

# Professional advice

■ This week, unused sinking fund contributions, clamping unauthorised cars, disabled tenant requests

**QUESTION:** One of my outgoing tenants has asked for their unused service charge contributions to a sinking fund to be refunded. It is an unusual request. Do I have to do this?



ROGER THORNTON, PARTNER AT  
MAPLES TEESDALE, RESPONDS

FIRST, CHECK THE TERMS OF THE LEASE. MOST LEASES will be silent on this point. Some leases provide expressly that sinking funds are held by the landlord in a separate account for the benefit of the tenants from time to time. This principle has been supported in the new RICS service charge code effective from 1 April 2007. This is intended to protect tenants in the event of the insolvency of a landlord and the potential seizure of a service charge sinking fund by a landlord's liquidator. In my experience, this is not requesting the refund of unused sinking fund contributions to a tenant at lease end.

The common law position regarding ownership of a sinking fund is set out in the *Secretary of State for the Environment v Postfund (Northwest) and Others (1997)*. The court held that, subject to any express contrary intention in the lease, payments made in respect of service charge sinking funds were to be used for that purpose. The fact that a tenant's contributions had not been put to use while that tenant was occupier was not relevant, and an outgoing tenant was not entitled to an unused contributions refund.

The reasoning behind this is that at some point the landlord would have to replace the plant and machinery that the sinking fund was intended to cover. That might be during the tenant's occupation or at some time after.

The commercial reality dictates that in paying into a sinking fund the tenant has effectively agreed to indemnify the landlord against the cost of replacement of plant and machinery whenever that is required.

So, subject to the express provisions in the lease, there should not be any obligation to return unused sinking fund contributions.

**QUESTION:** I own premises with a private car park, on which unauthorised members of the public park their cars. Can I have them towed or clamped?



CELYN ARMSTRONG, ASSOCIATE IN ALLEN & OVERY'S  
REAL ESTATE LITIGATION GROUP, RESPONDS

IT IS DIFFICULT TO POLICE WHO COMES IN AND out of a car park, and entry systems with barriers are expensive and may be physically impractical. Often the only effective way of preventing unauthorised use of the car park is by clamping or towing cars parked without permission. However, there are a couple of important legal issues to be aware of. Failure to follow the correct procedure could result in civil or even criminal liability.

It is unlawful to clamp or tow a vehicle unless the owner has consented to the risk of being clamped or towed. Consent is normally proved by showing that the vehicle owner must have known of the risk. You must display signs stating that unauthorised vehicles are not permitted in the car park, that they will be clamped or towed if they enter, and that a release fee will be payable if they are clamped or towed.

The signs must be prominent so that a driver would be bound to have seen them, and be of a type that the driver would be bound to have read them. The release fee must be reasonable. If you do not comply with these requirements, you run the risk of being sued by owners of vehicles that have been clamped or towed.

A further issue is that the clamping or towing company you employ must be licensed under the Private Security Industry Act 2001. It is a criminal offence to employ a wheel-clamper or tower who is not licensed under the act, so unless you check that the contractors have up-to-date licences, you may be liable to a fine or even imprisonment.

It is not sufficient that the towing company's supervisor is licensed. Each individual carrying out clamping or towing must have a licence.

**QUESTION:** One of my tenants has become disabled and has asked me to change the door handles in her flat and install a stair lift. Am I obliged to do this?



ALISON HART, SOLICITOR WITH  
DAVIES ARNOLD COOPER, RESPONDS

THE ANSWER IS YES TO THE FIRST REQUEST AND NO to the second. The key here is the Disability Discrimination Act 1995, as amended by the Disability Discrimination Act 2005. The tenant is asking for auxiliary aids which she needs to enable her to enjoy the premises. Under section 24(c) of the act, the landlord is under a duty to take reasonable steps to provide such aids if asked to do so.

So why is the landlord obliged to change the door handles but not install a stair lift? The answer lies in the Disability Discrimination (Premises) Regulations 2006 which came into force on 4 December 2006. They clarify the scope of the obligations under the act.

In response to a request from a tenant that might impose a duty under section 24(c), it is not reasonable to expect the landlord to alter or remove a physical feature. This includes anything arising from the design or construction of the premises or fixtures. However, furniture, furnishings and other chattels are not regarded as physical features.

Furthermore, the regulations confirm that replacing or providing signs and notices, or replacing taps and door handles, door bells or entry systems, are not alterations to physical features. So the landlord or their managing agent is under a duty to change the door handles if asked to do so by the tenant but need not install a structural feature such as a stair lift.

To ask our experts for professional advice, please email your questions to [mjansen@cmpl.biz](mailto:mjansen@cmpl.biz). All queries will be dealt with in the strictest confidence. It is recommended that parties always seek independent legal advice.