FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	CHI/00HB/LSC/2024/0021
Property	:	25 Cask Store, East Tucker Street, Bristol BS1 6WF
Applicant	:	Mr William Jones
Representative	:	----
Respondent	:	FREML (Residential) Ltd
Representative	:	Adam Church
Type of Application	:	Applications to determine service charges– section 27A Landlord and Tenant Act 1985 Applications that costs not be recoverable as charges- section 20C Landlord and Tenant Act 1985 and paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002
Tribunal Member(s)	:	Judge J Dobson Mr J Reichel MRICS
Date and venue of hearing	:	3rd February 2025, Bristol Magistrates Court and Tribunal Centre
Date of Decision	:	20th February 2025

DECISION

Summary of the Decision

1. **The Tribunal determines that the charges to the Applicant for the usage of gas for the building as a whole beyond the usage by the individual flats are service charges.**

2. **The Tribunal determines that the calculation/apportionment of the charges was correct, although the quarterly nature of the demands for that were not.**

3. **The Tribunal refuses the Applicant's applications pursuant to section 20C of the Landlord and Tenant Act 1985 and paragraph 5A of the Commonhold and Leasehold Reform Act 2002 such that the Respondent's costs of the applications are not prevented from being recovered as service charges or administration charges from the Applicant in the relevant proportion.**

4. **The Respondent shall pay to the Applicant £100 towards the Tribunal fees incurred within 14 days of issue of this Decision.**

The Background

5. The Applicant is the lessee of 25 Cask Store, East Tucker Street, Bristol BS1 6WF ("the Property"). The Respondent is the head lessee of Cask Store ("the Building"). The freeholder is not involved in these proceedings.

6. The Building extends over 7 floors and contains 38 flats. It forms part of a larger development in central Bristol, Finzels Reach ("the Estate") that comprises residential, office and retail buildings, a hotel and an underground car park. The Respondent is also the head lessee of the other 2 blocks of residential apartments. In October 2022, Adam Church Limited became the managing agent. Prior to that, the managing agent had been Savills.

7. The Building has a heat network. There is a boiler for the hot water and heating for the Building. There is a system of pipes to carry hot water around the Building. The flats have the use of hot water. The flats also have an underfloor heating system. There is, it was established, no heating to communal areas as such but some of the pipes pass under communal areas. There is a meter measuring the usage by the Building as a whole. There are meters measuring the usage by the individual lessees. The Tribunal addresses the heat network and the question arising further below.

8. Proceedings were instituted in 2020 by 11 lessees (of whom the Applicant was one) and were the subject of a decision by the Tribunal in 2021, although none of the issues determined directly bear on this Decision. It

merits mention that in Directions given in the course of those proceedings, it was said by Mr Banfield, then the Regional Surveyor, that

> "I explained that the Tribunal's jurisdiction was the determination of the service charges as referred to in the lease and as regulated by the Landlord and Tenant Act 1985. This meant that the issues of defect in the original construction and utility charges billed to individual lessees would not be considered".

9. However, that was a case management matter and not a final decision. The issue as to utilities at the time as expressed in the background to the 2021 decision was whether defects in the heat network may have resulted in overcharging for gas. That is a different question to the current one. The approach taken to charges which lies at the heart of this application had not at that time been instituted and so there could have been no determination about that. The Tribunal finds that the comment made in 2021 neither binds it nor assists it.

10. The Respondent has a contract with Crown Gas and Power for the supply of gas to the Building. It is invoiced monthly and re- charges quarterly.

11. The current approach to charges for the gas used and standing charge in the heat network commenced at the end of 2023/ the start of 2024. Savills (and the Tribunal surmises initially Adam Church also) had on behalf of the Respondent charged the individual lessees for their individual usage and a proportion of the standing charge and had also charged the balance between the gas usage shown on the meter for the Building as a whole and the total of the usage shown on the individual meters to the lessees in the same proportion as it charged the lessees for their individual usage (the "Loss").

The Application and history of the case

12. The Applicant sought determination of service charges for the years 2023/ 2024 and 2024/2025 by application dated 29th January 2024 [41- 54] pursuant to section 27A of the Landlord and Tenant Act 1985 ("the Act"). The costs in dispute related to charges for gas and in particular the apportionment of those as became clear.

13. The Applicant also made an application for an order under section 20C of the Act that the costs of the proceedings should not be recoverable by the Applicant as service charges and an application pursuant to paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002 (the title of which will continue to be used in full), for an order that the liability to pay an administration charge in respect of contractual litigation costs be reduced or extinguished.

14. Directions were given listing the case for a conciliation hearing at which the Applicant and the Respondent's representative attended but at which the case could not be resolved. Further Directions [108- 113] were required in respect of the preparation of the parties' cases and included the ability to

rely on expert evidence if the parties wished to, although in the event they did not.

15. The Directions provided for the Applicant to produce a bundle of documents relied on by the parties in relation to the issues for determination. The Applicant produced a PDF bundle amounting to 113 pages in advance of the final hearing.

16. Whilst the Tribunal makes it clear that it has read the bundle, the Tribunal does not refer to all of the documents in detail in this Decision, it being unnecessary to do so. Where the Tribunal does not refer to pages or documents in this Decision, it should not be assumed that the Tribunal has ignored or left them out of account. Insofar as the Tribunal does refer to specific pages from the bundle, the Tribunal does so by numbers in square brackets [ ], and with reference to PDF bundle page- numbering.

The Lease

17. The lease ("the Lease") of the Property was provided [55- 101] dated 24th May 2017 and made between the then Landlord, Finzels Reach Property LLP, the then lessee ("the Tenant" as termed in the Lease), and the Estate Manager as it then was FREML (Residential) Ltd, so the Respondent. The Lease was granted for a term of 250 years less ten days from 1 January 2015. The Respondent was subsequently granted the headlease (referred to in the Lease as the "Building Lease").

18. The Lease is drafted in modern terms. That includes the Lease being rather lengthy and including several pages of definitions.

19. Service charges include 3 elements, Building Service Charge Percentage of the Annual Building Expenditure, The Car Park Service Charge Percentage of the Annual Car Park Expenditure and the Estate Service Charge Percentage of the Annual Estate Expenditure, although only the first of those is relevant to this case. The Estate Service Charge Percentage is defined in the HMLR Particulars (and Schedule 9 to the Lease) as:

> "A fair and reasonable percentage of the Estate Service Charge payable by the Tenant as provided for in the budget or estimate provided by or on behalf of the Residents Manager for the current year or a fair and proper proportion in respect of the Property if no proportion has been provided."
>
> (The Residents Manager is defined as the Respondent. Whilst the Property is termed that in the above definition in the HMLR Particulars, it is otherwise referred to in Lease as the "Premises".)

20. That aside, service charges are principally addressed in Schedule 9 to the Lease. In paragraph 2.1 of Schedule 9 it is said that a fair and proportionate amount of the overall service charge to be applied to any commercial and Housing Association properties and that :

"the proportion of the remainder attributable to any Apartment is to be calculated primarily by reference to the gross internal area of the [Property] as a percentage of the aggregate gross internal areas of all the Apartments in the Building ..... but if that method is inappropriate having regard to the nature of the item of expenditure incurred ..... the [Respondent] may exercise its discretion and adopt an alternative method of calculation which is fair and proper in the circumstances .....".

There are therefore a number of elements. Firstly, the starting point is division according to the relative size of the flats. Secondly, the Respondent can decide that is not appropriate. If so, it is then able to, but is not compelled to, exercise a discretion to adopt a different method of division. If it decides to exercise that discretion, it can decide what it considers to be the fair and proper alternative method.

21. Schedule 9 provides that the financial year ends on 31st December of a given year. Estimated on- account service charges may be demanded in respect of any given year and are payable (paragraph 5.2 of Schedule 9) by two instalments on 1st January and 1st July each year (unless a quarterly payment scheme is chosen by the Landlord). Paragraph 4.1 of Part 1 of Schedule 9 to the Lease provides that "The Landlord shall within 6 months after the end of each Service Charge Year prepare and submit to the Tenant a certified statement of the Annual Building Expenditure incurred". Various different persons may certify. If the Service Charge exceeds the Estimated Charge paid, the Tenant is obliged to pay the balance. If the Service Charge is less than the Estimated Charge the difference is to be credited against future "rents".

22. The Applicant is also required to pay for "Outgoings and for Utility Services and Shared Facilities" pursuant to paragraph 2 of Schedule 2.

23. In particular, paragraph 2.2 says as follows:

" To pay the suppliers for and indemnify the Landlord and/ or the Estate Manager against all charges for gas electricity water telephone and any other supplies to the [Property] and to pay the Estate Manager on demand the metered charge for all such services received common to the Estate which may be included in the Service Charge for administrative purposes."

(It is not clear why this provision refers to the Estate Manager whereas it will be seen above that there is reference to the Residents Manager but the HMLR Particulars also identify the Respondent as the Estate Manager so the distinction has no effect for these purposes.)

24. Paragraph 2.3 adds a requirement as follows to contribute "a fair proportion" of the costs of "repairing maintaining cleaning replacing and renewing Service Media" and essentially anything else used or enjoyed in common with other occupiers "to the extent that such cost is not recoverable as part of the Service Charge".

25. In general, the Lease requires the Respondent to take the sort of steps which would be expected and allows it to incur the sort of charges which

would be expected. At first blush, those are to be met from the Service Charges much as the two provisions quoted above indicate both utilities and potentially some other expenditure may fall outside that.

26. The Lease defines Common Media as "all Service Media serving the Property and other parts of the Building" (or wider development).

27. Service Media is defined as including "pipes ….. other plant or equipment servicing facilities connected to the [Property] and any other conducting media or plant". The Property excludes Service Media except where that exclusively serves the Property.

28. Common Parts are defined as including amongst other elements, "all plant machinery equipment …. pumping stations…. and any electrical or mechanical systems serving the Building….. or facilities the use or enjoyment of which is common to some or all of the residents or users of the Building" (or the development).

29. Building Services is defined to mean service, facilities, amenities and items of expenditure in Part 2 of Schedule 9. Part 2 details those.

30. That includes maintenance, repair and similar of the Common Part and Common media and any other common service facilities and amongst other matters at paragraph 5 as follows:

> "Providing for utility services to include if applicable gas electricity and water to be supplied to the Development on a Communal basis and then charged to the Tenant based on the consumption of the same by the [Property] as recorded by individual meters".

31. There is also a specific inclusion in paragraph 27 of:

> "Any gas electricity oil or other fuel water telephones or other services used for the Building or the Development or in providing any Building Services"

32. In addition, there is a catch- all provision in paragraph 25 covering "providing such further services as ……. consistent with principles of good estate management and/ or preserving the amenities of the Building and the Development".

<u>The Construction of Leases</u>

33. It is well- established law that the Leases are to be construed applying the basic principles of construction of such leases, and where the construction of a lease is not different from the construction of another contractual document, as set out by the Supreme Court in *Arnold v Britton* [2015] UKSC 36 in the judgment of Lord Neuberger (paragraph 15):

> "When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to "what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean", to quote

Lord Hoffmann in *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38, [2009] 1 AC 1101, para 14. And it does so by focussing on the meaning of the relevant words, in this case clause 3(2) of each of the 25 leases, in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions."

34. Context is therefore very important, although it is not everything. Lord Neuberger went on to emphasise (paragraph 17):

"the reliance placed in some cases on commercial common sense and surrounding circumstances (e.g. in *Chartbrook* [2009] AC 1101, paras 16-26) should not be invoked to undervalue the importance of the language of the provision which is to be construed. The exercise of interpreting a provision involves identifying what the parties meant through the eyes of a reasonable reader, and, save perhaps in a very unusual case, that meaning is most likely to be gleaned from the language of the provision. Unlike commercial common sense and the surrounding circumstances, the parties have control over the language that they use in a contract. And again save perhaps in a very unusual case, the parties must have been specifically focusing on the issue covered by the provision when agreeing the wording of that provision."

The relevant Law in respect of Service Charges

35. Essentially, pursuant to section 18 of the Act, the Tribunal has the power to decide about all aspects of liability to pay service charges and can interpret the Lease where necessary to resolve disputes or uncertainties. Service charges are sums of money that are payable – or would be payable - by a lessee to a lessor for the costs of services, repairs, maintenance or insurance and the lessor's costs of management, under the terms of the Lease. The Tribunal has jurisdiction where the whole or part varies or may vary according to the costs incurred.

36. The Tribunal can decide by whom, to whom, how much, when and how a service charge is payable. That includes whether any service charge is payable both in respect of the particular expense and generally pursuant to the provisions of the Lease and the wider law.

37. Section 19 provides that a service cost is only payable insofar as it is reasonably incurred and where they are incurred on the provision of services or the carrying out of works, only if the services or works to which it related are of a reasonable standard. The Tribunal therefore also determines the reasonableness of the costs which gives rise to the service charges. Assuming service charges to be payable in principle, the Tribunal determines the amount of the service charges payable by a given lessee in respect of the service cost.

38. The Tribunal takes into account the Third Edition of the RICS Service Charge Residential Management Code ("the Code") approved by the

Secretary for State under section 87 of the Leasehold Reform Housing and Urban Development Act 1993 and effective from 1 June 2016. The Code contains a number of provisions relating to variable service charges and their collection. It gives advice and directions to all landlords and their managing agents of residential leasehold property as to their duties.

39. The Approval of Code of Management Practice (Residential Management) (Service Charges) (England) Order 2009 states: "Failure to comply with any provision of an approved code does not of itself render any person liable to any proceedings, but in any proceedings, the codes of practice shall be admissible as evidence and any provision that appears to be relevant to any question arising in the proceedings is taken into account."

40. There are innumerable case authorities in respect of several and varied aspects of service charge disputes. Many have no direct relevance to this dispute, and none were referred to by the parties. The Tribunal does not therefore seek to refer to any specifically. The Tribunal is however aware of the case authorities and applies the principles identified.

41. Those include by way of examples and without in any way suggesting what follows is comprehensive, that there are two elements to whether a cost is reasonably incurred, namely was the decision-making process reasonable and is the sum to be charged reasonable in light of the evidence; whether proposed method is a reasonable one in all the circumstances, even if other reasonable courses could be adopted and other reasonable decisions could have been made; the fact that the costs of the work will be borne by the lessees is part of the context and interests of the lessees must be conscientiously considered and given the weight due, although the lessees have no veto and are not entitled to insist on the cheapest possible means of fulfilling the landlord's objective or a minimum standard; any significant increase to costs in previous years and the financial impact on the tenants are relevant to the question of whether costs have been reasonably incurred.

42. The Tribunal has numerous other jurisdictions, and the number continues to grow. Importantly, they are all jurisdictions given to the Tribunal by statute. The Tribunal does not possess any inherent jurisdiction in the way that the courts do.

43. The relevance of that is this. If the Tribunal were to determine that a charge was not a service charge (or in other circumstances an administration charge), the charge would then fall outside of its jurisdiction. That would be the end of the matter, at least for the purposes of the Tribunal. The Tribunal could not decide whether the charges were payable at all or in any given sum.

The Hearing

44. The hearing was conducted at Bristol Magistrates Court and Tribunal Centre in person.

45. Mr Jones represented himself. The Respondent was represented by Mr Church, the owner/ director of the managing agent company. He was accompanied by Mr Yeo- Smith, a director of the Respondent, and Ms Murley.

46. The Tribunal received submissions from Mr Jones and from Mr Church in addition to the written cases. The Tribunal did not in general receive evidence. On occasion arguably comments made strayed into evidence insofar as they were made on the basis of matters known to the speaker and not based on written evidence in the bundle. However, given that the Tribunal is not bound by the stricter rules of evidence in the courts and no matter of concern arose, the Tribunal did not consider a need to preclude consideration of the elements of evidence, although in the event nothing turned on them.

47. The Tribunal did not inspect the Property. The Tribunal was content that the nature of the issues were such that it was not necessary to inspect in order to the determine the matters remaining for determination.

48. The Tribunal explained the point made above about the extent of the jurisdiction of the Tribunal. Hence, that the first question to be answered is one of whether the charge to the Applicant and other lessees for the balance of the metered usage is a service charge. The second question would be how the charge should be charged if it were a service charge.

49. It was established that, leaving aside the issue as to jurisdiction, the question for determination would be whether the Respondent was required to charge for the balance gas usage beyond the individually metered usage in the same proportion as the individual usage- so in the way Savills had done- or was able to charge for the balance usage proportionate to the size of the flats, as it had done since 2024.

50. In the hearing, the balance usage was in the main referred to as loss (hence the Tribunal's adoption of that for the balance usage). The Tribunal understood that was because there was inefficiency built into the network because heat was lost as the water travelled around the pipes. For the avoidance of doubt, the Tribunal does not seek to comment on whether that Loss has been greater than it ought to be or has been simply at the level unavoidable in this type of network. That was not a question for determination in this case or potentially one within the jurisdiction of the Tribunal at all. In any event the Tribunal does not have sufficient information to answer the question if it were able to and wished to.

51. It was clarified in the hearing that the charges related to hot water as well as heat- the parties had only talked about heat. It was clarified that both use of heat and of hot water is measured by the meters in the individual flats. Either of the underfloor heating and hot water can be switched off for the given flat. It was also clarified, there having been some confusion about the matter from the papers, the point mentioned above that there is no specific heating for communal areas, although the system pipes running

under the common areas in the Block indirectly provide heat, in both winter and summer, and that contributes to the loss.

Consideration of the disputed issue

52. The Tribunal does not set out the parties' cases at length in advance of discussion of the relevant issues. The cases were set out in writing, supplemented by recorded oral submissions. The Tribunal refers to the relevant parts of the parties' cases in its consideration of the matters below.

53. This Decision seeks to focus solely on the issues requiring determination. The omission to therefore refer to or make findings about every statement or document mentioned is not a tacit acknowledgement of the accuracy or truth of statements made or documents received. Not all of the various matters mentioned in the bundle or at the hearing require any finding to be made for the purpose of deciding the relevant issues in the application. The Decision is made on the basis of the evidence and arguments the parties presented, save where clarified by the Tribunal in the hearing, and is necessarily limited by the matters to which the Tribunal was referred. Any findings of fact are made on the balance of probabilities.

54. The Applicant described in his statement of case [2- 5] that the heat supply operates by way of central boilers supplying heat to the flats via a water-pipe network and metering of use by the flat at a heat exchanger located in the flat. Mr Church explained in the hearing that the meters take readings automatically. The Respondent's statement of case described the relevant equipment as "heat interface units" and smart heat meters.

55. It was common ground between the parties that at one end of what the Tribunal described as effectively a line, the individual flat owners properly pay for their own usage and as a utility cost. At the other end, the expense incurred by the Respondent in servicing the boiler and wider network, the cost of any repairs to or replacement of the boiler and any cost in relation to the communal pipes were matters payable through the service charges and the Applicant identified in his statement of case that is the manner in which he was charged.

56. It was also common ground that a share of the standing charge was properly payable by the individual lessees as a utility cost. Although that is a little further along the line from the individual usage, there was consequently no argument heard about whether that is or is not correct. The Tribunal simply adopts the position agreed by the parties and which requires no determination by it.

57. The Tribunal considers that in respect of the Loss element, so to repeat that is the difference between the metered supply into the Building and the metered usage by individual flats, the question is whether that forms part and parcel of or is akin to the supply to the individual flats or is in effect part of the cost of providing a supply of hot water and heat for the flats to be able to use.

58. The Applicant was concerned that the Heat Network (Metering and Billing) Regulations 2014 [extracts 17-18] ("the Regulations") and the Guidance issued about those by the Office for Product Safety and Standards ("the Guidance") [22- 39] require bills and billing information for the consumption of heating and hot water by a final customer are accurate, based on actual consumption and compliant with the Regulations. He accepted that his individual usage is recorded. He contended that the approach taken since January 2024 by the Respondent does not comply with the Regulations.

59. The Applicant was, he said, notified of the change by way of an email dated 15th January 2024, although it appears to the Tribunal that the email was dated 20th December 2023 [8- 10]. Nothing turns on the specific date. The Tribunal notes that the change was intended at that stage to be backdated to 1st April 2023 and that payments already made were to be adjusted.

60. The Respondent argued [6- 8] that the Loss is not part of the individual usage and so falls outside of the provision of the Regulations. The Respondent asserted that it complied with the Regulations by providing the actual consumption by the Applicant and billing for that (plus the share of the Loss element on actual consumption) and the other relevant details. It said that the current approach to apportionment of charging according to flat floor area (as opposed to that originally based in individual heat usage), is more transparent and removes inequalities. The Respondent added that there are no regulations applicable to how to charge for such Loss.

61. The question of any breach of the Regulations is not a matter for the Tribunal. Whilst the Applicant quoted at some length from the Guidance to which he referred, there is no need to set that out here. However, the positions of the parties about that matter and their reasons for adopting those positions were useful in the Tribunal's consideration of whether the charge for the Loss element is a service charge.

62. It is also worth identifying that a heat network is described in the Guidance as a system in which heating cooling or hot water is generated at a central source and supplied by the operator through pipe network. That is the nature of the supply to the Applicant's flats and the flats of other lessees by the Respondent. It was further common ground that the Respondent operates what is known as a heat network and so the Respondent is a "Heat Network Supplier".

63. The Tribunal's determination is that the charge for the Loss element is a service charge.

64. The Tribunal finds that the Loss arises from the means of supply of heat, for underfloor heating and hot water, to the individual flats. It is in consequence of there being a network of pipes through which water can flow to and from the individual flats and otherwise around the network.

65. The Lease provides, as quoted above, that any gas, amongst other services, used for the Building or in providing any Building Services is a Building Service.

66. The provision of gas charged to the Applicant as recorded by the individual meter to his flat is a Building Service.

67. Gas cannot be provided to the Applicant's flat without the Common Parts— in particular the boiler- and the Common Media- in particular the pipes, so to put it another way without the heat network which heats the required water and conveys it to the Applicant's flat.

68. The Tribunal noted the graph produced on behalf of the Respondent [11] indicating the level of usage by the Building, the flats and the difference (described there as "unaccounted for units") and that the level of Loss does not alter proportionately to the level of use of heat and hot water by the flats collectively- and certainly does not suggest it alters proportionately to the level of use by any given flat individually. The graph suggests a degree of increased Loss the more usage there is by the individual flats as a whole but to a relatively modest extent as compared to the increased usage.

69. The graph is located within an email dated 15th January 2024 [11- 12], which explains about the graph and re- iterates about the new approach to the Loss element. It is that email to which the Tribunal perceives the Applicant referred. The backdating is to be limited to the third quarter of 2023, so the amount of backdating is reduced from the originally intended level, but still within that service charge year. Hence, the Tribunal surmises, the reference to the 2023 service charge year in the application. There are other emails largely about the relevance or otherwise of the Guidance to which the Tribunal need not refer.

70. Whilst the Applicant asserted the methodology used by the Respondent not to be scientific, the Tribunal regards it as a fairly simple exercise to deduct the total usage by the individual flats as shown on their meters from the overall usage for the Building as a whole as shown on that meter. It may well be, as Mr Church suggested, a relatively time- consuming exercise to tot up the various figures period on period. However, that does not make it an intellectually challenging one or otherwise a complex one.

71. The conclusion which must be drawn from the graph is that the majority of the Loss is a consequence of the system existing whether used modestly or to a greater extent. It is a consequence of the Respondent having in place a heat system which the Applicant and other lessees are able to use. To at least a large extent, the Loss is unavoidable if that system is to exist.

72. Indeed, where the Loss increases, that is apparently a consequence of there being usage generally. It is a consequence of greater use causing more heat to be required in general terms and more of that being "wasted" in general terms because of the operation of the system as a whole to provide that extra heat.

73. Given that essentially the Loss is a consequence of the system in operation, the heat network as created, and not usage by specific lessees, it is far more akin to the other costs of providing the heat network such as servicing of the boilers or work to the communal pipes which transport the water than it is supply to any given lessee.

74. The Tribunal determines the Loss element to form part of the cost of provision of the heat network and therefore part of the cost of providing a service required to be provided by the Respondent under the Lease.

75. It is one of the matters for which the Respondent is able to incur service costs and demand service charges to meet those costs.

76. Plainly the Respondent could not be expected to bear costs involved in supplying heat and hot water to the flats itself. There would always need to be a means by which the cost could be recovered from the lessees. Whilst there may in principle have been other ways to attend to that, in practice the Lease achieves it through the service charges.

77. The Tribunal appreciates that paragraph 2.2 of Schedule 9 in referring to the Applicant being required to pay the Respondent on demand the metered charge for services received common to the Estate and that those may be included in the service charge for administrative purposes, suggests that the Loss may not be an item falling within the service charge, given that there is no need to include it as a service charge for administrative purposes if it is a service charge in the first place.

78. However, that provision includes various other utilities, refers to the Estate as a whole and does not, the Tribunal determines, go nearly far enough to demonstrate that the appropriate construction of the other relevant provisions is that they do not include the Loss element as part of the service charges. Rather, the Tribunal considers that the only proper way in which to construe the provisions of Part 2 of Schedule 9 is that the cost of gas used by the Building over and above the usage by individual flats is as part of the expenses which the service charges are said to meet.

79. Subject to any alteration to the starting point, the Loss element is payable in the same manner as any other service charges and hence proportionate to the floor area of the flats. The manner in which the contribution of the Applicant and the other lessees to the Loss has been calculated is therefore in itself correct. The Tribunal uses the word calculation deliberately.

80. The Tribunal identifies the provision in the Lease which enables the Respondent to exercise a discretion to alter the allocation of charges between the flats to one more appropriate. In principle, the Respondent was able to do that and then demand payments proportionate to individual usage as Savills did.

81. However, there is no evidence that the Respondent did that prior to Savills issuing demands dividing the costs of the Loss element as it did, still less that it did so in accordance with the requirement of the Lease. Rather, the

Tribunal infers from the evidence it did receive that Savills simply considered that method most appropriate without considering what the Lease required.

82. The Applicant did not in terms present his case on the basis that it was inappropriate for the Respondent to charge the Loss element on the basis of relative floor area. He argued for the approach taken by Savills as correct but on the basis that he considered it complied with the Regulations.

83. The Tribunal considers that the Respondent potentially could have charged as Savills did on an ongoing basis if it could have demonstrated that it had exercised its discretion and why it did so. However, that is quite different to the Applicant demonstrating that the only proper way in which the Respondent could proceed was to adopt that specific approach. That is to say that the Applicant could not demonstrate that the Respondent's approach of charging according to floor area in the same manner as adopted for the other service charges fell outside a range of reasonable approaches. It can be added that neither approach to apportioning the Loss makes the charge for that based on usage- the heat "lost" was not in practice used by anyone.

84. It follows that in the absence of demonstration that the Respondent ought to have exercised a discretion to vary the manner of charging for the Loss and that the only proper alternative method was to charge individual flat lessees proportionate to their individual usage, the Applicant has failed to demonstrate that the level of charges to him for a share of the Loss is not payable at that level.

85. It necessarily follows from the Tribunal's determination that the charge of the Loss is a service charge that it should not be demanded as a utility cost and with the demand for individual usage plus a share of the standing charge. Rather it is required to be demanded as part of the wider service charge.

86. That is to say in the manner of any other service charges including in respect of the statutory and other requirements of demands for them. As to whether the form of demands has been valid is beyond the Tribunal's ability to reach a determination- none of the demands were provided to the Tribunal.

87. However, whilst the method of calculating the sum is correct and hence the Tribunal is content that in any given service charge year the Applicant would pay the correct sum for the relevant service charges overall, the Lease does not permit demands to be made on a quarterly basis unless that is chosen by the Landlord.

88. The Tribunal received no direct evidence as to whether the Respondent had made such a choice. However, there was no hint that service charges were demanded other than twice yearly and when the Tribunal referred to twice- yearly demands on account, the parties did not seek to suggest the

Respondent operated in any other manner. The Tribunal infers that service charges remain demanded twice- yearly.

89. In contrast, the Tribunal understands that the gas charges were demanded quarterly on the basis of being utility charges, including the Loss element, and so falling outside of the provision for half- yearly service charge demands- or at least payments- on account. The Tribunal leaves to one side anything other than the Loss element but observes in respect of that element that unless there is any change to the regularity of demands for service charges generally, there is no entitlement under the Lease to demand that Loss quarterly in arrears as has occurred.

90. The Tribunal acknowledges a potential effect of this Decision being that the Respondent decides to increase the amount demanded on account and subject to reconciliation at the end of the service charge and that may not be regarded as an improvement by the Respondent or the lessees. However, the practical effect in respect of nature and regularity of the demands, subject to any agreed change, cannot determine the construction of the Lease.

91. The Tribunal notes the email dated 20th December 2023 included a statement by Adam Church Limited that from 1st April 2024 "the residual loss element of the gas charges will be included in the service charge budget. This means invoices for gas from that date will be based solely on actual usage". Leaving aside whether that statement is strictly accurate where the invoices for gas include an element of standing charge, the Tribunal noted that the Respondent did not in the event proceed in that manner- at that time. The 15th January 2024 communication said that the Loss element would continue to be included in the individual invoices to lessees for gas after all. Given the determination by the Tribunal, the approach indicated in the former email ought to have prevailed.

Is the Applicant required to use the system?

92. The Applicant included originally a request for a determination as to whether the Applicant is obliged to purchase heat supplied by the system, although in his statement of case he said that he considered the question was no longer relevant.

93. The Tribunal received nothing more about that particular matter. The Tribunal therefore understands no determination on the point to be required. The Tribunal has not in those circumstances considered whether the answer to the question falls within the jurisdiction of the Tribunal or given any other consideration of the matter. The Tribunal seeks to say nothing more about the point and simply makes that above clear for the avoidance of doubt.

Decision in respect of disputed Loss element

94. The effect of the above findings and determinations is that the Tribunal determines that the charges for the difference between the metered usage

of gas by the Building as a whole and the metered usage by the individual flats are service charges and are payable as service charges under the terms of the Lease.

95. That applies to the 2023, 2024 and 2025 years within this application and indeed any other year.

Applications in respect of costs and fees

96. As referred to above, applications were made by the Applicant that any costs incurred by the Respondent in connection with proceedings before the Tribunal should not be included in the amount of any service charge payable by the Applicant pursuant to section 20C(1) of the Landlord and Tenant Act 1985. In addition, an application was made pursuant to paragraph 5A of the Commonhold and Leasehold Reform Act that the costs of the Applicant's application should not be recoverable as administration charges.

97. Section 20C (3) of the 1985 Act, provides "the … Tribunal to which the application is made may make such order on the application as it considers just and equitable in the circumstances". The Tribunal is given a wide discretion. The provisions of paragraph 5A are equivalent and for practical purposes the test to be applied to each limb of the applications that costs of the proceedings should not be recoverable is the same.

98. The provisions of section 20C were considered in *Re: SMCLLA (Freehold) Ltd's Appeal* [2014] UKUT 58, where the Upper Tribunal held that:

> "although [the First-tier Tribunal] has a wide jurisdiction to make such order as it considers just and equitable in the circumstances" (at paragraph 25), "an order under section 20C interferes with the parties' contractual rights and obligations, and for that reason ought not to be made lightly or as a matter of course, but only after considering the consequences of the order for all of those affected by it and all other relevant circumstances" (at paragraph 27).

99. In *Conway v Jam Factory Freehold Ltd*, [2014] 1 EGLR 111 the Deputy President Martin Rodger QC suggested that, when considering such an application under section 20C, it was:

> "essential to consider what will be the practical and financial consequences for all of those who will be affected by the order, and to bear those consequences in mind when deciding on the just and equitable order to make".

100. One of the circumstances that may be relevant is where the landlord is a resident-owned management company or otherwise has no resources apart from the service charge income Whilst there is caselaw in respect of general principles, in practice much will depend on the specific circumstances of the particular case.

101. The Tribunal determines that the Applicant's applications should not be granted. The Respondent can therefore demand as service charges, or

administration charges if more appropriate, a share of the costs of these proceedings from the Applicant.

102. It has been determined that the Respondent has charged the Applicant and the other lessees incorrectly and that the Loss was and is required to be charged as service charges. However, there is no evidence that the sum involved in each service charge year was incorrect. The main purpose of the Applicant's application has not been achieved. There is a question as to the nature of the communication of the change, referred to below. The Tribunal does not consider the granting of the applications to be the appropriate way to recognise the outcome of the case in all of the circumstances.

103. The section 20C and paragraph 5A applications are therefore refused.

104. In terms of fees for the application, the Applicant has not succeeded in demonstrating that the Respondent is in breach of the Regulations insofar as the Tribunal dealt with matters relevant to that and where it lacks the jurisdiction to determine matters regarding the Regulations specifically. He has also failed to demonstrate that the amount charged to him was incorrect.

105. However, as explained above in consequence of the Applicant's application, it has been determined that the Respondent has charged the Applicant and the other lessees incorrectly and that the Loss element was and is required to be charged as service charges. To that extent the Applicant has revealed a failing in the approach taken.

106. In addition, whilst the Respondent was not compelled to consult on the change communicated by Adam Church to the approach taken by Savills on its behalf- and indeed that previous approach was wrong on the basis of the Tribunal's determination- the Tribunal considers that communication could have been handled rather better. There might reasonably have been correspondence indicating a proposal to alter the method of apportionment or even an intention to change rather than simply an announcement of a decision already made. It may very well be that would not have altered the situation which arose and the application made by the Applicant but the Tribunal finds that the Respondent's approach did not assist.

107. In those circumstances, the Tribunal considers it appropriate for the Respondent to meet a share of the fees of £300 payable for the application and the hearing. The Respondent shall pay a contribution of £100.

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 to the First-tier Tribunal at the Regional office which has been dealing with the case by email at rpsouthern@justice.ogv.uk

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.