FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**CAM/12UB/LSC/2021/0061**
HMCTS	:	**CVP & Face to Face**
Property	:	**117-131 (Odds) The Cherry Building and 133-171 (Odds), Addenbrookes Road, Cambridge CB2 9BA**
Applicants (Tenants)	:	**The Long Leaseholders identified in the Schedule to the Application**
Representative	:	**Dr Frank Gommer**
Respondent (Landlord):		**RMB 102 Limited**
Representative	:	**Ms Rebecca Ackerley of Counsel instructed by JB Leitch, Solicitors**
Type of Application	:	**1) to determine the reasonableness and payability of Service Charges (section 27A Landlord and Tenant Act 1985) and Administration Charges (Schedule 11 of the Commonhold and Leasehold Reform Act 2002)** **2) for an order that the landlord's costs arising from the of proceedings should be limited in relation to the service charge (Section 20C of the Landlord and Tenant Act 1985)** **3) for an order to reduce or extinguish the Tenant's liability to pay an administration charge in respect of litigation costs (paragraph 5A of Schedule 11 of the Commonhold and Leasehold reform Act 2002)** **4) To make an order under Rule 13 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013**
Tribunal	:	**Judge J R Morris** **Mr G Smith MRICS FAAV REV**
Date of Application	:	**28th September 2021**
Date of Directions	:	**28th October 2021**
Date of Hearing	:	**20th January 2022**
Date of Decision	:	**4th March 2022**

DECISION

Covid-19 Pandemic: Remote Video Hearing

This determination included a remote video hearing together with the papers submitted by the parties which has been consented to by the parties. The form of remote hearing was Video. A face-to-face hearing was not held because it was not practicable, and all issues could be determined in a remote hearing/on paper. The documents referred to are in a bundle, the contents of which are noted.

Pursuant to Rule 33(2A) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 and to enable this case to be heard remotely during the Covid-19 pandemic in accordance with the Practice Direction: Contingency Arrangements in the First-tier Tribunal and the Upper Tribunal the Tribunal has directed that the hearing be held in private. The Tribunal has directed that the proceedings are to be conducted wholly as video proceedings; it is not reasonably practicable for such a hearing, or such part, to be accessed in a court or tribunal venue by persons who are not parties entitled to participate in the hearing; a media representative is not able to access the proceedings remotely while they are taking place; and such a direction is necessary to secure the proper administration of justice.

Decision

1. The Tribunal determines that the costs of the Works are reasonable and payable by the Applicants to the Respondent under the Service Charge.

2. The Tribunal makes an Order under section 20C of the Landlord and Tenant Act 1985 that the Respondent's costs in connection with these proceedings should not be regarded as relevant costs to be taken into account in determining the amount of any Service Charge payable by the Applicants.

3. The Tribunal makes an Order extinguishing the Applicants' liability to pay an administration charge in respect of litigation costs under paragraph 5A of Schedule 11 of the Commonhold and Leasehold Reform Act 2002.

4. The Tribunal does not make an Order under Rule 13 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013.

Reasons

Application

5. On 28th September 2021 the Applicants applied for:

   a) A determination under section 27A of the Landlord and Tenant Act 1985 as to whether the service charges incurred for qualifying works ("the Works") were reasonable and payable.

   c) An order for the limitation of the Respondent's costs in the proceedings under section 20C of the Landlord and Tenant Act 1985.

   d) An order to reduce or extinguish the tenant's liability to pay an administration charge in respect of the litigation costs under paragraph 5A of Schedule 11 of the Commonhold and Leasehold Reform Act 2002.

   e) An order under Rule 13 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013

6. This Application was made following an Application made by the Respondents on 30th June 2021 for a determination pursuant to section 20ZA of the Landlord and Tenant Act 1985 that the requirement to comply with all the consultation requirements in relation to the Works as set out in the Service Charges (Consultation Requirements) (England) Regulations (81 2003/1987) at Part 2 of Schedule 4 (Consultation Requirements for Qualifying Works for which public notice is not required) ("the Consultation Requirements") should be dispensed with (the Dispensation Application). There is a separate decision relating to the Dispensation Application CAM/12UB/LDC/2021/026.

7. The Works were for the instruction of a specialist flue contractor, namely Pure Heating and Plumbing ("PHP"), to attend the Property and carry out the removal of the current flue system and install a new flue system.

8. The cost of the qualifying works was said to be £13,954.08.

9. Directions were issued on 28th October 2021 following a case management conference on 27th October 2021 in which Regional Judge Wayte consolidated the Dispensation Application and this Application made by the Leaseholders for a determination as to the reasonableness and payability of the Service Charge costs for the Works under section 27A of the Landlord and Tenant Act 1985 ("the Section 27A Application") and listed them for a joint final hearing.

10. It was apparent that an important part of the Applicants' objection to the cost of the Works was that they were only necessary due to defects for which Countryside Cambridge One Limited and Countryside Cambridge Two Limited and Countryside Properties (UK) ("the Developer") were liable. The Applicants requested that Countryside Cambridge One Limited and Countryside Cambridge Two Limited and Countryside Properties (UK) be made a party of these proceedings which the Procedural Judge rejected as they were not the Freeholder or Landlord (as noted

below). However, the Judge agreed that the argument that the Developer should have been asked to remedy the defects could be raised with regard to the Dispensation Application and this Secton 27A Application. In addition, with regard to the Applicant's contention, the Developer was ordered to produce any documents in its possession in respect of the 2019 works to the flues, in particular the recommissioning certificate and any report. A report and specification by AWA Building Services Consultants was provided.

Description

11. The Tribunal did not inspect the Property due to Government restrictions and sets out the following description based upon the Statements of Case, photographs, the Lease and the Internet.

12. What is referred to in this Decision and Reasons as the "Property" in the Lease is the Block which comprises two buildings, 117 – 131 (Odds) The Cherry Building, containing 28 purpose-built Apartments, and 133-171 (Odds) Addenbrookes Road, containing 8 purpose-built Apartments, which have joint communal facilities including a central heating system. The heating system has a flue which passes from the gas boilers in the plant room to expel any fumes into the atmosphere.

The Law

13. The Law relating to these proceedings is set out in Annexe 2 and should be read in conjunction with this Decision and Reasons.

The Leases

14. Each Apartment is subject to a long residential lease. Each lease is similar in terms as to the relevant covenants.

15. A copy of the lease relating to Plot 305 dated 30th September 2013 and made between (1) Countryside Cambridge One Limited and Countryside Cambridge Two Limited, (2) Countryside Properties (UK) Limited and (3) Kurt Stadler and Friedelind Stadler (the "Lease") was provided. The terms of the Leases are understood to be common to all Apartments.

16. On 8th August 2014, Countryside Properties (UK) Limited assigned the freehold title to the Property to E&J Ground Rents No6 LLP who then assigned the Property to the Respondent, RMB 102 Ltd, on 26th July 2019. E&J and RMB 102 Ltd form part of the same holding group. RMB 102 Ltd is therefore the Landlord and the long leaseholders of each of the apartments are the Tenants.

17. As at 2018 APT Property Management ("APT") was the managing agent for the Property. On 1st February 2019 Respondent appointed Flaxfields Ltd ("Flaxfields") as its managing agent for the Property to carry out all of the Respondent's obligations and duties under the Leases, ensure that all statutory requirements had been complied with and collect the service charges that have fallen due. On 1st September 2021 Flaxfields' appointment ceased, and Premier Estates ("Premier") were appointed in Flaxfields' place.

18. Relevant provisions of the Leases were identified as follows (references to the Property are to the individual Apartment to which the Lease relates):

19. Clause 1 Definitions

'The Block'
An area within which the Building is situated

Note: The Property is the Apartment within the Building. Therefore, the term Block in the Lease includes the Building. As noted above there are two Buildings and the heating is shared by both buildings.

'Building Communal Areas'
Those parts of the Building of which the Property forms part (excluding the Property) laid out as...ducts risers communal boilers/Heat Installations and Energy Centre (if any) and all other parts of the Building intended to be or are capable of being enjoyed or used by some or all of the owners tenants and occupiers of premises in the Building".

'Conduits'
Pipes downpipes sewers (excluding Estate Sewers) drains pumping stations soakaways channels gullies gutters watercourses conduits ducts flues Wires cables and other service conducting media or apparatus for the supply or transmission of water sewerage electricity gas (if any) telephone (if any) and other communications media now or to be constructed in any part of the Estate and serving the Property but shall not Include any conduits belonging to any local or other Statutory Authorities

'Heat installations'
The network of pipes wires and other ancillary plant and equipment serving the Building (together with any other buildings) that transfer Heat from the Energy Centre to the Heat interface Unit together with all connected meters and monitoring equipment

'Heat'
Heat in the form of hot water generated from the Energy Centre and also cold water to be supplied to the Tenant through the Heat Interface Unit

'Energy Centre'
The energy centre serving the Building (together with any other buildings) from which the Energy Service Company supplies Heat

'Energy Service Company'
The Landlord or any organisation appointed by the Landlord from time to time to move and/or procure the provision of Heat to the Building (together with any other buildings)

'Heat Interface Unit'
A unit composing a heat exchanger pump and associated valves and controls used to transfer Heat from Heat Installations to the Tenants Internal heating and hot and cold-water system

'Proportion'
The Part A Proportion the Part B Proportion and the Part C Proportion which are each defined as being a fair and proper proportion (assessed by the Landlord acting reasonably) of the Service Charge attributable to the respective Part A, B and C Services

'Services'
The services carried out by or on behalf of the Landlord from time to time as set out or referred to in Parts I, II and III of the Fifth Schedule

'Service Charge'
The total cost of providing the Services

20. Clause 4 The Tenant hereby covenants with the Landlord as follows: -

4.3 To pay to the Landlord in respect of every Service Charge Year, the Proportion of the Service Charge by two equal instalments in advance on the Half Yearly Dates (those being 19th September and 1st March).

4.4 To pay to the Landlord on demand, the Proportion of the appropriate Service Charge Adjustment pursuant to the Fourth Schedule.

4.5 To pay to the Landlord on demand, the Proportion as the case may be of any Additional Contribution that may be levied by the Landlord. Additional Contribution is defined within the Lease as "any amount which the Landlord shall reasonably consider necessary for any of the purposes set out in the Fifth Schedule for which no provision has been made within the Service Charge and for which no reserve provision has been made under Paragraph 2.2 of the Fourth Schedule

Schedule 5 -Services

Part 1 Building Communal Area Services (Part A)

1. To keep the Building Communal Areas [which includes the Energy Centre, Heat Installations and the Heat Interface Unit] in good repair and condition

7. To keep the Energy Centre and the plant and machinery housed within the Energy Centre and the Heat Installations serving the Premises [also known as the Property] in good repair order and condition including the renewal and replacement of all worn or damaged parts

Part 2 Building Services (Part B)

9. To make provision for the payment of all costs and expenses incurred by the Landlord: -

9.1 in the running and management of the building and the collection of the rents and service Charge in respect of the Dwellings and in the enforcement

of the covenants and conditions and regulations contained in the leases of the properties in the Block and

9.5 in the payment of the costs fees and expenses paid to any Agent Accountant or Legal Representative appointed by the Landlord in connection with the provision of the services set out in this Schedule

21. To carry out all repairs to any other part of the Building for which the Landlord may be liable and to provide and supply such other services of the benefit of the Tenant ... as the Landlord shall consider necessary to maintain the Building as a good class development

Part 3 Block Communal Area Services (Part C)

3. To keep all Conduits... in good repair and condition.

13. To carry out all repairs to any other part of the Block Communal Areas for which the Landlord may be liable and to provide and supply such other services for the benefit of the Tenant and the tenants of other properties in the Block and to carry out such other repairs and improvement works additions and to defray such other costs (including the modernisation or replacement of plant and machinery) as the Landlord shall consider necessary to maintain the Block Communal Areas as a good class development or otherwise desirable in the general interest of the Tenant and the tenants of other properties in the Block.

Written Statements and Hearing

21. Both parties provided written statements which were confirmed and developed at the hearing. The cases summarised below include both the written and oral cases presented to the Tribunal. The hearing was attended by:
Dr Frank Gommer, the Applicants' Representative,
Ms Rebecca Ackerley Counsel for the Respondent,
Mr Jonathan Coles, Director of Flaxfields, the Respondent's Managing Agents at the time the Works were undertaken,
Mr Ben Hunt, Associate Director (Development) New homes and Communities, Country Side Properties, the Developer, (attended by video link)
Mr Daniel Holding of Pure Plumbing and Heating Ltd ("PHP") main contractor for the Works (attended by video link).
Mr Paul Tolley and Ms Jessica Stack of Premier the Respondent's current managing agents observing.
Other persons were in attendance by video link which included Ms Cheryl Earle of JB Leitch the Respondent's Solicitors, Ms Fatemah Poorabdian, a Tenant.

Applicant's Case

22. The Tenants were not legally represented and some submissions made in the Statements of Case in respect of the Dispensation Application were more appropriate to the Section 27A Application. However, the Tenants' overarching argument for contending that the costs of the Works were not reasonably incurred and not payable was clear; the Developer was liable for the cost of the Works and

not the Leaseholders of the Property. The Tribunal identified the submissions in support of this argument as follows:

1. The Developer is liable under the terms of the Lease.
2. The Developer admitted that there were defects in the installation of the heating system, including the flues, the liability for the cost of the repair and replacement of which rests with the Developer. The Developer has repaired the flues on two occasions and now the flues have had to be replaced as set out below:
   a) The flue system was seen to be leaking in 2018 and repairs were claimed to have been carried out under the auspices of the Developer.
   b) The flue system was due to be repaired or replaced as part of recommissioning works to the heating installation between October 2019 and March 2020, which were part of a court settlement between the Developer and the Applicant's Representative and are still under a 2-year warranty from that work.
   c) The flue system was seen to be leaking and replaced in June 2021 being the Works currently in issue which are within the 2-year warranty period of the recommissioning works.
3. There has been historic negligence in that the flue system has not been maintained properly and if it had, the leaks would not have occurred or would have been repaired in a timely manner and the Works (which are to replace the flue system) would not have been necessary.
4. The Respondent Landlord has been paid for the Works by the Developer or the Respondent Landlord should obtain payment for the Works from the Developer. The Tenant Applicants should not be liable for the cost of the Works under the Service Charge.

1) The Developer is liable for the Works under the Lease

23. The Applicants' Representative said that the flue system when originally installed did not comply with Regulation 5 "Combustion appliances and fuel storage systems", Approved Document J of Building Regulations 2010, which do not allow unprofessional and improvised silicone joints to be installed. Silicone was used to repair a leak causing the flue to be in a poor state only 5 years after installation and now had to be replaced completely after only 7 years.

24. It was stated that the Developer's liability is in accordance with the Lease which states at Clause 8.11:
"The Landlord [here meaning Countryside Cambridge One Limited and Countryside Cambridge Two Limited] shall remain liable on its covenants contained in Clause 6 (excepting clauses 6.1 and 6.2) only for so long as the Landlord remains the proprietor of the reversionary interest in the Block."
and
Clause 6.1 which states:
"...that the Development will be completed and the curtilage laid out in accordance with the planning permission."

25. The Applicants' Representative submitted that the Developers had a continued liability under 6.1 and were liable for the Works because they failed to install the

flues correctly and "in accordance with the planning permission" which referred to the Building Regulations. Therefore, the Applicants should not have to pay for the repair or replacement of the flues.

2) The Developer admitted defects in the installation of the heating system

26. The Applicant's Representative referred to a report dated 22nd November 2018 requested by APT, the then managing agent, from PHP, the servicing contractor, which said that the flues were leaking only 5 years after the heating had been installed during the construction of the Property. The Report stated "Following our works to repair the leaking flue in the Cherry Building we found the cause which appears to be from the initial installation, you can clearly see in these pictures that the installers have had a problem with this joint before and tried to bodge it shut." It was submitted that the Developer, Countryside Properties, acknowledged that this was due to defective installation and accepted responsibility. It was said that this was evidenced by emails 2) to 5) below.

a) Repairs to the leaking flue system in 2018

27. The Applicant's Representative said that a leak from a rusty flue in a riser cupboard was found by Leaseholders in 2018 and reported to the then managing agent, APT who instructed PHP to investigate. This was then raised with the Developer in November 2018 who ultimately agreed that this was a fault by their contractor and agreed to resolve this issue at their own cost. Flaxfields took over the management from APT in January 2019. Mr Coles of Flaxfields attended several handover meetings which included a discussion of the flue. Mr Coles than liaised with the Developer and confirmed on 29th April 2019 that the works had been completed. However, this was only evidenced by a photograph of the top section of the flue and not the leaking bottom section. The issue was raised again with Mr Coles by Leaseholders in June 2019 as it was believed that any work that had been carried out had not remedied the leak.

28. A schedule of emails was provided to and from the following companies and personnel:

Role	Company	Personnel
1st Managing Agent	APT Property Management (APT)	Ms Dolores O'Reilly
2nd Managing Agent	Flaxfields Limited (Flaxfields)	Mr Jonathan Coles
Maintenance Contractor	Pure Plumbing and Heating Limited (PHP)	
Developer	Countryside Cambridge One Limited and Countryside Cambridge Two Limited and Countryside Properties (UK)	Ms Fiona Mowbray & Mr Ben Hunt & Mr Liam Baird
Developer's Plumbing Contractor	Associated Plumbing Limited (APL)	Mr Steve Clark
Original Flue Installer	A1 Flues	Mr David Bracegirdle

Flue Cleaning Contractor	Commercial Flue Cleaning & Maintenance Limited CFCM)	Mr Andrew Williams

29. The Applicants referred to the following emails in written representation or orally at the hearing in relation to the 2018 repairs (a number of personnel were 'copied in' to emails but the main correspondents are identified in brackets):

1) 15th November 2018 from the Developer (Ms Fiona Mowbray) to APT (Ms Dolores O'Reilly) referring to an inspection with AWA Building Service Consultants at which the flue in the small plant room was found to be "still leaking".
2) 22nd November 2018 from APT (Ms Dolores O'Reilly) to Developer (Ms Fiona Mowbray and Mr Ben Hunt) which states that a rusting flue cylinder had been identified in a riser cupboard. Reference was made to a statement by the Developer that as 2 years had passed the issue would be a management matter. However, the PHP maintenance engineers had said that having removed the outer cylinder the rust is due to a leak which is "most definitely as a result of improper fitting at installation stage, it shows that silicone has been used to fill the gap where the cylinder is not the right size". A copy of the report with photographs by PHP was provided. Ms O'Reilly also put the Developer on notice that the Leaseholders would be seeking a refund from the Developer for all costs incurred to rectify this issue. PHP said that in their opinion remedial work would take 2 days during which time the boiler would be shut down.
3) 22nd November 2018 from Developer (Mr Ben Hunt) to APT (Ms Dolores O'Reilly) stating that he would like to discuss with Mr Steve Clarke of APL arranging for the installing contractor to review the flue.
4) 26th November 2018 from Developer (Mr Ben Hunt) to APL (Mr Steve Clarke) asking APL to investigate the leak to the flue in the first instance.
5) 4th December 2018 from Developer (Ms Fiona Mowbray) to APL (Mr Steve Clarke) asking for confirmation that original installers will attend to deal with the flue issue.
6) 18th December 2018 from APL (Mr Steve Clarke) to A1 Flues (Mr David Bracegirdle) asking them to attend the site regarding the leaking flue. He adds "As you can see the flue is leaking, some attempt has been made by others to seal".
7) 10th January 2019 from APT (Ms Dolores O'Reilly), to the Developer (Ms Fiona Mowbray) stating that the PHP engineers suggested that the heating installation would have to be shut down for 2 days to repair the leaking flues.
8) 14th January 2019 from Commercial Flue Cleaning & Maintenance Limited (CFCM) (Mr Andrew Williams) to APL stating that A1 Flues had asked them to contact APL with a view to clean the flues. The email said that CFCM "can offer a clean and inspection as attached quote this will include up to 4 new 'V' bands including the cleaning of any leaking joints and resealing and a report on the condition of the flue and any remedial work that may need to be carried out." Quotation for £875.00 was attached.
9) 21st January 2021 from APT (Ms Dolores O'Reilly) to Residents' Association (Dr Frank Gommer) stating that leaking flues due to mis-management should have been identified during maintenance visits earlier.
10) 14th March 2019 from APL (Mr Steve Clarke) to CFCM (Mr Andrew Williams) to place an order for the quotation dated 14th January 2019.
11) 15th March 2019 from Developer (Mr Liam Baird) to Flaxfields (Mr Jonathan Coles) stating that CFCM would carry out the work in one visit and that the boiler would be turned off for about 4 hours.
12) 18th March 2019 from APL to Developer (Mr Liam Baird) stating that remedial work would be carried out on 16th April 2019.

13) 27th March 2019 from Flaxfields (Mr Jonathan Coles) to Developer (Mr Liam Baird) stating that there is another leaking flue in the plant room near the electrics.
14) 4th April 2019 from Developer (Mr Liam Baird) to Flaxfields (Mr Jonathan Coles) stating the additional leak had been raised with APL and it would not be an issue to inspect on 16th April 2019.
15) 24th April 2019 invoice from CFCM forwarded by APL.
16) 10th January 2022 from A1 Flues in reply to questions from Respondent's Legal Representative regarding the 2018 work:
"The works were carried out by Commercial Flue Cleaning and Maintenance which has been dissolved. The works were for a clean and general inspection only of the flue system as it stood that day." It was added that the works were not covered by an existing warranty and no warranty was extended or new warranty issued in respect of the works

30. The Applicants' Representative said that the emails showed that the leaks to the flues had been longstanding. They show that even after the leaks were identified in 2018 nothing was done between January 2019 and April 2019 leading to further damage. The emails also showed that the remedial work that was carried out by CFCM did not repair the leaks. The Applicants' Representative referred to the statement by PHP who considered that the work would require at least two days when the boilers would need to be shut down. The cleaning work only took a day when the boilers were shut down for 4 hours. The Applicants' Representative submitted that the work was insufficient to remedy the leaks and A1 Flues admit that all CFCM were asked to do on 16th April 2019 was to clean the flues. It was added that this was not done very effectively, if at all, as the flues were still encrusted with rust as seen from the photographs provided.

31. Mr Ben Hunt for the Developer was questioned by the Applicant's Representative. He said that the works as identified by A1 Flues, the original installer, were carried out by their recommended contractor CFCM who was a specialist company sub-contracted by the Developer's plumber APL. He said that work was carried out and the invoice provided totalling £1,050 (£875.00 plus £175.00 VAT) was paid by the Developer.

b) Replacement or repair of the flue system as part of recommissioning

32. The Applicant's Representative said that on 10th May 2019, as part of the settlement of claim number E8QZl8CF, allocated to the small claims track at Cambridge County Court for excessive energy usage of the heating system, a full re-commissioning had been agreed to be conducted by the Developer. The Applicants' Representative said that under clause 3.4 of the settlement agreement "Party B shall commit to a full re-commissioning of the Communal Heating System serving the Cherry Building and Great Court. These works would include, but not necessarily be limited to Boilers, Pumps, Pressurisation Unit and expansion vessel, BMS, Water Test Results, Heat Interface Units (HIUs), and instances of missing insulation to primary pipework."

33. AWA Building Service Consultants were instructed to provide a Specification for Abode Communal Heating Recommissioning on behalf of the Developer. The Specification dated 21st August 2019 was divided into 5 volumes of which the Applicants' Representative highlighted particular passages:

Volume 1

1.2 Project overview the specification was to achieve fully and complete and operational installations

1.3 Compliant with statutory regulations, Codes of Practice and relevant Business Standards.

2.7 All material supplied shall be new...

2.36 Manufacturer Guarantees and Warranties – Where existing equipment is being serviced or modified, the manufacturer -or his nominated specialist - shall carry out these works and guarantee sad works for a period of no less than up to the end of the defects liability period in the contract.

2.42 Defects Liability - The Defects Liability period shall be a period of twenty-four months from the Date of Practical Completion of the Contract, provided that during such period the Contractor shall have remedied and made good all faults or defects as described below, to the Contract Administrator's satisfaction.

2.54 Practical Completion – For the purposes of this Contract the date of Practical Completion of the Works shall be the date when the complete project is handed over...

34. A Commissioning and Testing Report was provided which is divided into 6 Sections. Section 4 set out the technical data for each Apartment carried out in October 2019. Section 5 contains the test documents including the commissioning report, Service and maintenance Check List and Technical Service Report for water treatment.

35. Practical completion was on 23rd March 2020.

36. The Applicants' Representative said that, taking into account 2.36, 2.42 and 2.54, the Works which commenced on 29th June 2021 fall under this "defects liability period". Therefore, the Developer should be held responsible for the leaking flue under the two-year warranty prescribed by the Recommissioning Specification.

c) Replacement of the leaking flue system in June 2021

37. The Applicants' Representative questioned Mr Holding of PHP regarding whether the flues had been leaking in late 2019 to 2020 in the course of, or after, the recommissioning. He replied that he had not been with the company that long. The Applicants' Representative referred to an email dated 2nd June 2021 from PHP to Flaxfields in which the removal of a light fitting in the Plant Room was mentioned. The Applicants' Representative said that due to a leak from the flue in the plant room where it enters the wall the light had failed as is shown in a photograph taken at the previous maintenance visit. Yet it was claimed by the PHP engineer that the flue was not leaking at that time and that the failure of the fitting and its eventual removal was between that visit and the one on 7th April 2021.

38. The Applicants' Representative said that the flues had started to leak before 2018, probably from the time of installation, and continued to leak up to 2021 and that neither the work in 2018 nor the recommissioning in 2020 had addressed the problem. The flues should have been repaired properly or replaced by the Developer in 2018 or as part of the recommissioning.

3. Historic negligence

39. The Applicants submitted that the cost of the Works had resulted from the Respondents' historic neglect and that the cost of a landlord's historical neglect of a property cannot be passed on to a leaseholder through a service charge. Reference was made to *Continental Property Ventures Inc v White* [2006] 1 EGLR 85.

40. The problems with the flues had been discovered and reported by APT, the previous Managing Agents who discovered the flue leak in 2018 and agreed with the Developer that repairs would be done by them as part of their failure to install the heating correctly. It was said that the Respondent's or Developer's failure to repair the flue in 2018 to 2019 caused further decay and eventually lead to the requirement of full flue replacement. The costs of repair work were increased and caused because of the landlord's earlier delay in acting to repair the damage and hence those costs for the flue replacement are not reasonably incurred and not payable.

41. In addition, between December 2020 and when a new maintenance contract was arranged with PHP on 30th March 2021 there was no service contract for the plant room jeopardising residents' safety. The issue only came to light when Leaseholders requested safety certificates for the plant room in March 2021 from Flaxfields, the current Managing Agent, which were not available.

42. In support of this the Applicants' Representative referred to emails from letting agent, Ms Angie German, who initially found out that the plant room safety certificates were expired and not renewed. Ms Hayley Goodge of Flaxfields confirmed in an email dated 8th April 2021 that the gas safety inspection had been carried out, when it had not as demonstrated by the emails disclosed by the applicant. An email from Mr Jonathan Coles on 15th April 2021 acknowledged that Flaxfields should have been more proactive in dealing with this issue but claimed in response to a question about safety from Ms Angie German on 4th May 2021 that "the properties are considered safe". PHP were then requested to obtain safety Certificates, but were unable to do so until the flue works were addressed.

4. Third Party Contributions

43. The Applicants' Representative said that a service charge provision in the lease should be interpreted so as to prevent double recovery. Therefore, the Landlord should give credit for the Developer's liability to replace the flue system under the warranty provided by the recommissioning referred to above and reduce the service charge payable by the leaseholder. Reference was made to *Avon Ground Rents Ltd v (1) Cowley & Others, (2) Metropolitan Housing Trust, (3) Advance, (4) May Hempstead Partnership* [2019] EWCA Civ 1827; Sheffield CC v Oliver [2017] EWCA Civ 225; and *Avon Ground Rents Ltd v (1) Cowley & Others, (2) Metropolitan Housing Trust, (3) Advance, (4) May Hempstead Partnership* [2019] EWCA Civ 1827.

44. The Applicants' Representative said that the Landlord had failed to hold the Developer responsible for the recommissioning of the plant which included the flue and failed to ensure a proper repair for the separately agreed flue works in 2019. The landlord is required to manage the communal plant room according to the lease which will include supervising and inspecting repair works and enforcing warranties. None of this seems to have happened. The Works should therefore not be charged to Tenants.

Respondent's Case

45. Respondents' Counsel submitted that the Works were of a reasonable standard and their cost of £13,954.08 was reasonable and payable as part of the service charge costs.

46. In its written statement of case the Respondent said that on 24th August 2021, invoices for payment of the Works in the sum of £498.36 to be paid by 23rd September 2021 were sent to all Leaseholders and the Applicants do not take issue with the validity of the demand for payment served by the Respondent's Managing Agent. The Applicants also do not dispute the relevant provisions within the Lease as to the recoverability and payability of the Works in principle.

1) The Developer is liable for the Works under the Lease

47. Reference was made to the Developer's letter of 23rd March 2020 to Flaxfields which stated that under 8.11 the Developer ceases to have liability on its covenants under Clause 6 once it transfers its reversionary interest in the Block with the exception of Clauses 6.1 and 6.2. Under Clause 6.1 the Developer is required to complete the Development in accordance with the layout as approved by the Planning Permission and 6.2 requires the Developer to ensure that the estate roads and sewers are completed to a satisfactory standard to be adopted by the local authority. Neither provision relates to the heating installation and do not make the Developer liable for the Works.

48. Respondents' Counsel reiterated what was said in its written statement of case that the Applicants have not provided any evidence to show there has been a breach of the Lease for which the Respondent has a liability. It is noted that the parties agreed under the Lease to exclude any implied obligations (Clause 8.6) and there are no express obligations that the Tenant has relied upon to suggest that the Landlord is in breach of those obligations.

2) The Developer admitted defects in the installation of the heating system

a) Repairs to the leaking flue system in 2018

49. It was not contested that the report dated 22nd November 2018 requested by APT, the then managing agent, from PHP, the servicing contractor, said that the leaks in the flues appear to be from the initial installation. Also, that following the finding of a leak from a rusty flue in a riser cupboard in 2018 the Respondent's then managing agent, APT, instructed PHP to investigate. When this was raised with the Developer

in November 2018, the Developer agreed that this was a fault by their contractor and resolved the issue at their own cost.

50. Mr Ben Hunt confirmed the e mail correspondence, firstly, with APT and later with Flaxfields. He stated that APL, the Developer's plumbing contractor, were instructed to deal with the issue and they in turn contacted A1 Flues. A1 Flues advised that CFCM should be employed to clean and repair the flues which is what happened. Mr Hunt refuted the Applicants claim that the remedial work was not carried out on 16th April 2019 to a satisfactory standard and said that the invoice was paid by the Developer.

b) Replacement or repair of the flue system as part of recommissioning

51. Mr Hunt also confirmed that in accordance with the settlement of County Court claim number E8QZl8CF, the Developer had a full re-commissioning of the heating installation carried out in accordance with clause 3.4 of the settlement agreement and the Specification for Abode Communal Heating Recommissioning dated 21st August 2019 and prepared by AWA Building Service Consultants.

52. With regard to the recommissioning works Mr Ben Hunt provided the following response to the Respondent's Legal Representative's questions in an email dated 17th January 2022 confirmed at the hearing.

1. Asked whether during the recommissioning in October 2019 were any works carried out to the flue Mr Hunt replied that as stated on the Invoice from PHP the scope of works in September 2019 was to check the flue and no issues were reported.
2. Asked whether the flue was left in good working order once the recommission was complete Mr Hunt referred to a letter from AWA dated 24th March 2020 in respect of completion of the works. The letter refers to the performance of specific parts of the heating installation and concludes "With the works undertaken above the communal heating system has been recommissioned to a position where it would have been left at first handover to a managing agent. It is essential that ongoing maintenance is undertaken to retain these settings..."
3. Asked as to what warranties were issued by A1 Flues Mr Hunt replied that the system was originally installed in 2013. So far as he was aware the first notification to the Developer of any issue with the flue was that reported by APT on 22nd November 2018. APL in an email to A1 Flues dated 18th December 2018 reported that it appeared that "works by others" had already been undertaken on the flue. The Managing Agents would have been responsible for instructing maintenance of the system from handover in 2013. The flue was originally covered by a one-year warranty.

53. In answer to the Tribunal's questions Mr Hunt said that there were several contractors and sub-contractors engaged in recommissioning the heating installation so no one contractor would issue a warranty for the whole work. The heating installation was tested on completion of the recommissioning to determine that it ws in full working order.

54. The Respondent submitted that the Works are not connected to the recommission that took place in 2019 by the Developer. Extracts from the Recommission Manual have been provided to show the system was left in a compliant and workable order.

c) Replacement of the leaking flue system in June 2021

55. Mr Carl Briggs of PHP provided the following response to the Respondent's Legal Representative's questions in an email dated 19th January 2022.

56. In respect of the original installation the leak referred to by APT in its email of 22nd November 2018, which was identified in a report by PHP, was a leaking flue joint on the first floor in the riser cupboard. The leak in the plant room in 2021 was an additional leak to the one previously attended to in 2019. Flues UK Ltd said the leak was from a bend as it exited the plant room. It was added that from the photographs provided of the flues there are other leaks which appear to be below the repair undertaken by A1 Flues in the first-floor riser. PHP cannot confirm what repairs A1 Flues undertook as this was not under PHP's instruction. PHP was advised that following their report in 2018 APT would be going back to the Developer. He added that most contractors provide a 6-to-12-month warranty.

57. Flues UK Ltd state that the flue that was originally installed is a product that they do not recommend for use with condensing appliances due to the jointing method. Further leaks were found and Flues UK Ltd advised that there would be no guarantees on repairs. The new flue system that has been installed is believed to be a more reliable product when being used with condensing appliances. Based on the repair that had been carried out by A1 Flues and the condition of the remaining installation Flues UK Ltd felt a new installation was the best long-term solution and comes with a new warranty.

58. Carl Briggs confirmed that any issues with other parts of the heating installation were not related to the flue system.

59. In questions to Mr Holding, the Applicant's Representative referred to the previous maintenance invoices dated 29th March 2019, 3rd September 2019, 26th March 2020 and 16th October 2020. These itemised what work had been undertaken and reported on the condition of the system, which stated that the flues had been checked. He asked Mr Daniel Holding of PHP why no note had been made of the corrosion which was apparent around the joints at these visits and in particular no mention was made of the leaks before the maintenance visit on 7th April 2020. Mr Holding said that he had not been present at previous maintenance visits and could only speak of the one on 7th April 2020. The Tribunal did subsequently note that on the invoice and report dated 16th October 2020 that it was "recommended that the current condensate pipework is upgraded to stainless steel. The current condensate pipework is steel. There is a possibility that in the future the run off from the flue which is acidic may cause this steel pipework to corrode".

60. Mr Holding said that when the engineers attended to service the boilers on 7th April 2021, they were found to be leaking carbon monoxide therefore the complete replacement of the flue was recommended. He said that tests only show the state of the installation as at the time of the maintenance visit. He said there may be signs of corrosion but the flue is not leaking. Leaks may occur quite suddenly and may be

pin hole size which are only identified by testing equipment. On 7th April 2021 the flues were leaking beyond repair as stated in the email dated 13th April 2021 to Flaxfields. He said that Flues UK Ltd had attended which were flue specialists and they had recommended the replacement of the flue system.

61. In response to questions from the Tribunal, Mr Holding said that corrosion did not necessarily mean that the flue was leaking or if it was, that carbon monoxide was being emitted, it would depend on the test carried out. He agreed that a flue might be leaking one day but that the corrosion itself may later seal the hole. He said that a flue could be preforming well for some time and then relatively suddenly fail and require replacing.

3. Historic negligence

62. Respondents' Counsel confirmed what was said in the Respondent's written statement of case that the discovery of the flue leak in 2018 did not have any bearing upon the necessity of the Works that had now been undertaken. As far as the Respondent was concerned the Developer agreed to and did, according to its evidence carry out the necessary repair works in April 2019, and paid for them. Furthermore, the Developer carried out further works as part of the recommissioning process which was completed in October 2019 and that this was also paid for by the Developer. It was added that both sets of works were agreed between the Tenants and the Developer.

63. The Respondent said that maintenance was carried out during 2020 which consisted of quarterly water checks on the heating system and bi-annual visits to inspect boilers and undertake servicing and inspection. The Applicants have failed to provide any evidence in support of their assertion that the flue had deteriorated during January and March 2021 to such an extent that the cost of repair would have been cheaper had other maintenance been carried out.

64. In addition, the Applicants have failed to provide any expert evidence to suggest the cost or necessity of the Works were as a direct result of any alleged delay or failure by the Respondent to act more promptly. According to its evidence the Developer did carry out repair works in April 2019 and the recommission in October 2019 and the documentation relating to these works have been provided.

65. Also, the Applicants have failed to provide any comparative quotations to show that the costs of the Works are unreasonable in amount.

4. Third Party Contributions

66. The Respondent said it denied it had received any third-party funding for repairs carried out at the Property that have thereafter also been passed on to the Tenant via the service charge mechanism under the Lease and the Tenant has failed to provide any evidence to the contrary.

67. The Works have not been undertaken by the Developer nor were they carried out under any Warranty or Builder's guarantee or insurance claim. The Respondent has incurred the costs for the Works which are payable under the Lease through the Service Charge.

Conclusion

68. Respondents' Counsel submitted that the Applicants had failed to adduce sufficient evidence to suggest the costs of the Works have been unreasonably incurred, or that they were unreasonable in amount and not payable under the Lease.

Decision

69. The Tribunal considered all the submissions made, both written and oral.

70. The Works that are in issue and which the Tribunal is required to make its determination upon are those regarding the replacement of the flues in 2021. With regard to those Works the Tribunal found that the Applicants did not submit that the cost of the work itself was unreasonable or that the work was not carried out to a reasonable standard. The issue to be determined is whether the cost of the Works was reasonably incurred and payable by the Leaseholders. The Applicants contend that the Developer is liable to pay for the work and that the Respondent should seek payment for the works from the Developer not the Tenants. The Tribunal examined each of the arguments put forward by the Applicants.

1) The Developer is liable for the Works under the Lease

71. The Tribunal considered the argument that the Developer was liable pursuant to the Lease. The Tribunal found that under Clause 8.11 the Developer ceases to have liability on its covenants under Clause 6 once it transfers its reversionary interest in the Block with the exception of Clauses 6.1 and 6.2. Under Clause 6.1 the Developer is required to complete the Development in accordance with the layout as approved by the Planning Permission and Clause 6.2 requires the Developer to ensure that the estate roads and sewers are completed to a satisfactory standard to be adopted by the local authority. Under Clause 8.6 of the Lease there are no implied covenants and from examining the Lease the Developer has not ongoing express obligations other than those under Clause 6.

72. The Tribunal found that neither Clauses 6.1 or 6.2 relate to the heating installation and therefore they do not make the Developer liable for the Works under the Lease.

2) The Developer admitted defects in the installation of the heating system

73. The Applicants submitted that because the leaks in the flues appear to be from the initial installation then the Developer should bear the cost of repairing them.

a) Repairs to the leaking flue system in 2018

74. From the photographs dating back to 2018 it was apparent that the flues had been leaking for some time prior to 2018. This risk may be reduced by stainless steel flues as well as filters, drainage etc. The PHP maintenance engineers had said in 2018 that having removed the outer cylinder the rust is due to a leak which is "most definitely as a result of improper fitting at installation stage, it shows that silicone has been used to fill the gap where the cylinder is not the right size". The Developer

appeared to accept this and asked APL, its plumbing contractor, to go back to the supplier and installer, A1 Flues, who recommended CFCM, a flue cleaning company. CFCM's invoice was paid by the Developer.

75. There was no evidence to suggest that there was a contract between A1 Flues, who it is understood supplied and installed the flue system, and the Tenants or the Respondent Landlord. On the balance of probabilities any contract and therefore any obligation to repair the flue system, such as under a warranty, would be between the Developer and A1 Flues either directly or indirectly, if A1 Flues was a sub-contractor employed by a main contractor, e.g., APL. No evidence was adduced as to why the Developer accepted responsibility for repairing the flue system. If it was under a NHBC (National House Builders Confederation) Buildmark Warranty then the contractual obligations would be between the Developer and the Tenants and not the between the Respondent Landlord and the Tenants.

76. The Tribunal found that the Respondent Landlord had no liability in respect of the 2018 repairs. The repairs were carried out under the auspices of the Developer who paid for them. No cost was incurred for the repairs by the Respondent Landlord and so no Service Charge demand was made from the Tenants. Any action for the failure of those repairs is between the Tenants and the Developer under whatever agreement, if any, the Developer accepted responsibility.

b) Replacement or repair of the flue system as part of recommissioning

77. The recommissioning of the heating installation was as a result of a settlement between the Developer and the Respondents' Representative, Dr Gommer as a Tenant. It appears to the Tribunal that the County Court action was just between the Developer and Dr Gommer. Although all the Tenants might benefit, Dr Gommer is the only person in a position to be able to enforce the settlement in the County Court.

78. Even if the recommissioning had a wider application enabling all the Tenants to claim under warranties that were or should have been provided, such action would be between the Tenants and the Developer and its contractors, either directly or indirectly if they were sub-contractors, who carried out the recommissioning. The Respondent Landlord had no part in the recommissioning.

79. The evidence adduced showed that the communal heating system was recommissioned to a position where it would have been left at first handover to a managing agent. No evidence was adduced to show that the recommissioning included or should have included work carried out on the flue system in respect of which a warranty was issued under the terms of which the Tenants or the Landlord might be able to claim for the Works, which are the replacement of the flue system.

80. The Tribunal found, on the evidence provided, that the Respondent Landlord had no liability in respect of the recommissioning which was carried out under the auspices of the Developer who paid for it. No cost was incurred for the recommissioning by the Respondent Landlord and so no Service Charge demand was made from the Tenants. Any action in respect of the recommissioning is between the Tenants and/or Dr Gommer and the Developer under the settlement of County Court claim number E8QZ18CF.

c) Replacement of the leaking flue system in June 2021

81. The Tribunal found from the evidence that there had been leaks of condensate from the flue system since before 2018 which had caused the flues to corrode at the joints. PHP reported that one of the leaks found in 2018 in the riser cupboard was "most definitely as a result of improper fitting at installation stage". The report went on to say "that silicone has been used to fill the gap where the cylinder is not the right size". The nature of the defect was not fully addressed by either party but it appeared to the Tribunal from the statement that at installation the wrong size cylinder had been provided compared with the rest of the flue and the resultant gap had been filled either at the time of installation or subsequently during maintenance by silicone. When the original supplied and installer, A1, were taxed about it by the Developer's contractor, APL, they recommended a flue cleaner. When the installer of the new flue system was asked about the original flue system, they said that they would not recommend that system for a condensing boiler.

82. However, this only related to the identification of one leak, there were others, but no explanation for their cause was given except that in the maintenance report on the invoice dated 16th October 2020 that it was "recommended that the current condensate pipework is upgraded to stainless steel. The current condensate pipework is steel. There is a possibility that in the future the run off from the flue which is acidic may cause the steel pipework to corrode".

83. It appears from this that the flue system was beginning to fail maybe because it was not of a stainless-steel construction required for a condensing boiler and perhaps irrespective of the alleged use of the wrong cylinder at installation.

84. A copy of the site report made by Huttie dated 7th June 2021 was provided. Under "Boiler and Flue" it stated "The items on the boiler flue would have been prevented if the condensate traps had been cleaned and free flowing allowing the condensate to be removed quickly from the system rather than flooding sections of the flue. If the flue is not in good condition that can affect the performance of the boiler. If the boiler is not working efficiently it may start to produce high levels of harmful carbon monoxide".

85. From this report two points are noted: a) to reduce the build-up of condensate and resultant corrosion to the flue, the traps need to be kept clean; b) if the flue is in poor condition the boiler may produce high levels of carbon monoxide. The findings of this report were not addressed by either party other than to say that it showed the flues were leaking carbon monoxide. The report did to suggest that the flue did not need replacement.

86. What was clear to the Tribunal was that the maintenance visit on 7th April 2021 identified leaks of carbon monoxide which meant that any further investigation was bound to lead to the boilers being shut down and that the evidence provided by PHP from this visit meant that the appropriate action was to replace the flues.

87. The question then arises who should pay for this new flue system. The Applicants say that the Developer should, however the Developer is not a party to these proceedings. Any action against the Developer is a matter for the County Court. The

Respondent as Landlord has inherited the heating installation together with the flue system which under the Lease the Landlord must maintain and under the Lease such maintenance must be paid for by the Tenants. No evidence has been adduced of any agreement, whether by warranty or not, between the Developer and the Respondent as Landlord, which obliges the Respondent to claim for the cost of the replacement against the Developer. The Applicants may have some action against the Developer or its contractors for fitting the wrong size or wrong type of pipework which may enable them to obtain reimbursement of the whole or a part of the cost of replacing the flue system. However, that is not a matter for the Tribunal to determine. Any such action should not be taken by a Tenant without full technical as well as legal advice.

3. Historic negligence

88. No evidence was adduced as to what the maintenance arrangements were between 2013 when the heating installation was first commissioned and 2018 when the flue was found to be leaking in the riser cupboard. It is understood that it was initially discovered by a Leaseholder who alerted APT the then managing agent who then contacted PHP to investigate and AWA Building Consultants as it appeared from the investigation to be resulting from a fault at the time of installation. Action was then taken by the Developer as noted above with a view to remediation.

89. The recommission of the heating installation was undertaken in 2019 to 2020 because it was agreed it was not operating as it should. No evidence was adduced to show that this lack of performance was due to a failure to maintain the heating installation or, more particularly, the leaking flue.

90. Apart from the 2018 report the previous maintenance invoices dated 29th March 2019, 3rd September 2019, 26th March 2020 and 16th October 2020, were provided which itemised what work had been undertaken and reported on the condition of the system. The 16th October 2020 maintenance invoice recommended the replacement of the flue with a stainless-steel version and the next maintenance visit on 7th April 2021 informed Flaxfields that the flue system had failed and required replacement.

91. The Tribunal referred to the site report made by Huttie dated 7th June 2021. This appears to criticise the manner that PHP had maintained the flue system in that it said that "The items on the boiler flue would have been prevented if the condensate traps had been cleaned and free flowing". This suggests that with different maintenance the Works would not have been necessary. If this were the case the fault would lie with PHP as the maintenance contractors. However, if the Applicants were to have submitted this the Tribunal would have needed more cogent evidence than the report.

92. The Applicants had expressed concern about what they could see, which was the corrosion around the flue joints. However, what seems to be of greater concern form the report is the build-up of condensate in the flue, which not only causes corrosion but may affect the operation of the boiler causing an increase in carbon monoxide.

93. The Tribunal considered the evidence that was provided with regard to the maintenance. Firstly, there was a flue clean in 2019 following the discovery of the

leaks in 2018, secondly there was a recommission of the boiler in 2019 and thirdly maintenance in March 2019, September 2019, March 2020 and October 2020. In the absence of evidence to the contrary the Tribunal found that there was no historic neglect that made the cost of replacing the flue in June 2021 unnecessary or more expensive.

4. Third Party Contributions

94. The Tribunal found that there was no evidence to suggest that there was any agreement, express or implied, between the Developer and the Respondent Landlord under which the Respondent could take action on its own or on the Tenants' behalf for reimbursement of the costs incurred in replacing the flue system.

95. The Tribunal also found that there was no evidence to suggest that the Respondent Landlord had received any payment for the replacement of the flue system which had not been passed on to the Tenants.

Conclusion

96. The Tribunal determines that in the absence of evidence to the contrary the costs of the Works are reasonable and payable by the Applicants to the Respondent under the Service Charge.

Representations re Section 20C & Paragraph 5A of Schedule 11

97. The Applicants Applied for an order under section 20C of the Landlord and Tenant Act 1985 that the landlord's costs arising from the proceedings should be limited in relation to the service charge and for an order under paragraph 5A of Schedule 11 of the Commonhold and Leasehold Reform Act 2002 to reduce or extinguish the Tenant's liability to pay an administration charge in respect of litigation costs.

98. The Applicants' Representative stated that the Respondent is a professional landlord with a portfolio of tens of thousands of properties, the property managers involved are professional companies and the Respondent's legal representatives are a firm specialised in property law. The landlord clearly has access to competent officers and solicitors with a good working knowledge of the relevant statutory provisions and therefore should have withdrawn their applications rather than fight the Leaseholders' Section 27A Application to determine reasonableness.

99. The Applicants' Representative stated that there was "overwhelming" evidence provided against the Developer in respect of the Works for which the Respondent Landlord is responsible which had been ignored by the Respondent. Documentary evidence, in particular the Specification for Abode Communal Heating Recommissioning prepared by AWA Building Service Consultants was not disclosed to the Leaseholders and was actively withheld from the Leaseholders by both the managing agents and the Developer until ordered to produce it by the Tribunal.

100. The Applicant's Representative said that the legal representatives failed to provide a Statement of Case in response to the Applicants' Statement of Case in the time

specified in the Directions. The Bundle also did not include any of the documents provided by Applicants which had to be provided separately.

101. The Applicants' Representative added offers to find a mutually agreed way forward had been rejected by the Respondent who had not even tried to approach the Developer with regard to providing warranties.

102. Counsel for the Respondent referred the Tribunal to Schedule 5 Part 2 Paragraph 9.1 and 5 stating that this enabled the Respondent to include its legal costs in respect of these proceedings in the Service Charge.

103. With regard to whether or not the costs for replacement of the flues have been reasonably incurred is a matter for the Tribunal but Counsel submitted that the Respondent should be able to claim its costs under the Service Charge if the costs were found to be reasonably incurred as no evidence had been adduced that they were unreasonable in amount or not payable under the Lease.

104. With regard to the conduct of the proceedings Counsel said that the Respondent had asked for an extension of time which had been granted and that it had complied with the amended Directions. With regard to the Bundle the Respondent had sought to have the Works and the Further Works as referred to in the Dispensation Application and the Case Management Conference dealt with and this had increased the size of its own Bundle by a half.

Decision re Section 20C & Paragraph 5A of Schedule 11

105. Leases may contain provisions enabling a landlord to obtain the costs incurred in proceedings before a tribunal or court either through the service charge or directly from a tenant. Where the lease contains these provisions, the costs of the proceedings could be claimed by a landlord under either lease provision but not both. The difference between the two was referred to in the *Freeholders of 69 Marina St Leonards on Sea v Oram & Ghoorun* [2011] EWCA Civ 1258.

106. The provision enabling a landlord to claim its costs through the service charge might be seen as collective, in that a tenant is only liable to pay a contribution to these costs along with the other tenants as part of the service charge. Under section 20C of the Landlord and Tenant Act 1985 a tribunal may, if it is satisfied it is just and equitable, make an order that a landlord's costs, either in part or whole, cannot be re-claimed through a service charge.

107. The provision enabling a landlord to claim its costs directly from a tenant might be seen as an individual liability, whereby a tenant alone bears the landlord's costs of the proceedings. Under paragraph 5A of Schedule 11 of the Commonhold and Leasehold Reform Act 2002 a tribunal may, if it is satisfied it is just and equitable, make an order that a landlord's costs, either in part or whole, cannot be re-claimed directly from the tenant.

108. Firstly, the Tribunal considered whether the Lease contains either or both of these provisions enabling the Respondent to claim its costs in respect of these proceedings through the Service Charge or directly from the Applicants.

109. The Tribunal examined the Lease and found that Schedule 5 Part 2 Paragraph 9.1 and 5 enabled the enabled the Landlord Respondent to reclaim its legal costs in respect of these proceedings through the Service Charge.

110. With regard to individual liability Schedule 3 Part 1 paragraph 17 was the only provision which permitted the Landlord to claim its legal costs directly against a Tenant but this was limited the service of Notices under Sections 146 and 147 of the Law of Property Act 1925 which did not cover these proceedings.

111. Notwithstanding there being no provision in a lease, for the avoidance of doubt, a tribunal is able to make an order under paragraph 5A of Schedule 11 of the 2002 Act if it is satisfied that it is just and equitable to do so. The Tribunal determined that it was just and equitable that the costs of these proceedings should not be reclaimed against an individual tenant and so make an Order under paragraph 5A of Schedule 11 of the 2002 Act.

112. Secondly the Tribunal considered whether an order should be made under section 20C of the Landlord and Tenant Act 1985. In deciding whether or not to do so the Tribunal considered the conduct of the parties and the outcome and nature of the proceedings.

113. With regard to the conduct, the Respondent's legal representative had asked for an extension of time on 14th December 2021. This was granted on 16th December 2021 with an order that they were "to use their best endeavours" to provide documentation in order for the Applicants to examine the papers before the Christmas break. By an email on 29th December 2021 the legal representatives informed the Tribunal that they chose to interpret this so as not to provide the Landlord's statement of response until the extended time. The Tribunal replied on 20th December 2021 that the Tribunal expected the Applicants to be provided with "at least the gist". This was not done, which was not compliant with Rule 3 of the Tribunal Procedure (Property Tribunal) (Residential Property) Rules 2013. In addition, the Respondent's legal representatives attempted to unilaterally extend the Applications to cover Further Works, as referred to in the Dispensation Application, which resulted in about a half of the material in the Respondent's Bundle for both Applications relating to these Further Works. Neither of these factors was helpful was helpful to the progress of the case.

114. Early in the hearing the Tribunal commented to the Applicants' Representative that on reading the papers it appeared that the dispute over payment for the replacement flue was a dispute between the Applicants and the Developer which, if they could not reach agreement was a matter for the County Court. The Tribunal was disappointed that this point was not made in correspondence by the Respondent to the Applicants with a view to settling the matter so far as the Respondent was concerned, well before the hearing. The Respondent had the benefit of expert legal advice, professional managing agents and all the documentation and access to the Developer well in advance of the hearing. The communal heating system is an essential part of the common parts and ongoing issues that occur within 5 years of completion warranted greater investigation by the managing agents and more than a bland acceptance of the Developer's statement that it was out of warranty. The Property is still within the NHBC Buildmark Warranty. The Tribunal found from the correspondence and other

documentation available that the relationship and respective liabilities of the parties was not made clear by the Respondent or its advisers who are in a dominant position. If it had been these proceedings would probably not have taken place.

115. The Tribunal is of the opinion that the parties should effectively pay their own costs of the proceedings. Therefore, the Tribunal finds it is just and equitable to make an Order under section 20C of the Landlord and Tenant Act 1985 that the Respondent's costs in connection with these proceedings should not be regarded as relevant costs to be taken into account in determining the amount of any Service Charge payable by the Applicants.

116. It also makes an Order for the same reasons extinguishing the Applicants' liability to pay an administration charge in respect of litigation costs under paragraph 5A of Schedule 11 of the Commonhold and Leasehold reform Act 2002.

Rule 13 Costs Representations

117. The Applicants' Representative submitted that the Respondent had acted unreasonably because:

- There was overwhelming evidence that the costs of replacing the flues are the responsibility of the Developer and should not be covered by the Tenants. He said that the Respondent should have tried to approach the Developer.
- During these proceedings, the Respondent had changed its details 4 times
- The updated correspondence details of Premier Estates, the landlord's new representatives, have not been passed on to Tenants.
- The Respondent failed to provide a bundle in time after being allowed a deadline extension for submission.
- The bundle provided did not include any of the documents provided by the Applicants.
- The Respondent said its role in managing the communal areas did not include taking legal proceedings against the Developer.
- The Respondent could not obtain information for the Tenants from Flaxfields.
- Not receiving information in a timely manner has led to these proceedings. Documents and information were only obtained from Flaxfields and the Developer after the Tribunal ordered it.

118. Counsel for the Applicant stated that the Applicant complied with Directions and that documents requested and ordered were provided and personnel from the Developer and PHP were available to be questioned. Counsel referred the Tribunal to *Willow Court Management Company (1985) Limited v Mrs Ratna Alexander; Ms Shelley Sinclair v 231 Sussex Gardens Right to Manage Limited; Mr Raymond Henry Stone v 54 Hogarth Road, London SW5 Management Limited* [2016] UKUT 290 (LC), LRX/90/2015, LRX/99/2015, LRX/88/2015

Rule 13 Decision

119. The Tribunal considered the submissions of the Respondents in respect of an application for costs under Rule 13 of the Tribunals Procedure (First Tier Tribunal) (Property Chamber) Rules 2013.

120. The Tribunal starts from a position that its jurisdiction is one in which costs are generally not awarded. The only exception being where a party has acted unreasonably. The Civil Procedure Rules do not apply to tribunals including the provision relating to costs and *"there is no equivalent general rule that the unsuccessful party will be ordered to pay the costs of the successful party"* as per paragraph 28 of *Ridehalgh v Horsefield* [1994] Ch 2015.

121. In addition, paragraph 43 of *Ridehalgh v Horsefield* states that a costs application *"should not be regarded as routine, should not be abused to discourage access to the tribunal, and should not be allowed to become major disputes in their own right".*

122. The Tribunal applied the three-stage test in *Willow Court Management Company (1985) Limited v Mrs Ratna Alexander; Ms Shelley Sinclair v 231 Sussex Gardens Right to Manage Limited; Mr Raymond Henry Stone v 54 Hogarth Road, London SW5 Management Limited* [2016] UKUT 290 (LC), LRX/90/2015, LRX/99/2015, LRX/88/2015 considering:
    (i) Whether the Applicant had acted unreasonably, applying an objective standard;
    (ii) If unreasonable conduct is found, whether an order for costs should be made or not;
    (iii) If so, what should the terms of the order be?

123. The Tribunal also took into account the meaning of "unreasonable" in *Ridehalgh v Horsefield* [1994] Ch. 205 which dealt with a wasted costs order, the principles of which we consider apply in this case:

    "Unreasonable" means what it has been understood to mean in this context for at least half a century. The expression aptly describes conduct which is vexatious, designed to harass the other side rather than advance the resolution of the case, and it makes no difference that the conduct is the product of excessive zeal and not improper motive. But conduct cannot be described as unreasonable simply because it leads in the event to an unsuccessful result or because other more cautious legal representatives would have acted differently. The acid test is whether the conduct permits of a reasonable explanation. If so, the course adopted may be regarded as optimistic and as reflecting on a practitioner's judgement, but it is not unreasonable.

124. The Tribunal considered whether the Applicant *has acted unreasonably in bringing, defending or conducting proceedings.*

125. In respect to each of the matters raised:
    - Irrespective of whether the Developer is or is not liable for the costs of replacing the flue system, as stated above, the Tribunal found that there was no evidence such as a contract to show that the Respondent had *locus standi* i.e., was in a position to take action against the Developer. The Respondent as Landlord could claim the costs from the Tenants through the Lease.
    - It the details of a party need to be changed, no matter how often, it is not unreasonable to do so.

- The provision of the contact details of the new managing agent is not relevant to the proceedings.
- The issues with regard to the Bundle and the provision of information have been taken into account in respect of the section 20C Application.

126. The Applicants have not shown the Respondent had acted unreasonably in defending or conducting proceedings under secton 27A of the Landlord and Tenant Act 1985.

Judge JR Morris

APPENDIX 1 - RIGHTS OF APPEAL

1. If a party wishes to appeal the 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.

APPENDIX 2 – THE LAW

The Law

1. The relevant law is contained in the Landlord and Tenant Act 1985 as amended by the Housing Act 1996 and Commonhold and Leasehold Reform Act 2002.

2. Section 18 Landlord and Tenant Act 1985
   (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, improvement 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 of which the service charge is payable.
   (3) for this purpose
      (a) costs include 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 period

3. Section 19 Landlord and Tenant Act 1985
   (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 provision of services or the carrying out of works, only if the services or works are of a reasonable standard; and the amount payable shall be limited accordingly.
   (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.

4. Section 20 of the Landlord and Tenant Act 1985 as amended by the Housing Act 1996 and Commonhold and Leasehold Reform Act 2002

   Section 20 applies to qualifying works if the relevant costs incurred in carrying out the works exceed an amount, which results in the relevant contribution of any tenant being more than £250 and to qualifying long term agreements which are agreements that are for more than 12 months and t which results in the relevant contribution of any tenant being more than £100. The provision limits the amount which tenants can be charged for major works unless the consultation requirements have been either complied with, or dispensed with by a First-tier Tribunal.

   The consultation provisions are set out in the Schedules to the Service Charges (Consultation etc) (England) Regulations 2003 (SI 2003/1987) (the 2003 Regulations).

Section 20ZA of the Act allows a Leasehold Valuation Tribunal to make a determination to dispense with the consultation requirements if it is satisfied that it is reasonable, as follows –

Where an application is made to a First-tier Tribunal for a determination to dispense with all or any of the consultation requirements in relation to any qualifying works or qualifying long-term agreement, the tribunal may make the determination if satisfied that it is reasonable to dispense with the requirements.

5. Section 27A Landlord and Tenant Act 1985

(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 arbitration agreement to which the tenant was a party
   (c) has been the subject of a determination by a court

(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. 20C Landlord and Tenant Act 1985

Limitation of service charges: costs of proceedings.

(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 leasehold valuation tribunal or the First-tier 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 the county court;

(aa) in the case of proceedings before a residential property tribunal, to a leasehold valuation tribunal;
(b) in the case of proceedings before a leasehold valuation tribunal, to the tribunal before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to any leasehold valuation tribunal;
(ba) in the case of proceedings before the First-tier Tribunal, to the 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 the 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.

7. Schedule 11 Commonhold and Leasehold Reform Act 2002 relating to reasonableness of Administration Charges

1 Meaning of "administration charge"

(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.

2 Reasonableness of administration charges

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

3

(1) Any party to a lease of a dwelling may apply to a tribunal for an order varying the lease in such manner as is specified in the application on the grounds that—
(a) any administration charge specified in the lease is unreasonable, or
(b) any formula specified in the lease in accordance with which any administration charge is calculated is unreasonable.

(2) If the grounds on which the application was made are established to the satisfaction of the tribunal, it may make an order varying the lease in such manner as is specified in the order.

(3) The variation specified in the order may be—
(a) the variation specified in the application, or
(b) such other variation as the tribunal thinks fit.

(4) The tribunal may, instead of making an order varying the lease in such manner as is specified in the order, make an order directing the parties to the lease to vary it in such manner as is so specified.

(5) The tribunal may by order direct that a memorandum of any variation of a lease effected by virtue of this paragraph be endorsed on such documents as are specified in the order.

(6) Any such variation of a lease shall be binding not only on the parties to the lease for the time being but also on other persons (including any predecessors in title), whether or not they were parties to the proceedings in which the order was made.

5 Liability to pay administration charges

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

5 A Limitation of administration charges: costs of proceedings

(1) A tenant of a dwelling in England may apply to the relevant court or tribunal for an order reducing or extinguishing the tenant's liability to pay a particular administration charge in respect of litigation costs.

(2) The relevant court or tribunal may make whatever order on the application it considers to be just and equitable.

(3) In this paragraph—

8. Tribunals Procedure (First Tier Tribunal) (Property Chamber) Rules 2013.

Rule 13 (1) states that:
The Tribunal may make an order in respect of costs only-

(b) if a person has acted unreasonably in bringing, defending or conducting proceedings in-

(ii) a residential property case

Rule 13(2) states:
The Tribunal may make an order requiring a party to reimburse to any other party the whole or part of the amount of any fee paid by the other party which has not been remitted by the Lord Chancellor.