

# RESIDENTIAL SERVICE CHARGES

*by*

***Christopher Heather  
Tanfield Chambers***

Christopher practises all aspects of contentious and non-contentious property law, but particularly enjoys service charges and leasehold enfranchisement. He is recommended by both *Chambers and Partners* and *The Legal 500* in the field of property litigation. His recent significant cases include *Hanoman v Southwark LBC* (2009) where he represented Southwark in the House of Lords without a leader, *Hughes v Borodex Ltd* (2010) (Court of Appeal – disregard of tenant improvements) and *Hilmi & Associates Ltd v 20 Pembridge Villas* (2010) (Court of Appeal – leasehold enfranchisement notices – signature by company director). He is a member of the Property Bar Association and the Chancery Bar Association and a contributor to *Service Charges and Management: Law and Practice* (2009) by Tanfield Chambers. When not working, he enjoys skiing, film and food.

## TANFIELD CHAMBERS

**2 - 5 Warwick Court  
London WC1R 5DJ**

Telephone: 020 7421 5300

Fax: 020 7421 5333

Email: [cheather@tanfieldchambers.co.uk](mailto:cheather@tanfieldchambers.co.uk)

## RESIDENTIAL SERVICE CHARGES

### The Problem

#### *Facts*

1. Palace Heights is a four-storey building constructed in 1985 in a smartish area of London. The freehold is registered to Fleecem Ltd. The entire building is demised to Mesne Man Ltd for a term of 125 years commencing on 25 December 1985 (“the Headlease”) which is registered.
2. The ground and first floors comprise office premises. They are held by Underling & Co Ltd on an underlease for a term of 25 years commencing 25 December 1985 to which Part II of the Landlord and Tenant Act 1954 applies and which is registered (“the Office Lease”). The second floor consists of 5 flats, as does the third floor. Each flat is held on a residential underlease for a term of 125 years less 7 days from 25 December 1985 at a peppercorn rent and is registered (“the Flat Leases”). There are two lifts, each of which serves all the floors of the building.
3. The leases contain (among other things) the following service charge provisions:

#### *Headlease*

There is a tenant’s covenant to pay the service charge - defined as the expenditure incurred by the landlord in connection with the matters set out in the 6<sup>th</sup> schedule. The service charge year starts on 1 January.

The 6<sup>th</sup> schedule sets out the service charge provisions which include the following

- The costs of repairing, maintaining, and where reasonably necessary renewing, the structure and exterior of the building (including all roofs), the lifts serving the building ...

#### *Office Lease*

There is a tenant’s covenant to pay to the landlord one half of the sums payable by the landlord to the superior lessor pursuant to the provisions the 6<sup>th</sup> Schedule of the Headlease.

### *Flat Leases*

Each Flat Lease contains a tenant's covenant to pay to the landlord 5.5% of the sums payable by the landlord to the superior lessor pursuant to the provisions of the 6<sup>th</sup> Schedule of the Headlease.

4. On 1 April 2010 Fleecem wrote to Mesne Man in the following terms:

We consider that the two lifts serving the building have reached the end of their useful life and need replacing within the next 6 months. The estimated cost of the works is £250,000 including VAT and professional charges.

We have also decided to replace the roof with a new roof system incorporating solar heating panels to provide heating and hot water for the building before the end of the year. The estimated cost is £200,000 including VAT and professional charges.

You will be invoiced for the works following completion as part of your balancing service charge payment for the 2010 service charge year. Further details of the timing and duration of the works will be provided in due course.

### *Questions for Discussion*

- (1) The directors of Mesne Man seek your advice. What will you tell them?
- (2) What advice would you give the Flat Tenants?
- (3) How would you advise Fleecem if they come to you for advice on
  - (a) 10 April 2010
  - (b) 1 February 2011 (assuming that the works have been completed)
- (4) How would you advise Underling & Co?

### *References*

Landlord and Tenant Act 1985 ss 18 – 20ZA

The Service Charges (Consultation Requirements) (England) Regulations 2003  
Regulations 2, 6, 7 and Schedule, Part 2

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### Some Answers

#### *Mesne Man*

#### (1) At common Law

- Always start with the terms of the lease. If it does not cover the proposed works, the landlord does not get past first base. Do the proposed works fall within the covenant in the Headlease?
- Lifts – are they out of repair? Is it reasonably necessary to renew them? What is meant by “reached the end of their useful life?”
- Roof – do the works fall within the covenant? Are they pure improvement, which is not covered?

#### (2) Statute

- Applying *Ruddy v Oakfern Properties Ltd* [2006] EWCA Civ 1389, Mesne Man is the tenant of a dwelling, so gets the benefit of ss 18-20ZA and s.27A of LTA 1985.
- Fleecem must therefore comply with s.20 consultation requirements.
- Consultation requirements are Sched 4 Part 2 of the Service Charges (Consultation Requirements) (England) Regulations 2003 because these are qualifying works and no public notice is required.
- Does the letter comply with the requirements? Almost certainly not.

- If not, recovery by Flecem will be limited to £250 per tenant unless dispensation is granted: s.20(3) and Reg 6. *Paddington Walk Management Limited v Peabody Trust* [2010] L&TR 6 (HHJ Marshall QC) held that the limit is per dwelling (i.e. 10 x £250). That was a case under a QLTA, but the reasoning (if valid) would be the same for qualifying works.
- What are Mesne Man's options? If it does nothing, and the LVT finds the letter to comply with the consultation requirements/dispenses with consultation, then it may find himself in difficulties vis-à-vis the undertenants. The safer course is probably to pass on the letter from Flecem to the undertenants.
- When the bill arrives, he should apply to the LVT under s.27A LTA 1985. In the light of *Ruddy*, mesne landlords can take advantage of s.27A.
- Whether the Lease covers the works, and Flecem's failure to consult will obviously be applicable the primary arguments.
- But in addition, are the works (a) reasonably incurred? of a reasonable standard? – see s.19(1) of LTA 1985
- There are numerous points that could be run under s.19(1). Is it reasonable to be replacing the roof/lifts of a modern building after only 25 years? Is it reasonable to include the solar panels? But what if Building Regs mean that the only way the roof can lawfully be done is with solar panels included? This may make additional cost reasonable. See *Craighead v (1) Homes For Islington Ltd* [2010] UKUT 47 (LC). How well

have the works been done? Expert evidence will assist the LVT on these points.

### *Flat Tenants*

- If not consulted by Mesne Man, they can rely on consultation requirements.
- Limited to £250 per tenant.
- They can also deploy s.27A directly to challenge the amount payable under the Headlease: *Ruddy*
- Bonus points: under the terms of the Flat Leases, Mesne Man recovers 105% of the expenditure . Consider application under s.35 of LTA 1987 to vary the leases on basis that aggregate of amounts exceeds expenditure: s.35(4)(c)

### *Underling & Co*

- At common law: Underling & Co's lease comes to an end in 8 months – is this relevant? No. The important point is length of the term that was granted: *Fluor Daniels Properties Ltd v Shortlands Investment Ltd* [2001] 2 EGLR 103.
- Term of Underling & Co's lease is 25 years. It will be a question of (expert) evidence whether reasonable to expect to have to pay for new roof/lifts in that time frame.
- Can a commercial tenant take advantage of s.27A in the light of *Ruddy*? Underling is the party who ultimately pays, so, applying the reasoning in

*Ruddy*, why should it not be able to challenge the amount payable by Mesne Man under the Headlease?

- S.27A does not say that only a landlord or tenant of a dwelling may apply

*Fleecem*

- If advising in April 2010 – the best advice is: start again. Commission decent expert reports and begin consultation process with Mesne Man and undertenants.
- If advising in February 2011 bills have probably been sent, or at least prepared.
- Advice might be to make an application to the LVT under s.20ZA to dispense with consultation requirements.
- Cases on dispensation suggest that minor defects in consultation process will be met with dispensation: *Eltham Properties Ltd v Kenny* [2006] L&TR 14. However, where the failure to consult causes significant prejudice, there will be no dispensation: *Camden LBC v Leaseholders of 30-40 Grafton Way LRX/185/2006*; *Daejan Investments Ltd v Benson* [2009] UKUT 233 (LC) (NB an Appeal to the Court of Appeal, with the permission of the Upper Tribunal, will be heard in October 2010)
- Has the failure to consult caused significant prejudice? Probably, because the undertenants have not been able to make observations on the proposed works, nominate their own contractor, consider the estimates etc. Unlikely to succeed in such application if letter is only attempt at consultation, unless urgent/emergency works.