FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case reference	**:**	**BIR/31UG/LIS/2021/0049**
Properties	**:**	**Flat 1, Burton Hall, Burton Hall Drive, Burton Lazars, Melton Mowbray, Leicestershire LE14 2UN**
Applicant	**:**	**Mr Michael Arnott**
Representative	**:**	**None**
Respondent	**:**	**Waterglen Ltd**
Representative	**:**	**Ms R Ackerley (counsel) instructed by JBLeitch, Solicitors**
Type of application	**:**	**Application for determination of liability to pay and reasonableness of service charges under sections 27A and 19 of the Landlord and Tenant Act 1985 ("the Act") and for orders under section 20C of the Act and under paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002.**
Tribunal member	**:**	**Judge C Goodall** **Mr R P Cammidge FRICS**
Date and place of hearing	**:**	**29 April 2022 by video / audio hearing**
Date of decision	**:**	**6 May 2022**

DECISION

Background

1. The Applicant is Mr Michael Arnott ("Mr Arnott"). The Respondent is Waterglen Ltd ("Waterglen"). The application concerns a property known as Burton Hall in Burton Lazards, Leicestershire ("the Property"). This is a three-storey residential property comprising around 19 or 20 flats, 17 or 18 of which are let on long leases. We were advised by the agent that the Property comprises a common entrance way and common passages and stairwells to the individual flats.

2. The application is for a determination of the payability of a service charge for costs incurred by Waterglen resulting from a notice ("the Notice") from Leicestershire Fire and Rescue Service ("LFRS"), which is the statutory fire authority for the area in which the Property is located. The Notice was dated 12 December 2019. Waterglen carried out the works required in the latter part of 2020, at a cost of £16,064.00. That sum has been charged to the service charge payable by the lessees of the Property.

3. Mr Arnott made a previous application to this Tribunal concerning the charge in 2020 under case number BIR/31UG/LIS/2020/0019. The Tribunal decision is dated 20 October 2020 ("the Previous Decision"). In his view, the Previous Decision left some issues undetermined, which he asks the Tribunal to determine in this application.

4. There was no inspection by the Tribunal. The Tribunal considered that this case was not suitable for determination on written representations and a hearing took place on 29 April 2022 by video / audio. Mr Arnott represented himself. Waterglen were represented by Ms R Ackerley of Counsel. This document sets out our decision and gives our reasons for it.

Facts

5. The Notice dated 12 December 2019 was from LFRS, under the authority of the Regulatory Reform (Fire Safety) Order 2005 ("the 2005 Order"), Waterglen was notified of 10 deficiencies in the fire protection system at the Property. They were required to take remedial action, including:

> "A fire alarm system should be installed in accordance with BS5839: 1 LD2 smoke detection coverage within the common areas and a heat detector in each flat within the room/lobby opening onto the escape route that is interlinked with the common areas. ("the Works")
>
> In addition BS5839: 6 LD3 smoke detection coverage in each flat that is <u>not</u> interlinked to the common alarm system within the room/lobby opening only the escape route."

6. Although the Tribunal did not inspect, it is not in dispute that the Property comprises of common areas, being an entrance, corridors, and staircases,

leading to the individual flats in the Property. The distinction between common areas and flats is important in this decision.

7. Waterglen decided to undertake the Works. Statutory consultation under section 20 Landlord and Tenant Act 1985 and the Service Charges (Consultation Requirements) (England) Regulations 2003 took place between March and June 2020. A Schedule 4 paragraph 1 notification of intended works was served on 10 March 2020. Quotes were obtained. What appears to be a paragraph 4 statement which we were told was served in July 2020 gave details of the quotes obtained for the Works. The cheapest quote was from Microlynx Ltd, who were then engaged to undertake the Works. Their final invoice, in October 2020, was for £13,060.00 plus VAT (as per quote), totalling £15,672.00. The managing agents charged management fees for managing the contract of £391.80, so the total cost of the Works was £16,063.80, which has been rounded by the Respondent to £16,064.00.

8. The Tribunal was provided by Waterglen with an apportionment of the cost of labour and equipment for works in the flats, which was £4,680 plus VAT, which equates to c35.8% of the quoted cost (excluding VAT). The Respondent's managing agent agreed when giving evidence that it would be reasonable to attribute some of the cost of the equipment installed in the common parts (including cost of installation) to the flats as the equipment in the flats would only work with the associated equipment in the common parts.

9. Ms Danielle Parker, an employee of the managing agents for the Property, gave evidence about the Works. She told us that an LD2 fire protection system had been installed comprising of a mains-controlled fire panel in a communal area wirelessly linked to a heat detector in each flat except for Mr Arnott's flat. There were problems with compartmentation (i.e. adequate fire resistant separation between different areas) in the Property, and advice in their fire risk assessment was that unless such a system was installed, it would be necessary to institute a waking watch at the Property to ensure fire safety.

10. Ms Parker said that the requirement for an LD3 individual smoke detector in each flat not linked to the LD2 system had not been complied with by Waterglen, (and no cost had therefore been included within the service charge) but she understood that the flat owners had each provided these for themselves.

11. The 2020 service charge accounts indicated that the cost of the Works, at £16,064, had been withdrawn from the reserve accrued to the service charge account. The cost was, curiously, not shown in the income and expense statement. It appears that no individual demands for each lessees' contribution to the Works were served.

12. Waterglen told us that Mr Arnott's contribution to the cost of the Works was £687.39, of which £441.07 was for costs or works in the communal area, and £246.32 was for his contribution to the costs of works in individual flats (though no work was carried out in his flat). We make no finding as to the precise sum paid by Mr Arnott for the Works. His lease requires him to pay 4.7% of the service charge costs, which would equate to £755.00. For the reasons accepted by Ms Parker in paragraph 8 above, we find Waterglen's apportionment of the communal area/flat costs unreliable. We do find that Mr Arnott has paid a sum of between £687.39 and £755.00 as his contribution towards the costs of the Works, some of which would have been for cost of installing equipment in the communal area and some for installing equipment in the flats where such equipment was installed.

13. There has been no challenge by Mr Arnott to the reasonableness of carrying out the Works, the quantum of the cost of the Works, to the consultation process, the procedure required to demand a service charge, nor the way in which the service charge accounts have been prepared.

The Lease

14. Mr Arnott's lease is dated 22 December 1989. It is a lease of Flat 1 at Burton Hall for a term of 199 years commencing on 24 June 1989. A fuller analysis appears in the Previous Decision. For the purposes of this decision, the key provisions are set out below.

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

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

17. Those services include:

    a. An obligation, at sub-paragraph 12:

       "Without prejudice to the foregoing to do or cause to be done all such works installations acts matters and things as in its [i.e. Waterglen's] sole discretion shall be deemed necessary for the proper maintenance safety and administration of the Building and the Lessor's Property."

    b. In sub-paragraph 13, a right for the Lessor "to make provision for the payment of all legal and other costs and expenses incurred".

    c. In paragraph 14(a) an entitlement to collect contributions towards a reserve fund for expenditure arising only once during the term, or expenditure which is likely to arise at intervals of more than one year.

18. "Building" is defined in the lease as:

> ""The Building" means the building or buildings together known as Burton Hall Burton Lazards Melton Mowbray Leicestershire which is included in the Lessor's Property and is shown on the Plan"

19. The plan attached to the lease clearly shows the whole of the building on the Plan, which includes the flats.

The Previous Decision

20. Readers are referred to the text of the Previous Decision for a full understanding of that decision and the reasons for it, but it is necessary to summarise it to understand our reasons for this decision. The Previous Decision was made on the basis of written representations without a hearing.

21. The Previous Decision concerned an application in 2020 at the point that estimates for the Works had been obtained, so the overall likely cost was known, but works had not been carried out. Mr Arnott's challenge in the Previous Decision was to the recoverability of the cost of compliance with the LFRS letter under the lease, as Mr Arnott disputed the legal obligations the Notice imposed upon Waterglen. The issue was the correct interpretation of the lease with regard to recoverability as a service charge cost of the Works. In paragraph 21 of the Previous Decision, the Tribunal identified Mr Arnott's challenge in his own words as:

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

22. Waterglen had argued the costs were recoverable under a direct covenant from each lessee individually (clause 3(2)(d) of the lease), or alternatively as a service charge cost under paragraph 12 of the Fifth Schedule.

23. The Tribunal determined that:

    a. Waterglen were required to comply with the Notice;

    b. Mr Arnott could not be compelled to allow access to his flat for works in connection with compliance with the Notice, as the Regulatory Reform (Fire Safety) Order 2005 did not apply to domestic premises;

    c. The cost of such works as could be performed by Waterglen were recoverable as service charge costs under paragraph 12 of the Fifth Schedule of the lease. The Previous Decision must be taken to

indicate that these costs would be reasonably incurred. In paragraph 44 of the Previous Decision, the Tribunal said:

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

d. The absolute discretion given to Waterglen in paragraph 12 of the Fifth Schedule to determine whether works were necessary was void; the paragraph was amenable to a determination by a tribunal that works were not necessary, but there was no such determination by the tribunal in the Previous Decision;

e. The reserve fund could be used for payment of the cost of the Works.

Mr Arnott's case in this application

24. Mr Arnott's case is that there is no legal basis for charging the expenditure of £16,064.00 on the Works to the service charge payers, and in particular for using the service charge reserves that have been built up for the payment of that sum.

25. The principal reason Mr Arnott says using service charge payers' funds is unlawful is that in his view there is no provision in the lease allowing recovery of service charge expenditure for works carried out in the individual flats. He did not in fact dispute that works in the common parts of the Property can be funded from the service charge.

26. In Mr Arnott's view, it makes no difference that lessees have consented to works being carried out in their flats; his case is that for the Works there is no contractual or statutory right of access to the flats, and so service charge payers' funds cannot be used to carry out works in them.

27. The consequence of Mr Arnott's argument, he says, is that only the cost of the common parts works should be added to the service charge. The balance could be funded by the freeholder, or by the individual lessees if they wish. If they did, reserves should not have been used to discharge that part of the costs incurred.

28. Mr Arnott suggested that the apportionment between flats works and common parts works should be 50/50, so that only £8,032.00 of service charge payers reserves should be used. He agreed that this was simply an educated estimate rather than being based on any scientific calculation.

29. Mr Arnott also challenged the decision to install the particular system that was installed on the basis that the LFRS letter was only notification of deficiencies and was not an enforcement notice. Additionally, he said there

was no need for the Fire Works to have an interlinking system between the common parts and the flats. Finally, he said allowing service charge monies to be used for works in the flats was in breach of the landlord's covenant for quiet enjoyment.

Waterglen's case

30. Waterglen's case is that the cost of the Works is recoverable under the service charge provisions in the lease, and the reserve fund can be used for payment.

31. It relies principally on paragraph 12 of the Fifth Schedule.

32. It also points out that the Tribunal determined the matter in the Previous Decision, and asserts that the application should be struck out under Rule 9 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013.

Discussion and determination

33. There is a powerful case for deciding that the issue raised by Mr Arnott in this application had already been determined in the Previous Decision. Paragraph 44 of the decision spelt out that Waterglen had to comply with the Notice in relation to communal areas and the flats where lessees had consented to having equipment installed. The determination in the Previous Decision that these costs fell within paragraph 12 of the Fifth Schedule is arguably determinative of the new question that Mr Arnott has raised.

34. We do however recognise that Mr Arnott has raised a new point concerning whether a service charge cost can be incurred for works in a flat where the lessee has consented to those works being carried out, which was not argued in the Previous Decision (though in paragraph 44 we think it was determined) and we will address it.

35. Mr Arnott is correct to point out that sometimes works in a flat cannot be charged to service charge payers. An example is maintenance work to the internal fabric of a flat where the lessee, rather than the landlord has covenanted to maintain.

36. Mr Arnott is also correct in asserting that if a lessee refuses to allow access for the landlord to carry out works in a flat, absent of a statutory obligation or an express or implied right to access, the landlord may not enter, so the costs would not be service charge costs.

37. But in our view he is incorrect in his assertion that where works are hybrid works, which need to be carried out both in the communal areas and in the flats to have any efficacy, and a lessee allows access, the law prevents the costs of those works from being charged to the service charge.

38. In our view, whether a cost can be charged to a service charge payer depends on the wording of the lease that permits that cost to be a service charge cost. Paragraph 12 of the Fifth Schedule is very clear. The cost of any works or installation deemed necessary for the proper safety of the Building is, in our view, within the service charge.

39. The appropriate statutory authority considered it necessary to carry out the Works and served a statutory notice requiring them to be so. We think it is artificial to draw a distinction between communal area works and flat works; the system was an integrated system requiring works in both areas. It was, in our view one set of works, not two.

40. We have carefully considered the definition of "Building" in the lease. The plan attached to the lease, which is determinative of the meaning of that word, clearly shows that the definition applies to the whole Property, including the flats.

41. Our view is therefore that carrying out the Works was permitted by paragraph 12, as they were "works or installations necessary for the proper … safety … of the Building". Our determination is therefore that the sum of £16,064 was properly payable by service charge payers at the Property in the 2020 service charge year, and Mr Arnott is responsible for his share.

42. We reject the additional arguments put by Mr Arnott which are summarised in paragraph 29 above. The Notice was a statutory notice which Waterglen was obliged to comply with. There is no need for a statutory authority to go to the stage of seeking to enforce a notice before an obligation to comply with the notice arises; the Notice itself created the obligation.

43. Our view is that it was essential for an interlinking system to be installed. It was required by the Notice and it is the industry standard for adequate fire protection.

44. A covenant for quiet enjoyment is not breached if a lessee allows access to his or her flat.

Costs

45. Mr Arnott has applied for two orders to protect himself from liability to pay costs arising from this application.

Section 20C Landlord and Tenant Act 1985

46. Mr Arnott argued that he had been directed to make this second application by paragraph 57 of the Previous Decision, so it was reasonable to bring it. That paragraph said:

> "We also determine that clauses 3(2)(a) – (d) provide an alternative contractual route to recovery of the costs of the fire safety works under

the lease, as we consider that these works are works required by an enactment. Using this route however would take the costs out of the service charge regime. We doubt that use of the reserve fund would be permitted using this route, but neither party made any submissions on the effect of using the direct covenant route rather than the service charge route, and if the parties find themselves failing to agree whether service charge funds could be used if the demand made was on the basis of clause 3(2), a further application to the Tribunal would be required."

47. With respect to Mr Arnott, he has misinterpreted paragraph 57, which concerned potential use of the reserve fund in the event that Waterglen charged the cost of the Works under clause 3(2) of the lease. They didn't.

48. Mr Arnott also disputed that the lease allowed recovery of the legal costs of these proceedings citing the cases of *Geyfords Ltd v O'Sullivan & Ors [2015] UKUT 683 ("Geyford") and Kensquare Ltd v Boakye EWCA Civ 1725 ("Kensquare")*. He did not refer us to any part of the discussion in these decisions.

49. In *Geyford*, the issue was whether the words "All other expenses (if any) incurred by the Lessors or their managing agents in and about the maintenance and proper and convenient management and running of the Development" were wide enough to allow recovery of legal costs in proceedings between the lessor and the lessees.

50. In *Kensquare*, the wording was "the cost of employing such professional advisers and agents as shall be reasonably required in connection with the management of the Building"

51. In both cases, the decisions were that these words were not sufficiently clear in identifying that legal costs, or costs of litigation, were included within the words used. Lord Justice Newey, in *Kensquare,* was of the view that failure to mention lawyers or legal proceedings indicated the wording referred to management services rather than litigation.

52. The wording in Mr Arnott's lease does specifically refer to legal costs (see paragraph 17b above). *Geyford* and *Kensquare* do not assist Mr Arnott. The Tribunal rejects Mr Arnott's argument that the lease does not allow recovery of the costs of these proceedings.

53. The Tribunal's discretion under section 20C is to make such order as it considers just and equitable in the circumstances. We must have regard to the fact that Mr Arnott has failed to persuade us to find in his favour in this application. In the event that Waterglen do seek to recover costs via the service charge, we consider it would be unjust for Mr Arnott to be relieved of responsibility to contribute his share. We make no order under section 20C. This does not mean that we consider the costs of which we were informed prior to the hearing to be reasonable. We have no view on that, and lessees may challenge the quantum of those costs in the normal way.

Paragraph 5A of Schedule 11 of the Commonhold and Leasehold Reform Act 2002

54. Where a lessor seeks all of the costs of proceedings under a direct covenant by a lessee to pay them, the Tribunal may order that those costs be reduced or extinguished. Ms Ackerley told us she was instructed that Waterglen would not seek costs directly from Mr Arnott under the lease, and accordingly we make no order.

Fees

55. Mr Arnott has applied for an order under Rule 13(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 that Waterglen should be ordered to reimburse the application fee of £100.00 and the hearing fee of £200.00 that he paid. We decline to make the order requested. It would not be fair for Waterglen to bear this cost as they have succeeded in this case.

Appeal

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

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