



**FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL
PROPERTY)**

Case reference : **BIR/31UG/LIS/2020/0019**

Properties : **Flat 1, Burton Hall, Burton Hall Drive,
Burton Lazars, Melton Mowbray,
Leicestershire LE14 2UN**

Applicant : **Mr Michael Arnott**

Representative : **None**

Respondent : **Waterglen Ltd**

Representative : **Pier Management**

Type of application : **Application for determination of
liability to pay and reasonableness of
service charges under sections 27A and
19 of the Landlord and Tenant Act 1985
("the Act") and for orders under section
20C of the Act and under paragraph 5A
of Schedule 11 to the Commonhold and
Leasehold Reform Act 2002.**

Tribunal member : **Judge C Goodall
Mr D Satchwell FRICS
Mr A Lavender Dip Law, CIEH**

**Date and place of
hearing** : **Paper determination**

Date of decision : **20 October 2020**

DECISION

© CROWN COPYRIGHT 2020

Background

1. The Applicant is Mr Michael Arnott (“Mr Arnott”). The Respondent is Waterglen Ltd (“Waterglen”). The application concerns a property known as Burton Hall in Burton Lazards, Leicestershire (“the Property”). This is a three-storey residential property comprising around 19 flats, 17 of which are let on long leases. We assume the Property comprises a common entrance way and common passages and stairwells to the individual flats.
2. All lessees have been informed of these proceedings but only Mr Arnott is pursuing the application.
3. The application is for a determination of the payability of a charge for works required by Leicestershire Fire and Rescue Service (“LFRS”), which is the statutory fire authority for the area in which the Property is located. Both parties have told us that £17,631 is proposed to be spent on certain works but we have no documentation explaining what works are covered within that figure and there is nothing in Mr Arnott’s application suggesting he is challenging the amount proposed to be spent.
4. The challenge is to the basis upon which any expenditure can be recovered from Mr Arnott under his lease for any expenditure by Waterglen as a result of a letter served upon them by LFRS.
5. There was no inspection by the Tribunal. Both parties asked for the application to be dealt with on the basis of written representations. The Tribunal made its determination on that basis on 12 October 2020. This document sets out our decision and gives our reasons for it.

The Lease

6. Mr Arnott’s lease is dated 22 December 1989. It is a lease of Flat 1 at Burton Hall for a term of 199 years commencing on 24 June 1989. The extent of the demise to the Applicant is described in the First Schedule Part III. It is a demise of ALL THAT Flat known as Flat 1 and it includes the internal plastered wall coverings and plaster work of all walls and ceilings and the doors and door frames and windows and window frames, the internal partition walls, floorboards and the conduits in the Property which exclusively serve the flat. At some point, we assume the lease would have been assigned to Mr Arnott.
7. In clause 3(2), the lessee (at sub-paragraph a) covenants to observe and comply with the provisions and requirements of any enactment (which includes any Act of Parliament passed in the future) and any direction, order, by-law, rule or condition deriving effect from any such Act from any national public local or other authority so far as they relate to the Flat.
8. Sub-paragraph (b) of clause 3(2) is a covenant that the lessee will execute all works required to be done by any government department local

authority or other public authority so far as they relate to the demised premises.

9. Sub-paragraph (d) of clause 3(2) is a covenant:

“To pay to the Lessor upon demand all proper costs charges and expenses (including surveyors architects and other professional advisers fees) or a fair and reasonable proportion thereof (to be conclusively determined by the Lessor or its surveyor from time to time) incurred by the Lessor of or incidental to:

(i) complying with all provisions and requirement of any and every enactment prescribed or required by any public local or other authority and

(ii) executing all works and providing all arrangements which may be directed or required as aforesaid so far as the same relate to any premises being used or enjoyed by the Lessee in common or jointly with any other person or persons or the user thereof.”

10. Rights of access on the part of the Landlord to the flat are granted by the lessee under clauses 3(6) and 3(7). Clause 3(6) is a right to enter the flat to examine its condition and take an inventory. The Landlord may then give the lessee notice to carry out works for which the lessee is liable under the lease, and if the notice is not complied with, the Landlord may then enter to carry out the works. Clause 3(7) grants a right of access in order to comply with any statute or byelaw.

11. In clause 3(9) the lessee covenants to pay a proportion of the costs charges expenses and management fees incurred by the Lessor in carrying out or procuring the carrying out of the services listed in the Fifth Schedule. The proportion allocated to Flat 1 is 4.7%.

12. Clause 5 of the lease is a covenant by the Lessor to provide the services set out in the Fifth Schedule.

13. Those services include:

a. In summary, an obligation in sub-paragraph 3, that whenever reasonably necessary the Lessor will maintain repair redecorate and renew the external walls, roof, foundations internal structure, conduits, driveways, boundary walls, gardens, parking areas and refuse areas.

b. An obligation, at sub-paragraph 12:

“Without prejudice to the foregoing to do or cause to be done all such works installations acts matters and things as in its [i.e. the Lessor’s] sole discretion shall be deemed necessary for the proper

maintenance safety and administration of the Building and the Lessor's Property.”

- c. In sub-paragraph 13, a right for the Lessor to make provision for the payment of all legal and other costs and expenses incurred.
- d. In paragraph 14(a) an entitlement to collect contributions towards a reserve fund for expenditure arising only once during the term, or expenditure which is likely to arise at intervals of more than one year.

The LFRS letter

- 14. The letter is dated 12 December 2019. It is addressed to Waterglen via an agent called HLM Property Management. It references the Regulatory Reform (Fire Safety) Order 2005 (“the 2005 Order”). It includes an action plan and requires an undertaking from the occupier to complete the preventative and protective measures listed in that plan.
- 15. The action plan lists ten deficiencies in the fire protection measures provided at the Property under articles 8, 9, 10, 11, 13, 14, 15, 19, 20, and 23, of the 2005 Order and suggests remedial action in respect of all of them. Each deficiency identifies the specific article in the 2005 Order that is alleged not to be complied with, brief details of the breach and the suggested remedial action.
- 16. Neither party has made any representations about any specific part of the LFRS letter and we have not inspected the Property. As best as we can ascertain on the papers, none of the deficiencies relate to the internal parts of lessees' flats at the Property with the exception of:
 - a. a deficiency under Article 13(1)(a) of the 2005 Order saying that no fire warning system is provided; and
 - b. A deficiency under article 14(2)(b) of the 2005 Order saying that flat front doors are not provided with intumescent strips, cold smoke seals and self-closing devices.
- 17. In relation to the deficiency under Article 13, the remedial action suggested is two-fold, being:
 - a. Instal a fire alarm system in accordance with BS5839: 1 LD2 smoke detection coverage within the common areas and a heat detector in each flat ...
 - b. In addition, BS5839: 6 LD3 smoke detection coverage within each flat that is not interlinked to the common alarm system ...

18. In all other respects the requirements of the LFRS letter relate to the common parts of the Property.

Mr Arnott's grounds for the application

19. In his application form, Mr Arnott described the service charge in issue as:

“Installation of wireless fire alarm system including heat detection within each apartment.”

20. The question he asked us to determine was:

“To determine payability of service charges and administrative charges. Can these costs be attributed and charged to the lessees through the service charges?”

21. In further comments, Mr Arnott said:

“The Landlord is not under any obligation either within the terms of the leases or outside of the lease by any legislative or regulatory impositions from any authority to undertake the work, which it intends to carry out and fund by withdrawing costs from the accumulated reserve fund. The work is not repair and general maintenance and not caught by any covenants in the lease to pay the lessor any costs it may incur.”

22. In an additional very short statement of case that he provided, he said that the works required by LFRS did not fall within the covenant in paragraph 3 of the Fifth Schedule. He said that paragraph 12 of the Fifth Schedule fell foul of the statutory anti-contracting out provisions in section 27A(6) of the Act. He said that the 2005 Order only applies to the common parts at the Property. It does not require (or rather, we assume his case is that it cannot require) installation of fire alarms in individual flats.

23. Mr Arnott also applied for an order under section 20C of the Act for all lessees at the Property. He also asked for an order under paragraph 5A of Schedule 11 of the Commonhold and Leasehold Reform Act 2002.

Waterglen's response

24. Waterglen argue that they are required to carry out the fire protection works set out in the LFRS letter by virtue of the provisions of the 2005 Order. They then rely on clause 3(2) of the lease, relying on sub-paragraph (d) of that clause as authority to require Mr Arnott to pay his contribution. Alternatively, they rely on paragraph 12 in the Fifth Schedule.

25. With regard to use of the reserve fund, they say this is permitted under paragraph 14 of the Fifth Schedule.

26. On the question of costs, they rely on paragraph 13 of the Fifth Schedule. They say in relation to the section 20C application that the right to costs is a property right and the Tribunal should be cautious not to allow section 20C to be used as an instrument of oppression against a lessor (citing *The Tenants of Langford Court v Doren Ltd* LRX/37/2000 Lands Tribunal).

Law

27. Sections 18 to 30 of the Landlord & Tenant Act 1985 (“the Act”) contain statutory provisions relating to recovery of service charges in residential leases. Normally, payment of these charges is governed by the terms of the lease – i.e. the contract that has been entered into by the parties. The Act contains additional measures which generally give tenants additional protection in this specific landlord/tenant relationship.

28. Under Section 27A(1) and (3) of the Act, the Tribunal has jurisdiction to decide whether a service charge is or would be payable and if it is or would be, the Tribunal may also decide:-

- a. The person by whom it is or would be payable
- b. The person to whom it is or would be payable
- c. The amount, which is or would be payable
- d. The date at or by which it is or would be payable; and
- e. The manner in which it is or would be payable

29. Section 27A(6) provides:

“(6) An agreement by the tenant of a dwelling (other than a post-dispute arbitration agreement) is void in so far as it purports to provide for a determination—

(a) in a particular manner, or

(b) on particular evidence,

of any question which may be the subject of an application under subsection (1) or (3).”

30. Section 19(1) of the Act provides that:

“Relevant costs shall be taken into account in determining the amount of the service charge payable for a period –

(a) Only to the extent that they are reasonably incurred, and

(b) Where they are incurred on the provision of services and the carrying out of works, only if the services or works are of a reasonable standard:

and the amount payable shall be limited accordingly.”

31. The construction of the lease is a matter of law, whilst the reasonableness of the service charge is a matter of fact. On the question of burden of proof, there is no presumption either way in deciding the reasonableness of a service charge. If the tenant gives evidence establishing a prima facie case for a challenge, then it will be for the landlord to meet those allegations and ultimately the court will reach its decisions on the strength of the arguments. Essentially the Tribunal will decide reasonableness on the evidence presented to it (*Yorkbrook Investments Ltd v Batten [1985] 2EGLR100 / Daejan Investments Ltd v Benson [2011] EWCA Civ 38*).

32. When interpreting a written contract, the Tribunal has to identify the parties' intention by reference to what a reasonable person having all the relevant background knowledge would understand the terms to mean. We have to focus on the meaning of the words in their context and in the light of the natural meaning of the clause; any other relevant provisions; the overall purpose of the clause and the lease; the facts and circumstances known by the parties at the time; and commercial common sense (*Arnold v Britton [2015] UKSC 36*).

33. In relation to the 2005 Order, article 3 provides:

Meaning of “responsible person”

3. In this Order “responsible person” means—

(a) in relation to a workplace, the employer, if the workplace is to any extent under his control;

(b) in relation to any premises not falling within paragraph (a)—

(i) the person who has control of the premises (as occupier or otherwise) in connection with the carrying on by him of a trade, business or other undertaking (for profit or not); or

(ii) the owner, where the person in control of the premises does not have control in connection with the carrying on by that person of a trade, business or other undertaking.

34. Article 6 provides:

6.—(1) This Order does not apply in relation to —

(a) domestic premises, except to the extent mentioned in article 31(10)

35. Article 31(10) relates to prohibition notices and is not relevant to this application.

36. Articles 8, 9, 10, 11, 13, 14, 15, 19 and 20 impose duties upon the responsible person.

37. Article 32 provides that it is an offence for any responsible person to fail to comply with any requirements imposed by articles 8 to 22.

Discussion

38. This is a case about the correct interpretation of the lease. We have not been asked to address the issue of whether any sums actually paid were or would be reasonable. We do not know what stage has been reached in relation to compliance with the LFRS letter. We do not know what the proposed cost comprises or how it is broken down.

39. We need to address the following questions:

- a. Does the LFRS impose any legal responsibilities upon Waterglen?
- b. If so, on which part of the Property are works required to meet those legal responsibilities?
- c. Does the lease allow recovery of any of the costs of compliance with the LFRS letter from Mr Arnott?
- d. Is any part of any cost which Waterglen may be able to recover payable from the reserve fund?
- e. Should we order that Mr Arnott be relieved from making any contribution towards Waterglen's costs via the service charge (the section 20C application), or that he be relieved of any claim under any other provision of the lease?

Legal responsibilities upon Waterglen arising from the LFRS letter

40. As identified in the extracts above from the 2005 Order, our view is that Waterglen is the responsible person under the Order and by virtue of Article 8 are required to comply with the terms of the letter dated 12 December 2019 in relation to the common parts. Failure to do so is an offence.

What part of the Property does the LFRS letter cover?

41. We agree with Mr Arnott's assertion that the 2005 Order does not cover works inside Mr Arnott's flat. Article 6 of the Order does not apply to domestic premises. Waterglen, or indeed LFRS, cannot compel Mr Arnott to give access to his flat for carrying out the fire safety works required in the LFRS letter. The works proposed to be carried out in the common parts however are not covered by the exemption for domestic premises.

42. This creates a problem for Waterglen, in that the LFRS requirements are for an integrated system that protects all residents at the Property and so

require some work to be carried out in the individual flats. The rationale is obvious; if there is a fire in an individual flat, all the occupiers of the rest of the Property need to be alerted. Hence an interlinked heat detector is required in each flat. A non-interlinked smoke detector is required in addition so that the occupiers of each individual flat will be alerted to the existence of a fire hopefully before it has become so fierce that it will trigger the heat alarm. If the smoke alarm was interlinked with the main communal alarm system so that it would trigger the alarm for the whole building, there would be a risk of frequent evacuation alarms which would engender dissatisfaction. The system may then fall into disrepute and so disuse.

43. So, if one flat owner will not co-operate in agreeing the installation of a whole building system, the responsible person is left in a difficult position. The answer is that although the fire authority, via the 2005 Order, cannot compel the occupier of a residential property to have works carried out in it, the local authority may do so using its powers in the Housing Act 2004 to serve an improvement notice. It should also be noted that the Local Authority can also recover their reasonable costs in taking this enforcement action. Matters have not progressed to that stage in this case.

44. We therefore determine that although Waterglen are required to comply with all elements of the LFRS requirements in so far as they relate to common parts, and in relation to any flat where the owner is willing to consent, at the present time they cannot carry out any works in Mr Arnott's flat.

45. We do not consider that the rights of access contained in clauses 3(6) or 3(7) of the lease would assist Waterglen. They only relate to obligations which Waterglen is compelled to meet, and they are not compelled by any statutory provision (yet) to do works in Mr Arnott's flat.

Does the lease allow recovery of Waterglen's costs of complying with the LFRS requirements?

46. Our view is that the costs of the proposed works (the considerable majority of which are obligatory) cannot be recovered under paragraph 3 of the Fifth Schedule. That only relates to repair of the Property and the fire safety works required do not come within that definition.

47. However, we are satisfied that the costs can be recovered via the service charge under paragraph 12 of the Fifth Schedule. We think that the proposed works fall four-square within the phrase "works [or] installations as in [Waterglen's] sole discretion shall be deemed necessary for the ... safety ... of the Building".

48. We do not think we should need to labour the point that modern fire protection systems are essential/necessary in residential buildings for the

safety of all occupiers, particularly those that have been specified by the statutory fire authority.

49. Mr Arnott's legal point though is that paragraph 12 is void. He has not expanded his argument at all, other than referring to *Sheffield County Council v Oliver* [2017] EWCA Civ 225, and *Williams v Aviva Investors Ground Rent* [2020] UKUT 111 (LC).

50. We think that Mr Arnott must have intended to argue that the clause is void because of the legal principles determined in a line of cases that started with *Windermere Marina Village Limited v Wild* [2014] UKUT 163 (LC). In that case, the Upper Tribunal was asked to consider a clause in a lease which provided that apportionment of service charges would be "determined by the Surveyor for the time being of the Lessors whose determination shall be final and binding".

51. The Deputy President of the Upper Tribunal held that part of this phrase breached section 27A(6) of the Act, as it purported to decide the apportionment in a particular manner (i.e. by the surveyor), that not being allowed under the sub-section. He said:

"44. ... I ... find that the LVT [was] entitled to consider what was the fair proportion of the expenses payable by the respondents, because the contractual mechanism for identifying that fair proportion was rendered void by section 27A(6) of the 1985 Act."

52. It is important to note that the Deputy President did not find the whole clause to be void; it was just the part of the provision that related to identifying the contractual mechanism.

53. Neither party has developed a legal argument on this issue and we do not propose to say much more, save that this issue has been further litigated in *Gater v Wellington Real Estate Limited* [2015] [2014] UKUT 0561, and *Fairman v Cinnamon (Plantation Wharf) Ltd* [2018] UKUT 0421(LC), as well as the cases cited by Mr Arnott. In the whole line of cases the basic principle set out in *Windermere* had been upheld. In the *Williams* case cited by Mr Arnott, the idea that it is the offending words in the clause that are void, not the whole clause itself, was approved.

54. None of the cases cited dealt with a clause using the same sort of language used in paragraph 12 of the Fifth Schedule in this case.

55. Our determination is that if the *Windermere* line of cases were to be applied to paragraph 12 (on which we make no determination as it was not argued before us), it would only have the effect of changing the clause to:

"Without prejudice to the foregoing to do or cause to be done all such works installations acts matters and things as ... shall be deemed

necessary for the proper maintenance safety and administration of the Building and the Lessor's Property."

56. We therefore affirm our view set out in paragraph 47 above.
57. We also determine that clauses 3(2)(a) – (d) provide an alternative contractual route to recovery of the costs of the fire safety works under the lease, as we consider that these works are works required by an enactment. Using this route however would take the costs out of the service charge regime. We doubt that use of the reserve fund would be permitted using this route, but neither party made any submissions on the effect of using the direct covenant route rather than the service charge route, and if the parties find themselves failing to agree whether service charge funds could be used if the demand made was on the basis of clause 3(2), a further application to the Tribunal would be required.

Are costs of the fire safety works recoverable from the reserve fund?

58. Paragraph 14 of the Fifth Schedule applies. There is no restriction upon using the reserve fund save for the requirement that it be used (inter alia) for items which are not likely to recur every year. That clearly applies to the cost of the fire safety works. We determine that they are recoverable from the reserve fund if they are charged to the service charge.

The section 20C application

59. Except in relation to his argument about access to his flat, Mr Arnott has failed in persuading us of the merits of the application. Even on the point on which he has succeeded, he is technically right but practically in error in resisting efforts to make the Property safe for all of its occupiers. If the local authority become involved, he may find that he is obliged to allow a proper fire system to be installed anyway, including appropriate installations in his flat that are hard wired to the main system protecting the whole Property. That would protect not only his own safety but also the safety of the other occupiers, and it is difficult to see a rationale for resisting this.
60. In our view, paragraph 13 in the Fifth Schedule is wide enough to allow the costs incurred by Waterglen in this application to be recovered via the service charge. We cannot see any basis for deciding that Mr Arnott should not contribute to those costs, which essentially he brought about. The other leaseholders will unwittingly have to contribute, but that is the nature of costs which a freeholder reasonable expends in connection with its management obligations. We therefore make no order under section 20C.
61. Mr Arnott has also applied for an order under paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002. Under this section,

we have power to direct that any costs claimed solely from him by way of an administration charge should be extinguished.

62. There is a possibility that Waterglen may seek all of its costs from Mr Arnott alone using an unidentified provision in the lease. They have said nothing about this, and we have not sought to find such a clause in the lease. We do not propose to make the order requested under paragraph 5A. If Waterglen do pursue that route, they will have to make a case for that claim and Mr Arnott will be entitled to challenge the claim in the usual way.

Summary

63. We determine that all the costs which either have been or are to be incurred by Waterglen in complying with the requirements of LFRS set out in their letter of 12 December 2019 **except** for any costs of works within Mr Arnott's own flat, are recoverable under Mr Arnott's lease under the service charge provisions or alternatively under clause 3(2) of the lease.
64. Our decision is limited to determining the point in the preceding paragraph. We were not asked to determine what sum would be payable. Nothing in this decision absolves Waterglen from compliance with all other procedural requirements and processes contained in the Act, such as consultation, and provision of statutory information etc. We do not know whether any sums have been expended yet, or whether any service charge demands on account have been requested. If any of these matters are not agreed, the parties should make a further application to the Tribunal.
65. Should they wish to do so, Waterglen may use any accrued reserve fund for payment of those costs.
66. We refuse the applications under 20C of the Act and under paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002.

Appeal

67. Any appeal against this decision must be made to the Upper Tribunal (Lands Chamber). Prior to making such an appeal the party appealing must apply, in writing, to this Tribunal for permission to appeal within 28 days of the date of issue of this decision (or, if applicable, within 28 days of any decision on a review or application to set aside) identifying the decision to which the appeal relates, stating the grounds on which that party intends to rely in the appeal, and stating the result sought by the party making the application.

Judge C Goodall
Chair
First-tier Tribunal (Property Chamber)