

## Overview of the Commercial Service Charge Code Professional Statement

Alistair Drummond  
DLA Piper Scotland LLP

21 November 2017, Glasgow  
22 November 2017, Edinburgh



## Commercial Service Charge Code

### Introduction.

- ▶ Alistair Drummond.
- ▶ Partner - DLA Piper Scotland LLP (formerly with DWF LLP – then Biggart Baillie).
- ▶ Chambers and Legal 500 – Recommended Property Litigation specialist for over 15 years.
- ▶ RICS – Dilapidations Conference and Commercial Property Conference.



## Commercial Service Charge Code



### Seminar Overview

- ▶ Introduction
- ▶ Core Principles
  - ▶ Key terms
  - ▶ Statements of Best Practice
  - ▶ Practical examples
  - ▶ Questions and comments

## Commercial Service Charge Code



### Introduction

- ▶ RICS Code of Practice
- ▶ Service Charges in Commercial Property 3<sup>rd</sup> Edition.
  
- ▶ Statement of Best Practice
- ▶ Professional Responsibility
- ▶ History and Purpose

## The Code



### Core Principles – The Service Cost

- ▶ Services are to be procured on an appropriate value-for-money basis
- ▶ Managers are to obtain competitive quotations or benchmark costs
- ▶ Owners should not profit from the provision or supply of services
- ▶ A reasonable commercial management fee is allowed – on a fixed price basis
- ▶ All costs are to be transparent

### Issues Arising

- ▶ What amounts to a "profit"?
- ▶ What is "appropriate value-for-money"?

## The Code



### Core Principles - Allocation and Apportionment

- ▶ Costs should be allocated to the relevant expenditure category
- ▶ Costs are to be apportioned to the occupiers who benefit from the particular services
- ▶ The basis and method of apportionment should be demonstrably fair and reasonable
- ▶ For each unit, managers are to make available a full apportionment matrix, showing:-
  - ▶ the basis of calculation; and
  - ▶ total apportionment per schedule

### Issues Arising

- ▶ Treatment of voids, concessionaries and car parks
- ▶ Apportionment Matrix – Floor Area, Rateable Value
- ▶ Tenant Alterations – do they have an influence. Nature and character.
- ▶ Weighting

## The Code



### Core Principles - Certification

- ▶ Certified accounts of expenditure to represent a true and accurate record of expenditure incurred
- ▶ Certifier under a duty of care to owners and occupiers
- ▶ Duty to act with professional care, diligence, integrity and objectivity

### Issues Arising

- ▶ Duty of care
- ▶ Statement of Accounting Principles
- ▶ "Certified" or "audited". Lease requirement?
- ▶ Contractual machinery - Ensure annual statements of service charge expenditure are issued strictly in accordance with the terms of the Lease.

## The Code



### Core Principles - Communication and Consultation

- ▶ Managers to consult with occupiers regarding the standard and quality of service charge provision
- ▶ Managers to communicate with occupiers to ensure:-
  - ▶ services are delivered effectively, for the benefit of all; and
  - ▶ Occupiers understand what they can expect to receive and how much to pay
- ▶ Managers will be transparent in demonstrating compliance

### Issues Arising

- Advance consultation for increases in annual budget or "one-off" liabilities.
- The earlier the better.

## The Code



### Core Principles - Duty of Care

- ▶ In managing the property, the manager has a duty of care to the occupiers and the owner
- ▶ The manager should have a clear policy setting out how the service charge will be managed

### Issues Arising

## The Code



### Core Principles - Financial Competence

- ▶ Managers are to demonstrate a high degree of competence, professionalism, integrity, objectivity and transparency in dealing with service charge accounts
- ▶ Managers are to act as experts when issuing statements of accounts and / or certifying expenditure
- ▶ Service charge monies to be held in one or more discrete bank accounts
- ▶ All interest earned on service charge accounts to be credited to the service charge account (after appropriate deductions)
- ▶ Recommended Industry Standard Cost Headings to be used in reporting budget and actual expenditure

### Issues Arising

- ▶ Industry Standard Cost Classification – Appendix B
- ▶ Recommended Best Practice – Change from 2 Edition.

## The Code



### Core Principles - Occupier Responsibilities

- ▶ Occupiers to ensure prompt payment of all service charge on-account and balancing charges
- ▶ In the event of a legitimate dispute, only the actual sums in dispute are to be withheld
- ▶ Occupiers to recognise that the service charge provisions in a lease have legal effect
- ▶ Occupiers to be proactive in assisting owners in the operation and utilisation of services

### Issues Arising

- ▶ When do the obligations on the tenant fall?
- ▶ Development works ongoing at Lease termination.
- ▶ Leases often refer to "costs incurred" – when are costs incurred?

## The Code



### Core Principles - Alternative Dispute Resolution

- ▶ New leases should make provision for either party to require the resolution of disagreements through the use of ADR
- ▶ The President of the RICS should be used as a suitable nominating body

### Issues Arising

- Mediation
- Early Neutral Evaluation
- Mediation
- Independent Expert Determination
- Arbitration

## The Code



### Core Principles - Timeliness

- ▶ Consultation between managers and occupiers is to be timely and regular to promote good working relationships
- ▶ Issue budgets to occupiers at least one month prior to the start of the service charge year
- ▶ Statements of actual expenditure will be issued within 4 months of the service charge year end

### Issues Arising

## The Code



### Core Principles - Transparency

- ▶ Transparency is essential
- ▶ Prompt notification of material variances to plans and forecasts ensures better working relationships

### Issues Arising

- Transparency – quality and quantity.

## The Code



### Core Principles - Value for Money

- ▶ Service quality is to be appropriate to the location, use and character of the property
- ▶ Quality service standards ensure that value for money is achieved at all times
- ▶ The aim is to achieve effective, value for money service rather than merely the lowest price

### Issues Arising

## The Code



### Limitations of the Code

- ▶ The lease is the overriding legal document.
- ▶ The Code cannot override the lease, but requires to be read in conjunction with the lease.
- ▶ In the event of a conflict between the terms of the lease and the terms of the Code, the lease must prevail.

### Proportionality



