FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	:	**LON/00BE/LSC/2019/0225**
Property	:	**199 Rodney Road Salisbury Estate London SE17 IRG plus other leasehold properties on the Salisbury Estate as per schedule attached to application form**
Applicant	:	**Mr Giancario Niccoli and 24 other lessees as per schedule attached to application form**
Representative	:	**Mr Niccoli represented himself and the other lessees**
Respondent	:	**London Borough of Southwark**
Representative	:	**Mr Mark Loveday of Counsel**
Type of application	:	**For the determination of the liability to pay a service charge**
Tribunal members	:	**Judge Carr** **Mr Sennett MA FCIEH** **Mr Francis QPM**
Venue	:	**10 Alfred Place, London WC1E 7LR**
Date of decision	:	**6 December 2019**

DECISION

Decisions of the tribunal

(1) The tribunal determines that the sum of £13,709.22 is payable by each of the Applicants in respect of the interim service charges demanded in 2018/19 and 2019/20 for the major works to the District Heating System.

(2) The tribunal makes the determinations as set out under the various headings in this Decision.

(3) The tribunal does not make an order under section 20C of the Landlord and Tenant Act 1985

The application

1. The Applicants seek a determination pursuant to s.27A of the Landlord and Tenant Act 1985 ("the 1985 Act") as to the amount of interim service charges payable by the Applicants in respect of the service charge years 2018/2019 and 2019/20. .

2. The Tribunal determines that Mr Simon Cox of 28 Hemp Walk, Salisbury Estate, should be removed as a party to the application as he is a freeholder and the Tribunal has no jurisdiction to determine his liability to pay an estate charge.

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

The hearing

4. Mr Niccoli appeared in person together with Ms Sarah Weatherhall of flat 17 Salisbury Close, Ms Maria O'Keefe of 5 Salisbury Close and Ms Tabbichi of flat 201 Rodney Road, and the Respondent was represented by Mr Loveday of Counsel. Mr Martin Crane provided expert evidence for the Applicants and Ms Mary Li from BPP provided some support. The Respondent had the following witnesses: Ms Bola Odusany (project manager with the Respondent), Mr David Evans (quantity surveyor with Potter Raper) Mr John Maranghi (Senior Mechanical engineer with the Respondent).

5. The Tribunal is grateful for the approach of all parties and witnesses involved in the hearing which enabled it to consider all the relevant arguments despite the Applicants being litigants in person.

The background

6. The Salisbury Estate comprises several low-rise 3 and 4 storey blocks and terraced houses built in the late 1970s. There are 227 properties on the

estate. The estate has a District Heating System which serves 223 of the properties on the Estate.

7. The application concerns the Applicants' liability for interim service charges relating to the costs of major works totalling £2.9m to replace the Estate's District Heating System. The works primarily concern the replacement of the underground pipework to the system. Although the Respondent is also replacing the boilers the Applicants have not been asked to contribute to those costs. The interim service charges do not include charges in connection with any work to the pipes and systems within the blocks. There is no proposal to carry out such works at the present, although such works may be carried out in future years if funds become available.

8. The works commenced on 22nd April 2019 and are due to be completed on 17th April 2021.

9. Neither party requested an inspection and the tribunal did not consider that one was necessary, nor would it have been proportionate to the issues in dispute. The hearing bundles contained a photograph and general plans.

10. The Applicants hold long leases of properties on the Salisbury Estate. The leases require the landlord to provide services and the tenant to contribute towards their costs by way of a variable service charge. The specific provisions of the lease will be referred to below, where appropriate.

The issues

11. At the start of the hearing the parties identified that the relevant issue for determination was whether the interim charges are greater in amount than is reasonable?

12. Several of the issues presented in the application were not pursued by the Applicants at the hearing and therefore the Tribunal has not considered them. So for instance the argument that the Respondent had not complied with the Heat Network (Metering and Billing) Regulations 2003 Sch 4.

13. In addition there was no argument that the interim charges were not payable under the lease.

14. Having heard evidence and submissions from the parties and considered all of the documents provided, the tribunal has summarised the arguments and made determinations on the various issues as follows.

Argument for the Applicants

15. The Applicants argue that the current heating system is problematic in that it is outdated, they have scalding water coming from the taps and they cannot regulate the temperature in their flats as the system offers no control to lessees. None of the proposed works will address these deficiencies.

16. They argue that these conditions mean that the Respondent is in breach of the covenant of quiet enjoyment. Further they argue that the fact that the works will not result in any improvement to their heating and hot water services means that the works are unreasonable.

17. They also point to the cost of the works. For the majority of the residents the installation of an individual boiler would be cheaper and it is unreasonable to expect lessees to pay high costs. This they argue will force certain lessees into poverty.

18. They also point to the poor history of District Heating works carried out by the Respondent on the estate and are not confident that the standard of work will be adequate.

19. The Applicants further argue that the Respondent's response to the failure of the District Heating System is flawed because it is not environmentally sound, as it is not low carbon. This means that it is not an appropriate option for the Respondent to have pursued and is therefore unreasonable.

20. The Applicants' expert, Mr Crane, who is a Chartered Engineer gave evidence that for a number of reasons the scheme of works designed to replace the current failing District Heating System did not comply with the Chartered Institute of Building Services (CIBSE)/Association of Decentralised Energy (ADI) Code of Practice (CP1). Compliance with the requirements could have cut costs and delivered a more efficient system. In his opinion these failures made the decision of the Respondent to embark on its current works unreasonable.

21. Mr Crane was concerned that no-one involved in the Respondent's team had completed the CIBSE training course and raised issues about the Respondent's Whole Life Cycle Costs studies.

22. The Tribunal were impressed by Mr Crane. He was reasonable and open-minded and was enthusiastic in his pursuit of environmentally robust heating systems. However the Tribunal did not consider that his evidence was sufficient to suggest that the decision by the Respondent resulted in interim costs which were greater than was reasonable.

23. When pressed by the Tribunal the Applicants argued that a reasonable figure for them to pay was to take the cost per leaseholder of installing their own boiler suggested by the Potter Raper report and the figure that they suggested it would cost to install their own boiler and offer to pay 80% of the average between the two.

24. The Applicants would agree, the Tribunal is sure, that this figure was not carefully thought through and did not clearly relate to the issue before the Tribunal. This was because the Applicants were under the legal misapprehension that they had no responsibility to show what a reasonable cost would be and came up with the figure in response to prompting from the Tribunal.

Argument for the Respondent

25. The Respondent's starting point is that it is under an express obligation to repair the District Heating system. There is a contractual obligation to supply hot water and heating to the flats and to repair the District Heating System under the Right to Buy leases. The works are therefore not optional or discretionary.

26. The Respondent points out that the exiting District Heating System is old and broken. There was no disagreement on that point.

27. Mr Marenghi, the Chief Mechanical Engineer with the Respondent, gave evidence. He has been in his current role since January 2015 and has responsibility for managing the repair and maintenance of the Respondent's district heating systems. He gave evidence of the history of the District Heating System on the Salisbury Estate, in particular that the current underground distribution pipework is believed to be original from the time of the estates construction in the mid 1970s.

28. The pipework has failed in recent years in various locations and there has been patch repairs. However, there are a number of small unidentifiable leaks across the network. The system therefore has to be topped-up with untreated raw water, which introduces oxygen and limescale into the system. Only by doing this can the system be kept operational and the Respondent fulfil its obligations to the residents of the estate.

29. In the light of this evidence, the Tribunal considers that there is no argument that the system can simply be maintained as it is. In this situation the Respondent has no choice but to incur very significant costs to continue to provide heating and hot water services to the flats and houses on the estate. The issue then is about the options available to the Respondent.

30. The Respondent argues that it made a reasonable decision to replace the underground pipes and the boilers to the system. It refers to Mr

Marenghi's evidence which concludes that retaining the current system but renewing the pipework and the boilers is the best way forward.

31. In addition the Respondent gave evidence that it had sought proper technical advice on its options. In particular the Respondent specifically commissioned Whole Life Cycle Costs studies on a range of options.

32. Mr Evans, quantity surveyor with Potter Raper, gave evidence of the decision-making process underpinning the decision to carry out the works. He told the Tribunal that Potter Raper and PI Consult the two external consultants contracted by the Respondent in connection with the works originally issued a feasibility report in December 2015. The report outlined the engineers considered decision as to the appropriate engineering solution to provide reliable heating and hot water to all residents at Salisbury estate. A 'whole life' cost analysis was carried out by Potter Raper in 2017 which indicated that the proposed communal system replacement represented the best overall value compared to individual boilers to each property.

33. Potter Raper were sent a report by Evora Global in December 2017. Evora Global were at that time acting as energy consultants for the residents' association. In February 2018 there was a mediation meeting between the residents and Southwark which included Mr Evans and Andrew Cooper of Evora Global. Following that meeting Mr Evans and Mr Cooper agreed a revised whole life costing document which stated that the scheme which is currently being implemented represented better value over 40 years compared with the other proposed options.

34. Mr Crane raised some questions about the costings, in particular whether it was appropriate to cost over thirty or forty years, and suggesting that the figures had been adapted to favour the Respondent's preferred outcome.

35. In response the Respondent considers that underpinning the Application is a desire on behalf of the Applicants to install their own individual heating system. It argues that it has considered that option and it is not, in their considered opinion the best option for the Respondent. It would leave the Respondent with considerable costs and there is no doubt that the infrastructure of the heating and water system would have to be upgraded.

The Tribunal's decision

36. The Tribunal determines that the amount payable by each of the Applicants in respect of interim service charges demanded in 2018 - 19 for the major works to the district heating system is £13,709.22.

Reasons for the Tribunal's decision

37. The Tribunal understands the frustrations of the Applicants. They are being asked to pay a substantial amount of money for a heating system which will deliver minimal improvements for them individually. There is no certainty when and if the further necessary works to update the system will be carried out. Of course the Applicants are fully aware that if and when the further works are carried out the Applicants will have to pay out substantially more money.

38. It is also true that for a considerably smaller sum individual lessees could install an up-to-date and effective system in their own flats. Whilst the Respondent was sceptical about the figures quoted by the Applicants, it is difficult to dispute that the sum is likely to be much smaller than the costs currently faced by the Applicants.

39. The Respondent has not made the position of the Applicants easier; statements from Ms Bola Odusany which suggested that if the Applicants were to disconnect from the system it would be at risk of explosion, when that was, in these particular circumstances not relevant, do not lead to the Applicants trusting the Respondent.

40. Nor is the relationship between the Respondent and the Applicants helped by the Respondent's insistence that it has been generous in not charging the Applicants for the replacement of the boilers. It is very likely, from the evidence that the failure of the boilers was as a result of the Respondent's failure, that a Tribunal would not have found that such charges were reasonable.

41. Nonetheless, however sympathetic to the Applicants the Tribunal is, it is required to start with the law and the particular challenge made by the Applicants.

42. The Tribunal agrees with the Respondent that, because the application concerns interim service charges, the relevant provision is s.19(2) of the 1985 Act, in particular that the test of reasonableness in those circumstances is that no greater amount than is reasonable is so payable. This is a narrower challenge than the challenge under s.19(1)

43. Section 19(2) does not enable the lessees to challenge the standard of works for instance, nor does it enable it to suggest that another course of action would have been more reasonable. What the Applicants have to show is that they are not having to pay in interim service charges more than is reasonable.

44. The Tribunal also agrees with the Respondent that the starting point has to be the obligation under the lease to provide heating and hot water services to the flats and that it is entitled to recover the relevant costs incidental to providing those services.

45. No-one is arguing that the current system is not defective and that the Respondent should not carry out works to it. So the Tribunal has to make an initial determination that works had to be carried out.

46. The problem for the Applicants is that whilst they, via their expert, provided arguments to demonstrate that the Respondent could have made a range of different decisions about the work that had to be done, which may have been cheaper at the outset or in the long run, they did not provide any substantiated argument that the sum demanded by the Respondent was not reasonable.

47. Moreover the Respondent provided evidence that it had considered a range of options, had listened and taken into account the Applicants' concerns, but finally came to a reasoned judgement that the current scheme for upgrading the system was the best option over the long term for it to fulfil its obligations to its tenants and under the terms of the Applicants' leases.

48. The Tribunal does not consider that the Applicants provided any evidence that the Respondent's decision was not reasonable, nor that the sum demanded in interim charges was more than was reasonable.

49. The Tribunal is not able to decide on breach of covenant of quiet enjoyment. Decisions about standards of work etc are more appropriate for consideration at the stage of service charge demands at the completion of the works.

Application under s.20C and refund of fees

50. At the hearing, the Applicants applied for an order under section 20C of the 1985 Act. Having heard the submissions from the parties and taking into account the determinations above, the Tribunal determines] not to make an order under section 20C of the 1985 Act.

Name: Judge Carr **Date:** 6th December 2019

Rights of appeal

By rule 36(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, the tribunal is required to notify the parties about any right of appeal they may have.

If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber), then a written application for permission must be made to the First-tier Tribunal at the regional office which has been dealing with the case.

The application for permission to appeal must arrive at the regional office within 28 days after the tribunal sends written reasons for the decision to the person making the application.

If the application is not made within the 28-day time limit, such application must include a request for an extension of time and the reason for not complying with the 28-day time limit; the tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed, despite not being within the time limit.

The application for permission to appeal must identify the decision of the tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal and state the result the party making the application is seeking.

If the tribunal refuses to grant permission to appeal, a further application for permission may be made to the Upper Tribunal (Lands Chamber).

Appendix of relevant legislation

Landlord and Tenant Act 1985 (as amended)

Section 18

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

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

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

Section 19

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

   and the amount payable shall be limited accordingly.

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

Section 27A

(1) An application may be made to the appropriate tribunal for a determination whether a service charge is payable and, if it is, as to -
   (a) the person by whom it is payable,
   (b) the person to whom it is payable,
   (c) the amount which is payable,

(d) the date at or by which it is payable, and
(e) the manner in which it is payable.

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

(3) An application may also be made to the appropriate tribunal for a determination whether, if costs were incurred for services, repairs, maintenance, improvements, insurance or management of any specified description, a service charge would be payable for the costs and, if it would, as to -
(a) the person by whom it would be payable,
(b) the person to whom it would be payable,
(c) the amount which would be payable,
(d) the date at or by which it would be payable, and
(e) the manner in which it would be payable.

(4) No application under subsection (1) or (3) may be made in respect of a matter which -
(a) has been agreed or admitted by the tenant,
(b) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,
(c) has been the subject of determination by a court, or
(d) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.

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

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) the appropriate tribunal .

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

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

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

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

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

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

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

Section 20B

(1) If any of the relevant costs taken into account in determining the amount of any service charge were incurred more than 18 months before a demand for payment of the service charge is served on the tenant, then (subject to subsection (2)), the tenant shall not be liable to pay so much of the service charge as reflects the costs so incurred.

(2) Subsection (1) shall not apply if, within the period of 18 months beginning with the date when the relevant costs in question were incurred, the tenant was notified in writing that those costs had been incurred and that he would subsequently be required under the terms of his lease to contribute to them by the payment of a service charge.

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.

Commonhold and Leasehold Reform Act 2002

Schedule 11, paragraph 1

(1) In this Part of this Schedule "administration charge" means an amount payable by a tenant of a dwelling as part of or in addition to the rent which is payable, directly or indirectly—
- (a) for or in connection with the grant of approvals under his lease, or applications for such approvals,
- (b) for or in connection with the provision of information or documents by or on behalf of the landlord or a person who is party to his lease otherwise than as landlord or tenant,
- (c) in respect of a failure by the tenant to make a payment by the due date to the landlord or a person who is party to his lease otherwise than as landlord or tenant, or
- (d) in connection with a breach (or alleged breach) of a covenant or condition in his lease.

(2) But an amount payable by the tenant of a dwelling the rent of which is registered under Part 4 of the Rent Act 1977 (c. 42) is not an administration charge, unless the amount registered is entered as a variable amount in pursuance of section 71(4) of that Act.

(3) In this Part of this Schedule "variable administration charge" means an administration charge payable by a tenant which is neither—
  (a) specified in his lease, nor
  (b) calculated in accordance with a formula specified in his lease.

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

Schedule 11, paragraph 2

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

Schedule 11, paragraph 5

(1) An application may be made to the appropriate tribunal for a determination whether an administration charge is payable and, if it is, as to—
  (a) the person by whom it is payable,
  (b) the person to whom it is payable,
  (c) the amount which is payable,
  (d) the date at or by which it is payable, and
  (e) the manner in which it is payable.

(2) Sub-paragraph (1) applies whether or not any payment has been made.

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

(4) No application under sub-paragraph (1) may be made in respect of a matter which—
  (a) has been agreed or admitted by the tenant,
  (b) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,
  (c) has been the subject of determination by a court, or
  (d) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.

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

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

(b) on particular evidence,

of any question which may be the subject matter of an application under sub-paragraph (1).