard lease in use at the properties. Each of them provided for the landlord to maintain and redecorate the structure and exterior and common parts of the block and for the tenant to contribute to the costs in accordance with the proportions of the rateable value of the block. There was no provision for a sinking fund, any excess service charge was to be returned to the tenant at the end of the year. Nothing in the Applications turned on any provision of the leases save as to the contribution proportions.

11. **THE LAW**

Section 20 Landlord & Tenant Act 1985 as amended by the Commonhold & Leasehold Reform Act 2002 states:

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

The consultation requirements are set out in the *Service Charges (Consultation Requirements) (England) Regulations 2003 SI 2003/1987* and in summary the relevant part of the regulations at Schedule 4 Part 2 requires the landlord to give each tenant written notice of intention to carry out works, to invite observations on the works and invite the tenant to nominate a person from whom an estimate should be obtained, and subsequently to obtain estimates and provide information about them to the tenants before entering a contract for the works to be done.

Section 20ZA Landlord & Tenant Act 1985 states that the Tribunal may dispense with any or all of the consultation requirements if satisfied that it is reasonable to do so.

12. Section 19 Landlord & Tenant Act 1985 states:

"(1) Relevant costs shall be taken into account in determining the amount of a service charge payable for a period—
(a) only to the extent that they are reasonably incurred, and
(b) where they are incurred on the provision of services or the

carrying out of works, only if the services or works are of a reasonable standard;
and the amount payable shall be limited accordingly.

13. **THE INSPECTION**
Immediately before the Hearing the Tribunal inspected the property in the company of several representatives of both Applicant and Respondents. The Tribunal inspected the exteriors and common parts of the 5 blocks in which leaseholder flats were located, and inspected the interior of the balcony area to 2 flats in Linchmere.

14. Generally the Tribunal observed that the blocks appeared to have been decorated relatively recently. Externally, the Tribunal observed staining and discolouration to the external balcony paintwork on each of the blocks, in both sheltered and exposed areas. The paint was cracked and peeling in areas. The balconies which the Tribunal inspected closely, Flat 6 and Flat 10, Linchmere, had large flakes of paint lifting away, leaving some areas of bare metal exposed. The tenant of Flat 6 also drew attention to her front door which showed brush strokes in the paintwork and areas of older paint where fittings had not been removed during the redecoration but had subsequently been removed by the tenant.

15. Many of the windows had PVC frames but some were metal framed, including the communal entrances, and several metal frames had flaking paintwork. There were areas of damp or decayed wood around the common entrances to several of the blocks.

16. Internally the common parts had been redecorated but there were areas of water staining in the communal stairwell of 2 blocks. The metal banisters to internal staircases had been repainted but the finish was uneven due to older paint remaining underneath.

17. The Tribunal did not inspect the roof areas.

18. **THE EVIDENCE AT HEARING**
A hearing over 2 days was held at Brighton Race Course. The Applicant was represented by Counsel Mr M Hutchings, and Mr D Barrett, Solicitor. Evidence was given in witness statements and orally for the Applicant by;
Ms C Price, Leasehold Liaison Officer
Mr G Cottle, Principal Building Surveyor of the consultant firm Haywards Property Services (now Erinaceous plc)

Mr P Matthews, Planned Maintenance Manager
Mr D Arthur, Right to Buy & Leasehold Senior Officer

19. Submissions and evidence were given for the Respondents by;
Ms A J Hill, Secretary to the Swanborough Drive Leaseholders' Association (SDLA), Flat 10, Linchmere
Mr M Bennett, Chair of SDLA, Flat 12, Brockhurst
Mr A Heath, member of SDLA, Flat 4, Brockhurst
Mrs C Geoghan, Flat 8, Tillington

20. There were also 3 substantial bundles of documents and witness statements before the Tribunal.

21. **SUBMISSIONS OF LAW**
Following the hearing the Tribunal invited the parties to make additional submissions on the construction and effect of the relevant law. The Tribunal had regard to those submissions in reaching its decision.

22. **REASONS AND DETERMINATION**

APPLICATION No CHI/00ML/LDC/2008/0001:
To dispense with consultation regarding 6 tenants:

The Applicant's case was that Notices of Intention were prepared separately in respect of the internal/external decorations and in respect of the flat roof replacements. A list of all the leasehold tenants was drawn up, including alternative addresses where known, and the Notices were taken to the Applicant's post room for delivery by first class post on 16 April 2004. A similar procedure was followed with regard to the Statement of Estimates on 24 September 2004, but the Applicant admitted that the Statement was not sent to the tenants' alternative addresses. A Notice of Reasons was sent out by the same procedure on 10 November 2004. The Applicant said that procedures had been changed, following the experiences of this Application. First class post was still relied on, but now certificates of posting were obtained and the list of addresses was double-checked. The Applicant said that it had considered whether to use recorded delivery, but believed that valuable time would be lost from the consultation process if letters had to be collected from a delivery office, and it would be an extra expense to tenants.

23. During the course of the consultation period the Applicant was made aware that some tenants maintained they had not received one or more Notices. The Tribunal noted that only the 6 tenants who had stated they did not receive at least one of the consultation notices were joined as Respondents. In the view of the Tribunal all the tenants liable to contribute to the cost of the works ought to

have been joined as Respondents to this application because the decision could potentially affect all of them. However, the Tribunal noted that all the tenants were joined as Respondents to the other 2 applications and had been invited to make any response they wished to any of the applications. In practice, the tenants who gave evidence and made submissions to the Tribunal did so in relation to all 3 applications. The Tribunal concluded that none of the tenants had in practice been prejudiced by this omission and proceeded to determine the matter.

24. It was common ground that the works under the contract in question were 'qualifying works' under s20 Landlord & Tenant Act 1985. The Tribunal considered the law and directed itself that the meaning and effect of s20 in conjunction with the Consultation Regulations was that non-compliance with the consultation requirements would have the effect that the amount of costs under the contract which could be taken into account in determining the service charge from each tenant who had not been so consulted would be limited to the specified amount, namely £250.

25. Consequently, if the Applicant had failed to comply with the consultation requirements in any respect, and if the Tribunal did not dispense with those requirements, the amount of costs which the Applicant could recoup from any tenant in respect of whom the requirements had not been met would be restricted to £250.

26. The Tribunal noted that s20ZA empowered a tribunal to dispense with all or any of the consultation requirements if satisfied that it was reasonable to do so. The question of whether it was reasonable was to be judged in the light of the purpose of the consultation provisions. The most important consideration was likely to be the degree of prejudice that there would be to the tenants in terms of their ability to respond to the consultation if the terms were not met. This would not, however, be the sole consideration.

27. The Tribunal directed itself that the Applicant had the burden of proof in establishing whether or not notices were 'given' to the tenants, and that this was a matter of fact to be decided in each case. The Applicant did not rely on any statutory or contractual 'deeming' provisions as to the receipt of notices.

28. The Tribunal considered the evidence as to the giving of notices. There was no direct evidence to contradict the claims of the 6 Respondents to this Application that they did not receive the documents in question. A letter was received from Mr Holter and an email from Mrs Buckingham soon after the NOIs were sent out, each making enquiries about major works. However there was insufficient evidence to conclude that either of these people had

been notified of their right to nominate a contractor from whom an estimate should be obtained, or to make observations about the proposed works within any particular period.

29. The tenant of 5 Blackdown, Mr Inglis, was not a named Respondent to this Application but completed a questionnaire in 2005 asserting that he had not received Notice of Intention. However, the Tribunal were shown a letter from Mr Inglis dated 20 April 2004 commenting on the proposed roof and redecoration works. The Tribunal concluded on the evidence that Mr Inglis had been given Notice.

30. The Tribunal found as a matter of fact on the evidence before it that the 6 named Respondents did not receive at least one of the Notices of Intention and of those 6 tenants Mrs Geoghan also did not receive the Statement of Estimates. This was the extent to which the Applicant had not complied with the consultation requirements (so far as the first application was concerned).

31. The Tribunal then considered whether it was reasonable to dispense with those parts of the consultation requirements with which the Applicant had not complied.

32. The Respondents said that the tenants who did not receive the NOI were deprived of the opportunity to nominate a contractor from whom an estimate should be obtained. The evidence before the Tribunal was that several tenants, including Mrs Hill, would have wanted to obtain alternative quotations (or nominate an alternative contractor) but were inhibited from doing so because the works had already got underway. They had some informal indications as to the cost of the work which suggested that the prices under the contract were high.

33. The Tribunal accepted this to be a sincere wish, but noted that it had no evidence that the firms from which other quotations might be sought would be in a position to quote for all of the work comprised in the contract. Any alternative quotation would have to be on the same basis as those obtained by the Applicant. The tenders placed different prices on different parts of the contract, and it was not possible to 'cherry-pick' the cheaper parts. It was accepted in the course of the hearing that it was reasonable for the Applicant to invite tenders only from its list of approved contractors.

34. The Applicant itself obtained 6 tenders, rather than the minimum of 2 estimates required under the consultation requirements, and the competitive tendering process was described in careful detail. This process was accepted by the Tribunal on the evidence to have been scrupulously and fairly carried out.

35. The Respondents said that the tenants who did not receive the NOI were deprived of the opportunity to make observations on the proposed works. However, on the evidence, 2 of those tenants (Mr & Mrs Holter and Mrs Buckingham) became aware of the Applicant's intention to carry out major works at least in a general sense very soon after the NOI was sent out and wrote to the Applicant in connection with the works.

36. Mrs Hill said that she was not told about the proposed works in the course of pre-sale enquiries made when she purchased her Lease in October 2003. The Tribunal considered this to have no bearing on the question of whether failure to consult in April 2004 had caused her any prejudice. On the evidence there had been no representation by the Applicant that no such works would be carried out.

37. The Respondents alleged in correspondence that Linchmere and Blackdown did not need to be re-roofed (as they were not leaking). The only evidence before the Tribunal about the condition of the roofs indicated that the work needed to be done. Consequently the Tribunal did not find that the tenants were prejudiced by being unable to make observations to this effect to the Applicant. The 6 affected tenants did not specify any other observations which they would have made if they had the opportunity.

38. The Tribunal accepted that tenants may have needed time to plan their affairs so as to prepare to pay for the works when the time came, and that delay in being informed about the works could cause financial problems. However there was no evidence of financial difficulty being suffered by any of the Respondents. Mrs Hill explained that her re-mortgage was being held up by the proceedings, because she needed to await the outcome, but apart from some inconvenience to her, there was no evidence of any financial detriment.

39. The Tribunal came to the view that in the circumstances of the case, no real prejudice had been caused to any of the 6 tenants who were not given Notice of Intention to carry out the works, nor to Mrs Geoghan who was given neither the NOI nor the Statement of Estimates.

40. As against dispensation, the Tribunal considered that it would have been relatively easy for the Applicant to have chosen a different system for giving notices and recording their delivery to the flats in question. The system was obviously fallible and had in fact failed. It was notable that the system had been changed, and the experience of this case may have contributed to that decision. Nearly a quarter of all the tenants liable to contribute had not been properly consulted. There had been widespread bad feeling and a

sense amongst the tenants that the Applicant was treating them in a high-handed manner. This was not helped by the way in which the contract was performed and that fact that the contract spanned the two sites at Moulsecoomb and Whitehawk.

41. The Tribunal considered the financial implications of its decision. If the requirements were not dispensed with, the tenants in question would effectively receive a 'windfall' of between £5,000 - £9,000 apiece. The Applicant, a local authority subject to the requirement to ring-fence its housing budget, would need to forgo other expenditure in order to bear the tenants' share of the contract costs. The Applicant's predicament however could have been avoided, and it was to be expected that legal and other specialist advice would have been available to it.

42. On balance, the Tribunal considered that it was reasonable to dispense with the requirements. Observations were made by those tenants who did receive the notices, and they were heeded by the Applicant. There was no reason to think that the failure to consult was deliberate. There was no prejudice to the 6 tenants affected, and a competitive tendering process was undertaken.

43. **REASONS AND DETERMINATION**

APPLICATION No CHI/00ML/LDC/2008/0002:
To dispense with consultation regarding further works.

The Applicant's case was that before preparing the specification of works and invitations to tender, a general inspection report was prepared by Mr Cottle and a further specialist survey was undertaken by ICOPAL, a flat roofing system manufacturer. The construction of the roofs in question included a flat felted roof surrounded by brick parapets and finished with lead flashing. Core sampling was undertaken which identified the internal layers of the roof.

44. The roofing work got underway but within a few days defects to flashing and cavity trays affecting the inner faces of the brick parapets were identified. These defects had not been discovered before the works started.

45. The Applicant took the firm view that additional work had to be done to replace the flashings because otherwise the 20-year flat-roof system guarantee offered by ICOPAL would be undermined.

46. The Applicant also took the view that the full consultation procedure would result in prohibitive expense because scaffolding was already in place and other contract costs would be replicated if the work

was stopped for the necessary period of time. It therefore carried out an 'informal' consultation by sending to the tenants a letter on 14 February 2005 which explained why Applicant believed the work was required to be done and what the additional costs would be. The tenants were invited to respond within 7 days.

47. A petition was received in response which challenged the cost of the additional work. A site inspection also took place with Mr Cottle, a representative of Quadric, the Project manager from the Applicant and with 2 tenants who had a special interest or experience in building matters. Those tenants did not dispute the need for the work to be done. The additional work was commissioned by the Applicant and work on the roof resumed soon after 22 February 2005.

48. The Respondents accepted that the parapet faces were not initially visible, being concealed by the existing roof felt, but contended that the costs had already included a charge for a survey by Mr Cottle's firm. This survey ought to have brought the need for work to the parapets to the attention of the Applicant. Alternatively, the costs ought to have been met from the contingency allowance in the contract price. Other contractors should have been asked to price for the work.

49. The Tribunal accepted that the report prepared by Mr Cottle was better characterised as an inspection than a 'survey', and that it was reasonable for him not to have undertaken any additional destructive investigations into the concealed parts of the roof. In any event the defective areas included cavity trays which would not have been visible even on lifting the felt.

50. The Tribunal found on the evidence that it was necessary for the work to be done, and that the key issue was the preservation of the 20-year guarantee of the roof system. Once faced with this situation, the evidence on balance supported the Applicant's claim that significant economies of scale would have been lost, or a loss-of-profit payment would have had to have been made to Quadric, if the existing contract had been suspended or terminated pending a fresh consultation and tendering process.

51. The Tribunal also accepted that the 'contingency sum' was an amount incorporated into the original fixed contract price for the work covered in that contract, and could not be apportioned to cover different and additional work which had not been the subject of the original contract.

52. The Tribunal asked the Applicant why it had not made an urgent application to the LVT for dispensation with consultation at the time

when the additional work was found to be required. It appeared to the Tribunal that this possibility simply had not been considered by the Applicant. The Applicant had not been as mindful as it should have been of the effect of its decision on the Respondents.

53. In all the circumstances, however, the Tribunal found that the lack of formal consultation in respect of the additional works did not give rise to prejudice to the Respondents. Even had the Respondents been fully consulted on the works, and had made the same objections to them as were raised before the Tribunal, the Applicant would almost inevitably have made the same rational decision regarding the continuation of the contract. Whilst clearly the additional work led to more money being asked from the Respondents, this did not arise from the failure to carry out the proper consultation procedure. There was no evidence that incorporating the additional work into the contract at a later stage had increased the costs of that work over what would have been payable otherwise. On the evidence therefore the Tribunal decided to dispense with the formal consultation in respect of the additional works.

54. **REASONS AND DETERMINATION**
APPLICATION No CHI/00ML/LIS/2008/0002:
Reasonableness of service charges

The Respondents objected to paying service charges for the work which was done on several grounds. Overall they objected to the work having been part of a huge contract spanning two sites with no physical connection with each other. They challenged the necessity of the roofs being replaced. They said that the standard of the work was very poor, and did not meet their expectations which had been generated by the specification documents. For example the paintwork was not rubbed down to a smooth finish before new coats were applied, resulting in a flaking and/or uneven finish; painting was done outside during rain and even snow; the finish of the paintwork was very poor with staining and flaking; areas of woodwork were supposed to have been repaired according to the Specification of Works but had not been done. They also objected to paying for the costs of disposal and recycling of waste because these facilities appeared to have been used by Quadric for the purposes of other contracts in nearby buildings. There was a charge for a site manager, but he was rarely seen on site, whereas the Respondents had expected to be able to see and speak to someone on site every day. There was no site office at Whitehawk, and this should not be charged to the Respondents.

55. The Applicant said that the work was done to an acceptable standard given the wish to keep costs down. The specification had not required the painter to strip surfaces back to a bare finish, nor to

feather every edge of existing paint; that would have enormously increased the costs, by as much as 40%. The decorating sub-contractor had a good reputation locally and was used by several local authorities. Whilst it was admitted in answer to the Tribunal's questions that the external work had been scheduled to take place at the least favourable time of year, that was because the Applicant had tried to avoid scaffolding being in place over Christmas. The expected life of the redecorations was in any event only 5 years, because of the lease obligations. However, that meant that by the 5th year, the surfaces would be in severe need of redecoration. To maintain a good finish over a period of 5 years in Brighton, much higher standards of materials and work would be needed which would have been very much more expensive. The Applicant could not afford to spend more on redecorating the flats which it owned.

56. Mr Matthews for the Applicant said that he had been disappointed by the condition of the paintwork observed on the Tribunal's inspection, and that he had been upset to hear that exterior painting had been carried out in bad weather. He said, however, that there was no evidence that the weather conditions had caused the present state of the paintwork, and generally it was still adhering well.

57. The site manager was not intended to be on site all the time, and there were contact numbers for residents' use. There was nowhere to locate a site office at Whitehawk so it was located at Moulscoomb. The costs of waste disposal were part of the contract fixed price, so if other contractors filled up the skips, it was Quadric who would bear the cost of disposal. Recycling costs were in fact removed from the total because on further advice it was found that the cork components of the roof could not be recycled.

58. The Tribunal found on the facts that the work was reasonably required. The stock survey and Mr Cottle's inspection were clear evidence for this, and there was no contrary evidence produced by the Respondents. However, the Tribunal took the view that the Applicant had been so attracted to the economies of scale offered by a large contract that it had lost sight of the consequences for the Respondents. The fact that the site office was based at Moulscoomb led to logistical problems, and it had been of no obvious benefit to the Respondents.

59. The Tribunal accepted on the evidence that the supervision of work had been inadequate and that the contact numbers given to residents were ineffective. The paintwork was in very unsatisfactory condition at the time of inspection, and the Tribunal was able to draw upon its own expertise to conclude that poor preparation and execution had contributed to that. Better supervision may have prevented problems such as painting taking

place during rain and snow. However, the Tribunal rejected the Respondents' view that the paintwork should have been stripped or prepared in such a way as to leave a smooth finish. This was a specification prepared to a standard sufficient for maintenance and weatherproofing, to last a few years before being required again. It was unfortunate for the Respondents that the quality standard had been set by what the Applicant could afford in respect of its own properties.

60. The Tribunal rejected further complaints by the Respondents that the roof work was not done well and there had been leaks, because there was insufficient proof of where and how this had happened. Moreover the Tribunal decided that the Respondents had each been asked to contribute in a proportion required by the terms of their Lease and therefore rejected the Respondents' submission that they each should pay 1/54 of the relevant costs.

61. The Tribunal concluded that the costs charged for external redecoration and for supervision and site accommodation should be reduced for each Respondent to the following extents, namely:
For each block:
- external decorations:
10% of the contract price for external redecorations plus 7% consultant supervision fees on that figure;
- supervision of works costs under the contract:
15% of the contract price for supervision plus 7% consultant supervision fees on that figure;
- site accommodation:
100% of the contract price for site accommodation plus 7% consultant supervision fees on that figure.

62. The Tribunal was shown a document headed 'Final Account for Blocks with Leaseholders', and it is the figures in that account which the Tribunal proposed to adjust, as set out below:

Block	£external decorations	£supervision	£site accommodation
Brockhurst	9,645.00	5,989.24	881.45
Tillington	9,645.00	5,989.24	881.45
Lynchmere	9,645.00	5,989.24	881.45
Lodsworth	5,240.00	3,418.14	503.06
Blackdown	5,240.00	3,418.14	503.06

Signed: Ms H Clarke

Dated: 24th June 2008