Court of Appeal Guidance on Landlord's Statutory Consultation and Changes to Works. Jonathan Chew, Wilberforce Chambers

In *Reedbase v Fattal* [2018] EWCA 840, an important decision for landlords and their advisers, the Court of Appeal explained how and when a landlord would need to repeat its statutory consultaiton if the works carried out changed from the original programme consulted on. It set out how changes in works fits with the consultation regime under section 20 of the Landlord and Tenant Act 1985 and associated regulations for the first time, and separately considered a landlord's obligation to make good a tenant's demise for the first time in over 25 years. Jonathan Chew acted for the successful landlord.

The Court of Appeal's practical approach to the consultation regime will be of assistance to landlords, while the fact-sensitive approach ensures tenants retain the benefit of their statutory protection.

The Consultation Issue

Section 20 and the associated regulations require a residential landlord to consult its tenants on major works in two stages. This dispute concerned the second stage: presenting estimates to the tenants. Works were carried out to the roof terrace of a penthouse flat overlooking Regent's Park. In the course of the works, the landlord changed the tiling on the roof from a tiles bonded onto asphalt to tiles resting on pedestals above a waterproof membrane. The estimates obtained by the landlord on which the tenants were consulted did not refer to the pedestal method. The tenant alleged there was not proper consultation on the works. The question for the Court of Appeal was whether the change in the works invalidated the second stage consultation such that the landlord could not recover all the sums spent (it was not in dispute on appeal that the sums were reasonable).

The Court of Appeal recognised (at [36]) that the there was no explicit statutory guidance on when a change in the works would invalidate a stage in the consultation such that it had to be repeated. The Court of Appeal held that the relevant test "*must be whether, in all the circumstances, the [tenants] have been given sufficient information by the first set of estimates" and that "it must also be considered whether…the protection to be accorded to the tenants by the consultation process was likely to be materially assisted by obtaining the fresh estimates*." (at [36].)

On the facts of the case, fresh estimates would not assist having regard to the following factors: (1) the tenants who complained knew of the change and approved it such that there was no ambush; (2) the change in cost (and substance) was relatively small in proportion to the full cost of the works; (3) it was unrealistic to think contractors who had not been awarded the main job would tender for this small extra part and there was no evidence there would have been a costs saving; (4) the extra time of a retendering might prejudice other tenants; (5) the tenants had the overarching protection of section 19 (that the sums be reasonable and reasonably incurred).

Making Good

The tenant argued by putting down different tiles placed on a different support system requiring maintenance the landlord had not satisfied its obligation to make good the tenant's premises in the course of its repair. The Court of Appeal rejected the argument that a landlord was obliged to replace exactly what was there before [14] or make a "like for like" replacement [12]. Instead, the Court of Appeal emphasised that there was no absolute obligation but rather an obligation on the landlord reasonably or "so far as possible" to restore the property to its pre-existing state [13]. This can include something different. The landlord's approach was reasonable and there was no breach.

An Unanswered Question

An important issue left open was whether a tenant could waive or be estopped from relying on its statutory right to be consulted under section 20, or whether that statutory protection was inalienable. The landlord argued that, because the tenant in this case knew of the works that were being done and approved them, it was estopped from alleging any breach of the consultation regime and could not rely on those rights. The tenant argued an estoppel could not deprive it of its statutory protection. The Court of Appeal did not need to, and did not answer this question.

Jonathan was instructed by Forsters LLP in the Court of Appeal and at trial.