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FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**LON/00BG/LSC/2015/0043**
Property	:	**Canary Riverside Estate London E14("the property")**
Applicants	:	**Canary Riverside Estate Management Limited**
Representative	:	**Mr J Hardman- counsel**
Respondent	:	**Various leaseholders at the development**
Representative	:	**Ms K Gray- Counsel**
Type of Application	:	**For the determination of the reasonableness of and the liability to pay a service charge**
Also in attendance	:	**Mr J Pursley-Solicitor** **Miss Whiting** **Ms A Jezard** **Mr P Hillman** **Mr J Hamilton** **Miss T Clarke**
Tribunal Members		**Ms M W Daley LLB (Hons)** **Mr S Mason FRICS**
Date and venue of hearing	:	**14 July 2014 10 Alfred Place, London WC1E 7LR**
Date of Decision	:	**7 September 2015**

DECISION

Decisions of the Tribunal

(1) The Tribunal makes the determinations set out in paragraphs 94 to 110.

(2) The Tribunal does not make an order under section 20C of the Landlord and Tenant Act 1985.

The application

1. The Applicant sought a determination pursuant to s.27A of the Landlord and Tenant Act 1985 ("the 1985 Act") as to whether future service charges are reasonable and payable for the periods 2014/15.

2. The leaseholders also sought an order for the limitation of the landlord's in the proceedings under section 20C of the Landlord and Tenant Act 1985.

3. The Applicant issued an application in January 2015. The Applicant stated that-: *"Marathon Estates Limited, on behalf of the Landlord Canary Riverside Estate Management Limited has undertaken a S20 process with regard to the replacement of seven chillers and the associated works to enable the replacement to take place... repair works were to the chillers four years ago, at which time a number of unknown and unforeseen issues were uncovered including for example failed separators... We utilised the services of SVM Associates (SVMA) who are highly experienced independent professional engineers providing amongst other services, heating, ventilation and air conditioning engineering services. Together with SVMA we reviewed all past issues and what needs to be incorporated in the specification ... S20 Stage 2 completed on 22 January 2015. The lowest estimate of the works is £797,368.95 plus VAT..."*

4. The Applicant set out that a determination was sought in advance of the work being carried out that the cost and specification for tender would provide for a scheme of work which was reasonable and that the cost of the proposed scheme of work was reasonable.

5. Directions were given by the Tribunal on 17 February 2015.

The matter in issue

6. An oral pre- trial review was held by the Tribunal on 17 February 2015, which was attended by representatives of both parties.

7. The Tribunal noted that a number of matters were identified as being in issue paragraph 5 stated " *...The Tribunal has identified that the issues to be determined are those set out in the application under responses to section 7 and these include (i) Whether the costs to be incurred in respect of the replacement of seven chiller units and associated works as set out in the specification prepared by SVM Associates are reasonable(ii) Whether the landlord has complied with the consultation requirements under section 20 of the 1985 Act.(iii) whether the lease permits the landlord to utilise £400,000 from the reserve Fund and should there be a shortfall whether the remainder of the cost of the major work can be met by the lessees through service charges (iv) Whether an order under section 20C of the 1985 [Act] should be made.*

8. The relevant legal provisions are set out in the Appendix to this decision.

The background

9. The premises which are the subject of this application are a mixed residential and commercial estate. Four residential blocks Berkeley Tower, Hanover House Belgrave Court and Eaton House. The estate also comprised a lower level plant room which provided shared services for the estate, water, electricity etc. The blocks are mix use in that Berkley has offices; Hanover a café and restaurant; Belgrave a restaurant and office; Eaton an office and 45 separate serviced apartments, treated as residential for service charge purposes . There are a total of 325 apartments with "280 qualifying as residential under LTA s18-30 1987". There were also commercial premises in separate buildings, a five star hotel Four Seasons Hotel (142 rooms) and a Virgin Active Health Club. The estate also has other restaurants and a car park and entrance to the blocks was also on the lower level.

10. The leasehold premises are subject to a 999 years under-lease.

The Hearing

11. Counsel for the Applicant was Mr Hardman he was instructed by Marathon Estates on behalf of the Applicant. Counsel for the Respondents, Ms Gray was instructed by TWM Solicitors.
12. At the hearing counsel for the Applicant stated that the premises had a head lessor Canary Riverside Development PTE Development, there were 325 flats across the development. Only 20% of the leaseholders had chosen to be Respondents in this case.
13. Mr Hardman stated that the issue was whether the works would remedy the disrepair. He stated that the Respondent's case was that the burden of proof concerning the reasonableness of the work was with the Applicant, in his view this was a 'novel argument' as the Applicant relied upon expert evidence and given this there was a presumption that the

scheme of work was reasonable. He stated that there was no cogent evidence from the Respondent disputing this, given this; he submitted that there was an evidential burden on the Respondents to show that the proposed scheme of work was not reasonable.

14. .The Tribunal was informed that the background to the major works was that in 2009, it became apparent that there were problems with the chillers that produced the air conditioning in relation to the apartments. The manufactures inspected and proposed works of repair in the sum of £322,294 excluding VAT. The proposed work was based on a visual inspection. The total cost of the work including VAT was £446,000. Unfortunately the repair works were unsuccessful.

15. The Tribunal was referred to a report from ICS Service dated 8 May 2013 which stated-: *"This report is to give a detailed view of the current condition of the chillers installed at the above site. It should be said that the chillers have had a significant amount of work carried out on them in their life...Heat rejection is via centrifugal speed controlled fans(400) driven off of Honeywell HVAC inverted drives fed into duct work. There is some suspicion that the air supply to the space (and therefore the chillers) may or may not be sufficient for all chillers to be operational at the same time, this could be the contributory factor to premature component failure. The overall condition of the units is poor at best although at fifteen years old they have met the maximum life expectancy of a water chiller..."*

16. Counsel also referred the Tribunal to the report prepared by SMV Associates. This report was prepared, prior to the Section 20 notice being served. In their report it was noted under the heading *current condition* that -: *"... Of the existing seven chillers none are operational within Hanover House and only two chillers within Belgrave House are operational, albeit at only 50% capacity each. This situation is a result of failures within the refrigeration circuits in all seven of the chillers, despite extensive maintenance works being carried out over the lifetime of the equipment."* In the report the engineer notes at 2.1.4 that -: *"...Our review of the available information for the premises indicates that the installed cooling capacity of the apartment fan coil units exceeds the installed cooling capacity of the existing chiller plant by up to 44%; as we do not have access to the original design philosophy we have to assume that an amount of diversification was allowed..."*

17. In the executive summary at the beginning of the report, it was noted that -: *"The normal life expectancy for air cooled chiller plant is 15 to 20 years, the age of the installed plant is between 14 and 17 years. This in conjunction to the current condition of the plant and the recent significant increase in the amount of remedial works undertaken to chillers, we consider the current chiller plant to be at the end of its economical working life. As a result we recommend that the chillers are replaced. We recommend the existing chiller plant is replaced with new chiller plant of an equivalent cooling capacity to the existing; for the works outlined ... recommend a budget figure of £825,000 net is allowed this includes for supply and installation costs for the new equipment together with professional fees..."*

18. As a result of this report, a decision was made to carry out the recommended work, and as part of the section 20 process, a Notice of Intention dated 26 August 2014, which provided a description of the work to be undertaken was served, on the leaseholders and the relevant residency association.
19. Counsel informed the Tribunal that 4 contractors were nominated by leaseholders. The specifications were then sent out and the contractors were given four weeks to submit a written tender.
20. On 17 December 2014 the managing agents Marathon Estates notified the leaseholders of the outcome of the tendering process.
21. Four contractors had submitted a tender Trane UK Limited, Cofley GDF Suez , Shepherd FM and PIP Building Services PLC, the estimates ranged from £911,278.80 to £1,067,800.80(none of the leaseholder nominated contractors had provided an estimate). In the report on the tendering exercise, the managing agents stated that they intended to choose the Trane UK Limited as they had provided the cheapest estimate. The leaseholders were invited to inspect the estimates and make written observations by 21 January 2015
22. The Applicant also provided a summary of the written observations received during the consultation period from the leaseholders as part of the tendering process.
23. *The Evidence of Mr Hardman of SVM Associates*
24. Mr Hardman stated that the Applicant relied upon the evidence of Jim Hamilton of SVM Associates Limited as both a witness of fact and an expert witness. The Tribunal asked Mr Hamilton about his credentials as an expert witness and his understanding of his duty as an expert witness. Mr Hamilton confirmed that he understood his duty to the Tribunal and stated that he had 42 years' experience of chiller replacements. This was in his words "a common process which he had carried out for any industry" (i.e. industrial, commercial and domestic). He stated that he was a chartered engineer who was an associate for SVMA associates in charge with design and remedial work, in relation to life cycle replacement.

25. Mr Hamilton had produced a witness statement which had been signed and dated 17 June 2015. In paragraph 3 of his statement he stated as follows -: *" I am a Chartered Engineer (CEng, MIMechE, BSc Hons) and employed by SVM Associates Limited (2SVMA") SVMA are professional consulting engineers who specialise in Building Services refurbishments. My company undertakes complex works such as chiller replacement and are well experienced in all aspects of building services refurbishment of core plant."*
26. *We were instructed to prepare the specification, contract documentation and the tender drawings associated with the replacement of the chillers at the request of the Managing Agents, Marathon Estates Limited ("Marathon") As part of this work, we produced a feasibility report ("the Report") dated 21 May 2014... which followed a site inspection of the existing installed chiller plant, associated shunt pumps and maintenance. This was undertaken in order to establish the operational condition of the existing chiller plant*

and propose a replacement chiller plant with new equipment to match the cooling duties of the existing equipment.

27. In his statement at paragraph 4 he stated -: "*The existing chilled water units were manufactured by Clivet Model WRA2.90 and were aged approximately 14 to 17 years at the date of the Report. There are seven existing chillers located in two separate plant rooms (Belgrave Court and Hanover House) these chillers serve the comfort cooling to the apartments with Belgrave Court, Eaton House, Hanover House and Berkley Tower.*
28. Mr Hamilton explained that the chillers took the warm air and recirculated it in the same method that a heater operated. He stated that from his inspection the chillers had reached the end of their working life, he stated that the normal life expectancy for air cooled chiller plant was in his opinion 15 to 20 years. He stated that the life cycle depended on the usage and the level of maintenance. He stated that the system at the premises was not like a domestic system, it was akin to a commercial system. The distribution was similar to a hotel system as it was centralised.
29. In paragraph 5 Mr Hamilton stated that-: "*... of the four chillers located in Belgrave Court two chillers were no longer operational and of the remaining two, only one cooling circuit in each chiller was operational resulting in only 50% capacity. This had resulted, in repeated failures and increased maintenance costs.6. From the visual, non-intrusive survey and the review of the current maintenance documentation held on –site, it was SVMA's opinion that the most cost effective long term solution was the replacement of the existing chillers and associated plant. ..*"
30. Mr Hamilton stated that there was no point in simply replacing the old chillers with new ones as they would simply breakdown it was " inconceivable to replace the chillers with exactly the same models"
31. Counsel Ms Gray asked for details of what the problems were with the chillers?
32. Mr Hamilton referred to the *ICS Service Nationwide Site Report dated 8 May 2013.* (ICS Cool Energy Limited were specialist contractors) Mr Hamilton reiterated that the report indicated that the chillers were at the end of their natural life. And that they should be replaced by more energy efficient water chillers. He also stated that the freezing of water around the chillers had the effect of crushing by the ice leading to the refrigerant leaking out.
33. In answer to counsel's further questions he accepted that the report was prepared as a way forward, and that he had not been engaged to look at the historic problems. He stated that if there were historic problems then the intention in replacing was to ensure that any problems were not incorporated into any future replacement of the system.
34. Counsel asked about the ventilation in the plant room whether this was considered to be sufficient. Mr Hamilton referred to the ICS report which stated that – "*...There is some suspicion that the air a supply to the space (and therefore the chillers) may or may not be sufficient for all chillers to be operational at the same time this could be a contributory factor to the premature component failure...*"

35. At paragraph 16 of his witness statement Mr Hamilton stated-; "*The original arrangement of the heat rejection from the chillers at Hanover House allowed the rejected warm air to be recirculated back in to the chillers. This recirculation of the warm air increased the ambient temperature in which the non-operational chillers were subject to. This increase in ambient air temperature promoted the loss of their refrigerant charge and increased the rate of failure of the chillers. At paragraph 18 of the statement Mr Hamilton stated-: To alleviate the above issues, and to maximise the life of the new chillers, the following works were specified: 1. All chiller extract fans to be fitted with electrically operated dampers that close when the chiller is not operating to stop recirculation of heat produced from the other chillers...*"
36. Counsel asked about the specific working of the system and whether the dampers could be shut off, Mr Hamilton explained that this may be effective were one chiller was not working, however if the other chillers are operational this created positive pressure and the dampers would need to be operational to deal with this.
37. This was provided for at 300.040 of the specification which stated-: "*Each of the condenser fans shall have a motorised shut off damper installed on the discharge connection from the chiller; these dampers shall operate in conjunction with the chiller; such that the dampers will open on the chiller enable signal and will close on the chiller enable signal and will close on the chiller disable signal. This is to prevent back circulation through the chillers.*"
38. Counsel Ms Gray suggested that an alternative may be the installation of a partition wall to isolate the chillers. Mr Hamilton agreed that this might be effective as a second form of defence.
39. Mr Hamilton was asked about the installed cooling capacity. He stated that this was dealt with at page 6 of the feasibility report at point 2.1.4 which stated-: "System *capacity -: Our review of the available information for the premises indicates that the installed cooling capacity of the apartment fan coil unit exceeds the installed cooling capacity of the existing chiller plant by up to 44%; as we do not have access to the original design philosophy we have to assume that an amount of diversification was allowed.*"
40. Mr Hamilton was asked about whether the demand from the individual premises would have affected the chiller. He did not consider that this was a factor as in his view this was the '*diversification*' that was referred to in his report. He also did not accept that the degree of usage could be provided for as an exact science as this would only be possible by approaching each individual occupier concerning their usage. In his view the difference between the fans and the chillers was not a significant factor which would have affected the performance of the chillers.
41. Mr Hamilton was asked to comment on the individual tenders and why the warrant was effectively limited to 5 years. He stated that this was the normal period for this type of work. He did not accept the suggestion that was put to him by counsel that it was possible to obtain a 15 year warranty (life-time warranty).

42. He was also asked to comment on the prices given in the tender for the warranty in particular why Trane had specified £52,500.00 and Shepherd £10,981.65.
Mr Hamilton stated that he had not analysed the terms of each warranty. He stated that it was normal for each contractor to take a view of what they perceived the risks to be and then build this into their overall price. This including factors such as their overheads, each contractor prepared their tender differently and as such he could not speculate on the factors which caused the variation in the pricing. It was possible that Shepherd had built in some of the overheads in relation to the warranty elsewhere in the contract price.
43. Ms Gray asked whether there was any guarantee in the event that Trane UK Limited was to go into liquidation. Mr Hamilton accepted that if this happened then it would have implications for the warranty.
44. Counsel stated that the report had not dealt with the historical information that was available concerning the problems with the chillers, given this, how could Mr Hamilton be confident that the major work would be effective in dealing with the issues?
45. Mr Hamilton stated that it had not been part of his brief to specifically comment on the historical context of the problems although he was aware of them. He stated that the replacement chillers operated more efficiently and as such could bear a greater cooling load even allowing for diversification between the fans and the chillers.
46. He was asked the basis upon which he could be confident. He stated that this was based on his knowledge of design and good engineering principles, and that his practice was governed by an Engineering Code of Practice.

The Evidence of Ms Tara Clark Property Manager

47. The Applicant then called Miss Tara Clark to give evidence. Ms Clark was a property manager employed by Marathon Estates Limited. Tara Clark commenced employment at Marathon Estates Limited in 2014. In her statement she set out details of the nature of the estate, the lease structure and the historical background of repairs. Her statement inso far as it dealt with historical matters did not purport to be first hand evidence.
48. Miss Clark stated that in around April/May 2014, before I commenced my employment Marathon instructed SVM Associates... " *to inspect the chillers; we specifically instructed them to a. Undertake an impartial feasibility report as regards potential chiller replacement b. Act as lead consultants on design/specification/competitive tender of works. C. undertake technical project supervision and take the lead on project management duties during the installation of the works."*
49. As a result of the recommendations of SVM Associates the decision was made to replace the chillers and section 20 stage 1 letters were sent out to the leaseholders.
50. Ms Clarke acknowledged that ½ million pounds had been spent on the repairs and that despite repeated request from the manufacturers for assistance with the chillers, the problems with the chillers had still not been remedied.

51. Counsel for the Respondent's Ms Gray queried why the Applicants had not commissioned a report into the reason for the historic failure of the chillers and why the leaseholders should have confidence in the major works which were now being undertaken. She also stated that the information had been technically difficult to follow and the consultation period had been short (which may have prevented more contractors from applying).
52. Ms Clark referred to the response from the leaseholders. She stated that they were all professional people who together had put together a detailed response. They had been given the option to inspect all of the documentation and if they had not understood nor needed clarification they were able to seek clarification.
53. Ms Clark stated that Marathon Estates had on 13 January 2015 issued a five page update answering all of the queries. It was however noted by her in her witness statement that only 17% of the leaseholders had raised queries, and that of the Respondents (to these proceedings) by 14 January 2015 none of the Respondents had inspected the documentation.
54. Ms Gray wanted to know whether the question concerning how the works were to be funded had been dealt with. Ms Clark stated that the funding would be through a combination of reserve funds and service charges. In relation to the question concerning the leaseholders' share of the cost Marathon Estates were waiting for a response from the landlord.
55. The letter referred to above had dealt with the section 20 process, the observations from the leaseholders together with the Applicant's technical response. This had dealt with the problems with the individual components for the chiller system.

The Respondent's case

56. The Respondents had prepared a joint Statement of Case; In addition the Respondent relied upon the evidence of Ms Jezard.
57. Mr Hardman indicated that there was an issue as to what Ms Jezard's status was in these proceedings, as she was not a party to the lease. In reply Ms Jezard indicated that her partner was the leaseholder of 56a Barclay court and as such she was authorised to speak on her behalf, she had also been consulted by the solicitors along with the other respondents in the preparation of the joint statement.
58. The Tribunal indicated that it was satisfied that she could give evidence in these proceedings.
59. In the Statement of Case prepared by the Respondents the Tribunal noted that a number of issues were raised. The Respondents were concerned about the timetable of the Section 20 Consultation process. However they accepted that the Applicant had complied with the consultation requirements.
60. In paragraph 24. Of the Statement of Case the Respondent's noted -: "For *recoverability under the leases, the proposed replacement would have to be a remedy of the disrepair of the chillers, and hence performance of the Applicant's leasehold obligation to repair them, which a reasonable surveyor might advise is appropriate in all the circumstances. Those circumstances include: (a) The expected use of the chillers (b) The history of disrepair so that the replacement would*

have to be what a reasonable surveyor would advise would remedy the cause of that history. (c) The history of payment by lessees towards repairs. (d) The estimated running costs of the replacement chillers (e) the estimated life span of the replacement chillers (f) The likely performance of the replacement chillers. (g)The availability of insurance and/or warranties for the replacement chiller works so that provision is made for costs of repairs of the replacement chillers should they too fail."

61. The Respondents stated that the lessees could not be expected to pay for the cost of the proposed replacement based on a specification, which could not be guaranteed to remedy the disrepair. In paragraph 29 of the Statement of Case the Respondent stated-: *"... For a reasonable surveyor to advise the replacement of the chillers in accordance with the current Specification and/or for the costs to be reasonable under s19, the surveyor would have to consider the causes of the history of the non-functioning of the current chillers across the previous 14 years, so that he could advise that the Specification with a reasonable likelihood would remedy those causes."*
62. The Respondents considered that the two reports (ICS Cool Energy Ltd dated May 2013 and the SVMA Report dated 21 May 2014, were both insufficiently detailed to give the Respondents confidence that the Specification prepared by SVMA would result in replacement chillers which worked effectively. In summary the Respondents' submissions were that if the expert's reports were not definitive in setting out why the chillers had failed, they may be liable to fail again. The Respondent's considered that a "... *reasonable surveyor*" would establish the history and causes of the breakdown so as to ensure that they were addressed in the specification.
63. For example, the Respondent noted that the ventilation of the plant room had been identified as an issue. In paragraph 35 the Respondent stated-: "...In the absence of adequate ventilation, it is possible that there is limited capacity for heat rejection... so that the plant's capacity to cool air is reduced, and a greater strain is placed on the chillers ..."The Respondent noted that although the specification identified two requirements that could assist with ventilation .The SVMA report does not set out why these requirements are adequate to remedy the issues raised in the ICS Report.
64. In paragraph 38. The respondent stated-: *"... No reasonable surveyor could recommend replacement of the chillers as per the Specification without analysing whether there is an issue with ventilation, why the Specification is appropriate to remedy such an issue, whether the Specification is likely adequately to reduce that risk and what the alternatives are..."*
65. The Respondent also queried whether the diversification allowance was sufficient given the demand from the individual flats and the fact that the SVMA report stated that the anticipated diversification factor of 0.63 and that this figure was acceptable. The Respondents noted that the report stated that the diversification did not take into account the occupational use of the building, as SVMA were "...*unable to determine the level of occupancy for individual flats* in either number of

occupants, and/or the daily occupation. The Respondent noted that an incorrect assumption could lead to the breakdown of the chillers.

66. The Respondent noted that at page 94 of the Specification there was an incorrect statement concerning the running of the chillers, in that it was stated that during October to May the chillers were disabled as the apartments do not require cooling, the statement noted that *"The chillers have previously operated for twelve months a year (when functioning at all) and chilled water is expected by lessees to be provided to flats all year round.."* It was simply not correct that there were shut down periods.

The Evidence of Ms Jezard

67. In her Oral evidence Ms Jezard dealt with the issues concerning the running costs and also the five year warrant.
68. Ms Jezard explained that her background was as a Director of Finance in the NHS, and that in this capacity she had experience of tendering and that she had worked with KPMG on private finance initiative schemes and had experience of using the NHS trust model on conducting capital appraisals. In her evidence she stated that the tendering appraisal had not considered many of the issues which in her experience were routinely considered when evaluating competing tenders. She stated that the running cost had not been considered, or the energy cost when compared to other possible specifications.
69. With regard to the 5 year warranty provided by Trane UK Limited, she stated that this was insufficiently detailed as there was no explanation of what was included in this. There had also been no attempt to consider a collateral warranty which would afford the leaseholders some protection in the event of insolvency of the contractor especially in the event that there had been negligence from SVMA concerning the design.
70. Ms Jezard was also critical of the lack of analysis for example she would have expected the reports to say *"...this is what went wrong in the past and this is what can be done to deal with it"*. The whole picture had not been put together, given this there was a real issue which concerned the leaseholders of whether the major repairs would bring about an effective working system
71. In answer to questions from Mr Hardman, she stated that although the landlord had provided a response to the emails of 3, 6 October and letter of 22 December it appeared to the leaseholders that this was a tick box response for the section 20 consultation rather than a consideration of all of the legitimate questions that had been raised.
72. She also stated that there had been no analysis of the actual running cost of the replacement chillers and how this compared with other companies who had tendered for the contract.

Closing submissions

The Respondent's closing submissions

73. Ms Gray asserted that the burden of proof remained with the Applicant and that they had a positive duty to prove that the cost of the chiller replacement is reasonable.

74. In her skeleton argument counsel Ms Gray stated-: *"Despite having already expended over £650,000 in the last eight years on repairing the chiller units, the lessees have rarely had effective cooling to their flats and it appears that the sums spent have been wasted. It is hardly surprising therefore that the lessees lack any kind of confidence that the £1,000,000 that they are now asked to pay in order to replace the units will any better or more effectively spent. Before paying out the substantial sums of money asked for, Rs must be assured that the replacement units will not face the same problems that caused the old chillers to consistently malfunction. A has failed to provide these assurances."*

75. In order for the cost to be reasonable it must be an effective remedy for the disrepair. Counsel stated in her Skeleton Argument that-: *"In performing its repairing obligations, the landlord must adopt such a method of repair as a reasonable surveyor might advise is appropriate in all the circumstances: Dowding & Reynolds on Dilapidations 10-02."*

76. In her closing submissions, Ms Gray referred the Tribunal to *Fluor Daniel Properties Ltd –v- Shortlands Investment Ltd at page 221.* She stated that although it was reasonable for the landlord to choose between two competing methods of repair even if the more costly scheme was chosen, it cannot be reasonable to ask leases to pay for something which isn't going to work, she also stated that regard had to be had to the length of the lease, compared to the value of the work to the freeholder.

77. In her submissions no one knew what the problems with the chillers were and what had caused them to fail, it was wrong to simply install new machines to repair the problem. The Applicant should commission a full report from SVMA whilst the chillers are still in situ. Ms Gray referred to the issues, which in her view, meant that there was no guarantee that the works would be effective. They were the facts that there was no definitive report about the condition of the chillers.

78. There was no analysis of whether the proposals for ventilation of the chiller room would resolve the problems. At paragraphs 19 & 20 of the skeleton argument counsel stated-: *"The diversification between the capacity of the fan coils within the individual apartments exceeds the capacity of the chillers by up to 44% (SVMA report, para. 2.1.4). SVMA are only able to assume that this diversification is acceptable, not having access to the original design philosophy. Furthermore, the SVMA report states at paragraph 4.3 that the acceptable diversification does not take into account the occupational use of the building.*

If SVMA are wrong about any of their assumptions the chillers could break down again in times of high use or high ambient temperatures. No steps have been taken by A to ensure that the assumptions made have been verified, nor to investigate how frequently the chillers will operate at maximum capacity, nor to identify the current occupancy of the buildings."

79. In respect of the report, Ms Gray submitted that, the chillers were required to work at maximum capacity. Given this Mr Hamilton ought to have had a survey of the occupancy of the units yet this had not been done. The occupancy affected the demand, if the units were at capacity this could affect the system and cause breakdowns. The information on occupancy was obtainable.
Ms Gray noted that there was no analysis in the reports on the effect of the occupancy on the chillers, something had caused the issues resulting in the disrepair, and however the Applicant had failed to establish what it was.

80. There had been likewise no analysis on whether the original design was defective. In respect of the specification it was clear that there was an error in that it had specified that the system was shutdown between October to May this was not correct, and this wrong assumption might affect the working of the system.

81. In her view the lack of detailed analysis of the previous historical problems, and the factors outlined above, were such, that the survey and the specification were called into question. Given this, no reasonable surveyor would recommend the carrying out of this work.

82. In conclusion counsel stated-: *"... The lessees are being asked to contribute a very significant sum of money in circumstances where such contributions have in the past failed to remedy the problems with the chillers. It is not unreasonable in the circumstances for the lessees to insist that a proper analysis is conducted by A regarding the reasons for the historical failure of the chillers and for A to be able to show that the works proposed will remedy that disrepair."*

83. In relation to the cost of the hearing, Ms Gray made an application under Section 20 C of the Landlord and Tenant Act 1985. She submitted that the Application was a protective application, the Respondents were not in breach of the lease, and it was unfair for the Respondents to pay for the cost of the Application when the Application was for the landlord's protection.

84. It was clear from the issues that the Respondents had no choice but to respond.

85. The leaseholders did not have confidence that the work would be effective and it the specification and the works had been spelt out in terms that the Respondents understood then there was the possibility that the application could have been avoided.

The Applicant's closing submissions

86. In reply, to the Respondents' section 20 C Application. Counsel, Mr Hardman stated that the Respondents had been properly consulted on the works under the section 20 procedure. Given this, the cost should be recovered under the service charges. The Respondents were effectively treating the letter dated 13 January 2015 as if it did not exist. If the leaseholders did not understand the Landlord's reply then they should have queried it. The letter dated 13 January was very clear and dealt with all of the matters that would have been addressed in a feasibility report which dealt with the historical matters which was requested by the leaseholders.

87. The leaseholders had not produced an expert and had no basis for saying that the works would not be effective, they had stated Mr Hardman "embarked *on a fishing expedition*". Accordingly they ought not to have the protection of a section 20C application.

88. Counsel in his skeleton argument stated-: "*The pay-ability of service charges is a matter of construction of the respective leases rather than a consideration of what "a reasonable surveyor might advise is appropriate in all the circumstances" and/or what the lessees "can be fairly be expected to pay". The effect of the Respondents' submission is to imply an additional contractual provision into the Lease that somehow meets the unexpressed contractual intention of the parties at the time that the Lease was entered into...*"

89. Mr Hardman stated that the Respondents were seeking to imply a term of reasonableness into the lease. "*...in addition to the statutory test of reasonable pursuant to s.19 LTA 1985.*" And that this approach had been rejected by the courts in *The Anchor Trust v Mr Tom Corbett & others [2014] UKUT 0510 (LC), and Berrycroft Management Co Ltd v Sinclair Gardens Investments (Kensington) Ltd [1997]*

90. Counsel referred the Tribunal to the decision *In Berrycroft Management Co Ltd v Sinclair Gardens Investments (Kensington) Ltd [1997] 1 E.G.L.R. 47*, which dealt with the issue of reasonableness in relation to service charges. The Court of Appeal declined to imply a term that the landlord should act reasonably in placing insurance, the cost of which he was entitled to recover from the tenant, holding:

> "*It is axiomatic that a court will not imply a term which has not been expressed merely because, had the parties thought of the possibility of expressing that term, it would have been reasonable for them to do so. Before a term which has not been expressed can be implied it has got to be shown not merely that it would have been reasonable to make that implication, but that it is necessary in order to make the contract work that such a term should be implied.*"

91. Counsel submitted that the Applicant had set out that they had consulted with the leaseholders Counsel in his skeleton argument stated that-: "*It is simply not sufficient to raise 'issues' challenging highly*

technical documents without first obtaining evidence, preferably expert in nature, to support these assertions... The only evidence provided by the Respondents is a witness statement of fact which submits various opinions without any obvious qualifications to support such statements ..."

92. Counsel stated that the Applicant had provided a comprehensive response to the issues raised by the Respondent in their letter dated 13 January 2015 -: *"Even a cursory glance through this letter indicates that SVMA undertook a comprehensive review of the existing chillers and the associated conditions. SVMA have made numerous recommendations in order to ensure, as far as it is possible, that the replacement chillers will not be afflicted by the same problems as resulted in the previously high running costs.*

93. In conclusion counsel in paragraph 62 of his skeleton argument submitted that -: *"The information provided during consultations as well as the letter dated 13th January 2015, addresses the concerns raised by the Respondents in their Statement of Case. SVMA have undertaken a comprehensive review of the chillers and recommended a replacement which takes into account, and seeks to avoid, the problems and malfunctions previously encountered."*

The Decision of the Tribunal

94. The Tribunal having considered all of the evidence have determined that the costs of the major works were reasonable and payable.

95. The Tribunal noted the concerns raised by the leaseholders, which were based in part on the history of the problems to the chillers. It was clear that a considerable sum of money had been spent in the past and the Tribunal consider that given this, the concerns of the leaseholders were understandable.

96. The Tribunal considers that the burden of proof was on the Applicant and in the Tribunal's view for reasons set out below this duty was discharged by the Applicant.

97. The Tribunal considered the evidence of Mr Hamilton, The Tribunal were prepared to look at this evidence with a degree of caution, given his role in preparing the specification on behalf of the Applicant. However the Tribunal found his evidence to be clear and cogent. The Tribunal noted the Respondents' criticism about the lack of a feasibility report which would have as its remit the purpose of establishing and commenting on the reasons for the historic failure of the chillers. The Tribunal considers that had Mr Hamilton considered that there was

uncertainty about the cause of the chiller failure, or some ambiguity then this would have been addressed in Mr Hamilton's report.

98. Mr Hamilton is an experienced engineer, and he did not appear to be surprised by the failure of the chillers, or have doubts as to what the potential solutions were.

99. The Tribunal considers that had the Applicant proposed repairing the chillers, then there would have been a greater onus on the Applicant to justify why, this additional repair would have been effective given the past failings, and the need for a more comprehensive feasibility report would have been apparent to the Tribunal.

100. The Applicant together with their experts had concluded that the chillers were at the end of their economic life, this conclusion had provided the Applicant with an effective opportunity to replace the chillers, and given this, the onus upon them was to ensure that they obtained expertise to enable the work to be carried out effectively.

101. Mr Hamilton had considerable experience of such replacements gained in both commercial and domestic settings, and was confident that the replacement chillers would work. He stated that this confidence was based on his experience of design and good engineering principles.

102. The Tribunal although an expert tribunal, in considering the cost of this replacement work, is not required to substitute its opinion with that of Mr Hamilton, this means that although the Tribunal cannot say with certainty that the replacement works will be effective, It is nevertheless satisfied that, given the Applicant's own lack of expertise, they have acted reasonably in seeking expert advice, and in following that advice, in the scheme of major works that are proposed.

103. The Tribunal noted that Respondents did not rely on expert advice. Although it was apparent to the Tribunal, in the detailed and somewhat technical issues raised by the Respondents in their reply to the section 20 consultation, and in their case, that they had the benefit of some engineering advice. It was however unfortunate that the Tribunal did not have the benefit of testing that opinion, (given the issues that they raised) by questioning their technical expert.

104. Even if the Tribunal is wrong about this, the Tribunal did not have the benefit of hearing from the leaseholders who had the technical knowledge which would enable them to make detailed criticisms of the considers that those amongst the Respondents who felt able to criticise specification on technical grounds, as only Ms Jezard gave evidence. The Tribunal was not able to assess whether the leaseholders' criticisms were well founded.

105. The Tribunal concluded that there was no information before it to suggest that the scheme of works proposed or the costs were not reasonable.

106. Although the Respondent sought to suggest that the life time cost had not been taken into account, and had raised issues with the warranty, and the implications, in the event of a lack of collateral warranty for the contractor undertaking the major work going into liquidation. There was no information that these costs would normally be considered as part of a section 20 consultation.

107. The Tribunal considers that the Respondents have the protection of the law and also the benefit of querying the reasonableness of the costs should this be necessary.

108. Accordingly the Tribunal considers that the costs of the major work in the sum of £825,000 are reasonable and payable.

Application under s.20C and refund of fees

109. The Tribunal noted that the Applicant had brought this claim because of the previous history between the parties, the Tribunal has not considered it necessary to comment upon this history however given the lack of technical challenge to the report, and given the full response made by the Applicant's in their letter dated 13 January 2015 which has not been undermined the Tribunal consider it is not reasonable to make an order under section 20C of the Landlord and Tenant Act 1985.

110. The Tribunal however determines that the Tribunal application and hearing fees are payable by the Applicant, as the Applicant would have had to bear the cost of this even if the respondent had made no challenge.

Name: Judge Daley **Date:** 7 September 2015

Appendix of relevant legislation

Landlord and Tenant Act 1985

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 27A

(1) An application may be made to a leasehold valuation 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 a leasehold valuation 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.

Section 20

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

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

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

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

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

(5) An appropriate amount is an amount set by regulations made by the Secretary of State; and the regulations may make provision for either or both of the following to be an appropriate amount—
(a) an amount prescribed by, or determined in accordance with, the regulations, and
(b) an amount which results in the relevant contribution of any one or more tenants being an amount prescribed by, or determined in accordance with, the regulations.

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

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

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 the Upper 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—
(a) in the case of court proceedings, to the court before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to a county court;
(aa) in the case of proceedings before a residential property tribunal, to that tribunal;
(b) in the case of proceedings before a residential property tribunal, to the tribunal before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to any residential property tribunal;

(c) in the case of proceedings before the Upper Tribunal, to the tribunal;
(d) in the case of arbitration proceedings, to the arbitral tribunal or, if the application is made after the proceedings are concluded, to a county court.

(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.

Leasehold Valuation Tribunals (Fees)(England) Regulations 2003

Regulation 9

(1) Subject to paragraph (2), in relation to any proceedings in respect of which a fee is payable under these Regulations a tribunal may require any party to the proceedings to reimburse any other party to the proceedings for the whole or part of any fees paid by him in respect of the proceedings.

(2) A tribunal shall not require a party to make such reimbursement if, at the time the tribunal is considering whether or not to do so, the tribunal is satisfied that the party is in receipt of any of the benefits, the allowance or a certificate mentioned in regulation 8(1).

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.