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11th December 2017

Dear Paul

RICS draft professional statement – Service charges in commercial property

The City of London Law Society (“CLLS”) represents approximately 17,000 City lawyers through individual and corporate membership including some of the largest international law firms in the world. These law firms advise a variety of clients from multinational companies and financial institutions to Government departments, often in relation to complex, multi-jurisdictional legal issues.

A full list of the CLLS corporate members may be found on the CLLS website at <http://www.citysolicitors.org.uk/attachments/category/81/Corporate%20Membership%202017%2001.pdf>

The CLLS responds to a variety of consultations on issues of importance to its members through its 19 specialist committees. This response, prepared by the CLLS Land Law Committee, is in respect of the Royal Institute of Chartered Surveyors’ consultation on the “draft professional statement – Service charges in commercial property.”

The Committee welcomes the production of the new “RICS draft professional statement – Service charges in commercial property.” Whilst many aspects of the professional statement are the same or similar to the current *RICS Code for Service Charges in Commercial Property, 3rd edition* (and users should, therefore, benefit from familiarity with the statement), the Committee broadly welcomes the changes in the professional statement.

The current Code and its previous iterations have had an important influence on service charge practices in the property industry. Leases increasingly include provisions that reflect

elements of the Code and service charge provisions in leases are generally becoming more balanced between landlord and tenant.

The Committee notes the RICS's view that, despite there being many managing agents and landlords who seek to employ the Code's principles, there are many situations where the best practice advocated by the Code has been ignored. The Committee understands that there needs to be a greater sanction for those who disregard the Code and, in one judge's words, "act in a partisan spirit, supposing their only task is to recover as much money as they can for the landlord".

The Committee, therefore, supports the RICS's commercial service charge document being elevated to a professional statement. It considers that the eight core principles are appropriate and most managing agents and landlords should be able to comply with them. The Committee is concerned about the situations where an RICS regulated surveyor is employed by a non-regulated property company, or an RICS regulated firm is employed by perhaps an overseas organisation that is not regulated by the RICS. If the mandatory requirements are too wide-ranging, they can cause real problems for the RICS regulated individual or firm who may wish to comply, but is prevented from doing so by the employer or client. This is especially problematic in the light of the legal and/or disciplinary consequences for those departing from those requirements.

In that regard, the Committee considers (and we agree with the professional statement) that it is appropriate that matters of timeliness in the issuing of budgets to occupiers and detailed statements of actual expenditure should be principles of best practice rather than mandatory requirements. There had been concern in the property industry that having precise time limits for the issuing of such information as a mandatory requirement would cause serious problems for RICS regulated people or firms employed or instructed by organisations not regulated by the RICS.

In terms of other comments:

1 The Committee wonders whether reference should be made to the service charge provisions in the Model Commercial Leases, in addition to the references to the City of London Law Society and Practical Law Company drafting, as examples of Code compliant provisions.

2 In relation to management fees, the professional statement at paragraph 2.4.2 states "This professional statement cannot override the terms agreed between the parties and recorded in the lease. However, where the lease limits the amount or quantum of the fee recoverable from occupiers it is a matter between the owner and occupier and should not prevent or limit the manager's ability to charge a commercial fee that reflects the requirements of this professional statement. In certain circumstances, this may result in a shortfall in the recovery of service charge costs on behalf of the owner, but the overriding principle should be to achieve best-practice principles for the management and administration of services charges in commercial property." The Committee questions why the owner should necessarily suffer the shortfall in this situation and not be able to recover from the occupiers. If the manager charges a commercial fee, the owner should be able to charge this to the occupiers and include provisions to that effect in the lease.

3 The professional statement advocates the use of alternative dispute resolution as industry best practice. It should be noted that most leases do not include ADR provisions. The Committee would point out that ADR provisions are not necessarily universally seen as helpful. Even if there is provision for ADR there is no obligation on the parties to agree a resolution using that method. While perhaps not an ideal route, recourse to courts at least

provides greater certainty of outcome. There is also greater certainty with an arbitration or expert provision.

4 In paragraph 2.7, should there be a reference to how owners behave if they self-insure?

5 In paragraph 9.3 on sinking and reserve funds, is it worth including some cautionary wording on the tax implications of such funds?

6 Paragraph 11 on Environmental sustainability could perhaps be enlarged. Has the RICS spoken to the Better Buildings Partnership? What happens with the income from photovoltaics or solar panels? Should this be covered by service charge since it may reduce the property's energy bills?

7 Does the professional statement contain sufficient best practice duties on the property owner to keep confidential tenant information provided in relation to service charge matters?

Yours faithfully

Jackie Newstead
Chair, Land Law Committee
City of London Law Society

A full list of the Land Law Committee members is herewith:-

http://www.citysolicitors.org.uk/index.php?option=com_content&view=category&id=142&Itemid=469