S20 consultation – Getting it right for leaseholders and tenants.

Avoiding the pitfalls.

Why are you here?

TO AVOID GETTING IT WRONG SO YOU CAN:

- Meet targets - on time and within budget
- Recover all costs
- High satisfaction levels
- VFM.

Who is responsible for achieving all of these objectives? One person or a number of different people? Internal processes and communication channels are key.

Section 20

- **What is it about?**
  - Consultation with people who are required to meet the costs of the works
- **Why consult?**
  - Section 20 Landlord and Tenant Act 1985
  - Significant reforms in the Commonhold and Reform Act 2002
- **Objective of consultation**
  - Allows residents to comment on landlord's proposals for works and/or services
- **Applies to** those paying a variable service charge where specific costs limits for works or services are likely to be met.

Section 20 ...(cont'd)

- Covers:
  - Qualifying works (QW)
  - Qualifying long term agreements (QLTA)
- Qualifying Works
  - More commonly known as major works
  - 'Works on a building or any other premises', the costs of which will be recovered from the resident through the service charge bill
  - Any works to which any tenant/leaseholder will have to contribute more than £250.00 (inclusive of VAT)
  - **Can include responsive repairs !!!!**
- Qualifying Long Term Agreements (leaseholders and tenants)
  - Agreement made on behalf of the landlord for a period of over 12 months,, eg cleaning/gardening
  - Where a contribution from any one tenant/leaseholder would exceed £100 in any accounting period.

Consultation – five sets

The regulations:

- Qualifying long term agreements where no public notice is required.
  - Schedule 1
- Enter a QLTA, where public notice (now Find a Tender) is required, - Schedule 2
  1. Works more than £5+M
  2. Services more than £213K
- Schedule 3 – qualifying works under a long term agreement
- Qualifying works not under a qualifying long term agreement:
  - Schedule 4 (1) – works for which a public notice is required
  - Schedule 4 (2) – works for which a public notice is not required.

Procedure – Qualifying work

- Works over £250 for <u>any one</u> leaseholder
- Assuming public notice is not required **Schedule four, part two**
  - Two stage-potentially three stage
  - Notice of intention
    - Describe the works you are proposing to carry out
    - State the reasons why the work is necessary.
    - Invite observations – give min 30 days from date of Notice
    - Invite nomination of contractor
    - State place/time to inspect specification or send on request
  - Must obtain at least 2 estimates – 1 totally unconnected to the L/L
  - Paragraph (b) statement – Notice of Estimates
  - Notice of reasons – if not cheapest or not nominated contractor.
  - All notices must also be sent to any RTA/RRA

  NB: Fail to consult limits the amount that can be re-charged

Connection with the landlord – is when....

- If the landlord is a company, if the contractor is, or will become, a director or manager of that company or is a close relative of any director or manager of the company.
- If the landlord is a company, and the contractor is a partner in a partnership, if any partner in the contractor's partnership is, or will become, a director or manager of that company or is a close relative of any director or manager of the company.
- If both the landlord and the contractor are companies, if any director or manager of one company is, or will become, a director or manager of the other company.
- If the contractor is a company, if the landlord is a director or manager of that company or is a close relative of any director or manager of the company.
- If the contractor 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 contractor's company or is a close relative of any director or manager of the company.
- A 'close relative' for this purpose means a husband, wife or live-in partner, or parent, parent-in-law, son, son-in-law, daughter, daughter-in-law, brother, brother-in-law, sister, sister-in-law, step-parent, stepson or stepdaughter.

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Procedures for QLTAs – no Public Notice Sch.1

- Notice of Intention – similar to QW
  - What service/works in general terms
  - Why necessary
  - Invite to inspect description or send on request
  - Invite nominations of a contractor
  - Invite observations – have regard to any received
  - Give 30 days and advise date of expiry
- Obtain Estimates
- Preparation of landlords proposals – not just the price, min of two.

Procedures for QLTAs – no Public Notice Sch.1 ...(cont'd)

- Notice of proposals –
  - cost for building or premises or unit price/hrly rate – 'if reasonable to do so' & say why not able to provide & when will be provided.
  - Details of whether a ny costs can be altered during the course of the agreement
  - How long the agreement is for
  - Summarise observations received at NoI stage
  - Invite further observations – have due regard
  - Give 30 days and advise date of expiry
- Notification of reasons
- All Notices must be sent to any RRA/RTA.

NB: Fail to consult limits the amount that can be re-charged

Difference with Notices under Schedule 2 and Schedule 4(1) – ie, Public Notice

- No invitation to nominate a contractor
- NoP – notify of chosen contractor
- If observations received following NoP – respond directly to leaseholder/tenant who made the observation within 21 days

Dynamic Purchasing Scheme (DPS)

- What is a DPS ? a new approach towards setting up framework agreements in a way that offers efficiency savings and flexibility.
- How does it work? –
  - the advert is advertised continually throughout the life of the contract.
  - Contractors can give expressions of interest at any time, and those accepted form a list of approved contractors.
  - When works are required, a mini-competition takes place amongst the contractors on the DPS framework, before the successful contractor is awarded the contract.
- How/when does S20 consultation work under this arrangement? - Where the works are to be undertaken by contractors selected under DPS, the consultation will be carried out when the works are required, and not when the DPS is being procured.

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When is a question an observation ?

- *OM Property Management Ltd* [2014] UKUT 9 (LC)
  - in order for correspondence to be considered an 'observation' for the purposes of section 20 it must relate to the proposed works.
  - The failure to reply to correspondence which is not relevant to the proposed works, or summarise that letter and a landlord's response, does not therefore constitute a breach of the consultation requirements.

Observations

- The issue of reasonableness never goes away.
- FAQ – 'I received an observation late do I need to respond?
  - Step back a moment and ask – are we doing the right thing, is what we are proposing sound?, could we do things a different way, have they got a valid point?
  - Use the S20 process to arrive at the right decisions
  - But remember the issue of reasonableness never goes away and you should never underestimate the power.

Lack of Observations

- *Southall Court (Residents) Ltd v Tiwari* [2011] UKUT 218 (LC)

- if a leaseholder fails to make an observation during the consultation period a landlord is entitled to conclude that there are no serious objections to the proposed works.no serious objections to the proposed works are no serious objections to the proposed works.

Qualifying works under a qualifying QLTA

- Straightforward/simplified procedure because:
  - Contractor already chosen
  - Already been consulted on
- Notice of Intention – no invitation to nominate contractor
- Regard to observations
- Response to observations
  - In writing to the leaseholders who made them
  - Within 21 days of receiving them.

NB: Fail to consult limits the amount that can be re-charged

Dealing with nominated contractors

- Approved list
- Quality/cost matrix selection process
- Minimum criteria
  - Public liability insurance
  - Competence
  - Financial probity
  - Health and safety compliance
  - Equal opportunities policy
- Selection criteria should be:
  - Pre-set
  - Notified to all lessee when nominations are invited
  - Applied uniformly to all contractors
  - Reasonable.

Where does it go wrong? Typical errors

Defective notices

- Wrong notice
- Not dated
- Less than 30 days for observations
- Not properly addressed
- How served? What does the lease say?
  - S7 Interpretation Act 1978 'Where an Act authorises or requires any document to be served by post (whether the expression "serve" or the expression "give" or "send" or any other expression is used) then, unless the contrary intention appears, the service is deemed to be effected by properly addressing, pre-paying and posting a letter containing the document and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post.
- Last known address
- Lack of work description
- No opportunity to nominate a contractor
- Only advise of lowest cost – NoP

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Where does it go wrong ? Typical errors ...(cont'd)

- Failure to send Notices to recognised residents association
- Failure to respond to observations received and to demonstrate that have had 'due regard' to the observations
- Failure to re-consult where additional works are required
- Failure to notify of costs incurred within 18months
- Making assumptions:
  - Dispensation does not mean that two tenders are not required (Elvaston Investments v various tenants LON/00AW/LDC/2008/0081)
  - Dispensation does not affect the right of residents to challenge the reasonableness of the amount being sought to be recovered or the quality of the work.

Lands Tribunal (now Upper Tribunal) and Tribunal (LVT/FTT) determinations

- LB Camden v leaseholders of 30-40 Grafton Way LRX/185/2006 – didn't know works to be carried out, or costs.
- D Augur v LB Camden – sent details of wrong job
- LB of Waltham Forest v all RTB leaseholders of Waltham Forest – did not carry out a Schedule 2 Notice although in the LTA for five years before qualifying works were consulted on.
- Daejan Investments Ltd v Benson & others– wrote to say who the contractor was for the job before the end of the consultation period. (£270,000).

Daejan Investments case – What should the NoP say(where no public notice required)?

- *Peverel v Stephen Hughes [2012] UKUT 258*, the judge decided that the specific wording used by P did not imply that they had already made their mind up. He interpreted those particular words as stating a preliminary intention subject to having regard to any observations received.
  - But there is no certainty that any different words would be interpreted the same way in any other case.
- Judge suggested that the following would be better:-
  - *"It is at present the provisional intention of x, after the end of the Relevant Period (subject always to further consideration in the light of any observations received in accordance with paragraph 3 above) to enter into an agreement with y"*
- Until decided otherwise by a Court of Appeal would use those words as much as they are not 'good England'!!

Where does it go wrong ? Typical errors ...(cont'd)

- Perceived covert tactics:
  - Not specifying or making it difficult to see specification/tenders
  - Advising of criteria for nominated contractors after nominations received
  - Deciding who the contractor is before the end of the consultation period. (Daejan Investments v Benson)
  - Fragmenting work so costs fall under the cost thresholds for consultation – Phillips and Goddard v Francis (2014) EWCA
    - Where the items of work are to be carried out
    - Whether they are part of the same contract
    - Whether they are to be carried out at more or less the same time; and
    - Whether the works are different in character from, or have no connection with each other.

Lands Tribunal (now Upper Tribunal) and Tribunal (LVT/FTT) determinations

- Eltham Properties v Kenny – incorrect process (no invitation to nominate contractor) but UT overturned LVT decision not to dispense as 'no prejudice'
- River Park Leisure Ltd v various leaseholders (LON/00A/LDC/2008/0104) – following S20 further works identified when scaffolding erected, simultaneously applied for dispensation, sent pro-forma S20 and approached a nominated contractor. Dispensation granted 'as entered into the spirit' of the consultation process although 30 days not provided
- **Reedbase Ltd and Anor v Fattal and Ors EWCA 2018 –** no material change despite additional work and costs to those originally notified in the Paragraph B Statement. **

Additional work or same but more?

- There is a significant difference between doing a totally different job and doing a job where the works get more complicated and the costs increase while you are on site and we need to distinguish between the two.

Additional work or same but more? ...(cont'd)

- Southern Land Securities *Ltd V Securities v Hodge* [2013] UKUT 480 (LC)
  - NoI refers to an intention to carry out "external repairs and redecorations which are due under the terms of the lease"
  - FTT said does not include additional works then undertaken to a wall immediately under the railings at the front of the building in question
  - UT agreed.: Appeal dismissed Whether a notice sufficiently describes in general terms is a question of fact and degree in each case. There was NO proposal at the time of the notice for these works to be carried out
  - The UT notes this is not a case of (1) problems revealed on site requiring additional works or (2) provisional sums being exceeded because work is more extensive or more expensive

Prejudice !!?

- Daejan Investments v Benson: no prejudice = ordered to pay compensation
  - Increasingly l/holders required to prove prejudice
- Aster Communities v Kerry Chapman & Others
  - AC applied to FtT for determination that s/c is reasonable for proposed works.
  - Works included balcony asphalt works
  - FtT said asphalt roof not necessary plus – not included in the S20 consultation notice!!!
  - AC applied for dispensation from S20 to carry out asphalt works.
  - FtT granted dispensation but ordered AC to pay for S20ZA application and costs for l/holders to engage a surveyors report on the asphalt replacement
  - As balcony works not in S20 notice l/h prejudiced from requesting info. about the condition.
  - AC appealed but dismissed.

'The exercise of the jurisdiction to dispense with the consultation requirements stands or falls on the issue of prejudice".

Emergency works and consultation

- Apply for dispensation to FTT S.20 ZA from all or part of the consultation.
  - £100 application/ a further £200 if a hearing required.
  - Copy of application must be sent to all interested parties.
  - Fast track (within 10 weeks) –
    - Simple cases
    - Not generating lots of paperwork
    - Not likely to be challenged
  - Standard track (months!!!)
    - More complicated
    - Numerous issues
    - More paperwork
    - May require case management conference (pre-hearing).

Frequently asked questions about S20

- We operate a reserve/sinking fund – there is more than enough money in the fund to meet the cost of the proposed work – is consultation necessary?
- How long after serving a Notice of Intention must the work be completed? – Jastrzembski v Westminster CC [2013] UKUT
  - if you are wondering whether you have left it too long then ask yourself the question as to whether you are still proposing to do the same works in general terms?
- What happens if we need to carry out emergency/urgent work and we haven't got time to consult? – FtT S20Z A

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Test one :Consider the following scenarios:

Scenario one

A block of flats has 22 flats, all paying 1/22 of the service charge.

The S.20 consultation starts when the cost of the works (incl.fees/VAT) starts at £5,500 (ie, 22 X £250)

Scenario two

Now assume the block has 20 flats all paying the same, with two penthouses paying twice as much as the other 20 flats:

So: 20 flats each pay 1/24 and 2 flats each pay 2/24

The S.20 consultation starts at £3,000 when the liability of the penthouses becomes £250 (1/12 X 3,000 = 250)

For the other 20 flats the figure is £125.

Question - **You forget to serve a S.20 notice and spend £8,000. How much can you collect?**

a) From each flat in the Scenario No.1 above? and

b) From the penthouse flats in Scenario No.2 above?

Test 2

What is the MINIMUM period within which S.20 consultation for qualifying works, can take place?

Explain how you have calculated this.

Section 19 Landlord and Tenant Act 1985

Reasonableness:

- Relevant costs shall be taken into account in determining the amount of a service charge payable for a period:
  a) Only to the extent they are **reasonably incurred** and
  b) Where they are incurred on the provision of services or works, only if the service or works are of a **reasonable standard**

Section 19 Landlord and Tenant Act 1985 ...(cont'd)

Payable in advance?

- Where service charge is payable before relevant costs are incurred, no greater amount than is reasonable is so payable, and after the relevant costs have been incurred any necessary adjustment shall be made...

Reasonable?

Consider:

- Are the landlords actions reasonable?
- Are amounts charged reasonable?
- 2 cases to consider:
  - Garside v RFYC Ltd [2011] UKUT
    - Financial impact was considered a relevant factor in determining whether costs were 'reasonably incurred'
    - Affordability in relation to scheduling of works over time should be balanced against other considerations e.g.urgency of the works in question, or whether doing the works in smaller lots would increase the overall cost.

Reasonable

- Waaler v Hounslow LBC [2015] UKUT
    - Lease – included an improvement clause
    - Flat roof to pitched
    - And to replace old wood framed window units with aluminium ones
    - In the past it had recycled hinges from other windows, but that supply was now exhausted. Replacements were no longer available
    - New units could only be installed if the exterior cladding to the building was replaced. That could not be done without removing the asbestos underneath the cladding
    - FtT – found in favour of Hounslow – actions were reasonable
    - Went to appeal

Reasonable ...(cont'd)

- Waaler v Hounslow continued...
  - At appeal - Must v may
  - Hounslow:
    - Was obliged to carry out repairs, but
    - Had a discretion to carry out improvements.
  - UT said "In carrying out repairs a landlord is usually fulfilling an obligation under the lease'
  - But that 'Improvements are a different matter and may simply be a matter of choice"
  - 'if a landlord decides to carry out a scheme of works which goes beyond what is required to effect a repair and seeks contributions to the cost from a leaseholder then in my view he must take particular account of the extent of the interests of the lessees, their views on the proposals and the financial impact of proceeding".

Reasonableness

- The landlord does not have to take the lowest quotation
- Must give credit if works are grant assisted
- If costs could have been covered by insurance ‘not reasonable’
- If services provided are not of a reasonable standard a tenant may be entitled to a deduction
- Increased emphasis on – ‘burden of proof’ on tenant (leaseholder).

What does reasonableness mean?

- Dictionary definition – 'not extreme or excessive'
- Our definition – ' would you make the same decisions if you were footing the bill?'

Payability – limitation

Limitation of service charges:

- No statutory time limit for a tenant (leaseholder) to bring an action – recent case might impact (Cain v LB Islington 2015 UKUT)

For the landlord

- For service charges recoverable as rent AND ground rent the limitation period for a claim being issued at court is six years from the date the sums are properly due under the terms of the lease .
- Where the service charge is not recoverable as rent AND where the tenancy/lease is granted by a deed the limitation period is 12 years from the date that the payment fell due.
- Where the tenancy is not created by deed then the limitation period is six years irrespective of whether or not the service charges are recoverable as rent.

NB. Fact that tenant (leaseholder) has paid does not amount to admission

CASE STUDY

Repair v Improvements

- What does the lease say about recoverability?
- Improvement v repair?
  - Some case law
  - No definition
  - Replacement with current day materials
  - To provide a facility/feature that did not exist previously
- Subject to S20 where applicable
- If unsure – ask the FtT to decide
- Waaler v Hounslow – improvement clause does not automatically mean it is reasonable to carry out the work.

Improvements

- Question – the lease doesn't include a clause for improvements but I want to carry out some works of improvement so if I carry out S20 can I recover the costs. No – S20 does not change the terms of the lease or extend what costs you can recover.

Repair v Improvements

- Improvements are:
  - An addition to the building or curtilage, i.e., something that is not already there.
- Improvements may be: Alterations to the building or curtilage that:
  - are to the whole building or to most of the building, and/or
  - transform the character / appearance of the building, and/or
  - increase the quality, value or lifespan of the building. AND
- Disrepair or a fault has been identified, but more extensive works are carried out rather than just the necessary works to address the disrepair or fault.

Repair v Improvement ...(cont'd)

- "Is the repair so radical and extravagant as to amount to creating a new thing in place of what was there and not a mere replacement"
- The replacement of a door or window which complies with modern materials and with current standards; and also complies with Fire Regulations/buildings insurance requirements would not constitute an improvement.

S20B (18 month rule)

Limitation re Service Charges
LTA 1985, s. 20B(1)

- **(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.* [emphasis in bold added]

Limitation re Service Charges
LTA 1985, s. 20B(2)

- *(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 **pay**ment of a **service charge***
- [emphasis in bold added]

Landlord and Tenant Act 1985
Time Limits under s. 20B

Questions:

- When does a landlord 'incur costs' for s. 20B ?
- What are the requirements of a s. 20B(2) Notice?

Q 1: When are costs incurred for the purposes s. 20B?

- Usually when the L/L pays the relevant sums: see *OM Property Management Ltd v Burr* [2013] EWCA Civ 479, although it may depend on the contract under which the sums are paid;
  - If a bill is paid after the due date are the costs incurred on the due date?
  - If a bill is paid before the due date are the costs incurred on the due date?

- Failure to comply = tenant is not liable to pay service charge

Q1 – When are costs incurred for the purposes s. 20B when there are intermediary landlords?

- **Westmark (Lettings) Limited vs. Peddle & Ors (2017)**

In this case there were a number of intermediate landlords, where costs were passed down the ‘chain’. The Upper Tribunal had to consider when the 18-month period for the purposes of Section 20B ran from, i.e. when were the relevant costs incurred by Westmark (Lettings) Limited, the intermediate landlord.

The Upper Tribunal (overturning the decision of the First-tier Tribunal (FTT)) held that the time limit ran from when the intermediate landlord was billed for the services provided. It did not run from when the superior landlord incurred costs.

In practice: This decision is helpful where there is a complex structure to a scheme and the intermediate landlord does not receive invoices promptly.

Q 2: What are the requirements of a valid s.20B(2) Notice ? -

- LB Islington v Abdel-Malek LRX/90/2006 –S20B provided the estimated costs not the costs to date; and
- *LB Brent v Shulem B*: decision, that Notice should state:
  - The aggregate sum that LB Brent had incurred which was rechargeable as service charges
  - The tenant would in due course be required to pay (they were current demands)

LB Brent v Shulem B: s. 20B(2) Notice

The Decision:

A s. 20B(2) Notice **must**:

- State that (relevant) costs have been incurred
- Tell the tenant that he/she will be required to pay service charges in respect of those costs
- Include the sum which the landlord has incurred; ie, aggregate costs not the amount of service charge.

LB Brent v Shulem B: s. 20B(2) Notice ...(cont'd)

What if landlord doesn't know precise costs?

- Where there is outstanding snagging and some of the contract costs have been incurred it may be necessary to serve a s. 20B(2) notice to preserve the landlord's right to recover its costs as service charges
- The landlord should serve a notice setting out a sum which the landlord thinks will (or may be) incurred so as to protect its position:
- Isn't that an estimate?
- Arrive at a reasonable but generous estimate based on actual figures
- State what part of the costs are estimated

What should the notice say if costs known?

- State in respect of what works the costs have been incurred
- State on the Notice your aggregate costs
- State that the tenant will be required to contribute
- State tenant's proportion cost (not necessary?)

L B Southwark v Woelke

- Common approach to billing for 'major works' by social landlords:
  - When Notice of proposal served; or
  - When start work on site; or
  - When complete work; or
  - A variation of the above
- Leaseholder (Woelke) challenged as not in line with the lease.
- 'major works' = 'big' repair
- Repairs = a service charge and therefore should be invoiced in line with other service charges
- Can minimise risk of financial loss/need for S20B(2) Notice

S20 works do not exist !!!!!

- There is no such thing as S20 works and S20 costs- we are talking about the landlords obligation to do works on a building.
- Obligations to do works on a building are defined in the lease
- The landlords right to recover costs of works to a building via the service charge is defined in the lease
- How and when the landlord recovers costs is defined in the lease
- S20 is a requirement, a process you follow before you spend that money. S20 is nothing whatsoever to do with demanding costs. You consult under S20 before you spend money.

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S20 – assisted by……

Consultation prior to S20 requirements

- Five-year rolling programme of works
- Sinking fund clause
- Newsletters
- Surgeries – advertise dates online
- Website:
  - What – description of the works
  - When – start on-site date and estimated completion date
  - Indicative costs if possible
  - Links for each block/estate
  - Photographs
  - Points of contact – resident liaison officer mobile number

S20 – assisted by…… …(cont'd)

Resident involvement

- Procurement process
- Set up steering group
- Programme of meetings for all leaseholders
  - First meeting – outline proposals
  - Second meeting following tender process – introduce contractor, costs discussed

Major works generally

- Legislative procedure – Section 20 consultation
- Other consultation – newsletters, website, surgeries prior to S20
- Involve leaseholders (residents) in the procurement process.
- Tease out pre-determination applications
- Interim certificate payments – S20B notices
- Variations identified – further consultation required with leaseholders
- Final payments as soon as possible after practical completion
- Invoice – on estimate preferably, or as soon as possible after practical completion and within defects period
- Use of resident liaison officers/satisfaction surveys
- Storage of associated documents/handover on staff changes
- Major works debt – offer repayment options.

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ANY QUESTIONS?



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