

Service Charge Determinations – Surviving the Leasehold Valuation Tribunal

Since 30 September 2003, the principal jurisdiction of the Leasehold Valuation Tribunal (‘LVT’) has been the determination of whether and the extent to which a service charge is payable by a residential tenant to a landlord or management company.

Jurisdiction

Section 27A of the Landlord and Tenant Act 1985 (‘the 1985 Act’) provides:

“Liability to pay service charges: jurisdiction

(1) An application may be made to a leasehold valuation tribunal for a determination whether a service charge is payable and, if it is, as to—

- (a) the person by whom it is payable,*
- (b) the person to whom it is payable,*
- (c) the amount which is payable,*
- (d) the date at or by which it is payable, and*
- (e) the manner in which it is payable.*

(2) Subsection (1) applies whether or not any payment has been made.

(3) An application may also be made to a leasehold valuation tribunal for a determination whether, if costs were incurred for services, repairs, maintenance, improvements, insurance or management of any specified description, a service charge would be payable for the costs and, if it would, as to—

- (a) the person by whom it would be payable,*
- (b) the person to whom it would be payable,*
- (c) the amount which would be payable,*
- (d) the date at or by which it would be payable, and*

(e) the manner in which it would be payable.

(4) No application under subsection (1) or (3) may be made in respect of a matter which—

(a) has been agreed or admitted by the tenant,

(b) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,

(c) has been the subject of determination by a court, or

(d) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.

(5) But the tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment.

(6) An agreement by the tenant of a dwelling (other than a post-dispute arbitration agreement) is void in so far as it purports to provide for a determination—

(a) in a particular manner, or

(b) in particular evidence of any question which may be the subject of an application under subsection (1) or (3).

(7) The jurisdiction conferred on a leasehold valuation tribunal in respect of any matter by virtue of this section is in addition to any jurisdiction of a court in respect of the matter”

The LVT is therefore endowed with the jurisdiction to consider all residential service charges and to determine the extent to which they are payable by the residential tenant. The jurisdiction extends to related questions such as whether a tenant has actually paid the service charges (s. 27A(2) of the 1985 Act) and whether the tenant is entitled to exercise a right of set off for breach of a repairing covenant.

The jurisdiction of the LVT may not be ousted by a prior agreement of the tenant and landlord. Save for an admission as to the liability of the service charge, any agreement which purports to provide for the determination of any of the wide range of questions which may be answered by the LVT will be void to that extent (s.27A(6) of the 1985 Act).

An application may be made by anyone with an interest in the property. For the purposes of a s.27A application, a ‘tenant’ includes both a statutory tenant or a subtenant (s.30 of the 1985 Act), and a former tenant (*Re Sarum Properties Limited’s Application* [1999] 2 EGLR 131).

Further, following the Court of Appeal’s decision in *Oakfern v Ruddy* [2007] 3 WLR 524, an intermediate lessee of the whole of a block of residential flats will also be a ‘tenant’ for the purposes of a s.27A challenge to the service charges levied by the superior landlord.

However, the service charge jurisdiction is not open ended and neither the tenant of a holiday chalet/bungalow with restricted hours of occupation (*King v Udlaw* [2008] L & TR 28) nor in all probability the tenant of mixed usage properties (*Buckley v Bowerbeck Properties Limited* [2009] 1 EG 78) will be entitled to make an application pursuant to s.27A of the 1985 Act.

Equally, ‘landlord’ includes any person with a right to enforce payment of the service charge (s.30 of the 1985 Act). Often this results in the inclusion of the management company as a party to LVT proceedings. Indeed, where the actual landlord has no obligations as to the payment or receipt of service charges within the lease and has not carried out such functions, it may be that the landlord is not entitled to be a party to the LVT proceedings, instead of which the management company will be exclusively (*Barton v Accent Property Solutions Limited* LRX/22/2008).

The Exercise of the Jurisdiction

Section 27A provides the jurisdiction and procedure for an application to the LVT to determine liability for service charges. The LVT employs a three stage process in order to arrive at a determination of service charge liability:

- (1) whether the service charges are recoverable as a matter of contract;
- (2) whether the service charges were reasonably incurred;
- (3) whether any of the other potential statutory restrictions on recovery are applicable.

(1) Contractual liability

The contractual liability for service charges, both in principle and in proportion, is rarely in dispute in the LVT.

It will rarely be difficult for a landlord to satisfy the LVT that the service charges are owing in principle. The production of the lease, together with any licences to assign or collateral agreements, is usually sufficient. Whilst on occasion provisions in a lease have required the LVT to undertake an exercise in construction, more often than not leases are sufficiently clear.

However, under the first stage of the process it may also be necessary for the LVT to determine any counterclaim by the tenant for breaches of covenant by the landlord insofar as they are relevant to the question of set off. In *Continental Property Services Ventures Inc v White* [2006] 1 EGLR 85 the Lands Tribunal held that it was an incidental jurisdiction of the LVT to consider such questions in order to be able to determine, pursuant to a s.27A application, the question of liability for service charges.

Whilst the Lands Tribunal have also indicated that the LVT ought to exercise restraint with such an incidental jurisdiction and consider whether it is best placed to try potentially complicated legal questions such as the landlord's breach of repairing covenants and/or the breach of quiet enjoyment covenants (see *Canary Riverside Pte Limited v Schilling LRX/65/2005* and *Continental Property Services Ventures Inc v White*) nonetheless it remains a potential minefield for landlords making or resisting applications to the LVT under s.27A of the 1985 Act.

The list of potential and difficult questions arising pursuant to this incidental jurisdiction is seemingly endless and includes:

- (i) the construction of repairing covenants;
- (ii) the determination of any breach of a repairing covenant;
- (iii) questions of rights of access and their breach;
- (iv) questions of the validity of a provision prohibiting set-off in a residential lease given the Unfair terms in Consumer Contracts Regulations 1999;
- (v) questions of voidability for mistake and/or forgery.

Where such tricky questions arise at a preliminary stage of the LVT application, landlords are advised to apply to the tribunal to stay the proceedings in the LVT pending the determination of such legally complex questions. The resulting delay will almost always be worth the wait.

The main focus of the service charges jurisdiction of the LVT nonetheless remains the question as to whether the service charges were reasonably incurred.

(2) whether the service charges were reasonably incurred

Section 19 of the 1985 Act provides:

“Limitation of service charges: reasonableness.

(1) Relevant costs shall be taken into account in determining the amount of a service charge payable for a period—

(a) only to the extent that they are reasonably incurred, and

(b) where they are incurred on the provision of services or the carrying out of works, only if the services or works are of a reasonable standard; and the amount payable shall be limited accordingly.

(2) Where a service charge is payable before the relevant costs are incurred, no greater amount than is reasonable is so payable, and after the relevant costs have been incurred any necessary adjustment shall be made by repayment, reduction or subsequent charges or otherwise.

(5) If a person takes any proceedings in the High Court in pursuance of any of the provisions of this Act relating to service charges and he could have taken those proceedings in the county court, he shall not be entitled to recover any costs.”

Section 19(1) of the 1985 Act provides a test not of reasonableness but of whether the service charge is ‘**reasonably incurred**’. The landlord must not forget that it is necessary, whether it is the tenant’s application or his/her own, to provide evidence both that it was reasonable to undertake such services/works and that the costs incurred for those services/works are also reasonable (see *Forcelux v Sweetman* [2001] 2 EGLR 173 and *Veena SA v Cheong* [2003] 1 EGLR 175).

In *Longmint Limited v Eggleton* (2009) LON/OOAJ/LSC/2009/115 the LVT held that in order to answer the question as to whether a charge had been reasonably incurred a tribunal had to consider whether the landlord’s actions were reasonable and appropriate under all three of (i) the terms of the lease, (ii) the provisions of the 1985 Act and (iii) proper practice at the relevant date.

A wide view is generally taken to the meaning of ‘reasonably incurred’ and in the recent Lands Tribunal case of *Garside and Anson v RFYC Ltd* [2011] UKUT 367, LC the Lands Tribunal held that this could include an assessment as to whether the works

had been carried out at a reasonable time and whether it was reasonable to do so in one go as opposed to spreading the costs of the works.

It is generally thought that the ‘reasonably incurred’ test is more stringent than a mere test of reasonableness (*Maryland Estates v Ayton LVT/SC/CR/123/166/01*), though often the satisfaction of a test of reasonableness will in practice also satisfy a test of ‘reasonably incurred’.

Further, where the landlord has undertaken works, in order to recover such sums by way of residential service charges it is necessary that the standard of the work was also reasonable (*s.19(1)(b) of the 1985 Act*).

It is worth noting that an argument by the tenant based upon the historic neglect of the landlord ought not to aid the LVT in determining whether the specific service charge is payable (*Continental Property Ventures Limited v White [2007] L & TR 4*) but may be relevant to the question of any counterclaim and set-off.

(iii) any further statutory restrictions

The final stage of the LVT’s assessment is whether there are any further statutory restrictions. The potential range of statutory restrictions are numerous:

- (i) expiry of statutory limitation periods (see *St Andrew’s Square LVT LON/00AW/NSI/200/0054*, *Limitation Act 1980* and *s.20B of the Landlord and Tenant Act 1985*);
- (ii) failure to comply with the consultation requirements in section 20 of the *Landlord and Tenant Act 1985*;
- (iii) failure to comply with ss. 47 and 48 of the *Landlord and Tenant Act 1987*;
- (iv) failure to provide the required information to tenants pursuant to section 21B of the *Landlord and Tenant Act 1985*.

Procedure in the LVT

The procedural regulations governing s.27A applications to the LVT are laid down in *Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003* ('the 2003 Regulations').

A dispute may arrive at the LVT via one of two means:

- (a) an original application - by a landlord or tenant to the LVT direct.

In this case the Residential Property Tribunal Service provide a specific form for this application, available on: <http://www/rpts.gov.uk>.

The application, together with the appropriate fee (see the *Leasehold Valuation Tribunal (Fees) Regulation 2003*), ought to be submitted to the appropriate regional office of the Residential Property Service.

The application will then be served by the LVT on all other parties named by the applicant and also both (a) the residents association, if any, of the building and anyone else the LVT considers to be significantly affected by the application (*Reg.5 of the 2003 Regulations*).

All notices are deemed to be properly served by sending them to the resident's usual or last known address (*Reg.23 of the 2003 Regulations*).

- (b) a transferred application: from within pre-existing court proceedings

Paragraph 3 of the Twelfth Schedule to the Commonhold and Leasehold Reform Act 2002 provides the court with a general power to transfer proceedings to the LVT.

The procedural requirements for the issue of such a transferred application is set out in paragraph 15 of the Practice Direction to CPR 56:

“If a question is ordered to be transferred to a leasehold valuation tribunal for determination under paragraph 3 of Schedule 12 to the Commonhold and Leasehold Reform Act 2002 the court will –

(1) send notice of the transfer to all parties to the claim; and

(2) send to the leasehold valuation tribunal –

(a) the order of transfer; and

(b) all documents filed in the claim relating to the question.”

After completion of the above steps the LVT treats the application in the same way as an originated application. A fee will be payable upon the transfer by the court (Reg.4 of the 2003 Regulations).

Often, if the service charge forms one part of a larger case, the appropriate action will be for the court to stay the court proceedings pending the determination of the service charge question by the LVT. The question as to whether there is a need for a transfer to the LVT at all is determined by the court, at an early case management stage, considering whether it ought to be transferred in the light of (a) the complexity of the issues, (b) any potential savings in costs, (c) whether the expertise of the LVT as an expert tribunal will be particularly applicable in the instant case and (d) whether there remain other issues to be dealt with by the court (*Aylesbond Estates Ltd v Macmillan, Garg & Abbey National Plc (2000) 32 HLR 1*).

Case Management

Upon receipt of an original application or a transferred application the clerk of the LVT will assign the papers to a tribunal chairman. The chairman will assign the application to one of three tracks:

- (1) the paper track: in accordance with Regulation 13 of the 2003 Regs, the chairman may deal with the application on paper alone;
- (2) the fast track: where the matter ought to be dealt with within 10 weeks of the application's receipt. It will typically involve a hearing of less than half a day at the LVT and is appropriate only where the service charge items in dispute are very limited in number and from only one service charge year;
- (3) the standard track: which is appropriate for most cases.

The case management powers of the LVT largely mirror that of the court and provides for:

- (i) adding parties upon an application to be joined (Reg.6);
- (ii) striking out an application which is either frivolous and vexatious or an abuse of process (Paragraph 7 of the Twelfth Schedule to the Commonhold and Leasehold Reform Act 2002). The LVT may strike out the whole or part of an application either upon an application of another party or of its own initiative. However, when intending on a strike out, the LVT must provide the applicant with notice of its intention and provide at least 21 days for the party to respond and request a hearing (Reg.11(3) of the 2003 regulations) (see also *Volosinovic v Corvan Properties Limited LRX/67/2006*);
- (iii) holding a pre-trial review;
- (iv) make directions (12(3) of the procedure regulations). These directions are generally standard and provide for witness statements, where necessary statements of case, further disclosure of documentation and fixing the date for the substantive hearing;
- (v) it may be appropriate for the LVT to hold the hearing of a preliminary issue.

It is worth noting that the LVT has a limited jurisdiction to extend time for compliance with a direction. The tribunal may only do so before the time has passed by which the direction ought to have been complied with.

Evidence

The following is a non-exhaustive list of the written and documentary evidence which it is usually advisable to present to the LVT:

- (i) service charge demands
- (ii) accounts
- (iii) final certificates
- (iv) management contracts
- (v) insurance estimates and policies
- (vi) schedule of works
- (vii) both job specifications and invoices where the two are distinct
- (viii) alternative estimates/quotations (particularly if the tenant);
- (ix) witness evidence dealing with:
 - (a) why the works were carried out;
 - (b) why the particular contractors were engaged;
 - (c) what if any consultation with the residents/tenants took place;
 - (d) a comment, where applicable, on the standard of the work.

In practice the LVT takes a very relaxed attitude to the admissibility of evidence and it is not uncommon for tenants, particularly when acting as litigants in person, to be afforded a generous exercise of the tribunal's discretion.

The Hearing

The tribunal will usually meet as close to the property as possible, save in London where the LVT usually meets at the London Residential Property Service building at 10 Alfred Place.

Usually all hearing are open and public hearings and usually 21 days' notice is given prior to the hearing of the hearing date. The LVT does have the power to adjourn the hearing upon an application but there is a presumption against postponement (Reg.15 of the 2003 Regulations), save where a party arrives with undisclosed documents where there is a presumption of an adjournment (Reg.16(2) of the 2003 Regulations).

Otherwise the LVT has a wide discretion as to the conduct of the hearing (Reg.14 of the 2003 Regulations). Anyone who has attended the LVT will know that the individual tribunals vary greatly as to their hearing of a case in practice. Some adopt a similar approach to a court, hearing one side's case and then the other. Many, however, adopt a more informal (select committee) style where the tribunal hears from each party issue by issue and literally service charge item by service charge item. A useful tip for landlords is to make the submission at the outset (if this approach is to be adopted) that the tenant ought to identify each and every item challenged, but be taken to admit each item left unchallenged. Many LVTs will proceed in this way and it is an efficient means of avoiding the need to explain every item, even where the landlord has made the application.

Again, the giving of evidence varies from LVT to LVT. In many, there is no formal swearing in of a witness, nor any distinct examination in chief and/or cross-examination. Instead, as each item is considered, often witnesses will simply 'pipe up' with their own comments, irrespective of what their representatives are submitting at the time. LVTs are generally very lax about such conduct and it can result in a somewhat chaotic hearing.

Any advocate appearing before the LVT will have heard the continual references to the fact that the LVT is an expert tribunal. This leads to an often inquisitorial style of tribunal hearing (a ‘select committee’ approach) and it is notable that this is often (particularly out of London) somewhat tenant-friendly in approach.

In using its own expert knowledge (see Reg. 16(1)(b) of the 2003 Regulations), the LVT often reaches conclusions based on its expert opinion which can be somewhat of a stretch from the actual evidence heard. In a recent case, *Stephen Lake v City & Country Properties Limited*, the LVT, in the absence of any witness evidence at all, reached a decision about the quality of major works which took place some 4 years previous. Despite the absence of evidence, the tribunal felt able, as it was invited to do by the parties, to reach a conclusion as to the reasonableness of the works.

The LVT is, however, limited in that it (1) must only decide issues between the parties, (2) must only reach a conclusion on the basis of evidence before it and upon which the parties could comment and (3) must give detailed reasons for its conclusions (see *Arrowdell Limited v Coniston Court (North) Hove Limite (2007)*).

It is usual for the LVT to carry out a site inspection at some point during the hearing. If possible, both parties ought to attend and each should point out to the tribunal members anything they wish to be considered. However, often the tribunal members attend a property in the absence of the parties, where both parties are happy to consent to this.

Evidential Burden of Proof

Usually the burden of proof, as one might expect, lies with the applicant. However, HHJ Rich sitting in the Lands Tribunal in *Schilling v Canary Riverside, LRX/26/2005* held that:

“If the landlord is seeking a declaration that a service charge is payable he must show not only that the cost was incurred but also that it was reasonably incurred to provide services or works of a reasonable standard, and if the tenant seeks a declaration to the opposite effect, he must show that either the cost or the standard was unreasonable. In discharging that burden the observations of Wood J in the Yorkbrook case make clear the necessity for the LVT to ensure that the parties know the case which each has to meet and for the evidential burden to require the tenant to provide a prima facie case of unreasonable cost and standard.”

One can distil from this judgment that:

- (i) the burden of proof initially rests with the applicant;
- (ii) when evidence is provided by the applicant the burden then shifts onto the respondent, until he produces sufficient evidence, when again it will shift back onto the applicant and so on;
- (iii) given the fiduciary duty of the landlord to account for any service charge which he collects, once a tenant has raised the issue of an expenditure, the evidential burden will often fall on the landlord to show that those costs have been reasonably incurred.

Decisions and Appeals

The decision of the LVT invariably is reserved and delivered in writing, as the LVT is required to provide written reasons for its decision in any event (Reg. 18(5) of the 2003 Regulations).

The LVT is supposed to provide its written decision within 6 weeks of the substantive hearing. However, it is far from uncommon for the decision to arrive only months later.

The decisions of the LVT are not those of a court of record and, as such, are not binding on either the courts or future LVTs (*West Midland Baptist (Trust) Association v Birmingham Corporation [1968] 2 QB 188*). This contrasts to the Lands Tribunal which, since becoming the Upper Tribunal (Lands Chamber) is now a court of record and creates binding decisions.

Pursuant to section 175(1) of the Commonhold and Leasehold Reform Act 2002, an appeal from the LVT lies to the Upper Tribunal (Lands Chamber) (formerly the Lands Tribunal).

Permission must be sought in the first instance from the LVT itself and then from the Lands Tribunal if permission is refused by the LVT (Reg 21(1) of the Tribunal procedure (Upper Tribunal) (Lands Chamber) Rules 2010). The time limit for the initial application for permission to appeal is 21 days from the date that the reasons are set out in the decision (Reg.20 of 2003 Regulations).

Neither the LVT nor the Lands Tribunal has the power to grant an extension of time for the filing of an appeal unless that application to extend time is itself made prior to the expiry of the 21 day limit (Reg. 24 of the 2003 Regulations).

Permission to appeal will only be granted where one or more of the following grounds (see paragraph 4.2 of the Practice Direction of the Lands Chamber of the Upper Tribunal 2010):

- (1) the LVT wrongly interpreted or applied the law;
- (2) the LVT wrongly applied or interpreted a principle of professional valuation;
- (3) the LVT took account of irrelevant considerations or failed to take into account relevant considerations.

A relevant factor, but not a substitute for the above, is whether the point in issue is of a potentially wide application or importance.

Further, the provision of inadequate reasons is a fertile ground for appeals. Any inadequacy is not able to be cured by the LVT subsequently expanding on its original reasoning (*Wisestates Limited v Mulji LRX/174/2007*).

Usually an application for permission to appeal is determined on the papers and does not require a hearing. Permission will only be granted where the LVT or Lands Tribunal is satisfied that there are reasonable grounds for concluding that the LVT was wrong on one or more of grounds (1) – (3) set out above.

If successful, an appeal may either be by way of a review, a review and then a consequential re-hearing or an appeal by way of re-hearing. It is more common for the appeal to amount to a review and then for the application, if the appeal is successful, to be remitted back to the LVT for a re-hearing. The advantage of an appeal by re-hearing is that fresh evidence may be admitted.

Costs

Common costs issues in service charge cases in the LVT

1. Winning a reasonableness application in the LVT is, in many cases, only half the battle. The next question is whether (and to what extent, and on what basis) a landlord can try to recover the often considerable amounts of costs which will have been incurred in getting that far.
2. It is important to advise a client at the outset that the costs bill for recovering service charge arrears might well be significantly higher than the debt itself, and furthermore that the costs (depending on the facts of each case) might prove to be irrecoverable.

The LVT has no general costs awarding jurisdiction

3. The first point to remember is that the LVT does not have a general jurisdiction to award costs in the way that a court does.
4. There is an exceptional power vested in the LVT to award up to £500 in cases where an application has been dismissed as frivolous, vexatious or an abuse of process, or where a party has acted frivolously, vexatiously, abusively disruptively or otherwise unreasonably in connection with proceedings, but it is hardly ever used (especially against tenants!) (paragraph 10 of Schedule 12 to the Commonhold and Leasehold Reform Act 2002).¹

Are costs recoverable under the lease terms, as a matter of construction?

5. Because of the absence of a general costs jurisdiction in the LVT, it is important to consider whether the landlord has a power to recover costs under the terms of the relevant lease. In principle, costs might be recoverable either pursuant to a contractual indemnity provision and/or as a service charge item. But in some cases they will not be recoverable at all because the lease will make no such provision.
6. Whether a lease has reserved a right in favour of the landlord to recover costs (and if so, in what way) is a straightforward question of construction of the relevant lease terms.
7. Experience tells that modern leases tend to make broader provision for the payment of costs incurred in recovering arrears of service charges. Often such

¹ There is also a limited power to order the reimbursement of fees: paragraph 9, Leasehold Valuation Tribunal (Fees) Regulations 2003 (in England) and paragraph 9, Leasehold Valuation Tribunal (Fees) (Wales) Regulations 2004. See also paragraph 9 of Schedule 12 to the 2002 Act on waiver, reduction and reimbursement of fees in limited circumstances.

costs will be recoverable under such leases both pursuant to an indemnity provision and also through the service charge mechanisms.

8. However, older leases tend to be more problematic, often making, at best, only oblique provision for the payment of the costs of recovering service charge arrears. This is a problem for landlords because, at least where it is being argued that the relevant provision has effect to reserve a right to recover legal costs as a service charge item, the consistent approach of the LVT and courts is to require such a construction to be supported by “clear and unambiguous terms” (e.g. *St Mary’s Mansions Ltd v. Limegate Investments Co. Ltd* [2003] 1 EGLR 41). This means that “sweep up” clauses and the like (of the sort in issue in *St Mary’s Mansions*) are unlikely to assist an argument that the costs of recovering service charges are themselves recoverable as service charges.
9. Although there are plenty of cases showing failure by the landlord to argue that a broadly phrased covenant entitles legal costs to be recovered as service charges, there are also cases where such costs have been found to be recoverable according to the contractual terms (e.g. *Iperion Investments Corp. v. Broadwalk House Residents* [1995] 2 EGLR 47 and *Seacon Residents Company Ltd v. Oshodin* [2012] UKUT 54 (LT)).
10. Even if a provision in a lease allows the landlord to recover legal costs, the next question is whether there is any internal qualification in the provision (whether express or implied) which restricts the circumstances in which those costs are recoverable. For example, the right to recover might be limited to those costs which are, “reasonably” and/or “properly” incurred. Note that the fact that an action to recover arrears has not been wholly or partially successful does not necessarily mean that costs incurred in running it were not reasonably or properly incurred.

Restrictions on recovery of costs pursuant to indemnity provisions

11. Even if a lease contains a provision to the effect that the legal costs of recovering arrears can be recovered from a tenant individually, that is not the end of the matter.
12. Legal costs payable by a tenant individually (i.e. as opposed to costs payable by way of service charge) are “administration charges” within the meaning of Part I of Schedule 11 to the 2002 Act.
13. The restrictions on recoverability which arise out of Schedule 11 will therefore apply to such costs. In particular, they will only be recoverable to the extent that they are reasonable. The LVT has jurisdiction alongside the court to make determinations under Schedule 11.

Restrictions on the recovery of costs as service charges

Section 19 of the Landlord and Tenant Act 1985

14. If on the true construction of a lease, costs are recoverable as service charge items, they will of course be subject to the limitations on their recovery which arise out of section 19 of the Landlord and Tenant Act 1985. I.e., they will be subject to the same reasonableness caps as other service charge items.
15. Whilst one might think that this restriction would operate rather like the summary assessment of costs in court, it should be noted that the LVT tends to take an extremely restrictive approach to what legal costs are reasonable in any particular context (i.e. amount of time required, appropriate charge out rate, brief fees etc). The result can be a very serious reduction in the costs which can be recovered compared to the overall bill.

Section 20C of the Landlord and Tenant Act 1985

16. The protection afforded to tenants by section 19 of the 1985 Act is supplemented by a logically prior jurisdiction under section 20C of the same Act.
17. In summary, by section 20C(1), a tenant may apply for an order that all or any of the costs incurred, or to be incurred, by the landlord in connection with the proceedings before a court, the LVT or the Upper Tribunal, are not to be regarded as relevant costs when determining the amount of service charge payable by the tenant or other person specified in the application.
18. Section 20C(2) makes provision as to when such applications are to be made, and where. In the LVT, they are often made informally at the end of a service charge hearing (and the LVT sometimes asks a tenant whether he wants to make one: tenants rarely decline to do so). Section 20C(3) provides that the court or tribunal to which the application is made may make such order as it considers just and equitable in the circumstances. There is therefore a wide discretion in disposing of such applications.
19. Tenants (and landlords) often assume that the resolution of the section 20C application should follow the “main” event, i.e. if the service charge arrears are found to be irrecoverable then the landlord’s costs of trying to recover them should be irrecoverable (and *vice versa*). But that is not the correct approach.
20. The starting point is that the landlord’s costs are recoverable as a service charge (assuming this is allowed under the lease) unless there is a reason why their recovery should be restricted.

21. In *Langford Court v. Doren Ltd* Lands Tribunal, LRX/37/2000, Judge Rich QC said (at paragraph 21) that, “I do not think that section 20C can be construed as establishing a general rule, or even a presumption, that a landlord should be unable to recover costs incurred in proceedings before the LVT by way of service charge, or even that he should be able to do so only if the tenant has acted unreasonably.”
22. In the following paragraph, the judge referred to the Court of Appeal decision in *Iperion Investments Corp. v. Broadwalk House Residents Ltd* [1995] 2 EGLR 47 as showing the true mischief at which section 20C is directed. Having considered the authorities, the judge said:
- a. that, “the only principle upon which the discretion should be exercised is to have regard to what is just and equitable in all the circumstances. The circumstances include the conduct and circumstances of all the parties as well as the outcome of the proceedings in which they arise” (paragraph 28);
 - b. “The power to make an order under section 20C should only be used in order to ensure that a right to claim costs as part of the service charge is not used in circumstances that make its use unjust. Excessive costs unreasonably incurred will not in any event be recoverable by reason of section 19 Landlord and Tenant Act 1985” (paragraph 31);
 - c. “Oppressive and, even more, unreasonable behaviour however is not founded solely amongst landlords. Section 20C is a power to deprive a landlord of a property right. If the landlord has abused its rights or used them oppressively that is a salutary power, which may be used with justice and equity; but those entrusted with the discretion given by section 20C should be cautious to ensure that it is not itself turned into an instrument of oppression” (paragraph 32).

23. A good point to stress when resisting a section 20C application is the fact that the tenant, even if the application is refused, will always have the protection of section 19 when the landlord seeks to recover legal costs as service charges. In other words, whatever order is made under section 20C, the tenant will never (by virtue of section 19) have to pay unreasonable costs. When that point is made clear, a lot of the wind is often taken out of the sails of the tenant's argument.
24. Other points which it might be appropriate to make include the fact that a landlord faced with a tenant refusing to pay service charges is effectively bound to incur expense in trying to recover those debts (especially where the landlord is institutional, or where there are a large number of flats in the building). In other words, it is often the tenant's conduct which forces the landlord to have to incur the costs.