9346

FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)
EASTERN REGIONAL OFFICE

Case Reference	:	CAM/26UL/LSC/2013/0071
Property	:	234 Parkhouse Court, Hatfield, Herts AL10 9RE
Applicant	:	Comet Square Phase Two Block Management Company Limited Represented by Mr James Sandham of Counsel
Landlord	:	BDW Trading Limited (formerly known as Barratt Homes Limited (not appearing)
Respondent	:	David John Plant (tenant) In Person
Date of Application	:	Transferred from St Albans County Court by Order of District Judge Cross dated 25th April 2013 and from Wigan County Court by Order of District Judge Gorman dated 28th June 2013
Type of Application	:	Landlord & Tenant Act 1985 section 27A Commonhold & Leasehold Reform Act 2002 section 158 & Schedule 11 Determination of reasonableness and payability of service charges and administration charges
Tribunal	:	Tribunal Judge G M Jones Mr D D Banfield FRICS Mr P A Tunley
Date and venue of Hearing	:	25th October 2013 Ramada Hatfield Hotel

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DECISION

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ORDER

UPON HEARING Counsel for the Applicant and the Respondent in Person

AND the Tribunal considering that the provision for consolidation made in paragraph 1 of the Order of Deputy District Judge Gorman dated 28th June 2013 and made in claim number 3YJ07921 in Wigan County Court to be of no effect but with a view to giving lawful effect to the purposes of the said Order

IT IS ORDERED THAT: -

1. The transferred claims from St Albans County Court under claim number 2YL58458 and from Wigan County Court under claim number 3YJ07921 shall be heard together.

2. It is hereby declared –

   a. that the service charges claimed by the Applicant from the Respondent in both claims were reasonably incurred and are (subject to any payments made in respect of such charges since the respective claims were issued) payable by the Respondent.

   b. The arrears administration charges claimed by the Applicant in both claims were reasonably incurred by the Applicant and are payable by the Respondent only to the extent allowed in accordance with the Schedule hereto and the Applicant must adjust the service charge accounts accordingly.

   c. Legal fees included in the service charge accounts rendered by the Applicant to the Respondent are payable by the Respondent as administration charges only as regards the sum of £242.38 dated 11th May 2011.

   d. Legal charges included in the said service charge accounts dated 18th June 2013 are not payable by the Respondent as administration charges but appear to be within the discretion of the Court.

3. The Tribunal makes no order as regards the legal charges claimed in both claims but not included in the service charge accounts as such costs are not claimed as administration charges and appear to be within the discretion of the Court.

4. No order is made as regards costs under section 20C of the Landlord & Tenant Act 1985, the Tribunal not considering it just or equitable to make any order.

5. Upon publication of this Decision the Tribunal Clerk shall send copies hereof to Wigan County Court and to St Albans County Court for consideration of the suggestion made at Paragraph 5.19 of the Reasons herewith (bearing in mind the issues considered in paragraphs 1.9 to 1.10 of the said Reasons).

6. Insofar as may lawfully be so ordered, claim number 2YL58458 is hereby transferred back to St Albans County Court and claim number 3YJ07921 to Wigan County Court for further disposal.

Tribunal Judge G M Jones
Chairman
29th November 2013

234 PARKHOUSE COURT, HATFIELD

Case ref: CAM/26UL/LSC/2013/0071

Schedule of Arrears Administration Charges

CHP account			**Claimed**			**Allowed**
	£	VAT %	£	£	VAT %	£
09/10/2007	35.00	17.5	41.13	0.00	17.5	0.00
13/11/2007	70.00	17.5	82.25	0.00	17.5	0.00
24/07/2009	35.00	15	40.25	0.00		0.00
22/03/2010	35.00	17.5	41.13	20.00	17.5	23.50
13/04/2010	70.00	17.5	82.25	20.00	17.5	23.50
31/07/2010	0.00		0.00	40.00	17.5	47.00
24/01/2012	35.00	20	42.00	20.00	20	24.00
28/03/2012	70.00	20	84.00	20.00	20	24.00
Totals	**350.00**		**413.00**	**120.00**		**142.00**

General account			**Claimed**			**Allowed**
09/10/2007	35.00	17.5	41.13	20.00	17.5	23.50
13/11/2007	70.00	17.5	82.25	20.00	17.5	23.50
28/12/2008	35.00	15	40.25	20.00	15	23.00
24/04/2009	70.00	15	80.50	20.00	15	23.00
29/09/2010	35.00	17.5	41.13	20.00	17.5	23.50
12/10/2010	70.00	17.5	82.25	20.00	17.5	23.50
28/03/2012	**End date of first claim**					
19/04/2012	35.00	20	42.00	20.00	20	24.00
28/09/2012	35.00	20	42.00	20.00	20	24.00
12/10/2012	70.00	20	84.00	20.00	20	24.00
Totals	**455.00**		**535.50**	**180.00**		**212.00**

Legal fees allowed as administration charges

11/05/2011	242.38	CHP account

Litigation fees set out below are a matter for the County Court's discretion

31/07/2012	952.00	First claim
28/12/2012	941.40	Second claim
18/06/2013	144.00	CHP account
18/06/2013	108.00	General account
Total	**2,145.40**	

REASONS

0. BACKGROUND

The Property

0.1 The property is a modest one bedroom flat in the development known as Equinox Comet Square Phase 2, located on the edge of the former (and once famous) Hatfield aerodrome. The development comprises four blocks of apartments or flats with commercial (retail) premise at ground floor level, Blocks 1 and 2 being joined together. Flat 234 is in Block 1. There are 267 Apartments benefiting from a Combined Heating and Power (CHP) plant. The blocks lie in grounds containing car parking areas and open space. The development is associated with a public open space called Arlington Park.

0.2 Adjoining Blocks 1 and 2 is a building containing the CHP plant. This is basically a large gas turbine motor designed to generate electricity, the excess heat (which would otherwise go to waste) being utilised to heat a large tank of water. Heat is transferred from the water tank via heat exchangers and piped underground into the Blocks to provide central heating and hot water to the occupiers. En route, the hot water also heats the common parts: hallways, stairs, lifts and landings. Also supplied is a nearby nursing home lying to the north-west. There are back-up systems for maintenance periods and in case of breakdown. The electricity supply is connected to the National Grid, so that a feed-in tariff can be claimed by Cofely and electricity drawn from the Grid when demand exceeds supply.

The Lease

0.3 The freeholder of the development under Land Registry title numbers HD426484 and HD424188 is Frontier Key (Hatfield) Limited, though the freeholder is in no way involved in the dispute. The landlord's leasehold interest is registered under title numbers HD451800 and HD451797. The Applicant is named in the leases as Manager of the development. Mr Plant was the original leaseholder of Flat 234 (described in the lease as Plot 102) under title number HD475381.

0.4 The underlease dated 29th June 2007 is typical of those held by private purchasers of flats in the development. The term is for 157 years from 1st April 2006 at a rent of £200 p.a. subject to review every 21 years in line with the value of the Block. The property to be maintained by the Manager is set out in Schedule 2. The demised premises are set out in Schedule 3. The maintenance expenses (to which the leaseholders must contribute) are set out in Schedule 6. By Part C2 of Schedule 6 these include –

(1) The costs associated with the provision and maintenance of the CHP plant including office costs health and safety including fire risk assessment bank charges accounts and audit

(2) The cost (unless otherwise collected direct by the provider) of consumption by the occupants of the Demised Premises of domestic electricity hot water and central heating provided to the demised premises

via the CHP plant together with all associated costs.

0.5 The Tenant's proportions of maintenance expenses are set out in the definitions section of the lease by reference to Schedule 6 and further described in Schedule 7. Schedule 7 contains an arbitration clause which it would no doubt be extremely expensive for the tenant to invoke. Fortunately, the arbitration clause does not oust the jurisdiction of the Tribunal. The expenses to which the tenant must contribute the specified proportions are divided into four parts as set out in Schedule 6: Part A Estate Costs (contribution 0.5848% or 1/171); Part B Block Costs (contribution 0.98% or 1/102); Part C Additional Charges (C1 Arlington Park costs 0.3746% or 1/267 and C2 CHP costs); and Part D general costs under the other headings.

0.6 Part D costs include the collection of rents and service charges and the enforcement of covenants and conditions. Schedule 8 contains the tenant's covenants to pay rent (paragraph 1); service charges (paragraph 2); interest on unpaid rents (paragraph 3); and the usual provision (paragraph 4) whereby the tenant is liable to reimburse the landlord in respect of any expenses incurred by the landlord in or in contemplation of the service of notices under sections 146 and 147 of the Law of Property Act 1925 (notices of breach of covenant). Paragraph 4 would include expenses incurred in relation to enforcement of rent arrears.

0.7 However, the service charges are payable to the Manager and are not reserved as rent. Thus paragraphs 3 and 4 of Schedule 8 do not apply to service charge payments. There is another provision in paragraph 8, where by the tenant must "keep the Landlord and the Manager indemnified in respect of any charges for other services payable in respect of the Demised Premises which the Landlord or the Manager shall from time to time ... be called upon to pay .." The lease contains no express reference to payment of administration charges or legal expenses incurred in the recovery of unpaid service or administration charges.

1. THE DISPUTE

1.1 The principal issue in this case is the cost to the Respondent as tenant of 234 Parkhouse Court of his contribution to the costs of running the Communal Heating and Power Plant (CHP) which provides electricity, space heating and hot water to the development and also to an adjacent nursing home. The dispute began in 2008. The Respondent was up-to-date with his service charge payments on 1st February 2008 and continued to pay his general service charges thereafter. However, as a matter of principle he refused to pay his assessed contribution to the CHP costs, as a result of which he incurred numerous arrears administration charges and legal costs were also added to his service charge account.

1.2 Mr Plant was not alone in his concerns about the CHP costs. On 25th August 2009 the issue was discussed at a meeting of the Residents' Committee in the presence of Mr John Gibbs of Ian Gibbs Estate Management Ltd ("IGEM", the managing agent). Those present expressed their dismay at the continued high cost of the CHP, which is run by Cofely District Energy Limited trading as Cofley-GDF-Suez ("Cofely", formerly known as Utilicom Limited) under a 25-year contract (the CHP Agreement Exhibit JG7) entered into with the developer (Barratt Homes) on 20th June 2005 before any of the flats were sold or occupied. During the contract period there is no

general legal right for developer, landlord or tenants to change provider.

1.3 The method of calculating the unit power costs payable to Unicom is fixed by the contract and that also cannot be changed except by mutual consent. Investigations by IGEM suggested that the rate of heat loss within the system was approximately 37% of the total generated. The minimum cost to the tenant of each flat for remote metering, administration and billing was said to be about £50 p.a.; for communal electricity £190; plant running costs £225; and wasted heat £350. Thus the minimum total cost per flat was over £800 p.a., even if no power was consumed within the flat. Apart from some economies on common parts lighting, the Applicant appeared to have no power to reduce the CHP costs in any way at all.

1.4 The litigation has a long and, in some respects, rather unfortunate history. On 12th August 2012 claim number 2YL58458 (the first claim) was issued in the Northampton County Court. This related primarily to arrears of CHP service charge contributions. A default judgment was issued against Mr Plant by that Court on 15th September but set aside on 19th October 2012 by Deputy District Judge Keating, who ordered (by clause 2 of his Order) that the claim be transferred to the Leasehold Valuation Tribunal (LVT). However, on 26th October 2012 clause 2 of that Order was set aside by DDJ Anderson and, of the Court's own motion, he ordered that the claim be transferred to Wigan County Court for directions. On 1st November 2012 DJ Jackson fixed a hearing for the District Judge to decide whether the claim was suitable for transfer to the Tribunal, as Mr Plant had requested.

1.5 On 14th December 2012 DJ Mornington ordered the Defendant to file a witness statement. By his statement of 26th December 2012 Mr Plant explained in detail why he considered that the charges were unreasonable and why the claim ought to be transferred the Tribunal. His reasons appear to this Tribunal very persuasive; but the Court took a different view.

1.6 On 8th March 2013 DJ Jackson the Court refused the application for transfer to the Tribunal and ordered that that the claim should be transferred to St Albans County Court to be referred to a District Judge with experience of matters involving service charges. The claim was in fact erroneously sent to Edmonton County Court. On 3rd April 2013 the claim was transferred to St Albans County Court. Finally on 25th April 2013 DJ Cross of his own motion transferred the claim to the Tribunal, there being no District Judge at St Albans with experience of service charge disputes. The Order was drawn up on 13th May 2013 and received by the Tribunal on 15th May 2013.

1.7 Meanwhile, on 28th December 2012 the Applicant commenced a second claim number 3YJ07921 in the Northampton County Court against Mr Plant primarily for general service charge contributions to December 2012. A default judgment was issued on 5th February 2013 against Mr Plant, who then applied for the judgment to be set aside, the claim consolidated with the first claim and the consolidated claim to be transferred to the LVT. On 18th February 2013 the second claim was transferred to Wigan County Court. The transferred claim unfortunately did not come before a Judge until 9th May 2013, by which date the first claim had already been transferred to the Tribunal. DJ Gordon (who was, of course, unaware of the Order of DJ Cross which had not yet been drawn up or served on the parties) set aside the judgment, ordered Mr Plant to pay assessed costs and file a Defence and also ordered a stay to

take effect thereafter until 21st June 2013.

1.8 The reason for the stay was that, along with his Defence of 22nd May 2013, Mr Plant filed a request for a stay pending judgment in a relevant High Court action. The Landlord and the Applicant had brought a claim number HC12E04517 against South Anglia Housing Limited (the tenant of the social housing element of the development) for a determination whether the CHP Agreement was a qualifying long-term agreement (QLTA). On 15th February 2013 Deputy Master Lloyd ordered the claimant to notify all the tenants of the block by 8th March 2013 and invite them to consider whether they wished to join in the claim. Mr Plant was considering whether to join in that claim (though, in the end, he did not do so). In the event the Court were to decide that the Agreement was a QLTA, Mr Plant nevertheless intended to dispute the charges on grounds of lack of consultation under the provisions of section 20 of the Landlord & Tenant Act 1985 (as to which, see Section 4 below). If he were correct, the costs recoverable by the Management Company would be severely restricted unless dispensation were to be given under section 20ZA, which the Tribunal would have power to do in certain circumstances.

1.8 The High Court claim was due to be heard (and was heard) on 21st June 2013 before Mr Nicholas Strauss, sitting as Deputy Judge (DHCJ) of the Chancery Division of the High Court. Judgment was given on 17th July 2013. It is not necessary to discuss the High Court decision in detail. In essence, the Deputy Judge held that the CHP Agreement was not a QLTA because the Agreement was entered into prior to the grant of any tenancy and the obligation to consult does not arise until there are tenants to consult. This decision does potentially have unfortunate consequences for tenants; but it is perfectly logical and in accordance with precedent and is binding on this Tribunal.

1.8 On 20th June 2013 the RPTS Eastern Region President (as he then was) issued a directions order in relation to the first claim. The Tribunal was, at this stage, unaware of the second claim or the High Court action. Meanwhile, on 28th June 2013 Deputy District Judge Gorman, sitting in the Wigan County Court, made an order consolidating the second claim with the first claim under reference CAM/26UL/LSC/2013/0071 and transferring the consolidated claim to the LVT. He further ordered that, within 28 days of the LVT's decision, the Court should list the claim for a case management conference.

1.9 The effect of this Order is not quite what at first sight appears because –

(a) The first claim was, on any view, not proceeding in the Wigan County Court, as it had been transferred to St Albans, so that the Wigan County Court could not make any order relating to the first claim.

(b) The St Albans County Court had purported to transfer the first claim to the LVT though, technically, in the judgment of the Tribunal, the effect of that order was only to refer the issues of reasonableness and payability of service and administration charges to the Tribunal. These are the only issues the Court can transfer under Schedule 12 of the Commonhold & Leasehold Reform Act 2002 and CPR PD56 and, moreover, the only issues in the claim the Tribunal has jurisdiction to decide.

(c) It is questionable whether the Tribunal would have power to transfer the first claim back to Wigan County Court or the second claim back to the St Albans County Court, or indeed either claim back to any Court. Paragraph 3(2) of the Schedule merely provides that the Court (by implication, the Court that has transferred the issues to the Tribunal) may give effect to the determination of the Tribunal in an order of the Court. The Tribunal routinely makes orders transferring referred cases back to the referring court; but the effect of these orders in reality is to notify the Court that the Tribunal has decided the referred issues.

1.10 In those circumstances, the Tribunal intends to proceed on the basis that the effect of DDJ Gorman's Order was to transfer to the Tribunal the issues the Tribunal has power to decide. Since the consolidating order appears to be of no effect (being ultra vires i.e. beyond the powers of a DJ sitting in Wigan County Court), the Tribunal has decided to hear the two cases together and report our decisions back to both Courts with a suggestion that the second claim should then be transferred to St Albans County Court. It is clearly right that the same court should decide the outstanding issues in both cases, whatever the decision of the Tribunal.

1.11 On 1st July 2013 the jurisdiction of the LVT was transferred to the First Tier Tribunal (Property Chamber) and this case to the Eastern Regional Office in Cambridge. Under transitional provisions the Order of ERAP President Edgington (now Regional Judge Edgington) of 20th June 2013 stands. By letter dated 1st August 2013 Brethertons (solicitors for the Applicant) sent the Tribunal a copy of the Judgment of DHCJ Strauss in the South Anglia Housing case. On 22nd August 2013 Tribunal Judge GM Jones issued an Order in relation to both claims with a revised timetable for compliance with the directions of RJ Edgington. Finally, on 4th October 2013, by which date neither party had fully complied with the Order of 22nd August, TJ Jones issued a further Order in the hope that both parties would comply and thereby ensure that the case was ready to be heard on the appointed date, 25th October 2013.

2. THE ISSUES

2.1 The Applicant's claims are for arrears of service charges relating to the CHP costs; for arrears administration charges; and for legal fees incurred in the enforcement of the service and administration charges. The Applicant's case is set out in the statement of John Gibbs dated 9th September 2013. The Applicant claims unpaid service charges, administration charges and legal fees. As regards the administration charges and legal fees the Applicant relies upon Schedule 8 paragraph 4 and upon Schedule 11 paragraph 1(1)(d) of the Commonhold & Leasehold Reform Act 2002 in support of the contention that such charges are payable under the lease terms.

2.2 The Respondent's case is simple. He says the CHP is inefficient and much heat is lost in the pipe-work because it is inadequately insulated. This can be seen on icy or snowy days because of melting along the line of the underground pipes and also experienced in the common parts of the block which are so hot that the windows are kept open even in the middle of winter. He says that it should be possible to achieve substantial savings by improving the insulation, which ought to have been specified

at the outset.

2.3 As regards the administration charges etc. the Respondent says he ought not to pay them because he was withholding his CHP contribution pending resolution of the dispute and, in any event, they are excessive and unreasonable. As regards the legal costs, he says those are not recoverable except by reason of the legal proceedings, which are not concluded, and in respect of which the claim for costs is disputed. Thus it was inappropriate to include the legal costs as part of the claim.

3. THE EVIDENCE

The Inspection

3.1 The Tribunal inspected the common parts, the grounds and the CHP plant, where helpful explanations were provided by the service engineer. Long pipe runs supply the blocks and the nursing home. It was explained (as documents before the Tribunal show) that the CHP Agreement requires the delivery of hot water at minimum temperatures to the end users, so that allowance must be made for heat losses en route. The internal common parts in Blocks 1 and 2 were, as Mr Plant claims, very hot, although the windows were wide open.

The Hearing

3.2 There was no expert evidence available as regards the efficiency of the CHP plant. However, as it turned out, this was not necessary. The Applicant's witness Mr Gibbs explained to the Tribunal that the heating, hot water and electricity are metered only in the flats. The heating of the common parts and the heat losses into the ground and into the air does not affect the charges rendered to the tenants, which are fixed charges calculated on the basis of the costs of running the CHP plant. The heat which provides hot water for space heating and for domestic purposes is essentially a by-product of the production of electricity and, if not used for heating water, must be dissipated to avoid the machinery and pipe-work from overheating. The metered charges per unit of energy are calculated according to a formula fixed by the Agreement, as the Tribunal could see from Exhibit JG7.

3.3 The hearing bundle contained copies of the invoices rendered by Cofely to the landlord and passed on to the Applicant by Barratt to be apportioned between the tenants. It is not suggested that the charges rendered to tenants are other than a correct apportionment of those costs. Also in the bundle is Exhibit JG5, a copy of the statement rendered to Mr Plant in respect of Flat 234 for the six-month period ending 31st July 2012. The total is £713.32, of which fixed charges total £329.90.

3.4 The conduct of the parties during the initial period of dispute and during the tortuous course of the litigation was considered at some length during the hearing. Each party accused the other of unreasonable conduct. However, a good deal of the hearing time was consumed in consideration of the CHP charges, the efforts of the Applicant to ascertain what (if anything) could be done to reduce those charges, and the ultimate conclusion reached by Mr Gibbs that nothing could effectively be done except to reduce the lighting costs in the internal common parts, which would not make a great deal of difference to CHP charges to individual tenants.

3.5 It was apparent that Mr Plant did not accept the Applicant's analysis of the CP Agreement, nor did he accept that almost nothing could be done by the Applicant or

its managing agent to reduce costs to tenants.

4. THE LAW

Service and Administrative Charges

4.1 Under Landlord & Tenant Act 1985 section 18 service charges are amounts payable by the tenant of a dwelling, directly or indirectly, for services, repairs, maintenance, improvement, insurance or the landlord's (or manager's) costs of management. Under section 19 relevant costs are to be taken into account only to the extent that they are reasonably incurred and, 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. Where a service charge is payable before the relevant costs are incurred, no greater amount than is reasonable is so payable.

4.2 Under section 27A the Tribunal has jurisdiction to determine whether a service charge is payable and, if so, the amount which is payable; also whether, if costs were incurred for services, repairs, maintenance, improvements, insurance or management of any specified description, a service charge would be payable for those costs and, if so, the amount which would be payable.

4.3 In deciding whether costs were reasonably incurred the Tribunal should consider whether the landlord's actions were appropriate and properly effected in accordance with the requirements of the lease and the 1985 Act, bearing in mind RICS Codes. If work is unnecessarily extensive or extravagant, the excess costs cannot be recovered. Recovery may in any event be restricted where the works fell below a reasonable standard.

4.4 Under section 158 and Schedule 11 of the Commonhold & Leasehold Reform Act 2002 (upon which the Applicant relies) variable administration charges are payable by a tenant only to the extent that the amount of the charge is reasonable. An administration charge is 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.

4.5 An application may be made to the Tribunal to determine whether an administration charge is payable and, if so, how much, by whom and to whom, when and in what manner it is payable. The Tribunal may vary any unreasonable administration charge specified in a lease or any unreasonable formula in the lease in accordance with which an administration charge is calculated.

4.6 An important distinction between service charges and administration charges is that the former are payable by tenants generally while the latter are payable by a particular tenant in relation to dealings between that tenant and the landlord or managing agent.

4.7 The Service Charges (Summary of Rights and Obligations) Regulations 2007, made under section 21B of the 1985 Act and taking effect from October 2007, require a landlord (other than a local authority) serving a demand for service charges to accompany that demand with a statutory notice informing the tenant of his rights. If this is not done, the tenant is entitled to withhold the service charge payments so demanded. However, Regulation 2 makes it clear that this does not apply where the landlord is a local authority. The Tribunal standard forms of directions may include reference to these Regulations; but they do not apply to local authority landlords.

Consultation

4.8 Under section 20 of the 1985 Act (as substituted by section 151 of the Commonhold & Leasehold Reform Act 2002 with effect from 31 October 2003) and the Service Charges (Consultation Requirements) (England) Regulations 2003 landlords must carry out due consultation with tenants before undertaking works likely to result in a charge of more than £250.00 to any tenant ("qualifying works") or entering into long term agreements ("qualifying long term agreements") costing any tenant more than £100.00 p.a. This process is designed to ensure that tenants are kept informed and have a fair opportunity to express their views on proposals for substantial works or on substantial long term contracts and to nominate if they so wish potential contractors to compete in the statutory tendering process.

4.9 In cases where the same contractor is employed to carry out items of work on a regular basis, the Tribunal must first consider whether there was a "long term agreement" within the meaning of the section. There will be many cases in which a single contractor carries out numerous items of work, perhaps over a long period, under a series of individual contracts. Such individual contracts may or may not be awarded under an express or implied umbrella contract specifying rates of remuneration and, perhaps standards of performance. There may or may not be a commitment for the landlord or manager to employ the services of the contractor. In each case, it will be a question of fact whether there is a qualifying long term agreement.

4.10 Consultation requirements vary depending upon the circumstances of the case and, in particular, whether the landlord is a designated public body for the purposes of statutory regulations dealing with public works, services and supplies and, in such case, whether the value of the contract exceeds the relevant threshold set under the Public Contracts Regulations 2006. These regulations are designed to provide a level playing field for contractors from EU member states bidding for large public sector contracts in such states.

4.11 In this case the relevant requirements are those set out in Part 2 of Schedule 4 to the 2003 Regulations. The landlord must first provide to the tenants (and, if applicable, to the tenants' association) prescribed information about the proposed works and

invite them to put forward a contractor. The consultation period is 30 days.

The landlord must have regard to the tenants' observations, which might result in a change in the specification of works. After that, the landlord may be obliged to seek an estimate from a contractor or contractors nominated by the tenants. That is likely to occupy a further period of at least 14 days. The landlord must then inform each tenant of the amounts of at least two estimates and the effect of any observations received and the landlord's responses and invite observations on the estimates. All estimates must be made available for inspection. The second consultation period is also 30 days. The landlord must have regard to any observations made. There are other requirements to provide information; but these should not delay the works.

4.12 Landlords who ignore these requirements do so at their peril. Unless the requirements of the regulations are met the landlord is restricted in his right to recover costs from tenants; he can recover only £250.00 or £100.00 p.a. per tenant (as the case may be) in respect of qualifying works. However, it is recognised that there may be cases in which it would be fair and reasonable to dispense with strict compliance.

4.13 Accordingly, under section 20ZA (inserted by section 151 of the Commonhold & Leasehold Reform Act 2002) the Leasehold Valuation Tribunal may dispense with all or any of the consultation requirements if satisfied that it is reasonable to do so. This may be done prospectively or retrospectively and, under recent case law, may be done on terms. In particular, in appropriate cases the Tribunal may impose, as a condition of dispensation, a reduction in the charges to tenants. Typically, prospective dispensation will be sought in case of urgency or, perhaps where a tenant is refusing to co-operate in the consultation process. Retrospective dispensation will be sought where there has been an oversight or a technical breach or where the works have been too urgent to wait even for prospective dispensation. These examples are not meant to be exhaustive; there may be other circumstances in which section 20ZA might be invoked.

Costs of enforcing covenants

4.14 A landlord is entitled under section 146(3) of the Law of Property Act 1925 to recover from a tenant as a debt reasonable costs and expenses (including legal costs and surveyors' fees) properly incurred in reference to any breach giving rise to a right of re-entry or forfeiture which, at the request of the tenant, is waived by the landlord, or from which the tenant is relieved under the provisions of the Act. In most cases, the lease will in any event contain an express covenant requiring the defaulting tenant to pay those costs. Such costs are not confined to costs recoverable through the Courts, which may often be considerably less than the actual costs incurred.

4.15 A landlord who has more than one residential tenant holding a long lease in the same building generally has an obligation to each residential tenant to enforce the covenants against other tenants. That is in the interests of the tenants generally, as it tends to maintain standards in the building and to ensure that tenants generally do not suffer nuisance, annoyance or inconvenience through the unreasonable conduct of any individual tenant. Enforcement of the service charge provisions is, of course, important to ensure that every tenant pays his fair share.

4.16 However, if the costs of enforcing the covenants cannot be recovered from the defaulting tenant, the landlord is generally entitled to recover those costs from the tenants generally through the service charge provisions. If he seeks to do so, the tenants are entitled under section 27A of the 1985 Act to challenge those costs on the ground that they excessive or were not reasonably incurred.

Costs generally

4.17 The Tribunal has no general power to award inter-party costs, though a general power now exists under Rule 13(1) of the Tribunal Procedure (First Tier Tribunal) (Property Chamber) Rules 2013 to make costs orders in cases where costs are wasted or a party has acted unreasonably. In general, if the terms of the lease so permit, the landlord or designated manager is able to recover legal and other costs (eg the fees of expert witnesses) associated with an application to the Tribunal from the tenants through the service charge provisions i.e. he is entitled to recover a contribution to such costs not only from the defaulting tenant but from all tenants.

4.18 However, under section 20C of the Act of 1985 the Tribunal has power, if it would be just and equitable so to do in the circumstances of the case, to prevent the landlord or manager from adding to the service charge any costs of the application.

4.19 The Lands Tribunal in the case Tenants of ***Langford Court –v- Doren Ltd*** in 2001 said that the Tribunal should use section 20C to avoid injustice. Clearly the manner in which this discretionary power is (or is not) exercised will depend upon the facts of the case. It ought not to be used in a manner oppressive to the landlord or manager. The relevant factors in this case are discussed in section 5 of this Decision.

4.20 In addition, under Rule 13(2) of the 2013 Rules the Tribunal may order a party to reimburse the Applicant in respect of application and hearing fees. This power is likely to be exercised in cases where the applicant is substantially successful, unless he has been guilty of unreasonable conduct in connection with the application, e.g. where he has unreasonably rejected a proposal for mediation or a fair and proper offer of compromise.

5. DISCUSSION AND CONCLUSIONS

5.1 In the judgment of the Tribunal, it is questionable whether the CHP plant was ever likely to be an economical means of supply heat and power to tenants of Parkhouse Court. However, it was apparently insisted upon by the local planning authority by way of planning gain as an environmentally friendly measure. There is no reason to suppose that the CHP Agreement was badly negotiated; that is a matter as regards which the Tribunal has no reliable evidence. However, it is clear that, as the law stands, there was no obligation upon the developer or the landlord to consult tenants in relation to the Agreement (as a long-term agreement the cost of which exceeded the statutory threshold). Indeed, it is difficult to see how one could consult non-existent tenants. In this particular case, it appears that the developer-landlord was in any event obliged by the terms of a section 106 planning agreement with the Council to enter into an agreement of that kind with one of a very limited number of

available suppliers.

5.2 It was clearly demonstrated to the Tribunal and the Tribunal accepts that the fixed charges (representing nearly half of the total charge to Mr Plant) and the rates of charge per unit of energy consumed in Flat 234 are totally beyond the control of the Applicant, having been fixed by the terms of the CHP Agreement, which (unless Cofely fails to deliver energy in accordance with the Agreement) will continue until 31st December 2031. Moreover, the Tribunal accepts that the charges are not materially affected by the rate of heat loss from pipework. On the evidence the pipework was completed in accordance with building regulations and to an acceptable standard. It must allow some heat loss if the system is not to overheat and heating the internal common parts is effectively cost-neutral. Mr Plant simply does not understand the engineering of the system properly and is wrong in his contentions that the pipework ought to be better insulated and that better insulation would reduce the CHP costs substantially (or materially).

5.3 A long-term agreement is essential in relation to this type of power installation in order to provide a reasonable return on the necessary capital investment. The on-going rates of charge are calculated by reference to an internationally recognised measure of energy costs; there is no reason to think that these rates are unreasonable compared to the cost of similar energy supply packages offered by other providers. Although it seems probable that energy costs are currently significantly higher than might be achieved by more conventional systems (electricity via the National Grid and space heating and hot water by individual gas-fired boilers) that may not always be the case during the contract period. Moreover, the system has the advantage that the tenant does not have the trouble and expenses of maintenance, safety checks (mandatory annual checks where the flat is sublet) and, in due course, replacement of a boiler. Accordingly, the Tribunal is satisfied that the CHP charges were reasonably incurred and are payable by the Respondent.

5.4 The Tribunal points out that it will not profit individual tenants to install their own boilers or to connect directly to the National Grid (even if those measures are possible, which is uncertain). They would still be required under the terms of their leases to contribute to CHP basic costs and to common parts costs, which would render the installation wholly uneconomic. It is unfortunate if the tenants who, like Mr Plant, bought their flats from Barratt were misled about the likely costs of the CHP system. The Tribunal has no jurisdiction to deal with that issue and has not heard evidence in relation to it.

Administration charges

5.5 A landlord or designated manager (as the case may be) has an obligation to all tenants to ensure that each tenant pays his fair share of service charges in accordance with the lease terms. A designated manager does not have the option of forfeiting the lease and can enforce service charge obligations only through the Tribunal and the Courts. Where there appears to be no defence to the claim, the proper forum is the County Court, as the Tribunal has no enforcement machinery or enforcement powers. Where there may be an issue as regards reasonableness it may, depending upon the circumstances, be reasonable to bring the claim in the County Court for similar reasons, accepting that any live issue of reasonableness is likely to be transferred to the Tribunal (which is a specialist forum experienced in deciding

such issues) for determination.

5.6 In this case, in the judgment of the Tribunal it was reasonable for the Applicant to bring the first claim in the County Court. However, on the facts of this case, it does seem unnecessary to have brought a second claim. Mr Plant's account had been up to date as at 24th April 2012 and, leaving aside an arrears administration charge of £42.00, he owed only £501.61, comprising a balancing charge of £4.69 added to the account on 26th July 2012 and a half-yearly advance charge of £496.92 due only on 1st August 2012. Moreover, up to the date of the second claim the sums included in the general service charge account for arrears administration fees since October 2007 amounted to £535.51, in addition to which three further arrears administration charges totaling £165.38 had been added but later cancelled.

5.7 The Tribunal has reviewed the scale of the arrears administration charges and the number of charges added to Mr Plant's account. The first such charge on each occasion is a formality only and amounts to a standard letter generated by computer software. In the judgment of the Tribunal a reasonable charge for a first or second letter is no more than £20.00 plus VAT and that is the sum payable by the Respondent on each occasion when such a letter has been issued on the general service charge account, save where duplicated on both service charge accounts, in which case one charge only is reasonable. Duplication occurred on 9th October and 13th November 2007. In March and April 2010 there were originally duplicate charges; but those on the general service charge account were remitted. It was argued that the Applicant must set up a file, which takes time. That is no doubt true if steps beyond reminder letters are in contemplation. But there is no reason to suppose that any such steps were contemplated before the middle of 2010. At that stage the Tribunal allows as reasonable an additional sum of £40.00 plus VAT to set up the file. Only one file should be needed to cover both service charge accounts.

Legal costs

5.8 Money due in respect of service charges is not rent. The Applicant cannot forfeit the lease and is not entitled to the benefit of Schedule 8 paragraphs 3 or 4. But in the judgment of the Tribunal, on a true construction of the lease, Schedule 8 paragraph 8 covers reasonable administration charges and also legal fees. There is no express reference to legal fees; but such fees may be and are in this case "charges for other services". However, litigation costs are in the discretion of the Court. The Applicant can recover reasonable non-litigious costs under paragraph 8 and reasonable litigation costs from the Respondent if and insofar as the Court so orders. If there is a shortfall, the balance can be included in the general service charge account as reasonable expenses of management and recovered from the tenants generally.

5.9 On 11th May 2011 a sum of £242.38 was added to the CHP service charge account in respect of legal fees. This does not appear to be in dispute. However, included in the first claim was a sum of £952.00 and in the second claim £941.40 for legal fees, clearly litigation fees. And on 18th June 2013 (since the date of the second claim) sums of £108.00 and £144.00 have been added to the general and CHP service charge accounts respectively. These must also relate to the on-going litigation and ought not to be included in the service charge account. In the judgment of the Tribunal all these fees were incurred in pursuing the Respondent through the Courts and, if reasonably incurred (which the Court will decide), may be recovered from the Respondent if and insofar as the Court so orders. Any shortfall may properly be

added to the general service charge account as payable by the tenants generally.

5.10 In relation to the CHP service charge account Mr Plant was acting on principle and, in the judgment of the Tribunal, was likely to accept the decision of the Tribunal in the first claim as deciding the principle for the future. He is clearly irate about the way in which charges have been heaped upon him; but he does not appear to the Tribunal to have been acting irrationally. The unfortunate multiplication of hearings and orders relating to these two claims has not been the fault of Mr Plant. He appears to have been considered at fault in relation to one of the default judgments; but the Court has imposed an appropriate costs order in relation to the setting aside of that judgment (see Order of 14th May 2013 in claim number 3YJ07921). Beyond that, Mr Plant's stance was reasonable; he very reasonably proposed that the two claims should be remitted to the Tribunal and heard together which, ultimately, and after a good deal of confusion in the Courts, was done. He has not wholly lost.

5.11 Mr Plant did, admittedly, conduct himself in an unfortunate manner on the morning of the hearing. However, that was perhaps understandable given the inequality of arms and the mountain of legal costs apparently piling up against him. Ultimately, he calmed down and the hearing was held in a reasonably civilised atmosphere, for which the Tribunal is grateful to all concerned. Prior to the day of the hearing it was far from clear to the Tribunal that Mr Plant's stance was untenable. It is clear that the situation was not explained to Mr Plant in terms which a lay person without scientific or engineering knowledge would be likely to understand. Indeed, the documentation before the Tribunal did not enable to Tribunal to grasp the point. As it happens, the Tribunal was comprised of three members with relevant experience. Even the lawyer chairman (who has no engineering background) happens to have studied physics at "A" level and applied mathematics at Cambridge and thus could follow the principles once properly explained on site and during the hearing.

5.12 Accordingly, the Tribunal does not consider that Mr Plant was acting unreasonably in disputing the CHP charges and in continuing his challenge until the Tribunal hearing. Moreover, the Tribunal considers that the Applicant bears responsibility for the continuation of the dispute because the Applicant (unlike Mr Plant) was in a position to ascertain the facts and ought to have been able to explain the situation to Mr Plant much more clearly than was, in fact, done. It did not help, bearing in mind that Mr Plant made it clear from the outset that he was withholding payment out of principle, to load administration substantial charges and legal costs onto his service charge account. The escalation of costs produced by the second claim also seems both unnecessary and unreasonable in all the circumstances.

5.13 Moreover, it was pointless repeatedly to send Mr Plant standard letters reminding him of what he already knew, namely, that he was being held liable for charges he was deliberately withholding because he disputed them. On 24th July 2009 a first reminder letter was issued pointlessly and not followed up. For these reasons all arrears administration charges on the CHP service charge account prior to March 2010 are disallowed; the 2007 letters as duplicates and the remainder as pointless. The charges on 22nd March and 13th April 2010 are allowed as they were a prelude to a threat of legal action and led to an agreement that Mr Plant would make regular payments to reduce arrears and thereafter, those on on 24th January and 28th March

2012, when they were a prelude to the first claim.

5.14 Pursuant to Directions Orders the Applicant has provided in Exhibits JG1 and JG2 statements of the general service charge account and the CHP service charge account for Flat 234 up to 5th August 2013. Documents previously provided were conflicting and confusing and inadequately explained. However, the picture now appears to be clear and accurate. For the reasons set out above the Tribunal disallows all the arrears administration charges on both service charges and the legal fees shown therein. However, Mr Plant was not disputing the general service charge; he was merely not paying on time. The Tribunal allows each of the arrears administration charges claimed on the general service charge account at £20.00 + VAT and the charges on the CHP service charge account from 22nd March 2010 onwards at £20.00 + VAT plus £40.00 + VAT to set up a file in July 2010. The effect of the Tribunal's decisions on administration charges can be seen in the Schedule hereto.

Costs generally

5.15 As has been explained, the Tribunal has no general power to make inter-party costs orders. This Tribunal takes the view that it has a wide discretion to exercise its powers under section 20C in order to avoid injustice to tenants. In many cases, it would be unjust if a successful tenant applicant were obliged to contribute to the legal costs of the unsuccessful landlord or (as in this case) manager or, irrespective of the outcome, if the tenant were obliged to contribute to costs incurred unnecessarily or wastefully. In many cases, it would be equally unjust were non-party tenants obliged to bear any part of the manager's costs.

5.16 However, in some cases, the Applicant manager's conduct of his defence may be a reasonable exercise of management powers even if he loses. The Applicant may have made an offer the tenant ought to have accepted. In such cases, it might be reasonable for the tenants generally to bear those costs. In other cases, for example where the non-party tenants supported the unsuccessful manager, it might be reasonable for the non-party tenants to contribute to the manager's costs. A wide variety of circumstances may occur and the section permits the Tribunal to make appropriate orders on the facts of each case.

5.17 In this case, although the Applicant's administration charges have been reduced and the Applicant criticised for poor communication, the Applicant's principal case in relation to the CHP service charge has succeeded. Overall, the Tribunal concludes that it would not be just and equitable in the circumstances of the case to order that the Applicant should be disentitled from treating its reasonable costs of and arising out of the application as relevant costs to be taken into account in determining any service charge relating to the property.

Procedural issues

5.18 An application was made by the Applicant for some form of debarring or "unless" order against Mr Plant as he did not comply with Directions Orders in the time allowed. However, Mr Plant did ultimately comply and, in the judgment of the Tribunal, the Applicant was not unfairly prejudiced by the delay, nor were additional costs incurred. In those circumstances it would be disproportionate to make a debarring order and the Tribunal declines to make such an Order. Clearly it is too late to make an "unless" order.

5.19 As has been said, the Tribunal decided at the start of the hearing to give effect to the consolidating Order in a lawful manner that does no injustice to either party and, on the contrary, enables the Tribunal to deal with the two claims justly and proportionately. Copies of this Decision will be sent to both County Courts with a suggestion that the Wigan case be transferred to St Albans County Court for final disposal.

Tribunal Judge G M Jones
Chairman
29th November 2013