FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

VIDEO: CVPREMOTE

Case reference	**:**	**CAM/33UB/LIS/2021/0032**
Property	**:**	**Flat 16, The Shire Hall, Swaffham, Norfolk PE37 7TU**
Applicant	**:**	**Richard Player**
Represented by		**In person**
Respondent Landlord		**Gillian, Evelyn and Stewart Green**
Represented by	**:**	**Mr Saffell and Mr Smart (Managing Agents)**
Type of application	**:**	**Liability to pay service charges pursuant to s.27A Landlord and Tenant Act 1985**
Tribunal	**:**	**Judge Stephen Evans Ms A Flynn**
Date of hearing	**:**	**25 April 2022 and 20 June 2022**
Date of decision	**:**	**1 July 2022**

DECISION

The Tribunal determines that:

(1) Any "service charge deficit" for the years ending 2015 to 2021 is not yet payable by the Applicant unless and until the Respondents serve a "service charge statement" which complies in all respects with Schedule 6 of the Lease, together with any necessary statutory information;

(2) Subject to (1) above, the 12 items of costs challenged by the Applicant (as set out in paragraph 23 below) are costs which the Tribunal finds to have been reasonably incurred and reasonable in amount, with the exception of the following:

(a) Vaages Survey: Applicant's share (£146.58) disallowed;

(b) AUK work: Applicant's share (£4.12) disallowed;

(c) RA Latham 2021: Applicant's share reduced from £49.04 to £26.98;

(3) No order is made under s.20C/para. 5A of CLARA.

REASONS

Background

1. The Applicant, by his application filed on 3 November 2021, sought a determination under section 27A of the Landlord and Tenant Act 1985 as to whether service charges are payable, reasonably incurred and reasonable in amount.

2. The Applicant also sought an order for the limitation of the Respondent's costs in the proceedings under section 20C of the Landlord and Tenant Act 1985 and an order to reduce or extinguish the tenant's liability to pay an administration charge in respect of litigation costs, under paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002.

3. The Property is a 2 bedroom first floor flat in a converted Graded listed building containing 17 flats.

4. The Lease of the Property is dated 30 July 1992 and the Applicant is the successor in title to the tenant under the Lease.

5. The Respondents are his Landlords.

Relevant Law

6. The key statutory provisions are contained in Annex A.

The Lease

7. By clause 1(b) the lessee covenants to pay additional rent by way of service charge in accordance with Schedule 6.

8. Clause 3 provides that the lessee's covenants are contained in Schedules 3 and 4.

9. Clause 5 provides that the lessor covenants to give quiet enjoyment etc, and also covenants in the terms contained in Schedule 5.

10. By Schedule 4 the lessee covenants at (f) to pay 1/17th of the costs and expenses of items and matters specified in the 5th Schedule for which the lessor is responsible in accordance with its covenants in clause 5, to be calculated in accordance with Schedule 6.

11. The lessors' covenants in Schedule 5 include decoration, insuring, repair, the payment of rates and taxes etc, water rates on the development, and the payment of fees/disbursements to any managing agent.

12. Schedule 6 provides the service charge machinery, and states that "expenditure on services" means those the expenditure of the lessor in complying with his obligations in Schedule 5.

13. The Applicant is required to pay a service charge instalment being half of the service charge specified on the last service charge statement received.

14. The "service charge statement" is defined in Schedule 6, paragraph A(iv). It means an itemised statement of:

    (a) expenditure on services for year… ending on the 31st day of December in each year

    (b) the amount of the service charge due in respect thereof…and

    (c) sums to be credited against that service charge being the interim service charge instalments paid by the lessee for that year or period any service charge excess from the previous year or period and any appropriate part of the proceeds of any claim under an insurance policy covering damage to the development accompanied by a certificate by the accountant preparing it that the statement is a true and correct summary of expenditure on services and set out in a way which shows how it is or will be reflected in the service charge and is sufficiently supported by accounts receipts and other documents that have been produced to him.

15. There then follows at paragraph B:

    "The lessor shall keep a detailed account of the expenditure on services and shall procure that a service charge statement is prepared for every such year or period by an independent member of the Institute of Chartered

Accountants in England and Wales to whom the lessor shall furnish all accounts and vouchers and forward all facilities necessary for the purpose.

16. Paragraph C provides:

> "The lessor shall as soon as he receives such service charge statement serve it on the tenant by sending him a copy thereof".

17. Paragraph D provides for the interim service charge instalments. Then Paragraph E provides:

> "Forthwith upon service on him of a service charge statement the lessee shall pay to the lessor any service charge deficit shown thereon".

18. There is also provision for underpayments and overpayments of service charge, which are not relevant for these purposes.

The hearings

19. At the hearing on 25 April 2022 it was clear to the Tribunal that neither party had complied with the Tribunal directions dated 11 January 2022. In particular there was no Scott Schedule to work from, and no receipts were included in the bundle prepared by the Applicant.

20. The Tribunal therefore, with the parties' agreement, adjourned the proceedings part-heard with consequential directions. These directions the parties substantially complied with. In particular, the parties have helpfully completed a revised Scott Schedule amounting to some 39 items of challenge for the years 2015 the 2021 inclusive.

21. At the hearing on 20 June 2022, the Applicant indicated to the Tribunal that he did not pursue any of the matters referred to in his original Scott Schedule, but wish to pursue only the items contained in the revised Scott Schedule.

22. As it was, during the course of the hearing, it became apparent that there were duplicate items in the 39 challenges on the Scott Schedule, and they were removed at the Applicant's request. Moreover, the Applicant withdrew a number of challenges after the Respondent had made their representations.

23. At the end of the hearing, the following items remained in dispute in this application (costs in brackets are the service charge to the Applicant alone):

    (1) For all years (2015-2021):

    > "All charges should be waived as landlords are unable or unwilling to provide audited accounts as required by the lease for the period. service charge notices have not been provided, so I cannot ascertain that the service charges were correct. if the total amount is disallowed, then I would be willing to pay 50% as the terms of the lease had not been complied with.";

(2) 2017: "Vaages Surveying: no preventative maintenance Schedule has been supplied" (£146.58)

(3) 2018: "East Anglian guttering. Should be covered by Draper and Nichols guarantee" (£4.61)

(4) 2018: "Ian Hyde and Associates. Should have been covered by Draper and Nichols guarantee" (£86.72)

(5) 2018: "Ian Hyde and Associates. Should have been covered by Draper and Nichols guarantee" (£20.72)

(6) 2018: "Blockbuster Drain service - duplicate invoice" (£10.94)

(7) 2018: "Swaffham Carpets. Should have been covered by landlords insurance." (£17.64)

(8) 2019: "Drakes. Unnecessary and refused work." (£48.80)

(9) 2019: "Drakes. Duplicate invoice" (£24.48)

(10) 2020: "AUK. Not an item that should be charged to lessees. This is a problem for the individual owner to pay for" (£4.12)

(11) 2021: "R A Latham Builder. Repair windows. Should be covered by Draper and Nichols guarantee" (£49.04)

Decision

24. Taking each item challenged in turn:

"All charges should be waived as landlords are unable or unwilling to provide audited accounts as required by the lease for the period. service charge notices have not been provided, so I cannot ascertain that the service charges were correct. if the total amount is disallowed, then I would be willing to pay 50% as the terms of the lease had not been complied with."

25. The Applicant's initial position was that the Lease states that the accounts should be audited. The Respondents in their Scott Schedule contended that "Service charge accounts do not need to be audited or certified. See schedule B of lease."

26. The Applicant conceded the point about auditing, but maintained that the statements had not been so prepared, although they had been provided to him.

27. The Tribunal agrees the under paragraph B of the 6th schedule accounts do not need to be audited or certified. The Lease only provides that "a service charge statement is prepared for every such year or period by an independent member of the Institute of Chartered Accountants."

28. The Respondents' position, in relation to the years up to 2019, as Mr Saffell developed, was that the year end statements had been provided with

reconciliations for each year to all tenants; that these are produced from the client account system Qube/MRI. These are checked by the agents property manager and accounts team. The department is audited by RICS and is overseen by a chartered accountant, under that persons' supervision. The statements are also audited by the Agents' auditors.

29. When it was pointed out that the service charge statements in the bundle do not contain an auditors' statement, Mr Saffell agreed it would be sensible to have such a statement on them. But his position remained.

30. In relation to 2020 onwards, the Respondents' position was developed by Mr Smart, the current Agent. They took over as Agents mid year. He stated that the documents prepared by them included expenditure breakdowns and year end actuals/budget analysis, and as a department they followed ARMA guidelines; further, all statements are reviewed by the block management and accounts team.

31. However, he conceded that those documents did not strictly comply with the requirements of the lease, in particular paragraph A(iv)(b) of Schedule 6, because the amount of the service charge due was not stated on those documents, only on the demands. Also he conceded that para. (c) had not been followed. Mr Smart asked that the Agents be given the opportunity to correct these documents.

32. In the Tribunal's view, the approach taken by Mr Saffell of Brown & Co up to and including the year ending 2019 substantially complied with the terms of Lease, but not wholly. The statements' preparation was overseen by a member of ICA, and the auditing of the same went beyond the requirements of the lease. It is correct, however, to say that the statements do not contain a certificate from an accountant to the effect that it is a true and correct summary of expenditure on services, as A(iv)(c) of Sch. 6 requires.

33. As regards the years ending 2020 and 2021, the same point can be made, as well as the concession made by Mr Smart as to the lack of compliance with the 6th Schedule, para. A(iv)(b).

34. In *Urban Splash Work Ltd v Ridgway* [2018] UKUT 32 (LC) after reviewing a number of cases about the certification of service charge accounts, the Upper Tribunal reiterated (at [77]) the fundamental but unsurprising proposition that in every case the function and significance of the certificate will depend on the terms of the agreement.

35. In *Powell & Co Investments Ltd v Aleksandrova* [2021] UKUT at para. 24 the Upper Tribunal held:

"The general function of a certificate is to provide confirmation of facts relevant to the obligations of a party under a contract. Where the certificate is provided by a third party, as is often the case where the certificate concerns service charges payable under a lease, it is also intended to provide an assurance to the paying party that an independent person, usually with some

relevant professional qualification, has satisfied themselves that the facts being certified are true."

36. In *Powell* the landlord was required to calculate the expenses after the year end, and if the lessee's share fell short of the payments on account, the "lessee shall forthwith upon production of a certified account pay to or shall be refunded by the lessor the amount of such shortfall or excess as the case may be…"

37. At paragraphs 28-29 the Upper Tribunal held:

"The Lessee's obligation to make a further payment is not triggered simply by an excess of their share of the costs and expenses over the sums paid by them on account. The payment (or any refund, if payments made on account exceed the Lessee's share) is to be made "forthwith upon the production of a certified account", so that the obligation to pay does not arise until that certified account is produced…."

"29. The lease therefore makes the Lessee's obligation to pay any shortfall between their share of the costs and expenses and their payments on account conditional on an account of that liability being certified."

38. And at para. 31:

"…The certificate contemplated by the lease is a bespoke document for each lessee, showing their individual liability, and it appears no such document has ever been certified."

39. At para 32:

> "I therefore agree with the FTT's conclusion that the costs incurred by the appellant which it found to have been reasonably incurred are not yet payable. I disagree that those costs will become payable when the service charge accounts alone are certified. What is missing is an account, certified by a Chartered Accountant, stating the individual Lessee's share of total expenditure, the payments made on account, and the resulting shortfall or surplus. Once that document is provided (with the necessary statutory information) the Respondents will "forthwith" be required by clause 3(2)(ii)(b) to pay the certified amount."

40. This Tribunal determines in a similar vein that the obligation upon the Applicant to pay any shortfall for the years ending 2015 and 2021 is conditional upon there being served a "service charge statement" which complies in all respects with the 6th Schedule, which includes a requirement that it be accompanied by certificate by the accountant preparing it that the statement is a true and correct summary of expenditure on services.

41. This Tribunal further determines that the words "forthwith upon service on [the Applicant] of a service charge statement shall pay to the Lessor the service charge deficit", can only be read as meaning there is a liability to

pay once a certified statement is served. Payment is truly conditional, as in *Powell*.

42. We therefore determine that it is only once a fully compliant "service charge statement" is served on the Applicant (with the necessary statutory information) that the Applicant will be liable to pay any deficit for the years 2015-2021.

43. The Applicant should note, however, that any interim service charge instalments he has paid remain payable. These do not need certification under the terms of the Lease. This was also the situation in *Powell*, where the non-compliance only impacted on the obligation to make a final balancing payment.

2017: "Vaages Surveying: no preventative maintenance Schedule has been applied" (£146.58)

44. Although there was an invoice in the amount of £2495.88, it was the Applicant's simple submission that was nothing to show for it. No survey report had been disclosed, nor any planned preventative maintenance schedule, which would show value for the sum paid.

45. The Scott Schedule indicates that the Respondents' position that it was that it was reasonable for the manager to have a five year maintenance plan to assist with the budgets.

46. Mr Saffell's representation was that he did not think it unreasonable to have undertaken the inspection and the preparation of the schedule, although he could not provide an explanation as to why it was not in the bundle.

47. The Tribunal is prepared to accept that the work may have been reasonably incurred, but without any further detail justifying the large sum incurred, we cannot be satisfied the sum was reasonable in amount.

48. We therefore disallow the Applicant's share of £146.58.

2018: "East Anglian guttering. Should be covered by Draper and Nichols guarantee" (£4.61)

49. The Applicant contended that there was a guarantee for works executed by a firm called Draper & Nichols in 2015/2016. In this regard he relied on a document which was a note from a leaseholder's meeting on 18 June 2015 which Mr Saffell attended amongst others, including a Mr Gary Pearce of Brown & Co managing agents. A question was posed by a leaseholder as follows:

"Mr Brook asked what warranties will be provided on the works and when it would be required to be done again. GP confirmed it was unlikely warranties would be provided but under the building contract there would be six years of workmanship. He also confirmed that when he had used Draper and Nichols previously they have gone back well after the contract

period if there has been any issue. They are reputable firm and wish to keep that reputation."

50. The Respondents' position was that this item was regular maintenance. Moreover Mr Saffell contended that these words were simply commensurate with there being a 6 year limitation period in respect of a breach of contract in relation to any works by Draper and Nichols, and that this was not to be read as meaning this was a warranty or guarantee. He confessed not to have any recollection of what was said 7 years previously.

51. In the Tribunal's determination there is no cogent evidence of a warranty or guarantee. There is no written document, and the minutes of this meeting are not sufficiently certain in meaning for the Tribunal to be able to place the interpretation which the Applicant placed on the words used.

52. We determine that this was routine regular maintenance, that it was reasonably incurred and reasonable in amount, bearing in mind the 3 years which had elapsed since the Draper and Nichols work. This was a simple re- sealing and re-bolting of a cast iron gutter section. Given the effects of weather and time, such work was not to be unexpected.

2018: "Ian Hyde and associates. Should have been covered by Draper and Nichols guarantee" (£86.72)

2018: "Ian Hyde and associates. Should have been covered by Draper and Nichols guarantee" (£20.72)

53. These 2 items concern the same area and can be taken together.

54. The first receipt discloses repairs to a double hung sash window. The invoice shows that the work was: carefully hack out old putty, put in new section of timber, re putty and to make good around alarm panel. First visit. Leave site clean and tidy on completion.

55. The second receipt states "to decorate previously repaired window and to make good around alarm panel, Fill and decorate. Second visit. Leave site clean and tidy on completion."

56. The Applicant's contention that was that the putty should need to be replaced, given the guarantee he believed had been given in 2015.

57. We reject the Applicant's contentions concerning the "guarantee", for the same reasons as under the previous item.

58. Mr Saffell made the point that these were not repairs dealing only with the window, but also concerned making good around an alarm panel. He clarified that the new section of timber was on the outside. He conceded that, with the benefit of hindsight, perhaps they should have gone back to Draper and Nichols on the matter.

59. We determine that, given the passage of time, i.e. at least 3 years after the Draper and Nichols works, and weathering, this new section of timber and

failed putties were not to be unexpected. Certainly, there is no evidence that Draper and Nichols had missed out this window when undertaking the original works in 2015.

60. We therefore find the works to have reasonably incurred, the costs reasonably incurred, and also reasonable in amount.

2018: "Blockbuster drain service duplicate invoice" (£10.94)

61. The Applicant's short point was that, given there were 2 receipts in the bundle of invoices, both must have been paid, and therefore he had been charged twice.

62. We note that the first of the two documents in the bundle has no letterhead. The second one has a letterhead from Blockbuster Drain Service. The typing on both is identical, but only the second one contains a stamp indicating that it had been paid. Only the second one contains a stamp setting out the date the invoice was received, who the landlord was, what the expenditure heading was, and that it had been approved.

63. The Respondent's evidence was that the document without the header had clearly been put in the bundle of invoices in error. Moreover Mr Saffell informed the Tribunal that he had personally checked, and the item had only been paid once.

64. We accept the Respondents' evidence and find that the cost was reasonably incurred and reasonable in amount.

2018: "Swaffham Carpets. Should have been covered by landlords insurance." (£17.64)

65. The total cost for the item was £300. Mr Saffell explained that there had been a sewerage problem and that they had replaced a carpet for that sum; that the insurance excess was £250 (they had double-checked it) but the cost of making a claim would have exceeded the difference in cost.

66. The Applicant's position was that he had only Mr Saffell' s word on the matter.

67. The Tribunal found Mr Saffell's evidence to be credible. Moreover, given the Agents' time on the matter and only a £50 difference between the excess and the carpet cost, together with the risk that the premium for the following year might increase as a result of a claim, we are satisfied that the cost was reasonably incurred and reasonable in amount.

2019: "Drakes. Unnecessary and refused work." (£48.80)

68. This concerns supplying and installing of a door entry system for flats 15 and 16 by an electrical contractor. It included the installation of an intercom system.

69. The Applicant's position was that this was unnecessary work which he had not wanted since it was first posited in 2012.

70. The Respondents position was that they were following the recommendations of expert advice in a health and safety report; and that they had a duty of care towards the occupants of the flats.

71. The Tribunal had the benefit of a report from SAF Fire Safety Consultants in the bundle. The survey date is 5 March 2019. It is a 10 page report which includes a fire risk assessment. At paragraph 4.2 of the said assessment, it is written:

> "It is recommended that the door at ground floor level serving the first floor flat numbers 15-16 should be fitted with an electric door entrance system similar to the one fitted on the Shire hall."

72. The Applicant's position was that such a system did not add to safety; indeed it may be the electrical lock would jam in a power cut or other situation.

73. Mr Saffell gave evidence that they had commissioned the report from a responsible contractor, and therefore they felt the works should be done. He pointed out that Brown and Co did not manage the property in 2012 and only came on board in 2015.

74. The Applicant stated that he did complain about these works at the time but his complaints were not in the bundle. He did not know they were going ahead. Any access must have been obtained without his input. Mr Saffell accepted that the Applicant had complained after it happened, but they had simply relied on the report.

75. The Applicant also pointed to emails in the bundle which revealed that the Norfolk Fire Brigade's website did not mention any requirement for door security systems, nor does Article 14 of the Regulatory Reform Fire Safety Order 2005, which he included in the bundle.

76. The Tribunal fully sympathises with the Applicant and understands his concerns. Another landlord may have made a different decision. However this Tribunal cannot say that, in the face of an expert report which is of some detail and ostensibly competent, the decision of this Landlord via their Agents was an irrational one. It was, after all, a decision for the Landlords to make in respect of their common parts' security.

<u>2019: "Drakes. duplicate invoice" (£24.48)</u>

77. The Applicant complained that this invoice had been included twice in the bundle of invoices sent by the managing agents. This would not have happened if the accounts had been properly certified.

78. The Respondents' position that this was not a duplicate invoice. Mr Saffell accepted it was a mistake to put it in twice, but it had only been paid once. He said this was evident from the service charge statement for the year

ending 31 December 2019; an entry dated 18 November 2019 shows the sum only appearing once.

79. The Tribunal accepts the Respondents' evidence and finds that this cost was incurred only once; that it was reasonably incurred and reasonable in amount.

2020: "AUK. not an item that should be charged to lessees. This is a problem for the individual owner to pay for" (£4.12)

80. This item concerns fitting a battery in a smoke alarm within an individual flat, and had nothing to do with the common parts, the Applicant submitted. He contended that once it was found that the smoke alarm was beeping in flat 6 from a low battery, that tenant should have had to pay for it.

81. Mr Saffell explained that the call-out was because the original complaint said the issues had been in the common parts, although it turned out to be within an individual flat.

82. In the Tribunal's determination, this was not a sum which was reasonably incurred as a service charge item. The cost should have been borne by the individual flat owner concerned, notwithstanding the initial call out was about the common parts.

83. Accordingly, the £4.12 service charge is not payable by the Applicant, we find.

2021: "R A Latham Builder. repair windows. Should be covered by Draper and Nichols guarantee" (£49.04)

84. The Applicant pursued the same argument as previously, namely that these works should have been covered by the Draper and Nichols guarantee.

85. The Respondents made the same response as before. Mr Saffell added that, without knowing the date of the work, he could not be sure (but suspected) that it might be outside any "guarantee" period anyway. The invoice is dated 11 March 2022.

86. Looking at the invoice, builders removed putty from 3 sash windows, primed them and added new putty. They returned a week later and painted the new putty. The materials incurred were minor compared to the labour of £750. The total invoice cost was £833.78. No VAT is indicated on the invoice.

87. The Tribunal determines that the works and cost were reasonably incurred but unreasonable in amount, by reason of the excess labour charge. We consider that a reasonable amount for labour was £375. That brings the invoice cost down to £458.78.

88. The Applicant's share is therefore £26.98, not £49.04.

Section 20C/Paragraph 5A to CLARA

89. As regards the Applicant's application under section 20C/paragraph 5A, the Respondents expressly confirmed to the Tribunal that they would not seek to recover the costs in relation to these proceedings by way of any administration all service charge. on that express promise, the Applicant did not pursue any application under the above provisions.

90. We conclude by thanking the parties for the sensible concessions made on both sides during the hearings, and the civil manner in which proceedings were conducted.

Judge:

S J Evans

Date:
01/7/22

ANNEX – RIGHTS OF APPEAL

1. If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber) then a written Application for permission must be made to the First-Tier at the Regional Office which has been dealing with the case.
2. The Application for permission to appeal must arrive at the Regional Office within 28 days after the Tribunal sends written reasons for the decision to the person making the Application.
3. If the Application is not made within the 28-day time limit, such Application must include a request to an extension of time and the reason for not complying with the 28-day time limit; the Tribunal will then look at such reason(s) and decide whether to allow the Application for permission to appeal to proceed despite not being within the time limit.
4. The Application for permission to appeal must identify the decision of the Tribunal to which it relates (i.e. give the date, the Property and the case number), state the grounds of appeal and state the result the party making the Application is seeking.