FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**CAM/12UB/LSC/2021/0061**
HMCTS	**:**	**Paper**
Property	**:**	**117-131 (Odds) The Cherry Building and 133-171 (Odds), Addenbrookes Road, Cambridge CB2 9BA**
Applicants (Tenants)	**:**	**The Long Leaseholders identified in the Schedule to the Application**
Representative	**:**	**Dr Frank Gommer**
Respondent (Landlord):		**RMB 102 Ltd**
Representative	**:**	**Ms Rebecca Ackerley of Counsel instructed by JB Leitch, Solicitors**
Type of Application	**:**	**Application for Review or Permission to Appeal**
Tribunal	**:**	**Judge J R Morris** **Mr G Smith MRICS FAAV REV**
Date of Original Decision:		**4th March 2022**
Date of Application	**:**	**29th April 2022 (Extension of time granted)**
Date of Decision	**:**	**16th May 2022**

DECISION

Decision of the Tribunal

1. The Tribunal has decided not to review its Decision and refuses permission to appeal to the Upper Tribunal because it is of the opinion that there is no realistic prospect of a successful appeal against its Decision.

2. In accordance with section 11 of the Tribunals, Courts and Enforcement Act 2007 and rule 21 of the Tribunal Procedure (Upper Tribunal) (Lands Chamber) Rules 2010, the applicant / respondent may make further application for permission to appeal to the Upper Tribunal (Lands Chamber). Such application must be made in writing and received by the Upper Tribunal (Lands Chamber) no later than 14 days after the date on which the First-tier Tribunal sent notice of this refusal to the party applying for permission to appeal. Where possible, you should send your application for permission to appeal **by email** to Lands@justice.gov.uk, as this will enable the Upper Tribunal (Lands Chamber) to deal with it more efficiently.

3. Alternatively, the Upper Tribunal (Lands Chamber) may be contacted at: 5th Floor, Rolls Building, 7 Rolls Buildings, Fetter Lane, London EC4A 1NL (tel: 020 7612 9710).

Reason for the Decision

4. The reason for the decision is that the Tribunal had considered and taken into account all of the points now raised by the Applicant, when reaching its original decision.

5. The original Tribunal's decision was based on the evidence before it and the applicant has raised no legal arguments in support of the application for permission to appeal.

6. For the benefit of the parties and of the Upper Tribunal (Lands Chamber) (assuming that further application for permission to appeal is made), the Tribunal has set out its comments on the specific points raised by the applicant in the application for permission to appeal, in the appendix attached.

Judge J R Morris

APPENDIX TO THE DECISION
REFUSING PERMISSION TO APPEAL

For the benefit of the parties and of the Upper Tribunal (Lands Chamber), the Tribunal records below its comments on the grounds of appeal. References in square brackets are to those paragraphs in the main body of the original Tribunal decision.

Original Application and Decision

1. On 28th September 2021 the Applicants applied for a determination under section 27A of the Landlord and Tenant Act 1985 as to whether the service charges incurred for qualifying works ("the Works") were reasonable and payable.

2. They also applied for Orders under section 20C of the Landlord and Tenant Act 1985 and paragraph 5A of Schedule 11 of the Commonhold and Leasehold Reform Act 2002 which are not in issue in respect of this Application.

3. An order under Rule 13 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 was also applied for and is in issue in respect of this Application.

4. The Works were for the instruction of a specialist flue contractor, namely Pure Heating and Plumbing ("PHP"), to attend the Property and carry out the removal of the current flue system and install a new flue system.

5. It was apparent that an important part of the Applicants' objection to the cost of the Works was that they were only necessary due to defects for which Countryside Cambridge One Limited and Countryside Cambridge Two Limited and Countryside Properties (UK) ("the Developer") were liable. The Applicants requested that Countryside Cambridge One Limited and Countryside Cambridge Two Limited and Countryside Properties (UK) be made a party of these proceedings which the Procedural Judge rejected as they were not the Freeholder or Landlord. However, the Judge agreed that the argument that the Developer should have been asked to remedy the defects could be raised and with regard to the Applicant's contention, the Developer was ordered to produce any documents in its possession in respect of the 2019 works to the flues, in particular the recommissioning certificate and any report. A report and specification by AWA Building Services Consultants was provided.

6. The freehold title was transferred and the reversion to the long leases in the Property was assigned to the Respondent, RMB 102 Ltd, on 26th July 2019.

7. As at 2018 APT Property Management ("APT") was the managing agent for the Property. On 1st February 2019 Respondent appointed Flaxfields Ltd ("Flaxfields") as its managing agent for the Property to carry out all of the Respondent's obligations and duties under the Leases, ensure that all statutory requirements had been complied with and collect the service charges

that have fallen due. On 1st September 2021 Flaxfields' appointment ceased, and Premier Estates ("Premier") were appointed in Flaxfields' place.

8. The Tribunal determined that the costs of the Works were reasonable and payable by the Applicants to the Respondent under the Service Charge.

9. The Tribunal does not make an Order under Rule 13 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013.

The Present Application

10. The Applicants seek a review or permission to appeal the Tribunal's decision dated 4th March 2022 on the ground that the Tribunal failed to take account of the failure by the Respondent Landlord to carry out proper maintenance which amounted to historical negligence. The Applicants are of the view that the need to replace the flues is due to the Landlord's failure to maintain them. As a result, the cost of replacing the flues should be met by the Respondent Landlord. The Applicants make the following submissions in support of their ground which they say the Tribunal did not take into account.

Submissions in Support of the Ground to Review or Appeal

Submission 1

11. The Landlord did not commission appropriate flue maintenance for years. Reference was made to paragraphs 23, 24 and 41 of the Present Application which stated in summary:

    23. The Maintenance agreements for the heating system for the time between 2013 and 2018 with CNC heating do not mention the flue system and are similar to the agreement with PHP provided in the bundle. A maintenance quote from Huttie was provided by the landlord which also did not include the flue maintenance or inspection.

    24. & 41. A statement from the landlord's own previous managing agents, APT, was provided and clearly stated their observation that the state of the flue (and degradation of the heating system) is most likely from neglect:
        - Contractor has been paid for works that were not carried out.
        - CNC is a good example of this. (NB: CNC is the previous service provider for plant room)
        - Plant room was not serviced for the best part of a year, the equipment must be serviced yearly!
        - Leaking flue (see picture) why was this never noted and addressed?"

Tribunal's Response to Submission 1

12. As stated at [88] of the Decision, no evidence was adduced either in respect of the Original Application or the Present Application with regard to the

contracts for flue maintenance between 2013 and 2018, such as copies of the agreement with CNC, and whether the maintenance or lack of it during this period led to the need to replace the flues in 2021.

Submission 2

13. The Landlord did not maintain the flue when advised to do so. Reference was made to paragraph 4 of the Application which stated in summary:

    4. PHP and their advisers did state that there were serious issues which would require substantial repair. The reports provided in the disclosure by Countryside do show a very serious concern which threatens the system to be shut down due to the leaks, identified by rusting cylinders.

Tribunal's Response to Submission 2

14. The Tribunal considered this point at [90]

    "Apart from the 2018 report the previous maintenance invoices dated 29th March 2019, 3rd September 2019, 26th March 2020 and 16th October 2020, were provided which itemised what work had been undertaken and reported on the condition of the system. The 16th October 2020 maintenance invoice recommended the replacement of the flue with a stainless-steel version and the next maintenance visit on 7th April 2021 informed Flaxfields that the flue system had failed and required replacement."

15. The Landlord engaged PHP to carry out the maintenance of the heating installation including the flues as indicated by the maintenance invoices. Only the PHP report on the maintenance invoice dated 16th October 2020 and 7th April 2021 referred to work required to the flue and this was that the flue should be replaced.

Submission 3

16. The Landlord did not perform the appropriate repairs for years. Reference was made to paragraphs 2, 3 and 5 of the Application which stated in summary:

    2. The Developer did not rectify the leaking flue, but merely ordered a 'clean' of the installation in April 2019. This has been confirmed by evidence provided by the landlord when requesting information from A1 Flues.

    3. Countryside did instruct the initial installation company to rectify the issue. However, the works performed were only for a clean and evidently not addressing the leaks: "We can offer a clean and inspection as attached quote"

5. It was confirmed by Mr Hunt during his witness statement, that Countryside accepted the leaking flue issue in 2018 as their fault to repair.

Tribunal's Response to Submission 3

17. The recommissioning including any work required regarding the flue was the responsibility of the Developer. The recommissioning was an agreement between the Applicants, Dr Gommer in particular, and the Developer, not the Respondent Landlord as determined at [77] to [80] of the Decision

Submission 4

18. The Applicants submitted that the Landlord did not inspect the quality of the minimal work that they did commission. Reference was made to paragraphs 7, 11, 12 and 13 of the Application which stated in summary:

7. The quote did suggest that "all coloured residue build up on steel will be cleaned" which is evidently not the case when comparing photos from 2019 and 2021. This would have been evident if the property managers had inspected the works as part of normal due diligence.

11., 12., & 13. In support of the lack of checks the Applicant stated:

- Mr Hunt confirmed during the hearing that Countryside did not perform any checks on the works conducted.
- Mr Coles confirmed during the hearing that Flaxfields did not check on the work either, and relied fully on PHP for checks.
- Mr Holdings from PHP did confirm during the hearing that checks of the flue system are not performed by PHP, and that they only do a visual inspection inside the plant room of easily visible parts.

Tribunal's Response to Submission 4

19. As stated with reference to Point 3, the recommissioning including any work required regarding the flue was the responsibility of the Developer. The recommissioning was an agreement between the Applicants, Dr Gommer in particular, and the Developer, not the Respondent Landlord. Any checking under the recommissioning agreement was a matter between the Developer and Dr Gommer as determined at [74] to [80] of the Decision.

Submission 5

20. The Landlord did not comply with lease covenants. Reference was made to paragraphs 18, 19, 20, 21 and 22 of the Application which stated:

18. The Landlord's covenants in the lease provide:

Schedule 5 -Services,
Part 1 Building Communal Area Services (Part A)

1. To keep the Building Communal Areas [which includes the Energy Centre, Heat Installations and the Heat Interface Unit] in good repair and condition (…)

7. To keep the Energy Centre and the plant and machinery housed within the Energy Centre and the Heat Installations serving the Premises [also known as the Property] in good repair order and condition including the renewal and replacement of all worn or damaged parts" and

Part 3 Block Communal Area Services (Part C)
3. To keep all Conduits… in good repair and condition."

19. The arranged repairs have not been carried out as required and the required good condition of the flue has not been ensured.

20. Mr Coles provided in his witness statement "After the completion of the works, I had a report done and this stated that the flues were still leaking, giving me the impression that the leaks had never fully been repaired." This clearly demonstrated that the Landlord accepted that the agreed flue repair has never been carried out. If the landlord or its property managers had checked the works after supposedly being completed or had merely asked the contractors what works have been done (as part of the landlord's managing covenant) it would have been evident that just cleaning the flue was insufficient and inadequate.

21. This statement was repeated in an email to PHP by Mr Coles: "This isn't something new and something that has been there since your management with APT".

22. If the Landlord does not have the power to hold the Developer responsible, then they would have needed to inform residents of the situation.

Tribunal's Response to Submission 5

21. As stated in [81] to [87] of the Decision, there had been ongoing problems with the flues. The argument of the Applicants in the Original Application focused on the Developer being liable for the cost of the new flue system installed in 2021 for which the Applicants were being asked to pay.

Submission 6

22. It was independently verified that the resulting state of the flue leading to the need for replacement was the result of neglect (24, 33)

24. Residents provided a statement from the Landlord's own previous managing agents, APT, clearly stating their observation that the state of

the flue (and degradation of the heating system) is most likely from neglect.

33. Mr Coles from Flaxfields provided evidence of leaking flue pictures (only of inside the plant and not of the leaks inside the risers) claiming that these were from 2020 only. However, based on the evidence provided by Countryside, residents have demonstrated that the photos showing the leak inside the plant room were a mixture from photos taken in 2018 (before the accepted repair) and 2020 (identifying the need for full replacement), showing the exact same poor state of the flue. This highlights that the same problem was known for years and had not been resolved.

Tribunal's Response to Submission 6

23. The Tribunal considered the evidence, its findings and Decision with regard to the condition of the flues prior to their replacement.

24. The Tribunal found at [74] of its Decision that, from the evidence of the correspondence between the Managing agents, the Developer and the contractors, recounted at [29], the flues were found to be leaking in 2018.

25. In 2018 PHP, the maintenance contractor, attributed the leaks to defective installation which was accepted by the Developer whose contractors advised cleaning as a means of remediation [74] and [76].

26. The Applicants submitted that the flues should have been part of the recommissioning in 2019 to 2020 [51] ff. Whether or not this was the case no evidence was adduced to support the need to recommission the boilers was due to a lack of maintenance of either the boilers or the flues [89].

27. The flues were considered to be of a material which is not in accordance with current standards which would require a stainless-steel flue for a condensing boiler. This was recognised by the contractors PHP on 16th October 2020 recorded at [59] and by Flues UK Ltd state that the flue that was originally installed is a product that they do not recommend for use with condensing appliances due to the jointing method recorded at [57] referred to at [82] and [83] by the Tribunal.

28. The Tribunal noted [84] a report by contractor, Huttie, dated 7th June 2021, that at least some of the problems with "the boiler flue would have been prevented if the condensate traps had been cleaned and free flowing allowing the condensate to be removed quickly from the system rather than flooding sections of the flue. If the flue is not in good condition that can affect the performance of the boiler. If the boiler is not working efficiently it may start to produce high levels of harmful carbon monoxide".

29. The Tribunal went on to state [85]:
"From this report two points are noted: a) to reduce the build-up of condensate and resultant corrosion to the flue, the traps need to be kept clean;

b) if the flue is in poor condition the boiler may produce high levels of carbon monoxide. The findings of this report were not addressed by either party other than to say that it showed the flues were leaking carbon monoxide. The report did not suggest that the flue did not need replacement."

30. The greatest concern from the report was the build-up of condensate in the flue, which not only causes corrosion but may affect the operation of the boiler causing an increase in carbon monoxide [92].

31. The Tribunal referred again to the Huttie Report dated 7th June 2021 at [91] stating "This suggests that with different maintenance the Works would not have been necessary. If this were the case the fault would lie with PHP as the maintenance contractors. However, if the Applicants were to have submitted this the Tribunal would have needed more cogent evidence than the report."

32. The Tribunal, having examined the evidence and its findings in the Decision with regard to the condition of the flues prior to their replacement, is of the opinion that there were several possible reasons for the need to replace the flues:
a) Defective installation by the Developer;
b) Inappropriate remedial action under the auspices of the Developer;
c) Inappropriate construction by current standards by the Developer;
d) Failure to keep the condensate traps clean and free flowing in the course of maintenance; and
e) Deterioration due to the age of the installation.

33. The Tribunal makes no findings as to whether a) the installation was defective, b) the remedial action was inappropriate or c) that the construction of the flue was inappropriate, as these are disputes between the Applicants and the Developer possibly with the involvement of the NHBC (National House Builders Confederation) Buildmark Warranty [75].

34. Although the Developer may have been the Landlord until 2013 it is not any longer and therefore alleged failings of the Developer are not those of the Landlord. Dr Gommer, the Applicant's Representative, on his own without any other Leaseholders or the Management Company, made a claim against the Developer in the County Court with regard to the heating system and its failure and an out of court settlement (the Agreement) was reached. At the hearing the Managing Agent made it clear that it was unaware of anything contained within the Agreement between the developer and Dr Gommer. Similarly, the Tribunal was not aware of the terms of the Agreement made between Dr Gommer and the Developer. Neither Dr Gommer nor the Developer divulged the terms of the Agreement other than it was for the complete recommissioning of the heating system. It was not clear to what extent the flues were included in this work. Dr Gommer argued that the flues were integral to the heating system which the Tribunal would not necessarily disagree with. However, the fact the Developer did not replace the leaking flues, but merely ordered a clean of the installation either as part of repairs or the recommissioning is a matter between Dr Gommer and the Developer not

the current Landlord and the Managing Agent. Any alleged shortcomings by the Developer in fulfilling the Agreement is for the County Court to consider.

35. With regard to d) the Huttie report dated 7th June 2021 stated that the items on the boiler flue would have been prevented if the condensate traps had been cleaned and free flowing. However, no information regarding the traps, their condition, the cleaning required, the extent of any condensate flooding etc was provided. The Applicants submit that maintenance contractors PHP only carried out a visual inspection and did not carry out any cleaning or maintenance work on the flues. However, with regard to the maintenance so far as the Landlord was concerned: 1) there was a flue clean in 2019 as recommended by the Developer's contractor, following the discovery of the leaks in 2018, 2) there was a recommission of the boiler in 2019 by the Developer in 2019 to 2020 and 3) maintenance work carried out by PHP in March 2019, September 2019, March 2020 and October 2020 when no issues regarding the flue were found. On the face of it so far as the Respondent Landlord was concerned the boilers and flues were being maintained.

36. The Tribunal found that the Huttie Report dated 7th June 2021, the statement made by the then Managing Agent, APT, in the email of 21st January 2021 and other emails of the Managing Agents, Flaxfields raised the possibility of shortcomings in the maintenance of the flues which may have been a contributory factor to their needing to be replaced. However, the onus is on the Applicants to show that, notwithstanding reasons a), b) and c) which were the Developer's responsibility and e) which is fair wear and tear, on the balance of probabilities, the replacement of the flues was due to the Respondent Landlord failing to ensure they were maintained.

37. The Tribunal found that the Applicants had not discharged that burden [93].

38. The Tribunal's Original Decision was based on the evidence and submissions before it and the Respondent has raised no new legal arguments or additional evidence in support of the application for review or permission to appeal. The Tribunal has decided not to review its Original Decision and refuses permission to appeal to the Upper Tribunal.

Submission re Rule 13 Application

39. On the understanding that the Tribunal would review the Decision in favour of the Applicants following their submissions the Applicants applied to have their Application under Rule 13 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 reconsidered and an order made for the Respondent Landlord to pay their costs.

Tribunal's Response to Rule 13 Application

40. The Tribunal has determined not to review or grant permission to appeal and therefore has not reconsidered its decision not to make an order under Rule 13.