

Service Charges in Commercial Leases

Introduction

The Commercial Landlord and Tenant Task Force established by the Conveyancing Committee has been reviewing service charge provisions in commercial leases. This review has coincided with the publication earlier this year by the Society of Chartered Surveyors Ireland of the latest edition of their code of practice in this area (see below). Recognising that negotiation of commercial leases (including the service charge components) is entirely a matter for the individual parties to the proposed lease and their advisers, the task force is very anxious to stress that the contents of this briefing note are for guidance purposes only and the sample drafting produced is to be read in this context and does not come with any recommendation from either the task force or indeed from the Conveyancing Committee itself.

Commentary on the sample drafting is set out below in note format and these notes should be read in conjunction with the footnotes. In addition, while recognising the valuable contribution made by the SCSI in the production of their code of practice, neither the task force nor the Conveyancing Committee is formally endorsing the code of practice. While the code has been incorporated by reference in the sample drafting, this should not be construed as an endorsement and the adoption of the code is entirely a matter for commercial negotiation between the parties to any lease.

Note 1 - The attached are sample service charge provisions and have not been designed with any particular building or scheme in mind and should **not** be treated as a precedent document but rather an aide memoir/guide to negotiation of service charge provisions in leases. Regard should be had to the SCSI/RICS Code of Practice, Service Charges in Commercial Property (Professional Statement – 1st Edition published 2020) which can be accessed at https://www.scsi.ie/documents/get_lob?id=561&field=file. Each of the City of London Law Society and Practical Law Company has drawn up service charge provisions designed to comply with principles of the code. See:

City of London Law Society:

www.citysolicitors.org.uk/index.php?optoin=com_content&view=category&id=161&Itemid=471

Practical Law Company:

<http://uk.practicallaw.com/3-339-5002?q=service+charge+clauses>

Please note these provisions relate to UK practice and should be used only with caution and careful consideration.

Note 2 – A distinction must be made in negotiation of service charge provisions in a new lease and in reviewing service charge provisions in an existing lease in the case of an assignment. In the case of the latter the service charge provisions are “cast in stone” and the proposed assignee needs to be alerted to the obligations they will be assuming under the service charge provisions of the lease should they proceed with the assignment. The proposed assignee needs to carefully review all recent service charge accounts and in particular the budget for the forthcoming service charge period to establish if any significant expenditure, likely of a capital nature, is anticipated which could add materially to service charge costs. The credit balance in any sinking fund account is also a material factor. Needless to say, careful attention should also be paid to the survey of the building/scheme which the proposed assignee should undertake. Distinction must also be made between new

or relatively new buildings and those which are “second-hand”. In the case of a new lease of a newly constructed building, a landlord’s reasonable expectation will be that there will be no carve out for any tenant in respect of replacement or renewal (but not improvement) of the building/estate or any plant and equipment therein. Typically, accruals are made for such expenditure through the sinking fund mechanism within the service charge provisions. In the case of older buildings an incoming tenant (but not necessarily an assignee of an existing lease) may be able to negotiate an obligation on the landlord not to put the building or the plant and equipment into any better state of condition and repair under the service charge provisions than they are at lease commencement. The SCSI Professional Statement recommends that landlords/management companies should implement planned preventative maintenance programmes (PPMs) to smooth out service charge costs as far as possible. In addition, many new commercial buildings nowadays enjoy the benefit of latent defects insurance which would mitigate against service charge being deployed to remedy defects. The proposed tenant should make all necessary enquiries as to the availability of such insurance as part of any prelease due diligence.

Note 3 - As part of tenant due diligence full details of service charge accounts (where the building is second hand) should be sought and whether the building is new or second-hand a service charge budget for the forthcoming service charge period should be sought and indeed negotiated where relevant. Frequently the accounts and/or budget may flag up issues which require further enquiry on the part of a prospective tenant.

Note 4 - There are many defined terms used in the attached which are not contained in the “Definitions” section as they may have a wider application in the lease and are not confined to the service charge provisions. The items in question should be readily understandable.

Note 5 - The service charge exclusions mentioned in the sample drafting are examples. Exclusions from the service charge will be a matter of negotiation on a case by case basis and will very much vary from building to building/scheme to scheme.

Note 6 - Tenants should seek to negotiate that any net income generated by use of common areas/retained areas for commercial or income raising purposes should be credited to the service charge unless those areas/activities are themselves contributing to the service charge.

Note 7 - Separate VAT advice should be taken in respect of service charge provisions in a lease and indeed in respect of the lease generally.

Note 8 - Invariably there will be building/scheme specific issues relevant to the service charge provisions in any individual lease which are not contemplated in the sample drafting attached. Care should be taken to ensure any such issues are not overlooked when the drafting is being finalised.

Sample Service Charge Clause for Multi-Let Office Building and Commentary

Definitions¹

["**Building**" means ●]

"**Conduits**" means each of the following of whatsoever nature: all sewers, drains, soakaways, pipes, gullies, gutters, ducts, mains, watercourses, tanks, attenuation tanks and systems, interceptors, channels, subways, wires, shafts, cables, valves, flues and other transmission or conducting media, installations and equipment (including all fixings, covers, cowls, louvres and other ancillary apparatus) of whatsoever nature or kind or any of them;

"**Common Areas**" means the pedestrian ways, forecourts, entrance halls, corridors, lobbies, landings, lift shafts, lifts, walks, passages, stairs, staircases, washrooms, toilets [loading bays, servicing areas,]² and any other areas, ways or amenities in the Building or within the curtilage thereof which are or may from time to time be provided and designated by the Landlord for the common use and enjoyment of some or all of the tenants and occupiers of the Building excluding the Lettable Areas and any parts of the Building which have been or are intended to be assured (whether by way of conveyance, assignment or long lease to any person (other than the Management Company) PROVIDED ALWAYS that if the Landlord or the Management Company should cause or permit any alterations in the Building which shall in any way alter the area or location of the Common Areas or any part thereof, the definition of Common Areas shall as and where necessary be modified accordingly but subject always to the exclusions aforesaid;

"**Floor Area**" means the total floor area of the premises being measured expressed in square [feet/metres] measured in accordance with the Measuring Code;

["**Lettable Areas**" means ●]

["**Measuring Code**" means [the Measuring Practice Guidance Notes issued by the Society of Chartered Surveyors Ireland current at the date on which those guidance notes are applied under the terms of this Agreement] OR [the International Property Measurement Standards 3: Office Buildings published by the International Property Measurement Standards Coalition current at the date on which those standards are applied] (or if there are no such standards, such standards or code as may be reasonably determined by the Landlord);³]

"**Retained Areas**" means all parts of the Building which do not comprise Lettable Areas, including, but not limited to:

- the Common Areas;

¹ Only definitions directly relevant to service charge have been included.

² Delete where not applicable.

³ Take instructions from the client in relation to the measuring standard to be used. The Measuring Practice Guidance Notes issued by the SCSi are a common agreed standard for the measurement of property. They measure the Net Internal Area (NIA), Gross Internal Area (GIA) and Gross External Area (GEA) of different types of property. Read more [here](#). IPMS: Office Buildings is an international measurement standard for offices created in November 2014. The IPMS Coalition aims to bring about harmonisation of national property measurement standards through the creation and adoption of agreed international standards for the measurement of buildings. The IPMS standards are IPMS 1, IPMS 2 – Office and IPMS 3 – Office. IPMS 3 – Office is referenced in this definition. It measures the floor area available on an exclusive basis to an occupier, but excluding shared or common facilities such as stairs, toilets, plant rooms etc., calculated on an occupier-by-occupier or floor-by-floor basis for each building. The standard used may require amendment depending on the nature of the Demised Premises. Read more [here](#).

- office or other accommodation which may from time to time be reserved in the Building for staff of the Landlord who are involved in the management or security of the Building;
- any parts of the Building reserved by the Landlord for the housing of plant, machinery and equipment or otherwise in connection with or required for the provision of the Services;
- all Conduits in, upon, over, under or within and exclusively serving the Building except any that form part of the Lettable Areas;
- the main structure of the Building and, in particular, but not by way of limitation, the roof, foundations, external walls, internal load bearing walls, columns and the structural parts of the roof, ceilings and floors, all party structures, boundary walls, railings, and fences and all exterior parts of the Building [,all roads, pavements, pavement lights and car parking areas (if any) within the curtilage of the Building]⁴; and
- all plate glass, cladding, curtain walling, glazing, window frames and window furniture and all glass in the windows of the Building separating the Demised Premises from the Retained Areas.⁵

[“**SCSI/RICS Code of Practice**” means the SCSI/RICS Code of Practice, Service Charges in Commercial Property (Professional Statement – 1st Edition published 2020) or any updated or successor code of practice adopted by those bodies.

“**Service Charge**” means the aggregate costs, expenses, overheads, payments, charges and outgoings paid, payable, incurred or borne by the Landlord or the Management Company in providing the Services (whether or not the Landlord is obliged by this Lease to incur the same) including any interest on borrowings obtained or other costs reasonably incurred by the Landlord or the Management Company in providing the Services;

“**Service Charge Period**” means the period of twelve (12) months from ● to ● in each year or such other 12 month period as the Landlord or the Management Company may, in its/their reasonable discretion and only following not less than 3 months’ notice in writing to the Tenant, from time to time reasonably determine as being that in which the accounts of the Landlord or the Management Company either generally or in relation to the Building shall be made up;

“**Services**” means the services specified in Schedule 1, Part 1;

“**Tenant’s Proportion**” means the proportion which is attributable to the Demised Premises and which is calculated on the basis of the proportion which the Floor Area⁶ of the Demised Premises bears to the total Floor Area of the Lettable Areas in the Building [save where such a comparison is objectively inappropriate having regard to the nature of any expenditure, or item of expenditure, incurred or the premises in the Building which benefit from it or otherwise, in which case the Landlord/Management Company may in its reasonable discretion:

⁴ Delete where not applicable.

⁵ The wording in this definition (and in particular the final three bullet points) may have to be adapted depending on what is included in the definition of Demised Premises. For example: if any car park spaces are demised to the tenant they should be excluded; consider a scenario where car park areas may not be within the curtilage of the Building; consider also whether plate glass and glass in the windows should be included or excluded (e.g. landlord being responsible for all glass may be appropriate in an office scenario but not for retail).

⁶ Note that this method of measurement will vary depending on the type of property involved and should be amended as appropriate. It may be that the Tenant’s Proportion is simply an agreed % in which case the definition of Floor Area may not be required.

- adopt such other method of calculation of the proportion of the expenditure to be attributed to the Demised Premises as is fair and reasonable in the circumstances and consistent with the SCSI/RICS Code of Practice; and
- in the exercise of its discretion the Landlord/Management Company may if it is appropriate and consistent with the SCSI/RICS Code of Practice:
 - attribute the whole of the expenditure to the Demised Premises; and
 - make special attributions of expenditure as may be reasonably appropriate.]⁷

Tenant's covenant to pay the Tenant's Proportion of the Service Charge

Subject to the terms and conditions contained in Schedule 1, Part 2, to pay to the Landlord or the Management Company or as directed by the Landlord or the Management Company from time to time within fourteen (14) days of demand without any deduction, set-off or counterclaim an amount by way of additional rent⁸ equal to the Tenant's Proportion of the Service Charge together with any interest that may be payable thereon as provided for in Schedule 1, Part 3.

Schedule 1

1. Part 1 – Services⁹

Subject to the provisions of this Schedule 1, Part 2, the maintenance and services to be provided by the Landlord/Management Company shall be consistent with the SCSI/RICS Code of Practice and are as follows:

- 1.1 maintaining, repairing, rebuilding, [and where reasonably necessary **replacing**¹⁰, **renewing**¹⁰,] renovating, refurbishing decorating, cleaning and keeping in good and substantial repair and condition (including, as necessary, the periodic inspecting, examining, burning off, preparing, painting, washing down, decorating, burnishing, unblocking or other treating) the Building and the Retained Areas;
- 1.2 maintaining, repairing, rebuilding, [and where reasonably necessary **replacing**¹⁰, **renewing**¹⁰,] renovation, refurbishing, cleansing, inspecting, testing and keeping in good and substantial repair and condition the Conduits in the Building (save for those which are the direct responsibility of the tenants or licensees of the Landlord under the terms of their lease or licence agreements);
- 1.3 cleaning and lighting the Retained Areas;
- 1.4 cleaning of all windows¹¹ in the Building (including the outside of the windows of the Demised Premises) save for those which are the direct responsibility of

⁷ This saver gives considerable flexibility to the Landlord and is probably not necessary where the Building/Services being provided are very straight forward. The SCSI/RICS Code of Practice does recommend flexibility.

⁸ Reservation of the service charge as rent will render non-payment of service charge a forfeiture event.

⁹ The services listed may have to be adapted depending on the extent of the services being provided by the landlord/Management Company, the nature of the Building, the Common Areas and/or the Retained Areas.

¹⁰ “renewing”, “replacing” may be a matter for negotiation depending on condition/vintage of the Building and its plant and equipment. In the case of older buildings, tenants will likely want to limit the Landlord's ability to put the Building or its plant and equipment into a better state of condition and repair than at Lease commencement through the Service Charge.

¹¹ Reconsider this wording if windows are included in the Demised Premises.

the tenants or licensees of the Landlord under the terms of their lease or licence agreements;

- 1.5 providing heating, cooling and/or mechanical ventilation within the Building or any part(s) thereof;
- 1.6 provision of and the cleaning, lighting, repairing, maintaining, [and where reasonably necessary] **replacing**¹⁰ and **renewing**¹⁰ of the public lavatories (if any) in the Common Areas and providing soap, towels (or other means of drying) and other toilet requisites for such public lavatories;
- 1.7 collecting, storing and disposing of refuse including providing, maintaining, repairing and [and where reasonably necessary] **replacing**¹⁰ refuse compactors, waste processors or similar machinery, equipment or containers for the collection, storage and disposal of refuse in the Building;
- 1.8 operating, maintaining, repairing and [where reasonably necessary] **replacing**¹⁰ any signs, loudspeakers, public address or music broadcast systems or closed circuit television or the like in the Retained Areas;
- 1.9 operating, maintaining, testing, repairing, [and where reasonably necessary] **renewing**¹⁰ and **replacing**¹⁰ the boilers, plant, machinery, generators and other equipment that are part of the common system or apparatus of the Building together with all the cabling, pipe work, duct work and other installations appertaining thereto;
- 1.10 operating and maintaining, repairing and [where reasonably necessary] **replacing**¹⁰ all lifts [escalators and shutter doors] in the Retained Areas;
- 1.11 operating and maintaining, repairing and [where reasonably necessary] **replacing**¹⁰ sprinklers, fire alarms, dry rises and other fire-fighting equipment serving the Building;
- 1.12 operating, maintaining, repairing and [where reasonably necessary] **replacing**¹⁰ all decorative and floor lighting and emergency lighting in the Retained Areas;
- 1.13 operating and maintaining, repairing and [where reasonably necessary] **replacing**¹⁰ such security and emergency systems and employing such security or policing personnel as the Landlord/Management Company may reasonably consider necessary in respect of the Building including, but not limited to, alarm systems and television systems, generators, emergency lighting, fire detection and prevention systems, any fire escapes for the Building and all fire-fighting and fire prevention equipment and appliances (other than those for which the Tenant or other lessee is responsible);
- 1.14 effecting or arranging:
 - (a) [inherent defects insurance with respect to the Building or any part of it for up to twelve (12) years or discharging the costs of effecting such insurances as may be put in place by the Landlord (in its absolute discretion)]¹²;

¹² Possible wording for inclusion where the building is newly built: latent/inherent defects insurance is becoming increasingly common in new build commercial buildings. Arguably it should be provided by the Landlord at its own cost as

- (b) periodic valuations of the Building for insurance purposes;
 - (c) works reasonably required to the Building in order to satisfy the requirements and/or reasonable recommendations of the insurers of the Building;
 - (d) property owner's liability, third part liability and employer's liability in respect of the Retained Areas and such other insurances as the Landlord/Management Company may, in its reasonable discretion in accordance with the SCSl/RICS Code of Practice from time to time, determine;
 - (e) any amount which may be deducted or disallowed by the insurers pursuant to any excess provision in any insurance policy upon settlement of any claim by the Landlord/Management Company¹³; and
 - (f) any other standard, reasonable and vouched costs incurred by the Landlord/Management Company in arranging and maintaining any insurances under this Schedule;
- 1.15 taking such reasonable steps as may be necessary for the control of pests and vermin and any other steps reasonably necessary to safeguard the health and safety of the Landlord/Management Company, its staff (if any) and any persons using the Building;
- 1.16 payment of all charges, impositions and other outgoings whether or not of an entirely novel character (other than rent) including rates and water rates and other charges which may be levied by a competent authority and which may be payable by the Landlord/Management Company in respect of the Retained Areas and whether or not of a capital or non-recurring nature but excluding any taxes or other charges imposed on the Landlord by virtue of the receipt of rents and/or in connection with any dealing with its interest in the Building;
- 1.17 complying with the provisions of all Laws which impose obligations on the Landlord/Management Company in relation to the provision of the Services including, but without limiting the generality of the foregoing, compliance with the provisions of the Planning Acts, Public Health Acts, Building Control Legislation, the Safety Act and any other Laws already or hereafter to be passed affecting the Building and the costs of opposing, making representations in respect of and/or complying with the provisions or requirements of any notice, order, regulation, instrument or bye law made under any Law;
- 1.18 ¹⁴making such contribution as the Landlord/Management Company is contractually or statutorily required to pay towards the expense of repairing, maintaining, **renewing**¹⁰, **replacing**¹⁰ and cleansing any roads, ways, paths, passages, bridges, perimeter walls, pavements, Conduits, walls, fences or other conveniences, structures or easements which may belong to or be used

the premium is generally a once off payment made on or before practical completion. This would be a matter of negotiation but generally should be provided by the Landlord at its own cost.

¹³ Tenant may seek to negotiate a cap on the excess or deductible to be covered by the Service Charge and make any amount in excess of such cap for the Landlord's sole account.

¹⁴ May not be relevant in every case and if so Tenant should delete.

from the Building or any part of it exclusively or in common with other neighbouring properties or the Adjoining Property;

- 1.19 abating any nuisance in the Building or any part of it insofar as the same is not the direct responsibility of the Landlord/Management Company;
- 1.20 operating, maintaining, repairing, [and where reasonably necessary] **renewing**¹⁰ and **replacing**¹⁰ the training, recreational, catering and welfare facilities for staff (if any) working in or at the Building;
- 1.21 operating, housing, inspecting, servicing, repairing, [and where reasonably necessary] **renewing**¹⁰, **replacing**¹⁰, maintaining, cleaning, lighting, all Landlord's fixtures and fittings, systems, plant and machinery and equipment for the servicing, cleaning, maintenance or otherwise of the Retained Areas;¹⁵
- 1.22 resurfacing, maintaining, marking out, providing barriers, bins, landscaping and other amenities and control systems management and equipment in any part of the Retained Areas;
- 1.23 ¹⁶the provision and payment of such staff as the Landlord shall reasonably deem desirable or necessary (including such direct or indirect labour as the Landlord deems appropriate) for the day-to-day running of any installations, plant and machinery in the Building and the provision of the other Services to the Building which are consistent with the SCSI/RICS Code of Practice and for the general management, operation and security of the Building and all other reasonable and vouched incidental expenditure, including, but not limited to:
 - (a) insurance, health, pension, welfare, severance and other payments, contributions and premiums;
 - (b) the provision of uniforms, working clothes, tools, appliances, materials and equipment (including telephones) for the performance of the duties of any such staff;
 - (c) providing, maintaining, repairing, decorating and lighting any accommodation and facilities in the Building which are reasonably required for the provision of the Services for staff employed in the Building and all rates, gas and electricity charges in respect thereof;
- 1.24 the payment of all reasonable and vouched professional fees for the performance of the Services, the management and performance of any other duties in and about the Building or any part of it by such parties engaged by the Landlord/Management Company to carry them out;¹⁷
- 1.25 the making good of all damage (unavoidably) caused to the Lettable Areas in the case of entry to them by the Landlord/Management Company for the purpose of providing the Services (other than the cost of making good any damage which is recoverable from any third party);

¹⁵ If acting for a tenant it is important to consider the age of the building in light of this wording as it could result in significant costs for your client if the building is old.

¹⁶ Staff costs could be significant and the Tenant should seek full details of numbers and labour costs as part of its service charge accounts/budgeting due diligence.

¹⁷ Staff costs could be significant and the Tenant should seek full details of numbers and labour costs as part of its service charge accounts/budgeting due diligence

- 1.26 the making and publishing of any rules and regulations for or in connection with the use of the Building and the enforcement of such rules and regulations;
- 1.27 the payment of any VAT chargeable on any item of expenditure referred to in this Schedule 1.
- 1.28 the payment of all reasonable and vouched bank charges, overdraft fees, interest charges on loans relating to the [management of]¹⁸ the Building and the provision of the Services;
- 1.29 the payment of rent and all other sums payable under and the performance and observance of all terms covenants and conditions contained in any superior lease and the costs of enforcing the observance by any superior landlord of its covenants in any superior lease;¹⁹
- 1.30 such annual provision as the Landlord may, at its reasonable discretion and in accordance with the SCSI/RICS Code of Practice, deem necessary for the establishment of a reserve or sinking fund for the replacement or renewal of the Landlord's plant, machinery, equipment, apparatus, fixtures and fittings and things forming part of or used in the operation and maintenance of the Building and/or the Retained Areas to be held in trust by the Landlord for the aforesaid purposes and not to be drawn upon except for those purposes and applied accordingly and the Landlord shall utilise the money outstanding in such fund in a reasonable and sensible manner in the replacement or renewal of the plant, machinery, equipment, apparatus, fixtures and fittings aforesaid;²⁰
- 1.31 the payment of any [reasonable and vouched] costs and expenses (not referred to above) which the Landlord may incur in discharging its obligations in this Schedule 1; and
- 1.32 the [reasonable] cost of the provision of such other services and amenities as the Landlord reasonably considers necessary or desirable for the benefit or comfort and convenience of the Building or any part or parts thereof or its users in the interest of good estate management and provided they are consistent with the SCSI/RICS Code of Practice including the enforcement of rights against third parties.

2. **Part 2 – Provisos in respect of the Services**

PROVIDED ALWAYS that the provision of the Services by the Landlord/Management Company shall be subject to the stipulations and conditions set out below.

- 2.1 In performing its obligations hereunder the Landlord/Management Company shall be entitled in its absolute discretion to employ experienced agents, professionals managers and contractors (including independent contractors) or such other persons as the Landlord may from time to time reasonably think

¹⁸ Matter for negotiation.

¹⁹ Landlord's title will require separate diligence by the Tenant.

²⁰ If acting for a tenant you may wish to expand this and/or seek confirmation as to how the reserve/sinking fund is to operate in practice. – Distinction between new and second hand buildings. If the latter, what is the current balance of the fund and are there any pending calls on its reserves?

fit or to buy, hire, rent or acquire on hire purchase or by way of lease any equipment or machinery required in connection therewith.²¹

- 2.2 The Landlord shall not be liable for any loss or damage, inconvenience or injury to any person or property arising from any failure or delay in carrying out or providing any of the Services whether express or implied where such failure or delay would not have occurred but for the Insured Risks, the occurrence of war, civil commotion, strike, lockout, labour dispute, shortage of labour and materials, inclement weather, mechanical breakdown, failure, malfunction, repair or replacement of plant, machinery and equipment or any other cause beyond the control of the Landlord [and where the Landlord/Management Company takes all reasonable steps to and has reinstated the provision of the relevant service as soon as practicable].
- 2.3 The Landlord/Management Company shall be entitled to cease to provide any of the Services if any such Services shall in the reasonable opinion of the Landlord cease to be for the benefit of the Building or become obsolete or redundant in accordance with the SCSI/RICS Code of Practice.
- 2.4 The Landlord/Management Company shall be entitled to provide any new or additional services if any such services shall in the reasonable opinion of the Landlord be for the benefit of the Building and consistent with the SCSI/RICS Code of Practice and any such additional services shall be deemed to be included in the list of the Services set out in this Schedule 1 as soon as the same are first provided.
- 2.5 If the Advance Payments (as defined in Schedule 1, Part 3) of Service Charge prove insufficient to meet an immediate liability, (and there is no reserve or sinking fund available or which may be applied to meet the liability) and the insufficiency does not arise from any of the causes specified in paragraph 2.6 the Landlord shall be entitled to borrow monies for the purpose from reputable banks at commercially competitive rates of interest, and the interest payable on the borrowing shall be recoverable as an item of the Service Charge²².
- 2.6 The causes specified in paragraph 2.5 are:
 - (a) Any Lettable Areas are or have been vacant or occupied by the Landlord;
 - (b) There are shortfalls in the recovery of contributions from a tenant or other occupier of the Due Proportion of the Service Charge attributable to any part of the Lettable Areas by reason of the tenant or occupier being in default or not being obliged to pay (whether as a result of a service charge cap, formal concession or otherwise).
- 2.7 Where the Landlord/Management Company carries out major works of repair, maintenance and decoration or replaces major items of plant or machinery, it may, at its discretion, apportion the Service Charge in respect of the relevant expenditure over more than one Service Charge Period and charge interest at

²¹ Cost implementation of buying, renting or hiring to be considered by Tenant in its diligence.

²² The Code states that Leases should enable owners to recover the reasonable and proper cost of borrowing to fund major non-cyclical or exceptional unbudgeted expenditure as a cost to the service charge.

commercially competitive rates of interest, which shall be recoverable as an item of the Service Charge.

- 2.8 If the Landlord/Management Company shall fail to provide the Services or any of them, the Tenant's sole remedy shall be an action to compel the Landlord to do so and the Landlord shall not be liable to the Tenant in respect of any loss, injury or damage which the Tenant shall sustain as a result of the failure of the Landlord to provide the Services or the failure of any agent of the Landlord or member of the Landlord/Management Company's staff (if any) to properly carry out his duties unless the Tenant shall notify the Landlord in writing specifying the failure of which the Tenant complains and the Landlord/Management Company shall after the expiration of twenty-one (21) days (or such shorter period as is reasonable in the circumstances) from service of the said notice continue to neglect to provide the said Services in respect of which notice has been given by the Tenant.
- 2.9 For the purpose of giving effect to the provisions of this Schedule 1 the Landlord/Management Company shall have the right from time to time to make rules and regulations and to make additions and amendments to them or revisions of them for the orderly and convenient operation, management and maintenance of the Building and the Retained Areas or any part of them all of which rules and regulations shall subject to the Tenant being notified in writing of such additions and/or amendments not less than 7 days in advance of the date on which such additions and/or amendments shall be effective, be binding on Tenant in accordance with clause ● (*Compliance with Services Rules and Regulations*) of this Lease.

3. **Part 3 – Calculation and payment of Service Charge**

- 3.1 The Landlord/Management Company shall not less than [one] month prior to the commencement of the Service Charge Period (or as soon as practicable thereafter) produce a budget of anticipated expenditure to the Tenant, including explanatory commentary and a clear explanation of calculation of the Tenant's Proportion of the Service Charge²³.
- 3.2 The Tenant's Proportion of the Service Charge shall be discharged by means of equal quarterly payments in advance (the "**Advance Payments**") to be made on each of the Instalment Days and by such additional payments as may be required under paragraph 5 of this Schedule 1, Part 3.
- 3.3 The amount of each Advance Payment shall be one quarter of such amount as the Landlord may reasonably determine to be equal to the amount of the Tenant's Proportion of the Service Charge for the relevant Service Charge Period and which is notified by the Landlord or its agents to the Tenant by way of a Service Charge budget on or before [● or each anniversary of the Term Commencement Date] or as soon as may be practicable thereafter.
- 3.4 The Service Charge is to be treated as accruing on a day-to-day basis in order to ascertain yearly rates and for the purposes of apportionment in relation to periods other than of one year.
- 3.5 The Landlord will as soon as may be practicable after the end of each Service Charge Period (but not less than four months after the end of such Service

²³ Core Principles of the Code requires the issuing of budgets of anticipated expenditure, including explanatory commentary at least one month prior to commencement of a service charge year.

Charge Period)²⁴ submit to the Tenant a statement (a “Service Charge Statement”) duly certified (if so requested) by the Landlord’s accountant or surveyor reviewed by an independent accountant if the Landlord or Tenant so decides²⁵ giving a proper summary and calculation of the Service Charge for the Service Charge Period just ended together with accompanying details of the sums paid in advance by the Tenant and any balance due from or to the Tenant, in order that the Tenant may come to a reasonable understanding of the calculation of the Service Charge.

3.6 The Landlord shall, so far as practicable to do so, endeavour to procure that the form and content of the Service Charge Statement reflects the principles of Best Practice Guidance contained in the SCSI/RICS Code of Practice.

3.7 ²⁶[Within [four months]²⁷ after the submission of the Service Charge Statement to the Tenant, the Tenant may challenge the Service Charge Statement by giving to the Landlord notice to that effect, but only if it has first made payment of the undisputed amount of any Service Charge that the Service Charge Statement shows as due from the Tenant and, if so:

(a) The Landlord shall deal with proper enquiries promptly and efficiently and the Landlord and the Tenant shall endeavour to resolve the relevant issue, but if they cannot do so:

(b) the issue in dispute shall be referred to the determination of an independent expert:

(i) to be appointed by the parties jointly, or if they cannot agree an appointment by the President (or other acting senior officer for the time being) of the Society of Chartered Surveyors in Ireland on the request of either party;

(ii) who shall act as an expert and not as an arbitrator;

(iii) whose determination will be final and binding on the parties except in the case of manifest error;

(iv) whose fees and expenses (including the cost of his nomination) shall be borne as the expert determines (but in the absence of determination they shall be borne equally) and the Landlord and the Tenant shall each bear its own costs with respect to the determination, but either may pay the costs required to be borne by the other if they remain unpaid more than 21 days after becoming due and then recover these and any incidental expenses incurred from the party in default on demand; and

²⁴ The Code of Practice recommends Detailed Statements of Actual Expenditure, together with accounting policies and explanatory text, will be issued within four months of the service charge year end.

²⁵ Regard to be had to the size of the Development. An audit may be more suitable but the cost of such audit might not be appropriate to the circumstances or size of the development. Also, an independent accountant may not be suitable given the size of the Development.

²⁶ 3.7 is subject to negotiation.

²⁷ Code of Practice recommends that a Tenant is allowed a reasonable period (e.g four months) in which to raise further enquiries or request further information in respect of certified accounts.

- (v) who, in the event of his refusing to act, becoming incapable of acting or dying, may be replaced by either party requiring the appointment of a replacement as provided in paragraph 3.7.(b).(i);
 - (c) such adjustments to the Service Charge Statement as may be required to be made in consequence of the determination of the expert shall be made and any sum due to or payable by the Landlord shall promptly be paid or allowed as the case may be; and
 - (d) Base Rate interest²⁸ shall be paid or allowed in respect of the period during which the relevant amount has been underpaid or overpaid;
 - (e) but, if not, the Tenant's right of challenge to that Service Charge Statement shall lapse.^{29]}
- 3.8 If the Tenant's Proportion of the Service Charge as certified is more or less than the total of the Advance Payments (or the grossed-up equivalent of such payments if made for any period of less than the Service Charge Period), then any sum due to or payable by the Landlord by way of adjustment in respect of the Tenant's Proportion of the Service Charge is to be paid or allowed as per clause [3.9]. The provisions of this paragraph are to continue to apply notwithstanding the determination or earlier termination of this Lease in respect of any Service Charge Period then current in which case any overpayment of Service Charges by the Tenant shall be refunded to the Tenant within 60 days of the expiry or termination of this Lease.
- 3.9 In respect of any balance of Service Charge mentioned in paragraph [3.8]:
- (a) if the balance is due from the Tenant to the Landlord, the Tenant shall pay the balance to the Landlord within 14 days after the receipt of the Service Charge Statement by the Tenant;
 - (b) if the balance is due from the Landlord to the Tenant, the balance shall be set off against the next advance payments of Service Charge due from the Tenant, or, if the Term³⁰ has ended, shall be paid by the Landlord to the Tenant within 14 days after the submission of the Service Charge Statement to the Tenant.
- 3.10 ³¹The Tenant is entitled to:
- (a) inspect the Service Charge records and vouchers of the Landlord at such location as the Landlord may reasonably appoint for the purpose during normal working hours on weekdays upon giving the Landlord at least fourteen (14) days prior written notice of its intention to inspect such records and vouchers; and
 - (b) at the Tenant's expense take copies of such records and vouchers.

²⁸ Ensure this definition is consistent with other interest rate definitions in the lease.

²⁹ Most leases will have a dispute resolution clause. This clause may be considered where a clause does not exist within the lease. The Code recommends that all new leases should contain an ADR resolution clause. Such ADR includes (i) early neutral evaluation; (ii) mediation (facilitative or evaluative); (iii) independent expert evaluation; or (iv) arbitration.

³⁰ Ensure the lease has a definition of "Term" and amend where appropriate.

³¹ This clause may be resisted by the Landlord but is a good "win" for tenants.

- 3.11 ³²[If the Landlord is required during any Service Charge Period to incur heavy or exceptional expenditure which forms part of the Service Charge, the Landlord shall be entitled to recover from the Tenant the Tenant's Proportion of the Service Charge representing the whole of that expenditure on the Instalment Day next following.]
- 3.12 [The Tenant is not entitled to object to the Service Charge (or any item comprised in it) or otherwise on any of the following grounds:
- (a) the inclusion in a subsequent Service Charge Period of any item of expenditure or liability omitted from the Service Charge for any preceding Service Charge Period;
 - (b) an item of Service Charge included at a proper cost might have been provided or performed at a lower cost provided such costs as identified by the Tenant and the engagement of the party providing the service to which the costs relate shall be re-considered and (where contractually possible) re-tendered in the subsequent Service Charge Period;
 - (c) disagreement with any estimate of future expenditure for which the Landlord requires to make provision so long as the Landlord has acted reasonably, in good faith, in accordance with the SCSI/RICS Code of Practice and in the absence of manifest error;
 - (d) the manner in which the Landlord exercises its discretion in providing the Services so long as the Landlord acts in good faith and in accordance with the principles of the SCSI/RICS Code of Practice;
 - (e) the employment of reputable managing agents or other persons to carry out and provide on the Landlord's behalf any of the Landlord's obligations under this Schedule 1;
 - (f) on a permitted assignment of this Lease the Landlord:
 - (i) shall not be required to make any apportionment relative to such an assignment; and
 - (ii) shall be entitled to deal exclusively with the tenant in whom this Lease is for the time being vested (and, for this purpose, in disregard of a permitted assignment of this Lease a certified copy of which has not been delivered to the Landlord in accordance with clause ●³³); and
 - (g) the benefit of a service provided by the Landlord will be enjoyed substantially at a time after the expiry of this Lease if the service is provided by the Landlord in good faith, in accordance with the principles of the SCSI/RICS Code of Practice, and it is generally of benefit to the tenants of the Landlord in the Building as a class.]
- 3.13 Any omission by the Landlord to include in any Service Charge Period a sum expended or a liability incurred in that Service Charge Period shall not

³² Matter for negotiation.

³³ Insert number of lease clause which requires the tenant to deliver to the landlord or its solicitors a certified copy of the deed or other document evidencing the alienation of the premises.

preclude the Landlord from including such sum or the amount of such liability in the subsequent Service Charge Period.

- 3.14 In performing its obligations contained in Schedule 1, Part 1, the Landlord shall be entitled, at its discretion, to employ reputable agents, contractors and such other persons as it may think fit for a contract term not exceeding [3] years in each case and to delegate its duties and powers to them and their reasonable and vouched fees and expenses (including VAT) shall form part of the Service Charge provided such costs and expenses are customary in the market and consistent with the principles of the SCSI/RICS Code of Practice at the time of the engagement of such parties.³⁴
- 3.15 The Landlord may, at its reasonable discretion and subject to notifying the Tenant in writing not less than 30 days in advance, withhold, add to, extend, vary or make any alterations to any of the services from time to time if the Landlord shall reasonably deem it desirable to do so for the more efficient management, security and operation of the Building, or for the comfort of the tenants in the Building provided such additions, extensions, variations or alterations are consistent with the principles of the SCSI/RICS Code of Practice.

Service Charge Exclusions – Examples³⁵

There shall be excluded from any element of the Service Charge:

1. any costs incurred by the Landlord or the Management Company in relation to:
 - 1.1 the review of rent of any Lettable Areas;
 - 1.2 the collection of rents or Service Charges or other sums payable by other tenants or occupiers of the Building;
 - 1.3 the sale, letting or re-letting of any Lettable Areas;
2. any costs incurred by the Landlord or Management Company in carrying out works to any part of the [Building/Estate/Centre] which are necessary to repair, reinstate or rebuild following damage or destruction by an Insured Risk to the extent that the Landlord or the Management Company is able to recover such monies under the Landlord's or Management Company's policy of insurance for the [Building/Estate/Centre] (having used all reasonable endeavours to do so);
3. any costs, liabilities or expenses in respect of any Lettable Areas which are for the time being unlet or unoccupied;
4. all costs of whatever description incurred in connection with the original construction, equipping and fitting out of the [Building/Estate/Centre] or any part or parts thereof or anything installed within the [Building/Estate/Centre] at the time of their original construction, it being acknowledged that the Landlord shall provide and bear the costs of the installation and provision (whether by way of capital expenditure or by way of leasing, hiring or other financing arrangements) of all systems, plant,

³⁴ Tenant should seek details of fees payable to any such agents as part of its due diligence and perhaps limit the fees to what is customary in the market from time to time.

³⁵ All exclusions are subject to negotiation/variation on a case by case basis. The Code specifies that certain charges are to be excluded from the service charge, including any initial costs, set-up costs, improvement costs (save certain repair and replace costs discussed above) and future development costs.

equipment, machinery, Conduits, Utilities, security and surveillance equipment, CCTV systems, fixtures and fittings required for the opening and operation of the [Building/Estate/Centre] as a good quality modern [retail/office/mixed use development] it being acknowledged that the future repair and maintenance and as and when necessary replacement and renewal of such items in accordance with the SCSi/RICS Code of Practice shall form part of the Services;

5. the initial costs of landscaping the [Building/Estate/Centre], the initial planting of trees shrubs and other plants and the initial decoration of the Common Areas;
6. the cost of adding to, altering or improving the [Building/Estate/Centre] or **replacing, renewing** or rebuilding or constructing any Lettable Areas PROVIDED THAT the necessary renewal, repair, replacement or improvements of items in the Building/Estate/Centre (but not those in any Lettable Area) which are beyond economic repair shall not be excluded.
7. any costs fees or expenses attributable to any dispositions of or dealings with the interest of the Landlord or the Management Company in the [Building/Estate/Centre] or any part thereof;
8. any liability or expense for which any purchaser, tenant or occupier of the [Building/Estate/Centre] is liable;
9. any Value Added Tax incurred by the Landlord or the Management Company in connection with the provision of the Services insofar as the Landlord or the Management Company is able to recover same;
10. the opening of the [Building/Estate/Centre] to the public and any expenditure incurred prior to the Service Charge Commencement Date;
11. the cost of remedying any defects covered by any latent defects insurance policy where the cost is recovered under the policy.

Conveyancing Committee

October 2020