Devonshires solicitors

Leasehold Management Brief

Issue 3

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Welcome

Welcome to the third edition of Leasehold Management Brief.

Since our last edition the Leasehold Management Team at Devonshires have been busy having just completed their very popular Leasehold Management seminar programme for 2014/15 together with the Manchester Leasehold Conference in April which was run in conjunction with 9 St John's Street. The seminar programme will begin again in October so keep an eye open for those dates. As well as presenting the seminar programme, the Leasehold Management Team are currently involved in a number of forfeiture cases, advising whether leaseholders front doors fall within the Landlord's or leaseholder's responsibility as well as advising in respect of granting leases for telecommunication masts.

In this edition service charges play a prominent part. We look at using the rules of the First Tier Tribunal (FTT) to manage service charge challenges brought in the FTT and limiting the issues raised by residents and/or an over-zealous tribunal panel. We also look at the intricacies of the s.20 consultation process and in particular when is a property a "Residential" property for the purposes of s.20 consultation. Another issue that we consider in our Q&A section is the question of when costs are actually incurred by a landlord triggering the "18 month rule" for recovering the costs via the service charges. The recent case of Waaler v LB of Hounslow is also considered as this has important consequences for landlords seeking recovery of service charges following completion of improvement works. Lastly, on a non-service charge issue we look at recovering the costs a landlord incurs when serving a s.146 following a breach of a lease by the tenant.

Neil Lawlor, Partner

Using the FTT's Rules to Manage Disputes

In our last edition we set out some of the new rules which apply to the First Tier Property Tribunal (FTT), following its introduction in place of the LVT. We set out some warnings about the FTT's ability to strike out a case if a party does not comply with directions. However, we also explained that the new rules provide Registered Providers with powers that can be used to their advantage.

By way of an example, we have recently represented a Registered Provider in which the FTT, at a Case Management Conference, expressly directed that all evidence was to be provided by way of witness statements. The leaseholders, having prepared a very detailed Statement of Case, believed that no witness statements were needed, despite the Statement of Case containing mainly legal arguments rather than evidential points, and not having a statement of truth. At the hearing of the case the FTT applied a strict interpretation of the directions, which we would perhaps expect more from a court than an FTT, and prevented the leaseholder giving oral evidence. The new overriding objective is that all parties be treated fairly. The tribunal accepted our argument that to allow the leaseholder to give evidence, which our client had not seen in advance and would be in breach of the directions, would be prejudicial to our client.

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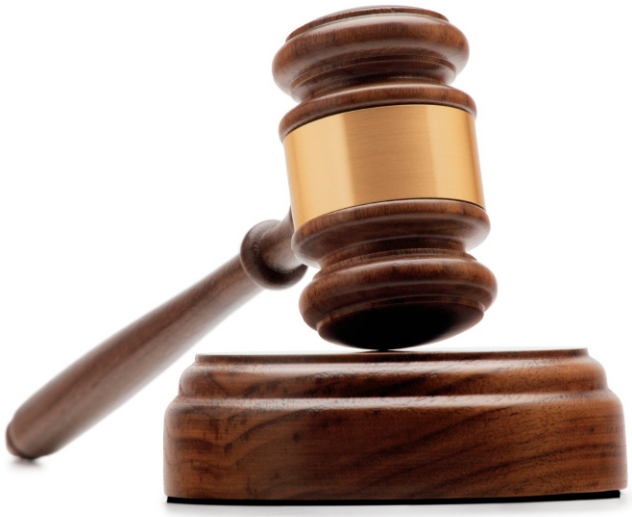
In another FTT case the leasehold applicants completed their application forms and provided very limited detail of their challenge. However, this time the FTT decided to give directions without setting up a Case Management Conference (CMC). In doing so the FTT made assumptions about what the case was about: the pay-ability and reasonableness of service charges. Having been involved in considerable pre-action discussions with the applicants, both our client and ourselves knew full well that the challenge was about whether our client had complied with s20 Consultation, not the reasonableness of charges. The FTT also made no direction allowing evidence to be given by witness statement, or by any alternative method.

Following the directions the Applicants then prepared a Statement of Case, which included considerable additional issues, many of which fell well outside of the scope of the case, as limited by the FTT's directions, and some even fell outside of the tribunal's jurisdiction (e.g. Party Wall Act disputes). The Statement of Case still did not raise any challenge of the reasonableness of charges however.

Many landlord's will be familiar with appearing at FTT hearings not knowing quite what case they have to answer. In this case there was a huge difference between what the leaseholders and the FTT thought the case was. The leaseholders did not intend to give witness statements in advance, as no such statements were directed. Our client's ability to face the case was therefore severely prejudiced. As such, we made an application to the FTT for a CMC to be listed, to revisit the scope of the case and for new directions to be given. The leaseholders objected to that application, but in doing so confirmed that they intended to challenge the



reasonableness of charges for undefined past years, despite this not being set out in the Statement of Case and despite not giving details of which charges they would actually challenge or for what reason. Again, we relied on the prejudice this was causing our client, and the overriding objective. In response the FTT agreed to a CMC, at which the case was greatly limited in its scope and many of the issues the leaseholders wished to raise were struck out. Witness Statements were directed, so that our client would know exactly what case it was required to answer. This shows the need to narrow down the issues as much as possible in dealing with disputes in the FTT and to use FTT rules to assist you in doing this.

Alex Wyatt, Solicitor

4 Recovering the costs of preparing s.146 Notices

Where a leaseholder has breached the terms of their lease (other than non-payment of rent) the landlord can serve a notice under s.146 of the Landlord and Tenant Act 1925 giving a reasonable period of time for the leaseholder to respond regarding remedying the breach, if it is capable of being remedied. If the breach is not remedied in that time then the landlord can seek to forfeit the lease. In the case of residential leases a determination that a breach has occurred must be made by a court or tribunal before a s.146 notice can be served. Leases often contain a term enabling the Landlord to recover costs incurred in contemplation or preparation of the s.146 notice.

Such provisions were recently considered in the case of Barratt v Robinson. In that case the lessee applied for a determination of the correct sums she had to pay in respect of insurance as part of the service charges and a decision was made by the LVT accordingly. Her landlord then sought to recover the costs of the LVT proceedings (£6250) under the clause that enabled the landlord to recover costs in contemplation of proceedings for forfeiture or preparation of a s.146 notice.

Although a determination was a pre-requisite for serving a s.146 notice the issue in this case was whether there was any contemplation or anticipation of serving a s.146 notice. The Judge, on appeal, found that there was no evidence of the landlord contemplating proceedings, forfeiture or service of a s.146 notice. The LVT proceedings were brought by the lessee for a determination of the sums she had to pay. They were not brought by the

landlord as a precursor to serving a s.146 notice.

The case highlights the importance of evidencing any intention to serve a s.146 or pursue forfeiture if the landlord is intending to look to recover the costs incurred in that process under the terms of the lease. Therefore, as a matter of good practice, such decisions should be recorded in writing at the time they are made so that reference can be made to this in future if challenges are raised.

P.S. This approach was confirmed in the recent Upper Tribunal decision of Willens v Influential Consultants Ltd.

Neil Lawlor, Partner

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Reasonableness of Service Charges for Improvements

Whether works or services provided by a landlord can be recharge to leaseholders is a matter of the construction of the lease.

Typically leases will oblige the landlord to maintain or repair the premises, or the building the premises is contained within. However, there is nothing which prevents a lease also allowing a landlord to carry out improvements, or for any such improvements to be re-charged through service charges. Provided the lease allows for the re-charge of improvements there is no statutory provision which precludes the re-charge.

However, the important case of *Waaler v LB of Hounslow [2015] UKUT 0017(LC)* may have to make landlords re-think how they approach improvement works if they wish to re-charge leaseholders in full.

While there is nothing, other than the terms of the lease, which prevents re-charging of service charges for improvements, section 19 of the Landlord & Tenant Act 1985 does require that all service charges must be reasonable. The First Tier Property Tribunal has jurisdiction to determine whether charges are reasonable or not. Challenges over the reasonableness of charges are possibly the most frequent that we see. The reasonableness of service charges applies equally to repairs as it does to improvements. Or at least

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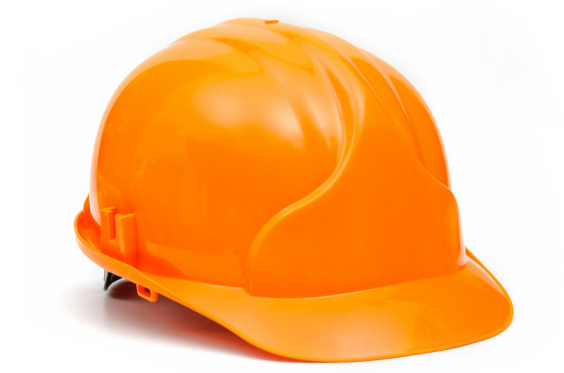

that used to be the case until Waaler.

In the Waaler case the Upper Tribunal took a somewhat different approach. The tribunal made a distinction between repairs and improvements. Repairs, maintenance or services, are generally contractual requirements on a landlord and there is an obligation on the landlord to do these. Improvements are typically something which the landlord can do, if they want. There is, therefore, no obligation on the landlord to carry out improvements. The landlord may choose to carry out improvements, or not. Yet it is the leaseholder who must pay if the landlord carries out improvements.

Due to this choice, in the Waaler case, the Upper Tribunal took the view that the landlord needs to take "particular account"

of the extent of the interests of the leaseholders when deciding to carry out improvements. The landlord must give greater weight to the views of the leaseholders. In particular, the landlord must consider whether the leaseholders wanted the works and whether there were other alternatives or less expensive remedies. Therefore the landlord must take into account affordability of the works.

What are the implications of this? Taking into account leaseholders' views is going to be necessary. It is likely, therefore, that an informal consultation process will be necessary. Setting out what works are planned, what the cost of the improvements are and taking into account whether the leaseholders want the works or can afford the works. Considering payment of charges by the leaseholders by instalments over an agreed time period may also be necessary.

Alex Wyatt, Solicitor

Section 20 Statutory Consultation - For "Dwellings"

It is well known that the consultation process for service charges, pursuant to s20 of the Landlord & Tenant Act 1985 applies to residential properties. It is also well known that it does not apply to commercial properties. But is the distinction between the two so clear cut?

S20 consultation is necessary where one set of Qualifying Works costs any one tenant £250 in a year, or £100 for any one tenant, in any one year for a Qualifying Long Term Agreement. If a landlord fails to consult, the level of service charges that can be recharged are capped at £250 /£100 respectively. Hence it is important to know exactly when the consultation applies.

It is not unusual now-a-days to have multiple layers of leasehold interest. For example, a freehold developer, Registered Provider as head leaseholder who then sublet to tenants and/or leaseholder or shared owner. In such a situation the freeholder may well seek to re-charge the head leaseholder service charges. In turn the head leaseholder may well pass these charges on to its sub-tenants, and re-charge for its own services as well.

So who in this scenario must carry out a s20 consultation, and who must be consulted? The answer is that both the freeholder and the RP must consult if any one tenant would be re-charged more than the £250/£100 cap. However, in this scenario it is important to remember that the RP is itself a tenant. So, is the RP a commercial or residential tenant, for the purposes of deciding whether or not s20 applies and does it matter whether or

not the RP has let its units out yet to residential occupiers?

For the answer to this we have to look at the case of Oakfern Properties Limited v Ruddy. There the Supreme Court confirmed that an intermediary landlord must be consulted, along with their residential tenant. So it is clear that if the intermediary landlords have residential subtenants both the residential subtenants and the RP (as intermediary landlord) must be consulted.

However, in reaching this decision the court set out how it came to this conclusion. The starting point is the Housing and Finance Act 1972 in which it defines a dwelling as being:

"*… a building or part of a building occupied or intended to be occupied as a separate dwelling together with any yard, garden, outhouses and appurtenances belonging to or usually enjoyed with that building or part …*".

This definition of dwelling has then been adopted for the definition of dwelling in s20 consultation.

As such, this suggests that s20 would apply even before the RP sublets to residential occupiers, as each unit is "intended" to be occupied as a single dwelling, even if they are not currently let. If the freeholder has not consulted when they should have done, they will be limited to recover at £250 per set of works, or £100 per year of any QLTA.

Freeholders who lease to RPs often believe that s20 does not apply to them. However, Oakfern Properties shows that a freeholder's non-compliance may well mean that the service charges over £250 or £100 will not be recoverable. Therefore, if you are an intermediary landlord and your landlord is demanding service charges, you should check if they have complied with s20.

Alex Wyatt, Solicitor

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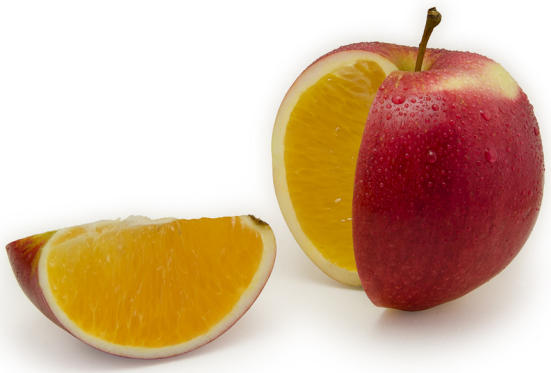

Ask the Expert: Time Limits on Recovery of Service Charges

Q: We are a Registered Provider of Housing and we are intending to recover the costs of works which were carried out to the roof to a block of flats. The RP is the freeholder and the flats are occupied by tenants and leaseholders. The works were carried out over a year ago but we have not yet received the invoice from our contractor for the work they carried out. Can we still recover the costs of the works from the residents via service charges?

A: The first point to check is whether the residents of the block are required to pay a variable service charge and that these works fall within the service charge provision in their leases or tenancy agreements. Assuming that they do, then you need to make sure that you make demands for payment from the residents within 18 months of the costs being incurred. This is because s.20b of the Landlord and Tenant Act 1985 provides that "*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*". Therefore, there is an 18 month limit for Landlord's to send out service charge demands from when the cost which those service charges relate to have been incurred. If a demand for payment is not sent out within 18 months of the cost arising then the landlord will lose the right to re-charge those costs to the residents.

The question of when the costs have actually been incurred was considered in OM Property Management Ltd v Burr. In that case the Court of Appeal found that "Costs" were not "incurred", for the purposes of the Landlord and Tenant Act 1985 s.20B, simply by the provision of services or carrying out of work. Instead costs were said to have been incurred when demand for payment was submitted by the supplier or service provider. In fact the Court of Appeal went on to comment that it might even be as late as when payment was made by the Landlord to the contractor.

Therefore, the Registered Provider appears to still be well within time for making demands for payment in respect of the works that have been carried out to the roof and the start of the 18 month time limit will not begin until the contractor submits their invoices for the work. However, it should be remembered that, under s.21B, a resident can withhold payment of a service charge if demands are not accompanied by a Summary of the Rights and Obligations in the requisite prescribed form. Therefore, it is important that demands for payment of service charges comply with this.

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Neil Lawlor, Partner

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Partner

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Neil conducts housing litigation, including defending disrepair claims and advising clients of settlements; bringing actions for nuisance such as possession proceedings, Anti-Social Behaviour Injunctions and Anti-Social Behaviour Orders; and bringing possession actions for unlawful sub-letting, non-occupation and disputed succession claims following the death of a tenant. Neil also conducts general property litigation which includes both residential and commercial properties. He regularly works on matters in relation to claims for forfeiture, service charge disputes including recovery of unpaid service charges and consultation and judicial review. Neil conducts cases in the County Courts, High Court, Magistrates Courts and Tribunals. As well as conducting contentious cases, Neil also provides non-contentious advice in respect of housing management and general property matters including drafting tenancy agreements and advising on policies and procedures.

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Alex has over 9 years' experience of dealing with housing litigation, both on a residential and commercial basis, and has experience of acting for both landlords and tenants. He has particular expertise in possession proceedings, including forfeiture, disrepair and debt recovery. His debt recovery experience includes the recoverability of Service Charges, LVT challenges and money claims.

Leasehold Management Training Programme

2015/16

Devonshires' Leasehold Management Team is pleased to present the 2015/16 Leasehold Management training programme.

Invitations outlining programme and speaker details will be issued for each event.

Seminar Programme

Leasehold Management for Beginners

6 October 2015

Leases: Dealing with Breaches

4 November 2015

Leases: Dealing with Dilapidations

13 January 2016

An Introduction to Commercial Lease Management

16 March 2016

Service Charges: S20 and Consultation

26 April 2016

Service Charges Workshop

24 May 2016

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