



LEASE

THE LEASEHOLD
ADVISORY SERVICE

APPOINTMENT OF A SURVEYOR, MANAGEMENT AUDITS



Introduction



Some of the most frequent causes for concern by leasehold occupiers of flats or houses are the costs of services and the standards of management and maintenance provided by the landlord. It is not unreasonable for leasehold tenants to want to know more about how their charges are made up and about the landlord's arrangements for managing and repairing their properties.

Information, other than that required by legislation, is often difficult to obtain just for a general assessment of management arrangements and highly problematical where tenants wish to actively challenge those arrangements.

A tenant with a leaking roof will find it difficult to dispute his landlord's costs or methods of repair, without a detailed inspection and a knowledge of building practice; similarly it is practically impossible to properly assess and evaluate contractual and financial arrangements. Although recent legislation has provided rights to question the reasonableness of service charges, this may not be possible in the absence of full information.

In our leaflet *Application to the Leasehold Valuation Tribunal* we emphasise the need for expert, objective, evidence in support of such applications. In many cases the matters in dispute will be beyond the abilities of the tenants to contest without both detailed information, presently only known to the landlord, and detailed advice relating to the structure and physical state of repair of the property. Whilst tenants have rights of access to certain information under Landlord and Tenant Acts this will not be sufficient, in many cases, to contest major issues of dispute on service charges.

However, leasehold tenants (and other renting tenants who pay variable service charges) have a legal right to appoint a surveyor to examine the management practices of their landlord. Where tenants are unhappy about any aspect of the management of their property, its state of repair or general maintenance, levels of service charges or the landlord's provision of accounting information, the law provides two rights:

(i) to appoint a surveyor to advise on service charges
(S84 and Schedule 4, Housing Act 1996)

- this right is available to a recognised tenants' association but not to individual tenants

(ii) to carry out a management audit (S76, Leasehold Reform, Housing and Urban Development Act 1993)

- this right is available to individual leasehold tenants where theirs is the only dwelling, or one of two, in a building but otherwise qualification is by not less than two-thirds of the tenants acting together.

The rights do not provide any specific remedy to problems in themselves but are to provide tenants with information:

- as a general check on present management standards and procedures
- as a check or audit of the service charge accounts
- to enforce covenants of the lease covering management, repair and services
- to ensure further compliance with approved codes of management practice
- to provide evidence for challenge of service charges at a Leasehold Valuation Tribunal
- to support an application for the appointment of a manager

The appointed surveyor or auditor has legal powers of access to the building/estate and to the landlord's accounts and other documents;

- this provides a means of tenants investigating what they normally can't see
- the appointed surveyor has more rights of access than the tenants

The tenants will be liable for the costs of the surveyor; these costs cannot be recovered from the landlord whatever the outcome of the surveyor's investigations or the management audit.

The rights

Both the rights provide direct means for tenants paying variable service charges to fully investigate how the landlord is spending their service charge contributions, how he is maintaining the property or estate and the efficiency of his management arrangements. In the provision of the rights the legislation is redressing the difficulty tenants can have in obtaining necessary information from their landlord, particularly so when they require the information for the purpose of evaluating the landlord's management or challenging charges.

The 1985 and 1987 Landlord and Tenant Acts provided rights to information, including summaries of costs and rights for tenants to inspect (but not receive) certain documents (*these rights are set out in full in Appendix 1*). The 1993 Leasehold Reform Act set out to provide greater rights for tenants not only to obtain information but to evaluate the management arrangements against an approved code of practice. In the arrangements for codes of management conduct to be formally approved by the Secretary of State, the Act provided for the first time published accessible criteria against which management could be measured.

The 1996 Housing Act introduced, by amendment to the 1985 and 1987 Acts, new procedures for tenants to challenge the reasonableness of their service charges and to have the Leasehold Valuation Tribunal appoint a manager. The legislation recognised the difficulties of tenants in obtaining detailed information in support of their actions and provided a right to appoint a surveyor, able to require landlords to provide access to buildings, accounts and other documents, enforceable by court order.

Both rights provide legal rights of reasonable access for the appointed surveyor to otherwise confidential information. The exercise of these rights is dependent upon tenants meeting certain qualification conditions and providing proper notice to the landlord. Whilst tenants paying service charges should be fully entitled to know how their money is being spent, they should also accept that these rights provide enforceable access to what the landlord will, not unreasonably, regard as confidential business arrangements and they should not be used lightly. In all cases tenants are recommended to negotiate matters with the landlord, including use of any existing grievance procedures, prior to formal appointment of auditor or surveyor.

The purpose

Management Audit

The purpose of the audit is set out in S78 of the 1993 Leasehold Reform, Housing and Urban Development Act as:

"an audit carried out for the purposes of ascertaining:

- a) the extent to which the obligations of the landlord which*
 - i) are owed to the qualifying tenants, and*

- ii) *involve the discharge of management functions in relation to the relevant premises or any appurtenant property are being discharged in an efficient and effective manner; and*
- b) *the extent to which sums payable by those tenants by way of service charges are being applied in an efficient and effective manner"*

The purpose of this right is clearly to carry out an objective assessment of the landlord's management functions and procedures and to evaluate those; it is not simply to provide rights of access to premises and information as a 'fishing expedition'.

The Appointment of a Surveyor

The rationale for the appointment of a surveyor is set out in S84 of the 1996 Housing Act and is much less specific:

to appoint a surveyor "...to advise on any matters relating to, or which may give rise to, service charges payable to a landlord..."

This is clearly a wider remit for both the tenants and the appointed surveyor and, whilst the information gathered may be similar to that required for the management audit, its use is not limited other than that it should provide the basis of advice on service charges.

Codes of Practice

The auditor or the appointed surveyor may refer to approved codes of management practice in evaluating the landlord's management or service charge arrangements. These codes are approved by the Secretary of State for Housing and are not legally enforceable but may be used to evaluate a landlord's management for purposes of a management audit, or to support tenants' applications in any court or tribunal proceedings.

The Secretary of State has, to date, approved two codes of practice, one produced by the Association of Retirement Housing Managers relating to retirement housing and one by the Royal Institution of Chartered Surveyors relevant to all tenants paying variable service charges. Either code may be used. They are obtainable direct from the ARHM and the RICS.

What can be achieved?

Tenants should be clear in their objectives before deciding on the appropriate course of action. A management audit is a one-task appointment, to carry out an investigation and then report back to the tenants in the form of an audit. The appointment of a surveyor is on-going, to assist and advise the tenants as appropriate to their requirements; it continues until formally ceased by the association. In practice both approaches are likely to cover the same ground and to produce similar results, although the appointment of a surveyor provides greater flexibility.

Examples of matters the Auditor could examine include:

- *how far the landlord is meeting his obligations under the lease (and the law)*
- *what procedures and contracts the landlord has for carrying out repairs and maintenance works: how the works are specified and managed, what arrangements there are for competitive pricing, how the work is recorded and how invoices are checked and authorised for payment.*
- *existing service contracts (eg. lift maintenance or gardening) and their suitability and relevance to present needs, the costs and the means of pricing including whether they are tested by competition*
- *the landlord's financial systems, particularly how and where the*

tenants' service charge money is held, that its trust fund status is clearly established (where this applies) and what happens to the interest

- *the general state and condition of the common parts of the building, or estate, to check, for example, on matters of maintenance and contracted services; the cleanliness or the proper functioning of equipment*

With this the auditor can provide the tenants with an informed professional judgement:

- *is the landlord actually providing the services he is required to*
- *are the services provided to a reasonable standard*
- *is the landlord obtaining value for money*

The Surveyor can, if so instructed, do all of the above. In addition he can carry out other ad-hoc tasks according to the tenants' association's specific requirements. These can simply be to carry out annual or quarterly inspections to advise on repairs and management matters or to advise the association on all service charge demands; the appointment may be little more than a retainer to ensure the availability of expert advice when required. Alternatively, the surveyor may be appointed to provide evidence for tenants, who are members of the association, to challenge their service charges before a Leasehold Valuation Tribunal or, in serious cases, to apply for the appointment of a manager.

Considerations

Care must be taken by tenants in selecting the appropriate procedure for their building and qualification will count for as much as the objectives to be achieved. There are different qualification criteria for two rights and these are set out below, together with procedures for appointment, notice to the landlord and relative rights of access.

It must be appreciated that the procedures provide considerable rights for tenants to obtain what may be sensitive information and that these rights arise solely from formal appointment of the auditor or surveyor and proper notice to the landlord in accordance with statutory requirements.

The form of the notices varies in accordance with the nature of the appointment. The appointment of a surveyor is the start of an open-ended arrangement, during the course of which the surveyor may have occasion to require information or rights of access from the landlord; the management audit is a specific investigation with a prospective completion date and commences with direct requests to the landlord for information. Therefore the notice to the landlord regarding the appointment of a surveyor is simply the provision of information; that for the appointment of an auditor is the commencement of a process.

In either case the auditor's or surveyor's notices may be served on the landlord's managing agent but must be copied to the landlord's official address. Again, both procedures allow for access to documents etc held by a superior landlord. Similarly, where a landlord disposes of his interest after service of the notices, his successor in title will be bound by them and must comply within one month of the date of disposal.

Costs

The landlord, or his managing agent, cannot charge for the provision of documents or the facilities provided for their inspection but they may make a reasonable charge for their copying.

However, the landlord can, quite legitimately, add any costs to him arising from the audit or activities of the appointed surveyor to the

tenants' service charges. The only protection here for tenants is that those costs would be subject to the challenge of reasonableness, as other service charge costs.

Management Audit

Qualification

To qualify for the right a tenant must have a long lease (an original lease of more than 21 years) which includes an obligation to pay service charges. The dwelling can be a flat or a house but the lease must not be a business lease:

- where there is only one tenant in the building paying service charges, that tenant can exercise the right
- where there are only two dwellings in the building either or both of the tenants can exercise the right
- where there are three or more dwellings then it requires not less than two thirds of the tenants to collectively exercise the right

Management Audits were introduced as part of legislation for leasehold reform and are applicable only to premises occupied by "qualifying tenants", that is long leaseholders. It is clear from the legislation that, whilst a management audit may be commissioned in respect of a building occupied by both long leaseholders and other tenants paying a variable service charge (so long as the long leaseholders have a two-thirds majority), the audit is only applicable to the flats of the qualifying tenants. Whether this would, in application, cause a problem is not so clear. However, a management audit may be commenced by either or both leaseholders of a building in only two flats where it is unlikely that a tenants' association exists. It is also available to individual leaseholders of houses or properties which contain only one flat.

Appointment

The auditor must satisfy certain statutory requirements:

- he must be 'suitably qualified'
 - either i) a qualified **Accountant**; which means a member of:
 - *the Institute of Chartered Accountants*
 - *the Association of Certified Accountants*
 - *any other body of accountants recognised by the Secretary of State*
 - or ii) a qualified **Surveyor**, which means a fellow or associate of
 - *the Royal Institution of Chartered Surveyors*
 - *the Incorporated Society of Valuers & Auctioneers*
 - *the Architects and Surveyors Institute; or*
 - *as prescribed in regulations made by the Secretary of State*
- he must not be:
 - i) a tenant of the premises, *or*
 - ii) an officer, partner, agent or employee of the landlord

The auditor may appoint others to assist him in the audit (who also exercise the rights of the auditor). An accountant may employ a surveyor for the purpose of the property inspection, a surveyor may employ an accountant for examination of the accounts. There is no specific advantage in the audit being carried out by either profession but tenants should check the auditor's relevant experience in property management.

Rights of access and information

For purposes of an audit, the auditor has a statutory right (S79 1993 Act) to require the landlord:

- i) to supply him with the summary of relevant costs referred to in Section 21 of the 1985 Landlord and Tenant Act on which the service charge is based.
- ii) to afford him reasonable facilities for inspecting and copying accounts, receipts and other documents supporting the summary, or any other document "sight of which is reasonably required by him for the purpose of carrying out the audit".
- iii) to allow an inspection of any common parts comprised in the relevant premises or appurtenant property.

Notice to the landlord

These rights arise from the provision of a notice to the landlord, under S80 of the 1993 Act, stating

- i) the full names of all the qualifying tenants on whose behalf it is served, and the addresses of the flats of which they are qualifying tenants
- ii) the name and address of the auditor
- iii) any documents which the landlord is required to supply to the auditor or to afford him access to inspect and copy
- iv) date on which the auditor proposes to carry out an inspection (not less than one month or more than two months from the date of the notice)

The notice must be signed by all the tenants.

The landlord must comply with the notice within *one month*, or serve a counter notice setting out his objections, or proposing an alternative date for the inspection. Where the landlord fails to comply or, provides objections, the auditor may apply to the court for an order.

The application to the court must be made no sooner than two months nor later than four months after the service of the S80 notice.

Appointment of a Surveyor

Qualification

This is not restricted to leaseholders but is a right only available to a *recognised tenants' association*, that is a tenants' association formally recognised by the landlord or by the local Rent Assessment Committee.

The right applies to tenants and leaseholders but is not available to individuals, only to the recognised tenants association. Where there is already a recognised tenants' association in existence the appointment can be simply achieved and avoids the complications and, sometimes, difficulties of achieving the two-thirds majority required for the management audit. However, where there is no recognised association this will have to be put in place first, before any further progress can be made. (See Appendix 2) In cases where tenants wish to appoint a surveyor in furtherance of a challenge of service charges the additional delay in setting up and obtaining recognition of an association may cause difficulties.

Appointment

The surveyor must be qualified as in the case of a management audit. The surveyor can be a tenant of the premises. The surveyor may also appoint an assistant.

The assistant can be another expert to investigate and advise on particular issues. For example, the surveyor can call in an accountant to check the soundness of the landlord's accounting systems and financial management and to look at the safeguarding of the tenants' sinking funds.

Similarly, he can appoint consulting engineers to check on technical and construction matters.

Rights of access

The rights available to the appointed surveyor are similar to those for the management audit. He may require the landlord:

- i) to afford him reasonable facilities for inspections and copying any documents, sight of which is reasonably required by him for the purpose of his functions.
- ii) to allow an inspection of any common parts comprised in the relevant premises or any appurtenant property.

Notice to the landlord

The formal appointment of the surveyor takes effect from the service of a notice on the landlord by the association stating:

- i) the name and address of the surveyor
- ii) the duration of his appointment
- iii) the matters in respect of which he is appointed

The notice is, at this stage, simply a notification to the landlord of the appointment and does not include any requirements for information from the landlord.

The appointment will remain in effect until the service of a further notice cancelling the arrangement.

There is no prescribed form for the notice to the landlord, who must comply within *one week* 'or as soon as reasonably practicable thereafter'; or give the surveyor a notice stating that he objects to doing so for reasons specified in the notice. Where the landlord fails to comply after one month and has not served a notice of objection the surveyor may immediately apply to the court for an order (within a period of four months from service of his original notice).

Tenants should recognise that in pursuit of information the appointed surveyor has far more rights on their behalf than the individual tenants or the tenants' association.

The full powers available to appointed surveyors is set out in Schedule 4 to the 1996 Housing Act.

Challenging service charges

The area in which a surveyor may be particularly valuable is in assembling and presenting the evidence for a challenge of service charges and, at the tribunal hearing, countering the landlord's arguments. The surveyor's rights to demand information, to obtain access for inspection and his own technical expertise can usefully inform arguments about the costs of works of repair.

For example, the surveyor may consider the following matters: was or is the work necessary at all? how much of the necessary work arises from previous neglect? how thorough was or is the specification and how much is it a reflection of what actually needs doing? what arrangements has the landlord for price tendering? how are the works supervised? what arrangements are there to deal with additional or unforeseen works – does this provide an opportunity to increase previously agreed costs?

what arrangements has the landlord for final inspection and payment? and, perhaps, of most importance, were the works done properly?

All these issues can be addressed by a competent surveyor, working within and fully utilising, the rights of the 1996 Act.

Appointing and instructing

Where a tenant, or group of tenants, or a recognised tenants' association wish to proceed they should take time and care in the selection and instruction of the surveyor or auditor. Not all surveying practices (and very few accountancy practices) specialise in this area and tenants should not therefore presume the practice to have the necessary expertise or a full knowledge of the relevant legislation. The rights available to the tenants, through the auditor or surveyor, are entirely dependent upon full compliance with statutory procedures and the appointment of a professional adviser not fully conversant with those procedures can endanger the process.

Tenants should ask, in interview with a prospective adviser, for him to explain the process, particularly relating to notices and timescales, and set out a proposal of what he intends to do, when, and to provide an outline timetable for feedback to the tenants. Some practices may also provide a structured scale of fees for the work, if not, this should be discussed. The fees should be agreed and a contract entered into before the surveyor starts work.

Confidentiality

Some landlords may be reluctant to fully comply with an auditor's or surveyor's wish to examine his accounts on grounds of confidentiality. There are no provisions in the legislation providing a landlord or managing agent any right of embargo or partial compliance arising from confidentiality of accounts, nor is there any provision for the court to be able to order disclosure of information to be subject to the blanking out of particularly confidential matters. The legislation gives no defence to the landlord in this area.

As the new legislation has not yet been tested in court it might be prudent to apply the general principle of privity of information in these cases – *that is, the information, obtained under compulsion, is confidential to the auditor or surveyor, for the purposes of his appointment, and is for use by the tenants in direct connection with the audit or other specific purpose arising from the appointment of the surveyor.*

It would be wise, pending any contrary precedent, not to pass such information beyond the auditor or surveyor and the relevant tenants – it should not be published in a newspaper or given to other tenants of the same landlord.

Conclusions

The two powers provide great opportunities for tenants to examine and evaluate the arrangements for the management and repair of their premises and to know how the service charges are made up.

Neither right provides an end in itself but can provide information and evidence to enforce better management, to challenge service charges, or insurance costs or to apply for the replacement of the landlord with a new manager.

The 1996 Act rights for the appointment of a surveyor are more flexible than the 1993 Act management audit arrangements and should be of great benefit to tenants.

Comparison of the two rights

Management Audit

Appointment of a Surveyor

1. Eligibility

- 'qualifying tenants' (long leaseholders) only who pay a service charge
- tenants of single dwellings where there is only one dwelling in the building
- one or both tenants of building in two dwellings
- two-thirds of all qualifying tenants in buildings of three or more dwellings
- recognised tenants' associations

2. Appointment

- must be a qualified surveyor or a qualified accountant
- not a tenant of the premises
- may appoint an assistant
- must provide notice of appointment to landlord
- the notice needs to be signed by each tenant on whose behalf it is given
- must be a qualified surveyor
- no conditions
- may appoint an assistant
- must provide notice of 'appointment to landlord
- no prescribed format for the notice

3. Right to Inspect Documents

- summary of relevant costs (1985 Act)
- accounts, receipts, and other documents supporting that summary
- any other documents reasonably required
- landlord has one month to comply
- any documents reasonably required
- landlord has one week to comply or 'as soon as is reasonably practicable'

4. Right to Inspect Premises

- common parts in the relevant premises or 'appurtenant property' (property not contained in the relevant premises but which is included in the management functions)
- building or buildings containing the dwellings let to the qualifying tenants'
- Landlord has one month to comply or provide alternative date for inspection within two months
- building or buildings containing the dwellings let to members of tenants association
- Landlord must comply within a 'reasonable period'

(continued overleaf)

Comparison of the two rights

(continued from previous page)

5. Where landlord fails to comply:

- application to court two months after service of notice (but within four months)
- application to court one month after service of notice (but within four months)

6. Duration of Appointment

- ceases on completion of the audit (no prescribed procedures)
- ceases if the association gives notice in writing to the landlord or if the association ceases to exist

Appendix 1



Tenants' rights to information

- the landlord must provide his name (or company name) and address on all rent and service charge demands. If his address is outside England and Wales he must provide an address within England and Wales at which notices may be served.
- if the landlord is a company, he must comply with tenants' requests for the names and addresses of all the directors and the secretary.

Information about service charges

- where requested by a tenant, or a recognised tenants' association the landlord must provide a summary of the costs on which the service charges are based. This must relate to the last accounting year or the 12 months before the tenants' request.

It must :

- show all costs incurred by the landlord for works and services etc., showing how they are, or will be, reflected in the service charges.
- distinguish between items where payment has not been demanded of the landlord, where demands are made but not paid and where the landlord has paid during the period.
- state whether any of the costs relate to works in respect to which an improvement grant has been, or will be paid.

The summary must be supplied within one month of the request or within six months of the end of the accounting period, whichever is later.

- within six months of receiving the landlord's summary the tenant or recognised tenants' association can ask the landlord in writing to see accounts, receipts and other supporting documents. The landlord must provide an opportunity for inspection and copying of the documents for a period of two months beginning within one month of the request. The landlord cannot charge for inspection but can charge for copying. (The landlord is not required to provide the documents to the tenant but make them available at a place convenient to him, but not necessarily to the tenant).
- these rights also apply to information held by a superior landlord.

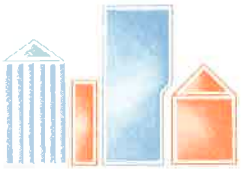
Information about insurance

- When the service charges include an amount relating to insurance for the building, the tenant or recognised tenants' association may

require from the landlord a written summary of insurance cover. This must include:

- the sum for which the property is insured
- the name of the insurer
- the risks covered by the policy
- within six months of receiving the landlord's summary the tenant or recognised tenants' association can ask the landlord in writing to see the insurance policy and any receipts and supporting documents, including evidence of payment of premiums. (Again, the landlord is not required to provide the documents to the tenants but make them available for inspection.)

Appendix 2



Recognised Tenants' Associations

The secretary of a tenants' association should ask the landlord for a written notice of recognition. Once the landlord does this he can only withdraw the recognition on six months notice.

Alternatively, or if the landlord refuses recognition, the association may apply to their local Rent Assessment panel. Recognition will be at the discretion of the panel who will normally expect the association to represent at least 60% of the tenants. The recognition certificate is normally for a period of four years.

Useful addresses



The Royal Institution of Chartered Surveyors
12 Great George Street
Parliament Square
London SW1P 3AD
0171 222 7000

The Incorporated Society of Valuers and Auctioneers
3 Cadogan Gate
London SW1X 0AS
0171 235 2282

The Association of Retirement Housing Managers
Finsbury Business Centre
40 Bowling Green Lane
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0171 415 7105



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