Where are we now?

Emma Gosling considers some recent cases

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It has been an eventful year for residential service charge litigation. There have been a number of cases that have helped to clarify the law, and in some instances, changed our understanding completely.

While most landlords are aware of the need to review leases carefully, and maintain a reasonableness mantra, there are three issues that crop up time and time again: demand requirements; time limits; and consultation. The following is a summary of recent cases that can both help and hinder landlords when considering if they have complied with their statutory obligations.

Demand requirements

Section 47 of the Landlord and Tenant Act 1987 (LTA 1987) provides that a written demand for service charges must contain the name and address of the landlord and, if that address is not in England and Wales, an address in England and Wales at which notices may be served on the landlord by the tenant.

Section 48 LTA 1987 further states that landlords must also provide tenants with an address in England and Wales at which notices may be served on the landlord by the tenant.

***Beitov Properties Ltd v Martin* [2012]**

In *Beitov* it was held that the requirement to give the landlord's address is not satisfied by giving the landlord's agent's address.

The demands in this case had been prepared by the landlord's managing agents and contained the following statement:

> Notice is hereby given pursuant to the Landlord and Tenant Act 1987 section 48 that all notices (including notices in proceedings) may be served upon the Landlord Beitov Properties Ltd Hyde House, The Hyde London NW9 6LH.

However, the address given was that of the managing agent and the LVT held that the amounts demanded were not payable because the demands did not comply with s47, in that they did not contain the address of the landlord.

On appeal to the Lands Chamber the landlord argued that the Act does not prescribe the particular address to be used by the landlord, and provided it is one with sufficient connection with the landlord at which it could receive communications, s47 is satisfied. Dismissing the appeal, the president said that the purpose of the requirement in s47 is not solely for the purpose of providing the tenant with an address at or through which they can communicate with the landlord, it is designed to enable a tenant to know who their landlord is. A name alone may not be sufficient for this purpose and providing an address at which the landlord can be found assists in the process of identification. He clarified that the address of the landlord for the purpose of s47 was:

> ... the place where the landlord is to be found. In the case of an individual this would be his place of residence or the place from which he carries on business. In

> the case of a company it would be the company's registered office or the place from which it carries on business.

Often landlord's agents prepare and send demands for rent and service charges in order to cover both ss47 and 48. This case clarifies that the landlord's address must be given in addition to an address for service of notices if the address for service is not the landlord's address.

***Triplerose Ltd v Grantglen Ltd* [2013]**
This case made it clear that the requirement to provide the landlord's name will also be strictly interpreted.

The demands were given in the name of 'Cane Developments, Paul Marsh and Holly Marsh', instead of 'Cane Developments, Grantglen Ltd and Holly Marsh'. Paul Marsh was a director of Grantglen. The LVT decided that the error had caused no prejudice and that the demand was valid. However, on appeal the Upper Tribunal held that the statutory requirement to name the landlord had not been met. The notice was invalid and no question of prejudice arose.

***Johnson v County Bideford Ltd* [2012]**
Some comfort is afforded to landlord's by way of *Johnson v County Bideford Ltd* [2012], in which it was held that an invalidity that arises by virtue of a failure to comply with the requirements of s47 is one that can be corrected and can be corrected with retrospective effect.

At the first hearing in the LVT it was accepted by the landlord that, even though the lessees who had received the disputed demands knew who the landlord was, the service charge demands did not comply with s47 as they only contained the name and address of the management company. Further demands were subsequently served on the lessees containing the landlord's name and address and, at a second hearing, the LVT determined that the service charge demands for earlier years complied with s47 and had been duly served and were payable.

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On appeal to the Lands Chamber the lessees argued that a service charge demand, which did not comply with s47, was not a valid demand, and could not therefore be treated as 'a demand for payment of the service charge' within the meaning of s20B(1) LTA 1985. This section imposes a limitation on the recovery of costs that have been incurred more than 18 months before a demand is made. It provides as follows:

> 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.

The lessees relied upon *LB Brent v Shulem B Association Ltd* [2011] to support their contention that a valid demand had not been served within the 18-month time limit.

In dismissing the appeal the president did not accept that *Shulem B* was comparable. The invalidity with which *Shulem B* was concerned was a contractual invalidity, and was not one which was capable of retrospective correction. It was held that the service of the later demands had the effect of validating those served within 18 months of the charges being incurred.

Section 21(B) LTA 1985

This section provides that a demand for the payment of a service charge must also be accompanied by a summary of the rights and obligations of tenants of dwellings in relation to service charges.

In *Tingdene Holiday Parks Ltd v Cox* [2011] it was argued by the lessee that two demands for service charges were not accompanied by the summary. A demand was sent out in April 2008 but no summary accompanied it. After the lessee pointed this out 11 days later a summary was dispatched but not with a demand. The LVT found that on neither occasion did the landlord comply with s21B.

The 18-month limitation period can arise in unexpected circumstances and will prevent a landlord from recovering costs that have probably been legitimately incurred.

The landlord appealed to the Lands Chamber and the president commented that:

> I do not see how a summary sent some 11 days after the demand to which it was intended to relate could be said to have accompanied the demand. It manifestly did not accompany it, and I can see no basis for an argument that there was compliance with Section 21B.

The effect of this decision appears to be that, while a landlord can retrospectively correct a failure to serve the summary, when doing so it must be accompanied by the demand. Furthermore, although the effect of s20B (1) LTA 1985 is not specifically covered in this decision, it would appear that, as the tenant was notified in writing that the costs had been incurred within 18 months by the first demand, the saving provision in s20B (2) LTA 1985 will apply. That provision states as follows:

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

Time limits

The cases discussed above demonstrate that the 18-month limitation period can arise in unexpected circumstances and will prevent a landlord from recovering costs that have probably been legitimately incurred. Savvy tenants may delay raising arguments about the validity of notices until they know that the 18-month time limit has expired. In some instances, tenants may even dispute the draft end-of-year accounts so as to delay the issue of a balancing service charge demand. Landlords therefore need diarise the time limits to avoid being caught out, as failing to comply with s20B is not an issue that can be remedied retrospectively.

A key problem that landlords have faced to date is how to determine when costs are 'incurred' for the purposes of s20B. The case of *OM Property Management v Burr* [2013] has been widely credited as resolving this issue. The tenant was required under his lease to pay service charges, which included a share of the costs of fuel supply to common parts. The management company's gas supplier presented them with a bill for fuel supplied many years earlier and they sought to recover that bill through the service charges. The total demanded from the management company was £135,337.28 for the period December 2000 to November 2007. The tenant argued that as the costs had been 'incurred' more than 18 months before the service charges were claimed they were irrecoverable. The

LVT agreed with him and held that the costs of gas were incurred when the gas was supplied, not when the gas company invoiced the landlord or the landlord paid the bill.

The management company appealed to the Upper Tribunal who found in their favour and when the tenant appealed to the Court of Appeal, the Master of the Rolls agreed with the Upper Tribunal and confirmed that costs are 'incurred' for the purposes of s20B when an invoice is served or payment is made. Accordingly, the LVT was wrong to hold that the management company had incurred the costs when the gas was supplied.

In the Upper Tribunal, HHJ Mole QC had commented:

> It is possible to foresee that where, for example, payment on an invoice has been long delayed, the decision as to when the cost was actually occurred might be different depending on the circumstances; it might be relevant to decide whether the payment was delayed because there was a justified dispute over the amount of the invoice or whether the delay was a mere evasion or device of some sort.

In the Court of Appeal it was held that a liability must crystallise before it becomes a cost. This means that costs will not be 'incurred' on the mere provision of services or supplies to the landlord or management company. Like the Upper Tribunal, the Court of Appeal did not find it necessary to decide whether costs are incurred on the presentation of an invoice or on payment.

It therefore appears that, unless there is a genuine dispute over the amount of an invoice, it is likely that costs will be 'incurred' for the purposes of s20B on the presentation of an invoice.

Landlords would do well to avoid any confusion about s20B by producing their service charge accounts and resulting balancing charges within six months of year end, otherwise they will also have to identify each cost within the estimated charges for the year which has taken them over budget and then calculate the time limit applicable to that cost.

Consultation

The sections in the LTA 1985 that relate to consultation can be summarised as follows:

- Section 20 provides that tenants paying variable service charges must be consulted before a landlord carries out qualifying works above a certain value or enters into a long-term agreement for the provision of services.

- Section 20(1) provides that unless the consultation requirements are complied with by the landlord, or dispensed with by the LVT, the landlord cannot recover more than a specified sum in respect of works for which the service charge would otherwise be greater. Section 20ZA (1) further provides that where an application for dispensation is made to the LVT, the tribunal may make the determination if satisfied that it is reasonable to dispense with the requirements.

The relevant values are contained in the Service Charges (Consultation Requirements) (England) Regulations 2003. Regulation 6 provides that s20 applies to qualifying works where any tenant is required to contribute more than £250. Whereas Regulation 4 provides that section 20 applies to a qualifying long-term agreement (a QLTA) if the costs incurred under the agreement in a service charge year exceed an amount that results in the contribution of any tenant, in respect of that accounting period, being more than £100.

Had this article been written pre-*Phillips v Francis* [2012], it is unlikely that there would have been any reference to 'qualifying' works, as generally practitioners would discuss 'major' works to reference the fact that a project or set of works would have to be substantial to exceed the £250 threshold. However, in *Phillips* the High Court (on appeal) decided that the common sense approach adopted since *Martin v Maryland Estates* [1999] of considering whether a particular set of works are 'qualifying works' is incorrect. The chancellor instead held that there is no 'triviality threshold' in relation to qualifying works as all works which are 'qualifying works' should be brought into the account for computing the lessee's contribution.

Unfortunately for those of us who deal with residential service charges on a regular basis, qualifying works are unhelpfully defined in s20ZA (2) as 'works on a building or other premises'.

The case concerned a dispute between the landlords and chalet owners of a holiday site in Cornwall in relation to the service charges the landlords

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were seeking to recover under the terms of the leases for various works carried out at the site. At first instance, the judge applied the three-stage test derived from the judgment of Walker LJ in *Martin*, namely:

- Which of the works fell within the definition of 'qualifying works' contained in s20ZA(2)?
- Did those works constitute one or more 'sets of qualifying works'?
- Did any of those sets fall below the triviality threshold set by the limit on the cost of those works?

The judge felt that he could not identify one scheme of works, just disparate pieces of work over the year. As there was no coordinated approach, no consultation was required. On appeal the tenants argued that the judge was wrong not to recognise all the qualifying works as being a single set designed by the landlords. Taken together those works generated individual service charges for lessees greatly in excess of the limit prescribed by the 2003 Regulations and, as there had been no compliance with the consultation requirements, the excess over £250 was irrecoverable.

In allowing the appeal, the chancellor moved away from previous thinking in a radical way. As stated above, he decided that there was no 'triviality threshold' and that all qualifying works should be brought into account.

In allowing the appeal, the chancellor moved away from previous thinking in a radical way. As stated above, he decided that there was no 'triviality threshold' and that all qualifying works should be bought into account. In many cases, a lessee's contribution to the cost of qualifying works in an accounting period will exceed £250, even if no major works projects are planned for that year, simply because the definition will cover basic and unexpected maintenance. The decision is made even more intriguing by the fact that neither party argued for this interpretation of s20; the lessees' case was that the qualifying works were all part of the same set of works.

The implication of the chancellor's decision is that if further unforeseen qualifying works are carried out later in the accounting period so that the lessees' contribution to qualifying works in the accounting period exceeds £250, the landlord will not be able to recover more than £250 from each lessee. As a result, landlords will now have to look at overall expenditure on qualifying works in each accounting period. Given the difference between the wording in Regulations 4 and 6 of the 2003 Regulations set out above, it is difficult to accept that Parliament intended the £250 threshold to be calculated by reference to an accounting period, in the same way as the £100 limit applies to OLTAs. The landlord in this case has applied for permission to appeal out of time with support from ARMA and RICS.

Poynders Court v GLS Property [2012]

While *Philips* has thrown landlords into a state of confusion, the case of *Poynders Court Ltd v GLS Property Management Ltd* [2012] has helped to clarify whether rolling contacts are QLTAs.

The dispute centred on whether a management agreement, which contained no termination date or term, and where either party was entitled to terminate the agreement on three months' written notice, was a QLTA. If so, only £100 per tenant per year would be recoverable, unless the landlord had either consulted or was granted dispensation.

The definition of a QLTA, contained in s20ZA(3) LTA 1985, is 'an agreement entered into, by or on behalf of the landlord or a superior landlord for a term of more than 12 months'. At first instance the LVT decided that, taking all the elements of the contract together, the agreement

Top five tips for landlords

- Check that demands contain your name, a usual address, an address for service of notices and are accompanied by a summary of rights and obligations, if not re-serve on the lessee as soon as possible.
- Aim to finalise service charge accounts within six months after year end.
- Review your budget for the upcoming year with *Phillips v Francis* [2012] in mind and consider the need to plan ahead where works to the building are concerned.
- If entering into a long-term contract, ensure it is not open ended, but for an initial period of one year thereafter continuing on a year-to-year basis.
- If you accept that it will be necessary to apply for dispensation from the consultation requirements, do so early before the lessees incur unnecessary costs which you could ultimately be held liable for.

was a QLTA because it was to be for a period of greater than one year. The landlord appealed to the Land Chamber on the basis that the agreement could be terminated at any time before or after one year.

The landlord relied upon the case of *Paddington Walk Management Ltd v The Governors of the Peabody Trust* [2010], where HHJ Marshall QC had held that the agreement at issue was not a QLTA because it was expressed to last:

> ... for an initial period of one year... continu[ing] on a year-to-year basis with the right to termination by either party by giving three months' written notice.

In dismissing the landlord's appeal, HHJ Gerald held that the agreement's effect was that the managing agent had contracted to provide the services therein defined forever, or indefinitely, and commented that:

> It is clear from those terms that [the services] will or are intended to be provided for a period which extends beyond 12 months: they relate to the ongoing preparation and collection of the annual service charge, management and maintenance of the building, obtaining insurance, enforcement of the leases and so on...

In his view, *Paddington Walk* could be distinguished because the term in that agreement was expressly defined as one year.

This decision has been criticised, as an entirely open-ended contract could not be described in plain language as having a 'term', however, landlords must now ensure that they do not enter into agreements of uncertain length without first consulting.

***Daejan Investments v Benson* [2013]**

The final case to consider is the Supreme Court decision of *Daejan Investments Ltd v Benson* [2013], where the landlord was granted dispensation from the consultation requirements under s20 of the LTA 1985.

At first instance the LVT had held that the landlord had not complied with the statutory consultation requirements by failing to provide a summary of the observations received from the tenants, and by not making all of the estimates available for inspection. The landlord appealed, and when the case got to the Supreme Court, three questions of principle were considered:

- the proper approach to be adopted when considering an application to dispense with the consultation requirements;
- whether the LVT can grant dispensation subject to conditions; and
- the approach to be adopted where prejudice is alleged by the tenants.

On the first question they found that the LVT should look at the extent, if any, to which the tenants' protection from paying for unreasonable works, or paying more than necessary, has been prejudiced. If there is no prejudice dispensation should be granted.

On the second question, they held that the LVT has the power to grant dispensation on such appropriate terms as it thinks fit. This means that the LVT can grant dispensation, but only if certain conditions are met. As a result, the landlord's dispensation was conditional upon it paying the tenants' reasonable costs, and the cost of the works that it was entitled to recover was reduced by £50,000.

Finally, on the third issue they decided that the factual burden of establishing prejudice was the tenants' responsibility, and only when a credible case for prejudice was established should the LVT look to the landlord to rebut it.

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The decision came as a welcome relief for landlords following *Phillips*. As a result of *Daejan*, the LVT will be able to interpret the statutory consultation requirements in a more commercial and flexible manner. However, the fact that tribunals can impose conditions means that landlords will still face potentially significant financial disadvantages if they fail to consult properly. ■

Beitov Properties Ltd v Martin [2012] UKUT 133 (LC)
Daejan Investments Ltd v Benson & ors [2013] UKSC 14
Johnson & ors v County Bideford Ltd [2012] UKUT 457 (LC)
LB Brent v Shulem B Association Ltd [2011] EWHC 1663 (Ch)
Martin & anor v Maryland Estates [1999] EWCA Civ 3049
OM Property Management v Burr [2013] EWCA Civ 479
Paddington Walk Management Ltd v The Governors of the Peabody Trust [2010] L&TR 6
Phillips & ors v Francis & anor [2012] EWHC 3650 (Ch D)
Poynders Court Ltd v GLS Property Management Ltd [2012] UKUT 339 (LC)
Tingdene Holiday Parks Ltd v Cox & ors [2011] UKUT 310
Triplerose Ltd v Grantglen Ltd & anor [2013] UKUT 204 (LC)