

It deserves reasonable consideration

Dispensing with 1985 Act consultation requirements must not undermine leaseholders' statutory rights, argue *Adam Colenso* and *Desmond Kilcoyne*

Before costly works are carried out to a building, its residential leaseholders are entitled to be consulted on: (i) the nature of the works; and (ii) the identity and likely costs of the proposed contractor.

The consultation scheme is set out in sections 20 and 20ZA of the Landlord and Tenant Act 1985 and in the Service Charges (Consultation Requirements)(England) Regulations 2003. Section 20ZA provides that a landlord may seek a determination from the leasehold valuation tribunal (LVT) to dispense with any requirements where it is "reasonable" to do so.

Local authority landlords are increasingly entering into long-term partnering agreements for repair work to their housing stock. The regulations set out specific requirements for use where a landlord enters into a qualifying long-term agreement (QLTA).

Reasonable practicability

Recently, however, a number of local authorities have applied to dispense with the consultation requirements in respect of proposed QLTA's. Many of the applications relate to subparas 4(4)-(7) of Schedule 2 to the Regulations. Subparagraph 4(4) requires the landlord to provide the leaseholder with an estimate of the sum that it will have to pay as service charge.

If it is not "reasonably practicable" to do so, subpara 4(5) requires the landlord instead to provide an estimate of the total cost of carrying out works to the building (although this provision is poorly drafted).

If that is not reasonably practicable, then, under subpara 4(6), the landlord is required to provide an estimate of the relevant unit costs or contractor's hourly or daily rates under the proposed QLTA. Irrespective of the type of estimate, if a leaseholder serves a response (for example, that the proposed charge is too high), the landlord must "have regard" to that response.

Lastly, if it is not reasonably practicable for a landlord to comply with subpara 4(6), it has the potentially less onerous obligation, under subpara 4(7) and para 8, of providing the estimate.

In *Auger v Camden London Borough Council* LRX/81/2007 unreported 14 March 2008, a local authority landlord applied to dispense with the requirements set out in subparas 4(4)-(7) in respect of proposed partnering agreements. The application was made after a proposed agreement had been advertised in the *Official Journal of the European Union* but before the applicant had

● **The leasehold valuation tribunal should not grant dispensation merely because it is difficult to provide information to leaseholders**

● **The tribunal should take into account the terms of the proposed QLTA**

● **It should also consider the effect of the QLTA on the protection afforded by section 19 of the Landlord and Tenant Act 1985**

invited parties to tender for the contracts. Accordingly, at the date of the application, the applicant had not entered into or agreed the terms of a QLTA and did not know how many agreements would be executed. The identity of any party to and the terms of any proposed QLTA were therefore unknown.

In support of the application, it was argued, among other things, that: (i) it was impractical to provide the estimates contemplated by subparas 4(4) and (5); and (ii) the nature of the proposed QLTA was such that information concerning unit costs and rates (subpara 4(6)) would be of little use to leaseholders. The LVT granted the dispensation.

The leaseholders' appeal came before the Lands Tribunal (LT). Its decision, allowing the appeal, is the first consideration by the LT of the principles relevant to such applications. The LT distinguished between the requirements based upon "reasonable practicability" in subpara 4 of Schedule 2 to the Regulations and the power to dispense based upon "reasonableness" in section 20ZA. It observed that if it was not reasonably practicable to provide information of a certain type, there was, logically, no requirement to do so. If, following the logic through, there was no requirement to provide the information, dispensation would be unnecessary.

The applicant therefore could not obtain dispensation on the basis that it was not reasonably practicable to provide information and the LVT had failed to recognise this. In substance, the applicant was seeking a declaration as to the impracticability of providing the required information that, it is submitted, should be made in the county court.

Two factors

The LT identified two factors that should be taken into account when considering reasonableness under section 20ZA.

First, the LVT must address the degree to which the proposed QLTA has been

finalised. In this case, the applicant was unable to point to any proposed QLTA contract document or to detail the key features of the document. The LVT should have taken into account the uncertainty surrounding these matters when considering whether to dispense. The judgment suggests that such a level of uncertainty ought to be fatal to any application.

It is submitted that, in future, QLTA dispensation applications should be supported by a draft contract document or by documents setting out the terms of the proposed agreement and sufficient evidence to satisfy the LVT that the terms are unlikely to change.

Second, when considering whether it is reasonable to dispense with any particular requirement, the LVT must now address the extent to which the QLTA will compromise the very different statutory protection provided to a leaseholder under section 19 of the 1985 Act. Section 19 prevents a landlord from recovering costs that are not reasonably incurred and of a reasonable standard.

At first instance, the LVT took the view that even if the protection afforded by the consultation requirements in subparas 4(4)-(7) was dispensed with, the leaseholders would still have the substantial safeguards set out in section 19. The appeal judge disagreed. He stated:

If works which are reasonably necessary and are done to a reasonable standard are carried out under a Partnering Agreement [the applicant] will be able to meet criticism regarding the level of expense by pointing out that [the applicant] is already contractually bound to the Partner and had to place the works with the Partner at the contract rate provided for in the Partnering Agreement, and therefore the costs were indeed reasonably incurred [therefore satisfying the test in section 19].

Prospective applications

The LT considered whether section 20ZA permitted dispensation in respect of a QLTA that had yet to be entered into. It concluded that the phrase "to dispense with" has both retrospective and prospective application and that the wording of section 20ZA clearly enables dispensation to be granted in respect of proposed QLTA's (as well as those already entered into).

This decision is required reading for any local authority that is considering QLTA dispensation applications – and for leaseholders who wish to object to the same.

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