



PROPERTY LAW
NUTS & BOLTS
SEMINAR SERIES

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Chambers」

Property Law Nuts & Bolts, Part 3: ‘Leasehold Service Charges – How they Work’ seminar

The recording can be accessed [here](#).

Programme:

- Introduction by Chair - Myriam Stacey KC
- Contractual machinery and valid demands – Katherine Traynor
- Service charge consultation requirements – Peter Sibley
- Section 27A applications – Admas Habteslasie
- Questions and discussion

Contractual machinery and valid demands

Katherine Traynor

Structure of Service Charge Provisions

***Arnold v Britton* [2015] UKSC 36:**

- No special rule of construction;
- Focus on the meaning of the relevant words;
- Consider the words in their documentary, factual and commercial context;
- Identify the parties' intention by reference to what a reasonable person with all the background knowledge would understand.

Contractual Machinery: Service Charges

- Service charge demand:
 - Are there any procedural provisions or pre-conditions to the tenant paying service charges?
 - ***Yorkbrook Investments Ltd v Batten* [1985] 2 EGLR 100**
- Interim payment on account?
- Time of the essence?
- Certification?
 - Conclusive or binding?

Valid Demands: S.47 LTA 1987

- S.47 LTA 1987 requires that a tenant **must** be provided with the following:
 - Landlord's name and address;
 - Landlord's actual address, or in the case of a company, the registered office or place of business: ***Beitov Properties Ltd v Martin* [2012] UKTU 133 (LC)**

NOTE:

- Director's name insufficient: ***Tripleroose Ltd v Grantglen Ltd & Cane Developments Ltd* [2012] UKUT 221 (LC)**
- Managing agent's address is **not** sufficient

Valid Demands: S.47 LTA 1987

S.47(2) LTA 1987, “suspensory only”, see ***Tedla v Cameret Court Residents Association Ltd* [2015] UKUT 221 (LC)**.

NOTE:

***Tripleroose Ltd v Grantglen Ltd & Cane Developments Ltd* [2012] UKUT 204 (LC)**:

“I echo the sentiments expressed by George Bartlett QC, as President, in Beitov Properties Limited v Elliston Bentley Martin that it is generally inappropriate for a tribunal to take a purely technical point (namely one that does not go to the merits or justice of the case) on the part of one side, when the issue has not been raised by a party in a party and party dispute.

Valid Demand: S.48 LTA 1987

- S.48 LTA 1987 requires:
 - a landlord to provide an address, which **must be** in England or Wales, at which notices may be served on them by their tenants or leaseholders.

Failure to properly comply with this provision results in rent or service charges demanded not being considered due: ***Dallhold Estates (UK) Property Limited v Lindsey Trading Properties Inc [1994] 1 E.G.L.R 93***

NOTE:

- Prevented from enforcing recovery.
- No prescribed form, but it **must** be in writing!

Time limit for making demands

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

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

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

Summary of rights and obligations

21B Notice to accompany demands for service charges

(1) A demand for the payment of a service charge must be accompanied by a summary of the rights and obligations of tenants of dwellings in relation to service charges.

(2) The Secretary of State may make regulations prescribing requirements as to the form and content of such summaries of rights and obligations.

(3) A tenant may withhold payment of a service charge which has been demanded from him if subsection (1) is not complied with in relation to the demand.

(4) Where a tenant withholds a service charge under this section, any provisions of the lease relating to non-payment or late payment of service charges do not have effect in relation to the period for which he so withholds it.

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

Summary of rights and obligations

NOTE:

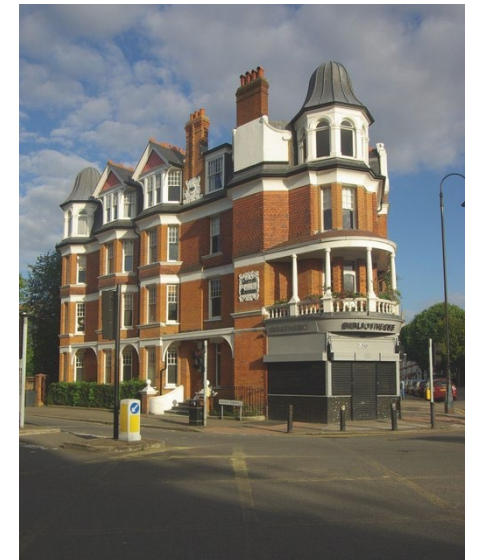
- Must be legible in a typewritten or printer form, at least font size 10pts.
- Must contain title “Service Chagres – Summary of tenants’ rights and obligations”
- ***Tudor Roberts v Countryside Residential (South West) Ltd*** – errors in font size, paragraph numbering and Welsh translation, held to be “trivial” defects.

Service charge consultation requirements

Peter Sibley

Key provisions

- Landlord and Tenant Act 1985 (as amended by the Commonhold and Leasehold Reform Act 2002)
 - s.19
 - s.20
 - s.20ZA
- Service Charges (Consultation Requirements) (England) Regulations 2003 (SI 2003/1987)
- Failure to comply?
 - Qualifying works - £250
 - Qualifying long term agreement - £100
- Purpose – s.19
 - *Daejan Investments Ltd v Benson* [2013] UKSC 14 at [52]



Qualifying works

- S.20ZA(2)
- *Paddington Walk Management Ltd v Peabody trust* [2010] L&TR 6
- S.20(3)
- Regulation 6
- *Phillips v Francis* [2015] 1 W.L.R. 741 at [36]



Qualifying long term agreement

- S.20ZA(2)
- Regulation 3
- S.20(4)
- Regulation 4



Consultation requirements

- Qualifying works and/or qualifying long term agreement
- Public notice
- Schedules 1 to 4
 - Schedule 1 – QLTA + public notice
 - Schedule 2 – QLTA + no public notice
 - Schedule 3 – QLTA + QW
 - Schedule 4 part 1 – QW + public notice
 - Schedule 4 part 2 – QW + no public notice



Schedule 4, part 2

- Notice of intention
 - Paragraph 1 to schedule 4 part 2
 - Regulation 2(1)
- Duty to have regard
 - *Waader v Hounslow LBC* [2017] EWCA Civ 45 at [38]



Schedule 4, part 2 – continued

- Estimates and response to observations
 - Landlord obtains estimates
 - Paragraph (b) statement
- Duty to have regard
- Duty on entering contract



Dispensation

- S.20ZA(1)
- *Daejan Investments Ltd v Benson* [2013] UKSC 14
- *Jastrzembski v Westminster City Council* [2013] UKUT 284
 - (i) whether, and if so to what extent, the tenant would relevantly suffer if an unconditional dispensation was granted
 - (ii) the factual burden is on the tenant
 - (iii) once the tenant has shown a credible case for prejudice, the [tribunal] should look to the landlord to rebut it
 - (iv) it is not sensible or convenient to distinguish between a serious failing and a technical, minor or excusable oversight, save in relation to the prejudice it causes
 - (v) the tribunal could grant dispensation on such terms as it thought fit

Conclusion

- Always consider whether consultation requirements are engaged.
- Refer to the schedules to the 2003 regulations.
- Dispensation may be granted if it is reasonable to do so.

Applications under section 27A of the Landlord and Tenant Act 1985

Admas Habteslasie

Introduction

- Two applications – under Tribunal’s broad discretion to determine a range of matters relating to recoverability of service charges in residential leases
- Part of statutory framework intervening in private law relations between (residential) landlord and tenant, broadly in favour of tenant
- Structure of talk:
 - A. *Background to s.27A*
 - B. *Preliminary matters*
 - C. *The two applications*
 - D. *Jurisdiction issues*
 - E. *Applications in practice*
 - F. *Costs*

A. Section 27A: background

- Provides for jurisdiction of Tribunal to determine two applications:
 - Whether a service charge is payable and related matters;
 - Where costs are incurred, whether a service charge would be payable for the costs and related matters
- Applications determined by First-tier Tribunal (Property Chamber) Residential in England, leasehold valuation tribunals in Wales
- Jurisdiction originally introduced (for predecessor leasehold valuation tribunals) by Part III Chapter I of the Housing Act 1996, entitled “*Tenants’ rights*” - also made provision for limiting power of forfeiture on basis of unpaid service charges

B. Preliminary matters (1) – meaning of “service charge”

- Only applies to residential properties – per s.18 LTA 1985:

“(1) In the following provisions of this Act “service charge” means 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 improvements 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.”*

- “Relevant costs” defined 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.”*

B. Preliminary matters (2) – statutory limits on recoverability

- Section 19 of the LTA 1985:

“(1) Relevant costs shall be taken into account in determining the amount of a service charge payable for a period—

*(a) **only to the extent that they are reasonably incurred, and***

*(b) 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;***

and the amount payable shall be limited accordingly.

*(2) Where a service charge is payable before the 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 by repayment, reduction or subsequent charges or otherwise.”*

B. Preliminary matters (2) – statutory limits on recoverability

- Per Lewison LJ in ***Point West GR Ltd v Bassi*** [2020] 1 WLR 4102 “*the 1985 Act overlays the lessee's contractual liability by the imposition of a cap*”.
- Tribunal approach to Reasonableness :
 - “reasonableness” should be read in its general sense and given a broad common sense meaning: ***Veena SA v Cheong*** [2003] 1 EGLR 175
 - Distinction between what is reasonable and what is reasonably incurred, which requires asking “*whether the action taken in incurring the costs and the amount of those costs were both reasonable*” (ibid)
 - Regard will be had to the terms of the lease
 - reasonableness of the demand has to be assessed by what is known at the time the Tenant's liability arises: ***Knapper v Francis*** [2017] UKUT 3 (LC)

C. First application - Section 27A(1)

“(1) An application may be made to the appropriate tribunal for a determination whether a service charge is payable and, if it is, as to—

- (a) the person by whom it is payable,*
- (b) the person to whom it is payable,*
- (c) the amount which is payable,*
- (d) the date at or by which it is payable, and*
- (e) the manner in which it is payable.*

(2) Subsection (1) applies whether or not any payment has been made.”

C. Second application – section 27A(3)

“(3) An application may also be made to the appropriate tribunal for a determination whether, if costs were incurred for services, repairs, maintenance, improvements, insurance or management of any specified description, a service charge would be payable for the costs and, if it would, as to—

- (a) the person by whom it would be payable,*
- (b) the person to whom it would be payable,*
- (c) the amount which would be payable,*
- (d) the date at or by which it would be payable, and*
- (e) the manner in which it would be payable.”*

D. Jurisdiction issues: general/courts

- Statutory tribunal(s) – extent of jurisdiction is a question of statutory interpretation of relevant provisions. *"the jurisdiction exercised by the FTT is statutory. It has no inherent power to determine any question."* **Cain v London Borough of Islington** [2015] UKUT 0117 (LC) at [15].
- Tribunal's jurisdiction is in addition to that of any court: section 27A(7)
- No application may be made under 27A(1) or (3) in respect of a matter that has been the subject of determination by a court: section 27A(4)(c)

D. Jurisdiction issues: agreements (1)

- No application may be made under 27A(1) or (3) in respect of a matter which has been agreed or admitted by the tenant

- BUT:
 - But the tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment: section 27A(5)
 - Agreement that purports to provide for a determination in a particular manner, or on particular evidence of any question which may be the subject of an application under subsection (1) or (3) is void: section 27A(6)

D. Jurisdiction issues: agreements (2)

- ***Aviva Investors Ground Rent GP Ltd v Williams*** [2021] 1 W.L.R. 2061
concerned a lease under which service charge was calculated on basis of a fixed percentage of the category of costs *“or such part as the Landlord may otherwise reasonably determine”*
- Court of Appeal held that:
 - Provision constituted an agreement as to the “particular manner” in which the amount of service charge is to be determined, contrary to s.27A(6)
 - Landlord must be deprived of their role in making the determination
 - *“the lease should be read as if it had provided for the fixed percentage “or such part as ... may otherwise reasonably determine.” If further slight linguistic adjustment is needed to make grammatical sense, so be it. On that reading, there is a vacuum to be filled, and it is filled by the FTT. “*

D. Jurisdiction issues: arbitration agreements

- Previously disputes covered by arbitration agreements were excluded from Tribunal's jurisdiction
- As of 2004 (i.e. in its current form as introduced by Commonhold and Leasehold Reform Act 2002), only an arbitration agreement entered into *after* a particular dispute has arisen excludes the Tribunal's jurisdiction (sections 27A(6) and 38)
- Definition of an 'arbitration agreement' is found in Part I of the Arbitration Act 1996

E. Section 27A applications in practice (1)

- Application is made by filling out and submitting **Form Leasehold 3**, available on gov.uk website or by a google search
- Fee of £100 for making the application, £200 on notice of hearing date
- On receipt, applicant will be sent an acknowledgment and respondent/any person significantly affected by the application will be served by Tribunal

E. Section 27A applications in practice (2)

- Tribunal will decide whether to deal with case:
 - on the papers or by a hearing
 - If by a hearing, on ‘Fast Track’ or ‘Standard Track’
- Fast track: cases that are “very simple” and will not generate significant amount of paperwork or argument
- Standard track: all other cases

E. Section 27A applications in practice (2)

- Tribunal may order a Case Management Conference (i.e. in standard track case), where directions made and attempt to identify areas of agreement and narrow the issues
- Directions will normally provide for statements of case, then disclosure and witness statements - direction for Scott Schedules common
- There is quite a bit of variation in practice and procedure can be 'loose' – nb ability to make an application for Tribunal to make directions under Rule 6 of Tribunal Rules, particularly where Tribunal has omitted to order disclosure/proper statements of case

E. Section 27A applications in practice (3)

- Burden is technically on the landlord to establish reasonableness but, in practice, the tenant has to provide some evidence of unreasonableness at least as a starting point:

“... it is well established that a tenant's challenge to the reasonableness of a service charge must be based on some evidence that the charge is unreasonable. Of course, the burden is on the landlord to prove reasonableness, but the tenant cannot simply put the landlord to proof; he or she must produce some evidence of unreasonableness before the landlord can be required to prove reasonableness.”

Wynne v Yates [2021] UKUT 278 (LC) per Judge Elizabeth Cooke at [11]

F. Section 27A applications – costs (1)

- In general - ‘no costs’ jurisdiction – ordinary rule that winner pays loser’s costs does not apply
- First-tier Tribunal can only make a costs order (so far as relevant here)
 - For unreasonable conduct
 - Wasted costs
 - Where statute or contract specifically provides for the same
- See rule 13 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013

F. Section 27A applications – costs (1)

- As to contractual costs, Tribunal has two relevant powers to limit ability of landlord to recover costs:
 - Via service charge
 - Via administrative charge

F. Section 27A applications – costs (2)

- Recovering costs under the service charge - Section 20C of the LTA 1985 – Tribunal power to order that costs of proceedings incurred or to be incurred should be disregarded in determining the amount of the service charge payable by the tenant – Form Leasehold 3 includes a box asking whether such an application is sought

“The obvious circumstance which Parliament must be taken to have had in mind in enacting section 20C is a case where the tenant has been successful in litigation against the landlord and yet the costs of the proceedings are within the service charge recoverable from the tenant.” “the landlord should not get through the back door what has been refused by the front”

See ***Iperion Investments v Broadwalk House Residents Ltd*** (1995) 27 H.L.R. 196

F. Section 27A applications – costs (3)

- Administrative charge – in essence costs payable by a tenant individually
- defined in para. 1 of Schedule 11 as “*an amount payable by a tenant of a dwelling as part of or in addition to the rent which is payable, directly or indirectly..... (c) in respect of a failure by the tenant to make a payment by the due date to the landlord or a person who is party to his lease otherwise than as landlord or tenant, or (d) in connection with a breach (or alleged breach) of a covenant or condition in his lease.*”
- See also “variable administrative charges” per para. 2

F. Section 27A applications – costs (3)

- Statutory power (as of April 2017) in paragraph 5A of Schedule 11 to Commonhold and Leasehold Reform Act 2002 to reduce or extinguish administration charge:
 - “(1) A tenant of a dwelling in England may apply to the relevant court or tribunal for an order reducing or extinguishing the tenant's liability to pay a particular administration charge in respect of litigation costs.*
 - (2) The relevant court or tribunal may make whatever order on the application it considers to be just and equitable.”*
- Litigation costs defined as “costs incurred, or to be incurred, by the landlord in connection with proceedings” which include proceedings in the First-tier Tribunal

F. Section 27A applications – costs (3)

- Para. 5A – “*court or tribunal may make whatever order on the application it considers to be just and equitable*” – very wide discretion – Tribunal likely to look at outcome and conduct of landlord
- Upper Tribunal in ***Avon Ground Rents Limited v Sarah Louise Child*** [2018] UKUT 204 (LC) considered how discretion might have been exercised:

“it may well be that those bodies would have considered it “just and equitable” to reduce the Respondent’s contractual liability to pay the legal costs that the Appellant had incurred in relation to that litigation to an amount which was proportionate to the sums in dispute, the issues involved and the level of representation appropriate to deal with those matters (and not simply by reference to whether costs had been incurred reasonably and were reasonable in amount)”

Key points

- s.27A applications comprise significant proportion of disputes in Tribunal
- Application made by Form Leasehold 3, available online
- Broad discretion to determine a range of matters relating to recoverability of service charges in residential leases:
 - 27A(1) – whether service charge is payable and related matters
 - 27A(3) – whether service charge is payable for costs incurred
- Tribunal's jurisdiction is very broad and landlord is unlikely to be able to retain a discretion as to the service charge amount (subject to SC)
- Tribunal's approach to 'reasonable' = broad, common-sense discretion
- In practice, tenant has to provide some evidence of unreasonableness
- In general, no costs jurisdiction

Thank you for listening

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