

Navigating NHSPS Service Charges – How to Protect Your Practice

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Partnership

Property

NHS Contracts

Employment

Disputes

DR Solicitors Services

Our **award-winning** expertise is associated with all areas of law required to run a professional healthcare provider. Our recent work includes:

Partnership

- Partnership deeds
- Super-partnerships

Property

- Surgery developments, purchases & sales
- Leasehold negotiations & transfers

NHS Commercial

- GMS, PMS, APMS, NHS negotiation & disputes
- PCNs & Federations

Employment

- Clinical & non-clinical employment contracts
- Business reorganisations

Disputes

- Partnership & contractual disputes & litigation
- Employment tribunals

Speaker Profiles



Elizabeth Duan

- Legal Director at DR Solicitors
- Commercial property solicitor with over 10 years experience
- Specialist in primary care



Michael Large

- Specialist property litigator with 20 years experience
- Described as “practical and efficient” by the Legal 500 in 2020
- Member of the Property Litigation Association’s Law Reform Committee
- Regular lecturer at MBL and Lexis Nexis webinars and the RICS (Royal Institution of Chartered Surveyors).

Why should you be concerned about service charge issues?

- Financial and accounting issues
- Issues with outgoing partners and quantifying their liability
- Issues with attracting incoming partners
- Issues with practice mergers
- Issues with negotiating a new lease/renewal lease with NHSPS

Deals and outcomes

- £500k of alleged service charge arrears wiped off the charge sheet and going forward our client is paying service charges at a considerably reduced level
- £450k of alleged service charge arrears settled at £340k payable in instalments
- £70k of facilities management charges reduced to zero and negotiation of client ability to use their own cleaning company at fraction of cost made by landlord
- £65k of service charges waived entirely
- £30k of telephone charges, postage costs and waste disposal charges waived entirely

Agenda

- **Service charges in the lease**
- RICS professional statement
- Special rules of interpretation
- Dispute Resolution Clauses: ADR
- Valley View v NHS Property Services
- Steps to protect your position

Service Charge Terms of the Lease (if there is one!)

The provisions of a basic service charge clause in a typical commercial lease include:

- a definition of 'Services' for which a charge can be made by the landlord
- "sweeper" clauses for additional items the landlord may decide to provide
- a tenant's obligation to contribute to the cost, including the method of calculation
- contractual procedure and timetable for certifying and invoicing charges

What if there is no lease? A major problem with NHSPS service charge disputes tends to be the lack of contractual clauses

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RICS Professional Statement

1. The RICS 2018 Professional Statement (1 April 2019) and Lease Code (2020) contains mandatory requirements, core principles and best practice
2. Not binding but has value as evidence

RICS 2018:

- recommends service charge should not be calculated by reference to rateable values (section 4.2.6)
- requires that apportionment should be "demonstrably fair and reasonable" (section 5)
- requires the tenant be given the opportunity to question and dispute the service charge (section 4.5.7)
- contains provision aimed at ensuring that the service charge provides value for money (section 4.1.5)

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Special Rules of Interpretation For Service Charges?

Arnold v Britton and others [2015]

Supreme Court confirmed service charge clauses don't have special rules of interpretation

Fluor Daniel Properties Ltd v Shortlands Investments Ltd [2001]

construed sweeper clauses restrictively, and a tenant's limited interest in the property is taken into account, and, where equipment is still functioning, it cannot be replaced within a repairing covenant

Russell v Laimond Properties (1984)

found a tenant is obliged to pay for services does not normally mean that the landlord is obliged to provide them

Craighead v Homes for Islington Ltd [2010]

found "repair" usually chargeable as service charge but not "improvements"

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Dispute Resolution Clauses: ADR

1. Your lease should set out how to deal with disputes, such as reference to an expert or mediation
2. Experts may be appointed by the parties or if they cannot agree, by the President of an appropriate body
3. Landlord's starting point is for the certified or audited service charge statement to be final and binding on the tenant, save in case of manifest error
4. Tenant will wish to have the right to dispute the statement. NOTE: check that the statement is properly audited and not simply certified by a surveyor who could be an employee of the landlord
5. Careful consideration is needed before deciding whether to go to court or first refer the matter to an independent expert

Again – what if there is no lease?

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Valley View v NHS Property Services: Background

- 5 NHSPS “test cases”
- Main messages from judgment
 - each dispute turns on its facts – where there is no written agreement then the Court looks to the conduct of the parties and imply terms where necessary
 - as an ordinary landlord, NHSPS has the right to recover a reasonable service charge for services which it delivers
 - need solid evidence to show that you should receive discounted or free services from your landlord
- The parties ended up settling on how much those fees actually were in each case

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- **Steps to take to protect your position**

Steps To Protect Your Position

1. Don't ignore the problem! Establish your liability. Considerations include whether there is a written lease in place and what you have been paying historically
2. Has there been any agreement as to what services are to be provided? You should be paying a reasonable amount for the services that you receive from NHSPS unless you can provide solid evidence of an agreement to pay less
3. Are the costs being demanded reasonable – challenge it in writing, request evidence of costs being charged. Keep safe records of all charges demanded and paid
4. Consider what defences may be open to you (eg limitation, reasonableness, improvements, etc), relevance of RICS guidance, consider ADR - get legal advice on this

Steps To Protect Your Position

5. Partnership deed needs to be clear about what happens partners leave and join – lease needs to be assigned, indemnities, service charge retention
6. New lease with NHSPS – use your leveraging position to get a new lease with NHSPS agreed at same time as sorting out the disputed service charge
7. Seek specialist legal advice especially before you start negotiating with NHSPS

Questions?



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