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MINI MONTHLY MAGAZINE

ISSUE TWO...

SECTION 20

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We are pleased to introduce the second edition of our Mini Monthly Magazine.

We have taken Flats Living's monthly feature and have prepared it as a hard copy for you to circulate to your team.

This month's issue is all about Section 20.

For further copies please email us at **magazine@residentsline.co.uk.**

To read a full copy of the latest Flat Living Magazine please visit **www.flat-living.co.uk.**

To contribute in future issues please contact **Rebecca@flat-living.co.uk**

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WHAT IS SECTION 20:

Section 20 of the Landlord & Tenant Act 1985 (as amended by the Commonhold & Leasehold Reform Act 2002) sets out the three-stage consultation procedure to follow when carrying out qualifying works to your building. This procedure applies in any situation where the contribution from any one lessee exceeds £250, or a qualifying long-term agreement where the contribution from any one lessee exceeds £100 in one financial year. If your Residents' Management Company (RMC) is looking to carry out works, or enter into a long-term agreement of this nature, then a Section 20 consultation must take place with all lessees. If there is a Recognised Tenants' (or Residents') Association (RTA), then you must include them within your consultation.

Stage One

For qualifying works under Section 20, you would be required to serve a "Notice of Intention to Carry Out Works" upon all lessees. The Notice must generally describe the proposed works, state the reasons for considering the proposed works, and invite leaseholders to make written observations within 30 days. The correspondence address for observations should be stated within the Notice as well. The importance of the Notice of Intention is that it offers lessees with the opportunity to provide the name of a contractor from whom the Landlord/RMC should try to obtain an estimate for the proposed works.

Stage Two

At the expiration of the 30-day consultation period, at least two estimates should be obtained: one of these estimates must be from a person completely independent of the Landlord/RMC. If nominations were made within the consultation period, then estimates should have been obtained from at least one of these nominations. The Landlord/RMC must then provide a "Statement of Estimates" which sets out the details of estimates that have been obtained and a summary of observations received within the consultation period.

Any estimates that have been obtained must be available for inspection by the lessees, including estimates obtained from nominated contractors. A "Notice to Accompany the Statement of Estimates" must also be served in conjunction with the Statement of Estimates, which sets out the hours and place where details of the estimates may be inspected, inviting lessees to make written observations on the estimates within 30 days, specifying the address to which those observations should be sent.

Stage Three

If, at the expiration of the consultation period, the chosen contractor did not provide the lowest estimate, then a "Notice of Reasons" must be served upon all lessees. This essentially states the Landlord's/RMC's reasons for awarding the contract. It is worth noting that if a nominee is chosen to carry out the works, and they didn't provide the lowest estimate, then although the requirements of Section 20 have been fulfilled, it would be prudent to serve a Notice of Reasons because that estimate could be tested for reasonableness by the First-tier Tribunal (FTT) under Section 19 of the 1985 Landlord & Tenant Act.

For long-term agreements, the procedure is essentially the same, however Stage 2 is referred to as a Notice of Proposals. For instance, an agreement such as an intercom maintenance contract isn't just about the cost of the maintenance, but the number of visits per year, frequency of visits, number of staff per visit, inclusions/exclusions of service etc.

If the consultation procedure is not followed correctly, and the Landlord/RMC is successfully challenged at the FTT, then the maximum amount recoverable from lessees under the service charge is £250 for major works and £100 for long-term agreements.

For fully comprehensive information on Section 20, there are a range of advice guides on the LEASE website.

THE CONSULTATION PROCESS – I ONLY HAVE TO PAY £250?

Charles Jamieson from Bishop & Sewell explains

One of the most daunting moments for a leasehold owner is receiving a service charge demand, knowing that there is a contractual cost contained within which is generally outside of their control. There can be arguments over reasonableness (careful not to make a section 27A admission!), however, the unfortunate fact is that these types of dispute are often disproportionate, and a commercial view must be taken. But for those contractual obligations of a greater sum or term, there is a statutory protection in place which compels the demanding party to consult with the paying party. This is commonly known as the Section 20 Consultation Process.

KEY FACTS RELATING TO THIS PROCESS

Relevant obligations are contained within Sections 18 to 30 of the Landlord & Tenant Act 1985 (as amended) and the Service Charges (Consultation Requirements) (England) Regulations 2003 ("the Regulations").

SECTION 20 APPLIES:

When there is a Major Works contribution (when the cost to any lessee is in excess of £250.00);
To Qualifying Long-Term Agreements ("QLTA" - a contract for a period of more than 12 months at a cost in excess of £100.00 per lessee); and,
To Qualifying Works under a long-term agreement (when the cost to any lessee is in excess of £250.00).

Some exceptions to the above which may apply are contracts of employment, contracts between holding companies and wholly owned subsidiaries, or contracts for services such as gardening or window cleaning. Failure to comply with the Consultation Process may preclude the consulting party from recovering any more than the statutory thresholds (i.e: £100 or £250 subject to which category applies).

Do I need to comply with the Consultation Process?

First question: when entering into a consultation, where should you start? Simply, the lease; otherwise, where is the certainty that the leaseholder is contractually obliged to pay the proposed sums?

For the avoidance of doubt, this should be the starting point for every interaction involving a leaseholder, and no presumption should ever be made that any two leases are the same.

QLTA's are relatively simple on their face to identify, but where there are Major Works taking place to differing areas of the building, or over a prolonged period, there may be some question as to whether the Major Works are divisible so as to avoid the Consultation Process or whether they are not sufficiently divisible to have avoided it.

The Court of Appeal in Phillips v Francis [2015] EWCA Civ 1935 considered whether a group of works were inside or outside of the scope of Section 20. The approach taken by the Court of Appeal has been, for the most part, warmly received, with Lord Dyson taking a common-sense approach (although including the usual caveats of non-exhaustive lists and remaining a question of fact and degree) and suggesting (at paragraph 36) relevant factors are likely to include:

Where items of work are to be carried out;
Whether the works are subject to the same contract;
Whether the works are done more or less at the same time; and,
Whether the items of work are different in character from, or have no connection with, each other.

How do I begin?

Now it has been established whether the works/contract fall within the scope of Section 20, and it is established that the sums are contractually payable under the Lease, how should the demanding party notify the leaseholder of the commencement of the process?

Again, check the Lease. One of the most common service clauses is the Section 196 (Law of Property Act 1925) clause, however, as Lord Hoffman said in Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd [1997] A.C. 749 at 776A: "If the clause had said that the notice had to be on blue paper, it would have been no good serving the notice on pink paper."

Therefore, a primary element which both parties should consider (whether a consulting party needing to comply or a lessee attempting to avoid liability) is whether or not the consultation documents have been properly delivered.

The Consultation Process Each charge has its own specific rules simply and concisely set out respectively in the Regulations, Schedules 1, 3 and 4 (Schedule 2 relates to QLTA's where a public notice is required although that is outside of the scope of this commentary).

Key features of the consultation process:

The timing of notices and responses must be complied with;

The leaseholder/recognised tenants' association must be given an opportunity to respond and be aware of their rights;

Regard must be had for written observations; and,

If required, notification of the final decision, and reasons for the same, must be provided to all parties involved.

Failure to comply with any element of the Consultation Process may render the entire procedure defective and the demanding party subject to the statutory restrictions on recoverability. In particular, regard should be paid to rules on nominating a more expensive option, or if there is any 'connection' between the appointing party and contractor.

What if there is not time to comply?

There are occasions when it is simply impossible to comply with the strict time requirements, which can take a number of months to conclude, because say the premises are dangerous or to delay would be unreasonable in the circumstances.

Section 20ZA of the Landlord & Tenant Act 1985 enables a party to apply to the appropriate Tribunal for a determination that the Consultation Process may be dispensed with. It should be noted however that there may still be scope for a later challenge to reasonableness, so simply because a Tribunal has awarded dispensation does not mean the appointing party has a carte blanche right to charge the leaseholder however much they should choose.

The Section 20ZA dispensation may also be sought to avoid failures in complying with the Consultation Process after the works have commenced / concluded, therefore simply because one stage may not have been complied with fully or properly does not mean there is any real certainty for any party to the Consultation Process whilst the Tribunal retain an unfettered and subjective discretion.

What do I need to remember?

Key points to always remember when a service charge may invoke Section 20 are: to check the Lease; comply with the Regulations; and, if you cannot comply with the Regulations, should you be applying for dispensation?

Both complacency with this process and a lack of proper understanding can lead to costly mistakes on the part of the consulting party therefore if there is ever an item you are unclear upon, seek appropriate advice which in the long-term may save you more than it costs.

For more information please call Bishop and Sewell's Litigation & Dispute Resolution team on 020 7631 4141.

WHAT YOU NEED TO KNOW:

Richard Owen is an Associate at JB Leitch who acts for landlords and management companies in respect of a variety of property management issues.

Relevant Legislation

The principal legislation relating to major works is Section 20 of the Landlord and Tenant Act 1985. Section 20 is fleshed out by the Service Charges (Consultation Requirements) (England) Regulations 2003.

Section 20 will apply where the landlord/management company carries out works and the service charge contribution of any long residential lessee to the cost of those works is more than £250.

For the above purposes, works are defined as works on a building or any other premises. It is thought that the works must involve a degree of permanent modification of the premises for Section 20 to apply. However, maintenance work such as roof repairs, cladding repairs or lift repairs etc. will (subject to the £250 threshold) engage Section 20.

Where major works are carried out and the landlord neither carries out the consultation process prescribed by Section 20 and the above-mentioned Regulations, nor obtains dispensation (from the First-Tier Tribunal) per the requirements of the consultation process, the landlord will be able to recover no more than £250 from any tenant in respect of the cost of the works.

The consultation process involves the service of written notices upon all residential tenants. Sample consultation notices are available from the Leasehold Advisory Service website.

Section 20 also applies to qualifying long-term agreements – these are agreements entered into by the landlord for a term of more than 12 months where the service charge contribution of any tenant in that period is more than £100. However, such agreements are outside the scope of this article (which focuses purely on major works).

Further regarding the consultation process, certain contracts require "Public Notice". These are generally contracts made by public authorities. This article only deals with major works contracts for which public notice is not required.

Surveyor's Report

In many cases, particularly where the works have a technical aspect, it will be advisable for the landlord to instruct a surveyor to produce a specification detailing the requisite works.

Ideally, the surveyor should be asked to produce a tender request (against which all prospective contractors should be asked to tender). This should help to prevent a situation whereby the nature of the works which the contractors offer to carry out differs from contractor to contractor (such a situation could make the consultation process flawed).
The surveyor should also give a rough indication of the likely cost of the works.

Consultation Process:
Notice of Intention

The first notice which must be served (upon all residential tenants and any recognised tenants' association) is the notice of intention.

The notice should:

- Describe the proposed works in general terms or specify the place and hours at which a description of the works can be inspected
- State why the landlord considers it necessary to carry out the works
- Invite the tenant to make, in writing, any observations in relation to the proposed works
- Invite each tenant to nominate a contractor (that is, to provide the name of a person from whom the landlord should try to obtain an estimate)
- Require observations and nominations to be made within the "relevant period" – that is, 30 days from the date of service of the notice

Where, in accordance, with paragraph 1 above, the

description of the works is made available for inspection (rather than simply given in the notice) both the place and the hours for inspection must be reasonable. The landlord is not allowed to charge for the inspection and the landlord must enable copies to be taken or supply a copy to the tenant (on request) free of charge.

If any observations are received in response to the notice of intention, the landlord must recognise them; however, the need to recognise any observations is subjective. It would be good practice for the landlord to at least respond (in writing) to observations by acknowledging receipt of the observations and stating that the observations have been noted.

In terms of nominations, the legislation states that the landlord should do the following:

- If a single nomination is made by a recognised tenants' association, the landlord should try to obtain an estimate from that nominated person
- If a single nomination is made by only one of the tenants, the landlord should try to obtain an estimate from that nominated person
- If a single nominee is nominated by more than one tenant, the landlord should try to obtain an estimate from the person who received the most nominations
- If more than one nomination is made by the tenants but none has multiple nominations and more than one nomination is made by the recognised tenants' association, the landlord should try to obtain an estimate from at least one person nominated by a tenant and at least one person nominated by a recognised tenants' association

Statement of Estimates

Following the expiry of the relevant period in respect of the notice of intention, the landlord must then obtain estimates for carrying out the works. As above, to prevent a situation whereby the scope of the works in respect of which the estimates are given differs from contractor to contractor, ideally the landlord will ask prospective contractors to complete the tender forms produced by the landlord's surveyor.

At least one of the estimates must be from a person wholly unconnected with the landlord.

The statement of estimates should set out the following:

- For at least two of the estimates, the amount specified in the estimate as the estimated cost of the proposed works
- Where the landlord has received observations (in response to the notice of intention), a summary of the observations and the landlord's response to the observations
- The place and hours at which the estimates may be inspected (and the landlord must then make the estimates available for inspection)
- Invite the making, in writing, of observations in respect of the estimates
- The address to which observations should be sent, that the observations should be delivered within the relevant period (again, 30 days from the date on which the notice is served upon the tenant) and the date on which the relevant period ends

Again, if any observations are received within the relevant period, the landlord must have regard to them.

Contract Notice

Finally, if the landlord chooses to enter into a works agreement with a contractor other than contractor who provided the lowest estimate, the landlord must, within 21 days of entering into such agreement, give notice to each of the tenants stating the landlord's reasons.

Service of Notices

The lease may contain contractual provisions as to how notices relating to the lease are to be served. As such, the landlord should read the lease carefully and ensure that such provisions are followed.

On a practical level, it would be wise for landlords to serve the notices at all addresses (including email addresses) which the landlord has on record for the tenant.

In regard to the relevant period (in terms of the notice of intention and statement of estimates), to avoid any suggestion that a tenant has not been given long enough to make observations, it will usually be wise for the landlord to give the tenants a period longer than the statutory minimum (perhaps a period of 35 to 40 days) to make observations/nominations.

Furthermore, the landlord should keep copies of all notices

(and any covering letters) as well as any responses/observations received from tenants and the landlord's responses to any observations.

Such copy documentation may prove extremely useful if a tenant alleges that he/she was not properly consulted.

Dispensation

There will be instances where it is not sensibly possible for the landlord to comply with the consultation requirements, particularly where emergency works are necessary. In such instances, the landlord will (if they wish to recover more than £250 from any tenant in respect of the cost of the works) need to seek dispensation from the requirements of Section 20. Dispensation applications are made to the First-Tier Tribunal (Property Chamber).

The leading case on dispensation is Daejan Investments Limited v Benson [2013] UKSC 14. Daejan establishes that the key focus of the Tribunal (in deciding whether to grant dispensation) is whether the absence of consultation has resulted in tenants paying for inappropriate works or the tenants paying too much for the works. Dispensation will often be granted but the Tribunal regularly attaches terms to the dispensation. One common term is that the landlord pays the tenants' legal costs of dealing with the dispensation application.

Where major works are not urgent but may become urgent, the landlord should in the first instance attempt to follow the consultation process (rather than refraining from following the process because a dispensation application may ultimately be necessary) – if a dispensation application does prove necessary, the Tribunal is likely to look favourably upon such attempt.

Managing Agents

If major works are forthcoming and the landlord has not appointed a professional managing agent, the landlord should consider doing so. Liaising with surveyors and contractors and serving the relevant notices is likely to be administratively onerous and time consuming for resident management companies. Good managing agents will be familiar with the relevant legislation and procedure and will have a number of useful contacts.

In addition, managing agents will be able to make the description of the works and the statement of estimates available for inspection at their offices (as well as providing photocopying facilities).

For more information, please call JB Leitch Ltd. on 0151 708 2250.

SECTION 20 CONSULTATION:

WHAT HAPPENS IF THE SPECIFICATION CHANGES?

Are you a leaseholder who has been consulted about major works, worked your way through the hefty process to then find that the initial proposals have changed? Until the Court of Appeal case of Reedbase v Fattal [2018] EWCA 840 (Reedbase) what happens in this situation was unclear.

What is section 20 consultation?

Residential landlords are required to undertake a two stages consultation with their leaseholders.

Stage One:

notice of intention must be given to the leaseholders and any other recognised tenant's association (RTA).

The law requires the notice to:

1. Describe the proposed works to be carried out;

2. Set out the reason why the landlord believes that the works are necessary; and,

3. Invite the leaseholders to make observations on the proposed works.

It is important to note that the landlord must have regard to any observations that are made by the leaseholders and/or the RTA.

Stage Two:

A notice of estimate, also known as a 'paragraph (b) statement' is provided by the landlord to the leaseholders and/or the RTA. Once again, the law states what must be included in the notice.

There is a potential third stage, but it only applies where the contractor chosen is not a nominated contractor or the cheapest, but none of this was relevant in this case.

Background Facts

The leaseholders in this case owned two penthouses on top of a block of apartments in London NW1. Around the apartments were terraces with mature trees and shrubs watered by an irrigation system. Underneath the asphalt terrace was a roof needing repair. This would involve removing tiles from the terrace placed on top of the roof by the leaseholders. The management company, responsible for undertaking the roof works, was aware that it would need to come to an agreement with the leaseholders about removing the tiles. Some of the tiles were in poor condition, but to repair the roof effectively it was proposed to replace them all.

After sending out the specification for the works, the management company discovered that the steps envisioned would invalidate the guarantee offered by the contractor. In any case the leaseholders wanted a more expensive tile than was proposed. The financial difference was approximately £30,000 on works worth over £300,000.

The costs of the works were added to the service charge, with the penthouse leaseholders' share being 10%.

However, they objected to the service charges for the following reasons:

- In not replacing like with like there had been a breach of the covenant to 'make good' damage to the existing tiles caused by the roof repairs
- The contractors had moved their plants to do the works and switched off the irrigation system, causing the plants to die
- The 'pedestal system' that resulted from the works created additional maintenance; and
- There had been a breach of the section 20 consultation procedure (What is the section 20 consultation process for major works?) by not repeating the second stage of the consultation requirements when there was a change in the proposals relating to the tiles

What happened in the County Court?

The County Court ruled that full information was provided to the leaseholders at both stages saying:

"...adequate notice and information was given to the Defendants throughout of all relevant changes made to the building works and that the works were carried out to a reasonable standard."

The leaseholders appealed to the Court of Appeal on the basis that the second stage should be repeated and a re-tendering take place to reflect the variation concerning the tiles.

What Did The Court Of Appeal Decide?

The Court of Appeal dismissed the leaseholders appeal because:

1. The absence of any explicit guidance by statute, the question was "whether in all the circumstances the leaseholders have been given sufficient information by the first set of estimates". Those estimates did not include the extra cost of the leaseholders' preferred tiles or the pedestal system for fixing them. However, the Court of Appeal said that one factor was not, in their view, a material change in the information provided. The Court of Appeal also decided it was necessary to consider whether, taking account of the position of the other leaseholders who did not object to the changes, whether the protection given to the leaseholders by the consultation process was likely to be materially assisted by obtaining the fresh estimates. They concluded that the answer to this question is no, for these reasons:

- The leaseholders knew of the change in the works and approved them without contending at that point in time that there should be a fresh tender; and this was not a case where the landlord was proposing a fundamentally different set of works to those originally presented to the leaseholders
- The change in cost was relatively small in proportion to the full cost of the works, considering that the only benefit was to satisfy the leaseholders and yet is being borne by the service charge
- It was unrealistic to think that the contractors who had estimated for the original works, but not obtained the contract, would be likely to tender for the small part of fixing the tiles. There was no evidence that there would have been any cost saving
- Any re-tendering would have caused delay, possibly prejudicing the other leaseholders
- The leaseholders of the penthouse continued to have protection of section 19 of the LTA 1985 against the inclusion of unreasonable costs in the service charge

The Court of Appeal held that there was no obligation for the landlord to restore the tiles to exactly what was there before.

2. Whilst what work is reasonably required of the landlord will depend on the facts of each particular case, the obligation to 'make good' did not impose an absolute standard. Instead it is an obligation on the landlord to restore the property to its pre-existing condition so far as possible. The condition of the flat before the work takes place should be considered, but the tiles could not be expected to have been placed directly onto the sealed roof or to replace the tiles in their pre-existing damaged condition.
Furthermore, the additional maintenance obligations would be unreasonable, and the leaseholders could not imply an agreement for the plants to be watered by the contractors who were offsite for several months. It must have been obvious that they were not watering the plants, so the loss was not, therefore, caused by the works but by the leaseholders' failure to water the plants themselves.

By Evelyne Oshian and Naana Nkansa-Dwamena – Legal Advisers at LEASE.

For more information, please call a member of LEASE on 020 7832 2500.

SECTION 20 - IS IT REASONABLE?

NICOLA MCANDREW FROM RESIDENTSLINE INVESTIGATES

Please note that for the purposes of this article, any reference to the "landlord" may be substituted for the Freeholder, Head Lessee, Residents' Management Company (RMC) or Right To Manage (RTM) company – in short, the person or organisation that enforces the service charge payment. Similarly, any reference to the "tenant" will also be applicable to a leaseholder.

If any major works (otherwise known as 'qualifying works') are required for a block of flats, the cost will normally be recoverable from the tenants. Under the terms of their lease, this cost will normally be added on top of their annual service charge payment – it may also be fully or partly covered by a reserve or 'sinking' fund, dependent on the price of the works and the amount available in the fund.

However, under Section 20 of the Landlord and Tenant Act 1985, if this charge exceeds £250 per tenant the landlord must follow a consultation procedure. This is referred to as a Section 20 consultation, and normally takes place in the form of three notices. The purpose of the S20 consultation process is to be certain that no leaseholder is prejudiced by the process.

Notice of Intention to Carry Out Works

This notice is the first part of the three-stage consultation procedure to which landlords must comply. This notice must describe what works are going to take place, as well as explaining why they are necessary. Landlords must also give tenants a 30-day window of opportunity to respond to the notice and, if they choose to do so, nominate a contractor for the building works.

Notice of Estimates

The second notification that must be sent is the Notice of Estimates – this entails another 30-day notice to be sent to the tenants detailing the estimates that the landlord has obtained. It is important to note that at least one of these estimates must be from a contractor who is entirely independent of the landlord. Also, at least one of these estimates must be obtained from nominations made by the tenants in the previous notice (if any). Tenants can use this second 30-day notice to send any observations, in writing, to the landlord. The landlord should also provide a reasonable time and place in which the tenants can inspect the estimates obtained.

Notice of Award of Contract

The final stage of the Section 20 consultation procedure is the Notice of Award of Contract. This should be sent to the tenants within 21 days of entering into a contract and must summarise the tenants' previous observations in regard to the Notice of Estimates. However, this notice does not need to be sent if either;

the contract has been undertaken by a nominated contractor; or,

the contract has been undertaken by the contractor with the cheapest estimate.

What happens when this procedure isn't followed?

Failure to meet the requirements of the Section 20 consultation procedure will often result in a legal dispute. Take, for example, the Ashleigh Court v De-Nuccio & Ors case from 2015.

The Right to Manage (RTM) company had provided both the Notice of Intention and the Notice of Estimates. However, in the latter notice, the RTM company had failed to provide a reasonable time and place for inspection of the estimates. Firstly, they only allowed leaseholders to inspect the estimates between 9am-12pm on weekdays, and even then, requested that tenants were to give 48

hours' prior notice. The RTM company did not provide sufficient contact details nor give out their registered address, meaning leaseholders were unable to access or inspect any of the relevant documentation.

The First Tier Tribunal, upon reviewing the case, ruled that the RTM company had failed to uphold the requirements of the Section 20 consultation. This decision was upheld by the Upper Tribunal, and thus rendered the RTM company only able to recover a maximum of £250 per leaseholder.

The FTT ruled against the RTM company on the basis that they had failed to provide clear contact details and offer a 'reasonable' time for estimates inspection. Initially, the FFT had stated the time and place the RTM made available for inspections was not "sufficiently adequate". However, according to the Royal institute of Chartered Surveyors, it was deemed that "the question which should have been asked pursuant to the regulations was whether the time and place specified for inspection were reasonable" as opposed to "sufficiently adequate".

What is reasonable?

This poses the somewhat abstract question as to what can be considered 'reasonable' in terms of the time and place that needs to be made available for tenants to access documents. Should inspections be offered within the standard 9am-5pm working hours? In the evenings? Mornings? Or should there be no restrictions imposed at all, instead allowing tenants to access documents at any time?

Logically, a 'reasonable' course of action would be to avoid the mistakes of the RTM company, i.e. having no 48-hour notice restriction prior to inspection, supplying clear contact details, and providing a clear address.

Imposing a 'reasonable' time and place for document access is where it gets slightly trickier. Realistically, there is no specific answer. It is impossible for one piece of legislation to dictate a specific time and place for every block of flats undergoing major works – this must be the responsibility of the landlord or managing company. And whilst having 48 hours' notice prior to inspection is an unnecessary requirement, it remains to be said that there is no set algorithm to which RTM companies or landlords can refer when deciding what availability is 'reasonable'.

Realistically, a retirement block of flats and a block with mostly working families will have different interpretations of what constitutes a 'reasonable' time and place to access relevant documentation. Likewise, it is difficult to determine the most 'reasonable' availability for tenants who are away from the property for lengthy periods of time for travel or work.

Charlotte Collins, a solicitor from Realty Law describes the question of 'reasonableness' as "subjective". She states that "reasonableness is also going to depend upon the documents which are to be inspected. If there are many documents, then it would not be reasonable to send copies to multiple leaseholders. If, however, there are only a few leaseholders who cannot come to the offices to inspect then it would probably be reasonable to send copies to them or offer to provide copies for a small cost."

In short, a 'reasonable' time and place to access documentation must be determined by a variety of factors; for example, the most accommodating time slot available; the address given to the tenants; the documents to be inspected; and, the availability of the tenants themselves. To reiterate the point made by Collins, this decision is entirely subjective. And, whilst 'reasonableness' is difficult to address under one piece of legislation; it remains to be said that any actions deemed as 'unreasonable' will be legally addressed. The critical factor is always to eliminate any prejudice to the leaseholder, so any action taken should always be taken with this in mind, and, as shown by the Ashleigh Court v De-Nuccio & Ors case, Section 20 consultation procedures should be taken very seriously – to a reasonable standard, of course.

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HEALTH AND SAFETY EMERGENCIES

CAN WE BYPASS THE SECTION 20 PROCESS FOR A HEALTH AND SAFETY EMERGENCY?

The intention of Section 20 of the Landlord and Tenant Act 1985 is to give some protection to residential leaseholders, ensuring they are consulted on any works that would eventually cost them more than £250 and longer-term contracts, explains Dr Shaun Lundy.

The Act also enables a cap on the amount any leaseholder will pay if the Landlord does not carry out the required consultation. There are circumstances when it could be difficult to follow the procedure due to an emergency. As a health and safety consultancy, a question we often get asked by property managers is:

"Can we bypass the section 20 process for a health and safety emergency?"

To answer this question let's look at a common example from the perspective of the leaseholder:

"My landlord has informed us that some immediate emergency works are required to our building to make it safe and subsequently issued us all with a bill which comes to over £400 per leaseholder. When I queried this the landlord told me that, because it was an emergency, the Section 20 procedure does not need to be followed."

On the face of it this may sound reasonable, as the intent is to make the building safe. However, despite declaring an emergency, the Landlord still needs to ensure that a procedure is followed and that the term 'emergency' is not used merely as an excused to bypass a process they are legally obliged to follow.

Reality check

If repairs are urgent due to serious health and safety concerns, it is indeed possible to apply to the First Tier Tribunal for a dispensation from all or part of the consultation requirement under Section 20.

This procedure generally takes 6 weeks or more and clearly is no good if the works are urgently needed in the case of a genuine emergency. Currently, there is no formal process for urgent works on the grounds of an emergency or health and safety.

However, the accepted approach in these situations is to start the emergency qualifying works immediately, if necessary, to prevent potential injury or loss.

At the same time the landlord must apply to the First Tier Tribunal for dispensation from some or all of the Section 20 requirements. Dispensation is not always guaranteed, although if the works are considered a genuine emergency it should be forthcoming.

Remember: if qualifying works are carried out without going through the consultation procedure and without obtaining emergency dispensation; the landlord may only be able to recover £250 per residential tenant - potentially an extremely expensive mistake.

Consider the following:
Is it a genuine emergency?

In a lot of cases it may be obvious that your first obligation is to ensure everyone's safety and act immediately. If there is any doubt get some professional and legal advice.

Can an immediate temporary solution be found to make the situation safe in the short term?

This will ensure everyone's safety, allow the process of applying for dispensation to be followed and reduce the risk of potentially excessive costs as a result.

Finally, keep everyone informed of what's going on.

Disputes often arise out of poor communication and residents can be particularly alarmed when it comes to health and safety issues, so make sure you have a clear communication plan especially in the early stages of any emergency works.

Conclusion

So, in answer to the original question 'can the Landlord bypass the section 20 process for a health and safety emergency?'

The answer is; not entirely. You can start urgent works on the grounds of an emergency, but the landlord must also apply for dispensation from the S20 process to the First Tier Tribunal at the same time.

In our example the Landlord has clearly failed to follow this advised procedure and the communication to the leaseholder is misleading. This is likely to lead to problems in recovering the costs in this case.

Taking immediate action to protect people's safety is always the right thing to do. However, consideration also needs to be given the requirements of section 20 and keeping tenants informed.

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0800 281 235 info@residentsline.co.uk