5506

Residential Property
TRIBUNAL SERVICE

Case Reference
LON/00AL/LSC/2010/0231

THE LEASEHOLD VALUATION TRIBUNAL

FOR THE LONDON RENT ASSESSMENT PANEL

IN THE MATTER OF THE LANDLORD AND TENANT ACT 1985
SECTIONS 27A and 20C

Re: Flat 196B
Burrage Road,
London
SE18 7JU

Applicant:	Marie Hippolyte
Respondent:	Maidenbridge Properties Limited
Appearances:	*Henry Warwick* of Counsel (instructed by TG Baynes, solicitors) for the Applicant Ms C Bagley, company secretary, for the Respondent
The Tribunal:	C Norman FRICS (Chairman) M Cartwright JP FRICS D Wills ACIB
Hearing:	1 November 2010 Held at 10 Alfred Place London

29/11

DECISION

Background

1. This matter concerns the payability of a service charge. It is before the tribunal pursuant to an application made on 1 April 2010. The Applicant is the lessee under a long lease. The Respondent is the freeholder.

2. The application is made under section 27A of the Landlord and Tenant Act 1985 ("the 1985 Act"). The service charge in issue is the lessee's share of major works carried out to the property concerning the roof. The lessee's proportionate share, if payable, amounts to £7,519.20.

3. The primary issue is whether or not good service of notices required to be served under the Service Charges (Consultation Requirements) (England) Regulations 2003 ("the Regulations") has been given to the Applicant by the Respondent. The Regulations have been made under section 20 of the 1985 Act. In this decision, for brevity, we refer to these notices as "section 20 notices."

4. The Applicant is the lessee of the lower ground floor flat in a Victorian block of four flats in Woolwich. The Respondent landlord, Maidenbridge Properties Limited is a small private property company based in Hereford.

5. At all material times in this dispute, the Applicant has not resided at the property, which has been sublet. The Applicant has resided at other addresses in the United States of America.

6. The proceedings in the tribunal have been lodged during the currency of pending related proceedings in the Woolwich County Court under Case No 9HR00881. Those proceedings were brought on 9 September 2009 where the freeholders Maidenbridge Properties Limited were Claimants (the Respondent in the tribunal proceedings) and Ms Hippolyte the Defendant (the Applicant in the tribunal proceedings). The Claimant obtained judgment in default against the Defendant in the sum of £8,849.

7. By an Order of District Judge Backhouse on 11 June 2010, that judgment was set aside and the judge made the following Order:

> "The claim is stayed pending determination of the Defendant's application to the Leasehold Valuation Tribunal under case reference LON/00A4/LSC/2010/0231 in respect of the charges claimed in this claim."

8. In the tribunal, pre-trial reviews of the case were heard on 28 April and 14 July 2010, following which directions were given.

The Issues

10. By the date of the hearing, the case had been narrowed to the following issues:

    a. Whether the Respondent landlord had failed to consult with the lessee in accordance with the Regulations, by failing to serve section 20 notices.

    b. Whether, following from the decision in a., the service charge in respect of the works was limited to £250 by operation of s.20(6) of the 1985 Act.

    c. Whether the Applicant had was entitled to withhold further payment of service charges on account until such time as the Respondent complied with clause 6 (d)(i) of the lease (which concerns auditing of expenditure).

    d. Whether an Order under s.20C of the 1985 Act should be granted to the Applicant.

11. During the course of the hearing the following additional or supplemental issues emerged:

    e. The law relating to the service of section 20 notices

    f. Whether or not an application for dispensation of the consultation requirements under s.20ZA(1) of the 1985 Act as made by the Respondent Company Secretary at the hearing should be granted.

The Relevant Statutory Provisions concerning Service Charges

12. By s.27A of the 1985 Act:

> "(1) An application may be made to a leasehold valuation tribunal for a determination whether a service charge is payable and, if it is, as to—
> (a) the person by whom it is payable,
> (b) the person to whom it is payable,
> (c) the amount which is payable,
> (d) the date at or by which it is payable, and
> (e) the manner in which it is payable."

13. By section 20 of the 1985 Act, consultation requirements are imposed on landlords as follows:

> "(1) Where this section applies to any qualifying works ...the relevant contributions of tenants are limited ...unless the consultation requirements have been either—

(a) complied with in relation to the works..., or
(b) dispensed with in relation to the works or agreement by...a leasehold valuation tribunal"
(3) This section applies to qualifying works if relevant costs incurred on carrying out the works exceed an appropriate amount."

14. By s.20 (5) an appropriate amount is an amount set by Regulations, which by Article 6 of the Regulations is £250.

15. The Regulations insofar as relevant are as follows:

"Schedule 4 Part 2

"Notice of intention
8.(1) The landlord shall give notice in writing of his intention to carry out qualifying works—
to each tenant;
(2) The notice shall—
describe, in general terms, the works proposed to be carried out ....
state the landlord's reasons for considering it necessary to carry out the proposed works;
(3) The notice shall also invite each tenant ...to propose ...the name of a person from whom the landlord should try to obtain an estimate for the carrying out of the proposed works
Duty to have regard to observations in relation to proposed works
10. Where, within the relevant period, observations are made, in relation to the proposed works by any tenant or recognised tenants' association, the landlord shall have regard to those observations

Estimates and response to observations
(5) The landlord shall, in accordance with this sub-paragraph and sub-paragraphs (6) to (9)—
(a) obtain estimates for the carrying out of the proposed works;
(b) supply, free of charge, a statement ("the paragraph (b) statement") setting out—
(i) as regards at least two of the estimates, the amount specified in the estimate as the estimated cost of the proposed works; and
(ii) where the landlord has received observations to which (in accordance with paragraph 3) he is required to have regard, a summary of the observations and his response to them; and
(c) make all of the estimates available for inspection.
(8) Where the landlord has obtained an estimate from a nominated person, that estimate must be one of those to which the paragraph (b) statement relates.
(9) The paragraph (b) statement shall be supplied to, and the estimates made available for inspection by—
(a) each tenant;
(10) The landlord shall, by notice in writing to each tenant ...
specify the place and hours at which the estimates may be inspected;
invite the making, in writing, of observations in relation to those estimates;
(c) specify—
the address to which such observations may be sent;
that they must be delivered within the relevant period; and
(iii) the date on which the relevant period ends.

Duty to have regard to observations in relation to estimates
12. Where, within the relevant period, observations are made in relation to the estimates by... any tenant, the landlord shall have regard to those observations."

The Lease

16. The Applicant holds under a lease dated 1 July 1981 for a term of 99 years from 25 March 1980.

17. By clause 5(a) of the lease the tenant covenanted

> "(ii) ...to pay to the landlord such sums on account of the Specified Proportion as the Landlord or his agents may reasonably consider sufficient ...to meet the cost of the Service Obligations...
>
> (iv) With twenty eight days of the receipt of a copy of the Auditors Certificate of the total expenditure on Service Obligations incurred by the landlord for the previous accounting year to pay to the landlord the Specified Proportion thereof less any amount or amounts which the tenant may have already have paid in advance
>
> (v) Within twenty eight days of demand to pay to the Landlord the same percentage as the Specified Proportion of any sum or sums actually expended by the Landlord or which it might be urgently necessary to expend which expenditure the Landlord cannot meet from funds in hand."

By recital 2 (d)

> "The Service Obligations "means the obligations to provide services and other things undertaken hereunder by the Landlord"

By recital 2 (e)

> "The Service Charge" means the yearly cost of the Service Obligations as determined by the auditors pursuant to Clause 6 (d) (i) hereof.

By recital 2 (f)

> "Specified Proportion" means 25% of the Service Charge

By clause 6

> The Landlord covenants with the Tenant that provided the Tenant pays the Specified Proportion the Landlord will:-
>
> (b) Keep the Common Parts ... in repair and rebuild or replace any parts that require to be rebuilt or replaced

By recital (c)

> "Common Parts" means the foundations main structure roof ...

By clause 6 (d)(i) the landlord covenanted to

> "procure that the service charge shall be duly audited by professional auditors who shall certify the actual expenditure during each accounting year and whose certificate shall be conclusive as to the expenditure."

18. A striking feature of the lease is that it omits any clause concerning the mode of giving of notices by the landlord to the tenant. This is most unusual. The tribunal considers that this amounts to a defect in the lease.

The Hearing

19. At the hearing, the applicant Ms M Hippolyte was represented by Mr H. Warwick of Counsel (instructed by T G Baynes solicitors) whose representative Ms C. Finn was also present. The Respondent was represented by its company secretary, Ms C Bagley. Mr T Bagley also attended. The Respondent was not legally represented.

20. Mr Warwick had helpfully prepared a written skeleton argument which was circulated.

21. At the outset of the hearing the tribunal referred the parties to paragraph 41 of the decision in *Warrior Quay Management Company & Another v Joachim & Others* (LRX/46/2006) where His Honour Judge Huskinson, sitting as a Member of the Lands Tribunal, said

> "Where there is a hearing before an LVT and there is an absence of a formal application for dispensation from a landlord (or at least from a landlord not professionally represented) I consider that the LVT should ask the landlord whether it wishes to apply for dispensation, rather than not raising the point and omitting to consider at all whether dispensation should be granted under section 20 ZA of the 1985 Act."

Section 20ZA(1) (as amended) is in these terms

> "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 .... the tribunal may make the determination if satisfied that it is reasonable to dispense with the requirements."

22. Ms Bagley thereafter applied to the tribunal on behalf of the Respondent for dispensation of the consultation requirements.

23. In accordance with the Directions, both parties had served statements of case. The Applicant had also served a witness statement. The Respondent, however, without the benefit of legal representation had only submitted a statement of case. However, in substance the Respondent's statement of case amounted to a witness statement by Ms Bagley, having been signed and dated personally by her and verified with a statement of truth. In the circumstances the tribunal proposed that the Respondent's statement of case stand as a witness statement by Ms Bagley. Mr Warwick did not object.

24. In view of the late application for dispensation, the tribunal asked the Respondent to prepare its grounds to support its application for dispensation. The tribunal explained that it would grant an adjournment for that purpose. On resumption of the hearing, the Respondent stated its grounds and the tribunal then further adjourned to enable Mr Warwick to take his client's instructions in relation to the Respondent's case for dispensation. The tribunal then allowed Mr Warwick to deal with any points arising in Ms Hippolyte's evidence in chief and as well as in Counsel's submissions.

25. The Respondent's grounds for seeking dispensation were (i) that the Applicant had stated in her witness statement that the she was satisfied that the works carried out were reasonably necessary and carried out to a reasonable standard at a reasonable price and (ii) that the Respondent had taken into account the views of the other lessees as evidenced by disclosed documents.

The Applicant's Case

Issue a) Service of Notices

26. Mr Warwick opened by referring to his skeleton argument. He submitted that the Respondent was required to consult with the Applicant in relation to the works in accordance with the Regulations. The Applicant had failed to do so. The evidential burden was on the respondent to prove that there was good service of the notices, or alternatively, deemed service of the section 20 notices. The lease did not contain any provision deeming notice to have been served by sending to a particular address or the property itself.

27. In the absence of contractual provisions in the lease, Mr Warwick asserted that service must take place at the last known place of abode or business of the addressee. He supported this by reference to section 7 of the Interpretation Act 1978 which states:

28.

> "Where an Act authorises or requires any document to be served by post (whether the expression 'served' or the expression 'give' or 'send' or any other expression is used) then, unless the contrary intention appears, the service is deemed to be effected by properly addressing, prepaying and posting a letter containing the document and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post."

29. Mr Warwick contended that there was no express agreement in the lease amounting to a contrary intention so as to disapply section 7.

30. Counsel also referred the tribunal to *Akorita v 36 Gensing Road Limited*, (LRX/16/2008) a decision of the Lands Tribunal. Mr Warwick relied upon this decision to support his contention that the expression "properly addressing" in section 7 means addressing to "the last known place of abode or business of the addressee or an address which the addressee has contractually agreed."

31. Mr Warwick contended that the Respondent had been wrong in law to assert that good service could be effected by service at the property as a result of the Landlord and Tenant (Notice of Rent) (England) Regulations 2004, as that provision relates only to ground rent.

32. Counsel submitted that a section 20 notice could not be deemed to be validly served by sending it to the demised property where it was clear that it would not come to the attention of the tenant. This is because it would be contrary to the requirement upon landlords to consult with tenants.

Issue b) whether notices served

33. Mr Warwick explained that the Applicant resided at the property until 2003 when she sub-let with the then landlord's consent. That landlord (the Respondent's predecessor in title) had not initially given consent and the Applicant had brought proceedings in Woolwich County Court. These were compromised and the consent granted.

34. Counsel listed the chronology of correspondence referred to by the Respondent in respect of the notices and which is as follows:

    a. Letter dated 11 March 2008 addressed to "all lessees 196 Burrage Road" and attaching a schedule of works dated 14 January 2008. This letter gave the lessees 30 days (i.e. until 10 April 2008) to comment or propose alternative contractors

    b. Responses were received from each of the other lessees, other than the Applicant.

    c. A letter dated 23 April 2008 was sent again addressed to "all lessees 196 Burrage Road"

    d. A letter dated 21 July 2008 was sent to "all lessees 196 Burrage Road" enclosing a specification and stating that tenders had been invited with results due on 15 August 2008.

    e. Tenders were received on 14 August and 3 September 2008.

    f. A letter dated 15 September 2008 was sent to "all lessees 196 Burrage Road" enclosing the tender evaluation report dated 9 September 2008 which gave notice of major works. This letter stated that Belsham Builders had been selected.

g. A further letter dated 9 October 2008 was sent to "all lessees 196 Burrage Road" regarding concerns expressed by two lessees about the cost of scaffolding.

Evidence Called on Behalf of the Applicant

35. In view of the conflict of factual evidence, the tribunal stated that it would ask both witnesses to read their witness statements.

36. Mr Warwick called Ms Hippolyte, who confirmed that the contents of her witness statement were true as verified by a signed statement of truth.

37. At paragraph 1 Ms Hippolyte's stated "...I am satisfied that the works carried out were reasonably necessary and carried out to a reasonable standard at a reasonable price." During evidence in chief, Ms Hippolyte changed her evidence. She said that what she meant was "nothing grossly unreasonable."

38. Ms Hippolyte's evidence was that she had owned the property since 1992. In 2003 she moved to the United States. She did not wish to sell the property, but she required her then landlord's consent (not the Respondent) to sublet which was not forthcoming. Ms Hippolyte commenced proceedings in the County Court for a declaration which were compromised and landlord's consent given. During those proceedings Ms Hippolyte moved to the Unites States. Ms Hippolyte exhibited the front pages of two witness statements which she made in those proceedings and which contain two addresses for her in the United States.

39. The Applicant stated that she did not become aware of the change in owner until June 2007. This was because a letter from the Respondent dated 8 January 2007 advising of the sale was only sent to the property. It had come to her attention only when her then sub-tenant posed it to the Applicant in the US. As requested by the Respondent, the Applicant sent a file update form to the Respondent showing her address as 367 Otis Street Newton MA and also indicating on the form that Ms Hippolyte was not living at Burrage Street. Mr T Bagley of the Respondent acknowledged this form by letter dated 19 June 2007.

40. Ms Hippolyte said that she sent a further cheque about two weeks later (the previous one being incorrectly dated 2006 not 2007). She then did not hear anything further from the Respondent until October 2008. She said that the major works were brought to her attention at that time as a result of telephone call from a Ms K Duignan one of the other lessees. The Applicant immediately telephoned the Respondent to request copies of documents. Ms Hippolyte said that she did not refer to damp [in her flat] during that conversation but only copies of documents. She said that as a result of that call the Respondents emailed to her copies of documents that had previously been sent out, but the Respondent did not say that these documents had been sent to the US. The Applicant asked the Respondent for 30 days to review the documents supplied. This was refused on the grounds that the scaffolding had already been ordered.

41. Ms Hippolyte denied that she had received the statutory consultation notices. She stated that the [Otis Street] address on the duplicate copy [of the Oyez Notice, see

paragraph 73 below] on the Respondent's file was shown correctly and that she had no reason to believe that "if indeed the notices were posted to me at that address they would not have reached me." She had moved into the Otis Street address in July 2006 and had not moved to a second address in Newton MA at 67 Trowbridge Avenue address until August 2008. The Applicant then said that she questioned the veracity of the Respondents statement and referred to the fact that the Respondent obtained a default judgment against her on 29 September 2009, by serving process at Burrage Road which judgment was later set aside.

42. Ms Bagley declined an opportunity to cross-examine Ms Hippolyte.

The Case for the Respondent

43. Ms Bagley declined the opportunity afforded to make an opening submission, but gave evidence. She confirmed to the tribunal that her signature was shown on her witness statement which was verified with a statement of truth.

44. Her evidence was that during June 2007 she received a telephone call from the Applicant who had only recently received the Respondent's letter dated 8 January 2007 as she was residing in the USA. The Applicant agreed to forward the File Update Form with a cheque to cover outstanding sums due. The File update form did not include an email address, contrary to the Applicant's statement of case. The Respondent amended their records, not by deletion of the Burrage Road address but by way of addition of Otis Street as an additional address.

45. Ms Bagley stated that the Landlord and Tenant (Notice of Rent)(England) Regulations 2004 provide that the Respondent is required to serve demands for ground rent at the property, unless the Applicant has provided a different address in England and Wales, pursuant to s.166 of the Commonhold and Leasehold Reform Act 2002. As no such address had ever been provided, the Respondents felt it pertinent to send all statutory notices and invoices to Burrage Road and Otis Street.

46. During late 2007 one of the leaseholders advised of a roof leak. Ms Bagley instructed a trusted contractor Mr I Belsham to investigate and he considered that re- roofing was required. The Respondent then instructed their surveyor Mr M Hemming FRICS PGD Devel. Ma PS of MH Associates to visit the property, meet with the affected lessee and prepare a full schedule of works. This was received on 10 March 2008; on 11 March 2008 the Respondent initiated the consultation procedure pursuant to the Regulations.

47. Ms Bagley stated that during the consultation period the respondent received written observations from the other three lessees and these were sent to the Applicant on at both addresses on 23 April 2008. The Respondent then instructed Mr Hemming to amend the schedule to take into account the observations received. This was received on 21 July 2008 and on the same date the Respondent sent a letter to both addresses stating that the work was being put out to tender with a return date of 15 August 2008.

48. On 15 September 2008 the Respondents received the tender results and on the same date the Respondents wrote to the Applicant at each of her addresses. This letter was the Notice and Statement of Estimates required by the Regulations.

49. During this stage of the consultation process, the respondent received two verbal responses. The Respondent wrote to the Applicant on 9 October 2008 informing her of this and inviting further representations by 16 October 2008.

50. The Respondent then awarded the contract to Belsham Builders who provided the lowest estimate.

51. On 16 October 2008, the Respondent received a telephone call from the Applicant regarding damp ingress suffered by her subtenants. The Applicant stated that she had not received the consultation notices because she no longer resided at Otis Street but at 67 Trowbridge Avenue Newton. The Applicant provided an email address. The Respondents emailed copies of the consultation procedure documents to that email address.

52. During a subsequent exchange of correspondence from November to March 2009 the Applicant did not raise questions regarding consultation procedure.

53. By virtue of clause 5(a)(v), the Respondent was entitled to make the demands for service charges claimed.

54. The witness was cross-examined, during which she agreed that there were no copies of letters on her file specifically addressed to the Applicant.

55. Subsequently in answer to questions to the tribunal, Ms Bagley explained that Maidenbridge was owned by a Mr Fancourt. He was 72 years old and a retired accountant. Only two persons worked in the office – she and Mr Bagley. The office procedures were "antiquated" in that all postage was recorded in a book; Ms Bagley affixed stamps herself and Mr Bagley took letters to the post office himself. Mr Fancourt always insisted that air mail stickers were applied to overseas post. The company only managed around 100 tenancies of which only 6 or 7 required overseas correspondence. Ms Bagley therefore clearly remembered those occasions when overseas postage was necessary. Ms Bagley explained that when she wrote to all lessees at a block this would be by means of a generic letter but she retained a copy of the label prints which showed the address labels of each lessee. She insisted that the consultation letters had been sent to the Applicant at Otis Street.

56. In a further answer to the tribunal Ms Bagley said that after Maidenbridge had acquired the property, she had become aware that the Applicant had been in litigation with the previous freeholder.

Decision

The Relevant Law relating to the Service of section 20 Notices

Preliminary

57. The tribunal firstly raised the issue with Mr Warwick as to whether section 7 Interpretation Act 1978 actually applied. Counsel agreed that absent this provision, the Respondent would be required to prove personal service on the Applicant. Counsel relied on *Akorita* to support his contention that section 7 applies.

58. The tribunal expressed doubts about this for the following reasons. First, the lease in *Akorita* contained detailed contractual provisions concerning the mode of service of notices, expressly permitting service by post, which is not the case here. Secondly, in *Akorita* the Lands Tribunal found that the letter had not been "properly addressed" and therefore that section 7 did not apply on the facts. Thirdly, the tribunal raised the issue that the 1985 Act did not appear to include provisions authorising or requiring any document to be served by post so as to engage section 7.

59. In that respect it notes that the Lands Tribunal in *Akorita*, at paragraph 20, referred to *Chiswell v Griffon Land and Estates* [1975] 2 All ER 665 which concerned service of a notice under section 66 of the Landlord and Tenant Act 1954, Part II. That Part of that Act is concerned with the renewal of business tenancies. Section 66 incorporates section 23 of the Landlord and Tenant Act 1927 which states

> "Any notice request demand or other instrument under [the Landlord and Tenant Act 1927] shall be in writing and may be served on the person on whom it is to be served either personally or by leaving it for him at his last known place of abode in England or Wales or by **sending it through the post** in a registered letter addressed to him there ..... and in the case of a notice to a landlord the person on whom it is to be served shall include any agent of the landlord duly authorised in that behalf." (emphasis added)

60. That provision specifically authorises service by post. The tribunal reminded Counsel that the 1985 Act, under which the consultation notices are required to be served, contains no mode of service provisions. The Landlord and Tenant Act 1927 is not incorporated into the 1985 Act. It is not clear from the decision that this was drawn to the Lands Tribunal's attention in *Akorita*, where the respondent did not appear and was not represented.

61. By way of contrast with the 1985 Act, the tribunal drew attention to section 54 of the Landlord and Tenant Act 1987 which specifically authorises the service of notices under that Act by post. The tribunal read the provision which states:

> [section 54]
> " (l) Any notice required or authorised to be served under this Act:
> (a) shall be in writing; and
> (b) **may be sent by post**" (emphasis added)

62. In reply, Counsel contended that the expression "authorises or requires any document to be served by post" in section 7 should be read as meaning "is not subject to an express contravention against service by post." We consider that this interpretation does violence to the language of section 7, and is inconsistent with the statutory provisions referred to above each of which expressly authorise service by post of notices under the respective Acts.

63. However, we accept that *Akorita* is authority for the proposition that to be properly addressed the notice must be sent to the last known place of abode or business. This, however, is still a lesser requirement on the Respondent than having to prove personal service.

64. However, as Counsel insisted on putting his case on the basis that section 7 applied, the tribunal has to deal with the matter on that basis.

65. For completeness and in view of its general importance, the tribunal also referred to section 196 Law of Property Act 1925. Counsel said that this applies only to letters sent by registered post [or recorded delivery following the Recorded Delivery Service Act 1962]. The tribunal agrees that this provision does not apply to this case both for that reason and other reasons to which it is unnecessary to refer.

66. The tribunal also agrees with Counsel that the Landlord and Tenant (Notice of Rent) (England) Regulations 2004 have no relevance to the case as they only relate to ground rent.

The effect of section 7 Interpretation Act 1978 in light of *Akorita*

67. The effect of this provision is that good service is deemed to be effected by properly addressing prepaying and posting a letter containing the document and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post. The effect of *Akorita* is that the document must be sent to the last known place of abode of the recipient.

Conclusion on the Law Relating to the Service of the Section 20 Notices

68. For the above reasons, the tribunal is required to decide, on the balance of probabilities, whether the Respondent sent prepaid, correctly addressed notices to the Applicant at Otis Street Newton MA being her last known place of abode. The evidential burden of proving this lies on the Respondent. If the tribunal so finds, the notices are deemed to have been served unless the Applicant proves on the balance of probabilities that she did not receive them, the proof of which lies on her.

The Conflict of Evidence

69. In view of the legal findings relating to the shifting burden of proof as a result of section 7 of the Interpretation Act, it is convenient to deal with the Respondent's evidence first.

The Evidence of Ms Bagley

70. The tribunal found Ms Bagley to be a credible witness who was able to give a detailed account of the way in which she sent the notices to the Applicant as Otis Street and that she remembered doing so. Ms Bagley also gave a clear description of the working practices in her company's office concerning the issuing of overseas mail. Further, there is no doubt that Ms Bagley issued the section 20 notices to the other three lessees, because they responded to the consultation.

71. This firstly supports Ms Bagley's evidence that the photocopies of address labels associated with generic letters accurately show the addresses to which those generic letters were sent. The photocopies of address labels include Otis Street.

72. Secondly, the fact that the other three lessees undisputedly received consultation notices makes it far more likely than not that they were also sent to the Applicant at Otis Street.

73. In addition, the Respondent's file does contain two Oyez "Notices of Intention to Carry out Qualifying Works..." addressed respectively to the Applicant both at 196 Burrage Road and 367 Otis Street (although the second page of the Otis Street Notice is missing).

74. Further, Ms Bagley had every incentive for sending the notices to Ms Hippolyte as the tender accepted was the lowest tender received. Moreover, the Respondent knew that Ms Hippolyte had been in previous litigation with the Respondent's predecessor thereby indicating that the Applicant might be more rather than less likely to challenge the consultation procedure.

75. For the above reasons, on the balance of probabilities, the tribunal finds that Ms Bagley did send the section 20 notices, properly prepaid and addressed, to the Applicant at Otis Street.

The Evidence of Ms Hippolyte

76. The tribunal did not find Ms Hippolyte to be a reliable witness. The reasons are as follows.

77. First, in response to the Respondent's application for dispensation, Ms Hippolyte changed her evidence at the witness desk. At Paragraph 1 Ms Hippolyte stated "...I am satisfied that the works carried out were reasonably necessary and carried out to a reasonable standard at a reasonable price." During evidence in chief, Ms Hippolyte changed her evidence on this important point. She said that what she meant was that there was "nothing grossly unreasonable" about the works. In the tribunal's opinion this is a significant departure from Ms Hippolyte's witness statement. It is relevant that this change came about only after the Respondent had applied for dispensation. It was clearly intended to assist the Applicant in resisting the Respondent's application for dispensation. This indicates a propensity to change evidence to suit her case.

78. Secondly, we found aspects of her evidence inconsistent. In particular, at Para 7 of her statement of case she stated "On or about June 2007 the Applicant completed the Respondent's file update form and returned it to the Respondent... which included an email address." Conversely, at Para 9 of her witness statement she said "At the request of the Respondent I completed a file update form ...There was no place to insert an email address so I did not think about adding one." This was a central issue and both documents were personally signed by Ms Hippolyte and verified by statements of truth.

79. Further, it struck the tribunal as implausible that various letters from England had reached her at Otis Street, including one from Mr Bagley in June 2007, but none relating to the major works.

80. Ms Hippolyte also seemed somewhat unfamiliar with her witness statement when she read it to the tribunal.

81. In her witness statement at paragraph 2, Ms Hippolyte said that she did not want to sell the property. However, she exhibited a letter dated 17 October 2007 from Peter James Estate agents which is addressed to her at Otis Street and which says "We regret to confirm that the sale of the above mentioned property [196B Burrage Road] is no longer proceeding ... upon your instructions, we will commence the remarketing of your property..." Although her reference in paragraph 2 relates to 2003, she nowhere in her witness statement states that she later decided to sell.

82. On page 4 of her application to the tribunal dated 22 March 2010, as a reason for seeking a fast track case allocation she stated "the freeholder requested payment from mortgage holder and my home is now under threat of repossession". At the date of that statement, her clear evidence was that the flat was let and her home was Otis Street Newton MA.

83. Ms Duignan was not called by Ms Hippolyte to confirm the nature of the telephone call that was said to have occurred between them. In evidence, Ms

Hippolyte said that she did not know Ms Duignan well, having only spoken to her on one previous occasion. The tribunal finds it strange, therefore, that Ms Duignan should have had the Applicant's telephone number and telephone her out of the blue when she was in the United States (with a significant time zone difference). The tribunal equally finds it odd that such a call should have been made almost at the very end of a lengthy consultation process, when Ms Duignan had previously made written representations to the Respondent several months earlier on 8 April 2008.

84. For the above reasons, the tribunal does not accept the Applicant's evidence.

Conclusion on the Service of Section 20 Notices Issue

85. We have accepted the evidence of Ms Bagley and rejected that of Ms Hippolyte. The Applicant has therefore failed to discharge the evidential burden of proving on the balance of probabilities that she did not receive the notices.

86. The effect of that is that the section 20 notices are deemed to have been served on the Applicant at Otis Street Newton MA by virtue of section 7 of the Interpretation Act 1978.

87. We must also decide when each of the relevant demands would have been delivered in the ordinary course of post. We did not hear argument on this point which is anyway inconsequential. However, we have decided that five working days after posting is the appropriate time period.

Whether service of an Auditor's Certificate is a condition precedent to the service charge being payable

88. The tribunal confines itself to matters before it in this application, namely the payability in respect of the major works concerning the roof.

89. The general scheme of the lease is that annual auditor's certificates are required to be produced to justify service charge demands (Clause 5 (a)(iv), (see paragraph 17 above)). No such certificates have been produced to the tribunal.

90. However, the lease contains an exception in the case of

> "sums actually expended by the Landlord or which it might be urgently necessary to expend which expenditure the Landlord could not meet from funds in hand" (clause 5(a)(v))

91. The tribunal construes this provision as having two requirements. First, the works must be urgently necessary and second the landlord must not be able to meet that expenditure from funds in hand.

92. The major works came about as a result of water ingress to the property and in particular the top floor flat. As an expert tribunal, the LVT is entitled to rely on its own knowledge and experience in deciding whether such works are urgent.

93. The tribunal considers that the question of urgency falls to be assessed at the time that the works are first contemplated. Thereafter, it matters not for the purpose of ascertaining urgency within clause 5(a)(v) whether the works are carried out shortly thereafter or some months later. Once fairly characterised as urgent, they do not lose that quality should the work be delayed for any reason.

94. The tribunal is of the opinion that remedial works to cure water ingress of this nature are urgent and it so finds.

95. As to the second requirement to engage clause 5(a)(v), Ms Bagley stated on 6 February 2009 in an email to Ms Hippolyte " We are borrowing the money to pay for the works to the property...".This statement was not challenged during the hearing and the tribunal accepts it. It follows that the landlord did not have funds in hand to carry out the works.

96. The tribunal therefore finds that the service charges in dispute fall within clause 5(a)(v). Liability to make payments under that clause is not conditional on the provision of an auditor's certificate.

97. Although a purported certificate has now been sent to the tribunal following the hearing it is unnecessary to consider that further in light of the finding that clause 5(a)(v) applies.

98. For the above reasons the tribunal determines that provision of an auditor's certificate is not a condition precedent to the landlord recovering the services charges in dispute in this application.

Application for Dispensation under section 20ZA(1) of the Act

99. In light of the first finding, it is strictly unnecessary for the tribunal to decide this question. However, in the event that matter goes on, and in light of the submissions made at the hearing on this issue, the tribunal gives its decision.

100. The decision is on the hypothesis that, contrary to our finding, good service of the section 20 notices was not given.

101. During the hearing the tribunal referred the parties to the approach set out in the decision of the Lands Tribunal in *Eltham Properties Limited v Kenny & Othrs* LRX/161/2006 in which the Member (A J Trott FRICS) said at paragraph 26

> "When an application is made under section 20ZA(1) of the 1985 Act the LVT may make the determination to dispense with all or any of the consultation requirements "if satisfied that it is reasonable to dispense with the requirements." The determination is thus one for the LVT's discretion... What the LVT had to determine was whether it was reasonable to dispense with the consultation requirements, and the reasonableness of dispensation is to be judged in the light of the purpose for which the consultation requirements were imposed. The most important consideration is 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 requirements were not met...It is evident that the LVT was aware of the

> correct statutory test because it referred to it at paragraph 7 of its decision dated 11 July 2006: "The Tribunal noted that the test in section 20ZA(1) was not whether a landlord had acted reasonably but whether it was reasonable – that is in an overall sense or in all the circumstances – to make the determination applied for."

102. The tribunal respectfully agrees with this and therefore considers that the essential question is whether it is reasonable in the overall sense to grant the dispensation sought.

103. The tribunal does not consider that the Applicant has suffered material prejudice for the following reasons. Firstly, the landlord appointed a qualified surveyor to investigate the issues and advise. It then acted reasonably and properly in drawing up a detailed schedule of work. This was consulted upon. Observations were invited and received from the other tenants. It acted upon those observations. Ultimately, it took further professional advice in relation to the tenders received and accepted the lowest tender. It then negotiated a price reduction from the successful tenderer.

104. At the time that this was being undertaken, the Applicant was living in the United States. In answer to a question from the tribunal, Ms Hippolyte stated that she wished to sell the property because it was difficult to manage from afar. We agree that it would indeed have been difficult for her to obtain further contractors' estimates. In any event there is no evidence that the work could have been obtained for a lower price. We have already referred to her statement that she was "satisfied that the works carried out were reasonably necessary and carried out to a reasonable standard at a reasonable price". Furthermore, the correspondence between Ms Hippolyte and Ms Bagley from 15 September 2008 until 6 February 2009 did not assert that any prejudice had been suffered by the Applicant.

105. In view of the lack of prejudice to the Applicant and the conduct of the Respondent, the tribunal would, if necessary, have exercised its discretion in granting the necessary dispensation to the Respondent under s 20ZA(1) of the Act, having considered it reasonable to do so.

The Application for an Order under section 20C of the 1985 Act

106. Section 20C of the Landlord and Tenant Act 1985 (inserted by the Landlord and Tenant Act 1987) provides:

> "(1) A tenant may make an application for an order that all or any of the costs incurred ... by the landlord in connection with proceedings before a court or leasehold valuation tribunal, or the Lands Tribunal ... are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant or any other person or persons specified in the application."

107. The tribunal firstly informed Counsel that, contrary to his application, the tribunal has jurisdiction only to make a section 20C Order in relation to proceedings before it. It has no jurisdiction to make any such order in relation to proceedings in any other forum.

108. The tribunal indicated that it could see no covenant under the lease by which the landlord could recover its costs of the proceedings via the service charge. Ms Bagley also stated that the lessor will not seek to do so. Nevertheless, as the application was not withdrawn, the tribunal is required to make a determination.

109. The sole guidance as to how such application is to be determined is contained in sub-section (3) as follows:

> "The court or tribunal to which the application is made may make such order on the application as it considers just and equitable in the circumstances."

110. In the tribunal's judgement this is the only principle upon which the discretion should be exercised. This will include the degree of success of the tenant and the conduct of the parties.

111. The tenant has lost her case and the tribunal considers that the landlord has acted reasonably in relation to this matter. For those reasons, the tribunal declines to make the Order sought.

Formal Determinations

112. The tribunal determines that the Applicant is liable to pay to the Respondent in aggregate the sum of £7,519.20 in respect of service charges which sum was payable in the following amounts on the following dates:

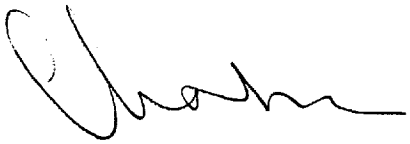
£2,000 payable on 5 December 2008

£2,302.50 payable on 8 January 2009

£3,216.70 payable on 9 April 2009

113. In the event that good service of the section 20 notices did not take place the tribunal would grant to the Respondent the necessary dispensation from compliance with section 20 in respect of notices required to be served upon the Applicant.

114. The Application for an Order under section 20C of the 1985 Act is refused.



C Norman FRICS
Chairman

29 November 2010