



SERVICE CHARGES: A SURVIVAL GUIDE FOR LANDLORDS

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Introduction: overview of the regulation of service charges

1. Service charges are charges levied by landlords to recover the costs they incur in providing services to a building. The mechanism for charging for the services provided is usually to be found in the tenant's lease. Ordinarily, the charge covers the cost of such matters as general maintenance and repairs, insurance of the building and, where such services are provided, central heating, lifts, lighting and cleaning of common areas etc. The charge may also include the costs of management by the landlord or by a professional managing agent and contributions to a reserve fund.
2. Service charges are a frequent source of conflict between those who arrange the expenditure and those who are required to pay for it. Back in 1985 the *Report of the Committee of Inquiry on the Management of Privately Owned Blocks of Flats* ('the Nugee Report') revealed an almost universal holding of grievances by tenants of flats about the management of their blocks of flats and the amount of service charges. The problems identified included lack of consultation by landlords and managing agents, failure to take proper account of tenants' views and mutual mistrust.
3. In the residential sector, successive governments have legislated to deal with these problems by imposing a statutory regime for residential service charges and by enabling residential flat owners to buy the freeholds of their blocks or take over management from the landlord. The Landlord and Tenant Act 1985 ('LTA 1985') as amended by the Housing Act 1996 and the Commonhold and Leasehold Reform Act 2002 ('CLARA 2002'), sets out a code which is generally applicable to cost-related, variable service charges levied by a landlord or management company in respect of residential dwellings.

4. In the commercial sector, a guide to good practice called ‘Service Charges in Commercial Property’ was published by the Royal Institute of Chartered Surveyors on behalf of seven property industry bodies with the stated purposes of securing co-operation between owners and occupiers through consultation and communication. That was elevated to the status of an RICS Code of Practice in 2007 and has been revised twice, with the third edition published in February 2014. It sets out best practice to be observed by surveyors who manage property and administer service charges.
5. The statutory code in LTA 1985 does not apply to fixed service charges, or to premises occupied wholly or mainly for business purposes. However, due to the breadth of the definition of ‘tenant’ in s. 30 LTA 1985, the statutory code does apply in the case of a mixed commercial and residential block with shops or offices on the lower floors and flats on the upper floors, where the residential part is let to a headlessee who sublets the individual flats and recharges the subtenants of the flats with the service charge levied by the freeholder.
6. Where LTA 1985 applies, sections 18 to 31C LTA 1985 regulate the payment of service charges. Pursuant to s. 27A LTA 1985, either the landlord or the tenant may apply to the First-tier Tribunal (Property Chamber) (‘FTT’), formerly known as the Leasehold Valuation Tribunal, for a determination whether a service charge is payable and, if it is, as to:
 - (a) the person(s) by whom the service charges is payable;
 - (b) the person(s) to whom it is payable;
 - (c) the amount which is payable;
 - (d) the date on or by which it is payable; and
 - (e) the manner in which it is payable.

Such an application may be made in respect of charges which have already been levied, or charges which are proposed, whether or not the charge has been paid.

7. The key statutory provisions that restrict the landlord's ability to recover payment of the service charges from the tenant are outlined below, but this is far from an exhaustive guide. Some useful resources to consult when faced with a service charge dispute are:

Woodfall: Landlord and Tenant (Volume 1 Chapter 7)

Service Charges Law and Practice (Freedman, Shapiro and Slater: 5th edition 2012)

Service Charges & Management (Tanfield Chambers: 3rd edition 2013)

The LEASE website (www.lease-advice.org): government funded independent advice on residential leasehold and park homes.

The elements of a service charge dispute

8. When advising a landlord faced with a potential claim in the FTT brought by a tenant under s. 27A LTA 1985 you will need to consider:
 - (1) The contractual provisions under which the service charge is levied;
 - (2) Whether a defence based on estoppel may be used where the terms of the lease have not been complied with;
 - (3) The key statutory provisions limiting the landlord's ability to recover service charges;
 - (4) Costs recovery.

The contractual basis of the service charge

9. The provisions relating to the service charge are usually to be found in the lease, but since arrangements between the parties to the lease may be binding on their successors could also be located in separate deeds or 'side letters'. In the situation where the

tenants are members of a management company, provisions imposing service charge liabilities on tenants are occasionally to be found in the articles of association of the company in addition to, or instead of, the leases.

10. No tenant is obliged to pay a service charge except so far as the terms of his lease/any other document setting out the terms on which services are to be provided to the tenant may provide for one. So the precise wording of the clauses creating the landlord's obligations (or those of a management company that is party to the lease) to provide services to the tenant and creating the entitlement to recover service charge from the tenant must be considered carefully.
11. Where a service charge clause is unclear or ambiguous, the courts will generally interpret it narrowly and determine ambiguities or uncertainties in the tenant's favour, under the *contra preferentem* rule that an ambiguous deed will be interpreted against the party who granted it: see **Gilje v Charlgrove Securities Ltd [2004] 1 All E.R. 91**

Identifying the relevant costs

12. In modern leases, the service charge clauses generally fall into three categories, namely:
 - (1) Those which directly link the service charge to the costs incurred by the landlord in performing his obligation to provide services set out elsewhere in the lease, for example by providing that the service charge is a percentage of:
'the costs and expenses incurred by the Lessor in carrying out his obligations under clause 5 of this Lease'.
 - (2) Those which list the chargeable items (for example, under the heading "Heads of Charge" or similar) quite independently of the landlord's covenants, for example by providing that the service charge is a percentage of *'the costs and expenses of*

such works services facilities and amenities listed in Part III of this Schedule as may from time to time be provided by the Lessor’.

- (3) A combination of (1) and (2) extending both to the cost of performing the landlord’s covenants and the costs of other, discretionary, classes of expenditure.
13. Often the service charge clauses will contain a sweeping-up provision intended to bring within the service charge the costs of services or works not otherwise specifically mentioned. The effectiveness of these clauses will depend entirely on their wording taken in the context of the lease as a whole.

Interim payments

14. Most modern service charge clauses provide for interim payments on account of the eventual charge, with the balance becoming payable when accounts of the annual costs have been prepared. Older leases may simply provide for the tenant to pay his proportion of the landlord’s actual expenditure. If the lease does not make express provision for interim payments, none may be demanded: see **Tingdene Holiday Parks Ltd v Cox [2011] UKUT 310 (LC)**.
15. Some leases purport to give the landlord or his agent an unfettered discretion to dictate the amount of the interim contribution, whereas others expressly require the landlord to provide and furnish the tenant with a proper estimate of the current year’s anticipated expenditure, on which the interim contribution is to be based. In those cases, no interim payment will be due until that procedure has been followed: see **Skelton v DBS Homes (Kings Hill) Ltd [2018] 1 W.L.R. 362**.

Apportionment between tenants

16. The calculation of the service charge payable by the tenant must be carried out strictly in accordance with the terms of his lease. The most common formulae for the ascertainment of each individual tenant's proportion of the lease are:
- (1) A fixed percentage set out in each lease;
 - (2) A statement in each lease that the proportion is to be determined by the ratio of floor areas of the various lettable parts of the building;
 - (3) A statement in each lease that the proportion is to be determined by the ratio of rateable values of the various lettable parts of the building;
 - (4) A statement in each lease that the proportion is to be a 'fair', 'proper', 'due' or 'reasonable' proportion (often to be determined by the landlord's surveyor).
17. Where the lease specifies mathematically the proportion (as a percentage or fraction) of the service costs that is payable by the tenant of that lease, the FTT can determine under s. 19 LTA 1985 how much of the underlying costs have been reasonably incurred and can check under s. 27A that the tenant's contribution has been duly calculated by applying the specified proportion, but it has no jurisdiction to change that proportion: see **Canary Riverside v Schilling [2005] EW Lands LRX/65/2005**.
18. Where the lease provides that the proportion is to be a 'fair', 'proper', 'due' or 'reasonable' proportion to be determined by the landlord's surveyor, the FTT will be able to substitute its own apportionment of the costs of services payable by the tenants for that of the surveyor. This follows from the decision in **Windermere Marina Village Ltd v Wild [2014] L. & T.R. 30** in which the tenant covenanted '*to pay a fair proportion (to be determined by the Surveyor for the time being of the Lessors whose determination shall be final and binding) of the expense of all communal services...*'.
19. In **Windermere Marina** the freeholders had engaged a chartered surveyor to consider what would be a fair apportionment of the costs of additional communal services among

the various users of the marina who benefited from them. The Upper Tribunal rejected the landlord's appeal against the decision of the LVT to substitute its own apportionment of the cost of services payable by the tenants of 26 dwellings for that of the freeholders' surveyor having regard to s. 27A(6) LTA 1985, which provides that: *'An agreement by the tenant of a dwelling (other than a post-dispute arbitration agreement) is void in so far as it purports to provide for a determination—*

(a) in a particular manner, or

(b) on particular evidence,

of any question which may be the subject of an application under subsection (1) or

(3)'.

20. The Upper Tribunal held that the effect of s. 27A(6) LTA 1985 was to deprive the surveyor of his role in determining the apportionment so that the paragraph in the lease had to be read as if the method of ascertaining a fair apportionment was omitted altogether. The surveyor's conclusions had no contractual effect. It was therefore for the LVT to decide a fair proportion of the expense of communal services payable by the tenant.

Potential defences where the terms of the lease have not been complied with

Estoppel by convention

21. As described by Lord Steyn in **Republic of India v India Steam Ship Co [1998] AC 878**, *'An estoppel by convention may arise where parties to a transaction act on an assumed state of facts or law, the assumption being either shared by them both or made by one and acquiesced in by the other. The effect of an estoppel by convention is to preclude a party from denying the assumed facts or law if it would be unjust to allow him to go back on the assumption. It is not enough that each of the two parties acts on*

an assumption not communicated to the other. But....a concluded agreement is not a requirement'. In the last three years there have been a number of decisions in the Upper Tribunal which consider the application of this doctrine in service charge disputes, the results of which are difficult to reconcile with one another.

22. In **Clacy v Sanchez [2015] UKUT 0387 (LC)**, the Upper Tribunal was required to determine whether the certification of accounts was a condition precedent of a valid service charge demand and whether an estoppel by convention had arisen, which prevented the tenants from denying their liability to pay service charges even though the landlord had not provided certified accounts. It held that certification of the accounts was not a pre-condition of a valid demand and that an estoppel had arisen because of a 19 year old agreement, at a meeting where the former tenants had decided that certification of the annual service charge was not required. Alternatively, the tenants had waived the right to require or enforce certification of the accounts.
23. In **Admiralty Park Management Co Ltd v Ojo [2016] UKUT 421 (LC)** the lease required the tenants to pay a percentage of service charge for the maintenance and insurance of the building and then a different percentage contribution for the management area of the estate. The landlord's managing agents had failed to apportion service charges correctly between the tenants for at least seven years, an issue first raised by the FTT. The financial consequences of the incorrect apportionment were unclear. Fortunately for the landlord, the Upper Tribunal accepted the contention that an estoppel arose where the tenant had never objected to the method of apportionment actually used (which was clear from the service charge statements) over many years, even in previous formal proceedings regarding disputed service charges. The Deputy President, Martin Rodger QC found that a 'conventional mode of dealing' existed

between the parties and it would have been unfair to allow the leaseholder to resile from that convention.

24. **Bucklitsch v Merchant Exchange [2016] UKUT 527 (LC)** was, like **Clacy**, concerned with a requirement for accounts to be certified as a condition precedent of valid service charge demands. No objection had been raised about the certification of accounts by the tenant during his 11 years of owning the property notwithstanding that, as in **Ojo**, there had been a previous set of proceedings in relation to the service charge. The issue was first raised by the FTT, which concluded that an estoppel by convention had arisen. That decision was overturned by the Upper Tribunal on appeal, HHJ Huskinson holding that the mere failure to object over a prolonged period of time did not give rise to an estoppel.
25. In **Jetha v Basildon [2017] UKUT 58 (LC)** the deed of covenant between the tenants and the landlord did not provide for service charges to be collected in advance: the only way they could have been so collected was if there had been a resolution agreed by a majority of the tenants at the company's AGM. In fact, service charges had been demanded in advance ever since a 1996 meeting and the tenants had paid the service charges without complaint since 2012. The FTT found that an estoppel by convention had arisen but on appeal the decision was overturned by HHJ Behrens, who was not persuaded of the existence of a common assumption by the parties. He also held that the tenants could not be responsible for any common assumption that did exist because the communications had not 'crossed the line' and further there had been no real detriment suffered by the management company in circumstances where a resolution could still be passed which would allow the service charges to be recovered.
26. In **Jetha** HHJ Behrens distinguished the case from **Clacy** on the basis that there was no express agreement in place. He also sought to distinguish the decision in **Ojo** on the

basis that the management accounts in that case made it clear to the tenants that service charges had been calculated incorrectly. However, **Ojo, Bucklitsch and Jetha** do not sit easily alongside one another, given that all three were cases where there was no express agreement between landlord and tenant, there were long periods of acquiescence by the tenants and in both **Ojo** and **Bucklitsch** there were previous sets of proceedings where the issue failing to follow the strict terms of the lease had not been raised.

27. In practical terms, a landlord seeking to raise estoppel by convention should identify the nature of the assumption said to be shared, the conduct which ‘crossed the line’ from which the necessary sharing can be inferred and what loss the landlord has actually suffered in reliance upon the assumption.
28. Surprisingly, none of the four decisions cited above consider the effect of assignment of leases and whether an incoming tenant is bound by an assumption of his predecessor in title. Equally surprisingly, none of the decisions consider the interaction between estoppel by convention and sections 27A(4) and (5) LTA 1985, which provide that:
- ‘(4) No application under section (1) or (3) may be made in respect of a matter which-*
- (a) Has been agreed or admitted by the tenant....*
- (5) But the tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment’.*

Agreement or admission by the tenant for the purposes of s.27A(4)

29. In **Cain v London Borough of Islington [2016] L. & T.R. 13** the tenant applied to the FTT to determine the reasonableness of service charges relating to a 12 year period under s. 27A LTA 1985. The FTT determined as a preliminary issue that the tenant was debarred under s. 27A(4) from making the application in relation to the first 6 years of the period on the basis that he had agreed or admitted the service charges and approach

to apportionment in dispute, the relevant considerations being (1) the fact that he had for many years made payment of the sums now being challenged without demur and had failed to challenge the sums claimed in previous proceedings before the Tribunal (2) the fact that he had made numerous requests for information from the landlord over the years and (3) the explanation that he gave the Tribunal for failing to make the application earlier (*'I did not want to waste anyone's time. Why should I waste the time of the Tribunal when Islington had the information but would just not provide it'*).

30. The Upper Tribunal dismissed the tenant's appeal, HHJ Gerald stating that, in order for there to be an agreement or admission on the part of the tenant *'the making of a single payment on its own, or without more, will never be sufficient: there must always be other circumstances from which agreement or admission can be implied or inferred. And those circumstances may be a series of unqualified payments over a period of time which, depending upon the circumstances, could be quite short, it always being a question of fact and degree in every case'*.
31. By way of illustration HHJ Gerald referred to the earlier decision in **Shersby v Greenhurst Park Residents Co Ltd [2009] UKUT 241 (LC)** in which agreement or admission on the part of the tenant was established from a combination of a series of payments over a period of time coupled with (a) substantial delay before challenge and (b) other proceedings in which the tenant had had the opportunity to challenge those elements which he later challenged.
32. The decision of HHJ Gerald in **Cain** indicates that s. 27A(4) is likely to be a more promising line of defence than estoppel by convention for a landlord faced with a s. 27A challenge from a tenant who has made payments for a number of years without protest. The breadth of the dicta in **Cain** suggest that that scenario could, of itself, allow for the inference of an admission (though I am unaware of a reported decision in which

a s.27A(4) defence has succeeded absent the additional factor of the tenant having failed to raise the issues complained of in previous proceedings against the landlord).

Statutory provisions limiting the landlord's ability to recover service charges

33. The starting point for the application of the statutory code in LTA 1985 is s. 18(1), which defines 'service charge' for the purposes of LTA 1985 as:

'an amount payable by a tenant of a dwelling as part of or in addition to the rent—

(a) which is payable, directly or indirectly, for services, repairs, maintenance or insurance or the landlord's costs of management, and

(b) the whole or part of which varies or may vary according to the relevant costs.'

34. 'Relevant costs' are defined in s. 18(2) as *'the costs or estimated costs incurred or to be incurred by or on behalf of the landlord, or a superior landlord, in connection with the matters for which the service charge is payable'*.

Reasonableness test

35. Section 19 LTA 1985 imposes a statutory test of reasonableness: relevant costs (namely the costs or estimated costs incurred by or on behalf of the landlord in connection with the matters for which the service charge is payable) will only be taken into account in determining the amount payable for a period to the extent that they are reasonably incurred and where they are incurred on the provision of services or the carrying out of works, only if the services or works are of a reasonable standard (s. 19(1)). The test extends to 'on account' payments (s. 19(2)).

Time limit for demanding payment

36. Where LTA 1985 applies, a service charge demand cannot include costs which are incurred more than 18 months before the demand for payment is served on the tenant, unless a written notice was given to the tenant during the 18 months beginning with the date when the costs were incurred, warning him that the costs were incurred and that he would, subsequently, be required to contribute to them through the service charge.
37. In **Gilje v Charlgrove Securities Ltd [2004] 1 All E.R. 91**, the tenant's liability in relation to service charge was stated to be discharged by '*the payment on account in each year of such a reasonable sum as the Lessor shall require such sum to be paid in advance by quarterly payments on the days herein before provided...*' and the lease went on to provide for a balancing payment to be made by the lessee within 21 days of demand in the event that the monies expended by the landlord in any year exceeded the sums paid on account. In respect of the accounting periods ending on March 25, 1999 and March 25, 2000, the landlord gave notice requiring payments on account in respect of those years based on anticipated expenditure for the period in question but did not supply accounts for the years in question until October 2001. Those showed that the amounts expended by the first defendant were less than the interim quarterly service charge demands for those years.
38. In upholding the decision of Master Price to reject the tenant's claim that, in consequence of s.20B, none of the sums demanded on account were payable, Etherton J held that s. 20B LTA 1985 has no application where (a) payments on account are made to the lessor in respect of service charges, (b) the actual expenditure of the lessor does not exceed the payments on account, and (c) no request by the lessor for any

further payment by the tenant needs to be or is in fact made. There was no ‘demand for payment’ after the incurring of costs to which s. 20B could apply.

39. **Gilje** was interpreted at first instance in **Skelton v DBS Homes (Kings Hill) Ltd [2018] 1 W.L.R. 362** as authority for the proposition that s.20B has no application to a demand for payment of estimated service charges on account of costs to be incurred in the future. However, the Court of Appeal confirmed that in light of the definition of service charge’ in s. 18(1) LTA 1985, s. 20B does apply to service charges in respect of costs to be incurred (‘on account demands’) as well as costs that have been incurred.
40. The tenant in **Skelton** held a long lease which required him to pay service charges on account but not until the landlord had prepared a written estimate containing a summary of the estimated service costs which it expected to incur or charge during or in respect of the accounting period which was about to begin and, within 14 days of preparation, served it on the tenant together with a statement showing the service charge payable by the tenant on account of those estimated costs. The demands for payment on account were not accompanied by the estimate of service charge costs required by the lease. An estimate covering the various periods in question was eventually supplied more than 18 months after the relevant costs were incurred. **Gilje** was distinguished on the facts as the demand was only validly served after the relevant costs were incurred, and so the tenant’s appeal succeeded.
41. Outside a **Gilje** scenario, where no demand is given within the 18 months period, the costs will only be recoverable if during that period a notice was given complying with s.20B. For this purpose, it is essential that the notice specifies the amount of the costs that have been incurred and that the tenant may be required to contribute to that amount, but it need not state the amount of the tenant’s contribution: **Brent London Borough Council v Shulem B Association Ltd [2011] 1 W.L.R. 3014**.

Landlord's address to be provided on the demands for service charge

42. Section 47(1) of the Landlord and Tenant Act 1987 (“LTA 1987”) provides that service charge demands must contain the name and address of the landlord and if that address is not in England and Wales, an address in England and Wales at which notices (including notices in proceedings) may be served on the landlord by the tenant. Where the demands do not comply with this requirement, ‘*any part of the amount demanded which consists of a service charge (“the relevant amount”) shall be treated for all purposes as not being due from the tenant to the landlord at any time before that information is furnished by the landlord by notice given to the tenant*’ (s. 47(2)).
43. In **Johnson v County Bideford Ltd [2013] L. & T. R. 18** the Upper Tribunal held that a landlord's failure to comply with the requirements of s. 47(1) LTA 1987 when serving invoices for service charge did not mean they did not constitute ‘demands’. When they were corrected with retrospective effect by later compliant demands, they could be taken into consideration for the purpose of the time limit under s. 20B LTA 1985. The ‘suspensory’ effect of s. 47(2) was confirmed in **Tedla v Cameret Court Residents Association Ltd [2015] UKUT 0221 (LC)**.

Provision of the landlord's address for the service of notices

44. Section 48 LTA 1987 provides that (1) a landlord of premises to which this part applies shall by notice furnish the tenant with an address in England and Wales at which notices (including notices in proceedings) may be served on him by the tenant and (2) where a landlord of any such premises fails to comply with subsection (1), ‘*any rent or service charge otherwise due from the tenant to the landlord shall...be treated for all purposes*

as not being due from the tenant at any time before the landlord does comply with that subsection’.

45. There is no prescribed form of notice that must be used for the purpose of s. 48(1). In **Rogan v Woodfield Building Services Limited (1995) 27 H.L.R. 78** the Court of Appeal held that the statutory notice must be in writing, but provided that an unqualified contact address of the landlord within England and Wales is provided within the lease agreement, there is no need for a separate notice to be served on the tenant. For the purposes of a corporation this address may or may not be its registered office. Further, the notice need not state that it is the address at which notices can be served. If no specific reference is made, the court is left to construe the documentary details, in the light of all the circumstances, to discover whether a reasonable tenant would have understood that notices can be served on the landlord at that address.
46. In **Drew-Morgan v Hamid-Zadeh (2000) 32 H.L.R. 316** the Court of Appeal held that a notice served for the purposes of s. 21 of the Housing Act 1988 sufficed for the purpose of s. 48(1).

Summary of the rights and obligations of tenants of dwellings in relation to service charges

47. Section 21B LTA 1985 provides that 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: the sanction for failure to do so is set out at s.21B(3), which provides that 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.

There is a prescribed form of notice to be found in the Service Charges (Summary of Rights and Obligations, and Transitional Provisions) (England) Regulations 2007¹.

48. As with s. 47 LTA 1987, the effect of s. 21B(3) is suspensory. In **Tingdene Holiday Parks Ltd v Cox [2011] UKUT 310 (LC)** the landlord had failed to send s.21B notices to the tenants of holiday chalets with the service charge demands issued in April 2008 and July 2009. The Upper Tribunal determined that the sums demanded at those times were not payable until the date in November 2009 when a further demand was sent, accompanied by a s. 21B notice. That cured the defect (where a s.21B notice sent by itself 11 days after the previous demand did not).

Consultation requirements

49. Section 20 LTA 1985 limits the ability of the landlord to recover contributions to the service costs from the tenants unless the relevant consultation requirements in relation to any ‘qualifying works’, ‘qualifying long term agreement’ or qualifying works under a long term agreement have been complied with. The requirements are to be found in the Service Charges (Consultation Requirements) (England) Regulations 2003 (‘the Consultation Regulations’).
50. ‘Qualifying works’ are ‘**works on a building or any other premises**’ – that is, works of repair, maintenance or improvement. Landlords must consult in accordance with Schedule 4 if qualifying works will cost over £250 per service charge year (including VAT) for any one contributing tenant. In **Phillips v Francis [2015] 1 W.L.R. 741** the Court of Appeal confirmed that s. 20 consultation should be applied to individual sets of qualifying works without reference to time periods or service charge years and

¹ Analogous regulations are in force in relation to Wales: the Service Charges (Summary of Rights and Obligations, and Transitional Provisions) (Wales) Regulations 2007.

provided guidance on what factors are to be taken into consideration in identifying a single set of qualifying works.

51. A ‘qualifying long term agreement’ is an agreement entered into by the landlord with a wholly independent organisation or contractor for a period of more than 12 months. Whilst this is not expressly stated, it is safest to assume that this would include ongoing contracts with no specific termination date. Landlords must consult in accordance with Schedule 1 where any one tenant’s total contribution resulting from the agreement, including VAT, exceeds £100 in the year. Examples of potentially qualifying long-term agreements include management or maintenance contracts and contracts in respect of utilities, cleaning and gardening and insurance. On the other hand, contracts that are **not** qualifying long-term agreements include contracts of employment, an agreement between a holding company and its subsidiary, or between subsidiaries of the same holding company and an agreement for less than five years which was entered into at a point when there were no leaseholders or leaseholders at the property.
52. Where the long-term agreement includes provision for the carrying out of works to the property (for example, a schedule of rates agreement for general maintenance), and these works will result in a charge to any one tenant of more than £250, then a separate consultation must be carried out under the provisions of Schedule 3 in addition to the original consultation under Schedule 1 in respect of the agreement itself. This requirement for consultation for works equally applies in cases of long-term agreements entered into prior to 31st October 2003 where at the time no consultation on the agreement was required.
53. Under s. 20ZA(1) LTA 1985, the FTT may dispense with the consultation requirements in a particular case ‘if satisfied that it is reasonable to dispense with the requirements’. Guidance in relation to the approach to be taken by the FTT to applications for

dispensation from landlords was provided by the Supreme Court in **Daejan Investments Ltd v Benson [2013] 1 W.L.R. 854**, in which the purpose of the Consultation Regulations was identified as being to ensure that tenants are protected from either paying for inappropriate works, or paying more than would be appropriate. In considering dispensation requests, the FTT should focus on whether they were prejudiced in either respect by the failure of the landlord to comply with the Regulations (relevant prejudice).

54. Whilst the legal burden is on the landlord throughout, the factual burden of identifying some relevant prejudice is on the tenants. They have an obligation to identify what they would have said, given that their complaint is that they have been deprived of the opportunity to say it. Once the tenants have shown a credible case for prejudice, the FTT should look to the landlord to rebut it and should be sympathetic to the tenants' case. Insofar as they will suffer relevant prejudice, the FTT should, in the absence of some good reason to the contrary, effectively require the landlord to reduce the amount claimed to compensate the tenants fully for that prejudice.
55. The power to grant dispensation is not 'all or nothing'. The FTT has power to grant dispensation on appropriate terms and can impose conditions on the grant of dispensation including a condition that the landlord pays the tenants' reasonable costs incurred in connection with the dispensation application.

Costs

56. The LVT was historically a no-cost regime and this has been carried through into the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 ('the 2013 Rules'). Under rule 13(1)(b) the FTT will only award costs in a leasehold case if one of the parties has acted unreasonably in bringing, defending or conducting proceedings.

57. Guidance on the FTT's discretion to award costs due to a party's unreasonable behaviour is to be found in the decision of the Upper Tribunal in **Willow Court Management Co (1985) Ltd v Alexander [2016] L. & T.R. 34**, in which Martin Rodger QC identified that the approach taken by the Court of Appeal in **Ridehalgh v Horsefield [1994] Ch. 205** as to what constitutes 'unreasonable' conduct is relevant for the purposes of s.13(1)(b) and that a sequential approach to an application under r.13(1)(b) should be adopted.
58. At the first stage the question is whether the person has acted unreasonably. At the second stage it is essential for the FTT to consider whether, in light of the unreasonable conduct it has found, it ought to make an order for costs or not. If so, the third stage is what the terms of the order should be. The issue of whether the party whose conduct is criticised has had access to legal advice will be taken into account at the first stage of the enquiry and may also be relevant, though to a lesser degree, at the second and third stages, without allowing it to become an excuse for unreasonable conduct.
59. In **Willow Court** the Upper Tribunal stressed that applications under r. 13(1)(b) should not be regarded as routine, should not be abused to discourage access to the tribunal and should not be allowed to become major disputes in their own right. They should be dealt with summarily, preferably without the need for a further hearing, and after the parties have had the opportunity to make submissions. Those submissions are likely to be better framed in light of the tribunal's substantive decision rather than in anticipation of it, and applications at interim stages or before the substantive decision should not be encouraged.
60. Potentially a more promising mechanism for the landlord seeking to recover their litigation costs in a service charge dispute is the lease itself. Many leases provide for the landlord's legal costs in managing the property to be rechargeable to the service

charge: whether this extends to the costs of proceedings in the FTT will depend on the precise wording of the lease.

61. Section 20C LTA 1985 enables a tenant to make an application to the FTT for an order that all or part of the costs incurred by the landlord arising from proceedings before the FTT are not to be included in the service charge, where the lease provides for the landlord's legal costs in managing the property to be rechargeable to the service charge.
62. In **Iperion Investments v Broadwalk House Residents Ltd (1996) 71 P. & C.R. 34** where costs of unsuccessful forfeiture proceedings had been awarded against the landlord, the Court of Appeal, having determined that the landlord's legal costs could be recoverable from the tenants as a whole by means of a service charge as a 'proper cost of management of the property', perhaps unsurprisingly exercised its discretion under s.20C LTA 1985 to direct that these costs be excluded from the service charge.

Emily Duckworth

Kings Chambers

25th May 2018

