UPPER TRIBUNAL (LANDS CHAMBER)

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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT – SERVICE CHARGES – paper determination of service charge dispute by FTT – service charges disallowed due to insufficiency of evidence – whether procedure fair to unrepresented parties – appeal allowed and charges re-determined

IN THE MATTER OF AN APPEAL AGAINST A DECISION OF THE FIRST TIER TRIBUNAL (PROPERTY CHAMBER)

BETWEEN:

ENTERPRISE HOME DEVELOPMENTS LLP **Appellant**

and

CHRISTOPHER RICHARD DAVID ADAM **Respondent**

Re: Flat 5,
131 St Michael's Road,
Aldershot

Martin Rodger QC, Deputy Chamber President

28 April 2020

The appellant was represented by its director, Mr Robert Gray
The respondent represented himself

The following case is referred to in this decision:

Yorkbrook Investments Ltd v Batten (1986) 18 HLR 25

Introduction

1. This appeal is about procedural fairness. It illustrates the perils of determining disputed issues of fact on the basis of written material provided by unrepresented parties, without either the parties or the tribunal having the opportunity to supplement that material by asking and answering questions at an oral hearing.

2. The appeal is against a decision of the First-tier Tribunal (Property Chamber) ("the FTT") given on 30 August 2019. The FTT comprised a Tribunal Judge sitting alone. The application before him was brought under section 27A, Landlord and Tenant Act 1985 ("the 1985 Act") and concerned service charges payable for the 4 years from 2016-2019 by Mr Adam, the respondent, under his lease of Flat 5, 131 St Michael's Road, Aldershot ("the Building").

3. Mr Adam's landlord is the appellant, Enterprise Home Developments LLP ("Enterprise"). Over the 4 years in issue Enterprise claimed service charges totalling £17,296.45, but the FTT reduced those charges by more than two thirds to £6,411.46. A significant reason for the reduction was that the FTT considered Enterprise had not sufficiently explained, justified, or evidenced its entitlement to the disputed amounts.

4. This Tribunal gave Enterprise permission to appeal and the appeal was heard, with the agreement of both parties, using a remote video conferencing platform. At the hearing Mr Adam represented himself, and Mr Robert Gray, who is one of the partners in Enterprise, represented it. Both parties provided separate bundles for use at the hearing. The Tribunal made use of the bundle provided by Mr Adam, which included all of the material in the bundle provided by Mr Gray.

The uncontroversial facts

5. The Building is a Victorian house which was converted by Enterprise into five flats in 2015 and 2016. Each of the flats was let on a long lease on substantially the same terms.

6. The lease of flat 5 was granted by Enterprise to Mr Adam on 18 July 2016. It is in conventional terms and makes provision for the payment of an annual service charge by the leaseholder covering "all expenditure reasonably incurred" by Enterprise as landlord in connection with the provision of services. Part 2 of Schedule 1 contains some relatively simple provisions for the collection of the service charge. Mr Adam is obliged by his lease to pay 20% of the cost of providing the services. By paragraph 1.2 the landlord is required to prepare an account of its expenditure. The lease says that when this account is certified by the landlord's agent it is to be conclusive evidence of the matters stated in it, but that part of the agreement is rendered void by section 27A(6), 1985 Act. More importantly, the lease does not oblige the landlord to have the accounts certified by its agent or by anyone else. The leaseholder's obligation to pay and the landlord's entitlement to receive a contribution towards the expenditure is not made conditional on certification or even on the landlord providing a copy of the account, or a budget, to the leaseholders.

7. The Building is not a large property, Enterprise is not a large landlord, and its style of management is relatively lax and informal. Copies of budgets and accounts were not provided to leaseholders in the building until Mr Adam asked for them in 2019. Nor was the information required by section 21B, 1985 Act concerning leaseholders' rights and obligations included with demands for payment of the service charge. Enterprise simply sent an annual demand for the sum payable as an estimated service charge at the start of the year, and then added any deficit or credited any surplus to the budget for the following year. It was entitled to collect a payment on account equal to the previous year's expenditure increased by 10%, but it chose to make its own more modest estimate instead.

The proceedings before the FTT

8. The service charges invoiced to Mr Adam were £400 in the 2016 half year, £800 in 2017, £880 in 2018 and the charge for 2019 was estimated to be £946. On 27 February 2019 Mr Adam applied to the FTT under section 27A, 1985 Act for a determination of the charges payable since the grant of his lease. He explained that until the previous month the only information he had received had been the annual invoices, and he did not accept that the sums charged were reasonable.

9. The application to the FTT was made on its own standard form which includes at section 11 an invitation to the applicant to state whether he or she would be content for the application to be determined without a hearing. This form of dispute resolution is known in the FTT as a paper determination and it was explained in section 11 as follows:

> "If the Tribunal thinks it is appropriate and all parties and others notified of their right to attend a hearing consent, it is possible for your application to be dealt with entirely on the basis of written representations and documents and without the need for parties to attend and make oral representations… Note even if you have asked for a paper determination the Tribunal may decide that a hearing is necessary… where there is to be a hearing, a fee of £200 will become payable by you…"

10. Rule 31 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 ("the 2013 Rules") allows the FTT to adopt an entirely written procedure if all parties consent. Mr Adam ticked the box signifying that he would be content with a paper determination "if the Tribunal thinks it appropriate".

11. The FTT served the application on Enterprise and on 3 April 2019 procedural directions were given by a Judge (not the Judge who eventually determined the application and whose decision is the subject of this appeal).

12. The directions included a statement that the application would be determined on the papers without a hearing unless a party objected in writing within 28 days of receipt of the directions. Neither party responded with any objection.

13. The directions also required each party to take steps intended to identify the matters in dispute. Enterprise was first required to provide copies of service charge accounts,

estimates and demands for the years 2016-2019. Mr Adam was then to provide a statement identifying the items in dispute, supplying full reasons for his disagreement with those items, stating the amount, if any, he would pay for each disputed item, and providing copies of any alternative quotes he relied on. Enterprise was next directed to serve copies of all invoices relating to the matters disputed by Mr Adam together with any other documents on which it intended to rely; it was also to provide a statement identifying the relevant service charge provisions in the lease and any legal submissions in support of the amounts claimed. Any witness statement Enterprise wished to rely on was to be provided to Mr Adam at that stage. Finally, Mr Adam was given the opportunity to make a concise reply.

14. The directions given by the FTT were in a standard form. The Judge who gave them may have concluded that the application was suitable for a paper determination, perhaps because it was of modest value and of a type which is often dealt with on paper. At that stage, of course, Enterprise had not yet participated in any way in the proceedings and the issues had not yet been defined.

15. Enterprise supplied its "service charge accounts" and estimates for the years in dispute on 24 April 2019. These were very brief and were presented without any verification by an accountant or other agents. Although headed "service charge accounts", for each year except 2018 the document supplied was the service charge estimate prepared at the beginning of the year. Each estimate, except for 2016, included a balance brought forward representing the surplus or deficit of actual expenditure against the previous year's budgeted sum.

16. On 4 June 2019 Mr Adam responded with a statement explaining his objections to the charges for each year. This was a lengthy document, but it repeated the same eight objections for each of the years in question, with some small additions for 2019. Mr Adam had paid all of the service charges demanded by Enterprise for the years 2016-2018 but he had not paid the estimated charge for 2019. In response to the direction to state the amount he would pay for the items in dispute, Mr Adam did not mention previous years but said that he was not willing to pay anything for 2019 unless Enterprise satisfied him and the FTT that the charges were reasonable and based on "solid documentary proof".

17. Mr Gray responded to Mr Adam's statement in a letter dated 24 June 2019. This letter addressed each of the points raised and contained the only information supplied by Enterprise in response to the application. Mr Gray also provided documents showing insurance premiums for the four years in dispute, and sample invoices for gardening services, but no invoices were supplied for utilities or maintenance costs. In his letter of 24 June Mr Gray referred to previous correspondence with Mr Adam in which he had explained that much of the work of providing services was supplied "in-house" as his company maintained several other buildings in Aldershot and the arrangement provided a significant cost benefit. This, it is to be inferred, was Mr Gray's explanation why few invoices were available.

18. In his letter Mr Gray also made the point that, in his experience, service charges for flats in other buildings were often significantly higher than those he charged. He gave as

anecdotal examples two modern flats which he owned where the service charges were said to be 82% higher and 132% higher than those payable by Mr Adam despite the fact that the maintenance required by a Victorian building might be expected to be higher than in a modern flat.

The FTT's decision

19. The FTT's decision contains a thorough treatment of the issues within the limitations of the evidence available to it. In an introductory section the Judge noted that the case had been listed for a paper determination but there is no suggestion in the decision itself that he undertook any further consideration whether that was an appropriate procedure for this case. Nor did he record that any other Judge had considered whether the case was suitable for paper determination after the original directions had been given.

20. Having explained the consequences of Enterprise's omission to supply the summary of rights and obligations required by section 21B of the 1985 Act (i.e. that the amounts were not payable until demands including the required information were delivered) the FTT proceeded to consider the disputed items in each year.

21. The treatment of each of the items followed a similar pattern. The FTT analysed all of the material provided before significantly reducing the charges, in many cases to nil. The only exceptions were the management and administration charges for 2016 and 2017, the contributions towards reserves in 2017 and 2018, and the 2018 utilities charge, each of which was allowed in full. The estimated budget for 2019 fared no better, with only the figure for fire alarm maintenance surviving unscathed. In each case the FTT's reasons for reducing or disallowing the charge included, usually as the sole ground of the decision, that the evidence supplied to explain and justify the item was insufficient. Three examples illustrate the approach taken.

22. The cost of insurance for 2016 was claimed at £682, which was an apportioned part of a single premium paid for four separate buildings. Mr Adam's only complaint about insurance had been that no documentary evidence had been provided showing the sums actually paid. Mr Gray responded by supplying invoices, but the FTT pointed out that no breakdown of the total premium had been provided and that the charge for 2016 was higher than those in subsequent years which were supported by a certificate. No explanation had been provided for this difference which led the FTT to conclude that the figure claimed for 2016 "appears to be incorrect and the charge excessive", although that was not a complaint made by Mr Adam. The charge for 2016 was therefore reduced to the sum proven to have been paid for 2017.

23. In relation to the cleaning of the common areas there was a dispute of fact about how frequently cleaning took place. The charge for 2016 was £820, with slightly higher charges for each of the following years. In his letter of 24 June Mr Gray had explained that cleaning was done fortnightly and that a charge of £35 was made for each visit. The FTT pointed out that £820 was not a multiple of £35 and that no written record had been

produced to show that the fortnightly visits had been made. It gave two reasons for reducing the sum recoverable for cleaning to nil in each of the four years under investigation. The first concerned Mr Gray's statement that cleaning was provided "in house" by Enterprise. The lease allowed the recovery of "expenditure reasonably incurred or payable in connection with" the services, but the FTT considered that this did not permit the landlord to charge what it described as "a notional cost" for a service provided by its own employees. Reference was made to a number of authorities to support that conclusion. In the absence of any evidence of payments made by Enterprise to cleaning staff or to an independent contractor the FTT concluded that the sum was not recoverable. As a separate ground of decision, the FTT also said that even if a notional cost was recoverable, there had been no explanation of how the sum charged was calculated, and no evidence in the form of contracts, timesheets or invoices to support the charge which it described as "wholly unsubstantiated".

24. The FTT's treatment of repairs followed a similar course. In each year there had been some small expenditure on items such as unblocking drains. In no year did the total exceed £880 and the only single significant item was an amount of just under £500 incurred in repairing a leak in one of the flats which had caused damage to the ceiling of the flat below. In his letter of 24 June Mr Gray had explained that maintenance services were provided by "our personnel". The FTT ruled once again that a "notional cost" was irrecoverable in principle. In each case it also found that the sum was "unsubstantiated".

25. The FTT's treatment of the evidence was unimpeachable. Enterprise had provided only the sketchiest outline of the work it had undertaken. The only documents it had furnished were insurance invoices and a few sample invoices from a garden maintenance company. It had supplied no comprehensive narrative explanation of its charges and it had assumed that a brief statement by Mr Gray that these were the services which had been provided and this was how much they had cost would be sufficient to satisfy the FTT. Mr Adam's approach had been to put Enterprise to proof of each and every item of expenditure, and to raise questions about how even very modest figures could be justified. He did not dispute the expenditure on the grounds that the work had not been done (apart from challenging the frequency of cleaning of the common parts which he did not accept occurred fortnightly) nor on the quality of the service. He simply required Enterprise to establish that each pound it expected him to pay was reasonable. The FTT looked at the material provided by Enterprise and concluded, quite rightly, that it did not provide the level of detail or documentation which Mr Adam's challenges required. It therefore concluded that Enterprise had failed to prove what it had spent and that its expenditure had been reasonable.

The appeal

26. There are two difficulties with the FTT's approach. The first is its treatment of Mr Adam's application as if it was enough in itself to place a burden on Enterprise to justify and document each item of expenditure. Mr Adam did not advance any affirmative case that services had not been provided, or had been provided to a poor quality, (although he

suggested that cleaning had not occurred fortnightly). The sums claimed appear modest and not enough to incite suspicion that costs had not been incurred or had been unreasonably incurred. Yet that is what the FTT assumed, unless Enterprise could prove the contrary.

27. In *Yorkbrook Investments Ltd v Batten* (1986) 18 HLR 25 Wood J, giving the decision of the Court of Appeal, addressed the issue of the burden of proof on the reasonableness of service charges. At page 34 he said this:

> "Having examined the statutory provisions we can find no reason for suggesting that there is any presumption for or against a finding of reasonableness of standard or costs. The court will reach its conclusion on the whole of the evidence. If the normal rules of pleadings are met, there should be no difficulty. The landlord in making his claims for maintenance contributions will no doubt succeed, unless a defence is served saying that the standard or the costs are unreasonable. The tenant in such a pleading will need to specify the item complained of and the general nature – but not the evidence – of his case. No doubt discovery will need to be ordered at an early stage, but there should be no problem in each side knowing the case it has to meet, providing that the court maintains a firm hold over its procedures. If the tenant gives evidence establishing a *prima facie* case then it will be for the landlord to meet those allegations and ultimately the court will reach its decisions."

28. Much has changed since the Court of Appeal's decision in *Yorkbrook v Batten* but one important principle remains applicable, namely that it is for the party disputing the reasonableness of sums claimed to establish a *prima facie* case. Where, as in this case, the sums claimed do not appear unreasonable and there is only very limited evidence that the same services could have been provided more cheaply, the FTT is not required to adopt a sceptical approach. In this case it might quite reasonably have taken the view that Mr Adam had failed to establish any ground for thinking the sums claimed had not been incurred or were not reasonable, which would have left only the question whether any item of expenditure was outside the charging provisions.

29. The second difficulty I have with the FTT's decision is the procedural course the application had taken before the Judge embarked on his own consideration of the issues. In its original directions the FTT assigned the application to an entirely paper based procedure unless the parties opted out. It does not appear to have considered at any subsequent stage whether that procedure was appropriate to the issues or to the parties. In adopting that procedure the FTT created a real risk that the eventual outcome would depend on the competence of each party in presenting its case. Mr Gray suggested that he may have been naïve in his approach to the proceedings and had not appreciated that he was expected to provide much more detail of the costs he had incurred. But Mr Gray is not a lawyer, and while he was prepared to accept proper responsibility for the inadequacy of the material he provided to the FTT, in my judgment a share of responsibility should also be allocated to the FTT's case management.

30. The "overriding objective" or guiding principle of dispute resolution in the FTT, identified in rule 3 of the 2013 Rules, is to deal with cases fairly and justly. The 2013 Rules reflect the requirement of section 22(4), Tribunals, Courts and Enforcement Act 2007, that the power to make Tribunal Procedure Rules should be exercised with a view to securing that, in proceedings before tribunals, justice is done and the tribunal system is accessible and fair. As rule 3(2) explains, a fair and just handling of a case includes dealing with it in ways which are proportionate to the importance and complexity of the issues and the anticipated costs, and the resources of the parties and the FTT itself. It also includes "ensuring, so far as it practicable, that the parties are able to participate fully in the proceedings" and "using any special expertise of the Tribunal effectively". These are positive duties imposed on the FTT by its own founding instruments.

31. Where both parties are unrepresented it is therefore necessary for the FTT to consider how it can ensure, so far as practicable, that they are able to participate fully in the proceedings, and how it can meet its own objective of dealing with their case fairly and justly. If specific consideration had been given to those questions in this case, there is every chance that the case would have been set on a different procedural course.

32. The decision to direct a paper determination seems to me to have been premature. The procedural Judge identified it as suitable for determination without a hearing before it was clear what the issues would be, or whether Enterprise would have professional representation. There was insufficient material at that stage to justify the conclusion that an entirely paper procedure was appropriate, yet it was at that point that the FTT handed the choice of procedure to the parties.

33. It is true that neither party asked for an oral hearing and that Mr Adam positively requested a paper procedure, but I question how informed the parties' option to forego an oral hearing really was and whether the FTT's standard procedures may inadvertently have guided them towards that choice. Section 11 of the FTT's standard form gives the impression that a paper based procedure will only be permitted if the FTT has satisfied itself that the case is suitable for disposal in that way ("if the Tribunal thinks it is appropriate … it is possible for your application to be dealt with entirely on the basis of written representations)". The statement in section 11 and the subsequent direction that the application would be determined on the papers unless either party objected, might very well lead a respondent to conclude that the FTT had already considered the suitability of the case and had concluded that a paper determination was appropriate. Yet it is not apparent to me that the FTT ever turned its mind to the question whether the case was suitable for determination in that way. It looks as though once Mr Adam signified his readiness to have a paper determination the matter would then follow that course unless Enterprise exercised the right to request an oral hearing.

34. Rule 31 allows the FTT to determine proceedings without a hearing if both parties have consented, but it treats the absence of a positive objection as amounting to consent. The FTT's directions in this case did not offer any guidance on what might make it suitable or unsuitable for determination without a hearing, nor did they identify any practical

consequences of the choice being presented. Indeed, an unwary or inexperienced party might well have been given the impression that by agreeing to a paper determination they would be following the FTT's own indication that that was appropriate, and that if its directions were followed the FTT would be equipped to arrive at a fair conclusion.

35. The directions given by the FTT were also surprisingly inconsistent. At paragraph 5 the FTT explained the matters which it expected Mr Adam to cover in his statement. He was required to identify the items in dispute and provide "full reasons" for his unwillingness to pay, and to explain what sum he was content to pay. In contrast paragraph 6 of the directions required Enterprise simply to produce copies of invoices and other documents together with a statement setting out the relevant service charge provisions and any legal submissions in support of the service charge. No guidance comparable to that given to Mr Adam was given to Enterprise as to the contents of the statement it might provide other than that it was expected to focus on issues of law. The directions appear to have assumed that issues of liability and quantum would be resolved by looking at documents.

36. It might be said that any reasonable person would understand that it was up to Enterprise to provide a detailed rebuttal of the points made by Mr Adam in his statement of case. A reasonable person familiar with formal dispute resolution might well have made that assumption, but I do not consider it can safely be assumed by the FTT that an unrepresented party will necessarily appreciate the material which ought to be provided in even a simple case. Yet there were aspects of this case which suggested it was not entirely straightforward. It was clear from Mr Adam's statement that there may be some disputes of fact, such as about the frequency of cleaning, which were unlikely to be resolved on the basis of documentary evidence. It was also apparent from Mr Gray's letter of 24 June 2019 that the arrangements for the provision of services were not typical and might give rise to questions (as indeed they did when the question of the recoverability of the cost of "in-house" services was identified by the FTT as an issue).

37. In my judgment by allocating the application to a written procedure without making it clear to both unrepresented parties what was expected of them, and then by relying on deficiencies of evidence and presentation as grounds of determination, the FTT fell short of the standard required by its overriding objective. By foregoing the opportunity for the parties to explain uncertainties created by their evidence, and by giving different guidance to each of them as to the content of that evidence, the FTT did not ensure "so far as practicable" that Enterprise was able to participate fully in the proceedings. It also hamstrung itself in making effective use of its own special expertise. That expertise is not limited to assessing the reasonableness of a service charge, but also includes facilitating lay parties in presenting their own cases to their best advantage, and using the Judge or panel's own skills in careful questioning to achieve a full understanding of the relevant facts.

38. This Tribunal understands very well the desire of parties, especially unrepresented parties, to have their disputes resolved by the FTT in the most convenient and inexpensive manner possible. It also appreciates that dealing fairly and justly with every case requires a proportionate allocation of the FTT's own resources to individual disputes. The choice

each party made to opt for a paper determination might have been enough to render the proceedings in this case fair had it not been for one other procedural objection to the FTT's decision. In relation to cleaning, internal and external repairs and maintenance, and garden maintenance in the early years, the FTT's decision to disallow the cost of services provided by Enterprise was based on its conclusion that the lease did not entitle the landlord to recover what it called "a notional cost" for work undertaken by its own employees. That was not a point taken by Mr Adam, although he was aware from correspondence with Enterprise that it appeared to charge for work carried out by its own staff. The suggestion that the lease did not permit the landlord to attribute a value to work done by its own staff and to recover that as a service charge was not an issue in the case until it occurred to the Judge. Had the case been determined at a hearing it would no doubt have been possible for the FTT to raise the issue with Mr Gray who would have then provided the rather more detailed explanation of the arrangements for delivering services "in-house" which he gave to me. But because the point was identified for the first time in the FTT's decision, he was not given the opportunity to consider or answer the FTT's own point. That was unfair.

39. Taking all these features into account, I am satisfied that the FTT's decision of 30 July 2019 was arrived at by a route which was procedurally unfair and which significantly affected the eventual outcome. For those reasons the decision must be set aside.

40. When I indicated to the parties at the start of the hearing that one possible outcome was that the matter might be remitted to the FTT for further consideration they both indicated that they would prefer a determination of all issues by this Tribunal. Mr Adam emphasised that he had always been willing to pay whatever reasonable sum it was determined his lease required him to pay. Mr Gray explained that he had not brought the appeal for the modest sums involved but because of the imputation that he had attempted to recover money he was not entitled to. He was very keen that the matter should be resolved with as little further time or expense as possible. I therefore indicated to the parties that I would consider each of the disputed charges and invite their submissions and evidence in relation to them. I am satisfied that there is no reason to remit the matter to the FTT and that I am in a position to give a final ruling on the application.

Insurance

41. The cost of insurance incurred in the years 2016, 2017 and 2018 was £682.09, £352 and £346.50 respectively. The FTT allowed £292.50 for each year. The budgeted figure for 2019 was £352.60 against which the FTT allowed £349.70.

42. Addressing the FTT's point, Mr Gray explained that the insurance premium had been higher in 2016 because the building had not been fully occupied and was rated as a higher risk for that reason. Having heard that explanation Mr Adam said that he was happy with it. I am also satisfied that the lease entitles the landlord to base the estimate on expenditure in the whole of the calendar year in which the lease was granted. Mr Adam was only required to pay one of the two instalments for 2016 but I am satisfied that the sum of £682.09 was the relevant cost for the full year.

43. Mr Adam said he was happy with the figures for 2017 and 2018. As far as the budgeted figure for 2019 was concerned Mr Gray said that the premium incurred had actually been slightly less, £323.47. Be that as it may, the issue for the Tribunal is the sum payable towards the estimated charge, which is the higher amount of £352.60 leaving the excess to be taken into account when calculating the sum due for the following year.

Cleaning common areas

44. The sums in issue in relation to cleaning of the common areas for 2016, 2017 and 2018 were £820, £960 and £1,045. The budget figure for 2019 was £992. The FTT disallowed all of these sums despite there being no dispute that regular cleaning had occurred (although the frequency of that cleaning was disputed) and there being no suggestion from Mr Adam that the quality of the cleaning was inadequate.

45. In relation to the first of the two grounds on which the FTT had disallowed the cleaning costs, Mr Gray explained in rather more detail than he had in his letter of 24 June how the cost was incurred. Enterprise is a limited liability partnership of which he is one of the two partners. He and his partner also own a limited company, Ayyaz Homes Ltd, which also operates in the Aldershot area. Enterprise has no employees, but Ayyaz Homes does. In 2016 Mr Gray agreed with Ayyaz, on behalf of Enterprise, that Ayyaz would arrange for the cleaning and maintenance of the building. Work carried out by the company staff was to be charged at the rate of £28 per hour. He, Mr Gray, organised any work that was required and kept a note of the time spent; this was periodically recharged by Ayyaz to Enterprise. That was why there were no regular invoices for work done by Ayyaz staff. The only evidence provided to the Tribunal was Mr Gay's own evidence but I have no doubt that he was telling the truth about these arrangements and Mr Adam did not suggest to the contrary.

46. In relation to the cleaning of the common areas Mr Gray explained that Ayyaz contracted with an independent cleaning company which charged it £35 for fortnightly visits which it passed on at cost to Enterprise. He said that his daughter had made enquiries with cleaning companies in 2016 and was satisfied that the rate of £35 per visit was consistent with the market at that time. The rate has not increased in the four subsequent years.

47. Once the true arrangement has been understood, and it has been appreciated that the cost incurred by Enterprise was not a notional cost which it attributed to the work but was an expense it paid to Ayyaz for arranging cleaning by a contractor, the FTT's concern about the recoverability of notional costs disappears.

48. The sum charged annually fluctuated a little partly because cleaning had not been undertaken for all 26 weeks in 2016 and partly because sums were occasionally included for window cleaning. Mr Adam was not satisfied that cleaning occurred as frequently as Mr Gray said it did. I note two points, however. First, Mr Adam works full-time and is not at home during the day, so is not in a position to observe the frequency of cleaning. Secondly, the transcript of a hand-written letter which Mr Adam told me he had sent to Mr

Gray in December 2018 stated that Mr Adam had been led to believe that cleaning was supposed to take place once a week. When I asked Mr Adam if he had any complaint about the quality of the cleaning he said that he did not. There may have been an occasion in October 2018 when he had found the communal areas to be dirty, and reported that in a text to Mr Gray, but that does not mean either that cleaning was not being undertaken at the agreed frequency or that the cleaners were not doing a thorough job. Mr Gray said that he regularly inspected the common parts of the building, which he visited every month and was in a good position to collaborate Mr Adam's view that there was no issue about the quality of cleaning. I am satisfied that Mr Gray made arrangements for fortnightly cleaning and there is nothing in the evidence I have heard to cause me to doubt that those arrangements had been implemented.

49. The only remaining issue is the charge of £35 for each fortnightly visit. Mr Gray explained that the cleaners cleaned the hall, the stairs and the landings (all of which have wooden floors). Mr Adam said that he had timed himself performing the same operations and it had taken him 20 minutes. He had also timed the cleaner on one occasion and she had taken 58 minutes to do what he described as an extremely thorough job. He had obtained a quotation from another cleaning company who would charge £27 to clean the common parts which the based on a rate of £18 per hour. Mr Adam said that he would be willing to pay £18 instead of £35 for cleaning.

50. I see no reason to doubt Mr Gray's evidence that in 2016 information available to him as a result of enquiries made by his daughter led him to believe that £35 was a market rate. The fact that in 2019 Mr Adam was able to find a cleaning company willing to do the work for £27 does not provide evidence that £35 was or is unreasonable. There are no grounds for thinking it is and on that basis the sum payable in respect of cleaning is the sum claimed.

Heating/Lighting/Utilities

51. The sums included in the annual accounts for utilities appeared initially under the heading "heating/lighting". In 2018 this changed to "utilities". For the first three years the sums claimed were £482, £515 and £119.26. For the 2019 estimated charge the figure was £225. The FTT allowed in full the figure for 2018 but reduced the remaining figures to £100, £110 and £120 for 2016, 2017 and 2019 respectively. Mr Gray explained that the common parts utilities comprise water and electricity. The electricity charge was in respect of lighting the common parts and one external light and consisted mostly of a standing charge. The water charge was entirely a standing charge. A separate landlords water supply had been installed when the building was converted in order to facilitate any future repairs or external cleaning, but it has not yet proved necessary to make use of that supply and no tap has been installed. Mr Gray was able to produce invoices for the water charges showing that the sum for 2016 was £93.93, for 2017 £99.02, 2018 £101.80 and 2019 £106.

52. The sum in respect of electricity fluctuated significantly. Mr Gray was able to produce invoices for the period 8 July 2018 to 31 March 2020. These suggest that some of the

fluctuations were attributable to the use of estimated consumption figures. Mr Gray explained that on one occasion the electricity charge for flat 4 was included by mistake. In the absence of invoices, I assume that the much higher figures for 2016 and 2017 were attributable in part to a similar mistake. The invoices covering the period 30 March 2019 – 31 March 2020 amount to £182.50 and do not include any estimate. These provide a solid foundation for an assessment of the appropriate figure for the previous years. Although Mr Gray was unable to produce invoices earlier than October 2018, there is no doubt that electricity was supplied throughout the period in dispute. I would therefore allow the sum of £270 for electricity and water in 2016 and 2017. This is more than the sum actually expended in 2018, which was £119.26, but this comprised only three items and I suspect two electricity bills and one water bill were not included. Nevertheless as that was the sum claimed there is no reason to disturb it. Similarly, the estimate for 2019 of £225 seems to be low, and Mr Gray said he had budgeted £290 for 2020 which seems a more realistic figure. Any shortfall in the sum collected for 2019 can be picked up in an end of year reconciliation.

Common areas - repairs

53. Mr Gray explained that repairs to the common parts were undertaken by Ayyaz Homes at an agreed charge of £28ph. He said that he recorded the number of hours which any job took and the total sum was then accounted for in transfers between Enterprise and Ayyaz. A schedule prepared by Ayyaz showed that the sum of £193 included in the service charge for 2016 was for internal decoration of the hallway. Mr Gray explained that these areas had been decorated after a number of new lessees have moved into the building. Mr Adam disputed this expenditure pointing out that there was a mark on the wall outside his flat which had been caused when he had moved in. However, Mr Adam was not granted his lease until 18 July 2016 and the date shown in the Ayyaz Homes schedule for the expenditure on redecoration was 23 June. The presence of a mark caused by Mr Adam moving in is therefore not a reason to doubt Mr Gray's evidence that the work was commissioned by him, undertaken by Ayyaz and paid for by Enterprise. I therefore allow the sum of £193 for 2016. I have already explained that I am satisfied that the service charge provisions in the lease entitle Enterprise to recover contributions for the whole year notwithstanding the lease was only granted in July.

54. The charge for 2017 was £386. The Ayyaz schedule indicates that this was in respect of further internal redecoration in November 2017, by which time all of the flats in the building had been let. It is likely that damage would be caused to the narrow hallway and stairs by new lessees moving in and it is possible that the area decorated did not include the area immediately outside Mr Adam's flat. Alternatively it is possible that Mr Adam is mistaken about when the mark was caused. In either event, the question is whether Mr Gray is to be disbelieved when he says he instructed further internal redecoration. There is nothing in the evidence which persuades me that Mr Gray has sought to exploit the leaseholders by including charges for fictitious work and I therefore accept his evidence and include a sum of £386 as the cost of internal repairs for 2017.

55. The sum of £465 was charged for internal repairs and maintenance in 2018. Mr Gray explained that this was in respect of work to repair a leak from a shower waste-pipe underneath the floor in the flat immediately above flat 1 and the replacement of the ceiling of flat 1 which had been damaged by the leak. The work had been carried out by Ayyaz at its agreed rate of £28ph. The ceiling finish had been unsatisfactory and he had directed that it be done again, but no charge had been made for this additional work.

56. Mr Adam had been aware of the damage to the ceiling of flat 1 and was also aware that some of the work had been redone. There is therefore no question of this expenditure being fictitious. Mr Adam pointed out that in his letter of 24 June 2019 Mr Gray had said that the repairs made necessary by the leak had been in 2017. I am satisfied, however, that whenever the work was undertaken it was charged for by Ayyaz on 19 March 2018. I also accept Mr Gray's evidence that no additional charge was made when part of the work had to be redone.

57. Mr Adam's final point in relation to this work was to question whether it could properly be a service charge item at all as it was made necessary by a defect in a waste pipe serving one flat. The precise arrangement of waste pipes in the building is not clear. Mr Gray described the pipe as a communal drainage pipe and he explained that because of the layout of flats in the building waste pipes from some flats passed through the floors of other flats.

58. I am satisfied that it is unnecessary to understand the arrangement of pipes in order to determine whether the charge is recoverable as a service charge item or ought to be recouped from the lessee of the flat in which the problem arose (there is no prospect of recovering the cost under the building insurance policy as this has an excess of £500). Under clause 3.4 of the lease the tenant is obliged to repair "the Premises". That expression is defined in clause 1.16 and includes "all Pipes in or on the Premises that exclusively serve the Premises". The definition of the Premises also makes clear, however, that it excludes everything below the level of the floor or above the level of the ceiling. Pipes running in the space between the floor of one flat and the ceiling of the flat below are therefore not included within the demise of either flat. The landlord's obligation to provide the services includes, by paragraph 4 of Part 1 of Schedule 1, an obligation to keep the common parts and any pipes used in common by more than one tenant in substantial repair and condition.

59. If the leaking waste pipe was a communal pipe as Mr Gray believed, it would fall under the responsibility of the landlord by reason of paragraph 4. If, on the other hand, as Mr Adam suspected, the waste pipe was not a communal pipe but took water away from only one flat, the obligation under paragraph 4 would not extend to it. But nor would the tenant of the flat be liable for the work since the pipe is not part of the Premises demised to her. Paragraph 9 of Part 1 of Schedule 1 permits the landlord to incur the cost of any works which in its reasonable discretion it considers necessary or desirable for the proper maintenance of the Building. If neither party was obliged to repair the pipe, Enterprise

was undoubtedly entitled to repair it and to recover the cost under paragraph 9. I therefore allow the sum of £465 for internal repairs and maintenance in 2018.

Fire alarm maintenance

60. In each year a cost was incurred under the head of "fire alarm maintenance". Mr Gray explained that this item represented the cost of Ayyaz Homes' staff attending when the fire alarm in the building was set off. They would check that there was no fire and reset the fire alarm. They charged £20 for a visit during office hours and £30 outside office hours. There were frequent problems which Mr Gray attributed to the tenant of one flat whose cooking in an unventilated kitchen regularly set off the fire alarm. Once that tenant had moved out the problem was said to have ceased. Mr Gray said that the problem was not a fault in the fire alarm and it had not had to be adjusted. In 2016 there had been five call-outs producing a charge of £140. In 2017 seven call-outs had resulted in a charge of £190. In 2018 eight call-outs had resulted in a charge of £240 and in 2019 there had been three call-outs resulting in a charge of £60. In total 23 call-outs were recorded in a period of three years and three months. Mr Gray pointed out that if the same service had been provided by a specialist fire alarm company it would have been likely that the charge would have been considerably higher.

61. Mr Adam took issue with both the suggested cause of the problem and the frequency of call-outs. He agreed that the fire alarm went off frequently but he suggested that the sensor in flat 2 (where the problem originated) had been replaced and it was that replacement which had resolved the problem. He also suggested that the call-outs predated the sub-letting of flat 2 to the tenant whose cooking had been blamed for the problem.

62. Mr Adam said he did not recollect the incidents as having been as frequent as the 23 for which charges were made. Two of the incidents included in the Ayyaz schedule predate the grant of Mr Adam's lease. He estimated that there were incidents when the fire alarm went off three or four times a year. I asked him if the average frequency could have been as often as seven times a year and he did not suggest that that was out of the question.

63. Once again, I am satisfied that Mr Gray is telling the truth about both the cause and the frequency of the fire alarm incidents. Each of the call-outs in the Ayyaz schedule has a specific date and I think it improbable that Mr Gray or anyone else has fabricated the schedule in order to claim perhaps as many as ten additional visits at a charge of £30 each. My confidence that Enterprise has not been trying to defraud Mr Adam or the other leaseholders by inventing fictitious service charge items is strengthened by a January 2018 invoice from a company which had carried out an asbestos survey and a fire risk assessment at a combined cost of £390. When Mr Adam pointed out that this charge did not appear in any of the schedules of service charges, which he took to be a matter of suspicion, Mr Gray explained that he regarded those surveys as "a landlord's cost" which he did not think ought to be passed on to the leaseholders. There seems to be no reason why they should not be passed on to the leaseholders, and a landlord which regarded the

provision of services to leaseholders as an opportunity for fraud would have been unlikely to take the benevolent view that Mr Gray exposed.

64. There is no evidence that the fire alarm in flat 2 was faulty or that it was replaced in 2019. As Mr Adam positively asserted those facts it was for him to prove them and he did not do so. I therefore allow the sums claimed in respect of fire alarm maintenance in full.

Garden maintenance

65. The building has a small rear garden adjoining a paved area, and a very small front garden. The rear garden is mostly grass with no significant planting and the front garden includes a single bed with a small number of plants. The cost of garden maintenance for 2016-2018 was £280, £420 and £445. The estimate for 2019 was £560.

66. Mr Gray explained that at first Ayyaz had carried out garden maintenance, making 14 visits in total in 2016 at a cost of £20 each time. The same pattern had continued in 2017 but in 2018 the work had been undertaken by a contract gardener who lived in the same road and who was willing to mow the lawn, remove weeds on the patio and paths and dig over the small bed by the gateway for £40 a month. There had been a slightly higher charge on the first two visits in 2018 when Mr Gray asked the gardener to do an initial clean-up and then approved the purchase and installation of some new plants and further tidying up. The gardener provided monthly invoices, a sample of which were produced.

67. Mr Adam pointed out that the garden was small and the planting was minimal. Nevertheless he confirmed that he did not regard the charge of £20 per fortnightly visit to be unreasonable and on that basis I allow the charges for garden maintenance in full.

External general maintenance

68. The costs included in the service charges for 2016, 2017 and 2018 under the heading "external general maintenance" were £95, £880 and £108. The budget figure for 2019 was £620. Most of these costs were incurred in clearing blocked drains. Mr Gray explained that inappropriate flushing of wipes by residents in the building frequently caused the drains to block necessitating visits by Ayyaz staff to clear the blockages. There was one such incident in 2016, three in 2017, one in 2018 and there had been a further one in 2019. On each occasion it had taken two men three hours or less to clear the blockages. Mr Gray explained that he had personally witnessed both the backing up of the drains and their overflowing outside the building and the work required to clear them. Mr Adam stated that he had not been aware of this problem before 2019 and that while he was not saying that the charges were fabricated "it seems a lot for five flats". Once again I have no doubt that the cost claimed was incurred and that the sums included in the service charges are recoverable in full. The only other items included for external maintenance were the sums of £68 in 2017 to replace the porch light fitting and the sum of £176 in 2019 to repair an external gutter using scaffolding. Mr Gray pointed out that the repair of the gutter would

have been considerably more expensive if an external contractor had been used instead of Ayyaz own staff and equipment. There is no reason not to allow these items.

Management and administration

69. The costs incurred for management and administration were £360 in 2016, £660 in 2017 and £1,088 in 2018. A sum of £730 had been budgeted in 2019. Mr Gray explained that he had initially budgeted for management time of 2 hours per month and that he charged his own time at £29 per hour. That was the basis of the charges in 2016 and 2017 but in 2018 he began to record the hours actually spent each month and applying the same rate produced a figure of £1,088. That represented a charge of less than £220 per flat which Mr Gray said was very much less than he was charged in the service charges of other flats he owned which were managed by professional property management companies. 2018 was the year in which the damage was caused to the ceiling of flat 1 necessitating the arrangement of repairs and it was also the year in which the dispute between Enterprise and Mr Adam first arose.

70. Mr Adam did not challenge the charge for management and administration on the basis of the time taken or the rate per hour but he did say that he did not think the management was very good and that he should not have to pay the full amount. He pointed out that the summary of rights and liabilities had not been included with the service charge demands and there had been errors in incorporating additional utility charges which turned out in some cases to be for individual flats.

71. There is no doubt that in some respects the management service provided by Enterprise has fallen below the level which would be expected of a professional managing agent. I doubt very much, however, whether a professional managing agent would be prepared to undertake management of this building at the rate accepted by Enterprise. I also accept Mr Gray's point that because of his personal involvement in sorting out maintenance issues and his preference not to use a management company or maintenance contractors, the modest expenditure on repairs and maintenance has been kept at a very economical charge. I am satisfied that the service provided by Enterprise was worth at least the sum charged for it in the annual accounts and I therefore allow those sums in full.

Contribution to reserves

72. The FTT allowed the annual contribution to reserves included in the service charge accounts in 2017 and 2018. It reduced the sum of £800 included for the 2019 budget to a figure of only £250. It is not clear why the FTT did this and I am satisfied that the sum of £800 is a reasonable contribution towards reserves for 2019.

Conclusion

73. In paragraph 88 of the FTT's decision it set out a table comprising each of the charges claimed and the amounts allowed. I allow in full the service charges claimed with the exception of the charges for heating and lighting in 2016 and 2017 which are reduced to £270 for each year. The total charges incurred by Enterprise and the proportion payable by Mr Adam at the rate of 20% (except in 2016 when he paid only one instalment rather than two) are as follows:

Year	Relevant cost	Contribution
2016	£2,840	£284
2017	£4,963	£992.60
2018	£4,206.76	£841.35
2019 (Estimate)	£4,924.60	£984.92

74. As the FTT explained, these sums represent the sums which were payable by Mr Adam in each year subject to compliance by Enterprise with the requirement of section 21B of the 1985 Act that a summary of tenant's rights and obligations be provided with the demand. The exact amount which remains to be paid will depend on what was actually paid by Mr Adam at the time, how much he has recouped since the FTT gave its decision, and whether any credits are due or balancing charges are payable. Neither party produced a reconciliation of sums payable and sums received. I very much hope that they will now be able to reach agreement on the balance which remains payable by Mr Adam. If they are unable to do so they may apply to this Tribunal within 28 days with details of any remaining accounting issues and I will quantify the sum now payable.

75. The FTT made an order under section 20C, 1985 Act and paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002 protecting Mr Adam from the inclusion of any costs incurred by Enterprise in these proceedings either as a relevant cost in any service charge to which he was liable to contribute or as an administration charge payable by him. Mr Gray said that it was not his intention to seek to recover any part of the costs of these proceedings from Mr Adam or any other leaseholder since he considered it would be unfair on the others. The only costs were his management time and the application and hearing fees payable to the Tribunal.

76. In view of the degree of success achieved in this appeal by Enterprise I am satisfied that the FTT's decision in relation to section 20C and paragraph 5A cannot stand. I set it aside with the rest of the FTT's decision. Nor do I think it is just and equitable to make any order in respect of the costs of the appeal. I am satisfied, however, that it is fair to direct that the fee paid by Enterprise when it filed its application for permission to appeal, £220, and the additional fee of £275 which it paid when it lodged the appeal should both be

reimbursed by Mr Adam. Although he made it clear that he only ever wanted to pay the reasonable sums due from him, and although there were failings on the part of Enterprise, the final outcome has been that the sums originally claimed by Enterprise have to a very substantial extent been confirmed. It does not seem to me to be unfair or unreasonable that the disbursements incurred in achieving that clarification should be payable by Mr Adam. I omit from that determination the fee of £110 which was payable by Mr Gray because he was a few days late in filing his application for permission to appeal. I therefore direct that the additional sum of £495 should be paid by Mr Adam to Mr Gray in respect of the Tribunal fees within 28 days.

Martin Rodger QC,
Deputy Chamber President

12 May 2020