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

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| **Case Reference** | : | CHI/18UD/LSC/2020/0072 |
| **Property** | : | 49 High Street, Crediton EX17 3JX |
| **Applicant** | : | Andrew James Ballantyne |
| **Representative** | : | |
| **Respondent** | : | Steven V and Martine G Colombe |
| **Representative** | : | |
| **Type of Application** | : | Determination of service charge |
| **Tribunal Member** | : | D Banfield FRICS<br>Regional Surveyor |
| **Date of Decision** | : | 21 December 2020 |

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**DECISION**

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**In the absence of either consultation or an application for dispensation the sum that may be recovered by way of service charge in respect to the repair works the subject of this application is limited to £250.**

**The sum will become payable when properly demanded including the "Summary of Rights and Obligations" required by the Service Charges (Summary of Rights and Obligations and Transitional Provision) (England) Regulations 2007**

**Orders are made under S.20C of the Landlord and Tenant Act 1985 and Paragraph 5A of Sch 11 to the Commonhold and Leasehold Reform Act 2002 that none of the costs in connection with these proceedings may be taken as relevant costs in determining the amount of service charge payable or as an Administration charge.**

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## Background

1. The Applicant seeks a determination of service charges for 2020 said to be £4,850 to date.

2. The Applicant has also applied under S.20C of the Landlord and Tenant Act 1985 and Paragraph 5A of Sch 11 to the 2002 Act.

3. The Tribunal identified the following issues to be determined:

   - Whether S.20 consultation was carried out
   - Whether the sums demanded are reasonable for the work carried out
   - Whether the work is the landlord's responsibility under the lease
   - Whether the landlord's management costs are chargeable under the lease

4. The Applicant accepted that he is liable to 50% of the service charge costs.

5. Directions were made on 28 August 2020 setting out a timetable for the determination of the matter.

6. The Applicant applied for an order for disclosure of documents held by a building company which was refused due to their not being party to the proceedings.

7. An application from the Respondent to be permitted to respond to certain allegations was permitted due to the matter being determined without an oral hearing.

8. The Tribunal considered that the application was likely to be suitable for determination on the papers alone without an oral hearing in accordance with rule 31 of the Tribunal Procedure Rules 2013 unless a party objected in writing. No objection has been received.

9. On receipt of the bundle the Tribunal again considered whether the matter was suitable for determination on the papers and decided that the issues raised in the very full submissions provided by both parties were unlikely to be further illuminated by conducting an oral hearing.

10. The bundle submitted is extensive and has been read in full. However, only matters relevant to the Tribunal's jurisdiction will be referred to with references to page numbers indicated as [x].

## The Law

11. Reference to the law is contained in the appendix to this determination.

**The Lease [179]**

12. The lease clauses relevant to this dispute are;
    - "the Premises" means the property hereby demised.
    - "the Reserved Property" means that part of the property not included in the Premises
    - Sixth Schedule clause 21; The lessee "shall upon demand contribute and pay and shall keep the Lessor indemnified from and against a one half part of all costs charges and expenses referred to in or occurred in respect of any matter or matters referred to in the Seventh Schedule hereto and the Eighth Schedule hereto and it is agreed ......."
    - Clause 25; "To give notice to the Lessor of any defect................"
    - Seventh Schedule clause 5 "The Lessor shall keep the Reserved Property .... In a good and substantial state of repair......."
    - Eighth Schedule Part 1 clause 1; "The Lessor shall be entitled to apply to the Lessee for payments on account....."
    - Clause 2; "The Lessor shall keep proper books of account of all sums expended...."
    - Eighth Schedule Part II;
        - Clause 1. "All expenditure incurred by the Lessor or his agents in and incidental to the observance and performance of the obligations on the part of the Lessor contained in the Seventh Schedule hereto and Part 1 of this Schedule.
        - Clause 2. This includes all fees, expenses and wages paid to professionals and employees.
        - Clause 3. The cost of insurance
        - Clause 4. The cost of repairing and maintaining the Reserved Property.
        - Clause 5. VAT etc
        - Clause 6. Recovery of costs relating to service charge disputes.
        - Clause 7. All other expenditure incurred in respect of the management of the Property.
        - Clause 8. Managing agents' fees or, if none employed "such reasonable sum as he thinks fit to any of the matters referred to in this Schedule for management and administration"
        - Clause 9. A reasonable sum to set aside for a reserve fund.
        - Clause 12. Legal costs in enforcing covenants by Less.
        - Clause 13. Costs of party matters.

**The Cases**

**Applicant Lessee**

13. In his statement of case [116] the Applicant says that he was first aware of problems with the rear corner of the building in March 2020 when

the freeholder was found discussing the repair with a builder. The freeholder subsequently wrote to him indicating that the repair was required and then proceeded to have the work carried out.

14. The demand for payment included three layers of render and two of plaster for the shop whereas in his flat above he only has one skim of plaster directly onto the cob wall. He queried the charge for what he considered purely cosmetic additional work. He later clarified that his objection was not to the removal and replacement of the plaster which was of course required to enable the cob beneath to be repaired.

15. Although he knew that such repairs were the freeholder's responsibility he was unaware of the requirements of S.20. If he had been consulted it would have resulted in a very different outcomes not only on plastering but many if not all other aspect of repair.

16. The apparent urgency for repairs only emerged once the plaster/render had been removed and had not been mentioned until the tribunal documentation was prepared.

17. The Respondent has admitted he did not follow the S.20 procedure and although he was made aware of the decisions that had been made he was not invited to contribute to the process. The extent of his involvement was permitting access for repairs and ensuring the electrician did not damage his property during the works.

18. The damage to the cob wall was caused by cracks in the cement render allowing water ingress. The responsibility for repair the need for which had been identified prior to winter 19/20 is that of the freeholder and it is impossible to say how much cheaper it would have been had repairs been carried out when first identified. The Respondent's assertion that the damage was caused by overflowing gutters is not correct and in any case the repair of the gutters is the freeholder's responsibility.

19. The contractor chosen was not the cheapest and, using information obtained from the internet he has calculated [86] that between £3,223 and £5502 would have been generous and which accords with the freeholder's original estimate of £5,000 [62]

20. The freeholder has admitted that the electrical work in moving the meter boxes was illegal [12] and may therefore result in future problems and expense. Potentially Listed building consent, insurance claims in respect of electrics and safety issues/water ingress due to excess cable poorly fitted to render.

21. Contrary to the lease, proper books and accounts have not been kept and he has doubts about the authenticity of some of the contractor's invoices. The freeholder's invoices lack key details, fail to qualify as a legal invoice and were not accompanied by a summary of rights and obligations.

22. The proposed painting is too expensive, not required, an inappropriate material and he would carry it out free of charge.

23. None of the gutters have been checked and storm Denis identified a blockage. Such repairs are the freeholder's responsibility.

24. The freeholder's service charge demand [16] refers to £450 for the freeholder's labour which was only raised after he queried the plastering. Until then he had been told no charge would be made.

25. In applying for reimbursement of Tribunal fees the Applicant points out that any differences between them should have been resolved during the S.20 process rendering the costs he incurred in respect of an application to the tribunal unnecessary.

26. For the same reasons the Applicant applies for an Order under Section 20c and Para 5A Schedule 11 preventing the costs of the proceedings being recovered through the service charge or by way of an administration charge.

**Respondent Freeholder**

27. In his statement of case [124] the Respondent considers the application to be an unnecessary use of Tribunal time which should have been capable of resolution between them.

28. It is accepted that S.20 was not followed believing that the work was urgent and that Covid 19 made finding suitable builders, dealing with utilities and all aspects of the work difficult. To carry out S.20 consultation would have resulted in unacceptable delays.

29. The Applicant's description of the issue of moving the electrical meter boxes is challenged and the Applicant's failure to report issues relating to the state of the building has contributed to the damage that occurred.

30. He was unaware of the need for S.20 with urgent repairs and it took only 5 days between being advised that the building was at risk of collapse and appointing a builder. He felt under a lot of pressure to get the work done and tried to discuss the process with the Applicant. During the works he had ample opportunity to discuss it either with him or the builder.

31. He has tried to keep costs as low as possible and despite the Applicant expressing the wish to return to an amiable working relationship has refused to meet. The Applicant has not been disadvantaged by the failure to consult and should not benefit from a windfall of over £4k.

32. Minor damp had been reported by a previous shop tenant 18 months ago which appeared to be condensation. Later in 2019 a new tenant reported that damp had returned for which he provided a dehumidifier. On returning to the country in March 2020 he noticed that the rear

corner of the building appeared to be falling out [125] A wide crack in the render from ground level rising 6 metres had opened up and was pulling away from the building attached to which were the electricity boxes.

33. He obtained an estimate dated 6 March 2020 from R J Salter Builders covering "minor repairs" in the sum of £8,839.20 including VAT which included three coats of lime wash externally, "two coats render and skim" internally and a new UPVC window. [140]

34. Whilst with the builder the occupier of the flat pointed out that the rear gutter was blocked and overspilling the wall. He returned and cleared it at which time he noticed a leak in the flat's waste pipe where it joined the soil stack.

35. He then approached two further specialist builders one of whom (Bramhill) visited and provided an estimate dated 25 March 2020 of £6,900 [141] which included a silicate masonry paint externally and 5 coats of lime plaster decorated with 2 coats of silicate paint internally.

36. In attempting to pursues an insurance claim which was eventually rejected he obtained a revised estimate created for the purpose from Bramhill dated 25 March 2020, priced at £5,850 for the external works and £2,250 for internal. [142]

37. In order to obtain a more accurate estimate he removed the render both internally and externally, removing in excess of one ton. Once the render had been removed a revised estimate dated 12 May 2020 was received from Bramhill [146]. The external works were priced at £5,950, the internal at £2,850. Neither included decoration and the internal finish referred to "2 coats of lime finish plaster"

38. The final invoice dated 30 June 2020 indicates the cost of external repairs at £5,100 and Internal repairs at £2,850.

39. In addition to works carried out by the builder he undertook works himself as recorded on a time sheet [150] and charged at £450. [16] Also charged is the cost of an oak lintol at £75 and dump fees of £75 [16]

40. The meter boxes had to be moved to facilitate the repair to the wall and Western Power quoted a total of £1,250 with a 6 weeks wait for the work to be done. He therefore engaged an electrician to carry out the work, and the boxes have been reinstalled and the work tested. The cost of which is £350 [16] Western Power have verified it as such. The Applicant was aware that the works were "illegal".

41. Whilst in the absence of a surveyor's report the cause of the crack in the render has not been established if a blocked gutter had been causing water to spill down the building the Applicant should have informed him as "part owner of the building" and in accordance with his

responsibility under Para 25 of the 6th Schedule to the lease. In addition, the leak from the flat's waste pipe may also have been an issue.

42. The disagreement has arisen due to the Applicant saying he was not responsible for the internal plaster and his own perhaps hasty and abrupt response.

43. A witness statement from Alister Polhill of Bramhill Restoration [165] is exhibited describing his involvement with the project.

**Discussion and Determination**

44. It is clear from both parties' statement that the freeholder has adopted a somewhat relaxed style in his management of the building with only passing regard to the terms of the lease and legislation governing the respective rights and obligations of the parties.

45. Whilst such a style may operate satisfactorily where the consent of the other party has been obtained problems will occur if and when a dispute such as this arises.

46. The Respondent has accepted that he did not carry out the required consultation under S.20 of the Landlord and Tenant Act 1985 (the Act) stating that as the work was urgent he did not consider it to be necessary. Given that to be the case I would have expected an application for dispensation to be made under S.20ZA of the Act but none has been made.

47. **In the absence of either consultation or an application for dispensation the only determination I can make is that the sum that may be recovered by way of service charge in respect of the repair works the subject of this application is limited to £250.**

48. The only example of a service charge demand [16] does not include the "Summary of Rights and Obligations" required by the Service Charges (Summary of Rights and Obligations and Transitional Provision) (England) Regulations 2007 and **as such do not become payable until properly demanded.**

49. Given that both parties are unrepresented I have included the observations below which I trust may assist in the future management of the property and enable the parties to return to a workable relationship.

50. From the photographs provided and a description of the building, its age and its construction will mean that ongoing maintenance will be required to keep it in a state of repair.

51. In the absence of a professional property manager and with a freeholder with regular absences abroad looking after his business interests, there is always the possibility that some of what may initially be minor issues may escalate, as seen in this case where there was eventually a potential for collapse.

52. Faced with such a dilemma it is likely that urgent action was felt to be necessary leading to an absence of adherence to the correct legal procedures.

53. Given the urgency and the difficulty of obtaining competitive quotations required it is understandable that the Respondent engaged a reputable specialist who was able to meet the time frame he considered necessary. The cost is broadly in line with the quotation from RJ Salter and I do not consider it to be excessive.

54. I also accept that in a valiant attempt to minimise costs the Respondent has paid for some items direct and in cash and carried out some of the work himself.

55. Whilst the Applicant has expressed doubts about the authenticity of the costs incurred particularly the invoice from Bramhill I am satisfied that it is typical of invoices rendered by such builders in a small way of business and that £5,950 was paid from a Nationwide account to Mr Polhill of Bramhill Builders.

56. The Respondent refers to the Applicant as “part owner of the building” and with an obligation to inform him of defects. Whilst the lease does contain such an obligation, the lease is clear in that it is solely the freeholder’s obligation to maintain the building and for the lessee to contribute by way of service charge. Whilst it may be sensible for a lessee to inform the freeholder of any wants of repair it does not diminish the freeholder’s duty to comply with his obligations under the lease.

57. Whilst a resident landlord may have been quicker to discover that repairs were becoming necessary I accept that until the render/plaster had been removed it was difficult to assess the extent of the damage to the cob beneath and that a timber lintol had failed at which point urgent action was required

58. It has been suggested that the extent of the works eventually carried out was exacerbated by a failure to repair the crack in the render which allowed rainwater to penetrate. However, in the absence of an expert report from either party both the cause of such damage and whether a failure to carry out remedial work promptly increased the eventual cost, must remain pure speculation. As such I am not satisfied that the cost of repairs has been increased due to any failure of the freeholder to comply with his repairing obligations.

59. The Respondent has accepted that the manner in which he dealt with moving the meter boxes was an error although I accept that any deficiencies in the work carried out have now been rectified.

60. The costs that the freeholder can charge to the lessee are set out in Part II of the Eighth Schedule all of which relate to the recovery of costs rather than the charging of a fee for work carried out such as **the £450 included in the demand which cannot therefore be recovered.**

**Costs**

61. Given that the Applicant has wholly succeeded in his application it would be unreasonable for the Respondent to be able to recover his costs of defending the application through either the service charge or by levying an administration charge. I therefore make an Order under S.20C of the Landlord and Tenant Act 1985 that none of the costs in connection with these proceedings may be taken as relevant costs in determining the amount of service charge payable.

62. I also make an Order under Paragraph 5A of Sch 11 to the Commonhold and Leasehold Reform Act 2002 preventing such costs being recovered from the lessee by way of an administration charge.

**D Banfield FRICS**
**Regional Surveyor**
**21 December 2020**

1. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application to RPSouthern@justice.gov.uk. The application must arrive at the Tribunal within 28 days after the Tribunal sends to the person making the application written reasons for the decision.

2. If the person wishing to appeal does not comply with the 28-day time limit, the person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28-day time limit; the Tribunal will then decide whether to extend time or not to allow the application for permission to appeal to proceed.

3. The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal and state the result the party making the appeal is seeking.

## Appendix of relevant legislation

### Landlord and Tenant Act 1985 (as amended)

### Section 18

(1) In the following provisions of this Act "service charge" means an amount payable by a tenant of a dwelling as part of or in addition to the rent -
(a) which is payable, directly or indirectly, for services, repairs, maintenance, improvements or insurance or the landlord's costs of management, and
(b) the whole or part of which varies or may vary according to the relevant costs.

(2) The relevant costs are the costs or estimated costs incurred or to be incurred by or on behalf of the landlord, or a superior landlord, in connection with the matters for which the service charge is payable.

(3) For this purpose -
(a) "costs" includes overheads, and
(b) costs are relevant costs in relation to a service charge whether they are incurred, or to be incurred, in the period for which the service charge is payable or in an earlier or later period.

### Section 19

(1) Relevant costs shall be taken into account in determining the amount of a service charge payable for a period -
(a) only to the extent that they are reasonably incurred, and
(b) where they are incurred on the provisions of services or the carrying out of works, only if the services or works are of a reasonable standard;
and the amount payable shall be limited accordingly.

(2) Where a service charge is payable before the relevant costs are incurred, no greater amount than is reasonable is so payable, and after the relevant costs have been incurred any necessary adjustment shall be made by repayment, reduction or subsequent charges or otherwise.

**Section 20**

Limitation of service charges: consultation requirements

(1) Where this section applies to any qualifying works or qualifying long term agreement, the relevant contributions of tenants are limited in accordance with subsection (6) or (7) (or both) unless the consultation requirements have been either—
(a)complied with in relation to the works or agreement, or
(b)dispensed with in relation to the works or agreement by (or on appeal from) the appropriate tribunal.
(2) In this section "relevant contribution", in relation to a tenant and any works or agreement, is the amount which he may be required under the terms of his lease to contribute (by the payment of service charges) to relevant costs incurred on carrying out the works or under the agreement.
(3) This section applies to qualifying works if relevant costs incurred on carrying out the works exceed an appropriate amount.
(4) The Secretary of State may by regulations provide that this section applies to a qualifying long term agreement—
(a)if relevant costs incurred under the agreement exceed an appropriate amount, or
(b)if relevant costs incurred under the agreement during a period prescribed by the regulations exceed an appropriate amount.
(5) An appropriate amount is an amount set by regulations made by the Secretary of State; and the regulations may make provision for either or both of the following to be an appropriate amount—
(a)an amount prescribed by, or determined in accordance with, the regulations, and
(b)an amount which results in the relevant contribution of any one or more tenants being an amount prescribed by, or determined in accordance with, the regulations.
(6) Where an appropriate amount is set by virtue of paragraph (a) of subsection (5), the amount of the relevant costs incurred on carrying out the works or under the agreement which may be taken into account in determining the relevant contributions of tenants is limited to the appropriate amount.
(7) Where an appropriate amount is set by virtue of paragraph (b) of that subsection, the amount of the relevant contribution of the tenant, or each of the tenants, whose relevant contribution would otherwise exceed the amount prescribed by, or determined in accordance with, the regulations is limited to the amount so prescribed or determined.**]**

**Section 20ZA**

Consultation requirements: supplementary

(1) Where an application is made to the appropriate tribunal for a determination to dispense with all or any of the consultation requirements in relation to any qualifying works or qualifying long term

agreement, the tribunal may make the determination if satisfied that it is reasonable to dispense with the requirements.

(2) In section 20 and this section—

- "qualifying works" means works on a building or any other premises, and
- "qualifying long term agreement" means (subject to subsection (3)) an agreement entered into, by or on behalf of the landlord or a superior landlord, for a term of more than twelve months.

(3) The Secretary of State may by regulations provide that an agreement is not a qualifying long term agreement—

(a)if it is an agreement of a description prescribed by the regulations, or

(b)in any circumstances so prescribed.

(4) In section 20 and this section "the consultation requirements" means requirements prescribed by regulations made by the Secretary of State.

(5) Regulations under subsection (4) may in particular include provision requiring the landlord—

(a)to provide details of proposed works or agreements to tenants or the recognised tenants' association representing them,

(b)to obtain estimates for proposed works or agreements,

(c)to invite tenants or the recognised tenants' association to propose the names of persons from whom the landlord should try to obtain other estimates,

(d)to have regard to observations made by tenants or the recognised tenants' association in relation to proposed works or agreements and estimates, and

(e)to give reasons in prescribed circumstances for carrying out works or entering into agreements.

(6) Regulations under section 20 or this section—

(a)may make provision generally or only in relation to specific cases, and

(b)may make different provision for different purposes.

(7) Regulations under section 20 or this section shall be made by statutory instrument which shall be subject to annulment in pursuance of a resolution of either House of Parliament.]

**Section 27A**

(1) An application may be made to the appropriate tribunal for a determination whether a service charge is payable and, if it is, as to -

(a) the person by whom it is payable,

(b) the person to whom it is payable,

(c) the amount which is payable,

(d) the date at or by which it is payable, and

(e) the manner in which it is payable.

(2) Subsection (1) applies whether or not any payment has been made.

(3) An application may also be made to the appropriate tribunal for a determination whether, if costs were incurred for services, repairs, maintenance, improvements, insurance or management of any specified

description, a service charge would be payable for the costs and, if it would, as to -

(a) the person by whom it would be payable,
(b) the person to whom it would be payable,
(c) the amount which would be payable,
(d) the date at or by which it would be payable, and
(e) the manner in which it would be payable.

(4) No application under subsection (1) or (3) may be made in respect of a matter which -

(a) has been agreed or admitted by the tenant,
(b) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,
(c) has been the subject of determination by a court, or
(d) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.

(5) But the tenant is not to be taken to have agreed or admitted any matter by reason only of having made payment