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Section 20 Consultation 2014

Nicholas Kissen Leasehold Advisory Service 20 November 2014

Lease Conferences Ltd

1

2



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

What is the purpose of statutory Consultation? Ensuring that tenants of flats are not required To pay for unnecessary services or services which are provided to a defective standard and To pay more than they should for services which are necessary and provided to an acceptable standard Daejan Investments Limited v Benson and others [2013] 1 W.L.R

What is the purpose of statutory consultation?

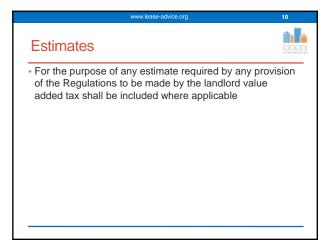


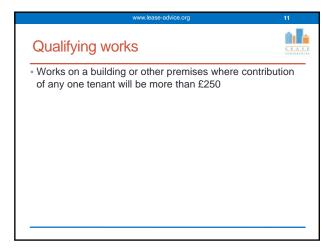
- "The real protection afforded by the 1985 Act to residential tenants is that all service charges must be reasonable and reasonably incurred under section 19. This is the sensible way to control routine works of repair and maintenance which are unlikely to be the subject of a detailed plan in advance"
- Phillips v Francis [2014] EWCA Civ 1395

Who is affected? Residential landlords both public and private Right to Manage companies Managing agents Solicitors and Leaseholders Recognised tenants' associations

Consequences of the rules Limits service charges that a tenant can be called upon to pay in respect of either a "qualifying long term agreement" or "qualifying works" unless Landlord has consulted the tenants in the required manner or Obtained dispensation order from the appropriate tribunal

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Appropriate tribunal	L E A S E
First-tier Tribunal (Property Chamber) England	
Leasehold Valuation Tribunal Wales	





Phillips v Francis • [2014] EWCA Civ 1395 • Judgment of Court of Appeal dated 31 October 2014 • The sets test

Phillips v Francis Substantial works undertaken by landlord to holiday park Numerous chalets on 999 year leases paying service charges No consultation with leaseholders No dispensation obtained from the appropriate tribunal

Phillips v Francis - County Court Leaseholders contended the works were one set of qualifying works and therefore only required to pay at most £250 per premises due to lack of consultation Landlords argued successfully that there were a series of works of which none led to a charge of more than £250 and so all costs recoverable even though total was over £250 Leaseholders appealed to the High Court

Phillips v Francis - High Court Appeal succeeded The Chancellor of the High Court took a different approach The aggregating approach All the works are "qualifying works" for the purposes of Section 20

The aggregating approach "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"

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

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 Leaseholders succeeded Landlords appealed to the Court of Appeal

Phillips v Francis - Court of Appeal High Court judgment overturned Limit based on single batch of qualifying works And the Court of Appeal provided guidance on identifying a single set of Qualifying Works when looking at a series of works

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

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

Qualifying long term agreement • Any agreement entered into by, or on behalf of a landlord or a superior landlord, for a term of more than 12 months, where the contribution of each tenant will be over £100 in any accounting period



Qualifying long term agreement



- Paddington Walk Management Limited v Governors of Peabody Trust [2010] L & T.R.6
- HHJ Marshall QC sitting in the Central London county court held that a contract is not a QLTA just because it could go beyond the original fixed period of 12 months or less

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25

Qualifying long term agreement

- Poynders Court Limited v GLS Property Management Limited [2012] UKUT 339 (LC)
- Should an agreement not spell out its duration it is a question of fact for the tribunal whether it is an agreement for over 12 months
- A provision for termination, even within the 12 month period, does not help in deciding the length of the agreement

www.lease-advice.org Qualifying long term agreement -

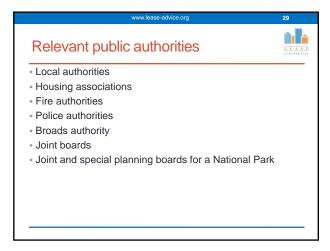


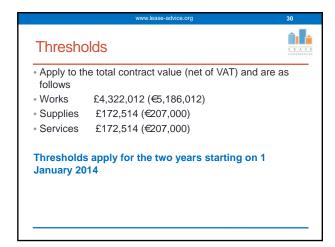
exceptions • Employment contract

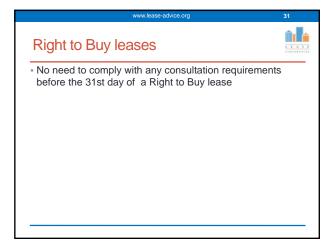
- Management agreement between local housing authority and a TMO
- · Between companies within a group
- No tenants in building when agreement entered into
 - Agreement not more than five years

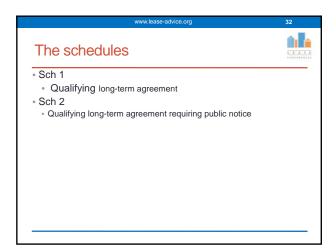
Qualifying long term agreement exceptions BDW Trading Limited v South Anglia Housing Limited EWHC B10 (Ch) No need to consult where building not yet constructed or not let at time of qualifying long term agreement

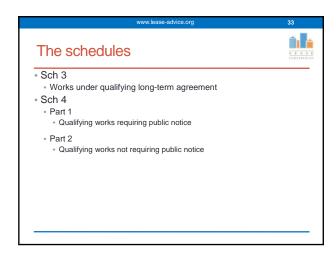
Public notice Works/agreement must be advertised in the Official Journal of the European Union Public Contracts Regulations 2006 Apply to certain public authorities Where thresholds equalled or exceeded

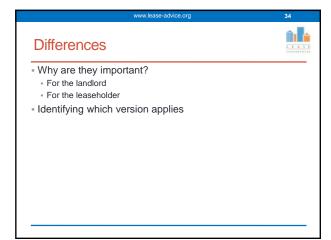


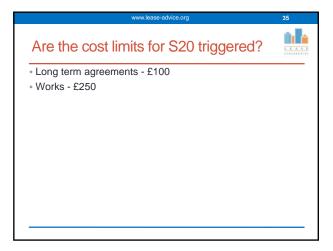






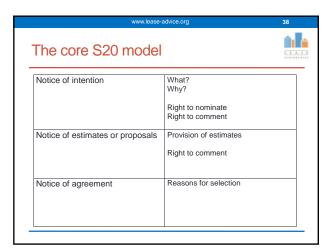






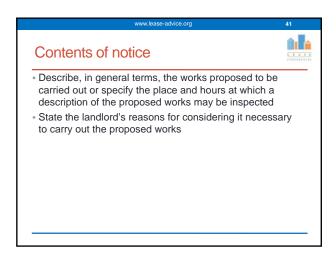
Schedule 3 – works under long term agreements Schedule 4 part 1 – works requiring public notice Schedule 4 part 2 – works where no public notice is required Schedule 4 part 2 – works where no public notice is required Schedule 4 part 2 – works where no public notice is required





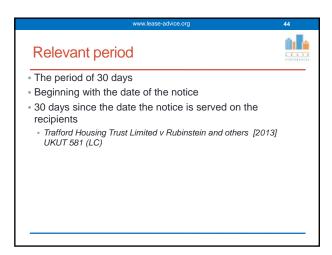
Schedule 4 Part 2 • Qualifying works not under a qualifying long term agreement and not requiring public notice • Most common process for private landlords • Notice of intention to do the works • Seeking estimates • Notice about estimates • Notification of reasons for awarding contract

Notice of intention to do the works The landlord shall give notice in writing of his intention to carry out qualifying works— a) To each tenant; and b) Where a recognised tenants' association represents some or all of the tenants, to the association



Contents of notice Invite the making, in writing, of observations in relation to the proposed works; and Specify— The address to which such observations may be sent That they must be delivered within the relevant period; and The date on which the relevant period ends

Contents of notice * The notice shall also invite each tenant and the association (if any) to propose, within the relevant period, the name of a person from whom the landlord should try to obtain an estimate for the carrying out of the proposed works



Inspection of description of proposed Works Where a notice specifies a place and hours for inspection— The place and hours so specified must be reasonable; and A description of the proposed works must be available for inspection, free of charge, at that place and during those hours

Inspection of description of proposed works If facilities to enable copies to be taken are not made available at the times at which the description may be inspected, the landlord shall provide to any tenant, on request and free of charge, a copy of the description

Duty to have regard to observations Where, within the relevant period, observations are made, in relation to the proposed works by any tenant or recognised tenants' association, the landlord shall have regard to those observations

Duty to have regard to observations



Woodfall para 7.198

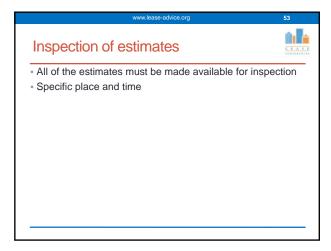
"The landlord is clearly not bound to adopt such observations. He is not, however, free to disregard them entirely. It is thought that he is obliged to consider the observations in good faith and to give to them such weight as he thinks fit. Provided he comes to a conclusion to which a reasonable landlord in his position could have come, he will have complied with the statutory requirement even though a reasonable landlord might equally have reached a different conclusion"

Seeking estimates Landlord must try to obtain estimates from persons nominated by the tenants and/or the association From whom should estimates be obtained? Single nomination Nomination by more than one tenant

Duties in relation to estimates Supply paragraph (b) statement to each tenant and any recognised tenants association Serve second notice on each tenant and any recognition tenants association

The paragraph (b) statement The landlord shall supply, free of charge, a statement setting out— As regards at least two of the estimates, the amount specified in the estimate as the estimated cost of the proposed works; and Where the landlord has received observations to which he is required to have regard, a summary of the observations and his response to them; and

The paragraph (b) statement Where the landlord has obtained an estimate from a nominated person, that estimate must be one of those to which the paragraph (b) statement relates



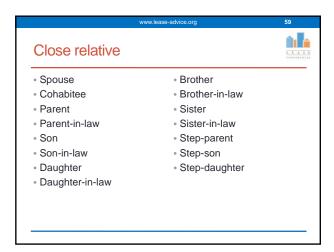
Duty in relation to estimates • At least one of the estimates must be that of a person wholly unconnected with the landlord

Connection to the landlord No exhaustive definition of what "connection" means ldea is to increase transparency of the consultation process Some relationships are deemed to a connection....

Deemed connection Where the landlord is a company, if the person is, or is to be, a director or manager of the company or is a close relative of any such director or manager Where the landlord is a company, and the person is a partner in a partnership, if any partner in that partnership is, or is to be, a director or manager of the company or is a close relative of any such director or manager

Deemed connection * Where both the landlord and the person are companies, if any director or manager of one company is, or is to be, a director or manager of the other company Where the person is a company, if the landlord is a director or manager of the company or is a close relative of any such director or manager; or

Deemed connection • Where the person is a company and the landlord is a partner in a partnership, if any partner in that partnership is a director or manager of the company or is a close relative of any such director or manager



Supply of para(b) statement and inspection of estimates

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The paragraph (b) statement shall be supplied to, and the estimates made available for inspection by—

- · Each tenant; and
- The secretary of the recognised tenants' association (if any)

Notice from landlord

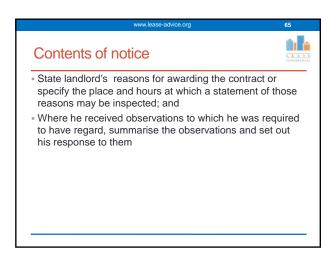


- The landlord shall, by notice in writing to each tenant and the association (if any)—
- Specify the place and hours at which the estimates may be inspected
- Reasonable place and time
- Copying facilities
- Supply of copies
- Invite the making, in writing, of observations in relation to those estimates
- And.....

Notice from landlord * Specify— 1) The address to which such observations may be sent 2) That they must be delivered within the relevant period; and 3) The date on which the relevant period ends

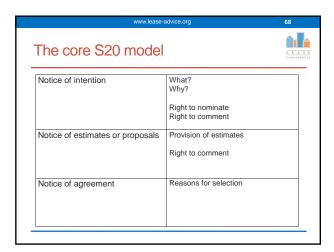
Duty to have regard to observations Where, within the relevant period, observations are made in relation to the estimates by a recognised tenants' association or, as the case may be, any tenant, the landlord shall have regard to those observations

Duty on entering into contract Where the landlord enters into a contract for the carrying out of qualifying works, he shall, within 21 days of entering into the contract, give written notice to each tenant and the recognised tenants' association (if any)



Statement of reasons - inspection Reasonable place/hours Copying facilities Supply of copies if facilities not available

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No need to serve notice of contract	LEASE
where	CONTRACT
 The person with whom the contract is made is A nominated person or 	
Submitted the lowest estimate	



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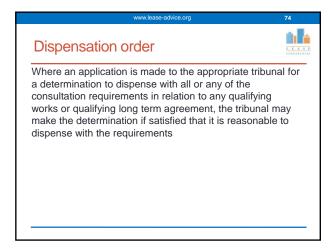
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Two LEASE guides on the subject

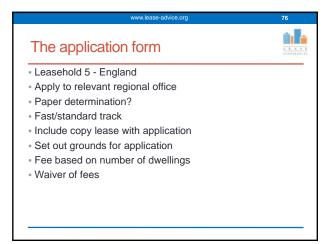
- "A guidance note issued by the Leasehold Advisory Service ("LEASE") contains helpful precedents for the various notices required under this procedure. The experience of this case suggests that landlords would be well-advised to pay close regard to them, rather than attempting to devise their own versions"
- Daejan Investments Limited v Benson and others [2009] UKUT 233 (LC) LT

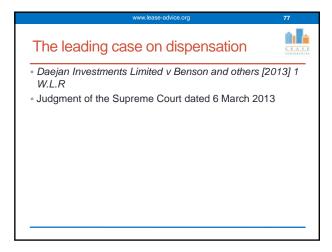
upply description of the work and an estimate of the total costs of the work en observations which the LL has a Duty to have regard to – 30 day period ays of receipt of observations the LL must supply a response to the individual

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Consequences of not consulting	L E A S E
 Limits service charges that a tenant can be called u to pay in respect of either a "qualifying long term agreement" or "qualifying works" unless Procedure followed or 	pon
Dispensation order granted by the appropriate tribu	nal

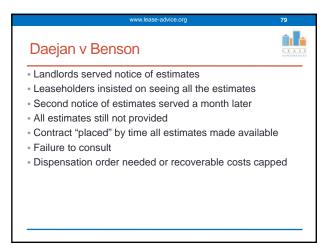


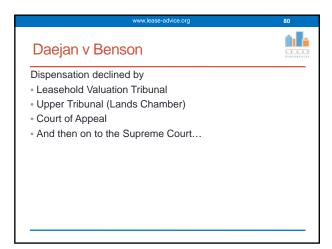
Why seek dispensation? Urgent works/supplies Cannot obtain two estimates Mistakes in the consultation process





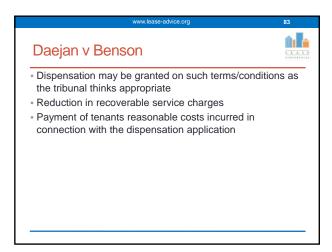
Daejan v Benson Mixed use block in Muswell Hill, London N10 Five out of seven flats liable for service charges Landlord wished to carry out major works Notice of intention served Work costed at around £400,000 Tenders received but only one given to the leaseholders





Daejan v Benson By 3 to 2 the Supreme Court found in favour of the landlord and awarded dispensation but on terms





Daejan/Benson applied OM Property Management Limited [2014] UKUT 9 (LC) The access breach The summary breach

Time limit on the notices? Jasrzembski v Westminster City Council [2013] UKUT 284 (LC) No time limit between serving notice of intention and undertaking the works However the relevant time periods for the work to be undertaken is months rather than years

The general description Southern Land Securities Limited v Hodge [2013] UKUT 480 (LC) It is a question of fact and degree whether a notice sufficiently describes in general terms the works to be undertaken or contract to be entered into

Some useful cases - Hannan v LB Newham [2011] UKUT 406 (LC) - Notice of intention published after OJEU notice - Dispensation granted - Paddington Walk Management Limited v Governors of Peabody Trust [2009] PLSC - Window cleaning is not "qualifying works" - M & M Savant v Brown [2008] P.L.S.C 264 - Display of estimates and making them available for inspection at managing agent's office

The prudent approach to consultation Plenty of forward planning Awareness of the risks of non-compliance As an opportunity to engage with leaseholders

Two LEASE guides "A guidance note issued by the Leasehold Advisory Service ("LEASE") contains helpful precedents for the various notices required under this procedure. The experience of this case suggests that landlords would be well-advised to pay close regard to them, rather than attempting to devise their own versions" Daejan Investments Limited v Benson and others [2009] UKUT 233 (LC) LT



Questions?

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