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RESIDENTIAL PROPERTY TRIBUNAL

LEASEHOLD VALUATION TRIBUNAL

Reference: LVT/00404/05/21

In the Matter of Flat 4 Wellington Court, Wellington Street, Cardiff CF11 9BL

And in the Matter of a transfer from the Cardiff County Court under section 176A of the Commonhold and Leasehold Reform Act 2002

Applicant:	**Araford Limited**
Applicant's Representatives:	**Heather Scott-Cook**
Respondent:	**Mr. Darren Gay**
Tribunal:	**Colin Green (Legal Chair)** **Andrew Lewis FRICS (Surveyor Member)** **Eifion Jones (Lay Member)**
Date of Hearing:	**15 September 2021**

DECISION

The sum of £1,433.07 is not due from the Respondent to the Applicant by way of service charge.

REASONS

Preliminary

1. This matter arises out proceedings brought by the Applicant ("Araford") against the Respondent ("Mr. Gay") in the Cardiff County Court, Claim Number 152MC640, seeking payment of £1,433.07 in respect of alleged service charge arrears. In his response to the claim Mr. Gay accepted only the sum of £834.40 as due. On 5 October 2020, an order was made by the County Court pursuant to s. 176A of the Commonhold and Leasehold Reform Act 2002, transferring to this Tribunal the determination of the service charge issue.

2. The Tribunal's jurisdiction in that regard is conferred by section 27A of the Landlord and Tenant Act 1985 (see Appendix) and paragraph 5 of Part 1 of Schedule 11 to the 2002 Act.

3. Following the Tribunal's directions of 18 May 2021 ("the Directions") statements of the parties' respective cases were served, together with witness statements, and a Scott Schedule. The hearing took place on 16 September 2021 using a Virtual Hearing

Room. Araford was represented by Heather Scott-Cook ("Mrs. Scott-Cook") – a director, shareholder, and lease owner – and the Respondent ("Mr. Gay") – the owner of flat 4, Wellington Court, a shareholder in Araford but no longer a director – appeared in person. During the hearing, the parties confirmed their statements, qualified where appropriate, and answered questions asked by each other and members of the Tribunal. Their evidence will be referred to where necessary. After the hearing, on 28 September, the premises were inspected by Andrew Lewis, the surveyor member, following which the panel held their deliberations on 1 October 2021.

The Lease

4. Before considering the sum claimed by Araford it is necessary to set out the relevant provisions of the underlease ("the Lease"). Flat 4 is on the second floor of Wellington Court, a purpose-built block of flats consisting of three storeys and nine flats. The lease provided at the hearing was in respect of Flat 9 but for present purposes its terms will be identical to the lease of Flat 4. By the Lease, Araford demised Flat 4 for a term of 99 years (less 10 days) from 25 October 1972. Mr. Gay is the current assignee of the Lease.

5. By clause (3)(iv) and (v) of the Lease, the Tenant covenanted with the Lessor (Araford) as follows:

> *"(iv) to pay to the Lessor in each year one equal ninth part of the cost (calculated as provided in the Fifth Schedule hereto) of providing for the services and other things specified in the Sixth Schedule hereto such payment to be made at the times and in the manner specified in the said Fifth Schedule.*
> *(v) to pay to the Lessor in each year by four equal quarterly payments (and so in proportion for any less period than a quarter) …to be made in advance on the four usual quarter days in each year an initial service charge of £25. such sum to be credited to the Tenant against his liability under paragraph iv of this clause and the Fifth Schedule and in the manner specified in such Schedule."*

Unsurprisingly, over the years quarterly payments have been replaced with monthly payments which during the period under consideration have been agreed at £30.00 then £50.00 per month, with Mr. Gay making a voluntary increased contribution of £80.00 per month since November 2020.

6. The Fifth Schedule to the Lease provides as follows:

> *"1. The cost of services and other things for each year shall be actual cost as certified by the auditors of the Lessor of providing the services and other things specified in the sixth Schedule to this Lease*
> *2. The year for the purpose of certifying the cost shall run from the 25th day of June to the 24th day of June ("hereinafter called "the accounting period")*

3. If the cost to the Lessor in any accounting period of 12 months of carrying out its obligations under the Sixth Schedule to this Lease as certified under paragraph 1 of this Schedule ("hereinafter called "the annual cost") exceeds the aggregate amount payable by all the tenants of all the flats in the Building by way of initial service charges (hereinafter called "the annual contribution") Together with any unexpended surpluses as hereinafter mentioned and a certificate of the amount by which the annual cost exceeds the total of the annual contribution and unexpended surpluses be served upon the Tenant by the Lessor or its agent then the Tenant shall pay to the Lessor within 28 days of the service of such certificate (which shall be a copy of that signed by the auditors of the Lessor) a ninth part (hereinafter called "the excess contribution") of the amount shown therein and if in any accounting period the annual cost is less than the annual contribution the difference (being the unexpended surplus) shall be accumulated by the Lessor to be applied towards the annual cost in future year.

4. As part of the cost of services herein provided for the lessor may make provision for an annual contribution to a redecoration reserve such reserve to be utilised in discharging the obligations of the Lessor under Clause One of the Sixth Schedule hereto"

At some point the accounting period changed to the tax year: 6 April to 5 April.

7. The Sixth Schedule provides:

"1. At all times during the said term to keep the external walls and load-bearing walls and the girders and timbers and roof and exterior of the Building (including drains gutters and external pipes) and the forecourt and surround and such boundary walls and fences as belong to the Lessor and all staircases passages and parts used in common by the tenants of the flats in good and substantial repair and in clean and proper order and condition and properly painted decorated or treated and also to keep the structure of the Building and all the upper parts of the Building and all water tanks and cisterns electric wires cables meters and gas and water pipes and meters and drains and soakaways not forming part of the demised premises in good and substantial order and condition and the gardens in the forecourt and at the back of the Building properly tended

2. To paint with three coats at least of good quality paint of suitable colours in a proper and workmanlike manner in the year One thousand nine hundred and Seventy Six and afterwards in every third year of the term and also during the last year thereof all the outside wood metal stucco and cement work of the demised premises and any additions thereto and other external parts usually painted.

3. [Provision for insurance]

4. To do all such acts matters and things as may in the Lessors reasonable discretion be necessary or advisable for the proper maintenance or administration of the demised premises and of the

Building including in particular (but without prejudice to the generality of the forgoing) the performance of all acts matters and things and the payment of all expenses required or desirable in running and managing the Lessor company and the appointment of managing or other agents company officers solicitors surveyors and accountants and the payment of their proper fees in connection with the supervision and performance of the Lessors covenants contained in this Lease and the provision of the certificates mentioned in the Fifth Schedule to this Lease"

8. Clause (4)(ii) of the Lease contains the following covenant by Araford:

"Subject to the payment being made by the Tenant in manner provided by paragraphs (iv) and (v) of Clause 3 hereof and the Fifth Schedule hereto to perform the obligations specified in the Sixth Schedule hereto"

9. Each of the nine flat owners is also a shareholder of Araford (clause (4)(iii) of the Lease) whose officers are drawn from the flat owners/shareholders from time to time.

10. In summary therefore, under the Lease, modified as aforesaid, the tenant is obliged to make monthly payments (as varied in amount by agreement from time to time) and if necessary to make an excess contribution after the end of each accounting period to the extent that the actual cost as certified by the Lessor's auditors exceeds the annual contribution for that period, such payment to be made within 28 days of service of the certificate.

The demand

11. In the present case, an email sent to all the tenants by Mrs. Scott-Cook on 1 May 2020 included the following:

"In terms of costing, the works total will be £16,320 inclusive of VAT. Therefore, based on 9 flats the cost equates to £1812.33 per owner.
In order to meet the necessary deadlines, the payment would need to be made within the next 21 days. However, should anyone wish to discuss a payment plan then this would need to be agreed with the next 14 days."

12. There followed an email dated 18 June 2020, headed "Revised Quote", confirming that the works in question had commenced (they will be addressed below), and which concludes in the following terms:

"I am pleased to confirm that we have been able to secure a cost reduction and on this basis Ian Solomon will carry out the works at Wellington Court. Please see attached the scope of the works involved, together with the associated, detailed, pricing. However, in summary the work will cost £12,897.60 inclusive of VAT. Therefore based on 9 flats the cost equates to £1,433.07 per owner,. In order to avoid the need to actively pursue payment of the above mentioned funds and the

additional costs which may be incurred, payments will need to be made within the next 7 days. Should anyone wish to discuss a payment plan then this would also need to be agreed within the next 7 days, to ensure that Araford LTD is in a position to meet the necessary deadlines and obligations."

It is on the basis of this demand that Araford has claimed £1,433.07 in the County Court proceedings.

13. There are two difficulties faced by Araford. First, the charge does not purport to be an excess payment after the end of the service charge year (accounting period), for which in any event there are no accounts, nor an auditor's certificate. As seen above, the Lease makes no provision for payment in advance of one-off items during the course of a service charge year in this way, so that there is no legal obligation under the Lease to make payment pursuant to the demand. The Tribunal recognises that there may be occasions on which extraordinary expenditure is required as a matter of urgency, and for which insufficient reserves are available. In such circumstances, there is no reason why tenants cannot agree to raise the necessary funds outside the strict service charge provisions of the Lease, but in respect of a tenant who does not agree to such a scheme there is no legal obligation for them to contribute at that time, though the costs might validly be included in a subsequent demand for a balancing payment.

14. The second difficulty is in respect of s. 21B of the Landlord and Tenant Act 1985, identified at paragraph (2)4 of the Directions as an issue to be addressed in the proceedings. Under that provision it is a statutory requirement that a demand for the payment of a service charge must be accompanied by a summary of the rights and obligations of tenants of dwellings in relation to service charges, the form and content of which is prescribed by regulations made under section 21B(2). In the present case, the relevant provisions are the Service Charges (Summary of Rights and Obligations, and Transitional Provisions) (Wales) Regulations 2007. The above demand was not accompanied by the prescribed information. In consequence, by virtue of section 21B(3) Mr. Gay is entitled to withhold payment of the sum demanded until a demand is served which complies with the statutory requirements.

15. The Tribunal must conclude therefore, that presently, the sum of £1,433.07 is not due from Mr. Gay to Araford.

16. Nevertheless, it is expedient to go on and consider the other issues concerning the works that have given rise to the dispute, as it is likely that in the future payment will be sought from Mr. Gay in respect of them by way of service charge pursuant to a demand that does comply with the terms of the Lease and the statutory requirements.

17. The works in question arose out of an enforcement notice served on Araford under cover of a letter dated 6 January 2020 by South Wales Fire and Rescue Service, and a desire by some of the tenants to have other works carried out to the building at the same time as those required by the Fire Service, all such works to be subject to a consultation process pursuant to s. 20 of the 1985 Act. Most, but not all of the works have been completed.

Consultation

18. At the hearing Mr. Gay has raised two complaints concerning the consultation process. First, he contends that the contractor chosen by Araford – Ian Solomon Construction – is a business with whom Mrs. Scott-Cook has had professional dealings, and that she had determined that Ian Solomon would be appointed to carry out the relevant works at the outset, prior to any proper consultation. He claims this is evidenced by dates that appear on parts of the frame structure of the new windows, from February and March 2020.

19. Mrs. Scott-Cook's statement deals with the history of how a contractor was selected. In summary, four companies were approached for quotes, of which three attended Wellington Court and provided estimates: Construction Consultants Property Services (£14,635.00 with no VAT), Ian Solomon (£15,550.00 plus VAT), and DGS Carpentry (£16,770.00 plus VAT). She had previously disclosed to the shareholders/tenants that she had a professional relationship with Ian Solomon in that she carried out payroll and HR work for the company but had experience of their work at her own home, another property owned by her, and at Wellington Court to repair a leak that had caused damage in July 2019. She also explained that the company had been trading for over 20 years and were experienced with commercial premises. During the AGM at which these matters were discussed, Thomas Williams, of the then managing agents, Maison Cumbria Limited, highlighted that Araford should ensure that they had copies of a contractor's public liability insurance, health and safety policy, and confirmation of its status on other matters. When contacting the lowest priced contractor, Construction Consultants, seeking such documentation Araford was told that due to the restrictions then in place they were not able to carry out the works. Mrs. Scott-Cook then reverted to Ian Solomon, the next lowest quote, and asked if anything could be done to bring the cost down. She received a revised figure of £12,897.60 inclusive of VAT (see: paragraph 12 above). On the appropriate documentation being provided, and after having discussed the matter with fellow director Elizabeth Gittens-Ward, Ian Solomon was instructed to carry out the work.

20. Mr. Gay was given the opportunity to ask Mrs. Scott-Cook questions about her statement but did not challenge her account of such matters. The Tribunal accepts her version of events, which is supported by documents, and does not consider that any proper inferences can be made concerning the dates which appear on part of the window frame structures other than that it is likely that this was the date they were manufactured, not the date Ian Solomon was instructed to carry out the work. Accordingly, Mr. Gay's allegation has not been established.

21. The second complaint regarding consultation is that Mr. Gay considers that health and safety concerns regarding asbestos present in items being removed, and their disposal, were not properly addressed. To the extent that this might amount to a failure to consult pursuant to s. 20, the Tribunal does not consider that the level of asbestos present was sufficient to give rise to such concerns. The issue is dealt with in more detail below.

Reasonableness

22. Even where works fall within the scope of those described in the in the Sixth Schedule to the Lease, and therefore the costs are capable of being recovered by way of service charge, by reason of s. 19(1) of the 1985 Act they can be taken into account in determining the amount of a service charge payable for a period only to the extent that they are reasonably incurred, and where they are incurred on the carrying out of works, only if the works are of a reasonable standard.

23. The Scott Schedule identifies a number of matters where Mr. Gay takes issue with whether the works in question were necessary and to an appropriate standard. Dealing with each of the items in turn, the Tribunal will indicate the estimated cost first, and the actual cost in parenthesis, in both cases net of VAT.

(1) Replace back door: £810.00 (£710.00). Mr. Gay contends that this was not needed and that painting and decorating would have been sufficient and complains that no asbestos survey was carried out. The Tribunal accepts that this was a proper item of repair, replacing the door with a uPVC door. As to the asbestos, there are no asbestos tiles in the building, only lino floor tiles with a low asbestos content, and not at this location.

(2) Two new internal fire doors and frames £1,020.00 (£820.00). Mr. Gay does not consider this was necessary and complains that there was no asbestos survey. The Tribunal accepts that the old doors were not adequate according to the Fire Service and that replacement was required, but both doors require decoration. The first-floor door does not close fully and needs adjustment. The face of the second-floor door has been damaged to the landing side and requires attention prior to decoration. The lino floor tiles below the opening swing of the first-floor fire door have been removed, whilst they remain in situ on the second floor. The amount of asbestos present within these tiles would not cause a health hazard on their lifting and removal from site, as per pages 3 & 4 of the Asbestos Report prepared by J & S Bridle Associates Ltd dated 5 October 2018, which Mr. Gay provided as part of his evidence.

(3) Four egress windows £4,200.00 (£4,000.00). Mr. Gay contends the windows did not need to be changed, and only required repair. They were not part of the fire assessment, and no asbestos survey was carried out. Araford states that flats 4, 5, 6, 7, 8 and 9 would use the windows in the event of a fire on the ground floor. Since the windows have been fitted prior to inspection the Tribunal cannot comment upon the condition of the previous frames. The new uPVC frames are within the previous window reveals and accordingly the artex finish to the ceilings were not disturbed where low levels of asbestos had been found in the report referred to above.

(4) & (5) Replace floor with hardwearing carpet £2,640.00, and uplift old flooring £1,900.00. These works have not yet been carried out. Mr. Gay disputes the need for such works. The Tribunal is of the view that the existing (original) staircases are of concrete finish and did not have any lino tiles or other covering. Therefore, the provision of any form of covering (tiles or carpet) is an improvement and outside the scope of the repairing provisions in the Sixth Schedule to the Lease (see: paragraph 7 above). This does not mean that tenants cannot agree to contribute to the cost of such work, but as it falls

outside that which can be recovered by way of service charge, any tenant who does not agree to contribute will not be obliged to pay.

(6) Two 8-yard commercial skips £500.00 (£140.00). Mr. Gay's concerns over this have been resolved by the contractor employing a different method of waste removal.

(7) Remove block walls £1,280.00 (£1,078.00). This work was carried out as the result of damage caused by a subtenant/licensee. Mr. Gay says that this work was not needed as the walls were of solid brick. The asbestos report records on page 16 that the wall had a plasterboard finish (and no asbestos was found). Therefore, Mr Gay's statement that the wall was of brick/block is clearly contradicted by the independent photographic evidence and description. The Tribunal is satisfied that this was work of repair.

24. Although not on the Scott Schedule, Ian Solomon quoted for works of redecoration at £3,200.00 plus VAT, but this was carried out by Philip. Ward, a decorator, at £1,500.00 (no VAT). There appears to be no dispute over this.

Conclusion

25. For the reasons provided, Mr. Gay is not currently under any liability in respect of the sum claimed in the County Court proceedings. It is to be hoped however, that the parties can reach an accord in respect of his contribution to the above works and avoid any future litigation on the point.

Dated this 9th day of December 2021

C. R. Green
Chair, Residential Property Tribunal

APPENDIX
Statutory Provisions

Landlord and Tenant Act 1985

18 Meaning of "service charge" and "relevant costs".

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

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

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

19 Limitation of service charges: reasonableness.

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

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

20 Limitation of service charges: consultation requirements

(1) Where this section applies to any qualifying works or qualifying long term agreement, the relevant contributions of tenants are limited in accordance with subsection (6) or (7) (or both) unless the consultation requirements have been either—
  (a) complied with in relation to the works or agreement, or
  (b) dispensed with in relation to the works or agreement by (or on appeal from) the appropriate tribunal.

(2) In this section "relevant contribution", in relation to a tenant and any works or agreement, is the amount which he may be required under the terms of his lease to contribute (by the payment of service charges) to relevant costs incurred on carrying out the works or under the agreement.

(3) This section applies to qualifying works if relevant costs incurred on carrying out the works exceed an appropriate amount.

(4) The Secretary of State may by regulations provide that this section applies to a qualifying long term agreement—

(a) if relevant costs incurred under the agreement exceed an appropriate amount, or

(b) if relevant costs incurred under the agreement during a period prescribed by the regulations exceed an appropriate amount.

(5) An appropriate amount is an amount set by regulations made by the Secretary of State; and the regulations may make provision for either or both of the following to be an appropriate amount—

(a) an amount prescribed by, or determined in accordance with, the regulations, and

(b) an amount which results in the relevant contribution of any one or more tenants being an amount prescribed by, or determined in accordance with, the regulations.

(6) Where an appropriate amount is set by virtue of paragraph (a) of subsection (5), the amount of the relevant costs incurred on carrying out the works or under the agreement which may be taken into account in determining the relevant contributions of tenants is limited to the appropriate amount.

(7) Where an appropriate amount is set by virtue of paragraph (b) of that subsection, the amount of the relevant contribution of the tenant, or each of the tenants, whose relevant contribution would otherwise exceed the amount prescribed by, or determined in accordance with, the regulations is limited to the amount so prescribed or determined.

21B Notice to accompany demands for service charges

(1) A demand for the payment of a service charge must be accompanied by a summary of the rights and obligations of tenants of dwellings in relation to service charges.

(2) The Secretary of State may make regulations prescribing requirements as to the form and content of such summaries of rights and obligations.

(3) A tenant may withhold payment of a service charge which has been demanded from him if subsection (1) is not complied with in relation to the demand.

(4) Where a tenant withholds a service charge under this section, any provisions of the lease relating to non-payment or late payment of service charges do not have effect in relation to the period for which he so withholds it.

(5) Regulations under subsection (2) may make different provision for different purposes.

(6) Regulations under subsection (2) shall be made by statutory instrument which shall be subject to annulment in pursuance of a resolution of either House of Parliament.

27A Liability to pay service charges: jurisdiction

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

(a) the person by whom it is payable,

(b) the person to whom it is payable,

(c) the amount which is payable,

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

(e) the manner in which it is payable.

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

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

insurance or management of any specified description, a service charge would be payable for the costs and, if it would, as to—

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

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

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

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

(6) An agreement by the tenant of a dwelling (other than a post-dispute arbitration agreement) is void in so far as it purports to provide for a determination—

(a) in a particular manner, or
(b) on particular evidence,of any question which may be the subject of an application under subsection (1) or (3).

(7) The jurisdiction conferred on the appropriate tribunal in respect of any matter by virtue of this section is in addition to any jurisdiction of a court in respect of the matter.

Commonhold and Leasehold Reform Act 2002

176A. Transfer from court to First-tier Tribunal

(1) Where, in any proceedings before a court, there falls for determination a question which the First-tier Tribunal or the Upper Tribunal would have jurisdiction to determine under an enactment specified in subsection (2) on an appeal or application to the tribunal, the court—

(a) may by order transfer to the First-tier Tribunal so much of the proceedings as relate to the determination of that question;
(b) may then dispose of all or any remaining proceedings pending the determination of that question by the First-tier Tribunal or, where determined by or under Tribunal Procedure Rules, the Upper Tribunal, as it thinks fit.

(2) The enactments specified for the purposes of subsection (1) are—

(a) this Act,
(b) the Leasehold Reform Act 1967,
(c) the Landlord and Tenant Act 1985,
(d) the Landlord and Tenant Act 1987,
(e) the Leasehold Reform, Housing and Urban Development Act 1993, and
(f) the Housing Act 1996.

(3) Where the First-tier Tribunal or the Upper Tribunal has determined the question, the court may give effect to the determination in an order of the court.

(4) Rules of court may prescribe the procedure to be followed in a court in connection with or in consequence of a transfer under this section.