



SERVICE CHARGES: Getting What Is Due

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S O L I C I T O R S

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Who Are We?



YASHMIN MISTRY

Brethertons

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What This All About??

- What is a “Service Charge”
- General Principles Involved in Recovery:
 - Leases
 - Consultation Requirements
 - Time Limits
 - Reasonableness
- Leasehold Valuation Tribunals

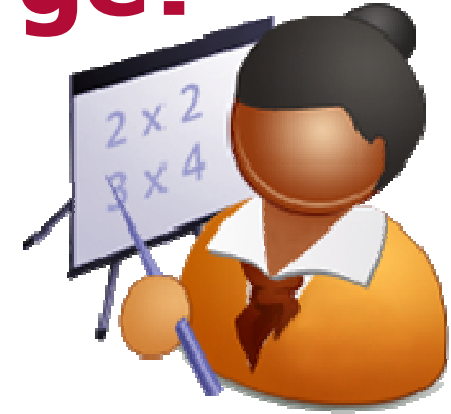


What is a “Service Charge??”



What is a Service Charge?

An amount payable by the tenant of a dwelling as part of or in addition to the rent:




- Which is payable directly or indirectly, for services, repairs, maintenance, improvements or insurance or the landlord's cost of management;

and

- The whole or part of which varies or may vary according to the relevant costs

What is *not* a Service Charge?



**Charges for giving consents to alterations –
administration charges or late payment charges**

Charges fixed within the lease

Some General Principles



General Issues Involved In Recovery of Service Charges

- Payable under terms of Lease?
- Statutory Controls
- Equitable Principles
- Consultations
- Time Limits



1. Payability

- Is it payable under terms of lease?
- Clauses construed constructively
- NOT an additional source of profit
- Obligation to provide services is independent to the tenant's duty to pay for them





Payable Under Lease?

- Natural meaning
- Seen in context
- If ambiguity, resolved in favour of tenants
- No presumption that landlord should recoup all their expenditure



Payable Under Lease?

Apportionments:

- Governed by terms of lease
- Typical lease:
 - Floor area;
 - Rateable value;
 - Fixed proportions
 - Duty to pay a “fair and proportion” or words to that effect



Payable Under Lease?

Repairs v Improvements:

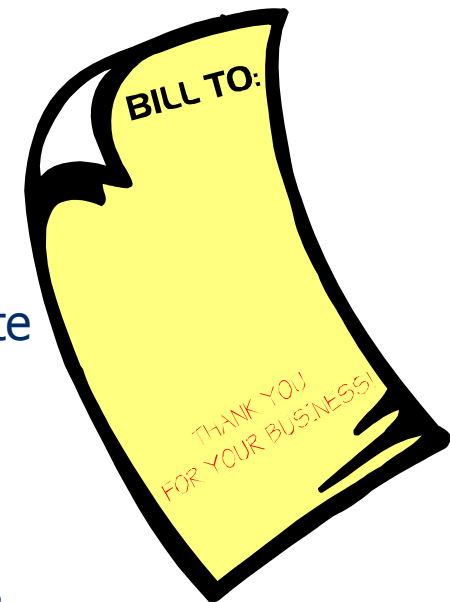
- Does the lease permit this?
- Distinction is no longer relevant for purposes of LVT's jurisdiction but relevant for construction of service charge provisions
- *"Is the repair so radical and extravagant as to amount to creating a new thing in place of what was there and not a mere replacement"*



2. Statutory Controls

Demands for Service Charges:

- Demanded in correct name & in accordance with lease dates
- Name & Address of Landlord
- An address for service of notices
- Summary of Rights and Obligations
 - Form of summary has been prescribed by statute
 - Printed or typewritten
 - No smaller than point 10 font
 - Applicable to Wales

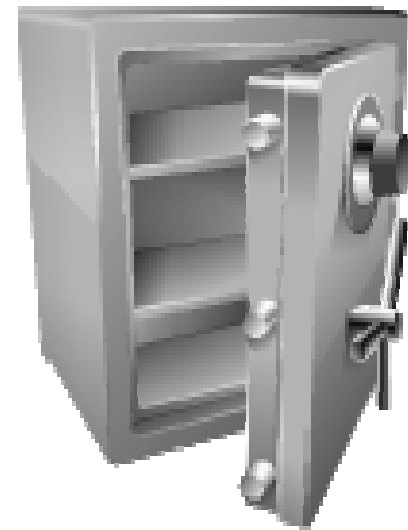


**Rights to withhold payments &
late payment clauses in lease DO NOT apply**

2. Statutory Controls

Holding Service Charges:

- Held on Trust for tenants – Section 42 Landlord and Tenant Act 1987
- Reforms are anticipated – Not Yet In Force:
 - Introduce new Section 42A
 - “Authorised Account”
 - Only hold service charge monies



2. Statutory Controls

Consultation – Section 20:

- Recently reformed
- Old rules apply to works carried out between 1st April 1986 and 30th October 2003



2. Statutory Controls

Consultation – Section 20:

- Where work is done which would require tenant to contribute more than £250 in any 12 month accounting period
- Where agreement (QLTA) made on behalf of landlord for period of over 12 months and tenant contribute more than £100 in any accounting period



2. Statutory Controls

Consultation – Section 20:

- Can apply for Dispensation
- Failure to Comply = landlord only entitled to recover the “capped amount”



2. Statutory Controls

Stale Service Charges:

- Demanded within 18 months of being incurred;
- or
- Tenant notified in writing that costs have been incurred he will be required to contribute towards them



Costs are incurred when become payable by landlord

**Failure to comply =
tenant is not liable to pay service charge**

2. Statutory Controls

Limitation of Service Charges:

- No statutory time limit for a *tenant* to bring an action
- Landlord bringing an action:
 - Recovery of Rent or "Service Charge Reserved as Rent" : 6 years from date when payment first becomes due
 - Service charge not reserved as rent: 12 years from date when payment first becomes due



3. Equitable Principles

Set-Off:

Tenant claims the landlord has breached a covenant under lease and as a result of damages suffered by tenant, service charge liability should be reduced

- No general right to set-off under leases, unless specifically provided
- Set-off must be pleaded as part of a defence in a civil claim



3. Equitable Principles

Set-Off:

Landlord may argue that any non-compliance was due to failure of tenant to pay service charge:



- *Bluestorm Limited v Portvale Holdings Limited* [2004]
- Contractual intentions of the parties when lease was drawn up; and
- “Principle of benefit and burden” – lease defines scope of benefits and burdens each party is subject to



Lease is King!



4. Reasonableness

- **Common Law**
 - Unclear



- **Section 19 Landlord and Tenant 1985:**
 - Payable to the extent that:
 - Reasonably incurred
 - Reasonable standard

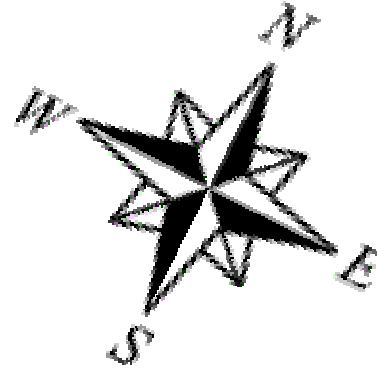
4. Reasonableness

General Principles:

- Contemplated under lease does not make it automatically reasonable to incur costs;
- 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

4. Reasonableness

General Principles:



- Nature and location of property is a relevant consideration as to what level of service is reasonable
- Actions taken pursuant to legal advice are likely to be reasonable
- Guarantees?
- Irrelevant whether tenant will benefit from works / services

4. Reasonableness

General Principles:



No discretion to dispense with the general requirement of reasonableness

No presumption for or against a finding of reasonableness

Conclusion must be reached on whole of the evidence

5. Challenging Payability

Application made to LVT



- Determination: is the Service Charge payable?
- Application made irrespective of whether service charge has been paid
- Fact that tenant has paid does not amount to admission

Challenging Payability



Challenging Payability

LVT Jurisdiction: Is the Service Charge Payable?

- The person by whom it is payable;
- The person to whom it is payable;
- The amount which is payable;
- The date at, or by, which it is payable; and
- The manner in which it is payable



Challenging Payability

LVT Jurisdiction:

If costs were incurred for services, repairs, improvements, would the service charge be payable?

- The person by whom it would be payable;
- The person to whom it would be payable;
- The amount which would be payable;
- The date at, or by, which it would be payable; and
- The manner in which it would be payable



Challenging Payability



LVT Have No Jurisdiction:

- Service Charge has been agreed or admitted by tenant
- Has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is party
- Has been the subject of determination by court; or
- Has been subject of determination by arbitral tribunal pursuant to a post-dispute arbitration agreement

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

Challenging Payability

Burden and Standard of Proof:

- “He who asserts must prove”
- LVT will scrutinise very carefully landlord’s justifications for carrying out the works – far more carefully than tenants own legal advisors
- Expert opinion will be severely tested
- No scope for landlord to recover costs from other party in LVT proceedings
- Section 20C Applications
- Careful preparation is everything!





Questions?