

Introduction to leases and recovery of service charges

These materials and slides are intended for guidance only and not as a substitute for legal advice or using formal reference documents such as current legislation and case law

Programme for the day

- Understanding the concept of a lease
- Navigating your way around a lease
- Transfer of freeholds
- Service charges
- S20 consultation
- Payability of service charges
- Miscellaneous
 - FTT
 - Ground rent
 - Repairs v Improvements
 - Lease extensions
- Recovery of service charges
- Forfeiture.

What is a 'leasehold'

- Tenure is the relationship between tenant and landlord, not between tenant and land – from when the Crown held the land in its own right ie, the owner of the land
- Land tenure is the name given to the legal framework in which land is owned by an individual. Tenure –French verb 'tenir' = to hold
- Leasehold is one type/form of land tenure or property tenure. Think Freehold/Commonhold ??
- Leasehold = **buying the right to occupy land or a building for a given length of time**
- A **lease** is a contractual arrangement whereby the lessee (user) pays the lessor (owner) for use of an asset.

What is a 'leasehold' ...(cont'd)

- Leasehold ownership – means a long tenancy – the right to own (*hold*), occupy and use a flat for a long period known as the 'term' of the lease. Usually 99/999/125 years
 - A diminishing asset
- Technically therefore a leaseholder is a tenant.

Difference between tenants and leaseholders?

	Tenant	Leaseholder
Contractual/enforceable arrangement	Tenancy agreement	Lease
Term (length)	Weekly/monthly	Up to 125 years usually, can be extended by a further 90 years (soon to be 990yrs)
Security of tenure	NoSP/NTQ for breaches	Forfeiture for breaches – in theory
Repairing obligations	Minimal	Full
Sub-letting	Not allowed	Can except for shared owners/HomeBuy

Difference between tenants and leaseholders? ...(cont'd)

	Tenant	Leaseholder
Alterations/improvements	Restricted	Restricted – licence or written approval, fees applied, possible lease variations
Moving on/out	Via Housing provider/ALMO/ council	Open market/Housing provider Lease restrictions
Payment of charges	Rent and service charges	Rent (shared owners, HomeBuy), service charges, ground rent
Major works (repairs to structure)	No direct payment.	S20 consultation (>£250) required

Leasehold management

- Types of leases
 - Flats purchased under RTB, RTA, etc
 - Shared ownership flats/houses
 - Fixed equity – 80/20, 70/30
 - Other long term leases – for a term of more than 21 years
- And then there are:
 - Head leases
 - Under-leases
 - Tripartite leases.



The importance of the lease

The framework which controls the relationship between registered social landlords and leaseholders/tenants in relation to service charge is determined by:

- **The lease**
- Common law – court decisions
- Statutory provisions.

Main lease terms

- Although there is no standard wording, layout, or required order of clauses in a lease, there are **main lease terms** that should always be present
- These cover the core issues that can lead to disputes between lessees and landlords in management and it is essential to good management to know what these are so that they can be located for each lease being managed
- Land Registry Prescribed Clauses from **19 June 2006**
- Just because you may manage one building, you cannot presume all the leases will say the same thing.

Main features of a lease

- Parties
- Land registry details
- Term
- Definitions
- Area granted/plan
- Covenants and schedules (rights and obligations)
- Exclusive possession/quiet enjoyment.

Format of a lease – where to look to find what you need

Particulars:

- Parties to the lease
 - The person or organisation granting the lease = lessor. Will be the landlord or the freeholder
 - The person or organisation buying the lease = the lessee
- Postal address
- Market value
- Initial percentage – if a shared ownership lease
- Specified proportion – % contribution of service charges
- Gross and specified rent – if a shared ownership lease.

Format of a lease – where to look to find what you need ...(cont'd)

Particulars:

- The term – length of lease
- Ground rent
- Review date of rent
- Commencement date... of lease.

Commencement date of the lease

- Commencement date may not coincide with the date the lease is signed
 - A development will have all leases dated the same but sales may not take place on all units simultaneously
 - When calculating length of lease use the commencement date indicated in the 'habendum' of the lease. Latin term – to have/to hold
 - Look for words similar to:

“TO HOLD the Demised Premises unto the Tenant from the First Day of September One thousand nine hundred and ninety eight for the term of NINETY

NINE YEARS” to calculate how many years remaining.

- Co-terminus – Schedule Para 12(3) Housing Act 1985 – ‘may’ be for term to end simultaneously with other leases granted in same building

Format of a lease – where to look to find what you need

- Definitions, for example
 - Demised premises – what is being sold? May include parking/shed/garden, etc
 - Common parts
 - The building
 - The estate
 - The term
- Lessor covenants (promises/undertaking to do or not do something): presented as a schedule or not
- Lessee covenants (promises/undertaking to do or not do something): presented as a schedule or not.

Landlords (lessor) covenants

For example:

- To maintain, repair and redecorate the main structure and common parts of the building
- To insure the building
- To collect and account for service charges
- To give the leaseholder “quiet enjoyment” of the demised property
- To enforce covenants against other leaseholders.

Lessees covenants – typically

- Positive covenants: for example,
 - To pay rent
 - To pay service charges
 - To pay rates, taxes and similar charges imposed upon the demised property by central and local government
 - To pay costs relating to notices under Section 146 of the Law of Property Act 1925
 - To give the landlord notice of any sale, mortgage or letting of the property
 - To repair and decorate internally
 - To permit access to the landlord for repairs or inspection.

Lessees covenants – typically ...(cont'd)

- Restrictive covenants ('not to rules'): for example,
 - Not to make any structural alteration
 - Not to do anything which might render buildings insurance void or voidable
 - Not to cause nuisance or annoyance to other residents
 - To observe regulations (generally by reference to a schedule).

Format of a lease – where to look to find what you need

- Schedules;
 - Easements – There must be two pieces of land in different ownership for an easement to arise
 - The land which enjoys the right over another's land – the 'dominant tenement'
 - The land over which the easement is exercised – the 'servient tenement'
 - Easements (a right over land), Rights and benefits/privileges for the tenant:
 - Right of access across the land (coloured on the lease plan)
 - Right of free passage of water/electricity/gas through drains/conduits
- Leasehold land = dominant tenement
- Landlords or sometimes a neighbours land = servient tenement.

Format of a lease – where to look to find what you need ...(cont'd)

Schedules, continued

- Exceptions and reservations for the benefit of the landlord, for example:
 - Right for contractors to enter to carry out work
 - Right to sell or construct on any part of the adjoining land
- Restrictive/positive covenants (rules) and stipulations – covenants may form part of the text of the body of the lease.
- Demised premises – more detailed description to include whether doors, door frames, windows and window frames are included.

Format of a lease – where to look to find what you need ...(cont'd)

- Schedules – continued
 - Service charges – financial year, frequency of payments, apportionments, whether there is a reserve fund, how surplus/deficits dealt with
 - Items of expenditure – a list of services being provided and the costs of which will be included in the service charge
 - Assignment– notice period, pre-emption, fees payable
 - Schedules specific to shared ownership – staircasing, re-sale

Lease plan

- The flat/house – the demised premises
- The building – proportion of costs payable?
- The estate – proportion of costs payable?
- The common parts – drying area/bin store/parking space.

Key clauses and why?

- Parties to the lease – data protection, LR, Deed of Covenant
- Demised premises – look at definition/description. Helps understanding responsibility for repairs
- Repairing responsibilities of both parties
- Definition of the financial year – third-party managing agents often have different FY
- When is payment due and when is the account considered to be in arrears?
- How are credits and debits treated at year end?
- Shared ownership rents – when due, review date, how calculated?
- Ground rent – review period.

Key clauses and why? ...(cont'd)

- Improvement/to improve: by landlord
- ASB: impact on insurance
- How notices are deemed to be served: S20 Notices
- Who can approve/audit/certify the accounts
- Insurance – who is responsible?.

Helpful clauses for day to day management

- Income recovery:

'To pay all costs charges and expenses (including solicitors costs and surveyors fees) incurred by the Lessor for the purpose of or in contemplation of the preparation and service of a notice under Section 146 of the Law of Property Act 1925....' **NB: not if lease says 'costs incidental to' – Tower Hamlets v Khan 2022 EWCA**

- Control of ASB/nuisance:-

'Not to do or permit to be done any act or thing which may render void or voidable any policy of insurance on any flat in or part of the Building or may cause an increased premium to be payable in respect thereof'
and...

Helpful clauses for day to day management ...(cont'd)

- To provide carpets or, subject to obtaining the Landlords prior consent...such other suitable floor coverings to the floors of the Premises.

Particular covenants relating to use and conduct

- Lease terms with regard to use and occupation should be unambiguous for ease of management and for it to become enforceable
- Leaseholders/prospective purchasers should be clear about their responsibilities – but often they are not!
- An organisations policies and processes should make leaseholders aware of what action will be taken if there are breaches of the terms of the lease, ie, people not living by the 'rules'
- Rules are the covenants within the lease.

Particular covenants relating to use and conduct ...(Cont'd)

- Often contain covenants to regulate some behaviours/actions
 - User – restriction on 'use' of the premises eg, positively restricting to residential only, or setting out uses that are prohibited eg, 'not to use for commercial purposes'
 - Alienation – eg, cannot assign or sub-let the whole of the premises or part – may also be subject to a requirement for landlords consent
 - Conduct – again a restriction on use, but relating to the conduct of the tenant and will reference other covenants eg, no nuisance, immoral/illegal use, noise.

Nemcova v Fairfield Rents Ltd [2016]

Facts of the case:

- Fairfield = Freehold owner of residential block
- Ms Nemcova = leaseholder of one of the flats, with 99 year lease; granted 1998
- Fairfield allege breach of covenant:
 - 'Not to use the demised premises or permit them to be used for any illegal or immoral purpose or for any purpose whatsoever other than as a private residence'
 - 'Not to do or permit to be done any act or thing in or upon the Demised premises or any part of the Property which may be or grow to be a damage nuisance or annoyance to the Lessor or the Company or any occupiers of other flats in the Property or to occupiers of any neighbouring or adjoining Property'
 - 'Not to do or permit to be done any act or thing in or upon the Demised Premises or any part of them or any part of the Property or may operate to increase the premium payable in respect of it or them'.

Nemcova v Fairfield Rents Ltd ...(cont'd)

- Further – the lease restricted alienation; Ms N obliged not to assign, underlet or part with possession of the flat in the last seven years of the term without the landlords prior consent
- Ms N had granted a series of short-term lettings of the flat; advertised on line via various short-term letting companies, up to a period of 90 days in the year. Guests stayed three to four days
- Ms N defence – advised she stayed at the flat three to four days a week, for approx eight hours each visit/paid the council tax and utility bills/remained her main residence although empty for 75% of the year as felt intimidate by neighbours
- Ms N argued:
 - No positive obligation obliging her to live at the flat
 - No express restriction on sub-letting (other than in the final seven years)
 - No prohibition on business use
 - Private residence user covenant no breached as was being used as that but by someone else.

Nemcova v Fairfield Rents Ltd ...(cont'd)

- FtT rejected Ms N argument
- What did the Upper Tribunal say about the issue of use as a private residence?
 - Lease 'operates to prohibit all uses save as a private residence
 - Contemplates that persons other than the lessee may use the premises
 - Thus an occupier who has been lawfully allowed into occupation of the premises may use the premises as a private residence without Ms N breaching the lease
 - The clause states that the premises are to be used as 'a' private residence and not 'the' private residence of the lessee. Use of the indefinite article is significant
 - However, what amounts to 'private residence' is that there is a connection between the occupier and the residence such that the occupier would think of it as his/her residence. (Albeit not without limit of time) ie, the occupier must be using it as his/her private residence.

Nemcova v Fairfield Rents Ltd ...(cont'd)

- The tribunal went on to say:
 - The reason the occupier is occupying is not decisive. Someone may take accommodation but while working in an area or on holiday eg, people occupying via Airbnb
 - The duration of the occupancy is material:
 - 'For it to be used as an occupiers private residence there does need to be a degree of permanence...beyond being there for a weekend or a few nights in the week. The problem (where the person occupies for a matter of days and then leaves) is that the occupation is transient, so much so that the occupier would not consider the property they are staying in as being his/her private residence...'
 - Thus the Tribunal concluded that 'very short lettings (days and weeks rather than months) breached the covenant in question.

Relevance of the cases mentioned

- Each lease turns on its own terms
- Each case will be fact specific
- Nemcova can be followed if lease contains same wording; but if not has limited or no assistance
- Nemcova does not mean that every short-term sublet via Airbnb type sites amounts to a breach.

Mapping leases

Why – efficient:

- Saves time having to re-read the lease
- Assists officers in dealing with issues/enquiries
- Assists officers in managing the tenancy.

Mapping leases ...(cont'd)

- What to 'map'/record?
 - Term of the lease
 - Initial percentage equity purchased – for shared owners only
 - Financial year
 - Payment intervals
 - Management fee clause
 - Method of apportionment
 - Is there a reserve fund clause
 - Repairing responsibilities – particularly window frames
 - Is there reference to costs of improvements
 - Ground rent review dates
 - Service of documents – refers to notices under the lease only
 - Other unusual clauses – eg, requirement to have a Gas Safe certificate.

Mapping leases ...(cont'd)

Consider the contractual position

- What does the lease say?
 - What are the obligations upon the landlord?
 - What does the lease say is payable by the tenant?

Scenario 1.

A tenant in the building has emailed the organisation complaining about noise nuisance from the leaseholder flat above; *'sounds like a herd of elephants running around up there'*.

Having looked at the lease, what do you do?

The lease

- Do not assume you can fully recover all expenditure
- Ambiguities of the lease can be construed by the courts narrowly and in favour of a tenant
- Consider:
 - Contractual provision for calculating the service charge
 - Are the services or works those which a tenant must pay for or contribute towards? – S19 LTA '85.
 - If you are not sure if particular costs incurred are recoverable under the terms of the lease – probably they are not.

Management fees

- Leases – can confuse/be silent – Nellie Hamilton v L B Of Brent
- Management fee for leaseholders – all costs of management, including costs of managing the services
- Management fees can be a contentious area
- Covers the offices, salaries, national insurance, pensions and staff training of the landlord. They also pay for everything else associated with running an office
- **No** statutory guidelines when it comes to what landlords can charge for their services – but S19 LTA '85 applies – reasonable.
- Fees charged should depend on not just the size and type of property but the range of services that the landlord is required to provide
- Percentage add-on – not favoured by RICS, ARHM, FtT !
- Leaseholders can challenge the 'reasonableness' and payability of the fee (s27A LTA85) at a tribunal.

Scenario 2

You have issued the service charge estimates for the year and a new leaseholder has contacted you to ask what the management fee covers. How do you respond?

Sinking funds /reserve funds

- Sinking funds (replacement provision) – are a pool of money collected to build up sums for expenditure incurred only once or twice during the course of a lease as the building ages, such as replacing windows, roofs, lifts or central heating systems
- Sinking v Reserve funds – terms have become interchangeable over the years
- Standard HCA (former Housing Corporation) leases include a provision, other leases vague
 - 'To pay...costs...of any services incurred or to be incurred by the Lessor'
- Advantages – equalises costs over a period of time
- Disadvantages – cumbersome to manage particularly RTB funds and require review
- Periodic review – materials/life cycles change
- Must provide/issue a statement of funds held with S21 summary.

Scenario 3.

Your organisation is planning major works on a building and at the same time wants to install a door entry system.

You have been asked by your asset team whether all of the costs can be recovered from the leaseholders within the building.

Having checked the lease how will you respond to this query.

Lease variation

The basics:

- Cannot be varied without consent of both parties
- In some cases, by application to the First Tier Tribunal (Property Chamber)
- Landlord cannot change or stop providing services which he is obliged to provide under the Lease (see above)
- Vary lease by deed.

Varying the lease – how?

- S35 – 40 Landlord and Tenant Act 1987
 - S35 – for variation of a lease of a flat where it fails to make management easy or service charges do not add up to 100%
- S36 – for a corresponding variation to other flat leases following an application by a party to a lease under S35
- S37 – for variation of two or more flat leases not necessarily in the same building to achieve a common objective
 - Supported by minimum number of parties – where nine or fewer dwellings
 - All but one of the parties must agree – where eight or more dwellings
 - 75% of parties must consent; and
 - No more than 10% objecting
 - The landlord constitutes one of those parties.

Extending the lease - currently

- 125-year RTB leases created in 1980 – 83 years to run
- 99-year former shared ownership leases in 1987 – 64 years to run
- Must have owned property for at least two years
- Statutory right:
 - Housing and Leasehold Reform Act 1993 (CLRA2002 amends)
 - Extend term by a further 90 years
 - Peppercorn rent
 - Right of appeal to FTT
- Policy to allow shared owners to extend – non statutory route
 - Can extend by a further 90 years – consistency
 - Can introduce a higher ground rent, eg, £300pa
 - No right of appeal
 - Opportunity to re-draft the lease.

Extending the lease – proposed/imminent changes

- No requirement to have owned for 2 years
- 990 yr extension
- Peppercorn rent
- No Marriage value
- Limited admin fees.
- Requirement to notify leaseholders of proposed changes.

Scenario 4

There has been consultation recently regarding the leasehold tenure including the costs and restrictions around lease extensions. The leaseholder is concerned and has asked you to confirm how many years term is unexpired on his/her lease?

How do you respond?

Freehold transfers (where the sale is freehold)

- Historical position on sale of freeholds – ‘once upon a time...’
- Service charge sometimes referred to as estate charge should be included in the transfer
- Fixed charge
- Jurisdiction of reasonableness not with FTT
- No protection of the LTA’s.

Service charges

Statutory control of service charges main legislation

- Landlord and Tenant Act 1985
- Landlord and Tenant Act 1987
- Commonhold and Leasehold Reform Act 2002 (amended parts of the above Act).

Statutory control of service charges

S18 Landlord and Tenant Act 1985 (as amended)

- Does not relate to commercial property
- Relates to 'variable' not 'fixed' service charges
- No definitions for fixed service charges.

Service charges

- A landlord who provides a service for the benefit of tenants, and in doing so incurs reasonable expenses, should be entitled to recover those expenses from the tenant **OR** The service charge is designed to allow the landlord to collect funds for the payment of those services the landlord must provide to the lessee in the lease
- Typically these may cover maintenance and utilities of common parts, the structure of the building and buildings insurance
- The lease will specify what the service charge liability is and how it is apportioned. This could be as varied as 'a reasonable percentage' or a specified percentage
- The lessee has no obligation to pay anything other than what is provided for in the lease, therefore whatever the justification of the action, you cannot recover the costs unless the lease entitles you to do so. You can only successfully pursue a lessee for arrears of service charges if you have successfully cleared all of the 'payability' hurdles.

Section 18 Landlord and Tenant Act 1985

- (1) ...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 cost of management**; and
 - b) The **whole or part** of which **varies or may vary** according to the **relevant costs**.

Section 18 Landlord and Tenant Act 1985 ...(cont'd)

- (2) "The **relevant costs** are 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".

Key definitions

- *Service charge* is defined so that it refers only to “services, repairs, maintenance, improvements or insurance or ... management”. **If the cost of anything else is covered by the service charge clause in the lease, that cost can be included in the service charge without the constraints of the LTA 1985 being applied to that particular cost.**

Section 19 Landlord and Tenant Act 1985

Reasonableness:

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

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

Payable in advance?

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

Reasonable?

Consider:

- Are the landlords actions reasonable?
- Are amounts charged reasonable?

Garside v RFYC Ltd [2011] UKUT

Waler v Hounslow LBC [2015] UKUT

Reasonableness

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

Section 20

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

Section 20 ...(cont'd)

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

Consultation – five sets/routes

The regulations:

- Qualifying long term agreements where no public notice is required.
 - Schedule 1
- Qualifying long term agreements for which a public notice is required
 - Schedule 2
- Qualifying works under qualifying long term agreements
 - Schedule 3
- Qualifying works not under a qualifying long term agreement:
 - Schedule 4 (1) – works for which a public notice is required
 - Schedule 4 (2) – works for which a public notice is not required.

Consultation

www.lease-advice.org

Repairs – of leaseholder

Usually but not always:

- Responsibility as if owners
- Internal plumbing/plasterwork/floorboards
- Not structure
- Fixtures/fittings/internal windows and doors/glazing/ bath/sink
- Pipes for gas/electric/water if only service leaseholder's home

Check the lease

Repairs – of the freeholder

- Structure and exterior
- Common parts
- Recover costs through service charges
- Can't refuse repair despite non-payment by leaseholder/ tenant.

Improvement vs repairs

- Check lease document includes improvements
- Application to FTT for determination.
- Improvement v repair?
 - Some case law
 - No definition
 - Replacement with current day materials
 - To provide a facility/feature that did not exist previously
 - Must be able to demonstrate cost saving over the life of improved replacement.

Repair v Improvement

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

Payability

General principles:

- Contemplated under lease does not make it automatically reasonable to incur costs. *Waller v Hounslow*
- Fact that it is reasonable to have a service does not automatically mean that the costs associated with the service will be reasonable
- Doesn't have to be the cheapest but can't be grossly out of line with market norms
- Would landlord have chosen method of repair if he was paying for repair himself.

Payability – limitation

Limitation of service charges:

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

For the landlord

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

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

Payability – Demands for payment

- S48 Landlord and Tenant Act 1987
 - No rent or service charge will be due unless the Landlord has served upon the Tenant a written notice giving an address in England and Wales at which notices can be served by the Tenant upon the Landlord
- S47 LTA '87
 - No service charge will be due unless the demand includes the name and address of the Landlord. And if the address is not in England and Wales to also provide an address in England and Wales where notices can be served upon the landlord
- Sums not due until notice is given
- No special wording is required.

Payability – Section 21B Landlord and Tenant Act 1985

- The service charges (summary of Rights and Obligations, and Transition Provisions) England) Regulations 2007
- Summary of Rights and Obligations

'10 points'

Payability – Section 20B Landlord and Tenant Act 1985 ...(cont'd)

Time limitation on demands

- (1) If any of the relevant costs were incurred more than 18 months before a demand for payment is served on tenant, then subject to (2), tenant shall not be liable

Burr v OM Property Management Ltd [2013] EWCA Civ479
'cost incurred'.

Payability – Section 20B Landlord and Tenant Act 1985 ...(cont'd)

- (2) Subsection (1) **will not apply if**, within the period of 18 months, beginning with the date when the relevant costs were incurred, the **tenant was notified** in writing that the costs had been incurred and he would subsequently be required to pay

There is no prescribed S20B Notice, however...refer to LB Brent v Shulem B

- Must state costs incurred to date/estimate if not known
- That an invoice will be sent in due course.

Section 27 – Landlord and Tenant Act 1985

Disputes

- Service charges to which S.18 apply
- Allows the **landlord or tenant** to apply to the First Tier Tribunal (property tribunal) for determination, as long as the **tenant has not already admitted the costs** or been determined by the court.

Section 27A Landlord and Tenant Act 1985

- FTT (PC) has jurisdiction to determine:
 - Who has to pay?
 - Who is to receive payment?
 - How much?
 - When is payment to be made?
 - How is it to be paid?
- Can be requested in **advance** of demands – useful tool.

First Tier Tribunal (Property Chamber) consideration

- When determining the above it can consider:
 - Test of reasonableness
 - Terms of the lease
 - Other statutory limitations
- This does not allow the FTT (Property Chamber) to change the dates for payment as set in the lease.

No application can be made which

- The tenant has agreed or **admitted** (paying the demands is not admitting)
- Has, or will be **referred to Arbitration** following agreement after the dispute arose
- Has been decided by a **court**.

FTT

- Consideration of cases:
 - Transferred from County Court
 - Hearing
 - Without a hearing (on papers)
 - Preliminary hearing
 - Fast track – (aim to deal ten weeks)
 - Standard track
 - Emergency hearings.

Social housing common application

- Service charge arrears
- Reasonableness of service charges
- Service charge generally
- Consultation – (S20).

Limitation of service charges: Landlord's costs Section 20C 1985 Act

- It is common in residential leases for the landlord's legal costs in managing the property to be rechargeable to the service charge
- These costs can include the costs of court or FTT actions, whether started by the landlord or the tenant
- Section 20c of the Landlord and Tenant Act 1985 Act enables a tenant to make an application 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 charges
- The FTT will review the evidence presented before making whatever order it considers just and appropriate in the circumstances.

Case study

Apportionment of costs

- Check what the Lease says
- Cannot change the apportionment calculation unless the Lease allows this

“Even if it is fair and reasonable to do so”
Kelsall v London Borough of Islington (2006).

Common methods of apportionment

- Fixed percentage for each property
- Provision for the proportion to be determined by Landlords surveyor
- Percentage – ‘fair proportion’ or ‘reasonable proportion’
- Floor space

Changing apportionment calculation?

- With consent of each tenant
- Application to court (if cannot reach agreement).

Scenario 5

A tenant has applied for the RTB. The lease is the standard lease adopted by the Council. You invite the tenant to meet with you so that you can outline key clauses with regard to service charges. What schedule/clause stipulates:

1. What proportion of the costs he/she will be required to pay?
2. What costs are included in the service charge?
3. When is the financial year?
4. When is the service charge payable?

Ground rent

Leaseholder only liable to pay when receives:

- Formal demand – S166 CLRA 2002
- In writing
- 'Notes for leaseholder'
- 30/60 days time scale – date for payment given in the notice cannot be earlier than 30 days from the date notice is given, and not more than 60 days after that date. And the date for payment cannot be earlier than the date set out in the lease itself
- Period to which it relates
- Name and address of landlord.

Recovery of ground rent

- Determination of debt owed:
 - By admission
 - Small claims
- Ultimate sanction – forfeiture.

Service charge and recovery

Before action check

- Service charges only fall due once all the procedures laid down by the lease have been followed including any procedure laid down for determining any dispute
- No action can be brought for arrears unless all accounts and certificates specified in the lease have been properly prepared and delivered to the tenant
- Have the 'payability' hurdles been addressed?

Mortgagee protection clause (MPC) – requirement of shared ownership lease

- Exactly what it says on the can – it protects the mortgagee, ie, building society/bank
 - When leaseholder falls into difficulty with payments
 - Clause provides for lender to recover its loan together with other associated costs, ie, legal, lock changes, marketing, redecorating
 - Provider must approve mortgage terms for the clause to become enforceable – for first and any subsequent shared owner
 - Provider is required under the clause to notify if taking any legal proceedings for non payment or other breach of lease – but you would want to anyway.

Recovery options

- Mortgage? inform the lender of breach of lease and arrears.
 - Remember the MPC
 - The lender may pay the arrears and add it to the mortgage loan in order to secure their interest
- ADR – Alternative Dispute Resolution as an alternative to court proceedings
 - arbitration/adjudication/conciliation/mediation/early neutral evaluation

**
- Small claims – money judgment (www.moneyclaim.gov.uk) info. www.gov.uk for fees etc – pre-action protocol must be followed
- Enforcement – details to come
- Last resort – forfeiture although cannot be used for service charges arrears unless admitted by tenant or liability proved in court (s81 HA as amended s170 2002 Act) and service of notice required s146 2002 Act.

Process

- Income recovery escalation process.
 - 2/3stage letters before action – since October 2017, pre-action protocol to follow- must allow 30days before instructing **
 - Consider – Scott Schedule ?? Can be useful.
 - 2nd letter – consider advising
 - Interest will be added under terms of the lease
 - Legal costs will be responsibility of leaseholder
 - If money judgement obtained may impact on credit rating
 - In danger of losing home if do not maintain/keep up with associated payments
 - Will/May approach mortgage lender.

Process...(cont'd)

- If 2nd letter is letter before action (LBA):must include
 - A statement of monies due
 - Details of how the debt can be paid (for example, the method of and address for payment) and details of how to proceed if the debtor wishes to discuss payment options and
 - The address to which the completed reply form should be sent
- No claim can be made until 30 days after letter sent and if no contact by shared owner/leaseholder.

Pre-action protocol – what you must do since October 2017

- Contact as soon as possible
- If joint tenants(owners)– letter addressed to each party
- Outline what due/the period in question – send statement of account
- A time limit to comply/pay by
- Ask the tenant to give reasons for the debt, and a repayment arrangement, personal circumstances that are impacting on ability to pay
- Should provide a summary of the protocol
- Should outline what action will be taken if the tenant fails to respond or adhere to payment arrangements within 30 days
- At least 10 days before court hearing send an up to date statement.

Shared owners – process

- For Housing Associations – Shared owners
 - Deemed to be assured tenants where the lease is granted on or after 15th Jan 1989
 - Therefore, escalate and then NOSP route 1988 HA:- Ground 10 and/or 11
- For local authorities – The term of a shared ownership lease is too long to qualify as a secure tenancy so the default position is that the shared ownership lease just takes effect as a normal long lease and if a LA Landlord needs to seek possession they would rely on the forfeiture process – in the same way a landlord of a non-shared ownership long lease would.
- Approach mortgagee – before or after judgement/CCJ/PO obtained/MPC requirement.

'Major works' – debts

- Shared owners – minimal if operating a RF collection policy.
- Other leaseholders
 - Where no RF in place.
 - Hold the debt on sub-account ?
 - Easier to manage.
 - Provide repayment options – over 1 year only, preferably
 - If more than 1 year – consumer credit licence as treated as a loan!
 - Reason – to record the debt/credit so other organisations are aware
 - G15 in discussions with FCA for a reduced regime.

Small claims action

Enforcement options

- Order to obtain information – N316
- Bailiff warrant – N323
- 3rd party debt order – N349
- Attachment of earnings – N337
- Charging order – N379
- CPR 70.2 – it is possible to use more than one option simultaneously
- <http://www.justice.gov.uk>
- Distraint abolished – 2007.

Forfeiture of the lease

Ultimate sanction

Forfeiture – what is it?

- Method to end lease before term expires
- No financial compensation
- If successful – ends on date of forfeiture (but see Protection from Eviction Act 1977)
- Law of Property Act 1925 – S146 Restrictions on forfeiture of leases.

Commonhold and Leasehold Reform Act 2002 – Section 168

- Restrictions on service of S.146 Notice
- Must have:
 - Final determination of breach by FTT(PC) or court or admission by leaseholder
 - Arrears of £350 or, has been outstanding for more than three years, regarding service charges/ground rent/admin charges.

Forfeiture

- 14-day waiting period after CCJ obtained
- Serve Section 146 Notice
 - Not needed if service charge reserved as rent or not created under a Deed.
 - No further demands for payment must be made and no payment accepted other than 'payment on account for previous years charges'
- Date of forfeiture – reversion of title
- If still in occupation, take possession proceedings – Civil Procedure Rules (CPR) 55 (possession claims on line PCOL website)
- Tenant or leaseholder may claim relief from forfeiture.

Waiver of the right to forfeit

- There are lots of ways in which a landlord can act so as to appear to affirm the continuation of the lease. It follows that there are many and varied ways in which a landlord might waive the right to forfeit, but classic examples include:
 - Demanding or accepting rent falling due after the landlord knows about the breach of covenant;
 - Commencing proceedings for arrears of rent alone (ie, without claiming possession as well);
 - Serving notices pursuant to other provisions in the lease;
 - Exercising an option contained in the lease
 - The risk of waiver runs from the date that the right to forfeit arose, until it is exercised, but not after. Exercise great caution during this 'danger period'.

Any questions?