Common problems: Disputes

- Freeholders claim there is no benefit from the services provided.
- They want to be disconnected from communal heating systems.
- The county court will often side with freeholders unless there is detailed history of the benefit and history relating to the freehold property.
- Landlords estate records are often poor.
- Estates not clearly defined and marked in the deed.
- Properties on the edge of estates often lead on to public highway.
Freehold transfers

- The transfer needs to make sufficient provision for the Landlord to recover a proportion of its costs in providing services to the estate in which the property lies.

- Unlike with Leasehold properties, this can prove quite difficult in practice if the owners (original or subsequent) seek to challenge their obligation to contribute.

- Items of expenditure that are not adequately provided for in the transfer and were not provided at the time the property was transferred, are unlikely to be recoverable without strong evidence that the property owner takes the benefit of the service and was given the choice of whether or not to take the benefit.
Positive Covenants in freehold transfers

Recovery of charges through positive covenants:

- An obligation to contribute towards charges incurred in the provision of services and maintenance of a wider estate is a type of positive covenant:
- an obligation to carry out some positive action in relation to land or requiring expenditure of money.
Successors in title liabilities

- The obligation to observe a covenant does not generally bind successors in title of freehold land (it does not "run with the land").

- However the obligation to observe a positive covenant may run with the land under the principle in *Halsall v Brizell* [1957] Ch 169. That case provides that one may not take a benefit of a right without accepting the burden that goes with it.
The rule in *Halsall v Brizell* was considered in the case of *Wilkinson v Kerdene* [2013] EWCA Civ 44.

- The appellants owned bungalows in a holiday village,
- In return for rights to use the facilities, the original bungalow owners covenanted to contribute annually towards the maintenance and upkeep of the roads, car parks and leisure amenities, for which the Respondents sought to recover their costs of maintenance and renewal
- Kerdene tried to recover the costs of the maintenance works under the terms of the original transfers of the bungalows.
- Many of the bungalows had been resold by this date and the new owners refused to pay the maintenance charge, stating that as they were successors in title to the properties, they were not bound by the terms of the covenant and therefore were not liable for the charge.
Wilkinson v Kerdene [2013] EWCA Civ 44.

- The Court of Appeal dismissed an application by the bungalow owners to overturn the decision and confirmed that the covenants to contribute were enforceable against them under the rule in Halsall v Brizel/ [1957] 1 Ch 169.
- The Court found that as there was a connection between the use of the facilities by the bungalow owners and the maintenance charge imposed by Kerdene, the owners were obliged to pay the charges.
- This means that if the new bungalow owners exercised the rights of the original covenant, i.e. the use of the roads and other facilities, they would be bound by the burden of the covenant and be required to contribute to the maintenance costs.
Goodman v Elwood: EWCA(2013) 1103

- The case concerned the liability to contribute to the cost of maintaining a road.
- It was held that the burden of a positive covenant bound a successor in title under the principal of benefit and burden in Halsall v Brizell even when it had not been registered.
Section 62 of the Law of Property Act 1925

Problems with transfers?

- Not all transfers provide express rights to use the whole estate or indeed sometimes due to poor drafting the roads and highways.

- More often it is the right to use recreational or grassed areas that are omitted. In such cases the operation of section 62 of the Law of Property Act 1925 should be considered when reading a transfer.
Section 62 of the Law of Property Act 1925

- Section 62 provides that a conveyance of land shall be deemed to include and shall operate to convey, with the land, all privileges, easements, rights and advantages whatsoever and which:
  - Appertain or are reputed to appertain to the land or any part of it; or
  - Are, at the time of the conveyance, occupied or enjoyed with the land or any part of it.

- Therefore, if a tenant had the benefit of rights to use common areas even by license prior to a transfer, Section 62 will operate to convert such rights into easements on the date of the transfer,
Poor drafting

The House of Lords considered and provided guidance to the construction of documents in the leading case of *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1997] UKHL 28.

The House of Lords decided that words in contractual documents should not just be given their "natural and ordinary meaning" when to do so would produce a result that the parties clearly did not intend.

Common sense should prevail and the words should be interpreted so that they mean that which would be conveyed to a reasonable person in the situation in which the parties were in at the time of the contract with the requisite background knowledge.
Poor drafting

- Judges comment:-

  “If one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had.”
Options for Landlord

Where transfers do not make adequate provision for the types of charges and/or the extent of the area over which the charges are to be levied consider:

- The Landlord may seek to argue that the obligation to contribute arises by operation of law; by means of section 62 of the Law of Property Act 1925,
- the benefit and burden principle in *Halsall v Brize* II,
- or by the fact that the transfer does not reflect the parties actual or purported intentions.
- Its important to provide historic data of the benefits to the court.
- In defending cases you need to have a good legal argument backed by historic evidence of the estate.
Heating charges: disconnections

- Typically landlords have reserved rights to access the freehold properties to maintain "pipes wires sewers cables and other conducting media which are used in common by the Land and the Corporation's adjoining or adjacent property". Communal heating will come within this clause.

- If a property can be disconnected and the communal supply capped without interference with a neighbouring property's supply, there would be little a landlord could do to prevent a freeholder from employing their own specialist to disconnect them, given that they own the pipes etc within the property.

Nb delays can leave to damages claims.
Heating charges : disconnections

- Where properties are interconnected and disconnection of one property may impact on another, one may seek to argue breach of an existing express (or implied) easement if you wish to resist a request to disconnect or impose a charge for doing so.

- If a freeholder attempts to disconnect in the scenario set out above, you may have an action for private nuisance and/or an action for interference with an easement and may consider making an application for an injunction to prevent disconnection unless conditions are met.
Estate management schemes

- You may find you acquire or manage properties under a scheme.

- You will need to establish whether the property is part of an Estate Management Scheme (EMS) made under Section 19 of the Leasehold Reform Act 1967, or under Chapter 4 or Section 93 of the Leasehold Reform, Housing and Urban Development Act 1993. If the property is part of an EMS, charges made under the scheme can be challenged at the First-tier Tribunal (Property Chamber).
Estate management schemes

- An application can be made to a Tribunal to vary the scheme itself on the grounds that a charge under the scheme is unreasonable or that any formula for the calculation of the charge is unreasonable.

- An application can also be made to an Tribunal to determine whether or not a charge is payable, and, if so, by whom and to whom it is payable; the amount that is payable; the date that it is payable and the manner in which it is payable. However, an application cannot be made to the Tribunal where the charge has been agreed or admitted.

- Some schemes have quite restrictive covenants and will try and control what happens on the estate.

- Other covenants will restrict things like the removal of trees.

- [2013] UKUT 0469 (LC) LT Case Number: LRX/23/2013 DR PATRICIA M SCRIVEN AND OTHERS v CALTHORPE ESTATES AND OTHERS is a useful case to read.
Will the law change?

- In 2011, the Law Commission published a report, *Making Land Work: Easements, Covenants and Profits á Prendre*, which recommended a series of steps to simplify the law including a new way of attaching obligations to land so that positive and negative obligations can be directly enforceable against successors in title.

- It remains to be seen if these reforms will be implemented in order to simplify this often complicated and difficult areas of law.
Good luck with your cases

Mike Edmunds
Head of Leaseholders Services
Camden Council

Mike.Edmunds@Camden.gov.uk
Goals

• Practical issues in dealing with charging Freeholders
• Houses sold Freehold
• Open market sale
• Right to Buy or Acquire
• Fully staircases shared owners
• who have acquired the freeholders
Freehold

- Governed by a Transfer Document not a lease.
- Houses not flats (exceptions).
- You are not their landlord.
- Transfer Documents have covenants like lease.
- Combination of Estate Rent Charge and Service Charge.
- Could be on estates or on streets.
What could you charge for?

- Gardening / Cleaning.
- Lighting estate areas.
- Refuse collection (skip hire).
- Facilities (e.g. laundry).
- Communal heating (separate agreement).
- Parking facilities.
- Lifts?

- Reflect the differences in your Transfer Document.
Is it worth charging freeholders?

- Can you charge? – Is it in the Transfer document?
- Do they really benefit form the item?
- What if you don’t charge?
- What are the reputational and PR issues?
- Loss of income – you can’t pass these costs on to others but resource implications with no disputes?
- Higher satisfaction? – might not always be the case.
- Cheaper admin? – you still have to work out the charges so not really.
How are the charges made?

- Most transfer documents only have “estate rent charges”.
- Some have “Service Charges”.
- They are not the same as “Service Charges “for leaseholders.
- When are there “Service Charges “?
- Freehold of a house sold by a public sector authority – e.g. LAs & RSLs.
- Governed by the Housing Act 1985  S45-51.
- Where the transfer document allows for service charges.
- Restriction on and provision of information about service charges.
## Service Charge or Estate Rent Charge

<table>
<thead>
<tr>
<th></th>
<th>Service Charge</th>
<th>Estate Rent Charge</th>
</tr>
</thead>
<tbody>
<tr>
<td>S47 limitation reasonableness,</td>
<td>yes</td>
<td>no</td>
</tr>
<tr>
<td>cost, standard and work or</td>
<td></td>
<td></td>
</tr>
<tr>
<td>service.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>S48 information – provision of</td>
<td>yes</td>
<td>no</td>
</tr>
<tr>
<td>account information.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Does S20 apply?</td>
<td>no</td>
<td>no</td>
</tr>
<tr>
<td>Covered by S20B (18 month</td>
<td>no</td>
<td>no</td>
</tr>
<tr>
<td>rule)?</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Access to FTT?</td>
<td>no</td>
<td>no</td>
</tr>
<tr>
<td>Typical billing (SHG)</td>
<td>Estimate and Actual</td>
<td>Actual</td>
</tr>
</tbody>
</table>
Practical Issues

• Making a correct demand.
  – Are they limped in with your leaseholders? It can get muddled.

• Low value charge each year.
  - Typically <£300pa

• Majority pay on demand.

• Balances paid when sold on.

• Not chased.

• Arrears build slowly.

• And freeholders dispute their liability.
Making a correct demand

- Getting the name of the charge wrong should not be an issue.
- It should be clear what the charge was for.
- With other errors - re-demand.
- Limitation period – it’s a grey area.
  - S8 Limitations Act 12 years (under a deed).
  - View of the court might be 6 years.
  - Might be possible to extend this period.
- Could be half your debt.
- Get legal advice on your particular cases.
- Housing Act ‘85 S45-51 limitations.
Disputes

- The freeholder doesn’t use that area or has no benefit from it.
- The proportion they pay is incorrect.
- Reasonableness of costs / work / proportion.

- Solutions will depend on the Transfer Document.
- Is the Landlords decision is final?
- Assessment by a surveyor *
- Can get a Court declaration.
- S47 – reasonableness
- S48 – written summary
Example - Assessment by a surveyor

- Background - row of freehold houses on the outer edge of an estate with communal ground and shared facilities.
- Disputing the apportionment and cost.
- One off case.
- Transfer document said RICS surveyor could resolve the dispute
- Use a RICs member of staff?
- Wanted the freeholders buy in.
- Ask them to nominate a surveyor and we agreed the surveyor.
- Plans, queries, discussion and visit to site.
- Agreed with existing.
- Freeholders disagreed
Collection - A fresh start

- Low value - long time to build a debt and not our core business.
- Historically left and disputes have been minimal.
- Approaching or over 12 years old.

- Old debt / new debt split.
- Assessing – demanding – chasing.
- Apportionment rational.
- Winners and losers and therefore disputes.
- Test case
Prepare your answers to defences and disputes

- Service is not being provided.
- Have not received the demand.
- Costs are not reasonable.
- Costs not fairly apportioned.
- Receive no benefit.
- Transfer document not complied with.
Questions

Ashley Parrette
Leasehold Manager
Southern Housing Group