Service Charge Budget: To Consult or Not to Consult?

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Abstract

This article examines whether freeholders should be legally required to consult long-leaseholders on service charge budgets before imposing and collecting charges. Using empirical survey data—both qualitative and quantitative—alongside doctrinal analysis and theoretical insights from management studies, I argue in favour of such a requirement. Additionally, I draw upon my experience of over 30 years as both a leaseholder and a freeholder managing the block of flats in which I reside.

The discussion is structured around three key arguments. First, I propose that long leasehold contracts include an implied term necessitating consultation on service charge budgets. While legally complex and contentious, this argument establishes the foundation for the broader discussion. Second, I demonstrate that consultation constitutes good practice, as evidenced by professional guidance from management bodies—guidance that is not always adhered to in practice. Third, I advocate for a cultural shift towards greater consultation, arguing that fostering a consultative approach leads to improved outcomes for all parties involved.

Empirical data further supports this argument, revealing a clear correlation between the degree of control exercised by leaseholders and the extent of consultation, which in turn enhances their overall experience. The stratified nature of this dataset provides a unique contribution to the debate.

Keywords: contract law; contract management; implied terms; relational contract; domestic leasehold contracts/long leases; socio-legal empirical research.

* I thank my colleague and friend Professor Pablo Cortés for his robust suggestions on my first draft and his continuing support. I also thank the 655 leaseholders who provided a mountain of data which I am still mining.

[A] INTRODUCTION

In a long lease relationship in England and Wales, in which the freeholder owns the land and the "bricks and mortar" and the leaseholder has the right to live in demarcated (demised) areas of the freeholder's property and use other areas (usually described as common parts), the landlord or a service company takes on the task of repairing and maintaining the non-demised bricks and mortar and common areas, and that work is for the benefit of both leaseholders and freeholders. It maintains the value of the estate to the freeholder, and it keeps bricks and mortar and common areas in a fit and safe condition (usually along the lines of in "good repair and condition") for the benefit of residents. Long leases, which are conceptually complex, were described by Lord Browne-Wilkinson, in *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* (1994),as "a hybrid, part contract part property" (at 16) in a passage pointing out that when courts review contract provisions which purport to limit property transfer rights courts have usually "looked askance at any attempt to render [property] inalienable" (also at 16).

It is also worth remembering that leases are contracts as Aldridge notes:

> Construing a lease is the same process as interpreting any contract (nd: 2-064).

Service charge, which must be kept ring-fenced and in trust (expressly under the lease I hold), is usually collected under lease provisions, by the freeholder or an agent, and is subject to multiple statutory controls. For example, germane to this article, section 42 of the Landlord and Tenant Act 1995 provides that:

> – the payee holds the money
>
> (a) on trust to defray costs incurred in connection with the matters for which the relevant service charges were payable, and
>
> (b) subject to that, on trust for the persons [or person] who are the contributing tenants for the time being

Sir Kim Lewison describes this as meaning that moneys belong "to the tenant beneficially" (Lewison 2015: 7.197).

The implicit contextual background to these contracts includes, using Leggatt J's description in *Yam Seng (Yam Seng Pte Ltd v International Trade Corporation Ltd* 2013: paragraph 134), amongst "shared values and norms" the expectation (the reasonable or commercial expectation) that parties will treat each other with dignity, respecting each other's

status and rights, use each other's assets (including service charge monies) as if they were their own, engage constructively, act reasonably, play fair, communicate, solve problems, and, critically, allow for peaceful enjoyment of the property, all vertical and horizontal and all directed to making the deal work. That particular argument infers that a long lease is a "relational contract".[1]

In advance of a service charge demand it is obvious that someone must develop a budget from which prospective service charges can be calculated. In our block we break the budget down as set out in Table 1.

Budget proposal 2X/2Z			
Line item	**This year**	**Next year**	**Comment (illustrative)**
General management			No increase
Management - accounting			
Management - secretarial			
Fire safety			FRA last year caused a major rise
Other safety			
Cleaning			
Gardening			
Insurance			
Major Projects			Discussed at April meeting
Ad hoc maintenance			
Electricity			
Bank charges			

Table 1: Model budget proposal.

There may be more line items in more complex buildings, such as lifts and building safety cases. But it really is not a complex undertaking.

This article examines the underlying lived reality of the budget process through which long-leaseholders become liable for service charges. It is informed by a qualitative and quantitative survey I carried out in 2024 asking respondents for details of their experience in long leasehold to which I received 655 responses.

I argue for a thorough and professional consultation process for this budget on three bases:

[1] This idea will not be fully developed in this article but is being developed in another, rather longer article.

- It is a contractual requirement.
- It is a management imperative. It is proper and professional to engage those on whose behalf one is spending money, especially when that money is not yours.
- It should lead to better decision-making.

[B] STATUTORY REQUIREMENTS FOR CONSULTATION IN LONG LEASEHOLD—THE DOG THAT CAN'T BARK

There are two statutory freeholder/tenant consultation schemes. One, contained in the Landlord and Tenant Act 1985 and the Commonhold and Leasehold Reform Act 2002, requires, in simple terms, that those who pay service charges are consulted in respect of works which are likely to cost more than £250 per any single flat. The "centrally relevant" requirements of the 1985 Act (sections 20(1) and 20ZA(1)) were described by Lord Neuberger in the *Daejan* case (*Daejan Investments Ltd v Benson & Ors* 2013: paragraph 7):

> 8. Section 20(1) states that:
>
> > "… [T]he relevant contributions of the tenants are limited in accordance with subsection (6) … unless the consultation requirements have been either –
> >
> > a) complied with in relation to the works …, or
> >
> > b) dispensed with in relation to the works"

The result of *Daejan*, is, in short, that a failure to consult only results in a remedy where a tenant is prejudiced by the failure, the onus being on the tenant to show prejudice. Professor Bright (2024: 2) has written that "the dial has shifted too far in favour of landlords", and I have argued that the consultation requirement provision is essentially neutered (Soper 2024).

Based on my three decades of experience as a leaseholder and freeholder, I proposed a legislative change designed to overcome *Daejan*. The amendment was based on a text I provided in "Lord Wilson was Right etc" (Soper 2024) and was drafted taking into account his powerful dissent in *Daejan* (paragraph 77): "Lord Neuberger's conclusion … seems to me to subvert Parliament's intention-… [and] … seems to me to depart from the width of the criterion ('reasonable') which Parliament has specified":

> 20ZA(1) Reasonable for the purpose of this provision is a matter of fact for the Tribunal which:

i. May or may not consider the matter of relevant prejudice to the tenant. If prejudice is to be considered the burden is on the landlord to demonstrate a lack of prejudice or to prove the degree of prejudice.

ii. Shall include consideration of the purpose of this Act which is to increase transparency and accountability, and promote professional estate management as well as to ensure that leaseholders are protected from paying for inappropriate works or paying more than would be appropriate.

iii. Shall consider the dignity and investment of the tenant, who should be treated as a core participant in the process of service charge decisions.

iv. Shall have regard to the tenant's legitimate interest in a meaningful consultation process, bearing in mind that minor or technical breaches may not impinge on the tenant's interest, nor prejudice the tenant.

v. At its discretion may or may not consider a reconstruction of the "what if" situation, analysing what would have happened had the consultation been followed properly. All costs of such a reconstruction shall be for the landlord.

The amendment was put forward by the Labour Party's Barry Gardiner. The then Government refused to accept any opposition amendments to its Leasehold and Freehold Reform Bill. However, Mr Gardiner was kind enough to acknowledge my work during the Third Reading:

> I also thank Dr Howard Soper, another academic who helped draft the amendment, who was appalled by the number of successful dispensations won by freeholders that he found in his study of first-tier tribunal decisions (HC Deb 28 February 2024, vol 746, no 55 at 53).

Under the Building Safety Act 2022 C30 (section 91), residents must be consulted on a residents' engagement strategy but this applies only to "an occupied higher-risk building", meaning, essentially, under section 31 of the Act:

(a) is at least 18 metres in height or has at least 7 storeys, and

(b) is of a description specified in regulations made by the Secretary of State.

This process does not apply to the block I help to manage but the resident directors on the board have formalized the engagement process, following this legislation with much wider consultation requirements in our recently distributed Residents Engagement Strategy:

> This strategy promotes and formalises the engagement strategy which ensures that flat-owners and residents may participate in the

> making of decisions which affect them directly or indirectly at XXXX including decisions relating to: -
>
> • Building Safety
>
> • Building Management
>
> • Service Charge Levels
>
> • Major works
>
> • Administration Charges
>
> The purpose of the strategy is to formalise consultation and communication arrangements at XXXX. We intend to ensure that all affected by safety or financial or other issues are provided with the opportunity to comment on all decisions relating to such issues and to be provided with appropriate documentation and advice in relation thereto. They will all be offered the opportunity to raise concerns face to face with management. Comment will be minuted by the Board and monitored to determine the effectiveness of the process.

It should be possible for Parliament to develop legislation or impose an implied term meeting these parameters. It should also be possible for a court to construe a lease accordingly but, given *Daejan*, this is unlikely. The latest legislation, in the form of the Leasehold and Freehold Reform Act 2024, does not add any new consultation requirements. In summary there is no statutory requirement for a landlord to consult those who must pay service charges in advance concerning the calculations and/or quotations underpinning a prospective service charge.

[C] AN EXPLANATION—WHAT IS "CONSULTATION"?

Dame Judith Hackitt, in her post-Grenfell report, found that "residents did not have a strong enough voice in the safe management of their homes and specifically that they often did not have the chance to offer views and participate in the decision-making process" -

> 4.3 The interim report identified the need to rebuild public trust by creating a system where residents feel informed and included in discussions on safety, rather than a system where they are "done to" by others.
>
> 4.4 No landlord or building manager should be able to treat the views and concerns of residents with indifference. The system should ensure that the needs of all residents, including those who are vulnerable, are taken into account,
>
> 4.6 The review has received evidence of excellent practice of consultation and resident involvement in decision-making by some

> organisations. Landlords and building managers have described the business benefits they gain from these collaborative relationships (Hackitt 2018: 64).

Fink and Kessler (2010) describe the power of collaboration in clear terms:

> By establishing a cooperation relationship, the partners can bundle (parts of) their resources and may thereby create a new and unique set of resources which can hardly be imitated. This is especially the case when the partners succeed in identifying and capitalizing on the synergetic potential of the cooperation arrangement. Under these circumstances, such an arrangement has the power to enhance the performance of both partners.

In public law settings, in England and Wales, a body which is required to consult over policy proposals is subject to what have become known as the "Gunning" or "Sedley/Gunning" principles, which were proposed to the High Court by Stephen Sedley QC in the *Gunning* case (*R v Brent London Borough Council ex p Gunning* 1985) in 1985. In *Gunning* the principles were approved by Hodgson J (at 189) saying that:

> Mr Sedley submits that these basic requirements are essential if the consultation process is to have a sensible content.
>
> - First, that consultation must be at a time when proposals are still at a formative stage.
> - Second, that the proposer must give sufficient reasons for any proposal to permit of intelligent consideration and response.
> - Third … that adequate time must be given for consideration and response and, …
> - Finally, fourth, that the product of consultation must be conscientiously taken into account in finalising any statutory proposals.'

The Supreme Court approved them in 2014 in *Moseley* (*R (Moseley) v Haringey London Borough Council* 2014). In this case Lord Wilson observed that it would be hard to improve upon the principles, Lord Wilson also having observed, in *Daejan*, that the same Supreme Court had subverted the will of Parliament by undermining statutory consultation requirements in long-leasehold law (see Bright 2024; Soper 2024). In a concise description of *Gunning*, Geoff Wild (2024) concludes that: "The underlying principle of fairness should be at the forefront of the process."

The budget process where I live and manage is fairly straightforward. The Supreme Court in *Moseley* (paragraph 29) agreed with the proposition that "consulting about a proposal does inevitably involve inviting and considering views about possible alternatives". Each October a draft budget is issued by email or hard copy inviting comment (see Table 1

above). A face-to-face meeting with leaseholders is held, the budget reissued, if appropriate, and followed up with a final meeting in March setting the charges which become due in June. In those years we have experienced no service charge litigation and everyone has paid their service charge in full.

From the survey, however, we see comment about the difficulty of meeting management and below one sees comment about the budget arriving at the same time as the demand, terms such as "*fait accompli*" and more being used. I will argue that the results of the survey and theoretical/experimental works show that leases work better with good consultation and communication and that an obligation to consult is an implied term in any long leasehold, also using policy statements from industry professionals to support this. Our lease provides that the upfront, in-advance ("Interim") service charge demand is as: "the Management Company or their Managing Agent shall specify at their discretion to be a fair and reasonable interim payment".

The *Service Charge Residential Management Code* of the Royal Institution of Chartered Surveyors (RICS) (2016: sections 4.11 and 9.9) advises that:

> It is better to keep in touch with leaseholders than to remain silent and the legislative requirements to consult where qualifying works and long-term agreements are concerned … should be regarded as the minimum standard required, not the optimum. …
>
> In addition to any statutory consultation requirements you should consult with leaseholders on management matters that are likely to have a significant effect on the level, quality or cost of services provided.

The RICS Code is not universally admired, the prominent and influential Leasehold Knowledge Partnership (the Leaseholders Charity 2021) describing it, somewhat harshly, as "feeble", "tokenistic and cynical" and saying that it was "cooked up by the same duds who preside over the current state of leasehold" (O'Kelly 2012).

Another report, led by Gemma Burgess at the Cambridge Centre for Housing and Planning Research (Burgess 2020: 19, app D) concluded that: "Leaseholders would like to see more transparency in the accounts, improved verbal and written communications about their service charges and more involvement in decisions about the services they received and how the service charge was spent."

[D] SURVEY METHODOLOGY AND HEADLINE RESULTS

The survey was created as an online survey using the standard university tool. Survey design, which required both qualitative and quantitative data, was informed by my own experience and knowledge of leasehold. It was reviewed in advance by leasehold campaigners including Harry Scoffin and Cath Williams, both of whom provided material assistance in finding respondents.

As between qualitative and quantitative methods, says Martin Davies (2007), the "ethos of a particular course" may be the deciding factor, qualitative (non-numeric) methods being arguably "more human" and quantitative (numeric/statistical), more geared toward contemporary "scientific principles and techniques". I am not a "quantophreniac" (the term coined by Pitrim Sorokin for the "cult founded on the belief that quantification is the most, or indeed the only, valid form of knowledge": Dingwall 2014), nor am I a softy or a ninny, as per Sylvia & Turner (1987) who parody criticism of qualitative work saying that critics assert that "soft data are weak unstable impressible squashy and sensual … softies and ninnies who carry it out have too much of a soft spot for counter-argument".

As Carter and Little advise, one must use appropriate techniques to unearth social phenomena and I decided upon a combination of qualitative and quantitative methods (Carter & Little 2007). My epistemological approach is that the knowledge embedded in the lived experience of participants is a vital component of research in socio-legal studies such as this one. Miles and Huberman advise that qualitative researchers should be familiar with the setting, utilize a multidisciplinary approach, be able to draw people out and possess good investigative skills (1994: 38). Numbers are not mere numbers, not vacuum packed—they exist in a context. Empirical researchers must avoid crude equation of correlation with causation (Joly 2017: a read of Vigen 2015 is worthwhile in this context). Qualitative data, comment, can and should be used to support or critique qualitative results. The vox pop element of the survey, illuminating long-leaseholders' lived experience is, in my opinion, an essential part of this socio-legal work. Much of the story emerges through contextual analysis rather than number crunching. Triangulation is always good practice, and in this case it seemed to me to be essential to ensure that my respondents were not simply the disillusioned. In order to obviate this possibility, I also obtained data from estates which are owned or managed by their residents (either as the freeholder or under the statutory

so-called Right to Manage (RTM) scheme), because I wondered whether the data would show better (or different) experience in those cohorts (it did). Non-random samples are typical in such studies, as Landers and Behrend (2015) say in their abstract, "virtually all samples used in I-O psychology are convenience" and Bryman (2012: 191) comments that they "may be typical in management and business studies". A random sample, using a defined population, as Bryman notes (at 166-170) selecting a representative sample, is not practically possible for leaseholders. Commercial enterprises are generally unable or unwilling to provide population data to researchers (true in the case of this survey). And, as Robson notes (2011: 276): "The exigencies of carrying out real world studies can mean that the requirements for representative sampling are very difficult, if not impossible, to fulfil."

Alvesson and Deetz make similar comments (2000: 192). Evocatively, Miles and Huberman observe that (1994: 27): "social processes have a logic and a coherence that random sampling can reduce to uninterpretable sawdust!"

I am confident that the survey covered the right questions, although, in retrospect, some of the questions were difficult for people to answer because they required serious detail of management costs or insurance costs per flat.

I found responses in multiple ways.

- I posted the survey on many Facebook sites: some campaigning sites, others simply discussion sites, some devoted to individual developments, two devoted to resident/tenant managers or directors.
- I posted it on Twitter/X asking contacts to pass it on or re-X it. I did the same on LinkedIn.
- I wrote to the management of various blocks in my locality and several agreed to assist.
- I posted it on the university chatboard.
- I wrote to leaseholders in my own block and to friends and former colleagues directly asking them to assist or pass the survey on (so-called snowball surveying).

I received 655 responses, amongst which were 16,000 words on service charge issues alone. The results take up 227 pages of data and text and provide information in a number of areas, but what is unique is my ability to stratify the data by reference to management type. The survey suggests deep levels of general unhappiness with long-leasehold; as I set out below.

I asked whether respondents received a budget showing how service charge is calculated:

- Yes—a detailed useful breakdown 24.8%, 35 bare "yes"
- Yes—breakdown is not very clear 44.7%
- No—23.6%, 73 bare "no"
- Other—6.8%

I also asked whether they were offered face-to-face meetings to discuss the budget:

- Yes—32.7% (210)
- No—57.5% (369)
- Other—9.8% (63)

Respondents who answered "Other" recorded in face-to-face meetings:

- He's said I can come up to Birmingham to meet him. I'm based in London
- based hundreds of miles away and respond to messages infrequently
- In theory, yes. In reality, we request meetings with managing agent and get ignored [numerous similar comments]
- I can visit the MA office where a revolving cycle of young people is available but even then nothing gets achieved

The frustration is evident as is the feeling that some managers place obstacles in the way of leaseholders. I asked whether they were able to ask questions or make comment: 53.8% said yes and 46.2% said no.

My last question on this was an open question, intentionally designed to allow us to hear the voice of the leaseholder and ponder their lived experience: if you make comments or ask queries do you receive prompt sensible responses?

In order to determine how experience was rated, I had to code each response thus:

- very poor
- poor
- variable
- good
- very good

There is necessarily some judgement in play. I have not previously seen detailed data on long leasehold stratified by management structure or centre of power, except that a Competition and Markets Authority report

in 2014 recorded that: "Results were notably different for properties where there was either an RTMCo or an RMC; overall satisfaction was high with [83%] rating services as good, compared with 58% for non-RTM/RMC leaseholders."

Despite that, in line with the Government's then *laissez-faire*, deregulationary policy, it recommended more "self-regulation". The management category cohorts by percentage in my survey are comparable to those from Gemma Burgess' 2020 survey (20.A, app C). A government survey from 2022 reported that "Only 8% of leaseholders requested the right to manage their building/house" (UK Government 2022).

The Government describes RTM, the statutory basis for which is found in the Commonhold and Leasehold Reform Act 2002, as allowing "some leasehold property owners [to] take over management of the building - even without the agreement of the landlord".[2]

Cohort	Burgess Survey	Very Poor	Poor	Variable	Good	Very Good
Overall - 442		60%	7%	6%	6%	20%
Freeholder Manages: 54 (12%)	16%	65%	9%	11%	2%	13%
Freeholder Appointed Managing Agent: 229 (52%)	61%	76%	6%	5%	4%	9%
RTM Appointed Managing Agent: 68 (15%)	16%	35%	8%	10%	12%	35%
RTM: 23 (5%)		17%	9%	17%	13%	44%
Tenants who own the freehold: 21 (5%)		5%	5%		9%	81%
Other: 47 (11%)	2%	53%	6%	11%	9%	23%

Table 2: Budget process experience of long-leaseholders by management structure.

Freeholder manages

In the survey, 67% of 54 respondents asserted a poor or very poor experience in obtaining answers to questions from freeholder managers, with only 26% reporting the experience good or very good. I asked people to provide me with their opinions and I find this vox pop exercise valuable in setting out how people chronicle their own experience. Their time is worth rewarding by publishing a selection in full. In creating themes, a normal coding technique, I found that 8 people or 15% expressly described

[2] Government Guidance on how this works can be found at "Right to Manage statutory guidance: part 1".

the freeholder as obstructive, evasive or dismissive—although a few said, for example, "the freehold responds reasonably promptly".

- No, the housing association is evasive both by email and in person.
- No, they just drag it out hoping we will stop asking.
- Sometimes but I feel we are given minimal answers as an attempt to fob leaseholders off.
- Freeholder seems deliberately evasive.
- Amateurish gaslighting [a term used by another respondent] and patronising towards residents' complaints and concerns.
- You can email a generic email address where questions are lost in a black hole.

Eleven or 20% found answers slow, incomprehensible or vague:

- we end up talking to a brick wall (a certain member in the service charge team) who just copy and paste answers that don't make sense.
- No. Generic and repetitive.
- They do not encourage comments and queries and there is insufficient time to make changes before new charges start.

One said the freeholder threatened them with a late payment fee in lieu of a serious response.

Managing agent appointed by freeholder manages

I should record here that I wrote to over 20 managing agents asking for assistance with the survey. Not one dignified my request with a reply. In itself that seems to support my respondents' views of agents: 82% of 229 respondents asserted a poor or very poor experience in obtaining answers to questions from freeholder managers, with only 11% reporting the experience good or very good. Using the themes above, I found that 33 or 14% found the freeholder's agent obstructive, evasive or dismissive, saying, for example:

- No its like talking to a politician you never get a straight answer!
- It is apparent that the Managing Agent does not welcome questions and is rarely "honest, open and transparent" in their responses.
- The managing agent generally ghosts leaseholders on this issue [another used the term "gaslighting"].
- Receive a timely response but usually a no alternative response.

- I was told and now I quote: "you are not my client, freeholder is" [another said the same].
- No—largely ignored/fobbed off [the term 'fobbed off' also used by four others].
- not really—purpose appears to be to bat us away rather than understand or improve.

Thirty-one or 13% found answers slow or incomprehensible, saying, for example:

- Response takes weeks Rude and condescending replies.
- Not prompt but we do get responses.
- No not really, we have to chase approximately 3-4 times.
- We receive prompt responses, but it is very much a fait accompli by this point.

Twenty-eight or 30% found answers slow and/or vague, saying:

- Queries and comments are met with a generic, automated "we aim to respond to queries within 48 hours" email response [the term "generic" also used by 3 others].
- The answers are repetitive and copy paste to other leaseholders [two others made a similar comment].

Ten or 4% said that the agent threatened them, forfeiture meaning that the freeholder terminates the lease, you lose your property and any equity in it:

- When I asked for it, I was immediately told that I need to pay it or they will take forfeiture proceedings.
- Any question is answered with a threatening email saying you pay or else …
- If we question we get pushed back, ignored, spoken to aggressively and threatened so have now just given up questioning for my own mental health.

Managing agent appointed by RTM company manages

An RTM company is one in which the tenants have used the provisions of the Commonhold and Leasehold Reform Act 2002 to take control of the physical and economic management of their building. This transfers the rights to take decisions about service charge and maintenance works from the freeholder to tenants. The right has been made easier to obtain under the Leasehold and Freehold Reform Act 2024, with changes that became effective on 3 March 2025 (Goh 2025). Forty-three per cent of

68 respondents asserted a poor or very poor experience in obtaining answers to questions from managing agents appointed by an RTM, with 47% reporting the experience good or very good, one observing:

- The Directors of our right to manage company are currently very helpful but this has not always been the case.

Using the themes above, I found that three respondents or 4% found the freeholder's agent obstructive, evasive or dismissive, leaseholders saying:

- We are labelled troublemakers and get dismissed.
- No. The managing agent only answers questions she likes. If it's difficult, she ignores us.
- written answers are quite generic and do not really answer the queries.

Ten or 15% found answers slow or incomprehensible, although one noted that: "The company directors who set the budget with the managing agent provide immediate and detailed information":

- yes we receive sensible responses but not always prompt!

Two or 3% said answers were vague, for example, commenting:

- No. No transparency on any charges, plans, repairs, or anything.

Zero respondents said that the agent threatened them.

RTM company manages

Twenty-six per cent of 23 respondents asserted a poor or very poor experience in obtaining answers to questions from their RTM, with 57% reporting the experience good or very good, making such comment as "Yes as we have carried out a RTM and everyone is a member", with several simply answering "yes". Using the themes above, I found that three or 13% found the RTM obstructive, evasive or dismissive:

- No, responses are obstructive and obscure, sometime truly Trumpian.
- Lack lustre they do not like being asked questions.
- Pros I have always found them easy to get in touch with. Cons they treat and speak to us on the whole disrespectfully and aggressively. Like we are children and threaten us if we are slow at paying the service charge …

One or 4% found answers slow or incomprehensible, three or 13% found them vague, and one or 4% said that the RTM threatened them (albeit this was for late payment of service charge).

Tenant freeholder and manager

Ten per cent of 21 respondents asserted a poor or very poor experience in obtaining answers to questions when their property is tenant owned and managed, with 90% reporting the experience good or very good, saying for example:

- Yes—once the Budget is drawn up by the Board (all leaseholders) it is sent to leaseholders for consultation.
- We are the directors of the management company—we often find that other freeholders, particularly those who rent out their flats are disinterested.
- I am a director of the freehold company in which all tenants are shareholders. There are eight including me, two of whom would say they are not satisfied, whatever responses they are given.

Using the themes above I found that zero found management obstructive, evasive or dismissive, one found answers slow or incomprehensible, zero vague, zero reported threats.

[E] OVERALL EXPERIENCE OF LONG LEASEHOLD

As we saw in Table 1 above, I asked respondents to tell me how they felt about their experience of the long leasehold budget process and I cross-analysed their responses along the centre of power lines above. I also asked the same question about their general experience: in general how would you rate your experience of owning a leasehold, other than your experience of service charges or ground rent?

My survey paints a bleak picture with 70% of my 655 respondents giving a negative rating of their experience: see Figure 1.

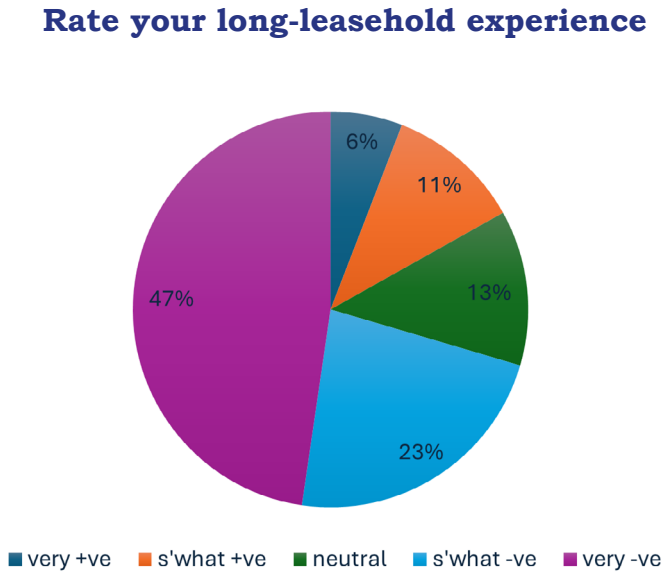

Figure 1: General leasehold experience rating.

When I asked them to think about their ground rent and service charge experience the negative numbers rose to 83%: see Figure 2.

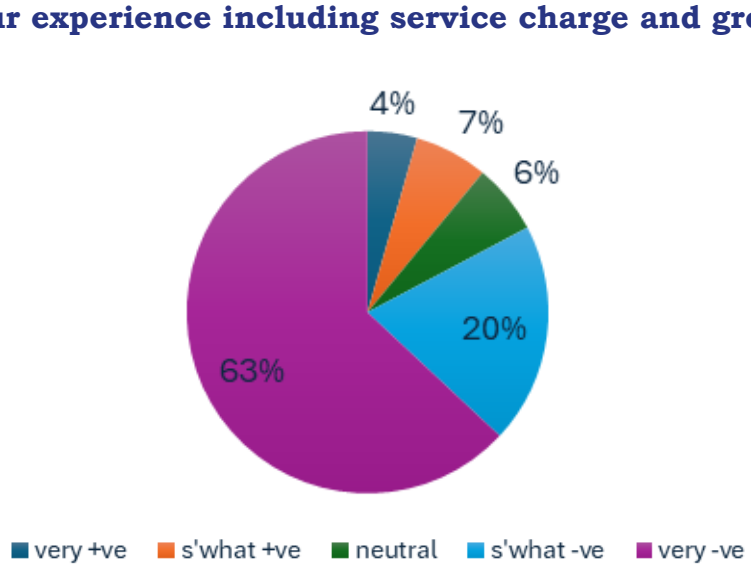

Figure 2: Experience of service charge and ground rent.

These results are very different from those obtained by Burgess (2020) although the question is slightly different: "Over half of surveyed leaseholders say that they are satisfied with their landlord/freeholder, management company or Right to Manage company (58%) or managing agent (52%)."

Wendy Wilson (2023) recorded that: "Fifty-seven per cent of those that responded to the 2016 National Leasehold Survey said that they regretted buying a leasehold property."

You will remember that I asked whether people were able to make comment on the budget: 53.8% said yes and 46.2% said no. I then analysed these two groups determining their overall experience levels: 63% of this group report an overall negative experience (see Figure 3).

May ask budget questions versus overall experience

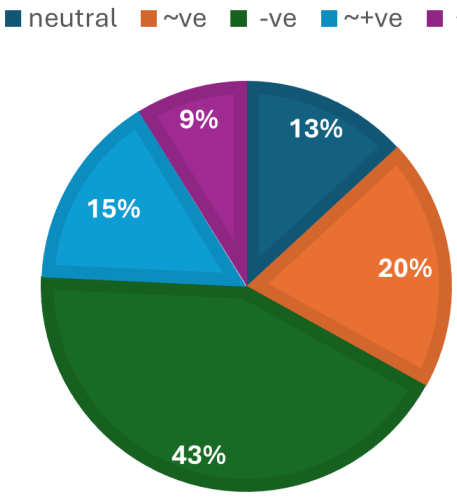

Figure 4: Satisfaction Levels—long-leaseholders who can ask budget questions.

Eighty-two per cent of this group report a negative experience (Figure 4).

Can't ask budget questions versus overall experience

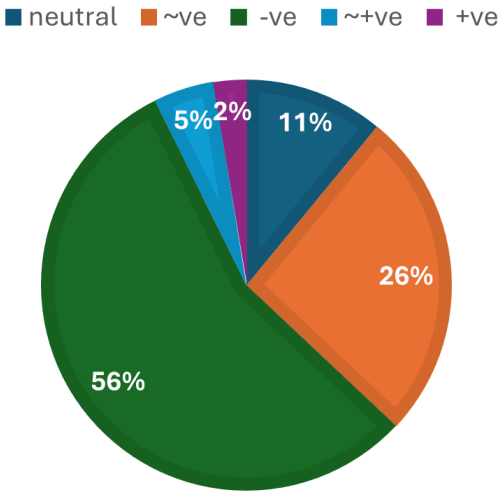

Figure 3: Satisfaction levels when long-leaseholders cannot ask budget questions.

Is there an implied term of a duty to consult?

An implied term is one which the court imposes in a contract where the matter is not covered by an express (or written) term. As mentioned above the obligations of freeholders and tenants are set out in the lease and in a vast array of legislation, which may include consumer protection legislation (Bright 2025). That legislative carapace does not mean that the lease has become unimportant, and, for example, one of the key protections for all parties remains the "ancient" implied term (implied-at-law) of peaceful enjoyment (Wilkinson 1990).

Woodfall records that:

> unless there is an express covenant, an obligation for quiet enjoyment [my emphasis] will be implied, whether the tenancy is by deed, under hand or oral …
>
> The basis of it is that the landlord, by letting the premises confers on the tenant the right of possession during the term and impliedly promises not to interfere with the tenant's exercise and use of the right to possession during the term (Lewison 2015: paragraph 11.267).

Where, therefore, there is a "gap" in the lease or in the statutory framework one possible remedy is to imply a term into the lease. In a recent case, *Barton v Morris*, Leggatt SCJ in the Supreme Court made the practical issue very clear, expanding, perhaps, on his comment above in *Yam Seng*:

> The essential reason why [implied terms] are necessary is, to put the point colloquially, that life is too short to negotiate contract terms designed to cover every contingency that may occur (2023: paragraph 127).

The best overall (and concise) account of the court's role in such interpolation was that of Lord Hughes in *Ali v Petroleum Company of Trinidad and Tobago*:

> the process of implying a term into the contract must not become the re-writing of the contract in a way which the court believes to be reasonable, or which the court prefers to the agreement … negotiated. A term is to be implied only if it is necessary to make the contract work, and this it may be if (i) it is so obvious that it goes without saying (and the parties, although they did not, ex hypothesi, apply their minds to the point, would have rounded on the notional officious bystander to say, and with one voice, "Oh, of course") and/or (ii) it is necessary to give the contract business efficacy (2017: paragraph 7).

Lord Hughes cites *Marks and Spencer v BNP Paribas* (2015) but does not credit McKinnon J for the 1926 colourful and self-explanatory "oh; of course" phrase (*Shirlaw v Southern Foundries (1926) Ltd* 1939):

> that which in any contract is left to be implied and need not be expressed is something so obvious that it goes without saying; so that, if while the parties were making their bargain, an officious bystander were to suggest some express provision for it in the agreement, they would testily suppress him with a common "Oh, of course!"

As Lord Kerr advised in *Ali* (paragraphs 30-31), one should "reformulate" the obviousness question to elucidate the answer. Paraphrasing him for the purposes of this argument:

> The question to be put by the supposed officious bystander must be reformulated to become.
>
> > what if, whilst the first purchaser of the flat was discussing matters with the estate agent, she asked about Service Charge works and whether she would be able to discuss the budget for future service charge or would be given credible advance detail of why it was being demanded and how it would be spent.

Framed in that way, it seems to me that the response of the estate agent—indeed the only reasonable response—would be along these lines:

> of course they will tell you how much it is and what it is for and I am sure there will be proper discussion and you will be involved; it is your home; after all, and they are professional managers …

Another question to be asked, when consideration is given to implying a term, relates to the state of knowledge of the parties. In *Luxor (Eastbourne) Ltd v Cooper* (1941) Lord Wright explained (at 137, my italics) that:

> what it is sought to imply is based on an intention *imputed* to the parties *from their actual circumstances.*

In *Barton v Morris* (paragraph 14), for example, the courts reviewed extensively the actual negotiations between the parties to determine whether there was anything in there to support or otherwise the claimed implied term, investigating the "actual circumstances". The Supreme Court found against an implied term on a majority decision, the Court of Appeal having found for it unanimously and the High Court having found against it, meaning that five judges out of nine found for an implied term. *Barton v Morris* involved an oral contract meaning that a review of the negotiations was required. Normally, courts will decline to construe contracts by interrogation of negotiations, even where such interrogation might make the intention of the parties "crystal clear"—Lady Hale's phrase in (*Chartbrook Ltd v Persimmon Homes Ltd* 2009: paragraph 99). This raises an interesting conundrum. If we envisage the estate agent providing a different answer to the one above, say that the freeholder will decline to consult or provide credible explanation for the sums being requested, would that be reviewed as part of the matrix seeking

to understand the parties "actual circumstances" or state of knowledge? If not, that appears to create potential unfairness to the freeholder. In *M&S v Paribas* (paragraph 38), Lord Neuberger at the Supreme Court took account of the fact that the lease had been "negotiated and drafted by expert solicitors" but it appears that it was the fact of negotiations and the participants rather than their content that was persuasive. At paragraph 21, Lord Neuberger approved Lord Steyn's analysis in *Equitable Life Assurance Society v Hyman* (2000: 459):

> [he] rightly observed that the implication of a term was "not critically dependent on proof of an actual intention of the parties" when negotiating the contract. If one approaches the question by reference to what the parties would have agreed, one is not strictly concerned with the hypothetical answer of the actual parties, but with that of notional reasonable people in the position of the parties

Lord Wright in *Luxor* (page 137) reiterated the principle that a second test for implication-in-fact "is that it should be 'necessary to give the transaction such business efficacy as the parties must have intended'". The principle dates back to 1889, from the well-known case of *The Moorcock* (1889) in which Bowen J, referring to an implied warranty as a "covenant in law", ruled:

> In business transactions such as this, what the law desires to effect by the implication is to give such business efficacy to the transaction as must have been intended at all events by both parties who are businessmen (at 68).

He clarified the point at pages 68 and 70 in saying that the result derives from "inferences such as are reasonable from the very nature of the transaction". *Treitel* (Peel 2020) cites Lord Hoffmann in *A-G of Belize v Belize Telecom Ltd* (2009), explaining the danger in detaching the phrase "necessary to give business efficacy" from the "process of construction of the instrument": the contract "may work perfectly well in the sense that both parties can perform their express obligations, but the consequences would contradict what a reasonable person would understand the contract to mean" (paragraph 23). Other explanations of "necessity" cited by Treitel are:

> to give effect to the reasonable expectations of the parties—Lord Steyn in (*Equitable Life Assurance Society v Hyman* 2000: 459).

> make the contract "work in the way the parties would reasonably have expected it to work" (*Equitas Insurance Ltd v Municipal Mutual Insurance Ltd* 2019: paragraph 152).

Although in *Equitas Insurance Ltd v Municipal Mutual Insurance Ltd* (paragraph 152) Males LJ discusses how the parties might have reacted

had they foreseen the circumstances in question, stressing that these were unforeseeable, his general principle that "The Court's task is nevertheless to consider how reasonable parties should be taken to have intended the contract to work in the circumstances which have in fact arisen" holds good even in circumstances where parties have foreseen the circumstances but have not addressed them expressly. Unhelpfully perhaps, Lord Neuberger suggested in *M & S v Paribas* (paragraph 21) that "necessity for business efficacy involves a value judgment … the test is not one of absolute necessity". He went on to observe (also at paragraph 21) that perhaps a better test is whether, without the term, the contract lacks practical or commercial coherence.

It seems to me that, whether one uses the test of obviousness, necessity (near absolute or otherwise), or of practical coherence, or party expectation (reasonable expectation), the result is the same; a term requiring the freeholder to take serious steps to consult long-leaseholders on service charge budgets is a core requirement for a long leasehold. To make the contract work, to give it business efficacy, or make it coherent it is clear (obvious) that the freeholder must supply a reasonable amount of information and analysis to the tenant. It cannot be the intention of the parties that the machinery can have grit placed in its oil, or spanners in its works as Sir Robert Goff (1984), as he then was, described matters by the unreasonable or recalcitrant conduct or lack of conduct, lack of candour or exploitative behaviour of the freeholder.

Another issue as to whether the term is "necessary", whether the contract works without it, whether it has "practical coherence" as Lord Neuberger described this test in *M& S v Paribas* (paragraph 21), is worth exploring. Now, it is certain that service charge can be collected without adequate consultation. We have seen the threats that may be issued, and it is trite that leaseholders recognize that their building needs to be maintained. But, as we have also seen, inadequate consultation is correlated with negative experience in long leasehold and, given that these are homes for many, it is hard to conclude that success in collecting service charge is evidence of the contract working. Practical coherence, in my opinion, means that adequate, professional consultation, timeous and real, is essential to making these contracts work.

Another reason for early, clear consultation is that this provides a leaseholder with the ability to consider their legal options. The Leasehold Knowledge Partnership always advises leaseholders to pay first and fight later:

> If you are in dispute with your freeholder over service charges … pay the sum and fight the action retrospectively. Make sure that you are the applicant of the action, rather than the respondent (O'Kelly 2021).

If there is no consultation about the budget or limited consultation, leaseholders are left with a *fait accompli* and with professional advice that means they need to first pay the service charge and then the legal cost of challenging it. With consultation there is at least the possibility of early challenge.

There are, of course, two routes to implying a term. One is the common law; through a judgment. The other is statutory, as with terms implied in sale of goods or goods and services. The problem with the latter is that it does not appear to be on the legislative agenda. The problem with the former is that it is not clear what damage would be experienced by a non-consulted long-leaseholder; the *Daejan* prejudice issue is a good analogy. Pre *Daejan* the statutory remedy was to disallow service charge collection in excess of the threshold amount of £250 per property where the process had not been properly carried out or dispensation granted. Post *Daejan*, dispensation is a formality (Soper 2024), the burden on the leaseholder to show prejudice being generally impossible to overcome and my previous research showing dispensation granted in every case I reviewed. Any statutory implied term would have to provide a statutory remedy, which should be analogous to the section 20 remedy of limiting service charge liability but allowing some discretion to the First Tier Tribunal judge; who tends to be an industry professional. This might take the form of limiting management charges, or of insisting on proper consultation for larger items in advance of money being spent (whether covered by section 20 or not).

In 2024 I reviewed 110 dispensation cases in the First Tier Tribunal. The findings for that were reported in (Soper 2024) but for this article I think that the timelines are interesting.

Remedies alone are insufficient, and Professor Dixon (2020) is completely right to say that:

> one can reform the legal structures around the leasehold estate as much as one likes, but until there are effective, cheap remedies for long and short term residential tenants, millions of homeowners will still suffer

Figure 5 shows that around 50% of the cases are dealt with in the timeframes of construction adjudication. Although most are undefended and a formality, this shows that speedy resolution is possible and in cases such as failure to consult it is arguable that speed is of the essence in order to allow unwinding of decisions or control of service charge collection before irrevocable actions are undertaken. That might be taken care of by a new practice direction requiring speedy disposition of non-consultation cases.

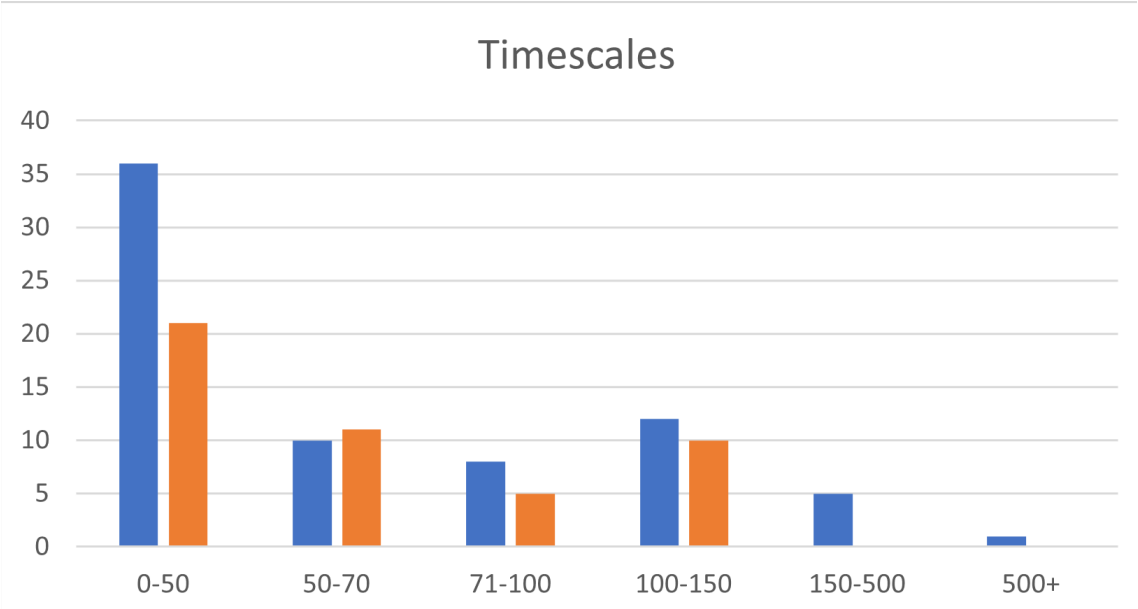

Figure 5: First Tier Tribunal: Decision timelines in consultation cases.

Is it a management imperative?

In the recently published report on the Grenfell disaster, the inquiry panel, led by Sir Martin Moore-Bick, concluded that the local authority "lost sight of the fact that the residents were people who depended on it for a safe and decent home and the privacy and dignity that a home should provide" (Moore-Bick 2024: section 2.56).

Dame Judith Hackitt prefaced her major report ("A Personal View") with a comment that:

> The relationship between landlords and tenants, in whatever ownership model exists in a given building, needs to be one of partnership and collaboration to maintain the integrity of the system and keep people safe (Hackitt 2018: 8)

The contempt and discrimination with which people subject to the vicissitudes of those running large systems or companies remotely was

exposed in the Post Office scandal, in which the inquiry heard from one help-desk trainee:

> Many of these people we were supporting were Asian subpostmasters. Sometimes they would ring up and say they have a £2,000 or £5,000 discrepancy, or even a wild figure like £100,000, and people in the team would say, "I've got another Patel" (Amandeep Singh Statement No WITNO6660100) (Wallis 2023).

Nick Wallis's work on the scandal documents this area in detail.

Michelle Lewis of the giant Managing Agents, Firstport in an article entitled "Building Trust in Property Management" explains that:

> It is our responsibility to ensure they [long-leaseholders] fully understand their rights and responsibilities under the lease, and to provide complete transparency. This involves explaining everything in simple terms, leaving no room for misinterpretation.
>
> An informed customer is an empowered customer, and working with empowered customers benefits all aspects of communal living, ensuring we can work in partnership with customers based on shared goals and understanding.
>
> Homeowners need to know exactly what they are paying for and why'(Lewis 2024).

Outcomes which do not take into account the needs and opinions of those most closely affected cannot seriously to be argued to reflect good professional management, especially when a home is the subject of the decision-making process.

Zygmunt Bauman argued that the technical-administrative success of the Holocaust was due in part to the skilful utilization of "moral sleeping pills" made available by modern bureaucracy and modern technology (Bauman 1991: 43). See also Villegas-Galaviz and Martin (2023: 1699):

> Individuals tend to hand over their responsibility for their actions to those who have ordered them to carry them out and limit themselves to doing their chores in the way that they have been instructed.

From the data above we can see that the closer management is to long-leaseholders, the more positive their experience. The more they are treated as responsible people by being consulted, the more positive their experience. There are occasional examples of cruelty, such as when a threat is made to take someone's home away (which is the effect of forfeiture), but in the main the complaints are of being dismissed or ignored; in other words a failure to respect the home owner. The Leasehold Advisory Service notes that: "Dissatisfaction with the present managing agent may result

more from the leaseholders' feelings of impotence in the decision-making process than from any real shortcomings in the manager's abilities."[3]

We can see both senior figures in Firstport and the RICS itself accepting the need for serious consultation. That reinforces the argument that this is a feature of good management. It would be worth further work to explore whether there is a difference in the experience of long-leaseholders depending on whether their managing agent is a local or a national company.

Does serious consultation lead to better decisions?

Elinor Ostrom won the Nobel Prize in economics for work, including *Governing the Commons: The Evolution of Institutions for Collective Action*, which suggested that groups of people can manage common resources successfully if certain core design principles are present (Ostrom 1990). Principle 3 is:

> *Collective-choice arrangements.* Group members must be able to create at least some of their own rules and make their own decisions by consensus. People hate being told what to do but will work hard for group goals that they have agreed upon (Wilson & Ors 2013)

Later work appears to have validated Ostrom's eight core design principles (Wilson 2015: 12 and generally). Wilson and colleagues (2013) explain Principle 3 in more detail at sections 3 and 4.2 (with an urban example):

> (3) Consensus decision-making provides a safeguard against decisions imposed by some members of the group at the expense of others, since group members will not agree to arrangements that place them at a disadvantage. In addition, when group-level decision-making is structured the right way, it can lead to better outcomes than individual-level decision-making. Group-level decision-making is itself a group-level adaptation.

In contract the decision-maker does, I think, deal with a resource, the contract, which can, particularly in long leasehold, be regarded as common, especially in the sense that service charges are collected and spent for the benefit of both parties (or, more accurately, all parties) and are held in trust by one. If that is the case, then it is arguable that good management requires that resources are dedicated to ensuring that decision-making processes are fair; and this, in turn, connotes the inclusion of key stakeholders in the process.

[3] Leasehold Advisory Service, "Right to Manage".

Theories of collective mind, neatly encapsulated in the equation [we ≠ you + I], ascribe "a unified mental state to a group of agents with convergent experiences" (Shteynberg & Ors 2023), which conveys well the *ad idem* idea of contract. Intuitively, one would say that consulting those affected by your decisions should lead to better decisions, and this is supported by extensive literature, much of which is cited by Alessia Isopi and colleagues in an experiment "where demonstrability of correct solutions is low" (Isopi & Ors 2014). They say in the "Introduction" that:

> There is now considerable evidence that groups can often "outperform" individuals. The bulk of it comes from experiments in social psychology examining behavior in decision problems that have correct solutions and thus have a meaningful criterion for assessing decision accuracy.

One important piece of field research revealed "Rational [as opposed to intuitive] decision-making was associated with good performance" when participants had looked "extensively" for information (Kaufman & Ors 2017) and it is possible that this finding can be read across to consultation in long leasehold. It is also possible, as Weber and Lindeman find (in Betsch & Ors 2008: 205-206) that personality and cultural differences will affect decision-making, and that "standardizing" processes or insisting on bias-reducing mechanisms will strengthen decision-making.

[F] CONCLUSION

The general thrust of this article is that there are significant advantages to consultation in general where people's material interests are concerned. This article has tried to convey from multiple viewpoints, managerial, legal and psychological, using empirical evidence and theoretical work alongside doctrinal legal positions that such consultation is obligatory, advisable and good professional practice.

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