FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	CHI/00ML/LSC/2020/0110
Property	**:**	33 Wilbury Grange, Hove, East Sussex, BN3 3GN
Applicants	**:**	Cyrus Yow
Representative	**:**	
Respondent	**:**	Wilbury Grange (Hove) Limited
Representative	**:**	Danielle Pickard, Jacksons
Type of Application	**:**	Liability to pay and reasonableness of service charges
Tribunal Member(s)	**:**	Judge J Dobson
Date and venue of hearing	**:**	N/A- Determined on the papers
Date of Decision	**:**	5th March 2021

DECISION

Summary of the Decision

1. **The Tribunal determines that no service charge is payable and reasonable of the £850 demanded on behalf of the Respondent in relation to redecoration of the ceiling of Flat 31.**

2. **The Respondent is ordered to pay to the Applicant the fee paid in relation to this application of £100.**

3. **The Tribunal further allows the Applicants' applications under Section 20c of the Landlord and Tenant Act 1985 and Paragraph 5A of Schedule 11 Commonhold and Leasehold Reform Act 2002, such that the Respondent may not recover its costs in relation to the application from the Applicants by way of service charges or administration charges.**

The Application

4. The Applicant has applied by way of an application dated 1st November 2020 for a determination of the reasonableness and recoverability of service charges demanded by the Respondent in relation to 33 Wilbury Grange, Hove, East Sussex, BN3 3GN ("the Property") in the sum of £850 for the service charge year 2020 for one specific element. That is described as a demand for direct payment of a repair from the Applicant via the service charge on behalf of another leaseholder.

5. The Applicant also made an application that any costs incurred in connection with proceedings before the Tribunal should not be included in the amount of any service charge payable by the tenant pursuant to section 20C of the Landlord and Tenant Act 1985. The Applicant further made an application, pursuant to Paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002, for an order that his liability to pay an administration charge in respect of contractual litigation costs be reduced or extinguished.

The History of the Case

6. The Tribunal gave Directions on 9th September 2020. The Tribunal identified that the issues for the Tribunal to determine appeared to include:

    - Whether the demand is for a service charge and can be added to the Applicant's service charge account
    - Whether the Respondent is entitled to demand that sum be paid by the Applicant to the Respondent on behalf of another leaseholder or at all
    - Whether the Respondent was entitled to not contact the Applicant's insurer and whether it was reasonable not to do so

- If so, the amount reasonable.

7. The Tribunal set out the steps to be taken by the parties in preparation for the determination of the application. The Directions stated that the application would be determined on paper unless party objected. None of the parties has done so.

8. The Tribunal also stated that it would not inspect the Property but that if the condition of the property is salient to the issues the parties had permission to include photographs and also explained that the Tribunal may also seek to view the property on the internet. The parties were informed that if a party contended that an external inspection of the property was necessary, they must make an application no later than the date for provision of the bundle. No application has been made.

9. The Directions further provided for the Applicant to produce a bundle of documents relied on by the parties in relation to the issues for determination. The Applicant has done so. The Tribunal has considered that bundle.

10. This is the Decision of the Tribunal following the paper determination on the application made by the Applicant. Numbers with brackets as shown, [ ], are number of pages in the bundle.

The Background

11. The application [1 onwards] explains that the Applicant is the Lessee of a one bedroom flat in a block of 63 flats ("the Block") and that the Lessees of each flat own a share in the Respondent. The Respondent is a company whose shareholder consist of the majority of the Lessees and is the lessor of the Applicant's Property.

12. The Applicant says that a pipe for the communal heating but situated in his flat began to leak in Autumn 2019, which he paid to fix but where the flat below sustained damage. The Applicant says the Respondent's agent paid for the repairs to the ceiling of the other flat and then sent an invoice to the Applicant, adding the sum to his service charge account as arrears. He further states that he never agreed to such a service.

The Lease

13. The pertinent parts of the Lease state as follows:

2. THE Lessee HEREBY COVENANTS with the Lessor as follows:-

.....
(ii) (a) To pay to the Lessor in addition to the rent hereby reserved the sum of £76.50 per annum (hereinafter called "the basic maintenance charge") or such increased sum as hereinafter provided as a contribution towards

the expenditure incurred by the Lessor in carrying out its obligations under Clause 3 (i) (ii) and (iii) and Clause 4 hereof

.....

(e) For the purposes of this sub-clause it is hereby agree and declared as follows:-

(1) The maintenance year shall (so far as practicable) be computed from the commencement of the financial year of the Lessor from time to time during the said term

.....

(v) The Lessee will from time to time and at all times during the said terms at his own cost well and substantially repair cleanse maintain amend and keep in good and substantial repair and condition the flat and every part thereof and in particular as occasion requires will.....keep in repair and replace where necessary.....all gas electrical water sanitary and heating apparatus tanks cisterns radiators pipes wires conduits cables watercourses drains and other things now or hereafter installed or laid for the exclusive service of the flat.....

vii) That the Lessee will not waste or permit to be wasted any water on the flat and will at all times keep all water pipes and radiators within the flat reasonably protected against frost and will be responsible to the Lessor for all damage caused from the bursting over-flowing or stopping up of any pipes or other fittings in or about the flat occasioned by the negligence f the Lessee his family servants or visitors

3. THE Lessor HEREBY COVENANTS with the Lessee as follows :-

(i) At all times during the said term to insure and (unless the policy of insurance shall be vitiated by any act of neglect or default of the Lessee) keep insured the building.....against loss and damage.....

(ii) To the extent that the same are not repairable by the Lessee under the covenants in that behalf hereinbefore contained at all times during he said term to keep the structure of the building including the roof and all ceilings floors and external and internal walls and also all boilers radiators cisterns pipes wires conduits sewers and drains therein other than those or such parts thereof as are included in this demise or in the similar demise of any other flat in the building in good and substantial order and condition.

(iii) To paint with two coats at least of best quality paint in a proper and workmanlike manner..... all outside wood and ironwork and other outside parts of the building an all additions thereto hereinbefore or usually painted..... And all inside parts of the building used by the Lessee in common with other tenants and heretofore or usually painted and on the occasion of very such internal painting to decorate varnish distemper wash stop whiten and colour all such of the parts used in common as have previously been so dealt with and to repaper such of those parts as are usually papered with suitable paper of as good quality as that in use at the commencement hereof

.....

4. THE Lessor HEREBY FURTHER COVENANTS with the Lessee as follows:-

(i) That the Lessor will (so far as practicable) keep in clean and proper order condition and repair the entrance halls landings staircases boilers heating

plant and ancillary equipment thereto lifts and passages and such other internal parts of the building as shall from time to time be used or capable of being used by the Lessee in common with other tenants supplying all materials and labour necessary for this purpose and adequately light such of the said parts used in common as would normally be lighted or would be dangerous I not adequately lighted.

.....

(xi) Without prejudice to the foregoing to do or cause to be done all such works installations acts matters and things as may be in the Lessor's absolute discretion be necessary or advisable for the proper maintenance amenity safety and administration of the flat and of the building and curtilage including (but without prejudice to the generality of the foregoing) the employment of porters gardeners and other staff as the Lessor may consider necessary and the provision of such equipment uniforms telephones and other such requirements.....

.....

7. PROVIDED ALWAYS AND IT IS HEREBY AGREED AND DECLARED that notwithstanding anything herein contained the Lessor shall not be liable or responsible for any inconvenience injury accident or damage which may at any time during the said term be suffered by the Lessee (whether personally or in respect of the flat or any of the goods or property of the Lessee) or by any member of the Lessee's family or servant or employee or visitor of the Lessee whether by reason of any act neglect or default of any servant or employee of the Lessor or any tenant in the building or arising from the bursting overflowing or stopping up of any pipes tank cistern drain or other sanitary or water apparatus in any part of the building (including the flat) or from the defective working accidental stoppage or breaking of any fixture fitting pipes wires conduit cable lift staircase appliance apparatus or thing in connection with or used for the purpose of the building or any part thereof (including the flat) or from any other cause whatsoever

THE FIRST SCHEDULE above referred to
PART 1

The flat includes :-

(i) the internal plastered coverings and plaster work of the walls bounding the flat and the doors and door frames and windows fitted in such walls
(ii) the internal walls and partitions lying within the flat save as hereinbefore expressly mentioned
(iii) the plastered coverings and plaster work of the ceilings and the floorboards and other surfaces of the floors thereof
(iv) ..... balconies.....
(v) All pipes wires conduits cables sewers watercourses and drains carrying or conveying gas electricity water ot soil which are or shall hereafter be laid in any part of the building and serve exclusively the flat
(vi) All gas electrical and water and sanitary apparatus belonging exclusively to the flat and all other fixtures and fittings now or

hereafter in or about the flat (other than tenants fixtures and fittings) and not hereinafter expressly excluded from this demise

But the flat does not include :-

(i) Any part or parts of the building (other than any of the said pipes wires conduits cables sewers watercourses and drains expressly included in this demise) lying above the said surfaces of the ceilings or below the said floor surfaces
(ii) Any of the main timbers and joists of the building or any of the walls or partitions bounding the flat except such of the plastered surfaces thereof and the doors and door frames fitted therein as are expressly included in this demise
(iii) ..... balconies
(iv) Any pipes wires conduits cables sewers watercourses and drains in the building which do not serve exclusively the flat

THE THIRD SCHEDULE above referred to
REGULATIONS

.....
5. Not to do or permit to be done in or upon or about the flat or any part of the building or curtilage any act or thing which shall or may be or become a nuisance damage annoyance or inconvenience to the Lessor or other tenants or occupiers of any of the adjoining flats or to the neighbourhood or any illegal or immoral act
.....
Not to alter add to or damage the heating apparatus installed in the flat ..... except with the prior approval in writing of the Lessor first obtained

14. Those provisions define the Property and those parts of the block other than the Property and the other flats in the block, set out certain of the Respondent's obligations towards the cost of which the Applicant must contribute and set out the Applicant's responsibilities.
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The Law

15. The relevant statute law is set out in the Appendix to this Decision.

16. Essentially, the Tribunal has the power to decide about all aspects of liability to pay service charges and can interpret the Lease where necessary to resolve disputes or uncertainties. Service charges are sums of money that are payable – or would be payable - by a tenant to a landlord for the costs of services, repairs, maintenance or insurance or the landlord's costs of management, under the terms of the Lease.

17. The Tribunal can decide by whom, to whom, how much and when a service charge is payable. A service charge is only payable insofar as it is reasonably incurred, and works to which it related are of a reasonable

standard. The Tribunal therefore also determines the reasonableness of the charges.

Agreed facts

18. The factual background to this application is largely not in issue. Many of the facts are agreed. Others set out in this section are not specifically recorded in the papers as agreed but are not in dispute and so are treated as accepted for the purpose of this Decision.

19. The matters in paragraph 11 above are not in dispute. The Block has a communal heating system. There are no isolation valves on the communal heating pipes. Prior approval of work to the system on behalf of a Lessee is required.

20. It is also agreed that the Respondent employs managing agents, Jacksons, and that the management of the Block is primarily dealt with by Ms Danielle Pickard of that company. Within that, Jacksons manage the control of the communal heating system. The Respondent itself acts through a board of directors.

21. There is no apparent dispute about a leak having been first identified in October 2010 to a pipe with the Property connecting a radiator in the Property to the heating system for the Block. Neither is there a dispute that the leak took the form of a slow drip from the connection between the communal heating pipe and the supply to the Applicant's living room radiator.

22. The Applicant initially employed a plumber to attend to the leak, who applied plumbing seal. However, after a few weeks, the leak returned and had worsened. The Applicant requested a quote for a permanent repair and also spoke to Servcom Services Limited, who were contracted by the Respondent to service the central heating system, although not the pipes. The Respondent has raised no issue with those statements of fact by the Applicant.

23. Servcom were unable to offer an appointment during the subsequent two weeks. The Applicant decided to proceed with his plumber.

24. Permission was sought by the Applicant for the heating system to be turned off to facilitate the work. It should be noted that not every last detail of that element appears to be agreed but nothing turns on any such matter. There have also been some points raised as to timing on the day but nothing turns on that either.

25. On 25th November 2019, Ms Pickard expressed concern to the Applicant. She explained that to the Respondent as being in relation to the risks involved with the approach intended to be taken by the Applicant's plumber, namely freezing the pipe to allow work to the area of the leak, although her email to the Applicant does not explain the concerns [124].

26. Significantly, on 5th December 2019, the Applicant's plumber attempted to repair the leak but as the Applicant concisely states [20], "the work was unsuccessful and the leak could not be stopped".

27. The plumber sought to undertake the repair by freezing the pipes and then attending to the area of the leak.

28. That evening, the Applicant emailed Servecom stating "the situation is getting worse so I am hoping to get it repaired as soon as possible." A photograph was included in the email. That shows a relatively large squarish tray by/ under the radiator pipe and also shows wet areas of carpet.

29. On 6th December 2019, the Applicant emailed Jacksons [133] stating that "The work yesterday was not successful. Another point of weakness in the pipe has now been created. I have asked Servcom to do the partial drain down AND repair so that everything is well controlled……This is the only option I have now to prevent flooding the building".

30. It is accepted that the leak was subsequently fixed on 19th December 2019 by Servcom.

31. It is asserted and the Applicant does not dispute it, that the Lessee of the flat below the Applicant's Property, Flat 31, suffered damage to the ceiling of her flat, which required redecoration.

32. The Lessee of Flat 31 was away from 5th December 2019 until 13th December 2019. There was no evidence of the effects of a leak when she went away. She noted damage on her return [145].

33. On 17th December 2019, Jacksons notified the Applicant of the complaint by the Lessee of Flat 31 that there was water staining to the ceiling of her flat, providing photographs showing the damage [136]. It is further agreed that Jacksons requested the Applicant to put his plumber on notice of a potential claim.

34. By email on 3rd January 2019 [141], Jacksons forwarded two redecoration quotes, for £750 (no VAT) from one Nick Withey [142], who appears to have traded as Finishing Touches, and £850 plus VAT from one Terry Parnell [143] trading as Colourwave respectively. The Tribunal pauses to note that the first of those is addressed to the Lessee of Flat 31 and the latter to Jacksons.

35. The Applicant provided his insurance details to Jacksons on 9th January 2020.

36. The Applicant states that he himself contacted his insurers on 23rd January to report the situation. The Respondent does not challenge that. The insurer stated that on the information provided by the Applicant, he

had not been negligent and suggested that the Lessee of Flat 31 contact her won insurer.

37. Subsequent emails were exchanged. Only a couple of specific examples need individual mention.

38. On 28th January 2020, the Applicant's insurers sent an email [151] stating "from the information we have received that our insured has not been negligent as the pipe leak was unforeseen which means they would not have known the pipe was going to leak until it happened and could not have prevented it." Hence, they considered that the Applicant was not liable.

39. On 29th January 2020, the Applicant sent an email [151] to the Lessee of Flat 31 in which he referred to his financial situation and stated that he had hoped that the damage to the ceiling could be resolved with his insurer but also that he had fulfilled his legal responsibility. The Lessee of Flat 31 replied to that [152] indicating her understanding that there had been a massive leakage of water when the works were undertaken on 5th December 2019 and that was the cause of the damage.

40. On 31st January 2020, Ms Pickard of Jacksons wrote [154] to the Applicant reiterating that the excess on the buildings insurance policy for the Block was £1000 and stating that if the outlay exceeded £1000, the buildings insurers would look to recover the outlay.

41. On 6th February 2020, Ms Pickard stated by email [157] that the Lessee of Flat 31 "will now be seeking to recover her loss by legal means".

42. Jacksons arranged for the redecoration work to the ceiling of Flat 31 to be undertaken at the end of February 2020.

43. It is further agreed that the cost of the decoration work was £850 and that the decorator had previously indicated a cost of £750, although the Respondent states that was an estimated cost and it is not entirely clear that the Applicant accepts the cost to have been estimated as opposed to quoted.

44. On 10th March 2020, Jacksons sent an invoice to the Applicant for £850 and requested that the Applicant reimburse the amount. The email stated that the invoice of £850 had been paid "from the service charge account" (and so the service charge funds for the Block).

45. Jacksons subsequently informed the Applicant by email dated 16th March 2020 that "the cost of redecoration within Flat 31 has been added to your service charge account" [111] and demanded payment from the Applicant to the Respondent.

46. There was subsequent communication about the Applicant claiming on his insurance but the Applicant could not do so as the damage was to the

property of a third party. There were communications asserting negligence on the part of the Applicant.

47. On 27th May 2020, Jacksons sent a document headed "Tenant Demand" [43], including an entry for £850, described as "Arrears from previous/ other demands". The demand was primarily for a new ground rent payment due.

48. On 16th July, it was stated on behalf of the Respondent that the decision to add the £850 to the Applicant's service charge account was final [117].

49. There has not been a claim made against the Applicant's insurance or on the Lessee of Flat 31's insurance.

Consideration of the Disputed Issues

50. The Applicant has not raised any issues in respect of the form of demand made by the Respondent or any statutory requirements in relation to a service charge. Rather the dispute raised is to whether the Applicant is liable to the Respondent for the sums at all.

51. The Tribunal has similarly not sought to address any matters beyond the Applicant's specific application in relation to the charge as sought to be imposed by the Respondent by addition to the Applicant's service charge account.

52. The Tribunal has limited its determination to such matters as the Applicant and Respondent have raised.

Relevant issues as to Fact

53. The Applicant asserts that the leak was from a heating system pipe, which would therefore have been the responsibility of the Respondent. The Tribunal does not accept that assertion.

54. The Tribunal finds that the leak emanated from the join between the pipe leading from the heating system as a whole and part of it which lay physically within the Applicants' Property and the radiator which is also situated in the Property.

55. The Applicant also appears to the Tribunal to assert that the leak was unforeseen and hence there was no negligence on his part or the part of anyone instructed by him in relation to the leak.

56. The Tribunal finds that the original leak was a relatively minor one. The Tribunal accepts the evidence of the Applicant [20] that it was "a very slow drip".

57. The Tribunal does not find that the cause of the damage Flat 31 was the original leak and the continuation of that for a period of time. The

Respondent, at least through Ms Grossi and in emails asserted that the period of time taken constituted the asserted negligence on the part of the Applicant [114].

58. The Tribunal finds that the matter which caused the damage to the flat below, Flat 31, was the unsuccessful repair work undertaken on 5th December 2019.

59. It is of considerable significance and entirely supportive of the above finding that the Lessee of Flat 31 was away from 5th December 2019 to 13th December 2019 [36 and elsewhere] and particularly that she identified no damage to the ceilings of Flat 31 as the time she went away but did identify damage on her return. There was not, on the evidence presented, any damage to Flat 31 prior to December 2019, whereas damage was apparent by only a few days later.

60. It follows that the Tribunal need not make any finding in respect of the time taken for the original leak to be attended to from the time at which that was identified, nothing relevant to this application turning on that. The same applies to the delay from the original intended date for undertaking of the work on 27th November 2019 until 5th December 2019.

61. The Tribunal has noted the comment in an email dated 5th December 2019 from Mr Beaddie to the other board members of the Respondent that when he entered the Applicant's Property, the carpet was badly water stained. There appears to be no dispute about that evidence in itself.

62. However, weighing that against the other evidence, the Tribunal finds that the position prior to the attempted repair was not such as to have caused the damage to the ceiling of Flat 31 and that the damage was caused by the ongoing and increased leaking after then.

63. Neither does the Tribunal find the question of whether Jacksons could have arranged for Servcom to undertake the work sooner if appropriate efforts were made, or whether there is any reason for which they should have done so, to be of any significance.

64. The Respondent asserts that the Applicant knew about the option of draining down the system prior to 5th December 2019 and that advice was given by Jacksons to use Servcom for that [for example 34]. That may be so. It has not been specifically accepted as correct by the Applicant. As to whether it is correct or not makes no difference to the actual cause of the damage to the ceiling of Flat 31, namely the work actually undertaken by the Applicant's plumber on 5th December 2019.

65. The Tribunal finds that attempting to freeze the pipe was not in the event the appropriate approach to take, was unsuccessful in prevent flow of water from the pipe and caused flow of water from the pipe on the day of the attempted repair and thereafter the ongoing flow of water at a greater rate than the pre-existing leak, some of which seeped through to the ceiling of the flat below, Flat 31, and damaged the ceiling of that flat.

66. The Tribunal makes no finding as to whether the Applicant's plumber was negligent in attempting to freeze the pipe or in the execution of that attempt. The Tribunal considers that this application does not turn on that. In any event, the Tribunal has no expert evidence as to the range of approaches that a competent plumber might reasonably have taken. The opinion of Mr Colin Beaddie as to the plumber's competence or lack of it does not assist in that regard.

67. It is not appropriate for the Tribunal to seek to determine the particular point in those circumstances.

68. The Applicant asserts in his Reply to the Respondent's statements [41] that the Respondent through its agent did not engage with or suggest that they could engage with Servcom to try to obtain a date earlier than 19th December 2019. The comment suggests that the Applicant contends that Jacksons ought to have so engaged.

69. The Tribunal finds that it was for the Applicant to attend to the work necessary to fix the leak, including the increased leak following the work on 5th December 2019. The Tribunal finds that neither the Respondent or its agents had a responsibility to the Applicant to seek to expedite the work undertaken on 19th December 2019. The Tribunal observes that even if it had so found, there is no evidence that there would have been success in expediting such work and that there was any effect on the overall situation.

70. The Tribunal finds the £850 cost of repair of the ceiling of Flat 31 to be reasonable.

71. The original price suggested of £750 was an estimated price. The document from the decorator is clear as to that. It necessarily follows that the originally suggested cost was not a quote and was certainly not a fixed price.

72. The Tribunal accepts that the actual cost was greater and that the increase was reasonable, reflecting additional expense required. The Tribunal accepts that a dehumidifier was required to assist with drying out the ceiling to Flat 31.

73. The Tribunal has noted that two estimates were obtained on behalf of the Respondent and that the other one was in the sum of £1020, including VAT, whereas the other was lower even ignoring it then being exclusive of VAT. The Tribunal agree with the observation of Ms Pickard that the one estimate was 20% lower than the other, indeed over 20% lower.

74. In that regard, the Tribunal expresses its considerable concern at the contents of the email from the Applicant to the Respondent dated 4th February 2020 suggesting a claim on the buildings insurance for the amount of the higher estimate [155]. Ms Pickard replied to that [156] stating that such a course would be "tantamount to insurance fraud".

75. She is wrong in that regard. Such a course would not be "tantamount to insurance fraud". Rather it would be to commit insurance fraud.

76. Such a suggestion is not only of considerable concern to the Tribunal but it very damaging to the Applicant's credibility in this matter. The fact that the Applicant was prepared to countenance lying to the insurance company and committing fraud casts doubt on the honesty of his other evidence.

77. It is of no direct relevance that the Tribunal has some doubt that the buildings insurance company would have dealt with a claim, given that the damage was within an individual flat.

78. However, the position forming the background to this application is that the Respondent has demanded payment of the Applicant. The case does not turn on the credibility of the Applicant but rather on the rights and responsibilities of the parties pursuant to the terms of the Lease. It is principally for that reason that the Applicant has succeeded and despite the concern created by his approach to an insurance claim. The reason for that is explained below when applying the terms of the Lease.

79. The Tribunal finds that there was no obligation on the part of the Lessee of Flat 31 or the Respondent to contact the Applicant's insurer. That was a matter for the Applicant to attend to if he so wished when in receipt of a claim that the leak was his responsibility, or at least the responsibility of someone engaged by him and for whose fault he may be liable.

80. That the Applicant provided the details of his insurer to the Respondent is neither here nor there. There are other assertions made by the Applicant in respect of insurance and claims under insurance with which the Tribunal does not agree but nothing turns on those either.

81. However, to those factual matters, and the agreed facts must be applied the provisions of the Lease.

Application of the provisions of the Lease and the Law

82. The Applicant has referred in his statement of case [21 and 22] to certain provisions of the Lease in respect of what is and is not included in the Property. He asserts that "the Respondent should have been part of the effort to repair any leak relating to the communal heating system, particularly where there were no isolation valves available to stop the leak."

83. It is unclear whether the Applicant thereby asserts that he was not responsible for undertaking the work. However, the Tribunal determines that if that is the Applicant's position, it is not correct.

84. The Tribunal agrees with the Respondent that the join between the radiator pipework and the heating system pipe where the leak arose was the responsibility of the Applicant pursuant to paragraphs 2 (v) and/ or 2 (vii) of the Lease

85. In any event, the Applicant took it upon himself to attend to the work through his plumber and bears responsibility for that work and any effects of it.

86. The basis of the Tribunal's determination that the Applicant succeeds is, however, that the Respondent was not able to charge the redecoration cost to the Applicant.

87. Ms Grossi, Chair of the Board of Directors of the Respondent, asserts [25] "that the demand for £850 for the damage to Flat 31 is fair and reasonable under the terms of the lease owing to negligence and delays by the Applicant Cyrus Yow."

88. The Tribunal has had particular regard to the provisions of clause 2 (vii) of the Lease and the statement that the Lessee will be responsible to the Lessor for any "damage" caused from over-flowing pipes or fittings. The statement of Ms Grossi referred specifically to that as the basis for the Respondent's entitlement to recover the £850 from the Applicant.

89. The question arises as to whether the Respondent suffered any damage as a result of the failed repair work and the extent of the leak caused.

90. The Tribunal determines that the Respondent did not.

91. The decoration of the internal parts of a flat plainly falls outside of the responsibilities of the Respondent pursuant to the Lease.

92. The extent of the flats is described in Part 1 of Schedule 1 of the Lease- see above. The extent of the areas for which the Respondent is responsible for the decoration, repair and maintenance is described in paragraphs 3 (ii), 3 (iii) and 4 (i) of the Lease- see above.

93. It is abundantly clear that the ceiling of Flat 31 falls into the former category and not the latter one.

94. The Lease indeed goes to some length to attempt to exclude liability on the part of the Respondent to a Lessee for damage to the flats even in relation to matters which are the responsibility of the Respondent. No more need be said about that, as not relevant in the circumstances.

95. The Respondent had no responsibility to do anything in respect of the ceiling of Flat 31, including there being no obligation for any payment to be made for repair. The damage to the ceiling was not a matter for the Respondent.

96. It necessarily flows from the fact that the Respondent had no obligation, had no steps that it needed to take and had no cost that it needed to incur, that there was no damage to the Respondent.

97. The Tribunal accepts of course that there was physical damage to decoration in Flat 31. However, that was a matter impacting on the Lessee of Flat 31 and not on the Respondent.

98. The Tribunal determines that the reference to damage in the Lease is damage suffered by the Respondent whether physical damage to a part of the Block for which the Respondent is responsible or financial damage in respect of expenditure that the Respondent must incur.

99. The Respondent chose to incur expense to pay for the redecoration cost to the ceiling of Flat 31. It was the choice to do so and the payment out then made that caused the Respondent loss. The decision of the Respondent's board of directors to approve the payment made as a matter of internal governance has no bearing on the position between the parties pursuant to the Lease.

100. Cost which the Respondent chooses to incur and which is does not need to incur does not amount to damage pursuant to the terms of the Lease.

101. The Tribunal has specifically quoted part of clause 4 (xi) of the Lease, which gives the Respondent power to undertake works and otherwise incur expenditure on matters which falls outside of the specific items of expenditure listed in the other clauses of the Lease. That includes works and other matters as may be "necessary or advisable" for the "proper maintenance amenity…" "of the flat". The overwhelming likelihood is that the lease of Flat 31 contained the same or a substantively similar provision.

102. It is arguable that the decoration of the ceiling falls within the maintenance or amenity of the flat. Although, it must be noted, not an argument that has discernibly been advanced by the Respondent. The Tribunal should be cautious of venturing down a path the parties have not sought to lay out.

103. However, even if the Respondent has a discretionary power, that is not the same as a responsibility. The Respondent was not compelled to exercise the power and indeed it is difficult to identify why it would have decided to do so and properly do so, where the matter related to decoration of a flat which the Lessee of Flat 31 was entirely capable of attending to personally or via a contractor.

104. In any event, the discretionary power simply takes us back to the Respondent not suffering damage from the Applicant's action but rather from its own choice to incur expenditure on a matter it had no need to.

105. That is the effectively the end of consideration of the question the Tribunal is asked to determine.

106. However, the Tribunal makes some limited further observations as set out below.

107. As the Tribunal has found that the Respondent did not incur damage, the particular manner in which the Respondent sought to charge for it is of no direct relevance. Nevertheless, the Tribunal addresses the matter of the sum of £850 being added to the "service charge account" of the Applicant for completeness.

108. When referring to the payment to the decorator, Ms Grossi says that Jacksons paid the invoice and that "Accordingly, the sum of £850 for the repairs to Flat 31 was allocated to the Applicant's service charge account" [28]. However, no identification is made of why she uses the word "accordingly" and why, as the term suggests, the payment on behalf of the Respondent meant that the sum could properly be allocated to the Applicant's "service charge account", necessarily as a service charge.

109. The Tribunal determines that the £850 could not be a sum payable as a service charge payable by the Applicant in any event. It cannot be added to his "service charge account " as such.

110. Service charges payable by the Applicant must be a proportionate share of the expenditure which the Respondent is obliged to incur to meet its responsibilities plus the additional expenditure which the Respondent validly exercises its discretion to incur pursuant to clause 4 (xi). It necessarily follows that the whole of the £850 could not be added to the Applicant's service charge account as a service charge payable by him.

111. Whilst it is not directly relevant in the circumstances, if the £850 is properly a service charge, it would be payable by all of the Lessees to the extent of the contribution required of them under the terms of their leases and in the service charge year in which the sum would properly have been payable following a valid demand for it. It might be that a portion of the cost of redecoration could be payable by the Applicant in due course if the £850 forms part of expenses to which service charges are payable generally.

112. Even if the sum had been properly able to be demanded from the Applicant, the Respondent could not simply add an extra service charge item to the Applicant's account. If there had been a service charge properly payable, a valid demand would have been required, with any relevant requirements being complied with. In a similar vein, if the Respondent is to seek to recover the £850 as a service charge from the Lessees collectively on the basis of it being an expense payable through service charges, it will have to form part of a sum appropriately demanded from the Lessees collectively.

113. If the Respondent had been entitled to recover the £850 from the Applicant as damage suffered by it, it would not have been as a service charge. That need not be dwelt on.

114. It is apparent that the Respondent's director, Ms Grossi, hit the nail on the head in her email dated 16th July 2020 [117] when she stated as follows, at least for the first element:

"As already advised, the correct procedure is:

. Flat 31 to claim from you
. You to claim from your insurer OR
. You to claim from your plumber and him to claim from his insurers"

115. Similarly, Ms Pickard of Jacksons was correct in her witness statement [38] to state "the leaseholder (31) has made her claims abundantly clear" and the correct approach appears to have been envisaged by her her email [157] stating that the Lessee of Flat 31 "will now be seeking to recover her loss by legal means".

116. Any relevant claim was one for the Lessee of Flat 31 to make against the Applicant. As to whether she claimed on her own relevant insurance covering damage caused by a third party, if any, or not would be her own affair. If her insurance company paid out, it would be a matter for it as to whether, or not, it sought to recover the sum from the Applicant. It would be a matter for the Applicant as to whether he sought to claim such cost from his own insurer, if possible, or against the plumber. It would be a matter for the plumber as to whether, or not, he sought to involve his insurer. There is no need to dwell on any of that, such circumstances have not arisen.

117. The Lessee of Flat 31 has not, as far as the Tribunal is aware, sought to make any such claim. The Tribunal perceives that may be because the Lessee of Flat 31 has not in the event incurred any cost for her to wish to claim back. There is no need to speculate further.

118. Returning to the question there is for determination and in conclusion, it necessarily follows from the above that £850 in respect of the decoration of Flat 31 is not payable by the Applicant to the Respondent as a service charge, or indeed at all, and could not be added to his "service charge account".

Applications in respect of costs and refund of fees

119. The Tribunal grants the applications made by the Applicant that any costs incurred in connection with proceedings before the Tribunal should not be included in the amount of any service charge payable by the tenant pursuant to section 20C of the Landlord and Tenant Act 1985 and the similar application, pursuant to Paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002, for an order that his liability to pay an administration charge in respect of contractual litigation costs be reduced or extinguished.

120. The Tribunal is given a wide discretion to do that which it considers just and equitable in all the relevant circumstances. The Tribunal considers it to be just and equitable to do grant both of the applications in light of the

Applicant's success in this matter. The Tribunal has borne in mind the practical and financial consequences of the approach taken.

121. No application has been made by either the Applicant or the Respondent for an order for costs against a party who has conducted the proceedings in an unreasonable manner, pursuant to Rule 13 of the Tribunal Procedure Rules 2013.

122. The Applicant is entitled to refund of the fees in light of the Applicant's success in the application.

123. The Tribunal orders the Respondent to refund the £100 fee to the Applicant within 28 days.

RIGHTS OF APPEAL

1. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application to the First-tier Tribunal at the Regional office which has been dealing with the case by email at rpsouthern@justice.ogv.uk

2. The application must arrive at the Tribunal within 28 days after the Tribunal sends to the person making the application written reasons for the decision.

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

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

Appendix of relevant legislation

Landlord and Tenant Act 1985 (as amended)

Section 18

(1) In the following provisions of this Act "service charge" means an amount payable by a tenant of a dwelling as part of or in addition to the rent -

(a) which is payable, directly or indirectly, for services, repairs, maintenance, improvements or insurance or the landlord's costs of management, and

(b) the whole or part of which varies or may vary according to the relevant costs.

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

(3) For this purpose -

(a) "costs" includes overheads, and

(b) costs are relevant costs in relation to a service charge whether they are incurred, or to be incurred, in the period for which the service charge is payable or in an earlier or later period.

Section 19

(1) Relevant costs shall be taken into account in determining the amount of a service charge payable for a period -

(a) only to the extent that they are reasonably incurred, and

(b) where they are incurred on the provisions of services or the carrying out of works, only if the services or works are of a reasonable standard;

and the amount payable shall be limited accordingly.

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

Section 20C

(1) A tenant may make an application for an order that all or any of the costs incurred, or to be incurred, by the landlord in connection with proceedings before a court, residential property tribunal or leasehold valuation tribunal, or the First-Tier Tribunal, or in connection with arbitration proceedings, are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant or any other person or persons specified in the application.

(2) The application shall be made –.....

(ba) in the case of proceedings before the First-Tier Tribunal, to the Tribunal.

(3) The court or tribunal to which the application is made may make such order on the application as it considers just and equitable in the circumstances.

Section 27A

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

(a) the person by whom it is payable,

(b) the person to whom it is payable,

(c) the amount which is payable,

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

(e) the manner in which it is payable.

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

(3) An application may also be made to the appropriate tribunal for a determination whether, if costs were incurred for services, repairs, maintenance, improvements, insurance or management of any specified description, a service charge would be payable for the costs and, if it would, as to -

(a) the person by whom it would be payable,

(b) the person to whom it would be payable,

(c) the amount which would be payable,

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

(e) the manner in which it would be payable.

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

(a) has been agreed or admitted by the tenant,

(b) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,

(c) has been the subject of determination by a court, or

(d) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.

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

Commonhold and Leasehold Reform Act 2002

Schedule 11, paragraph 1

(1) In this Part of this Schedule "administration charge" means an amount payable by a tenant of a dwelling as part of or in addition to the rent which is payable, directly or indirectly—

(a) for or in connection with the grant of approvals under his lease, or applications for such approvals,

(b) for or in connection with the provision of information or documents by or on behalf of the landlord or a person who is party to his lease otherwise than as landlord or tenant,

(c) in respect of a failure by the tenant to make a payment by the due date to the landlord or a person who is party to his lease otherwise than as landlord or tenant, or

(d) in connection with a breach (or alleged breach) of a covenant or condition in his lease.

(2) But an amount payable by the tenant of a dwelling the rent of which is registered under Part 4 of the Rent Act 1977 (c. 42) is not an

administration charge, unless the amount registered is entered as a variable amount in pursuance of section 71(4) of that Act.

(3) In this Part of this Schedule "variable administration charge" means an administration charge payable by a tenant which is neither—

(a) specified in his lease, nor

(b) calculated in accordance with a formula specified in his lease.

(4) An order amending sub-paragraph (1) may be made by the appropriate national authority.

Schedule 11, paragraph 2

A variable administration charge is payable only to the extent that the amount of the charge is reasonable.

Schedule 11, paragraph 5

(1) An application may be made to the appropriate tribunal for a determination whether an administration 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) Sub-paragraph (1) applies whether or not any payment has been made.

(3) The jurisdiction conferred on the appropriate tribunal in respect of any matter by virtue of sub-paragraph (1) is in addition to any jurisdiction of a court in respect of the matter.

(4) No application under sub-paragraph (1) 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 matter of an application under sub-paragraph (1).