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Great service... Great people...
To consult or not to consult: that is the question?

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Leasehold consultation procedure

Hot off the press: “Florie’s Law”: new cap for council house repairs came into force: August 2014;

Caps the amount public landlords can charge leaseholders for repairs to their homes;

£10,000 cap on leaseholder works on homes outside London; £15,000 cap applies on homes within London;
Leasehold consultation procedure

• The cap will only apply to landlords post 12 August 2014 if they receive a grant or other financial assistance of any kind from any programme which is used for the costs of works of repair, maintenance or improvement.

• Such assistance must be from the Decant Homes Backlog Funding provided through the 2013 spending round; and / or any other assistance for the specific purpose of carrying out works of repair, maintenance or improvement provided by – the Secretary of State; or the HCA
Leasehold Consultation Procedure

[*] The Legislation: the Landlord and Tenant Act 1985 which contains the primary legislation about consultation in Section 20 of the Act;

[*] The Regulations: the Service Charges (Consultation Requirement) (England) Regulations 2003;

[*] The Forum handling disputes: First Tier Tribunal (formerly LVT).
Consultation Procedure

-Leaseholders paying variable service charges to be consulted before a Landlord carries out works above a certain value or when entering into a Long Term Agreement for the provision of services;

-Detailed Regulations produced under Section 20 of the Landlord and Tenant Act 1985 (as amended by Section 151 of the Commonhold and Leasehold Reform Act 2002) which sets out the precise consultation procedures Landlords must follow;
Consultation Procedure

The requirements in the Regulations are defined under three headings:

– Qualifying Works;

– Qualifying Long Term Agreements;

– Qualifying Works Under Long Term Agreements
What are Qualifying Works

- Works to the Demised Premises and to other parts of the Estate. These works include works of repair, maintenance or improvement. The inclusion of improvement in the definition of Qualifying Works does not allow a Landlord to recover costs for improvements unless a liability for costs of improvements is included in the Lease;

- Landlords must consult if these works will cost over £250 for any one Leaseholder;

- When calculating the estimated cost, VAT on works must be included.
Phillips -v- Francis [2012]

“I see nothing in the present legislation which requires the identification of one or more sets of qualifying works…there is no “triviality threshold”…all the qualifying works must be entered into the calculation”.

Permission to appeal granted (out of time)

Appeal due to be heard on 13/14 October 2014
What are Qualifying Long Term Agreements

-An Agreement entered into by the Landlord with an organisation or contractor for a period of more than 12 months;

-Landlords must consult where the amount payable by any one contributing Leaseholder under the Agreement in any accounting period exceeds £100;

-The figure is to be calculated on the basis of the Leaseholder’s total contribution resulting from the Agreement, including VAT;
What are Qualifying Long Term Agreements

If consultation is not undertaken, the Landlord may not be able to recover more than £100 per Leaseholder in any accounting period towards the costs under the Agreement;

Examples of Qualifying Long Term Agreements include to clean Estate, gardening and insurance agreements, agreements affecting the building generally and management agency agreements;

Leaseholder consultation must be carried out unless dispensation from compliance has been granted by the Leasehold Valuation Tribunal;
What are Qualifying Works Under a Long Term Agreement

Where the Long Term Agreement includes provision for the carrying out of Works to the property and these works will result in a charge to any one Leaseholder of more than £250, then a separate consultation must be carried out.
BDW Trading -v- South Anglia Housing Association Ltd [2013]

* A long term agreement entered into before a building was constructed or let was not a “qualifying long term agreement”
Who must be consulted

* Consultation Notices to be sent to both individual Leaseholders and any recognised Tenant Association;

* Landlords must invite Leaseholders to nominate possible contractors. If a nomination is made, the Landlord must try to obtain an estimate from the nominated Landlord.
How many Notices must be served?

- The pre-tender stage – notice of Intention; and
- The tender stage – notification of Landlord’s proposals (estimate); and
- In some cases, Notice of reasons for awarding the contract.
Inspection of details of proposed works and estimate

※ The Landlord must specify the place and hours at which documents can be inspected by the Leaseholders;

※ The documents must be made available for inspection free of charge;

※ Facilities for copying of the documents by the Leaseholders should be made available if possible.
The timing of Notices

* Leaseholders to be given a clear period of time to respond to the Notices. So if notice required 30 days within which a Leaseholder can comment, it is recommended that the Notice give a 30 day consultation period but add an extra 2 to 3 days to allow for the time taken in posting the Notice.
Trafford Housing Trust Ltd -v- Rubenstein [2013]

※ S.20 notice dated 11 March 2011

※ Posted on 16 March 2011

※ Received on 18 March 2011

※ 30 days given? No!
How long will the consultation take?

* Leaseholders have 30 days to respond to a Notice of Intention served at the pre-tender stage;

* If a contractor is nominated by a Leaseholder or a RTA, the contractor may need to be invited to tender;
How long will the consultation take?

* Landlords must make a summary of the observations and responses to the Notice of Intention (first notice), which must be sent to Leaseholders with the Notice of the Landlord’s proposals or statement of estimates (second notice);

* Leaseholders have a further 30 days to respond to the notice of the Landlord’s proposals served at the tender stage.
Southern Land Securities Ltd -v- Hodge [2013]

- Section 20 consultation carried out
- Subsequently Landlord became aware that additional works required
- Landlord wrote to tenants instead of re-consulting
- Landlord had failed to comply with consultation requirements
- Note: no application made by Landlord for dispensation
The role of the LVT dispensation

The LVT has the power under Section 20ZA(1) to dispense with the consultation requirements in a particular case (if it is satisfied that it is reasonable to dispense with the requirements – Stenau Properties Limited v Miss Karin Leek, Mr Klaus Reckling and Others (2011) – the purpose of consultation is for the decision made to be open to influence by the Leaseholder, dispensation will not be granted where Leaseholders are not given an opportunity to voice their opinions at all stages of the decision making process.
What was the proper approach to be adopted when considering an application to dispense with the consultation requirements?

- “Prejudice”

The Tribunal can grant dispensation subject to conditions

- On terms as it thinks fit including the landlord paying the tenants reasonable costs.

Burden of establishing “prejudice” falls on the tenant.
What is the penalty for non compliance?

Unable to collect or recover service charges above the level of the statutory minimum amount - £100 per Leaseholder per year in respect of a Long Term Qualifying Agreement, or £250 per Leaseholder for works carried out to the building.
Post Benson Cases

* Jastrzembski -v- Westminster City Council (2013)

* OM Property Management Ltd (2014)
Case Study

Ms Locke, a resident of Reigate and a Leaseholder of the Raven Housing Trust has received a Notice of Intention to carry out repair works to all windows in her building and has been given 30 days to respond to that Notice and to nominate a contractor.

She is an elderly Leaseholder and does not understand the Notice that she has been sent. She tells you that in her view, the windows to the building do not need to be replaced.
Case Study

1. She asks you to explain what ‘this Notice is all about’. Can you explain this Notice to her?

2. She tells you that her son is in the building trade and would like to know whether she can nominate him to carry out the proposed works to the windows, if such works need to proceed. How would you respond to this query?
Case Study

3 She wants to know that should she respond to the Notice nominating her son as a contractor, what further Notice will she received and when will she receive it?

4 She also says that she would like to visit your offices in order to inspect all supporting documentation in relation to the proposed works. Does she have the right to inspect the documents and if so, where will you make available those documents for her to inspect?
If you were to appoint a contractor to carry out the works to repair the windows in the building before you have received a response to the Notice of your intention to carry out works from the Leaseholders and as a consequence you have not complied with the consultation procedure, what steps would you take to ask for the dispensation from the consultation requirements? Are you likely to be successful in making this application?
10 Top Tips for Avoiding Service Charge Disputes

* Engage with your tenants – formally & informally
* Notice – invite tenants to view full spec
* Don’t place any restrictions on contractors in notice
* When serving notices allow time for service
* Utilise sinking funds
* Check lease terms carefully
* Obtain estimates for repairing & replacing items
* Are works really urgent
* Costs
* Alternatives to litigation