

COVID-19: WHAT ARE THE EFFECTS ON SERVICE CHARGES?

IT IS LIKELY THAT THE PANDEMIC WILL SEE AN INCREASE IN SERVICE CHARGE-RELATED DISPUTES AS TENANTS LOOK TO REDUCE FIXED OPERATING COSTS, PARTICULARLY IN RELATION TO OFFICE BUILDINGS, RETAIL PARKS, INDUSTRIAL PARKS AND SHOPPING CENTRES.

Most commercial leases state that the landlord must provide certain services in return for which the tenant is liable for the cost of the services provided.

Under the current lockdown this gives rise to a number of issues:

1. What services should the landlord provide in circumstances where the effect of the lockdown is that a number of premises or units cannot open?
2. What services should a tenant pay for in circumstances where only a handful of tenants benefit from those services?
3. What is the effect of an obligation on the tenants to pay for an additional service that is provided under the “sweeper clause” that is common in modern commercial leases relating to “good estate management”?
4. Is it more likely that there will be a shift away from the conventional service charge structure towards an ‘all-inclusive’ model consistent with an increasing appetite amongst occupiers for greater flexibility?

It is not as simple for a tenant just to say that, as it is prevented from occupying/operating because of the COVID-19 regulations, it should pay no service charges for the period of the lockdown.

There will be many situations where the nature of the building requires that certain plant and machinery remain operated throughout the lockdown. For example, lifts, air-conditioning plant and building management systems need to remain operative because they may have a reduced life span if not in constant use. Further, the cost of having to re-engage these systems if they are shut down may be more than the cost of keeping them operated. In addition, the cost of security will not go away.

Whilst the use of the types of “sweeper clauses” mentioned above is often doubted as giving a free rein to landlords to do what they want and then charge for it, these clauses should hopefully come into their own in the current climate. This may be of great use to landlords, because the flexibility in the courses of action that most landlords would want to take should fall fairly and squarely within the principles of good estate management.

There is, however, much to be said for continuing to engage with tenants and in particular with respect to a landlord’s plan for operating the building while the lockdown continues. One aspect that remains open for discussion is “keep open” covenants. For example, tenants might wish to have discussions about extended opening hours to help them to get back on their feet.

It is essential that landlords have a detailed understanding of the service charge provisions in place for a particular scheme specifically to assess the available grounds for recovery and to quantify the prospect of a successful challenge.

FOR FURTHER INFORMATION



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