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## Disclaimer



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## Section 20 Consultation 2014

Nicholas Kissen  
Leasehold Advisory Service  
20 November 2014

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### A typical reaction?



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### 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

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### 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*

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### 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*

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### Who is affected?



- Residential landlords both public and private
- Right to Manage companies
- Managing agents
- Solicitors and
- Leaseholders
- Recognised tenants' associations

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### 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

- First-tier Tribunal (Property Chamber)
  - England
- Leasehold Valuation Tribunal
  - Wales

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### Estimates

- For the purpose of any estimate required by any provision of the Regulations to be made by the landlord value added tax shall be included where applicable

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### Qualifying works

- Works on a building or other premises where contribution of any one tenant will be more than £250

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### Phillips v Francis

- [2014] EWCA Civ 1395
- Judgment of Court of Appeal dated 31 October 2014
- The sets test



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### 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



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### 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



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### 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



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### 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”



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### 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”



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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
- Leaseholders succeeded
- Landlords appealed to the Court of Appeal

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### 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

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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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**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

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**Qualifying long term agreement- examples**

- Schedule of rates contracts
- Professional services
- Cleaning
- Gardening
- General maintenance
- Utilities

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### 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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### 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

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### 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

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### 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

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### 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

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### Relevant public authorities

- Local authorities
- Housing associations
- Fire authorities
- Police authorities
- Broads authority
- Joint boards
- Joint and special planning boards for a National Park

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### Thresholds

- Apply to the total contract value (net of VAT) and are as follows
- Works £4,322,012 (€5,186,012)
- Supplies £172,514 (€207,000)
- Services £172,514 (€207,000)

**Thresholds apply for the two years starting on 1 January 2014**

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### Right to Buy leases

- No need to comply with any consultation requirements before the 31st day of a Right to Buy lease

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### The schedules

- Sch 1
  - Qualifying long-term agreement
- Sch 2
  - Qualifying long-term agreement requiring public notice

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### The schedules

- Sch 3
  - Works under qualifying long-term agreement
- Sch 4
  - Part 1
    - Qualifying works requiring public notice
  - Part 2
    - Qualifying works not requiring public notice

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### Differences

- Why are they important?
  - For the landlord
  - For the leaseholder
- Identifying which version applies

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### Are the cost limits for S20 triggered?

- Long term agreements - £100
- Works - £250

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### Is the contract for work or services?

- Work
  - 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
- Services
  - Schedule 1 – Long term agreement
  - Schedule 2 – Long term agreement where public notice is required

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### Is public notice required?

- Official Journal of the European Union
- Financial thresholds

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### The core S20 model

Notice of intention	What? Why? Right to nominate Right to comment
Notice of estimates or proposals	Provision of estimates Right to comment
Notice of agreement	Reasons for selection

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**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




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**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




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**Contents of notice**

- Describe, in general terms, the works proposed to be carried out or specify the place and hours at which a description of the proposed works may be inspected
- State the landlord's reasons for considering it necessary to carry out the proposed works




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### Contents of notice



- Invite the making, in writing, of observations in relation to the proposed works; and
- 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

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### 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

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### Relevant period



- The period of 30 days
- Beginning with the date of the notice
- 30 days since the date the notice is served on the recipients
  - *Trafford Housing Trust Limited v Rubinstein and others [2013] UKUT 581 (LC)*

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### 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

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### 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

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### 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

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### 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"

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### 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

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### 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

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### 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

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### 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

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### Inspection of estimates



- All of the estimates must be made available for inspection
- Specific place and time

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### Duty in relation to estimates



- At least one of the estimates must be that of a person wholly unconnected with the landlord

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### Connection to the landlord



- No exhaustive definition of what “connection” means
- Idea is to increase transparency of the consultation process
- Some relationships are deemed to a connection....

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### 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

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**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

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**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

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**Close relative**



- Spouse
- Cohabitee
- Parent
- Parent-in-law
- Son
- Son-in-law
- Daughter
- Daughter-in-law
- Brother
- Brother-in-law
- Sister
- Sister-in-law
- Step-parent
- Step-son
- Step-daughter

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### Supply of para(b) statement and inspection of estimates



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)

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### 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.....

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### 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

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### 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

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### 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)

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### Contents of notice



- State landlord's reasons for awarding the contract or specify the place and hours at which a statement of those reasons may be inspected; and
- Where he received observations to which he was required to have regard, summarise the observations and set out his response to them

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**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 where...**

- The person with whom the contract is made is
  - A nominated person or
  - Submitted the lowest estimate

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**The core S20 model**

Notice of intention	What? Why?  Right to nominate Right to comment
Notice of estimates or proposals	Provision of estimates  Right to comment
Notice of agreement	Reasons for selection

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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

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## QW vs QLTA

Schedule	Schedule 4 Part 2	Schedule 1
Notice of Intention	<ol style="list-style-type: none"> <li>1. Invite written observations which the LL has a Duty to have regard to – 30 day period</li> <li>2. Invite nominations of a person from whom the LL should try and obtain an estimate</li> <li>3. LL must try to obtain estimates</li> </ol>	<ol style="list-style-type: none"> <li>1. Invite written observations which the LL has a Duty to have regard to – 30 day period</li> <li>2. Invite nominations of a person from whom the LL should try and obtain an estimate</li> <li>3. LL must try to obtain estimates</li> </ol>
Notice of Estimates / Proposals	<ol style="list-style-type: none"> <li>1. LL must supply at least 2 estimates setting out the estimated cost of the works</li> <li>2. LL must supply a summary of the observations together with his response to them</li> <li>3. LL must make all estimates available for inspection</li> <li>4. Invite written observations in relation to the estimates which the LL has a Duty to have regard to – 30 day period</li> </ol>	<ol style="list-style-type: none"> <li>1. LL must supply details of the person who they propose to contract with</li> <li>2. LL must provide an estimate of costs (for the individual, if not the building cost or total cost, if not the unit cost, hourly rate or daily rate)</li> <li>3. Where proposed appointment of agent to deal with management must state whether they are a member of professional body and whether they subscribe to a code of practice</li> <li>4. LL must supply a summary of the observations together with his response to them</li> <li>5. Invite written observations in relation to the contract which the LL has a Duty to have regard to – 30 day period</li> </ol>
Notice of entering into Contract / Agreement	<ol style="list-style-type: none"> <li>1. State reasons for awarding the contract or allow inspection of the reasons, and</li> <li>2. LL must supply a summary of the observations or allow inspection of these</li> </ol>	<ol style="list-style-type: none"> <li>1. State reasons for awarding the contract or allow inspection of the reasons, and</li> <li>2. LL must supply a summary of the observations or allow inspection of these</li> </ol>

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## QW(PN) v QLTA(PN)

Schedule	Schedule 4 Part 1	Schedule 2
Notice of Intention	<ol style="list-style-type: none"> <li>1. Invite written observations which the LL has a Duty to have regard to – 30 day period</li> <li>2. LL must give notice in OJEU</li> </ol>	<ol style="list-style-type: none"> <li>1. Invite written observations which the LL has a Duty to have regard to – 30 day period</li> <li>2. LL must give notice in OJEU</li> </ol>
Notice of Contract / Proposals	<ol style="list-style-type: none"> <li>1. LL must supply details of the person who they propose to contract with</li> <li>2. LL must provide an estimate of costs if that is practicable or explain why they can't</li> <li>3. LL must supply a summary of the observations together with his response to them</li> <li>4. Invite written observations in relation to the contract which the LL has a Duty to have regard to – 30 day period</li> <li>5. Within 21 days of receipt of observations the LL must supply a response to the individual</li> <li>6. If the LL could not provide an estimate of costs then within 21 days of receiving the appropriate information give notice of the estimated amount</li> </ol>	<ol style="list-style-type: none"> <li>1. LL must supply details of the person who they propose to contract with</li> <li>2. LL must provide an estimate of costs if that is practicable or explain why they can't</li> <li>3. Where proposed appointment of agent to deal with management must state whether they are a member of professional body and whether they subscribe to a code of practice</li> <li>4. LL must supply a summary of the observations together with his response to them</li> <li>5. Invite written observations in relation to the contract which the LL has a Duty to have regard to – 30 day period</li> <li>6. Within 21 days of receipt of observations the LL must supply a response to the individual</li> <li>7. If the LL could not provide an estimate of costs then within 21 days of receiving the appropriate information give notice of the estimated amount</li> </ol>
Notice of entering into Contract / Agreement		

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### QW under QLTA



Schedule	Schedule 3
Notice of Intention	1. LL must supply description of the work and an estimate of the total costs of the work 2. Invite written observations which the LL has a Duty to have regard to – 30 day period 3. Within 21 days of receipt of observations the LL must supply a response to the individual
Notice of Contract / Proposals	
Notice of entering into Contract / Proposal	

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### Consequences of not consulting



- 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....
- Procedure followed or
- Dispensation order granted by the appropriate tribunal

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### Dispensation order



Where an application is made to the appropriate tribunal for a determination to dispense with all or any of the consultation requirements in relation to any qualifying works or qualifying long term agreement, the tribunal may make the determination if satisfied that it is reasonable to dispense with the requirements

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### Why seek dispensation?

- Urgent works/supplies
- Cannot obtain two estimates
- Mistakes in the consultation process



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### The application form

- Leasehold 5 - England
- Apply to relevant regional office
- Paper determination?
- Fast/standard track
- Include copy lease with application
- Set out grounds for application
- Fee based on number of dwellings
- Waiver of fees



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### The leading case on dispensation

- *Daejan Investments Limited v Benson and others* [2013] 1 W.L.R
- Judgment of the Supreme Court dated 6 March 2013



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### 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

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### Daejan v Benson

- Landlords served notice of estimates
- Leaseholders insisted on seeing all the estimates
- Second notice of estimates served a month later
- All estimates still not provided
- Contract "placed" by time all estimates made available
- Failure to consult
- Dispensation order needed or recoverable costs capped

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### Daejan v Benson

Dispensation declined by

- Leasehold Valuation Tribunal
- Upper Tribunal (Lands Chamber)
- Court of Appeal
- And then on to the Supreme Court...

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### Daejan v Benson



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

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### Daejan v Benson



- Principal focus of the tribunal is to make sure tenants are protected from paying for inappropriate works or paying more than is appropriate
- Onus on the tenants to establish they have been prejudiced by the failure to consult

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### Daejan v Benson



- Dispensation may be granted on such terms/conditions as the tribunal thinks appropriate
- Reduction in recoverable service charges
- Payment of tenants reasonable costs incurred in connection with the dispensation application

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**Daejan/Benson applied**

- *OM Property Management Limited [2014] UKUT 9 (LC)*
- The access breach
- The summary breach

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**Time limit on the notices?**

- *Jaszembski 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

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**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

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**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

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**The prudent approach to consultation**



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

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**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*

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**Upcoming LEASE training**



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**25 November**  
**Variation of leases**

- Why vary the lease?
- Variation by deed
- Grounds for seeking variation at the Tribunal
- Majority application to the Tribunal
- Contents of Tribunal application
- Possible Tribunal orders and compensation
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**Questions?**

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