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Phillips and Goddard v Francis - the Court of Appeal judgment



Nicholas Kissen
5th November 2014

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The judgment



- *Francis and another v Phillips and another (suing on behalf of themselves and other owners of 97 Holiday Chalets at Atlantic Bays Holiday Park, Formerly Point Curlew, St Merryn, Padstow, Cornwall and Secretary of State for Communities and Local Government*
- Hearing date 14th October 2014
- Judgment dated 28th October 2014
- Made public on 31st October 2014

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The law that concerns us



- Sections 20 and 20ZA of the Landlord and Tenant Act 1985
- The Service Charges (Consultation Requirements) (England) 2003
- The Service Charges(Consultation Requirements)(Wales) 2004

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Section 20 of the 1985 Act




Limits recovery of cost of **qualifying works** by landlord from residential tenants through a service charge unless

- Prescribed consultation procedure followed or
- Dispensation order granted by the appropriate tribunal
 - First-tier Tribunal (Property Chamber) - England
 - Leasehold Valuation Tribunal - Wales

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What are qualifying works?


- Works on a building or on any other premises



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When does Section 20 apply?


- If the relevant costs incurred on undertaking the works exceeds the appropriate amount
 - £250 from any one tenant



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Qualifying works - meaning

- "The generally accepted view was that the correct approach to the meaning of "qualifying works" in Section 20 was a "sets" approach for the purpose of identifying whether the "relevant costs" exceed "the appropriate amount" specified in the section and so triggering the statutory consultation process"
- *Martin v Maryland Estates Limited*
 - [1999] L&TR 541



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So if appropriate amount exceeded...



- Prescribed consultation procedure to be followed or
- Dispensation order sought and obtained from the appropriate tribunal
 - First-tier Tribunal (Property Chamber) - England
 - Leasehold Valuation Tribunal - Wales

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Consultation for qualifying works in a nutshell



- Notice of intention
 - Description of works
 - Chance to make observations and nominate contractors
- Statement of estimates
 - Chance to inspect all of them
 - Chance to make observations on the estimates
- Notice of award
 - With reasons
 - Certain exceptions

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Dispensation from consultation




Upon application to the appropriate tribunal to dispense with all or any of the consultation requirements in relation to any qualifying works, the tribunal may make the decision if satisfied that it is reasonable to dispense with the requirements

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And if fail to consult or obtain dispensation


"Relevant contribution" of a tenant limited to the prescribed amount of £250



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It all started with.....


- Disused WWII airbase
- 25 acre holiday site created in the 1970s
- Over 150 chalets on 999 year leases
- Sale of freehold in April 2008 to Mr and Mrs Francis



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The intended works

- Announcement to chalet owners of intention to bring the site up to a first class standard from which they might all benefit
- Meeting of 3rd May 2008
- Letter to owners of 15th May 2008



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Impact on service charges



- Last service charge before sale to Mr and Mrs Francis
 - £1,400 approximately per owner
- First demand after sale
 - £3,100 approximately per owner

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The yearly accounts



January 2010 accountants certified recoverable charges as

- 22/04/2008 to 31/12/2008 - £269,933.49
- 01/01/2009 to 31/12/2009 - £583,542.87

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It goes to court



- February 2009 - proceedings issued in High Court by some chalet owners
- Declarations and injunctions
- The court decided chalets were "dwellings" and so 1985 Act applied
- Transfer to the county court
 - Six day hearing on 19th March 2012

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Common ground



- No consultation under Section 20 for service charges demanded for 2008 and 2009
- No dispensation order made by the appropriate tribunal
- Contribution sought from each tenant exceeds £250

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What did the owners argue?



- All works planned as a single set of works and there should have been Section 20 consultation
- Accordingly each owner should not have to pay more than £250 each towards the cost of the works

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What did the landlords argue?



- They were separate individual sets/projects of work undertaken in a piecemeal fashion
- As none of these sets/projects led to any owner being liable for over £250 the obligation to comply with Section 20 consultation had never arisen

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The county court approach



- Identify individual “sets” of work (eg external decoration, roof repairs)
- Consultation only required in relation to those sets which would lead to one owner being called upon to pay more than £250

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What did the county court decide?



- Section 20 consultation need not be followed
- “None of the items in the 2008 and 2009 accounts relating to expenditure recoverable through service charges amounts, individually or together, to a single set of “qualifying works” for the purposes of Sections 20 and 20ZA of the 1985 Act”

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The leaseholders appealed...




- On to the High Court, Chancery Division
- Judgment dated 21st December 2012

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The High Court decided...


- Found in favour of the owners
- Section 20 procedure applied
- The aggregating approach
- All the works are “qualifying works” for the purposes of Section 20



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The judgment


“Accordingly, I see nothing in the present legislation which requires the identification of one or more sets of qualifying works. It will be for the landlord to assess whether they are on such a scale as to necessitate complying with the consultation requirements or face the consequence that he may not recoup the cost from the tenants’ contributions.”



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The judgment

“As the contributions are payable on an annual basis then the limit is applied to proportion of qualifying works carried out in that year...all the qualifying works must entered into the calculation unless the landlord is prepared to carry any excess cost himself”.



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The aggregating approach



- No distinction between different sets of works or projects
- All the works which were qualifying works should be taken into account for working out the contribution and then applying the £250 limit
- Straddling two service charge years

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The landlord's appeal



- Permission to appeal given out of time
- Master of the Rolls
- Chancellor of the High Court
- Lord Justice Kitchin

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Secretary of State intervened



Question of statutory interpretation of public importance with potential to affect large number of residential landlords and tenants throughout the country

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The court view of the aggregating approach



"...not a sensible approach and gives rise to serious practical problems. It cannot therefore have been intended by Parliament".

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The Court of Appeal judgment



- Qualifying works could not mean the total of all works of the relevant kind carried out in a given year
- Serious practical problems with this approach
- Once £250 annual limit reached landlord required to consult on any service charge items "however small they might be"
- Administrative burden
- No mention of annual cap

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The Court of Appeal judgment



"Sensible way to control routine works of repair and maintenance, which were unlikely to be the subject of a detailed plan in advance, was through the requirements in Section 19 of the 1985 Act that all service charges should be reasonable and reasonably incurred."

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The Court of Appeal judgment

- Correct approach was to apply the cap by reference to individual sets of works
- The status quo restored

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What is a single set of qualifying works?

- Multi-factorial question
- To be answered in a common sense way
- Taking into account all relevant circumstances

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Relevant factors likely to include...

- Where the items of work are to be carried out
- Whether they are the subject of the same contract
- Whether they are to be done at more or less the same or at different times; and
- Whether the items of work are different in character from, or have no connection with, each other

List is not exhaustive and the matter is a question of fact and degree

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Effect of qualifying works



No requirement that they should have a permanent effect modifying effect of what was previously there

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Applying the “sets” approach



- County court entitled to find work planned and carried out until 2009 was not part of a single set of works
- Conclusion on facts supported by evidence and with which the appeal court could not interfere
- Landlords entitled to undertake work in such sequence and such manner as they chose so long as they complied with their contractual obligations

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Applying the “sets” approach



- Judge had properly addressed the question which was an objective one of whether the work constituted a single or multiple set of qualifying works
- Appeal allowed
- County court decision restored

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Variation of leases 25 November 2014 at 13:00	Park homes Manchester 25 November 9.30-16.30
Case law update 2014 13 January 2015 at 13:00	
Collective enfranchisement case law – non-valuation 10 February 2015 at 13:00	
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