

Focus on Service Charges

November 2015

November 2015

1 Overview

Landlords will often seek to recover their costs associated with a let property from tenants by way of service charge payments. As tenant, it is important to be aware what costs can and cannot be recovered by the landlord through service charge demands.

2 General position

Generally, no tenant is obliged to pay a service charge except so far as the terms of the lease provide that a service charge is payable. The fact that the tenant has the benefit of a service does not, of itself, mean that the tenant is obliged to pay for that service. Equally the fact that a landlord does not receive payment for a service does not mean, in itself, that the landlord is entitled to refrain from providing the service.

3 What is the position in my particular circumstances ...

3.1 I have a lease

As a starting point, and despite you having a lease in place, there is no presumption that a landlord is entitled to a full recoupment of costs incurred and the landlord will only be able to recover all its costs where the terms of the lease allow the landlord to do so.

In light of this fact careful scrutiny of your lease will be needed as in almost all circumstances the terms of the lease will guide you through what can be recovered by the landlord.

If the landlord seeks to recover items outside the scope of the service charge provisions within the lease, then it is likely that they are not payable and payment should be resisted.

In addition to checking the terms of the lease, care should be taken to check whether any ancillary documents or side letters may bind the parties in respect of service charge provisions.

3.2 I had a lease but it expired but I remain in occupation

If this applies to you then you will fall into one of two categories, namely:-

- ***You have the protection of security of tenure (see the end of the Article for an explanation of this concept).***

In such a situation your occupation will continue under the same terms as under your expired lease. As a consequence, and as was the case if you had a lease in place, careful scrutiny of your former lease will be needed.

If the landlord seeks to recover items outside the scope of the service charge provisions within the lease, then it is likely that these are not payable and once again payment should be resisted.

- ***You did not have the protection of the Landlord and Tenant Act 1954, because it contained express wording to exclude security of tenure.***

In such a situation then (assuming the landlord has not notified you that they are treating you as a trespasser), you will most likely be occupying as either a tenant at will or under the terms of an implied periodic lease.

The terms of the tenancy at will or periodic lease will be the same as under your previous contractual lease, save to the extent that they are inconsistent with a tenancy at will or periodic tenancy and unless varied by the conduct of you and your landlord.

You should therefore carefully consider making payments in respect of service charge demands, following the expiry of your lease, which would not otherwise have been covered under the terms of that expired lease. Indeed, making payments that were not originally covered under your lease may leave you open to the landlord claiming that the parties conduct has varied the terms of your original lease.

3.3 I do not have a lease

The general position would ordinarily apply i.e. as there are no terms then no service charge would be payable. However, it is important to note that you might be deemed to have agreed a payment is due in a range of circumstances such as:

- (i) where there was a previous agreement where such sums were payable,
- (ii) where the tenant has previously made those payments on request from the landlord, or
- (iii) where the tenant has indicated its acceptance, whether orally or in writing, to those payments.

If you have not, whether expressly or otherwise, agreed to pay service charges then, unless your landlord was prepared to go through set statutory proceedings to regain possession, they will have limited options beyond seeking to agree the terms of your occupation or seeking a declaration from the court as to the terms of the lease.

3.4 I have a lease but neither the landlord nor I have ever applied the documented lease terms in practice?

It is not unusual for parties to agree a lease but then to adopt different arrangements in practice. However, it is very unlikely, where a properly drafted lease is in place, that either you or your landlord will be able to argue that conduct alone has impliedly varied the documented service charge provisions.

Not particularly useful if you are arguing against payment of a service charge that your landlord, although they may have never demanded the same before, is now demanded. However, on the reverse, your landlord would struggle to argue that a history of paying for items not actually covered by the service charge provisions, shows an implied agreement to make such payments in the future.

3.5 I have a lease but the landlord has increased the service charge?

Where you have been in occupation under a lease for some time, you may receive a higher than usual service charge demand. In such circumstances, and in line with the general

position, the ability to charge such an increased service charge will depend on your lease terms.

In considering your lease, remember that your lease

- may provide for a fixed service charge, in which case it will be clear what your landlord can charge;
- may provide for a capped service charge, so that the maximum cost is clear but where there may be some scope for disagreement over the actual cost below that capped level;
- may state that the charge is equal to the landlord's costs;
- may limit the services your landlord can charge for.

3.6 Can my landlord charge me property management charges as part of my service charge?

Your landlord may seek to recover the costs of local property managers, regional infrastructures or indeed national infrastructures as well as the staff employed within the same. Whether these are recoverable will depend on the terms of your lease and any express limits or exclusions.

In the absence of any lease provisions you should seek a breakdown of any increased management costs. Whilst the law does not imply any obligation upon a landlord to be reasonable, market forces and the Code (see below) may assist.

Royal Institute of Chartered Surveyor's Code of Practice regarding Service Charge in Commercial Properties ("the Code")

The Code has the status of a guidance note and surveyors are not obliged to follow the advice or recommendations contained in the Code. However, the Code represents what is considered best practice, and where allegations of professional negligence are made against a surveyor the courts are likely to take the Code into account. For this reason surveyors would generally look to comply with the Code, which is therefore a key driver of what might be considered "market" practice.

Whilst the Code does allow for Landlords to recover a Management Fee from a Tenant, the Code is quite specific as to what may be considered a Management Fee. The Code specifies that the Management Fee should relate to the person managing "the services comprised in the service charge". The Code does anticipate that in some circumstances the manager may comprise a tiered management structure (i.e. regional team, county teams and national teams), but it cautions that in such cases the manager "should be prepared to demonstrate that the total cost of management is fair and reasonable".

4 I think I'm being overcharged, what do I do?

- ### **4.1**
- The first thing to do is to check the terms of your lease to ascertain whether the item claimed falls within the scope of the items which may be claimed under the relevant service charge provisions. If you have no lease in place, then consider whether the terms of your previous lease of the property are relevant and also whether the actions of you and/or your landlord may suggest that you have agreed to make the relevant payment. If a particular service is covered by the service charge provisions, then ensure that any pre-conditions for requiring payment under the terms of the lease have been fully complied with and consider whether the costs have been reasonably incurred.

- 4.2** Where you discover you have been overpaying service charge then steps should be taken to ensure that your landlord does not charge for such costs in the future and you may also consider, subject to limitation arguments, seeking re-payment of the monies paid by mistake to your landlord. The first step will usually be to raise the issue with them to see if matters may be agreed without disagreement. If matters cannot be agreed, then it is likely that legal advice should be sought to ascertain the extent of your liability and the options available to remedy the situation.

Security of Tenure

Security of tenure applies to most leases that are in place in respect of premises that are being used for business purposes which have run for a period over 6 months unless positive actions have been taken to exclude the provisions contained in Part II of the Landlord and Tenant Act 1954 ("the 1954 Act").

Your lease does not have to be formally documented for security of tenure to apply. In fact if you have exclusively occupied your premises for a period in excess of six months then it is highly probable that you will automatically benefit from having this security. But what does it mean?

In very basic terms security of tenure acts as protection to prevent tenants from being evicted at the end of their lease term or (where no lease is formally in place with a defined term) at the landlord's will. In order to regain possession the landlord must serve a notice under the 1954 Act stating one or more of the grounds specified in the 1954 Act as to why they oppose the renewal of the lease. These grounds range from the landlord wanting to redevelop the property, to the tenant having a poor history in observing the covenants under the lease.

Rob Day, Senior Lawyer - BMA Law.

This note has been jointly prepared by GPC and BMA Law. If you require legal advice or support in relation to any of the issues raised in this article please do not hesitate to contact BMA Law on 0300 123 2014 or via email to info@BMALaw.co.uk. Set up by the BMA to support its members, BMA Law provides sector specific specialist advice at preferential rates to members of the BMA.