

Service Charge Consultation Requirements, Demands and Costs

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Introduction

- Section 20 of the Landlord and Tenant Act 1985 (as amended by the Commonhold and Leasehold Reform Act 2002)
- Along with section 19, the most significant statutory provisions for the regulation of the recovery of service charges.
- Failure to comply with the consultation requirements means that the contribution of each tenant will be capped at £250 in relation to qualifying works.... Leaving the landlord to make up the shortfall.
- In *Zuckerman v Calthorpe* [2010] 1 EGLR 187, the Upper Tribunal even accepted an argument on the part of tenants in a claim for new long leases under the Leasehold Reform, Housing and Urban Development Act 1993 that the management difficulties caused by the consultation requirements had a measurable impact on the value of the landlord's reversionary interest.

Judicial interpretation



- In *Daejan Investments Ltd v Benson* [2013] UKSC 14, Lord Neuberger explained that the purpose of sections 20 and 20ZA is to reinforce the requirements in section 19(1)(a) and (b) that tenants do not pay for unnecessary services and services provided to a defective standard, and that they do not pay more than they should for services which are necessary and provided to an acceptable standard.
- Importantly, Lord Neuberger rejected the idea that the purpose of sections 20 and 20ZA is to achieve transparency and accountability as ends in themselves – in other words, they are not concerned with public law issues or public duties.



The current section 20 requirements

20 Limitation of service charges: consultation requirements

(1) Where this section applies to any qualifying works or qualifying long term agreement, the relevant contributions of tenants are limited in accordance with subsection (6) or (7) (or both) unless the consultation requirements have been either—

- (a) complied with in relation to the works or agreement, or
- (b) dispensed with in relation to the works or agreement by (or on appeal from) [the appropriate tribunal].

Subsections (6) and (7) stipulate that where the consultation requirements are not complied with, the contribution of tenants is capped at £250 – the “appropriate amount”.

Does section 20 apply? (1) Must be “Qualifying Works”



Section 20ZA:

(2) In section 20 and this section—

“*qualifying works*” means works on a building or any other premises, and

(2) Works must be “works on a building”

Clearly a wide definition, consistent with the purpose of the sections.

In *Paddington Walk Management Ltd v Peabody trust* [2010] L&TR 6, it was held that window cleaning did not fall within the definition of “works”, since “*Works on a building comprise matters that one would naturally regard as being building works.*”

(3) Costs of works must “exceed an appropriate amount”.



Section 20(3):

“This section applies to qualifying works if relevant costs incurred on carrying out the works exceed an appropriate amount.”

The appropriate amount is presently £250 (Service Charges (Consultation Requirements) (England) Regulations 2003 (SI 2003/1987))

(4) Works must result in any tenant being obliged by their lease to $\frac{L}{C}$ contribute more than £250 towards the cost of the works

Section 20(2):

“In this section “*relevant contribution*”, in relation to a tenant and any works or agreement, is the amount which he may be required under the terms of his lease to contribute (by the payment of service charges) to relevant costs incurred on carrying out the works or under the agreement.”

NOTE: If only one tenant’s contribution exceeds £250, **the consultation requirements will still apply**. Failure to consult will result in that one tenant’s contribution being capped at £250.

What if the cost of the works exceed the original estimates?



The position under the old consultation requirements (i.e. pre-2003) was established in *Martin v Maryland Estates Ltd* [1999] L & TR 30. The landlord conducted a consultation process. During the course of the works, it became apparent that the property was in a significantly worse position than had been appreciated. Additional works almost as expensive as those originally estimated were required. The landlord decided not to engage in a further section 20 consultation before carrying out the additional works.

The judge held that the cap applied to the whole of works and not just to the additional works and rejected the landlord's application for dispensation. The Court of Appeal rejected the landlord's appeal.



The present position

In *Phillips v Francis* [2012] EWHC 3650 (ch), it was held that the decision in *Martin v Maryland* did not apply to the current section 20. The decision was widely criticised and introduced much confusion into the law. It reached the Court of Appeal [2015] 1 W.L.R. 741, where the position was clarified.

Philips v Francis: the Court of Appeal



The Court of Appeal considered that the “aggregating approach”, where a landlord was required to consult the tenants on any service charge items, however small, once the limit for contributions had been reached, was unworkable. To apply that obligation to every item of maintenance and repair, some of which might be of an emergency nature, would give rise to serious practical and administrative problems and could not have been intended by Parliament. The real protection afforded by the 1985 Act was that all service charges had to be reasonable and reasonably incurred under s.19. That was the sensible way to control routine works of repair and maintenance which were unlikely to be the subject of a detailed plan in advance. It followed that both the aggregating approach and the incorporation of an annual limit were wrong.

The question of what a single set of qualifying works comprised has to be determined in a commonsense way, taking into account factors which are 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 the same time or different times, and whether they are different from or connected with each other. Adopting the sets approach, it was possible to conclude that the works planned and carried out to the holiday site were not all part of a single set of works.



Qualifying Long Term Agreements

Section 20ZA(2):

qualifying long term agreement” means (subject to subsection (3)) an agreement entered into, by or on behalf of the landlord or a superior landlord, for a term of more than twelve months.

(3) The Secretary of State may by regulations provide that an agreement is not a qualifying long term agreement—

- (a) if it is an agreement of a description prescribed by the regulations, or
- (b) in any circumstances so prescribed.

NOTE: an agreement for a year certain and then from year-to-year to continue is not a QLTA (*Paddington Walk Management Ltd v Peabody Trust* [2010] L & TR 6). The fixed term must at the outset exceed 12 months.

Exceptions in S.20ZA(3)

The Service Charges (Consultation Requirements) (England) Regulations 2003/1987 sets out the exceptions:

- A contract of employment
- A management agreement made by a local housing authority
- If the parties to the agreement are either a holding company and one or more of its subsidiaries, or two or more subsidiaries of the same holding company
- If when the agreement is entered into, there are no tenants of the building or other premises to which the agreement relates and the agreement is for a term not exceeding five years.

NOTE: “tenants of the building” does not mean occupying residential tenants (*Paddington Walk Management Ltd v Peabody Trust*).



Where section 20 applies to a QLTA...

If the consultation requirements are not complied with or are not dispensed with, the amount that the tenant can be required to contribute by way of service charge to the relevant costs incurred under the QLTA is limited to £100 in respect of each accounting period.

The consultation requirements: qualifying works

(4) In section 20 and this section “*the consultation requirements*” means requirements prescribed by regulations made by the Secretary of State.

(5) Regulations under subsection (4) may in particular include provision requiring the landlord—

(a) to provide details of proposed works or agreements to tenants or the recognised tenants' association representing them,

(b) to obtain estimates for proposed works or agreements,

(c) to invite tenants or the recognised tenants' association to propose the names of persons from whom the landlord should try to obtain other estimates,

(d) to have regard to observations made by tenants or the recognised tenants' association in relation to proposed works or agreements and estimates, and

(e) to give reasons in prescribed circumstances for carrying out works or entering into agreements.

Refer to the Regulations!



The requirements are set out in full in the schedules to the **Service Charges (Consultation Requirements) (England) Regulations 2003/1987**



In summary:

In *Daejan Investments Ltd v Benson*, Lord Neuberger gave the following summary:

Stage 1: Notice of intention to do the works

Notice must be given to each tenant and any tenants' association, describing the works, or saying where and when a description may be inspected, stating the reasons for the works, specifying where and when observations and nominations for possible contractors should be sent, allowing at least 30 days. The landlord must have regard to those observations.

Stage 2: Estimates

The landlord must seek estimates for the works, including from any nominee identified by any tenants or the association.

Summary continued



Stage 3: Notices about estimates

The landlord must issue a statement to tenants and the association, with two or more estimates, a summary of the observations, and its responses. Any nominee's estimate must be included. The statement must say where and when estimates may be inspected, and where and by when observations can be sent, allowing at least 30 days. The landlord must have regard to such observations.

Stage 4: Notification of reasons

Unless the chosen contractor is a nominee or submitted the lowest estimate, the landlord must, within 21 days of contracting, give a statement to each tenant and the association of its reasons, or specifying where and when such a statement may be inspected.

The consultation requirements: QLTA



Also contained in the **Service Charges (Consultation Requirements) (England) Regulations 2003/1987**, schedules 1 – 3:

Schedule 1 addresses QLTA other than those for which a public notice under European Union public procurement regulations is required – in other words, to private landlords.

Schedule 2 addressed QLTA for which a public notice under EU public procurement regulations is required – in other words, to landlord which are public bodies.

Schedule 3 sets out more limited consultation requirements applicable to qualifying works carried out pursuant to the terms of QLTA that has previously been the subject of consultation.

Regulations must be complied with if the statutory cap is to be avoided.

Dispensation



Section 20ZA(1):

“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.”



Dispensation: the test

In *Daejan v Benson*, Lord Neuberger summarised the position thus:

“All in all, it appears to me that the conclusions which I have reached, taken together, will result in (i) the power to dispense with the requirements being exercised in a proportionate way consistent with their purpose, and (ii) a fair balance between (a) ensuring that tenants do not receive a windfall because the power is exercised too sparingly and (b) ensuring that landlords are not cavalier, or worse, about adhering to the requirements because the power is exercised too loosely.”

Importantly, tenants opposing applications for dispensation must now identify what difference would have resulted if the landlord had in fact complied with the consultation requirements. If the tenants identify a credible case for prejudice, it is for the landlord to rebut it.

Shift from focus on technical compliance towards assessing the substantive outcome, avoiding significant windfalls being awarded to tenants.

Time limit for making demands



20B.— Limitation of service charges: time limit on making demands.

(1) If any of the relevant costs taken into account in determining the amount of any service charge were incurred more than 18 months before a demand for payment of the service charge is served on the tenant, then (subject to subsection (2)), the tenant shall not be liable to pay so much of the service charge as reflects the costs so incurred.

(2) Subsection (1) shall not apply if, within the period of 18 months beginning with the date when the relevant costs in question were incurred, the tenant was notified in writing that those costs had been incurred and that he would subsequently be required under the terms of his lease to contribute to them by the payment of a service charge.

Summary of rights and obligations



21B Notice to accompany demands for service charges

- (1) A demand for the payment of a service charge must be accompanied by a summary of the rights and obligations of tenants of dwellings in relation to service charges.
- (2) The Secretary of State may make regulations prescribing requirements as to the form and content of such summaries of rights and obligations.
- (3) A tenant may withhold payment of a service charge which has been demanded from him if subsection (1) is not complied with in relation to the demand.
- (4) Where a tenant withholds a service charge under this section, any provisions of the lease relating to non-payment or late payment of service charges do not have effect in relation to the period for which he so withholds it.

See the [Service Charges \(Summary of Rights and Obligations, and Transitional Provision\) \(England\) Regulations 2007/1257](#)

Costs



20C.— Limitation of service charges: costs of proceedings.

“(1) A tenant may make an application for an order that all or any of the costs incurred, or to be incurred, by the landlord in connection with proceedings before a court, residential property tribunal or leasehold valuation tribunal or the First-tier Tribunal, or the Upper Tribunal, or in connection with arbitration proceedings, are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant or any other person or persons specified in the application. (...)

(3) The court or tribunal to which the application is made may make such order on the application as it considers just and equitable in the circumstances.”

For example, in *The Church Commissioners v Derdabi*, unreported, Upper Tribunal (Lands Chamber) LRX/29/2011, it was held that where the tenant is successful in whole or in part in respect of all or some of the matters in issue, it will usually follow that an order should be made under s.20C preventing the landlord from recovering the costs of dealing with the matters on which the tenant has succeeded because it will follow that the landlord’s claim will have been found to have been unreasonable to that extent, and it would be unjust if the tenant had to pay those costs via the service charge

Conclusions



- Always consider whether any works incurring costs recoverable under service charge provisions engage the consultation requirements.
- If they do, refer to the regulations and ensure that the detailed requirements are complied with.
- Otherwise, dispensation may be granted if the relevant court or tribunal is satisfied that it is reasonable to do so... But this should not be counted on and in the first instance it is advisable to comply with the consultation requirements.