FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case Reference	**:**	**LON/00BK/LSC/2019/0438**
Property	**:**	**Flats G, 7, 53 and 54 Melcombe Regis Court 59 Weymouth Street London W1G 8NA**
Applicant	**:**	**Melcombe Regis Court Freehold Company Limited**
Representatives	**:**	**Mr B R Maunder Taylor Chartered Surveyor**
Respondent	**:**	**Andreas Staribacher and Gabriela Maria Staribacher**
Representative	**:**	**Ms Fern Horsfield-Schonhut of Counsel**
Type of Application	**:**	**For the determination of the liability to pay and reasonableness of service charges (s.27A Landlord and Tenant Act 1985)**
Tribunal Members	**:**	**Professor Robert Abbey** **Mr Peter Roberts DipArch RIBA**
Date and venue of Hearing	**:**	**17 February 2020 at 10 Alfred Place, London WC1E 7LR**
Date of Decision	**:**	**19 February 2020**

DECISION

Decisions of the tribunal

(1) The tribunal determines that: -

(2) The respondents are liable under the terms of the lease of the property to pay service charges in respect of the communal heating system notwithstanding that the respondents are not connected to that communal system.

(3) The Tribunal declines to consider and determine the counterclaim for damages arising out of allegations of water ingress which the respondents seek to set against the service charge liability for the reasons set out below.

The application

1. The applicant seeks a determination pursuant to s.27A of the Landlord and Tenant Act 1985 ("the 1985 Act") as to the amount of service charge payable by the respondent in respect of service charges payable for services provided for **Flats G, 7, 53 and 54 Melcombe Regis Court 59 Weymouth Street London W1G 8NA**, (the property) and the liability to pay such service charge.

2. The relevant legal provisions are set out in the Appendix to this decision. Additionally, rights of appeal are set out below in an annex to this decision

The hearing

3. The applicant was represented by Mr Maunder Taylor a Chartered Surveyor and the respondents were represented by Ms Horsfield-Schonhut of Counsel.

4. The tribunal had before it a trial bundle of documents prepared by the the parties, in accordance with previous directions. Additional copy paperwork was made available to the tribunal on the day of the hearing that was seen and approved by all parties and therefore added to the trial bundle. Legal submission/skeleton arguments were also made available to the tribunal.

The background and the issues

5. The property which is the subject of this application comprises a purpose-built block of 57 flats of which the respondents are the owners of the four flats affected by this dispute. Flat G is located on the lower ground floor, Flat 7 is on the ground floor and Flats 53 and 54 are located at the mansard roof level.

6. Neither party requested an inspection and the tribunal did not consider that an inspection was necessary in the light of the detailed and extensive paperwork in the trial bundle; nor would it have been proportionate to the issues in dispute.

7. The lessees of the flats in the property hold long leases which require the lessor to provide services and the lessees to contribute towards their cost by way of a service charge. The lessees must pay a percentage stipulated in their lease for the services provided. The actual percentage is expressed in the leases and will vary from flat to flat. So, for example flat 53 pays 1.3766% of the total service charge annual cost while flat 54 pays 1.6967%.

8. There is a communal heating system for the whole block. The respondents have detached themselves from the communal system and have installed their own heating system in flats 53 and 54. The applicant has continued to demand service charges of the respondents that include charges for the communal heating and the respondents have objected.

9. Therefore, two disputes arise, first, are the respondents liable to pay service charges for the provision of communal heating and secondly, can the respondents make a counterclaim for damages for water ingress in flats 53 and 54. The reasonableness of the service charges is not in dispute, the payability is.

Summary of the applicant's argument

10. The applicant takes the view that the respondents are contractually bound to pay service charges in accordance with the terms of the lease. The Applicant says that a lease variation would be necessary to allow the respondents to avoid these charges but none has been entered into and no application to seek a variation has been made to this Tribunal.

11. With regard to the counterclaim, the applicant says that the applicant has properly attended to its responsibilities in regard to these old roof coverings. Surveyors reports have been obtained and repair work advised or that has been found to be necessary has been promptly carried out. There is no evidence of continuing water damage or neglect.

Summary of the respondent's argument

12. The respondents say that the first issue is about the true construction of the lease and whether the heating system that already exists is capable of use by the Respondents. The Respondents are obliged by clause 2.2 of the lease to pay towards the costs of "*….heating….as shall from time to time be used or capable of being used by the lessee in common with other lessees",* (Clause 4.1 of the lease). The Respondents say they cannot use the heating system as it is not connected to their flats. Therefore, it does not fall within the ambit of the clause and they are not required to contribute to it. Clause 4.1 says payment must be made for services provided from time to time. The Respondent says this means the lease draftsperson envisaged systems would change so this would cover the change to the heating system in flats 53 and 54.

13. With regard to the water ingress the Respondents say that there is clear evidence of this and the damage it has caused. They claim a right of set off and have given details of how their claim is constructed. The say costs of repairing damage totalled £3300, then they make two claims for loss of amenity for flat 53 over 43 months at 10% of the estimated rental value of £2383 per month being £10248.32. Likewise, for flat 54 during 28 months at 10% of the same rental value giving a claim of £6673.24. The total counter claim advanced by the respondents for set off purposes is therefore £20,221.56

Decision

14. The tribunal is required to consider which argument they prefer in their interpretation of the service charge provisions and the communal heating system covered by the terms of the lease. The tribunal therefore sought precedent guidance to support their decision-making process. The recent Supreme Court case of *Arnold v Britton and Others* [2015] UKSC 36 is extremely helpful in this regard. This case was about judicial interpretation of contractual provisions analogous to the dispute before the tribunal. The court held

> *"that the interpretation of a contractual provision, including one as to service charges, involved identifying what the parties had meant through the eyes of a reasonable reader, and ,save in a very unusual case, that meaning was most obviously to be gleaned from the language of the provision; that, although the less clear the relevant words were, the more the court could properly depart from their natural meaning, it was not to embark on an exercise of searching for drafting infelicities in order to facilitate departure from the natural meaning; that commercial common sense was relevant only to the extent of how matters would or could have been perceived by the parties, or by reasonable people in the position of the parties as at the date on which the contract was made….it was not the function of a court to relieve a party from the consequences of imprudence or poor advice".*

15. Accordingly, the tribunal turned to the lease to try to identify what the parties had meant through the eyes of a reasonable reader. Starting at clause 4.1 as more particularly described above. The Tribunal could find nothing in this clause that might assist the respondent. Indeed, the Tribunal was of the firm view that this clause makes it clear that the respondents must pay for the provision of the communal heating system, whilst it may be true that the respondents do not use the heating system and indeed they cannot use it because it is not connected to the flats.

16. However, if they wished to reconnect to the system then they could do so. The respondents disconnected from the system but did not ask to be released from the lease terms regarding the payment of service charges for the communal heating system. The fact that they do not use it does not release them from paying for the system when the lease specifically requires them to pay service

charges in that regard. Accordingly, the service charge items relating to the communal heating system do fall within the scope of the respondents' service charge liability and must be paid. The lease is a contractual arrangement that the respondents accepted when they bought the flats and as such they are required to pay for this charge. There is nothing in this clause that enables the respondents to stop paying simply because they are no longer using the communal system.

17. Turning now to the counter claim, the Tribunal considered all the evidence but it found that it was insufficient to allow it to take this further. The evidence of water ingress and subsequent damage was not sufficient to enable the Tribunal to make a decision on the counter claim. The Tribunal therefore declines to make a determination in this regard. However, it is of course still open to the respondents to advance a claim in the County Court or elsewhere.

18. The Tribunal has taken this view because it seemed to the Tribunal that the water ingress was in different places at different times both before the respondents were the owners of the two flats as well as after. Also, there was a lack of convincing expert evidence supporting the counter claim and no such evidence was given orally to the Tribunal at the time of the hearing. Not even a builder was to give evidence to the Tribunal. All it had was a paper trail that was not sufficient for the Tribunal to make a decision.

19. For all the reasons set out above the tribunal is of the view that the respondent must pay service charges for the communal heating system and should the respondent wish to pursue the claim for damages they can do so in another jurisdiction.

Name:	Judge Professor Robert Abbey	**Date:**	19 February 2020

Appendix of relevant legislation and rules

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.

ANNEX - RIGHTS OF APPEAL

1. 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.

2. 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.

3. 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.

4. 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.