

COMMERCIAL PROPERTY SERVICE CHARGE SEMINAR

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THE LEGAL PERSPECTIVE OF ONE LAWYER

Vivien King



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A landlord's business is providing space for occupation by other businesses often in multi-occupied premises.

So, should the landlord not bear the risks (including the uncertain costs) of that provision?

Would a restaurant's customer agree to pay for a meal provided as and when it suits the restaurant, at a standard and price to be defined after the food and drink is delivered?

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Is it not time for an upfront all inclusive disclosed rental - inclusive of the items presently charged to the infamous service charge (particularly in relation to maintenance of and repairing the property itself)?

Put the risk where it belongs – with the party providing “the service”.

And allow the occupiers to accurately budget for the costs of occupying the property.

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- There *are* a few “all inclusive rentals” but serviced accommodation is still the exception.
- And when I suggested some years ago to the PMA that we might seek an all inclusive rental for commercial property, its members were divided amongst
 - o those who thought it a good idea enabling a tenant to know what outgoings would be and thus budget for expenditure and
 - o those who feared that landlords would “take the extra money and fail to provide the services”!

AND WHAT DOES *THAT* SAY ABOUT THE PROPERTY INDUSTRY
AND ITS SO CALLED “SERVICE CHARGE”?

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- Perhaps we need a compromise?
- Buildings deteriorate over time and they and the services within them become outmoded and outdated. Tenants should not pay for the upgrade in the service charge.
- However, some services are provided by the landlord in order that tenants might better function within the property (e.g. heating, lighting, security within common parts). In these instances, a service charge can assist all.
- It's horses for courses but we need some parameters.

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Boundaries need to be defined.

And at present, service charges = trouble.

To quote Graham Chase, then RICS President, in his foreword to the Service Charge for Commercial Leases Code of Practice ("the RICS Code"):

"Poorly managed service charges are a frequent cause of disputes between landlords and tenants, owners and occupiers".

And speaking as a property litigator, I would add "Oh and how!"

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And so, we have the RICS Code for Service Charges in Commercial Property - a guide to good practice.

However, it is the relevant lease terms that prevail and it therefore requires both parties to agree to adopt the Code. And do landlords? Some but we are a long way short of all.

And sadly it appears to take a collapse in the letting market for some landlords to fully co-operate with tenants in respect of service charges (particularly evident in the retail market). But are "soft" deals coming to an end? (Press reports indicate that they are.)

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And would full scale adoption of the Code help? Let us take an example. The Code says:

- Service charge costs *"include reasonable costs of maintenance, repair and replacement (where beyond economic repair) of the fabric, plant, equipment and materials necessary for the property's operation"*.
- Service charge costs do not include, inter alia, *"improvement costs above the costs of normal maintenance, repair or replacement"*.

And in practice ... ?

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First: what is an improvement?

Hoffman J (as he then was) said in *Post Office v Aquarius Properties Ltd* "one usually thinks of an improvement as a fairly substantial and identifiable addition to or change in a building but involving a subsidiary part rather than the building as a whole. Nevertheless, 'improvement' is different from repair."

Dowding and Reynolds in their book "Dilapidations: Modern Law and Practice" say "Many repairs will involve an element of improvement, if only in the sense that an old item has been replaced with a new."

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May be viewed as being not terribly helpful. And hence, the door to litigation is opened.

Don't get hooked on case law but we will look briefly at for instance:

- *Scottish Mutual Assurance plc v Jardine Public Relations Ltd* [1999]
- *Credit Suisse v Beegas Nominees Limited* [1994]
- *Postal Properties v Boots the Chemist* [1996]

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So, although we may need to tighten some definitions in the Code it is useful and on assumptions that

- we are to retain service charges in the commercial lease,
- that adoption of the Code for new leases would assist the relationship between landlord and tenant and
- the parties themselves do not adopt the Code

how do we make sure the Code *is* used?

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We heard some suggestions earlier:

I cannot see the Law Society enforcing compliance.

None of us, I suspect, approves enforcement by legislation – although adoption of something similar to that used for the residential market may be enough to frighten landlords into use of the Code.

Market leadership is, I believe, the way to go. Realistic?

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First, what *does* happen in the residential sector?

Not my field (or topic for today) but in essence by legislation:

- Landlords must consult with tenants about proposed works or services, must then obtain at least 2 written estimates and then consult again with tenants
- Costs and standards of services must be reasonable
- Demand for payment must be made within specified time periods and if statutory procedure not complied with, recovery is very limited
- Landlord cannot forfeit for non-payment unless charge agreed by tenant or determined by the courts

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What *does* happen in the residential sector? (legislation cont):

- Landlord's summaries of service charges must provide information about tenants' rights and obligations
- Accounts must be held separately and be transparent
- Regular statements are to be made available to tenants
- Tenants have a statutory right to enfranchise in specified circumstances
- Latest edition of RICS Service Charge Residential Management Code is now formally approved by Government by Statutory Instrument 2009 No. 512

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- As I said previously, such a tight legislative scheme cannot be the way to go in relation to the commercial field. Not only inconvenient and time consuming for landlords, but equally so for the tenants.
- BUT if landlords do not adopt the RICS Code voluntarily, should the Code be enforced by way of Statutory Instrument (as has happened in the residential world)?
- Would be interested in taking straw pole of this audience!

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Or is my preference for market leadership the path to take?

How realistic is it in the light of the past?

There IS a need for well managed service charges but there always has been. So what, if anything has changed?

The question to be asked is *“Is the market listening at last?”*

I would hope so but have a horrid feeling I will be doing this talk again in the future!

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