Dispensing with service charge consultation requirements

Eltham Properties Ltd v A Kenny and others LRX/161/2006.

When asked to dispense with the service charge consultation requirements of the Landlord and Tenant Act 1985, the Leasehold Valuation Tribunal must consider whether it is reasonable to do so in all the circumstances. The requirement is not to consider whether the landlord has acted reasonably. The statutory provisions were not intended to be a sanction on landlords for minor breaches of procedure which do not adversely affect the leaseholders.

Background

The *Commonhold and Leasehold Reform Act 2002* (CLRA 2002) addressed a number of difficulties relating to residential long leases. New requirements were introduced for landlords to consult with the leaseholders before carrying out works above a certain value or entering into any long-term agreement for the provision of services.
Section 151 of the CLRA 2002 replaced section 20 of the Landlord and Tenant Act 1985 (LTA 1985), and introduced a new Section 20ZA which took effect, in England, on 31st October 2003.
Briefly, the requirements oblige the landlord to:

- Explain to leaseholders why the works it proposes doing are necessary.
- Set out a response to any observations received.
- Give reasons for selecting the successful contractor.
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Consultation notices must be sent both to individual leaseholders and to any recognised tenants' association (RTA). Both the leaseholders and the RTA have a right to nominate an alternative contractor and the landlord is obliged to ask for an estimate from such nominees.

The purpose behind the consultation process is to involve the leaseholders in the landlord's proposals. However, the landlord's ability to recover the costs of the works is limited if it fails to carry out the full consultation procedures in the correct manner.

Section 20ZA(1) of the LTA 1985 permits the Leasehold Valuation Tribunal (LVT) to dispense with the consultation requirements in a particular case "if satisfied that it is reasonable to dispense with the requirements".

For more information on the background to the changes introduced by the CLRA 2002, see *Legal updates:*

Facts

Etham Properties Ltd (E), the landlord of a building comprising five flats, served a section 20ZA notice (the notice) on its leaseholders detailing external painting works (the works) that it intended to carry out at the building.

The leaseholders were unhappy about the works. They believed that the exterior paint work should have lasted longer and that guarantees were in place to this effect, covering the repainting done eight years previously. In their response to the notice the leaseholders suggested that the notice was defective but did not specify in what way.

The leaseholders were reluctant to pay for the works and the matter went to the LVT. The LVT decided that the notice was defective because it failed to invite each tenant to propose the name of a person from whom E should try and obtain an estimate for carrying out the works.
In fact, notwithstanding the defect in the notice, and their objections, the leaseholders had been involved in the process of obtaining quotations for the works. However, the LVT decided that the notice was invalid and the leaseholders were only obliged to contribute £250 each to the cost of the works, (being the maximum sum recoverable without a landlord being obliged to follow the consultation procedure).

E made a subsequent application to the LVT asking them to dispense with the consultation requirements under section 20ZA (1) LTA 1985. The LVT found no evidence that E had checked with its solicitors to find out in what way the notice could have been defective (in fact, it had done so) and held this to have been unreasonable. The LVT refused to dispense with the consultation requirements. E appealed.

Decision

E argued that the LVT had been wrong to decide it was not reasonable to dispense with the consultation process. It had approached the question of whether to grant the dispensation incorrectly. The LVT had stated that:

"The legislation is clearly intended to make sure that landlords observe the consultation requirements and fail to do so at their peril".

They had considered exercising the dispensation with this punitive approach in mind.
On appeal, the Lands Tribunal held that this was an incorrect approach. What the LVT had to decide was whether it was reasonable in all the circumstances to dispense with the requirements for consultation. The requirement was not to consider whether the landlord had acted reasonably, in this case by purportedly failing to seek advice on how the notice may have been defective.

The dispensation procedure was intended to cover situations where consultation was not practicable, for example emergency works, and to avoid penalising landlords for minor breaches of procedure that did not adversely affect the leaseholders.

The most important consideration when deciding whether to dispense with the consultation requirements was the amount of prejudice to the leaseholders if the consultation process was not followed. On the facts, there was no evidence that the leaseholders had been prejudiced by the defect and no evidence that they would have acted differently if the notice had been fully compliant. The LVT had incorrectly focused upon one aspect of E's behaviour which it had concluded was unreasonable; E's apparent failure to check with solicitors how the notice might be defective. The weight the LVT gave to that was misguided. It should have given consideration to what was reasonable under all the relevant circumstances.

On appeal, the Lands Tribunal held that it was reasonable to give dispensation from the consultation requirements as there had been a minor breach of procedure that had not prejudiced the leaseholders.

Comment

Landlords will be relieved by:

- The decision to dispense with the consultation requirements on the facts of the case.
- The confirmation given by the LVT on appeal that all the relevant circumstances need to be considered.
- The fact that the intention behind the legislation is not punitive.
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However, landlords should remain diligent when consulting with leaseholders. There will still be occasions where, if the landlord fails to carry out the full consultation procedures in the correct manner, it will not be able to collect or recover service charges above the level of the statutory minimum amounts (currently £100 per leaseholder per year in respect of a long-term contract, or £250 per leaseholder for works to the building).

The landlord will have to cover the loss itself and the consequences of a large shortfall could be disastrous, potentially rendering the landlord insolvent and unable to continue to fulfil its obligations to leaseholders.

It would be advisable for landlords concerned about emergency works to apply for dispensation as

early as possible, although this would inevitably lead to some delay which may also have unpalatable consequences.

Case
Eltham Properties Limited v A Kenny and others LRX/161/2006 (A J Trott, FRICS).

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