

Y TRIBIWNLYS EIDDO PRESWL
RESIDENTIAL PROPERTY TRIBUNAL
LEASEHOLD VALUATION TRIBUNAL

Reference: LVT/0018/08/21

In the Matter of Flat 7, Wesleyan Church, High Street, Llanhilleth, Abertillery, NP13 2RB

And in the Matter of an Application under Section 27A of the Landlord and Tenant Act 1985

Applicants:	(1)	Mr. David Whiteley
	(2)	Mrs. Gill Whiteley
Representative:		Mrs. Gill Whiteley
Respondents:	(1)	Green Valley Property Management Company
	(2)	Genesis Limited
Representative:		Jonathan Furneaux
Tribunal:		Colin Green (Legal Chair) Johanne Coupe FRICS (Surveyor Member) Carole Thomas (Lay Member)
Date of Hearing:		14 December 2021

DECISION

- (1) Genesis Limited is joined as a Second Respondent to the proceedings.**
- (2) In respect of the service charge year 2020, a reasonable figure for tree and bramble clearance would have been £850.00, Flat 7's proportion of which would have been £57.14, which increases Flat 7's credit at the end of 2021 to £115.61.**
- (3) In respect of the service charge year 2021:**
 - a. the £5,000.00 demanded by the letter of 15 July 2021 is not currently due;**
 - b.**

REASONS

Preliminary

1. This is an application by the Applicants, Mr. and Mrs. Whiteley concerning service and administration charges arising under a lease of Flat 7, Wesleyan Church, High Street, Llanhilleth, Abertillery, NP13 2RB ("the Building"). The Building, which includes its curtilage, is a converted Church providing seven self-contained flats. There are three communal entrances: Flats 1 and 3 are accessed via a side entrance; Flat 2 is accessed via the front entrance and Flats 4, 5, 6 and 7 via a rear entrance.
2. Following the Tribunal's directions of 27 August 2021 ("the Directions") statements of the parties' respective cases were served, together with a Scott Schedule. The hearing took place on 14 December 2021 using a Virtual Hearing Room. Mr. and Mrs. Whiteley were represented by Mrs Whiteley and the Respondents by Jonathan Furneaux. 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. Prior to the hearing, on 9th December 2021, the Building and surrounding land were inspected by Johanne Coupe, the surveyor member, in the presence of Mrs. Whiteley and Mr. Furneaux. Following the hearing the Tribunal convened in another virtual room to make their deliberations.
3. Green Valley Property Management Company is the trading name of Jonathan Furneaux, who is also a director of Genesis Limited ("Genesis"), the freeholder of the Building. Mr. and Mrs. Whiteley's application named only Green Valley as a Respondent but at the hearing Mr. Furneaux consented to the landlord being joined as Second Respondent so that it would be bound by the Tribunal's decision.

The Lease

4. Before considering the matters in dispute it is necessary to set out the relevant provisions of the lease ("the Lease") which demised Flat 7 for a term of 999 years from and including 1 March 2006. As regards the service charge, this is defined by clause 1.12 of the Lease as one-seventh of the "Annual Expenditure", in turn defined by clause 1.10. For current purposes, the relevant part of that definition is:

"1.10.1 all costs expenses outgoings whatever reasonably and properly incurred by the Landlord during a Financial Year [1 January to 31 December] in or incidental to providing all or any of the Services"
5. By clause 1.8, "the Services" are the services facilities and amenities specified in the First Schedule:

"1 To maintain and keep in good and substantial repair and condition and renew or replace when required the Main Structure the Common parts and any Pipes used in common by the Tenant and other tenants of the Building and which are not expressly made the responsibility of the Tenant or any other

tenant in the Building and the boundary walls and fences not included in the lease of any flat in the Building

2 *As and when the Landlord shall deem necessary but not more often than every 5 years to decorate in a good and workmanlike manner the external parts of the Building and the Common Parts*

3 *To keep the Common Parts clean and where appropriate lit*

4 *To pay and discharge any Rates Council Tax water and sewerage charges taxes duties assessments charges impositions and outgoings assessed charged or imposed on the Building as distinct from any assessment made in respect of any flat in the Building.*

5 *To do or cause to be done all works installations acts matters and things as in the reasonable discretion of the landlord may be considered necessary or desirable for the proper maintenance safety amenity and administration of the Building*

6 *To keep proper books of account of the sums received from the Tenant and the other tenants in the building in respect of the Annual Expenditure and all costs charges and expenses incurred by the landlord pursuant to his covenants in this lease.*

7 *To set aside such sums as the landlord reasonably requires to meet such future costs as the landlord reasonably expects to incur in replacing maintaining and renewing those items that the Landlord has covenanted to replace maintain or renew.”*

6. The Second Schedule – The Service Charge Provisions - sets out the mechanics for the calculation and payment of the service charge. For current purposes only two paragraphs are relevant.

“2 *The landlord shall as soon as convenient after the end of each Financial Year prepare an account showing the Annual Expenditure for the Financial Year and containing a fair summary of the expenditure referred to in it and upon such account being certified by the Agent it shall be conclusive evidence for the purposes of this lease of all matters of fact referred to in the account except in the case of manifest error*

4. *If the Service Charge for any Financial Year exceeds the provisional sum for that Financial Year the excess shall be due to the Landlord on demand and if the Service Charge for any Financial Year is less than such provisional sum the overpayment shall be retained by the landlord on account as prepayment for the next years Service Charge”*

7. The expression “the provisional sum” receives no definition in the Lease and there is no express obligation for the tenant to pay the provisional sum. In the Tribunal’s view however, the provisions of paragraph 4 would be inoperable unless such a provisional sum – an advance service charge or payment on account -- had been made for the year and a reconciliation carried out after the year end to determine if there was a

debit or credit This is in fact, how the service charge provisions have been operated by Mr. Furneaux. Accordingly, it is considered that there is an implied term in the Second Schedule that a provisional sum will be paid by the tenant at the beginning of the service charge year, being an estimate of the Annual Expenditure for that year.

8. The Lease of flat 7 was purchased by Mr. and Mrs. Whiteley as an investment property, subject to a sub-tenancy, at an online auction that took place in early October 2020, with completion on 12th November 2020. The completion statement details certain additional items for which payment was made: £350.00 to the seller in respect of the management pack, and an apportioned service charge payment. This is shown as having been calculated by taking £900.00 paid by the seller for the year to 31.12.20, which was then divided by 365 to produce a daily rate, and multiplied by 297, presumably the number of days from 1 January to the date of the auction or when contracts were exchanged. This produces a figure of £732.33. As accepted by Mrs. Whiteley, this was not a sum paid to the landlord or its agent in respect of the service charge but an apportioned reimbursement to the seller in respect of the service charge, and therefore not a payment for which the landlord need account.
9. The Tribunal now turns to consider the issues it must determine.

Statutory requirements

10. Paragraph 2 b) of the Directions provides that one of the issues to be determined is whether the service and administration charges have been properly demanded in accordance with the law and the lease. This is expanded on at paragraphs 4 ii and ii, by reference to the statutory requirements of the Landlord and Tenant Act 1985 section 21B, and sections 47 and 48 of the Landlord and Tenant Act 1987, and the requirements of paragraph 4 (1) of Part 1 of Schedule 11 to the Commonhold and Leasehold Reform Act 2002. Compliance with these provisions is addressed in Mr. Furneaux's statement and the relevant exhibits, and no issue has been taken with them by Mr. and Mrs. Whiteley in their joint statement in reply. The Tribunal is satisfied that the relevant statutory provisions are satisfied.

Service charge matters

11. The present application was made in response to County Court proceedings brought by Genesis Limited for recovery of the advance service charge for 2021, the annual insurance charge and two £50.00 administration charges in connection with the insurance. The insurance charge has now been paid and during the hearing Mr. Furneaux agreed to withdraw the £100.00 administration charges.
12. There are two service charge years where issues arise: 2020 – a sum of £1,141.43 (including management fee) for flat 7's account – which resulted in a surplus of £58.57 that has been carried over as a credit; and 2021, for which an advance service charge of £800.00 was demanded on 12 April 2021. Since the 2021 service charge year has not yet ended there is no final account for the current year and no reconciliation that can take place against the advance charge of £800.00.

13. As seen above, Mr. and Mrs. Whiteley acquired the Lease approximately six weeks before the end of the 2020 service charge year and have made no service charge payments for that year, as distinct from reimbursing part of the service charge payment made by their predecessor in title. Nevertheless, the Tribunal considers that they have sufficient standing to query items within the 2020 expenditure, as any reduction in those items will result in an increase in the credit carried over to the 2021 service charge year.
14. In determining the items in dispute, by reason of section 19 of the 1985 Act, costs are taken into account in determining the amount of a service charge payable for a period only to the extent that they were reasonably incurred, and where they were incurred on the provision of services or the carrying out of works, only if the services or works are of a reasonable standard.
15. Mr. and Mrs. Whiteley's statement exhibits various photographs. Due to Covid restrictions, they purchased the flat without a viewing and Mrs. Whiteley first visited the Building in February or March 2021, followed by visits on about 16 June, for a fire alarm test when she met with Mr. Furneaux, dates in July, October and November, and the inspection on 9 December. The photographs were taken during the June and July visits.
16. The items in dispute are as follows.
- 2020*
- (1) £350.00 for gutter cleaning by DW Maintenance on 6 March 2020 (Flat 7's share: £50.00). Mrs. Whiteley contends that the gutters were not properly cleaned and in support relies on a photograph that shows reeds growing from the gutter. The Tribunal does not consider the photograph, taken from ground level, supports the conclusion that the year before the gutters were not properly cleaned.
- (2) £1,250.00 (£187.57) for tree and bramble clearance by Green Fingers Tree Services on 18 September 2020. Mrs. Whiteley does not consider that the cost is justified by the amount of work involved. The Tribunal agrees and considers that £850.00 would be a reasonable figure, a difference for flat 7 of £57.14. The Tribunal also considers that rather than a yearly visit the work could more easily be carried out by three visits a year at about £150.00 a time.
- (3) £140.00 (£20.00) for general rubbish removal on 20 April 2020. The receipt from Andrew Harris states the payment was made in cash. Mrs. Whiteley queries whether the payment was made. While acknowledging that where possible, payments should not be made in cash, the Tribunal accepts the receipt and Mr. Furneaux's evidence that he did pay such sum. Mrs. Whiteley also states that a registered waste carrier should have been used but there is no evidence that any of the waste removed would require this, or that the waste was not disposed of in an appropriate fashion.
- 2021*
- (4) There has been no dispute as to the amount of £800.00 by way of advance service charge and the Tribunal considers that to be a reasonable estimate in

the light of the previous year's charge of £1,141.43, even subject to the small adjustment of £57.14 mentioned in paragraph (2) above.

- (5) During 2021 an additional service charge payment has been sought by a demand dated 15th July in respect of major works to the roof of the Building and repointing, estimated at about £70,000.00. The demand seeks payment of £5,000.00, half Flat 7's estimated contribution to the works, for the purpose of the reserve fund provided for by paragraph 7 of the First Schedule to the Lease, so that adequate funding will be in place when the proposed works commence in 2022. Mr. Furneaux accepts that the consultation provisions specified in section 20 of the 1985 Act will apply and the consultation process is still in progress. The Tribunal considers that there is no reason in principle why a reserve fund cannot be built up in respect of major works before the consultation process has been completed and recognises that it is often prudent to do so. The difficulty however, is that although the Tribunal has found there is an implied term for a demand for the advance service charge – "the provisional sum" (see paragraph 7 above) – there is no basis for implying a term that additional advance payments can be sought after such a demand has been made. In other words, having made a demand for the advance charge for 2021 in April, Mr. Furneaux was not entitled to raise a further advance charge in July. Such a contribution would have to await the advance service charge for 2022. Therefore, the sum of £5,000.00 is not currently due.
- (6) Since the s. 20 consultation process has not yet ended, the Tribunal does not feel it appropriate to comment further on the proposed works other than to note that on Mrs. Coupe's inspection it was apparent that the roof needed repair, which Mrs. Whiteley accepted was the case. To be quite clear, in this decision the Tribunal is making no determination concerning the nature of the works required, their cost, the suitability of any contractor, or whether the consultation requirements have been complied with.
- (7) Mr. and Mrs. Whitely's statement complains about the state of repair of the common parts, supported by photographs. At the time of the inspection all communal areas had been freshly redecorated and cleaned, and only limited mould remains. The carpets are badly stained and are considered to be nearing the end of their economic life. The hole in the boarding had been repaired and the obstructed gas flue cage, cleared. Two items were outstanding: a fire door, which still does not close properly, which Mr. Furneaux proposes to have removed as it was installed by a tenant and he claims that it is unnecessary to have a fire door at that location; and some broken or missing steps which the parties agreed fall outside the freehold title and therefore are not subject to any repairing obligation. The Tribunal does not consider that any adjustment is required to the advance service charge in respect of the works of maintenance and repair, and it is not in a position to consider the reasonableness of the costs which will appear in the end of year accounts.
- (8) Mr. Furneaux has charged a sum for his monthly visits to the Building to test fire alarms, and remove rubbish from the communal hallways and exterior. In 2020 this was at the rate of £95.00 per visit (£13.57). Such a monthly charge will also appear in the final accounts for 2021, presumably at the same rate. On her attendance for the fire alarm test on 16th June, Mrs. Whiteley noted

voluminous post piled up behind the entrance door to flats 4, 5, 6 and 7, as seen in the photographs she took, estimated as at least 200 items. There are no letterboxes for the flats so that post accrues in this way. Mr. Furneaux stated that on his monthly visits he sorts through post on the floor and places it outside each flat. According to Mrs. Whiteley, when she pointed out to him the considerable pile of letters inside the entrance door, some of which were four months' old, Mr. Furneaux admitted that he had let things slip. He denies having said this.

- (9) Having considered the photographs, and accepting that some were four months old, the Tribunal is of the view that they represented at least three months' worth of post which the occupiers of the flats had not collected, and that had the letters been sorted in the manner described by Mr. Furneaux during that period they would not have made their way back to behind the main door. From this the Tribunal concludes that Mr. Furneaux had not made monthly visits to the Building in the preceding three months – March, April, and May – and that therefore, in the end of year accounts for 2021 he will not be entitled to include his monthly fee for three months.

Administration charges

17. There are two administration charges challenged by Mr. and Mrs. Whiteley, being the £350.00 charged for each of two management packs.

- (1) The first was that provided to the solicitors for Mr. and Mrs. Whiteley's predecessors. According to Mr. Furneaux, this was requested by the solicitors in the usual way. The Tribunal does not consider that Mr. and Mrs. Whiteley are able to challenge this item as it is a charge not made to them but their seller, albeit one that was reimbursed to the seller on the sale. In addition, paragraph 5(4) of Schedule 11 to the Commonhold and Leasehold Reform Act 2002 provides that no application can be made to determine if an administration charge is payable where the charge has been agreed by the tenant. On the uncontested evidence of Mr. Furneaux, the charge was agreed by the solicitors for the previous tenant, and Mr. and Mrs. Whiteley agreed to reimburse that tenant.
- (2) The second management fee of £350.00 arose because Mr. and Mrs. Whiteley had entered Flat 7 into an auction in July 2021. It is clear from the exchange of emails between their solicitors and Mr. Furneaux that the solicitors had requested a management pack and approved the charge of £350.00. There was some dispute between the parties as to whether a fresh management pack was required in the circumstances, less than a year after the first, but as Mr. and Mrs. Whiteley's solicitors requested it this is a moot point so far as Mr. Furneaux is concerned. Again, since the charge was agreed it cannot now be challenged.

Section 20C

18. Mr. Furneaux confirmed that he would be charging for his involvement in these proceedings, which would form part of the service charge for 2021. On the footing that he is entitled to do so under paragraph 5 of the First Schedule to the Lease, the

Tribunal has considered whether to exercise its powers under section 20C of the 1985 Act, under which it can direct that all or part of such costs shall not be included in the service charge for Flat 7. For the following reasons the Tribunal has decided that to the extent any costs regarding these proceedings are recoverable by way of service charge against the service charge account for Flat 7, such costs shall be excluded.

- (1) In light of the charging rates exhibited to Mr. Furneaux's statement, the amount he will charge will be disproportionately high in comparison to the value of the issues on which he has been successful.
- (2) Viewed as on an issue-by-issue basis, the outcome of the proceedings has been roughly even.
- (3) The Tribunal considers that the only reason why the works of maintenance and repair mentioned above were completed by the date of inspection was because Mr. and Mrs. Whitely had made the present application.

Dated this 30th day of December 2021

C. R. Green
Chair, Residential Property Tribunal