RESIDENTIAL PROPERTY TRIBUNAL SERVICE
SOUTHERN RENT ASSESSMENT PANEL &
LEASEHOLD VALUATION TRIBUNAL

Case No: CHI/00HY/LDC/2010/0021
In the matter of an application under Section 20ZA of the Landlord and Tenant Act 1985 (as amended)
And in the matter of 43/44 Market Place, Devizes, Wiltshire, SN10 1JG

Between:

1. Mr. John Farnsworth
2. Mrs. Susan Farnsworth Applicants

and

Sarsen Housing Association Limited Respondent

Date of application:	8 July 2010
Date of hearing:	6 October 2010
Members of the Tribunal:	Mr. J G Orme (Lawyer chairman) Mr. P E Smith FRICS (Surveyor member)
Date of decision:	8 October 2010

Decision of the Leasehold Valuation Tribunal

1. **For the reasons set out below the Tribunal is not satisfied that it is reasonable to dispense with the consultation requirements imposed by Section 20 of the Landlord and Tenant Act 1985 (as amended) in respect of qualifying work carried out by the Applicants in September 2009 to the property known as 43/44 Market Place, Devizes, Wiltshire.**

2. **Further, the Tribunal orders that, pursuant to Section 20C of the Landlord and Tenant Act 1985 (as amended), all costs incurred by the Applicants in connection with this application are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the Respondent.**

Reasons

The Application

1. On 8 July 2010, Mr. John Farnsworth and Mrs. Susan Farnsworth ("the Applicants"), acting by their solicitors, applied to the Tribunal under Section 20ZA of the Landlord and Tenant Act 1985 ("the Act") for the dispensation of all of the consultation requirements set out in Section 20 of the Act and in the Service Charges (Consultation Requirements) (England) Regulations 2003 (SI 2003/1987) ("the Consultation Regulations") in relation to qualifying works carried out by them in September 2009 to the property at 43/44 Market Place, Devizes, Wiltshire, SN10 1JG ("the Property"). Sarsen Housing Association Limited ("the Respondent") is the leasehold owner of 4 residential flats at the Property.

2. On 21 July 2010 the Tribunal issued directions providing for the Applicants to prepare and serve a written statement of case by 21 August 2010 and for the Respondent to prepare and serve a written statement of case within 28 days from receipt of the Applicants' statement. The Tribunal subsequently extended those periods by seven days in each case.

3. The Applicants filed their statement of case on 23 August 2010. The Respondent filed its statement of case on 28 September 2010. The Respondent included in its statement of case an application for the Tribunal to make an order under section 20C of the Act.

4. After both parties had confirmed their availability, the Tribunal listed the application for hearing on 6 October 2010.

5. By letters dated 1 October 2010 the Applicants notified the Tribunal and the Respondent's solicitors that the Applicants had terminated the retainer of their solicitors and the Applicants requested an adjournment of the hearing for 28 days. By letter dated 1 October 2010, the Respondent's solicitors objected to the adjournment.

The Law

6. Subsection 1 of Section 20 of the Act as amended provides:

> *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.*

7. Qualifying works are defined by Section 20ZA (2) of the Act as works on a building or any other premises.

8. The effect of subsections 2 and 6 of Section 20 and the Consultation Regulations is that the consultation requirements apply where the contribution which any tenant has to pay towards the cost of qualifying works by way of service charge exceeds £250. The consultation requirements are set out in the Consultation Regulations. Those that apply in this case are those set out in Part 2 of Schedule 4 to the Consultation Regulations. They require the landlord to enter into a 3 stage consultation process with the tenant about the need for and cost of the qualifying works. That process takes a minimum of 60 days.

9. Subsection 1 of Section 20ZA of the Act provides:

> *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.*

10. The Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003 (SI 2003/2099) apply to this application. Regulation 15 gives the Tribunal power to adjourn or postpone a hearing on its own initiative or at the request of a party. Sub-paragraph 2 of that regulation provides

> *Where a postponement or adjournment has been requested the tribunal shall not postpone or adjourn the hearing except where it considers it is reasonable to do so having regard to-*
> *(a) the grounds for the request;*
> *(b) the time at which the request is made; and*
> *(c) the convenience of the other parties.*

The Lease

11. The first and second floors and the ground floor entrance to the Property are demised to the Respondent by a lease dated 8 February 2002 made between Greenwood Property Investments Ltd as landlord and the Respondent as tenant. The lease is for a term of 125 years from 8 February 2002 at a yearly rent of £1. The lease contains covenants by the Respondent to pay as additional rent a service charge in accordance with the fourth schedule to the lease. The fourth schedule sets out the mechanism for calculating the service charge and includes details of the costs which may be charged by the landlord through the service charge.

12. The lease contains covenants by the landlord to insure the Property and to use reasonable endeavours to keep the common parts including the roof, foundations and main walls of the Property, in an adequate state of repair and decoration. The cost of complying with that covenant is recoverable through

the service charge with the Respondent being responsible for 60% of the cost and the tenant of the commercial premises on the ground floor being responsible for 40% of the cost.

13. The Applicants are now registered as proprietors of the freehold reversion in the Property.

Inspection

14. The Tribunal inspected the Property prior to the hearing on 6 October 2010 in the presence of the first Applicant, his builder, counsel for the Respondent and representatives of the Respondent.

15. The Property is a substantial building adjoining the market place in Devizes. The ground floor is occupied as commercial premises. The first and second floors are occupied as residential flats.

16. The Tribunal inspected the exterior of the Property and was shown where works had been carried out by the Applicants. The Tribunal inspected the access to the rear of the Property and the fire escape. The Tribunal inspected the interior of flats 2 and 3 and noted damage to paint work which appeared to be caused by water ingress.

The Hearing

17. The Hearing took place at the Town Hall, Devizes on 6 October 2010. The Applicants were represented by Mr. Farnsworth, accompanied by his builder, Mr. McKeith. The Respondent was represented by Mr. Lintott of counsel. He was accompanied by Miss Waters, Miss Dodd and Miss Deimert, employees of the Respondent.

Application for adjournment

18. Mr. Farnsworth requested an adjournment of the hearing on the following grounds:
    a. The Applicants had dismissed their solicitor as a result of a conflict of interest on 30 September 2010. They had not had sufficient time to instruct an alternative solicitor to act on their behalf;
    b. Mr. Farnsworth had only received a copy of the witness statement of Miss Deimert at 12 noon on 5 October and he had not had an opportunity to respond to it;
    c. In response to comments made by Miss Deimert he wished to produce further evidence from 3 surveyors who had surveyed the property and from 3 builders who had carried out work to the property during the Applicants' ownership which began in 2002.

19. Mr. Lintott opposed the application saying that the Respondent's documents were filed and served in accordance with the Tribunal's directions. They were sent to the Applicants' solicitors by DX on 28 September 2010. He did not know why Mr. Farnsworth had not received them until yesterday. He said that an adjournment would result in further costs being incurred by all parties. He said that the issue to be determined by the Tribunal was whether or not it was

reasonable for dispensation to be given. That issue could be dealt with without further evidence. Mr. Farnsworth was accompanied at the hearing by the builder who had carried out the relevant works. The evidence from the surveyors and other builders was not relevant.

20. Having adjourned to consider the application, the Tribunal refused to adjourn. Oral reasons for the decision were given to the parties, namely:
    a. Mr. Farnsworth had not persuaded the Tribunal that evidence from surveyors or builders who had been involved prior to the relevant works would assist the Tribunal in determining the issue of whether or not it was reasonable to dispense with the consultation requirements in relation to the works carried out in September 2009.
    b. The Tribunal was concerned that Mr. Farnsworth had only recently received a copy of Miss Deimert's witness statement but it considered that the relevant parts of that statement went to the issue of prejudice to the Respondent and Mr. Farnsworth could deal with that issue today. This was not sufficient to justify an adjournment.
    c. Whilst the Tribunal considered that it was unfortunate that Mr. Farnsworth appeared without a solicitor, the Tribunal did not know the detail of why the Applicants had terminated the retainer of their solicitor and it noted that they would have been in receipt of legal advice until 30 September and should have been prepared for the hearing. The Tribunal is used to dealing with litigants in person and would endeavour to ensure that the Applicants were not prejudiced.
    d. An adjournment would prejudice the Respondent as further costs would be incurred.

The Applicants' Evidence

21. Mr. Farnsworth gave evidence on behalf of the Applicants. He had filed a witness statement dated 19 August 2010 and he was cross-examined at the hearing.

22. Mr. Farnsworth first became aware of the need for repairs at the Property when he received a letter from the Respondent dated 2 June 2009. The Respondent had employed a contractor to carry out repairs to the windows at the Property. The contractor had drawn the Respondent's attention to the need for other external repairs. The Respondent sent to the Applicants a copy of the quotation prepared by its contractor for carrying out repairs to the external stonework, brickwork and render and external redecorations in the sum of £35,837 excluding VAT. The quotation noted that *"the left-hand elevation has extensive defective render and is in my opinion in a dangerous condition."* The Respondent's letter dated 2 June 2009 informed the Applicants that they were responsible for carrying out the works and that there was also a leak in the roof which was the responsibility of the Applicants.

23. Mr. Farnsworth says that he telephoned Miss Deimert on receipt of the letter and told her that he would obtain an estimate for carrying out the work. He was concerned that the Respondent's estimate was excessive.

24. Mr. Farnsworth obtained one estimate for carrying out the works suggested by the Respondent's contractor and for additional works to the roof. On 19 August 2009 he wrote to the Respondent with a quotation for carrying out the works at a total cost including VAT of £23,758.20. Although the letter said *"please find enclosed quotation for the work"*, Mr Farnsworth confirmed that no further document was enclosed with that letter. The letter did not give any details of the work to be carried out at the Property other than to say that it included work required to the roof. The letter said *"If you have any queries please contact ourselves, if we do not hear from you we will advise when work is to start, which will be as soon as possible due to the fact that there could be a danger to the public."*
25. Mr. Farnsworth received no response to that letter. On 2 September 2009 he sent a letter to the Respondent informing the Respondent that work would commence on 7 September 2009 and would take approximately one month. The Applicants' contractor carried out the work, erecting scaffolding around the property as required. Mr. Farnsworth says that the Respondent was aware that the works were being carried out because Miss Deimert provided keys to enable the contractor to obtain access to one of the flats.

26. On 24 September 2009 Mr. Farnsworth sent to the Respondent an invoice for its share of the cost of the works. In the absence of a response a reminder was sent on 24 October 2009 followed by 2 further reminders. On 15 December 2009 Mr. Farnsworth received a letter from the Respondent informing the Applicants that they had failed to comply with the consultation requirements and that it would make a payment of only £250 per unit towards the cost of repairs.

27. In cross-examination, Mr. Farnsworth confirmed that he was not aware of the consultation requirements at the time when the works were carried out.

The Respondent's evidence.

28. Miss Gail Deimert provided a witness statement on behalf of the Respondent. She was the leasehold services coordinator employed by the Respondent but she is now a neighbourhood housing officer.

29. Miss Deimert says that the Respondent received notification from one of its tenants in January 2009 that the roof was leaking. She instructed a surveyor to inspect the premises as a result of which the Respondent's contractor provided the quotation for repair works. Miss Deimert accepts that she had a telephone conversation with Mr. Farnsworth on 2 June 2009 in which she told Mr. Farnsworth that repair works were required. She disputes that Mr. Farnsworth told her that he would obtain an estimate.

30. Miss Deimert says that the Respondent did not receive the letter dated 19 August 2009. She says that if she had received it, she would have asked the Applicants for further quotations. She says that she was familiar with the consultation requirements.

31. Miss Deimert received the letter dated 2 September 2009. She says that she had no reason to reply to the letter as she assumed that the Applicants were aware of the consultation requirements and that the works were being carried out to enable the Applicants to make a full inspection in order to provide quotations.

32. Miss Deimert says that the Respondent did not receive the invoice dated 24 September 2009 but did receive the invoice dated 24th of October 2009. She agrees that she wrote to the Applicants on 15 December 2009.

33. Miss Deimert says that the Respondent was not aware that works were being carried out to the roof and only became aware of that when one of its tenants told them that the roof was still leaking. She gave evidence that she still did not know what work had been done to the roof.

34. At paragraphs 21 and 22 of her statement, Miss Deimert submits that the Respondent has been prejudiced as a result of the Applicants' failure to comply with the consultation requirements. She says that the Respondent still has no idea what work was actually carried out by the Applicants and she has not seen any estimates for the cost of carrying out the work.

The Applicants' submissions

35. The Applicants' case was that they did not consider that they had caused the Respondent any prejudice. The Respondent had notified them that work was required, the Applicants had obtained an estimate for carrying out that work and additional work and they had carried out that work at a cost substantially less than the cost estimated by the Respondent's own contractor, thereby saving expense for the Respondent. They had consulted with the Respondent before doing the work and had provided details of the cost in advance. The work was done to a good standard. It would be reasonable to dispense with the consultation requirements.

The Respondent's submissions

36. The Respondent's submissions are set out in its written statement of case. In brief, the Respondent says that the Applicants have failed totally to comply with the consultation requirements. This was not just a minor breach but a total failure to comply. As a result, the Respondent has been prejudiced as it has not been provided with information about the extent of the works to be carried out and it has not had an opportunity to consider and comment on the extent of those works or the proposed cost. It says that it would not be reasonable to dispense with the consultation requirements.

The section 20C application

37. The Respondent says that in view of the Applicants' complete failure to comply with the consultation requirements, it is just and equitable for the Tribunal to make an order under section 20C. It would be unjust for the Respondent ultimately to pay the Applicants' costs incurred in making an unsuccessful application if they were recoverable through the service charge.

38. Mr. Farnsworth objected to the making of an order but said that in view of his lack of legal knowledge, he was unable to say anything in reply.

Conclusions

39. The question which the Tribunal must determine is whether it is satisfied that it is reasonable to dispense with the consultation requirements in whole or in part. The Tribunal is mindful of the fact that the consultation requirements have been imposed by Parliament in order to protect the interests of lessees who, ultimately, have to pay for the work.

40. By his own admission, Mr. Farnsworth did not know about the consultation requirements at the time when he arranged for the work to be carried out. Therefore, he made no attempt to comply with them. The Tribunal must decide whether the information which the Applicants gave to the Respondent was sufficient to make it reasonable to dispense with the requirements.

41. There is little dispute on the main facts leading up to the carrying out of the works. There are disputes on minor issues such as whether the Respondent's contractor could obtain access to the roof; whether Mr. Farnsworth mentioned to Miss Deimert that he was going to obtain another estimate during the telephone conversation on 2 June; whether the Respondent received the letter dated 19 August; whether the scaffolding had been erected when the keys were handed over to the Applicants' contractor; and whether the Respondent received the invoice dated 24 September.

42. The Tribunal does not find it necessary to make any findings of fact on those issues because even if the Tribunal accepts the Applicants' version of events, it is clear that:
    a. Work was required at the Property which was the responsibility of the Applicants under the terms of the lease.
    b. The Applicants obtained only one estimate for carrying out that work. The Applicants did not obtain 2 competing estimates and did not give the Respondent the opportunity to inspect and comment on those estimates.
    c. The Applicants did not give the Respondent any information about the extent of the work which they proposed to carry out. They relied on the fact that the Respondent had already identified the work required and that the Applicants then added on unspecified works to the roof. Even now, the Tribunal has seen no evidence detailing the actual work which was carried out.
    d. The Respondent was given no notice inviting observations on the proposed works other than the letter dated 19 August which was not in the form required by the consultation regulations.

43. The Tribunal finds as a fact that there was prejudice to the Respondent. It knew about the consultation requirements and it was entitled to expect that the Applicants would comply with them. As it was, the Respondent received no description of the work which was proposed by the Applicants, it did not have the benefit of seeing 2 estimates for that work, it did not have the chance to nominate a contractor to provide an estimate, it was not invited to make observations other than in the letter dated 19 August and without seeing the specification on which the one estimate was based, it was not possible for the Respondent to say whether or not the estimate was reasonable.

44. The Tribunal has some sympathy with the Applicants in that they reacted quickly to the notice of disrepair and arranged for repairs to be carried out. They were also conscious of their duty to minimise the risk of injury to third parties. However, as a property owning company, they should have been aware of the consultation requirements and their ignorance cannot afford them an excuse.

45. Even on the basis of the Applicants' evidence, the Applicants have totally failed to comply with the consultation requirements and the Respondent has been prejudiced as a result. It is not sufficient for the Applicants to say that the Respondent knew that work was required and had obtained its own estimate for carrying out those works. The Respondent was entitled to expect that the Applicants would follow the correct procedures. In those circumstances, the Tribunal is not satisfied that it is reasonable to dispense with the consultation requirements.

46. The fact that part of the work was required to remove a danger to the public does not assist the Applicants at this stage. There was no evidence before the Tribunal as to the extent of the danger or the cost of rectifying that particular defect. If that defect meant that there was an urgent requirement for the work to be carried out before the consultation requirements could be met, an application to dispense with those requirements could have been made at the time.

47. **Section 20C:** The Applicants have failed in their application. They have put the Respondent to expense in opposing the application. The Tribunal consider that it would be unjust if the Applicants were able to recover their costs of making the application from the Respondents through the service charge. For that reason, the Tribunal finds that it is just and equitable to make an order under Section 20C.

Dated 8 October 2010.

Signed

J G Orme
Chairman