An unsatisfactory situation

Before undertaking works, residential landlords must consult their tenants and their tenants' tenants...

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The Brunswick Centre

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Since the Supreme Court turned the law of dispensation from the consultation requirements upside down in *Daejan Investments Ltd* v *Benson* [2013] UKSC 14; [2013] 2 EGLR 45, the Upper Tribunal has been troubled with very few cases involving the requirements to consult leaseholders on major works. However, the decision in *Lessees of Foundling Court and O'Donnell Court* v *Camden London Borough Council and others* [2016] UKUT 366 (LC); [2016] EGLR 59 has rewritten preconceptions as to who needs to be consulted and caused landlords some new headaches.

Foundling Court concerned the Brunswick Centre, which is a complex of shops, flats and offices in Bloomsbury built in the 1960s in the "brutalist" style. The building leaked and in 2004, the freeholder, Allied, decided to carry out extensive repairs. The lease structure was not an uncommon one. The residential parts of the Brunswick Centre were held on a long lease by the London Borough of Camden. Camden had covenanted with Allied to meet 25% of the cost of major works. Camden, in turn, had granted long leases of 87 of the flats and those under-leases required each lessee to reimburse Camden a proportion of the superior landlord's costs.

The problem

Before carrying out the major works, Allied consulted its tenant, Camden, in accordance with section 20 of the Landlord and Tenant Act 1985 ("the 1985 Act"). It allowed Camden the "relevant period" of 30 days to make observations in the usual way. Camden then "sub-consulted" by sending a copy of each of the notices to its leaseholders and inviting comments and passed those comments up the chain to Allied. Inevitably, Camden's notices did not allow the full 30-day period for observations because there simply was not time.

The works were carried out and Camden paid its 25% share of the costs. However, the works were not a success, so Camden delayed billing its own leaseholders until many years later. When it did, the leaseholders claimed they were only liable for £250 each because they had not been properly consulted. The issue for the Upper Tribunal was who, if anyone, should have consulted them? The perceived wisdom at the time was that a landlord need only consult its immediate tenant. But in this case the immediate landlord was not actually intending to do any works.

The solution

Regulation 1(3) of the Service Charges (Consultation Requirements) (England) Regulations 2003 provides that the consultation requirements apply where a landlord "intends to carry out qualifying works".

Section 20 of the 1985 Act provides that relevant contributions in respect of major works are limited unless the consultation requirements have either been complied with or dispensed with. A "relevant contribution" is the service charge which the tenant is required to pay under the terms of his lease.

Here Camden did not intended to carry out qualifying works but its tenants were still required to make a "relevant contribution". By contrast, Allied did intend to carry out works but was not seeking a "relevant contribution" from the under-lessees because it had no direct contractual relationship with them. As the under-lessees would ultimately pay for the works, they argued that they must be permitted some say in them.

The President of the Upper Tribunal, Martin Rodger QC, agreed and concluded that the policy of the 1985 Act would only be furthered if the superior landlord (who "intends to carry out qualifying works") was obliged to consult the sub-lessees. He was bolstered in this conclusion by section 30 of the 1985 Act which provides that "tenant" includes (where the dwelling or part of it is sub-let) a sub-tenant."

Practical difficulties

The difficulty with this solution is that just because a "sub-tenant" has the protection of the 1985 Act doesn't make that "sub-tenant" the "tenant" of the superior landlord who is doing the works. There is no contractual relationship between them – no lease to govern them. The superior landlord may not even know who the sub-tenants are or where they live. Further, the 1985 Act only requires the landlord to consult a tenant who is required to make a "relevant contribution". Knowledge of the service charge provisions in the lease would be needed to determine who is required to contribute to what. What if the sub-tenant has sub-sublet? The sub-sub tenant would also need to be consulted if he was liable to pay service charges and, again, his details may be unknown.

The Upper Tribunal acknowledged these difficulties but thought they were surmountable. One solution suggested was that notices could simply be addressed to "the leaseholder" at the flat address. Martin Rodger QC said that although it may not be guaranteed that the notice would come to the attention of every lessee, as the 1985 Act contains no service provisions and does not require each tenant to be given notice by name, proof of receipt may not matter. This is not the approach taken by most FTTs where failure to serve the notice is put in issue but perhaps this will now change.

The second solution suggested was for the superior landlord to obtain the necessary information from the intermediate landlord. The difficulty with this is that the 1985 Act imposes no obligation on the intermediate landlord to provide this information, although it is difficult to see why he would refuse to do so.

A third option would be to seek a dispensation from the consultation requirements altogether, but who would the application be served on? The FTT usually requires a dispensation application to be served on all the lessees, so we would be back to square one.

What about obtaining a dispensation in advance of the works on terms that, for example, the notices are pinned on the communal notice board or distributed to the flats addressed to "the leaseholder".

None of these solutions is entirely satisfactory. They place a heavy administrative burden on a superior landlord and are likely to delay major works. It seems that the draftsman of the 1985 Act simply overlooked the fact that works are not always carried out by a tenant's immediate landlord.