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Fair and Reasonable Service Charge Proportions.

Some flat leases, particularly older ones, do not necessarily have fixed service charge proportions or, where they do, nevertheless make provision for those proportions to be varied at some later date. Sometimes the variations are triggered by specific events, sometimes they are left to the discretion of the landlord and his (or his surveyor's) final and binding decision. A fertile area for disputes!

With so many blocks of flats and mixed use buildings now being extended, altered, converted or changed, there are an increasing number of disputes when landlords attempt to vary the existing service charge proportion arrangements.

The terms of the individual lease of the flat (or other unit) for which a change in the service charge proportion is proposed, is of the utmost importance. Mercifully, in most blocks, the lease terms are the same and there is a common form of lease, but that needs to be checked. In a recent case Bruce Maunder Taylor gave evidence at a Tribunal hearing for a building where the landlord had converted commercial units to residential flats and wanted to change the service charge proportions throughout the building (his right to do so being challenged by many of the lessees of the original flats). Two of the original flats had had an additional provision to the effect that their proportion could not be raised in the clause which, in restricted circumstances, allowed proportions to be changed. Each lease for which a variation is sought must be checked individually.

In the case of a large block of mansion flats with basement accommodation, the lessees had enfranchised the freehold and the freeholder leased back the vacant basement accommodation. The lessee controlled freehold company then started charging service charges on those basement units one of which was then used for office purposes and the other for light storage. In principle, there was no argument that some service charge should be payable, but the lessee controlled freehold company wanted their proportion to be assessed on floor area ratios despite the fact that the basement accommodation was of inferior quality and did not have the same availability, benefit and use of the common services. The aggregate service charge proportions of all the flats add up to 100% recovery so that the additional income from the basement units result in recovery of more than 100%. Because the basement units are not used for residential purposes, the leaseholder (the previous freeholder) is not able to take the dispute to the First Tier Tribunal. If it cannot be settled by agreement or mediation, the matter will have to go to the County Court where, unlike the Tribunal, costs can be awarded against the unsuccessful party. The lessee controlled freehold company does not have any other income except the service charges, nor any other assets. It is doubtful if the service charge provisions allow costs recovery as a service charge item for a dispute of this nature. There are multiple and complex issues involved in resolving this particular problem.

In another case which went to the First Tier Tribunal, a large number of flats had access through the common entrance hall with lift and staircase, but a few flats had their own direct external access and no need to enter through the common parts. The lease provisions were drawn on a *"fair and reasonable"* basis (which is quite unusual for modern flats). Bruce Maunder Taylor gave evidence on behalf of the direct access flats to the effect that service charge expenditure ought to be scheduled

so that internal common part maintenance and repairs are not contributed to by the direct access flats. That decision is awaited.

Cases in which service charge proportions in a block add up to 100% but then changes take place such that recovery is either more or less than 100% can be taken to the FTT pursuant to s.35 of the Landlord & Tenant Act 1987 for a determination so that a 100% recovery is made, no more and no less.

Cases in which there is some other mechanism built into the lease for variations (eg the Landlord's decision or the landlord's surveyors' binding decision) are generally challenged on the basis of such decisions being void pursuant to s.27(A)(6) of the Landlord & Tenant Act 1985. There are a few cases in which that has been taken to the Upper Tribunal and therefore there are authorities on the subject.

If the parties have sensibly agreed their own variations, then brief Deeds of Variation, or at least written agreements properly made out, are what ought to be provided both for the dispute-free management function of the building as well as for satisfying purchasers of individual flats when sales take place.

If service charges have been collected for a number of years on a different basis to that provided for in the lease, without challenge or dispute, there is a possibility that those changes can be defended and upheld on a *"long custom and practice"* basis or by reference to what a lawyer might call *"the convention of estoppel"*.

In years gone by the main disputes were when one lessee thought that their percentage was unfair compared with another lessee, but that is what they signed up to in their lease, and there was no provision either in the lease or in the law for them to be able to challenge what they thought was an unfair percentage. That could not then be changed, and cannot now be changed if the percentages add up to 100% and the percentages are stated in each lease.

The big change in recent years is mixed use buildings where the flats and commercial elements each contribute to different sets of service charge costs, roof developments so that the landlord is now collecting more than 100%, conversions of commercial space following permitted development when the commercial occupiers were previously paying a weighted proportion of service charge costs and the newly converted flats want to pay on a like for like proportion to the original flats, and the inevitability of service charge disputes generally, particularly in buildings with common heating, lifts, and other sophisticated high cost services to maintain.

Then there are the badly drawn leases in which the tenant's repairing covenant, the landlord's repairing covenant and the service charge covenants cannot be easily reconciled with each other, or are plain contradictory. Thankfully, not that many, but complex problems to resolve when major works money is demanded and no-one wants to pay!