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## IN THIS ISSUE:

- 01 In House News
  - New Faces
  - Webinars Success
  - Brethertons Webinars
  
- 01 Special Report - LVT and Case law update
  - Service Charges
  - Appointment Of Manager
  - Right To Manage
  - Leaseholders to Know Their Rights About Service Charges
  
- 04 In Brief
  - Leaseholders to Know Their Rights About Service Charges
  - Landlocked Land - Lords Confirm No Right of Access
  - Prevention of Illegal Working - New Penalties
  - Webinar Calendar

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## In-House News

### New Faces

#### Gabriella Bruce

We are pleased to announce the recruitment of Gabriella Bruce to our ever-expanding Property Management Team. Gabriella has joined the team as a Debt Recovery Assistant, after completing a B-Tec National Award in E-Business.

#### Dale Clarke

Dale Clarke has also joined the Banbury Property Management Team as an Administration Assistant. Dale has just completed his A-Levels in Law, Business and I.T. and has also enrolled to start the Institute of Legal Executives (ILEX) course in September.

### Webinars Success

Over 500 people have participated in Brethertons and ARMA webinars to date. With an exciting and interactive approach in delivering legal expertise to the property industry, they are proving to be an extremely popular training resource. Please find below the topics and dates for the forthcoming webinars. To book on one of the webinars or to ensure you receive details of future webinars, please register your interest with Marie Holloway at Brethertons by sending an email to marieholloway@brethertons.co.uk

## LVT and Case Law Update

Brethertons are grateful to Annette Cafferkey for producing this very useful insight to some of the recent cases which have been dealt with by the LVT.

Annette is a barrister at Arden Chambers, a specialist housing, property and local government set. She was called to the Bar in 1994 and her practice covers the following areas: housing, service charge disputes, landlord and tenant and property. She is a co-author of Leasehold Valuation Tribunals, A Practical Guide (Thomson) and writes, on a quarterly basis, a housing law update for the New Law Journal.

### Service Charges

#### The Lease

1. As a matter of established principle, a lessor cannot recover money from the lessee in the absence of clear contractual provisions entitling it to do so: *Gilje v Charlegrove Securities Ltd* [2001] EWCA Civ 1777; *Embassy Court v Lipman* (1984) 271 EG 545.
2. This premise leads on to the question of how a lease should be construed. Generally, those who have appeared in the LVT will be accustomed to it taking a restrictive approach to the interpretation of leases - one that favours leaseholders.
3. In *Earl Cadogan v 27/29 Sloane Gardens Ltd LRA/0/2005* the Lands Tribunal was concerned with the question of whether to ascribe, in determining the price to be paid for a freehold title under 1993 Act, a value to the caretaker's flat in the basement. The question was whether the lease allowed the head lessee to recover a market rent in respect of the flat. This decision makes clear that the need to construe the provisions of the lease narrowly and against the landlord should not arise unless there is ambiguity. The approach is as follows:

- (i) it is for the landlord to show that a reasonable tenant would perceive that the underlease obliged him to make the payment sought
  - (ii) such conclusion must emerge clearly and plainly from the words used
  - (iii) if the words used could reasonably be read as providing for some other circumstance, the landlord will fail to discharge the onus upon him
  - (iv) this does not, however, permit the rejection of the natural meaning of the words in their context on the basis of some other fanciful meaning or purpose, and the context may justify a "liberal" meaning;
  - (v) if consideration of the clause leaves an ambiguity then the ambiguity will be resolved against the landlord as "proferor".
4. An example of how context can be important (and favourable to the landlord, particularly where that landlord is a local authority) is the decision by the Lands Tribunal in London Borough of Brent v Hamilton LRX/51/2005 where it reversed the LVT's decision and concluded that the authority was entitled to recover a management charge by way of service charges even though this cost was not expressly provided for in the lease. The Lands Tribunal concluded that the lessee's obligation to pay "a reasonable part of the expenditure incurred by the Council during the Council's financial year in fulfilling the obligations and functions set out in Clause 6" was sufficient to incorporate the charge. In arriving at this conclusion regard was had to "the context in which the clauses in the lease were drafted. The lease... was made under the RTB provisions in the 1980 Act". The lessor was referred to as the council and the lessor's obligations under the lease, in effect, provided for the continued performance by the council of functions that until the grant of the lease it had performed under a secure tenancy. Had the Lands Tribunal not reached this conclusion the cost would have been met by from the authority's housing revenue account; that this was intended was considered to be unlikely.

## The LVT's jurisdiction

5. The LVT's jurisdiction in relation to service charges was extended considerably by s 27A of the Landlord and Tenant Act 1985 which came into effect on 30 September 2003. This applies to all applications made to the LVT made after this date regardless of whether the application challenges services charges levied and paid before this date: *Sinclair Gardens (Investments) Ltd v Wang* LRX/89/2005. It was immaterial when the service charges had been demanded. So, whilst it is true to say that landlords were under an express duty to claim service charges promptly (s20B Landlord and Tenant Act 1985) there no such obligation on the tenant. Arguments in relation to abuse of process were also pursued. They were rejected with Lands Tribunal commenting that it would be slow to interfere with the LVT's decision on such issues and would only do so if it could clearly be shown that the LVT had erred in principle or misdirected itself or had otherwise reached a perverse decision.

## Applications

6. Applications to the LVT are construed broadly. The LVT will determine issues in the course of a hearing even if that issue was not expressly before it on the face of the application form. In *Abaris Limited v Saltoun* LRX/40/2004 the LVT had directed the leaseholder applicants to serve a statement of case identifying all the issues and to file a bundle of documents upon which they intended to rely 14 days before the hearing. These directions were not complied with - the statement of case was so generalized as to make it difficult for the landlord to know what case it had to answer and the bundles of documents were only delivered 2 days before the hearing. Despite this the Lands Tribunal concluded that the LVT had not been wrong to disallow costs in respect of management fees which prior to the hearing had never been expressly disputed. The leaseholders challenged the reasonableness of the cost renovation work. It was held that such a challenge implicitly included within it all the "constituent parts" including the management charge.

7. In *Dallas and others v Gleeson Homes Ltd* LON/00BFL/LSC/2006/0196 the LVT rejected the argument that its jurisdiction was restricted to the matters raised in the application form. Three matters had been listed in the application form. At the pre-trial review hearing these matters were added to by the directions settled at this hearing. The LVT was clear that it had jurisdiction to hear these further matters, noting that its jurisdiction flows from sections 18, 19 and 27A of the Landlord and Tenant Act 1985 and not from the application form.

## Mesne Landlords

8. A leaseholder who holds his lease from a residents' management company who in turn holds its title from a head lessor can proceed against the head lessor in a service charge dispute: *Oakfern Properties Ltd v Desmond Ruddy* EWCA Civ 1389. *Oakfern* were the freehold owners of a building on the Fulham Road which consisted of a basement, ground floor and three upper floors. The ground floor and basement were commercial and let separately from the rest of the building. The upper floors comprised 24 residential flats. A long lease of the upper floors was held by *Publicshield Property Management Limited (PPL)* on long lease from which the flats were sub-let also on a long leasehold basis. Under the headlease *Oakfern* was responsible for keeping the building in good and substantial repair. PPL was obliged to pay *Oakfern* a maintenance charge equal to 90% of the costs incurred by *Oakfern* in discharging its obligations. The maintenance charge was passed on by the sub-leases, a non-profit making company owned by 15 of the leaseholders. Mr Ruddy sought to challenge the maintenance charge in the LVT. Was the maintenance a service charge for the purposes of s. 18 of the Landlord and Tenant Act 1985 which defines service charge as an amount payable by the tenant of a dwelling? Was PPL the tenant of a dwelling? It was held that it was.
9. The point was considered again by the LVT in *Connaught Court Residents Management Ltd v Abbouzzaki Holdings Ltd* LON/00BK/LSC/2006/0017 in which the management company sought to challenge the charges levied under the headlease. The LVT concluded that the charges paid by the management company to the head lessor

were service charges for the purposes of the 1985 Act and that the management company had locus to challenge service charges in the LVT. This decision goes further than the Oakfern decision: in Oakfern an individual lessee sought to challenge the costs that he was personally charged. In the Connaught Court case the applicant was the management company. No individual lessee sought to challenge the costs and, in addition to this, the provisions by which the management company was charged were not co-extensive with provisions of the sub-leases.

## Reasonableness of charges

10. In *Hughes v Rochdale Borough Wide Housing* MAN/00BQ/LIS/2006/0004 the applicant was a leaseholder pursuant to the right to buy. His local authority landlord sought to charge him with his share of the costs for replacing the roof in which Mr. Hughes flat was situated. The block originally had a flat roof which was in a state of disrepair. The authority had replaced this with a pitch roof because this was consistent with the council's regeneration policy to install pitch roofs on the basis costs and aesthetic grounds. Tenders were only invited for pitch roofs. The Tribunal concluded that the authority's decision that it was more cost-effective to replace the roof with a pitch roof was not reasonable and that the costs incurred were not reasonable either. This case is interesting because the authority sought to rely on the fact that the work had been done in line with their regeneration policy. This, however, did not hold sway with the Tribunal.
11. It's arguable that a similar conclusion would have been reached had the authority sought to rely on the Decent Homes Standard. The Report of the Social Sector Working Party covers a wide range of issues of relevance to those working in leasehold property. It is proposed that there should be a cap on the service charge bills arising from the Decent Homes Standard and the Government should pay any necessary top up. A number of other wide ranging reforms are proposed including a method for opting out of consultation requirements and compulsory sinking funds.

## Insurance

12. Insurance policies are another area of dispute but despite this there does not seem to be any discernible trend to the decision. *Shorter v Toalster* CHI/29UQ/LSC/2005/0025 was a case where the leaseholders sort to challenge the cost of works in relation to damp and dry rot. It was argued that the landlord should have insured against such problems and that he should have attempted to use a guarantee in given by contractors in respect of earlier damp proof works. Unfortunately the LVT did not have to make substantive decisions on these two points for evidential reasons. It must be however, that if a landlord is obliged to insure under the lease and entitled to recover the cost of that insurance from the lessees then the question of whether the cost of works could have been covered by insurance is relevant to the question of reasonableness.

## Proportionate share?

13. In *Saunders v Jason Court Ltd* CAM/22UD/LIS/2006/0006 the applicant was obliged under the terms of his lease to pay a "proportionate share" of the service charges. The landlord contended this entitled him to split the charges equally between the leaseholders. The tenant contended that the phrase meant something other than equal division - had the draftsman intended equal division that is what the lease would have provided for. The LVT agreed. The property contained six similar sized flats and three larger ones. A "proportionate share" was more appropriately determined by floor area.

## Appointment of a manager

14. In addition to having the power to appoint a manager under s. 24 of the Landlord and Tenant Act 1987 the LVT also have jurisdiction to extend and vary any such appointment. As much was confirmed by the LVT in 2-4 Westferry Road, London E 14 8JL LON/00BG/LAM/2005/0020.
15. In *Fisher v Thurloe Properties Ltd* LON/00AWL/LAM/2005/0017 the LVT held that the jurisdiction to appoint a manager was not restricted merely to ordering him to comply with the lease provisions. It concluded that s. 24 was designed to

provide adequate management powers and, in certain circumstances this could involve overriding the terms of the lease. It would, however, have to be established that this was necessary for the management function.

16. The question of whether the costs of a manager appointed under s. 24 can be recovered as a service charge remains unresolved. In *Maunder Taylor v Joshi* LON/00AE/LSC/2004/0148 the terms of the manager's appointment allowed for reasonable remuneration to be paid to the manager. The payments were to be paid by the lessees in accordance with a specified proportion. The manager attempted to recover this fee via the service charge. The LVT disallowed this approach and concluded that a manager's ability to charge the lessees with his fees and charges depends on s. 24(5) and on the terms of the order. The appointment does not, however, allow the manager to charge outrageous fees. The order restricted them to what was "reasonable". In addition to this an application can be made back to the LVT for any directions, including the manner in which the manager is discharging his duties.
17. If the appointment fails for matters beyond the manager's control he can apply back to have his appointment discharged: *Denning v Beamsafe Ltd* BIR/00CS/LVM/2006/001. This case highlights the shortcomings of the LVT's jurisdiction and enforcement mechanisms. It also serves as a useful reminder that a prospective manager should always see the accounts and relevant documentation before accepting an appointment.
18. In *Cawsand Fort Management Co Ltd v Stafford and others* LRX/ 145/2005 the property concerned was a grade II listed building and an ancient monument. It contained a number of residential units which had been demised on long leases which provided for rights of access over the remainder of the site. The management order did not limit the management functions to the demised property only but extended them to areas of land within the freehold title and to other freehold properties that had been sold off. The Lands Tribunal concluded that it was "inescapable" that a management order "in relation to" premises that included

easements may appoint a manager to carry out functions "in connection with the management of the premises" and that the property in respect of which the manager is appointed to exercise functions may properly include appropriate parts of the servient tenement.

## The Right to Manage

19. Prescribed forms must be used. The Right to Manage (Prescribed Particulars and Forms) (England) Regulations 2003 contain in its schedules the forms that must be used in conjunction with the provisions of this part of the Commonhold and Leasehold Reform Act 2002. The failure to use the prescribed forms will be fatal:
- 23 Albert Road RTM Company Ltd v Oasis Properties Ltd LVT 15/10/04
  - Upper Brook Street RTM Company Ltd v Aylwen LON/00BK/LRA/2005/0010
20. If more than 25% of the building's internal floor area is in non-residential use at the time the claim notice is served then the Right to Manage provisions will not apply. Plainly, this has resulted in the LVT having to determine what parts of the building fall to be considered as residential and non-residential. See: Gaingold Ltd v WHRA RTM Co Ltd LRX/19/2005.
21. In Trafalgar Court RTM Company Ltd v Wells and others the RTM company did not succeed with its application for a determination that it was entitled to acquire the right to manage. The LVT concluded that more than 25% of the building was in non-residential use and there was no genuine or realistic intention to use the undeveloped part of the building for residential purposes. The decision is also noteworthy for its conclusions on abuse of process arguments that were run on behalf of the manager, Mr. Wells, who had previously been appointed by the LVT pursuant to s. 24 of the Landlord and Tenant Act 1987. The landlord had granted a series of leases to nominee tenants who formed the majority of the tenant body and hence controlled the RTM company. The attempt to claim the right to manage was nothing more than an attempt to subvert the earlier appointment of Mr. Wells. This pursuit of the right to manage in such circumstances was considered to be an abuse of process. The

LVT held it would have dismissed the claim on this basis in any event and it went on to award over £7,000 against the RTM company.

## In Brief

### Leaseholders to Know Their Rights About Service Charges

Junior Housing Minister, Iain Wright MP has recently proposed changes to the law by proposing a new Section 21 of the Landlord and Tenant Act 1985. The proposals, when implemented, will introduce the concept of a "statement of account".

The new proposals will require landlords to provide tenants with an annual statement showing a breakdown of how much service charge money the landlord has spent in the last year on repairs, maintenance, improvements, professional fees and staff costs etc. Landlords will also need to show balances of service charge monies held at the beginning and end of each year.

Further, the proposals also seem to require any single item of expenditure accounting for 10% of the total amount spent on service charges (i.e. lift repairing/maintenance, refuse collections, cleaning etc), to be shown separately.

The intention of the proposed changes is to protect tenants paying service charges by improving transparency surrounding the way in which landlords hold money. The proposals have been set out in a consultation paper called, "Commonhold and Leasehold Reform Act 2002 - A Consultation Paper on Regular Statements of Account and Designated Client Account".

A copy of the consultation paper can be obtained from Communities and Local Government Publications, PO BOX 236, Wetherby, LS23 7NB. Telephone: 0870 1226 236; Text Phone: 0870 1207 405; E-mail: [communitest@twoten.press.net](mailto:communitest@twoten.press.net).

The paper is also available on the Communities and Local Government Website at: [www.communities.gov.uk/index.asp?id=1512024](http://www.communities.gov.uk/index.asp?id=1512024)

The closing date for the consultation is 4th October 2007.

### Landlocked Land - Lords Confirm No Right of Access

The House of Lords has confirmed the 2006 decision of the Court of Appeal that when a piece of land is landlocked (i.e. has no right of access over adjoining land so cannot be lawfully accessed by its owner), there is no automatic right to have a right of way 'of necessity' over adjoining land.

The case involved land which was bounded to the East and to the West by private land. To the North and South it was bounded by a piece of land and a highway respectively. Both of the latter pieces of land had been sold to the predecessor of the local authority which now owned them. The landlocked land had been retained by the original owner and the conveyance of the adjoining land which was sold did not reserve any right of access over it.

When the landlocked land was subsequently sold, the company that bought it sought to obtain a ruling that it should be granted a right of way to its property over the land to the North, which would be necessary for the land to be developed. The local authority had previously indicated that planning permission for access to the highway would not be granted.

In the view of the Court of Appeal, at the time the land was sold there had been no common intention that there should be a right of access across the land to the North. Accordingly a right of way of necessity should not be granted. The Lords confirmed this decision.

#### The Brethertons' View

*"This case illustrates the importance of not making assumptions - especially over things as critical as access to land, You should always make sure that the essentials are in place before signing on the dotted line. Relying on the courts to put things right after the event is a very risky strategy."*

## Prevention of Illegal Working - New Penalties

Following the recent split of the Home Office, which saw responsibility for prisons, probation and sentencing transferred to a new Justice Ministry, a new executive agency of the Home Office, the Border and Immigration Agency, has been created. It assumes the responsibilities of the Immigration and Nationality Directorate for managing immigration control in the UK. The Border and Immigration Agency has published a consultation on the implementation of new powers to prevent illegal migrant working in the UK. The consultation document outlines the Government's key strategy for preventing illegal working, which includes the introduction of biometric visas for non-European Economic Area foreign nationals. Under regulations made under the Immigration, Asylum and Nationality Act 2006, rogue employers face a prison sentence and/or an unlimited fine if they are found knowingly employing illegal workers. Civil penalties will also be levied on businesses which have been negligent in carrying out checks on workers. The level at which these fines will be set and how they will be imposed forms part of the consultation, which can be found at <http://www.ind.homeoffice.gov.uk/6353/6356/17715/consultation>

It is proposed that the new measures will take effect early in 2008.

In a document as concise as PropertyManagerFILE it is impossible to give a complete answer to all facets of any legal problem. Treat PropertyManagerFILE as food for thought, but don't take any action based on its advice unless you have seen a solicitor. ©2007.

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