



FIRST-TIER TRIBUNAL  
PROPERTY CHAMBER  
(RESIDENTIAL PROPERTY)

Case Reference : CHI/00MS/LSC/2022/0097

Property : Guildhall Apartments, 10 Park Walk,  
Southampton, SO14 7BL

Applicants : Stephen and Janet Garlick (Apartment 32)  
Peter Munday (2)  
Ruth Leary and Mr Peter Sculley (11)  
Anthony Shakesby (16)  
Siu Pak Ho (34)  
Peet Van de Pass (35)  
Jonathan Wade (38)

Representative :

Respondents : Harborne Holdings Limited

Representative : Avignon Capital Investment

Type of Application : Determination of Liability to Pay Service  
Charges (section 27A of Landlord and  
Tenant Act 1985)

Tribunal Member(s) : Judge Tildesley OBE  
Mrs J Coupe FRICS  
Mr E Shaylor

Date and Venue of  
Hearing : Havant Justice Centre  
22 February 2023

Date of Decision : 20 March 2023

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DECISION

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## Summary of the Decision

The Tribunal decides that the standing charge and the costs of the system usage for the heating and hot water system are costs associated with the communal supply and are part of the Heating and Hot Water Service Charge. The Tenant's contribution to these costs is calculated in accordance with the net internal floor area of the Tenant's apartment as a proportion of the net internal floor area of all apartments.

The Tribunal considers it just and equitable not to make an Order under section 20C of the 1985 Act preventing the Landlord from recovering the costs of these proceedings through the service charge.

## The Application

1. The Applicants seek a determination of service charges in relation to heating and hot water costs for the period September 2021 to December 2021, and 2022 "All months to date" pursuant to section 27A of the Landlord and Tenant Act 1985 ("1985 Act").
2. The Applicants also applied for Orders under section 20C of the 1985 Act and paragraph 5A of schedule 11 of the Commonhold and Leasehold Reform Act 2002 preventing the Landlord from recovering the costs of these proceedings through the service charge and/or direct against the Tenant.
3. On 21 November 2022 the Tribunal directed a hearing of the application in person at Havant Justice Centre on 22 February 2023. The Tribunal also required the parties to exchange statements of case.
4. On 22 February 2023 Mr and Mrs Garlick appeared in person. Mr Garlick is the Chair of Guildhall Apartments Tenants Association and had written authority to act for the other Applicants named on the Application form. In addition Mr R A Broad of Apartment 19 gave Mr Garlick permission to receive correspondence and documentation on his behalf in relation to the case. Mr Peet Van De Pass of Apartment 35 was also notified of the proceedings in his capacity as Secretary of Guildhall Apartments Tenants Association.
5. At the hearing Mr Michael Lucey, Head of Property and Asset Management for Avignon Property Management represented the Respondent, Harborne Holdings Limited, which acquired the Head Lease for Guildhall Apartments in Spring 2017. Avignon Capital Investment is the UK Business Representative of Harborne Holdings Limited which is registered in Guernsey. Since acquiring the Head Lease the Respondent has appointed various managing agents for the property: Ashdown Phillips and Partners from spring 2017 to spring 2019; Platinum Property Management (PPM) from spring 2019 to 1

December 2021; Avignon acquired PPM on 1 December 2021 and from that date Avignon Property Management has been the managing agent.

6. The Applicant prepared the bundle of documents for the hearing comprising 186 pages. The parties supplied various documents during and after the hearing which were admitted in evidence. References in this decision to the documents in the bundle are in [ ].

#### The Issue

7. Guildhall Apartments are a development of 38 privately owned apartments forming part of the mixed use Southampton Arts Complex. Other tenants of the complex include an Art Gallery, a Theatre, and seven commercial units. The apartments were completed and occupied during the spring of 2016.
8. The Guildhall complex is connected to the Southampton Geothermal Heating Company (SGHC) district heating system which provides the heating and hot water to the building. SGHC utilises heat from a geothermal aquifer 1.7km below ground, and provides hot water to a pair of heat exchangers located in the basement pump room in the Guildhall complex. The heat exchangers heat the water in the building's hot water system, and the cooled SGHC water is returned to them. Each apartment is connected to the building's heating water circulation system via a heat interface unit (HIU) located in the utility area of each apartment. Each HIU contains a heat exchanger to heat incoming cold potable water utilising the circulating heating water, thereby providing hot potable water to each apartment's kitchen and bathroom(s). The HIU also diverts a portion of the circulating heating water through the underfloor heating pipes to provide space heating to each apartment.
9. SGHC calculate the total energy consumed within the building by measuring the flow of heating water it provides to the building, and the difference between the temperature of the water supplied to the building and that returned to them as it exits the basement heat exchangers.
10. There are separate meters for each part of the Guildhall Complex which measure the energy consumption for the different category of occupiers for the Complex. There is a meter for the residential unit comprising the 38 apartments which measures the energy consumed for the residential unit as a whole. SGHC uses the meter readings to calculate the costs of the energy supplied to heat and provide hot water to the residential unit for which an invoice is sent for payment by the Respondent.
11. The Respondent then recovers the costs of the energy supplied by SGHC to the residential unit from the leaseholders of the 38 apartments. The Respondent breaks down the re-charge to each leaseholder into three elements, namely:

- a. Apartment usage: which represents the costs of the actual amount of energy used by each apartment in a given period. Each apartment has its own meter from which readings are taken to measure the actual usage in a given period. This is then multiplied by the individual unit cost given by SGHC to give the cost of the energy used by that apartment during a specific period of time.
  - b. The standing charge for the residential unit as a whole which is apportioned between the 38 leaseholders.
  - c. System Usage: which represents the outstanding balance of costs on the invoice for the residential unit as a whole after deduction of the usage costs for the 38 apartments and the standing charge for the residential unit as a whole. The costs for system usage are apportioned between the 38 leaseholders.
12. The dispute between the parties concerned the method used by the Respondent to apportion the standing charge and the costs of the system usage between the leaseholders from September 2021.
13. Mr Garlick explained from the time of the building opening in April/May 2016 until the end of 2017, the Respondent's managing agents, never read the apartment water meters and did not invoice leaseholders for the SGHC recharge element of the Heating and Hot Water Service Charge. This resulted in the entire SGHC element of the Heating and Hot Water Service Charge for the period May 2016 to December 2017 inclusive being written off.
14. Mr Garlick stated that on 22 March 2018 Mr McGonigal of Ashdown Phillips and Partners, the then managing agent, emailed the leaseholders setting out the method by which the heating and hot water costs for the residential unit would be apportioned between the leaseholders [54]. Essentially the method was that the meter readings for the individual apartments would determine the proportion that the leaseholder of that flat would contribute to the costs of the energy consumed for the residential unit as a whole, and that the standing charge would be split equally between the 38 leaseholders. Thus under this arrangement there was no separate charges for apartment usage and system usage. Instead there was just one charge calculated for the apartment usage and the system usage based on the meter readings for the individual flats. Mr Garlick asserted that the contents of the email dated 22 March 2018 amounted to a variation of the lease by carving out SGHC monthly invoiced amounts for both heating water energy cost and standing charges from the capturing phrase: "all expenses" in clause 14.1 of the lease which deals with the service charge for hot water and heating.
15. Mr Garlick said that on 4 April 2022 the Respondent was required to re-issue the invoices for hot water and heating charges going back to September 2021 because they contained errors. Mr Garlick challenged

the re-issued invoices on the ground that they fundamentally altered the mechanism for apportioning the heating charges between the leaseholders. Initially the Respondent decided to apportion the costs of the system usage equally between the 38 leaseholders in order to bring it in line with the method of apportioning the standing charge. Following the objections of Mr Garlick and other leaseholders the Respondent reviewed the position and decided that the costs of the standing charge and the system usage would be apportioned between the leaseholders in accordance with the respective floor areas for each apartment which was the method laid down in the lease for calculating the contributions of each leaseholder to the Heating and Hot Water Service Charge.

16. The dispute, therefore, between the parties is that the Respondent asserts that it is applying the terms of the lease for calculating the contributions of the leaseholders to the costs of the system usage and the standing charge. In contrast the Applicants contend that the terms of the lease had been varied by the email of 22 March 2018 and by custom and practice, so that the correct method of apportionment was that set out in the email of Mr McGonigal. The Applicants also argue that the outcome of the apportionment based on net floor area is unreasonable because the leaseholders were not paying the same price (p/kWh) for heating water and not paying the same standing charge.

#### Consideration

17. Under section 27A of the 1985 Act the Tribunal can determine 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 which it is payable. It follows from the wording of section 27A that the Tribunal is entitled to decide upon the method of apportioning the service charges between the various leaseholders. In order to do this it is necessary for the Tribunal to construe the wording of the lease which governs the contractual bargain between the parties.
18. The Applicants supplied a copy of the Under lease between Grosvenor Developments Limited of the one part and Stephen Byron Garlick and Janet Marie Garlick of the other part in relation to Apartment No 32 and dated 16 May 2016 [135]. The Tribunal understands that this is a representative lease of all the leases for the 38 apartments. The under lease is for a term of 125 years from 1 January 2016.
19. The relevant terms of the lease are as follows:
20. Clause 1.1 Defined Terms:

"Heating and Hot Water Service Charge": The total of the expenses incurred in accordance with or as otherwise referred to in clause 14.

"Heating and Hot Water Service Charge Proportion". The proportion of the Heating and Hot Water Service Charge applicable to the Property set out in the Sixth Schedule hereto but subject to the rights reserved by the Landlord in clause 14 .5.

21. Clause 4 Variation:

The Landlord shall have power in writing to licence minor variations of the stipulations and restrictions affecting any residential or commercial property on the Estate.

22. Clause 14 Heating and Hot Water Service Charge

14.1 The expression "Heating and Hot Water Service Charge" shall consist of all expenses incurred by the Landlord of and incidental to observing and performing the provisions of Schedule 4 Part 4.

14.2 The Heating and Hot Water Service Charge shall Include:-

14.2.1 the proportion of the management and administration fees of the Landlord which relate to the observance and performance of the provisions of Schedule 4 Part 4 hereto.

14.2.2 all fees and costs in respect of all certificates and of accounts kept and audits made which relate to the observance and performance of the provisions of Schedule 4 Part 4 hereto including health and safety audits.

14.2.3 if applicable the proportion of the proper fees of any Managing Agents employed by the Landlord which relate to the observance and performance of the provisions of Schedule 4 Part 4 hereto.

14.2.4 the cost of employing staff for the performance of the duties and services of the Landlord in connection with the observance and performance of the provisions or Schedule 4 Part 4 hereto and all other incidental expenditure in relation to such employment including (but without limiting the generality of such provision) advertising costs the payment of the statutory and such other insurance health pension welfare and other payments contributions and premiums industrial training levies redundancy and similar or ancillary payments that the Landlord may at its absolute discretion deem desirable or necessary and the provision of uniforms working clothes tools appliances cleaning and other materials bins receptacles and other equipment for the proper performance of their duties and benefits in kind fares and out of pocket expenses.

14.2.5 the bank charges and the cost of interest and over drawings in respect of any separate bank account(s) maintained by the Landlord for the receipt of the relevant service charge

payments and the payment (including payment in advance of the receipt of the appropriate contributions from the tenants of the Apartments and Commercial Units (if connected) and Affordable Housing Units) of any monies in pursuance of the Landlords obligations contained in Schedule 4 Part 4 hereto.

14.2.6 any Value Added Tax or any other similar taxes levied or charged and paid in respect of the above mentioned heads of expenditure or otherwise in connection with the provision of the services contained in Schedule 4 Part 4 hereto.

14.3 The Landlord shall be at liberty to review any additional costs and expenses referred to in this part of the Lease and to add thereto any items of expenditure charge depreciation or other allowance or provision for future anticipated expenditure on or replacement of any installation equipment plant or apparatus or the rental value of any part of the Building used in connection with the provision of heating and hot water thereto not previously included therein and from and after the relevant date of such review such additional items of expenditure charge depreciation allowance provision for future anticipated expenditure or value shall be included in the calculation or the Heating and Hot Water Service Charge and deemed to be included in the heads of expenditure or charge referred to above for all the purposes of this Lease.

14.4 It is expressly agreed that the intention of the Landlord and the Tenant in relation to the Heating and Hot Water Service Charge provisions is that all costs expenses and other liabilities which are incurred by the Landlord shall be the subject of reimbursement recoupment or indemnity by the tenants of the Apartments and Commercial Units (if connected to the heating and hot water system) so that no residual liability for any such costs expenses or liabilities shall fall upon the Landlord. PROVIDED THAT for the avoidance of doubt the Tenant shall have no liability in respect of any unlet areas or where the Landlord should recover costs from other tenants or occupiers.

14.5 If in the opinion of the Landlord it should at any time become necessary or equitable to do so by reason of any of the Apartments and/or Commercial Units (if connected to the heating and hot water system) within the Building of which the Property forms part ceasing to exist or to be habitable or being compulsorily acquired or requisitioned or the number being increased or decreased or for any other reason including any apartments not having been constructed the Landlord or their surveyor shall recalculate the proportion of the Heating and Hot Water Service Charge for such Financial Year payable by the Tenant either as appropriate to the remaining Apartments or as appropriate to all the Apartments {as the case may be) and notify the Tenant and tenants of other Apartments accordingly and in such case as from the date of such event the new proportion notified to the Tenant in respect of the Property shall be substituted for that referred to herein and all reference to the Heating and Hot Water Service Charge Proportion

payable by the Tenant shall be construed as reference to the Heating and Hot Water Service Charge Proportion as recalculated.

14. 6 The Landlord may at any time during the Term in its discretion elect to novate the heating and hot water supply agreement for the Property to the Tenant or require the Tenant to enter into a new heating and hot water supply agreement with the relevant supplier in respect of the Property in which case the Landlord will serve written notice on the Tenant requiring it to enter into the relevant agreement with the Landlord and/or the heating and hot water supplier for the Property and the Tenant shall enter into such documentation as soon as reasonably practicable thereafter following which the Heating and Hot Water Service Charge shall be adjusted to exclude the charges for heating and hot water to the Property which the Tenant shall pay direct to the relevant supplier of heating and hot water.

23. Clause 19 Payments

19.5 The Tenant covenants with the Landlord and as a separate covenant severally with each of the Tenants of the other Apartments and the Commercial Units to pay on demand or to the order of the Landlord without deduction the following amounts.

19.5.1 such sum as is demanded by the Landlord on account of the provision of the Heating and Hot Water Service Charge Proportion or thereafter by half yearly instalments in advance on the Service Charge Payment Dates or otherwise within 21 days of the date of any demand made by or on behalf of the Landlord, and

19.5.2 all expenses the Landlord may incur in collecting arrears of payment for the Heating and Hot Water Service Charge Proportion and on all Heating and Hot Water Service Charge Proportion which is in arrears and unpaid for more than 21 days after the same shall become due and payable hereunder or properly and reasonably enforcing any obligation of the Tenant whether or not proceedings are taken and whatever the outcome of any such proceedings.

24. Schedule 1 Tenants Covenants

33.2 To pay on demand consumption charges (measured by a check meter) for the Heating and Hot Water consumed at the Property. The charge to include standing charge and metering charges and an administration charge for the submission of invoices and to be demanded by the Landlord on a monthly basis and reconciled on a quarterly basis with any overpayment being carried over the next quarter.

25. Schedule 4 Part 4 Heating and Hot Water Service Charge by the Landlord



The Landlord will

1. Keep maintained repaired replaced and renewed from time to time all or any part of the equipment associated with the provision of heating and hot water to all Apartments including the Property and Commercial Units (if connected).

2. Pay all existing and future rates taxes assessments insurance premiums and outgoings now or hereafter imposed on or payable which form part of the Heating and Hot Water Service Charge in the Building of which the Property forms part including but without prejudice to the generality or the foregoing all accounts for private service organisations and companies and all electricity accounts and all other like service accounts save those relating solely to one Apartment or Commercial Unit (if connected) within the building of which the Property forms part.

3. Pay all costs for any communal supply of electricity heating hot water and water to the building of which the Property forms part (if any) and to maintain such communal supply boilers (including back up boilers) equipment and the distribution pipes or wires within the Building of which the Property forms part so as to ensure that each Apartment within the Building of which the Property forms part has the ability to receive such a supply.

4. Keep in good and substantial repair and condition and wherever necessary to rebuild and reinstate the Transmission Media as relating solely to the heating and hot water systems in the Building and serving the Building of which the Property forms part or any part thereof except such as are maintained at the public expense or for the sole supply to one Apartment or Commercial Unit.

5. Do all things necessary to comply with the obligations herein as to reference to obligations including the creation of such reserves as the Landlord may deem prudent from time to time and the paying of all interest or other financial charges which may be incurred on any monies borrowed for the purposes of any of the Landlord's obligations herein or the observance or performance of any of its covenants herein and all fees and costs incurred in respect of all Certificates and accounts kept and audits made in pursuance of its obligations under this Lease.

6. Take all steps deemed desirable or expedient by the Landlord for complying with making representations against or otherwise contesting the incidence of the provisions of any legislation or orders or statutory requirements thereunder concerning town planning public health highways streets drainage or other matters relating or alleged to relate to the Heating and Hot Water Service Charge to the Building of which the Property forms part or any part or parts thereof for which the Tenant is not directly liable hereunder and for which the owners of the other apartments within the Building of which the Property forms part and any Commercial Units (if connected) within the Buildings of which

the Property forms part are not liable under the leases which they own their respective properties.

7. Carry out all other services which the Landlord deems desirable for the heating and hot water system that serves the Property, the Apartments, and the Commercial Units (if connected) thereof in accordance with the purpose of good estate management.

8. Setting aside such sums of money as the Landlord shall reasonably require by way of reasonable provisions for expenditure in complying with its obligations in this Part of Schedule 4 whether or not of a capital nature and whether recurring at regular or irregular intervals

26. Schedule 6 Head of Service Charge and Proportion Payable

4. Heating and Hot Water Service Charge

The Heating and Hot Water Service Charge will be apportioned on the pro rata net internal floor area of all of the Apartments (including the Property) and Commercial Units (but only if each of the Commercial Units is connected to the heat and hot water system) as appropriate within the Estate which are connected to the heating and hot water system. At the end of the landlord's Financial Year the Heating and Hot Water Service Charge can be reapportioned to those units which are physically complete at the reasonable discretion of the Landlord to reflect the benefit derived from specific services.

27. The Tribunal begins with sub Clause 19.5 under which the Tenant covenants to pay the Landlord the Heating and Hot Water Proportion. This is defined at paragraph 4 of schedule 6 as a pro rata of the charges in accordance with the net internal floor area of the Tenant's apartment as a proportion of the net internal floor area of all the apartments.

28. Clause 14 defines the scope of the Tenant's liability to pay the Heating and Hot Water Service Charge by beginning with "All expenses" incurred by the Landlord of and incidental to observing and performing the service of hot water and heating as defined in schedule 4 part 4 and in addition includes those expenses as defined in clause 14.2. In short clause 14 provides an exhaustive list of costs for which the Tenant is liable in respect of the heating and hot water system.

29. Clause 14.4 emphasises the extensive scope of the Tenant's liability to pay the Heating and Hot Water Service Charge by declaring that the Tenant indemnifies the Landlord against all such costs so that no residual liability for any such costs shall fall on the Landlord.

30. It follows from the above construction of the lease the starting proposition is that the Tenant is liable for all costs associated with the provision of heating and hot water to the residential unit as a whole, and that each tenant's contribution to those costs is calculated in accordance with the net internal floor area of the tenant's apartment as a proportion of the net internal floor area of all apartments.

31. The Tribunal asks next whether the lease provides exceptions to the proposition that all expenses for hot water and heating are included in the Heating and Hot Water Service Charge.
32. Clause 14.4 provides that the Tenant shall have no liability in respect of unlet areas or where the Landlord should recover costs from other tenants or occupiers. The proviso to Clause 14.4 operates as a safety valve to prevent the Landlord from recovering costs from a Tenant where another Tenant is liable to pay them.
33. Paragraph 2 of schedule four part 4 excludes from the definition of the Heating and Hot Water Service Charge those service accounts relating solely to one apartment. Paragraph 3 restricts the Charge to costs of any communal supply. The Tribunal infers from the wording of paragraphs 2 and 3 that the costs of heating and hot water consumed in the individual apartment do not form part of the Heating and Hot Water service charge.
34. The Tribunal's inference is supported by the inclusion in the lease of paragraph 33.2 of schedule 1 where the Tenant is required to pay on demand the consumption charges for the Heating and Hot Water consumed in the individual apartment as measured by a check meter.
35. The Tribunal concludes from its construction of the lease that
  - a) The costs of the apartment usage are not part of the Heating and Hot Water Service Charge and are payable by the Tenant by virtue of the covenant under paragraph 33.2 of schedule 1. The costs are calculated by reference to the readings taken from the meters for the individual apartments.
  - b) The standing charge and the costs of the system usage are costs associated with the communal supply and are part of the Heating and Hot Water Service Charge. The Tenant's contribution to these costs is calculated in accordance with the net internal floor area of the Tenant's apartment as a proportion of the net internal floor area of all apartments.
36. At the hearing Mr Garlick put forward no alternative construction of the lease terms. Instead he argued that the terms of the lease had been varied by the contents of the email dated 22 March 2018 from Mr McGonigal, which he said had the effect of excluding costs of the system usage from the Heating and Hot Water service charge.
37. The email was headed "Subject: Guildhall Apartments Heating Charges" which was addressed to All Leaseholders and stated as follows:

"I wanted to provide you all with some clarity on the recent heating charges we have issued.

1. All heating charges prior to 01 December 2017 are being paid for by the former owners, GDL.
2. We are paying the District Heating costs directly to the supplier, Engie, in respect of the entire apartment building.
3. The monthly costs for the entire building appear to be approximately £1,400
4. We then apportion this cost between the flats based on the meter readings taken from the heat meters serving each and every flat.
5. Fixed electricity charges are distributed evenly between all flats.
6. The monthly costs for each flat are detailed in our own invoices.
7. A covering sheet has also been provided and this details the allocated costs for the monthly heating bills for every flat.
8. We also sent a copy bill for the entire building for the month in order to show you the actual costs for the block as a whole and how it then relates to the method of our apportionment.
9. At the moment, we will issue monthly bills. We have issued one month and a further month will follow shortly.
10. We will try and run these on a quarterly basis from April onwards as it does appear that we will have sufficient cashflow to pay three months of heating bills to the District Heating supplier before recovering costs from all the leaseholders.
11. On this basis, I implore you all to make immediate payment of the bills that we issue".

Thanks

Greg

38. The Tribunal acknowledges that it has always been and remains possible for a Landlord and a Tenant to vary the terms of a lease by agreement. However, an agreement to vary a long lease is a "disposition" of land within the meaning of the Law of Property (Miscellaneous Provisions) Act 1989. The terms must therefore be incorporated in a document either by being set out in it or by reference to some other document. The document incorporating the terms must be signed by or on behalf of the parties to the contract.
39. The email falls far short of the requirements to vary a lease. It did not specify which provisions of the lease were varied and did not set out the

new terms. The document was not signed by the Landlord and by each of the leaseholders.

40. Clause 4 of the lease enables the Landlord in writing to licence minor variations of the stipulations and restrictions affecting any residential or commercial property on the Estate. This clause, however, has no application to altering the definition of the Heating and Hot Water Service Charge. Clause 14.6 permits the Landlord to require the Tenant to enter into a direct agreement with the supplier of heating and hot water but again this has no relevance to the circumstances of the case.
41. In the alternative Mr Garlick suggested that the lease have been varied by custom and practice. The Tribunal observes that the Respondent had been complicit in allowing this dispute to arise by not applying the lease provisions correctly in respect of the heating and hot water charge. Although not explicitly mentioned by Mr Garlick, the question posed by the Respondent's conduct is whether it was estopped from altering the existing method of apportioning the standing charge and the costs for the system usage. The Tribunal is satisfied that estoppel has no bearing on the facts of this case because the Respondent is not seeking to recover the charges demanded under the previous mistaken method of apportionment. The concept of estoppel based on a mistaken interpretation of the lease is not a permanent state of affairs and ceases once the mistake has been realised.
42. Mr Garlick submitted that by adopting a method of apportionment based on the net internal floor area of the apartment it produced an outcome that was unreasonable within the meaning of section 27A of the 1985 Act. Mr Garlick stated that as a result of the change leaseholders were being charged vastly different prices for heating water and for the standing charge, whereas under the previous method the leaseholders were charged the same price (p/kwh) for heating water, and the same standing charge. In Mr Garlick's view, high energy consumers were not paying their fair share of the costs associated with the system usage.
43. The Tribunal considers that Mr Garlick was applying his own concept of reasonableness not the one laid down in section 27A in saying that the application of the method of apportionment based on net floor area was unreasonable. The reality is that there was no difference in the overall costs of the heating and hot water between the previous method of apportionment and the apportionment based on net floor area, it was just that the two methods resulted in different winners and losers amongst the leaseholders. Further Mr Garlick's argument about the contrasting outcomes for the two methods of apportionment was irrelevant. The Tribunal found that the costs of the system usage and standing charge were part of the Heating and Hot Water Service Charge, in which case the leaseholders were contractually bound to contribute a proportion of the costs based on the net floor area of their respective apartments.

44. Mr Garlick's final argument was that the system usage was not a separate charge because it represented the energy that was lost through inefficiencies within the system distributing the hot water around the residential unit. Mr Garlick asserted that the only connections to the heating circulation system were the 38 apartment HIU's, and that the communal areas received no benefit from the heating and hot water system. According to Mr Garlick, the system usage costs were in reality part of the costs of heating the apartments and this accorded with standard industry practice which incorporated such costs in the sale price to the final customer. Mr Lucey disagreed with Mr Garlick's assertion that the communal areas received no benefit from the heating and hot water system. Mr Lucey pointed out that whenever he visited the building the communal areas were warm.
45. The Tribunal considers that Mr Garlick's analysis overlooks the fact that the Respondent has incurred a cost in respect of the system usage. This cost is the outstanding balance after the costs of the apartment usage and the standing charge is deducted from the amount invoiced by SHGC for the heating and hot water costs of the residential unit. Under the terms of the lease the Respondent as Landlord is entitled to recover the costs from the Tenants. The costs fall within the definition of Heating and Hot Water Service Charge and are apportioned between the Tenants in accordance with the net internal floor area of their apartments.

#### Decision

46. The Tribunal decides that the standing charge and the costs of the system usage for the heating and hot water system are costs associated with the communal supply and are part of the Heating and Hot Water Service Charge. The Tenant's contribution to these costs is calculated in accordance with the net internal floor area of the Tenant's apartment as a proportion of the net internal floor area of all apartments.
47. In view of the Tribunal's decision the Respondent is entitled to recover the costs by invoicing them monthly with the costs of the apartment usage but the Respondent must account for the standard charge and the costs of the system usage as service charges.
48. The Applicants applied for an Order under section 20C of the 1985 Act. The Tribunal finds that the Applicants were unsuccessful with their application and that such an Order would only benefit the named applicants at the expense of the other leaseholders. In those circumstances the Tribunal considers it just and equitable not to make an Order under section 20C of the 1985 Act preventing the Landlord from recovering the costs of these proceedings through the service charge.
49. The Tribunal finds that the lease does not permit the Landlord from recovering the costs of these proceedings from the Tenants direct.

There is, therefore, no need to consider whether an Order under paragraph 5A of schedule 11 of the 2002 should be made.

## RIGHTS OF APPEAL

1. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application by email to [rpsouthern@justice.gov.uk](mailto:rpsouthern@justice.gov.uk) to the First-tier Tribunal at the Regional office which has been dealing with the case.
2. The application must arrive at the Tribunal within 28 days after the Tribunal sends to the person making the application written reasons for the decision.
3. If the person wishing to appeal does not comply with the 28 day time limit, the person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28 day time limit; the Tribunal will then decide whether to extend time or not to allow the application for permission to appeal to proceed.
4. The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal, and state the result the party making the application is seeking.