8929

MAN/OOCG/LSC/2012/0166

HER MAJESTY'S COURTS AND TRIBUNALS SERVICE

LEASEHOLD VALUATION TRIBUNAL

LANDLORD AND TENANT ACT 1985, SECTIONS 27(A), 19 AND 20(C).

IN THE MATTER OF 33, 36, 49 and 68, WHITE CROFT WORKS, FURNACE HILL, SHEFFIELD, S3 7AF.

APPLICANTS	MR AND MRS S. D. HAYES
RESPONDENT	P. A. S. PROPERTY SERVICES LTD.
REPRESENTED BY	J. B. LEITCH SOLICITORS, MR GILCHRIST OF COUNSEL (7/1/2013) AND MR WOOD OF COUNSEL (17/4/2013 AND 20/5/2013)
DIRECTIONS HEARING	7/1/2013
HEARING	17/4/2013, 20/5/2013, WITH DELIBERATIONS IN THE ABSENCE OF THE PARTIES ON 4/6/2013.
TRIBUNAL MEMBERS:	MR C. P. TONGE, LLB, BA. MR J. PLATT, BSC, EST MAN, FRICS, FIRPM MRS B. MANGLES, BA.

PSP8

SUMMARY OF THE DECISION

1. The following service charge amounts are payable now, if they have not already been paid by the Applicants.

2. Service charge year 2010 (total Respondents expenditure £4018.33). Payable by Applicants:

• Apartment 33	(1.22%)	£49.02
• Apartment 36	(1.74%)	£69.92
• Apartment 49	(1.01%)	£40.59
• Apartment 68	(modified to 2.1%)	£84.38

3. Service charge year 2011 (total Respondents expenditure £1033.38). Payable by Applicants:

• Apartment 33	(1.22%)	£12.61
• Apartment 36	(1.74%)	£17.98
• Apartment 49	(1.01%)	£10.44
• Apartment 68	(modified to 2.1%)	£21.70

4. Service charge year 2012 (total Respondents expenditure £304.38). Payable by Applicants:

• Apartment 33	(1.22%)	£3.71
• Apartment 36	(1.74%)	£5.30
• Apartment 49	(1.01%)	£3.07
• Apartment 68	(modified to 2.1%)	£6.40

5. Service charge year 2013 (total Respondents estimated expenditure £1442). Payable by Applicants:

• Apartment 33	(1.22%)	£17.59
• Apartment 36	(1.74%)	£25.09
• Apartment 49	(1.01%)	£14.36
• Apartment 68	(modified to 2.1%)	£30.28

6. Section 20c of the Landlord and Tenant Act 1985. The Applicant having raised this matter the Tribunal decided that it was just and equitable to make no order.

THE BACKGROUND TO THE APPLICATION

7. This application came before the Leasehold Valuation Tribunal by an application from the Leaseholders of apartments 33, 36, 49 and 68, White Croft Works, Furnace Hill, Sheffield, S3 7AF, dated 26/11/2012. The application was for the Tribunal to consider service charge years 2008, 2009, 2010, 2011, 2012 and 2013. The application was limited to consideration of the proportion of the service charge that related to the inspection, service, maintenance and repair of the common heating system in the new build area of the apartment complex.

8. The Applicants held the remainder of 4 leases that had been let for a period of 125 years on 4 apartments in a complex of 74 apartments and a "retail area".

9. The Tribunal had previously dealt with an application involving the same parties over a similar time period reference MAN/00CG/LSC/2012/0058. That case had involved amongst other things service charges relating to the cost of gas to power the common heating system. The Tribunal was concerned to ensure that this present case would not involve matters that already been litigated and therefore a Procedural Chair decided that there should be a Directions Hearing.

10. On 7/1/2013 the Directions Hearing was held at the Employment Tribunal Centre in Sheffield with Mr Tonge sitting as the Procedural Chairperson of the Tribunal. The Applicants were both present. The Respondent was represented by Counsel, Mr Gilchrist. At that hearing it was established that matters to be dealt with in this case would not involve going over matters that had already been dealt with. Directions were given for the conduct of the case. These included a direction that the Tribunal to deal with this case would attempt to constitute itself with the same members as had dealt with the prior case and in that case an inspection would not be necessary.

11. The Applicants made a written application dealt with by the Procedural Chair on 14/1/2013 for permission to extend the ambit of the present case to include the cost of gas used to heat the common heating system. Permission was refused.

12. The Respondent made a written application dealt with by the Procedural Chair on 20/2/2013, seeking an order that the present case be stayed pending the outcome of an application for leave to appeal against the earlier case MAN/OOCG/LSC/2012/0058, already referred to. The Procedural Chair had already been assured in representations made by the Respondents Barrister during the Directions Hearing that these new matters would not go over matters already litigated. The Procedural Chair did not stay the present proceedings.

13. The Applicants served a statement of case and hearing bundle which was 319 pages in length.

14. The Respondent served a statement of case and hearing bundle which was 280 pages in length. This was served late and as a result the Applicants were given an extension to the time limit for them to serve any comments that they wished to make upon the Respondents statement of case.

15. On 14/3/2013 the Applicants served their comments upon the Respondents case. That was 37 pages in length.

16. The final hearing was listed to commence at Sheffield Magistrates Court on 17/4/2013. Both parties were informed by letter dated 6/3/2013.

17. The Respondents sought to serve evidence by way of a witness statement from David Simon McDonald, the Respondents management agent, dated 4/4/2013, with a bundle of exhibits, 79 pages long. That document was not paginated and was either over a month late or was served completely outside the scope of the Directions. As a result the Applicants wrote to the Tribunal to complain that this was unfair as it raised important points not covered previously by the Respondent. The Applicants sought permission to serve supplementary evidence to answer these points. As a result the Applicants served a further 42 pages of Supplementary Evidence just before the hearing by email on 12/4/2013.

18. On the day before the hearing Counsel on behalf of the Respondent, Mr Wood, served a 34 paragraph long skeleton argument and then later that day served a 35 paragraph long amended skeleton argument by email.

19. On 17/4/2012 the hearing did commence at Sheffield Magistrates Court. The Tribunal had reconstituted itself with the members that had dealt with the prior case and the Tribunal met expecting to commence the hearing at 10.30am. No new inspection was to be held, the Tribunal relying upon the inspection it had made in the earlier case.

20. As a result of an administrative error the parties had been told that an inspection would take place and they therefore did not arrive at the hearing until 11.45 am. Present at the hearing were both applicants, David Simon McDonald, management agent of The McDonald Partnership and Counsel on behalf of the Respondent, Mr Wood.

THE INSPECTION

21. The Tribunal had previously inspected the premises at 1000hrs on 13/8/12. Present at the inspection were the Applicants and on behalf of the Respondents Mr McDonald.

22. The complex had a new build area and a refurbished area with 2 of the apartments subject to this application in each area. The "retail area" was situated in the new build area. Apartments 33 and 36 were in the new build area, apartments 49 and 68 were in the refurbished area. There was also a car park in the new build area with parking spaces that were all let out for the sole use of individual Tenants of apartments or the "retail area". The exterior common driveways, walkways and internal common parts were all provided with electric lighting.

23. The new build area had a ground floor and five further floors. The common areas included an entrance, corridors, stairs and a lift. There was a boiler room that provided hot water to the apartments in that area. Each apartment had a hot water cylinder that permitted the hot water from the common boiler room to be used to heat the water in that apartment's cylinder or to not use the common hot water at all. Each apartment had an ultrasonic heat meter that had been fitted when these new build apartments were built. The meters were measuring the amount of heat from the common hot water that was used in each apartment. This system was capable of providing an individual bill for the use of the common hot water to each apartment in that area. The common parts of the new build area were provided with radiators. The Tribunal noted that the whole of the new build area was uncomfortably hot. Electricity meters were in a common meter room.

24. The bathrooms of apartments 33 and 36 were inspected and there was no sign of any damage having been caused by water leakage.

25. The parking area was also used as a bin store area for the complex and was provided with a fire door for use by all occupiers and visitors.

26. The refurbished area contained the remainder of the apartments and all the apartments in this area had their own gas and electric meters. There were common parts in this area, but they were not provided with heating.

THE LAW

Landlord and Tenant Act 1985

S27A Liability to pay service charges: jurisdiction

(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.

S19 Limitation of service charges: reasonableness.

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

S20C "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 or leasehold valuation tribunal, or the Lands Tribunal, or in connection with arbitration proceedings, are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant or any other person or persons specified in the application.

(2) The application shall be made—
(a) in the case of court proceedings, to the court before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to a county court;
(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;

THE LEASE

H.M. LAND REGISTRY

LAND REGISTRATION ACT 2002

County & District	:	South Yorkshire : Sheffield
Title Numbers	:	SYK466349
Property	:	Furnace Works, Furnace Hill, Sheffield
Date	:	25th April 2008

THIS LEASE made between :

(1) **INHOCO 2833 LIMITED** (Company Registration no. 4730527) of 1 Sykes Close, Swanland,. East Yorkshire HU14 3GD (hereinafter called "the Landlord")

(2) **STEPHEN HAYES** and **MARJORIE HAYES** of Longclough, 32 Statelands Road, Glossop, Derbyshire SK13 6LH (hereinafter called "the Tenant")

IN CONSIDERATION of the sum of ONE HUNDRED AND SIXTEEN THOUSAND POUNDS (£116,000) now paid by the Tenant to the Landlord (the receipt whereof the Landlord hereby acknowledges) and of the rents hereby reserved and the covenants on the part of the Tenant and the conditions hereinafter contained this deed **WITNESSES** as follows:-

1. **Definitions and Interpretation**

1.1 In this deed the following expressions have the following respective meanings :

"Accountant"	means any person or firm appointed by the Landlord (including an employee or a Group Company to perform any of the functions of the Accountant) under this Lease provided that any such person or one or more partners of any such firm shall be an associate or fellow of the Institute of Chartered Accountants
"the Apartment"	means the unit numbered 58 on the fourth floor of the Building and for the purposes of identification shown so numbered and edged red on Plan A including for the purpose of obligation as well as grant those parts described in the First Schedule hereto as included
"the Building"	means the building constructed on or within the Estate of which the Apartment form part shown edged green on Plan B
"Common Parts"	means all entrance halls lifts stairways passages landings and other areas in the Building and other areas which are from time to time during the Term provided by the Landlord for the common use by and enjoyment of the tenants of the Building and all persons expressly or by implication authorised by them
"Communal Bin Store"	means the area within the Estate that may be set aside from time to time for the deposit of refuse bins paladins or a compactor
"the Estate"	means the land comprised in the title number above mentioned shown edged blue on Plan C being the pathways, forecourts, boundary walls and the Communal Bin Store gardens and grounds surrounding the same for use of the owners and occupiers of the Building and any other nearby property in which the Landlord has or acquires during the Term

of a freehold or leasehold interest and which are capable of enjoying the services to be provided by the Landlord but excluding (i) the Apartment (ii) the Common Parts and (iii) those parts of the Building which are from time to time demised to a tenant or occupied by a tenant

"First Service Charge Payment"	means the sum of £767.29 on account of the Tenant's obligations to pay the Service Charge as set out in the Eighth Schedule hereto
"Group Company"	means a company that is a member of the same group as the Landlord within the meaning of Section 42 of the Landlord and Tenant Act 1954 (as amended)
"Insurance Rent"	means the insurance rent payable pursuant to the provisions of the Sixth Schedule
"Insurance Rent Percentage"	means 1.73% subject to the provisions for variation contained in paragraph 2.7 of the Sixth Schedule hereto
"Part I Service Percentage"	means 1.73% of the Part I Service Charge subject to the provisions for variation contained in paragraph 1.4 of the Eighth Schedule
"Part II Service Percentage"	means 1.73% of the Part II Service Charge subject to the provisions for variation contained in paragraph 1.4 of the Eighth Schedule
"Plan A"	means the plan annexed hereto marked "A"
"Plan B"	means the plan annexed hereto marked "B"
"Plan C"	means the plan annexed hereto marked "C"
"the Rent"	means £150 per annum for the first 25 years of the Term and £300 per annum for the next 25 years of the Term £450 per annum for the next 25 years of the Term and £600 for the remainder of the Term
"Service Charge"	has the meaning given to it in paragraph 1.1.10 of the Eighth Schedule hereto
"Service Media"	means pipes wires conduits cables sewers drains trunking ducting gutters piping and other fixtures and fittings and installations for the provision of any gas electricity water drainage telecommunications and other services to the Estate
"Surveyor"	means any person or firm appointed by the Landlord (including an employee of the Landlord or a Group Company and including also the person or firm employed to collect rents) to perform any of the functions of the Surveyor under this Lease
"the Term"	means the term of 125 years from the 1st January 2007

1.2 The expression "the Landlord" includes where the context so admits the person for the time being entitled to the reversion expectant on the determination of the Lease hereby created

1.3 The expression "the Tenant" includes where the context so admits his successors in title to the term of years hereby created

1.4 The expressions "balcony" and/or "terrace" shall respectively refer to any such area shown and so marked within the area edged red on Plan A and if no such area shall be

shown and so marked any reference thereto in this Lease shall be ignored

1.5 The expressions "garden" shall refer to any such area shown and so marked within the area edged red on Plan A and if no such area shall be shown and so marked any reference thereto in this Lease shall be ignored

1.6 The expression "payment due" shall mean all sums due to be paid by the Tenant to the Landlord and whether reserved as rent or otherwise and for the avoidance of doubt including but not limited to the Rent and all such sums unpaid shall be recoverable as if they were rent in arrear

1.7 Any reference to any Act of Parliament shall refer to the said Act and any modification extension re-enactment or replacement thereof for the time being in force and shall include all statutory instruments orders directions permissions conditions or regulations issued pursuant thereto or deriving validity therefrom

1.8 Any covenant in this Lease not to do any matter shall include a covenant not to permit or suffer the same to be done

1.9 In this deed where the context so admits words importing the singular number only include the plural and vice versa the masculine shall include the feminine

1.10 Headings to clauses are for ease of reference and shall not affect construction

1.11 The perpetuity period for the purposes of this Lease and any grants or reservations herein is eighty years from the 1st January 2007.

2. Demise

2.1 THE LANDLORD HEREBY DEMISES with full title guarantee unto the Tenant ALL the Apartment TOGETHER WITH the appurtenant rights set forth in the Second Schedule hereto BUT EXCEPTING AND RESERVING and SUBJECT TO the rights set forth in the Third Schedule hereto and all other rights easements quasi easements and privilege to which the Apartment are or may be subject TO HOLD the same unto the Tenant for the Term YIELDING AND PAYING therefor during the Term FIRST the Rent half-yearly in advance on the first day of January and the first day of July in each year without any deduction abatement or set off whatsoever the first of such payments being a proportionate part calculated on a day to day basis and payable to the next payment day is to be made on the date hereof and in cleared funds SECONDLY by way of further rent the Service Charge payable in accordance with the provisions on the Eighth Schedule THIRDLY By way of further rent the Insurance Rent payable on demand in accordance with the Sixth Schedule all such payments to be made by bankers standing order if required by the Landlord on the due dates so specified

2.2 The Tenant shall not by virtue of this demise be entitled to any right of light or air which will interfere with the free use of any other part or parts of the Building and/or the Estate or any neighbouring or adjoining land or property for building or any other use whatsoever whether or not the same shall be in the ownership of the Landlord

3. Tenant's Covenants

3.1 THE TENANT COVENANTS with the Landlord to perform and observe the obligations on the Tenant's behalf set out in the Fourth, Fifth, Sixth and the Eighth Schedules hereto

3.2 THE TENANT FURTHER COVENANTS with the tenants from time to time of all other parts of the Building to perform and observe the stipulations set out in the Fifth Schedule hereto

4. Landlord's Covenants

THE FIRST SCHEDULE
Description of the Apartment

The Apartment INCLUDING

1. the internal plastered coverings and the plaster work of the walls bounding the Apartment and the doors and door frames and window frames fitted in such walls (other than the external surfaces of such walls doors frames and window frames) and the glass fitted in such window frames and

2. the plastered coverings and plaster work of the walls and partitions lying within the Apartment and (to the extent that the same are non-structural and non-load bearing) such walls and partitions and the doors door frames windows window frames and hatches fitted in such walls and partitions and

3. the plastered coverings and plaster work of the ceilings (but nothing above them) and the surface of the screed covering the load bearing structure supporting the floors or if there is no such screed the surface of such load bearing structure (including (if and where applicable) the floor of any balcony or terrace within the red edging on Plan A but in each case nothing below such floors and

4. all Service Media which are laid in any part of the Estate and serve exclusively the Apartment and

5. all fixtures and fittings in or about the Apartment and not hereafter expressly excluded from this demise and

6. where applicable the floor surfaces and interior surface of any walls forming part of any balcony and/or terrace shown on Plan A (but excluding the structure of the balcony and/or terrace such parts being part of and comprised in the main structure of the Building)

BUT EXCLUDING

7. any part or parts of the Building (other than any conduits expressly included in this demise) lying above the said surface of the ceilings or below the said floor coverings and/or the floorboards

8. any of the main timbers of the Building or any of the structural walls or structural partitions thereof (whether internal or external) and such of the plastered surfaces thereof and the doors and door frames fitted therein as are not expressly included in this demise and

9. any Service Media in the Building and/or the Estate which do not serve the Apartment exclusively and

10. all parts of the main structure of the Building not expressly included

THE EIGHTH SCHEDULE
The Service Charges

1. **Service Charge**

1.1 Definitions

1.1.1 The terms defined in this sub-paragraph shall for all purposes of this Lease have the meanings specified:

1.1.2 the "Part I Services" means:

1.1.2.1 renewing repairing maintaining decorating or otherwise treating rebuilding replacing and keeping free from and remedying all defects whatsoever in the Estate

1.1.2.2 providing installing inspecting servicing maintaining repairing cleansing emptying draining amending overhauling replacing and insuring (save in so far as insured under other provisions of this Lease) all Service Media apparatus plant machinery and equipment within the Estate from time to time including (without prejudice to the generality of the above) stand-by generators closed-circuit television entrance barrier and other security systems

1.1.2.3 cleaning and lighting the Estate to such standard as the Landlord may from time to time reasonably consider adequate

1.1.2.4 providing and maintaining (at the Landlord's reasonable discretion) any architectural decorative or ornamental features and any plants shrubs trees or garden or planters in the Estate and keeping the same planted and free from weeds and the grass cut as appropriate

1.1.2.5 maintaining operating and replacing any signs or close-circuit television or the like in the Estate as the Landlord shall reasonably determine

1.1.2.6 supplying providing purchasing hiring maintaining renewing replacing repairing servicing overhauling and keeping in good and serviceable order and condition all fixtures and fittings bins receptacles tools appliances materials equipment and other things which the Landlord may reasonably deem desirable or necessary for the maintenance appearance upkeep or cleanliness of the Estate or any part thereof

1.1.2.7 collecting and disposing of refuse from the Estate

1.1.2.8 any other services relating to the Estate or any part of it reasonably provided by the Landlord from time to time during the Term and not expressly mentioned

1.1.3 the "Part II Services" means:

1.1.3.1 maintaining repairing amending altering rebuilding renewing and reinstating and where appropriate treating washing down painting and decorating to such standard as the Landlord may from time to time reasonably consider adequate the main structure of the Building including the foundations roof and load bearing walls thereof together with the gutters and rainwater pipes thereof and the Common Parts

1.1.3.2 providing installing inspecting servicing maintaining repairing cleansing emptying draining amending overhauling replacing and insuring (save

in so far as insured under other provisions of this Lease) all Service Media apparatus plant machinery and equipment within the Building and the Common Parts from time to time including (without prejudice to the generality of the above) stand-by generators and boilers and items relating to cable or satellite television or telecommunications mechanical ventilation heating cooling and closed-circuit television and other security systems

1.1.3.3 providing installing maintaining inspecting repairing amending altering rebuilding renewing reinstating cleansing decorating and insuring to such standard as the Landlord may from time to time reasonably consider adequate the lift in the Building and any ancillary plant and equipment

1.1.3.4 providing electricity and lighting to the lift and the lift lobbies

1.1.3.5 maintaining and renewing any fire alarms and/or burglar alarms and ancillary apparatus fire prevention and fire fighting equipment and any other apparatus in the Building and the Common Parts

1.1.3.6 cleaning treating polishing and lighting the Building and the Common Parts to such standard as the Landlord may from time to time reasonably consider adequate

1.1.3.7 providing and maintaining (at the Landlord's reasonable discretion) any architectural decorative or ornamental features and any plants or planters in the Common Parts

1.1.3.8 maintaining operating and replacing any signs or close-circuit television or the like in the Common Parts as the Landlord shall reasonably determine

1.1.3.9 supplying providing purchasing hiring maintaining renewing replacing repairing servicing overhauling and keeping in good and serviceable order and condition all fixtures and fittings bins receptacles tools appliances materials equipment and other things which the Landlord may reasonably deem desirable or necessary for the maintenance appearance upkeep or cleanliness of the Building and the Common Parts or any part thereof

1.1.3.10 cleaning as frequently as the Landlord shall reasonably consider adequate the exterior of all windows and window frames in the Common Parts and in any apartments within the Building where the same cannot reasonably be accessed from the interior of any apartment within the Building

1.1.3.11 collecting and disposing of refuse from the Common Parts

1.1.3.12 any other services relating to the Building and the Common Parts or any part of them reasonably provided by the Landlord from time to time during the Term and not expressly mentioned

1.1.4 "Services" means the Part I Services and the Part II Services

1.1.5 "The Additional Items" means:

1.1.5.1 the reasonable and proper fees and disbursements (and any VAT payable on them) reasonably and properly incurred of:

regular or irregular periods) whenever disbursed incurred or made and whether prior to the commencement of the Term or otherwise including a sum or sums of money by way of reasonable provision for anticipated expenditure in respect thereof as the Landlord may in its reasonable discretion allocate to the year in question as being fair and reasonable in all the circumstances and

1.1.6.2 all reasonable and proper sums reasonably and properly incurred in relation to the Additional Items but excluding any Additional Items relating exclusively to the provision of the Part II Services

and any VAT payable on such items but excluding any expenditure in respect of any part of the Estate for which the Tenant or any other tenant shall be wholly responsible and including any sums incurred in relation to a larger area but properly apportionable to the Estate

1.1.7 "The Part II Annual Expenditure" means:

1.1.7.1 all reasonable and proper costs expenses and outgoings whatever reasonably and properly incurred by the Landlord in or incidental to providing all or any of the Part II Services and shall for the avoidance of doubt include not only those costs expenses and outgoings which the Landlord shall have actually incurred or made during the year in question but also a reasonable sum on account of those items of expenditure which are of a periodically recurring nature (whether recurring by regular or irregular periods) whenever disbursed incurred or made and whether prior to the commencement of the Term or otherwise including a sum or sums of money by way of reasonable provision for anticipated expenditure in respect thereof as the Landlord may in its reasonable discretion allocate to the year in question as being fair and reasonable in all the circumstances and

1.1.7.2 all reasonable and proper sums reasonably and properly incurred in relation to the Additional Items as relate exclusively to the provision of the Part II Services

and any VAT payable on such items but excluding any expenditure in respect of any part of the Building for which the Tenant or any other tenant shall be wholly responsible and including any sums incurred in relation to a larger area but properly apportionable to the Building

1.1.8 "Computing Date" means 31st December in every year of the Term or such other date as the Landlord may from time to time nominate and

1.1.9 "Financial Year" means the period:

1.1.9.1 from the commencement of the Term to and including the first Computing Date and subsequently

1.1.9.2 between two consecutive Computing Dates (excluding the first Computing Date but including the second Computing Date in the period)

1.1.10 "Service Charge" means the aggregate of:

(a) the Part I Service Percentage of the Part I Annual Expenditure; and

(b) the Part II Service Percentage of the Part II Annual Expenditure

THE WRITTEN REPRESENTATIONS

27. The written representations on behalf of both parties were extensive. The Tribunal has been very selective in the way it refers briefly to some of the issues raised.

THE APPLICANTS

28. The Applicants submitted that they had bought the long leases to these apartments, "off plan" during late 2007 and early 2008. The leases were all identical. They were bought as a financial investment sublet then to sub-tenants.

29. The Applicants had taken possession of the two apartments in the refurbished area first in late 2007 Or early 2008. There was no common heating system in this area.

30. The Applicants had taken possession of apartment 33 and 36 in April 2008. They then discovered that these apartments that were in the new build area were served by a common heating system. There were then discussions between the Applicants and the then Landlord. That Landlord did not commission the heating system immediately and sold the development to the Respondent.

31. The Applicants submitted that on 1/8/2009 the Respondents had bought the freehold to the complex and therefore became the Landlords of the complex. They appointed The McDonald Partnership as their management agents on 1/9/2009. It was only as a result of a telephone conversation between the Applicant and the management agent in December 2009 that the management agent became aware that all the apartments were not served by the common heating system. That there were in fact two separate forms of heating within the complex.

32. The Applicants submitted that the Respondent had since purchase of the complex, attempted to "fit" the common heating system into leases that were not drafted for such a system.

33. The Applicants described the common heating system as being an unvented direct feed system. A sealed system that has a body of water continually flowing through it going through each individual apartment in turn and then back to the boiler. Any interruption of the flow of that water through the system in any part of the system will affect the flow throughout the whole of the system. The Applicants referred to being informed that one such break down of the whole system had been caused by one occupier of an apartment bleeding a radiator. That had caused a fall in the pressure within the system and had caused the whole system to fail.

34. The Applicants pointed out that they had no control over what could happen inside the apartments in the new build area.

35. The Applicant was of the view that the Respondent should take responsibility for all the parts of the system.

36. The Applicants had taken some photographs of the parts of the common heating system that were visible within their apartment 33 and exhibited them.

37. The Applicants listed the dates upon which they had exchanged contracts upon each apartment and pointed out that the Legal Handbook that they had been provided with made it clear that they would not be permitted to enter the property until completion had taken place. At exchange of contracts the new build area was at foundation level.

38. The Applicants pointed out that there is no mention in the lease of a common heating system.

39. The Applicants then went year by year through the period covered by the case.

40. The Applicants submitted that the Respondents should be responsible for the inspection, repair and maintenance of the common heating system that had been put into the new build area, but that the tenants should not be responsible for the cost that were then incurred because they were not payable under the lease. The leases were not drafted for a common heating system to be installed. Alternatively, the Landlord was estopped from claiming these costs in a service charge, the Applicants had no notice of the fact that a common heating system was to be installed into the new build area. They did not know that this had been done until they took possession of their apartments in this area.

41. The Applicants made an application pursuant to section 20C of the Act that the Respondents costs incurred as a result of the application be not relevant costs when determining the amount of service charges payable.

42. The Applicants "Comments on the Respondents statement of case" were a critique of that document.

43. In the Applicants "Response to the Respondents second skeleton argument", the Applicants stated that they were challenging the reasonableness of the service charges. The Applicants sought to rely upon promissory estoppel to defeat the Respondents claim that the service charges were payable. The Applicants stated that they had not known that there would be a common heating system in the new build area at exchange of contracts. Further, they stated that in their view the leases did not provide for such a system to be installed. The Applicants stated that it must have been to the Landlords advantage to install such a system, otherwise he would not have done so. That created a detriment to the Applicants. Further the nature of the system itself was a detriment to them in that faults arising anywhere in the new build area and outside the control of the Applicants, could result in failure of the common heating system.

THE RESPONDENT

44. The Respondent submitted that it had bought a complex in which there was a common heating system and sought to charge as a service charge the cost of inspecting, maintaining and repairing that heating system.

45. The boiler house at the complex was part of the common parts of the complex. That remained the responsibility of the Respondent to inspect, maintain and repair. The system then became the responsibility of each individual tenant as the system moved from apartment to apartment within the new build area. However the whole of the system had to be properly inspected , maintained and kept in good repair.

46. The Respondent submitted that these service charges were payable under the lease.

47. The charges at issue had all been properly demanded and were reasonable.

48. The Respondent further submitted that there was nothing to be made out of the fact that only the tenants in the new build area had the benefits provided by the common heating system. There was nothing wrong with tenants from one area subsidising tenants from another area.

THE HEARING

49. The hearing commenced at Sheffield Magistrates Court at 11:45 am on 17/4/13. The Applicants were present. The Landlord did not appear but was represented by his management agent, Mr David McDonald and Counsel Mr Wood. The hearing could not be completed in one day and was adjourned to continue at Sheffield Magistrates Court on 20/5/2013. On the second day the same persons were present and also present was a senior partner of the managing agents, Mr Michael McDonald. The case was further adjourned to 4/6/2013 for the Tribunals deliberations.

50. The applicants raised the issue of the Respondents late service of Mr McDonalds witness statement and Mr Woods skeleton and revised skeleton arguments. Both sides were heard briefly on these issues. The Applicants had brought with them to the hearing a document of 11 pages in length that was a response to the Respondents skeleton argument.

51. The Tribunal decided that Mr McDonalds statement and exhibits were served over a month late but it was clear that the Applicants had already had time to consider the content of that document. The Applicants had in fact served their own document, "Supplementary Documents" that was 42 pages in length and was designed to deal with some of the issues

dealt with in the late witness statement. As such the Tribunal decided that despite the breach of Directions by the Respondent that it would admit in evidence both the witness statement and the Applicants "Supplementary Documents".

52. The Tribunal decided that the skeleton argument and revised skeleton argument were not new evidence and had not been served late. They had been served as a matter of courtesy by Counsel, Mr Wood. They were designed to help the parties and the Tribunal focus on what Mr Wood thought were the important issues in the case. They were however lengthy and the Tribunal granted time to both parties to make sure that all present had time to consider the documents that were before the Tribunal.

53. There had not been a recent inspection of the property so the Chair of the Tribunal read the inspection notes that form part of this judgement, paragraphs 21 to 26, to both parties and invited comments. The Applicants referred the Tribunal to the photographs that form part of their bundle.

54. The photographs showed the content of the cylinder cupboard in apartment 36. Hot water would be supplied from the boiler house through pipework to the cylinder cupboard in every apartment in the new build area of the complex, one after the other. Each occupier could choose whether or not to permit that hot water to heat the water in the cylinder and supply hot water to the radiator. There was a heat meter to measure the common hot water usage.

55. It was agreed by both parties that all leases for the apartments at this complex were drafted in the same terms.

56. The Respondent was called upon to give evidence first. The Tribunal has been selective in choosing what evidence to summarise in this judgement.

THE RESPONDENTS ORAL CASE

57. On behalf of the Respondent the management agent made it very clear that no service charge was being sought in relation to a demand for payment relating to an inspection and service at apartment 36 that had been received by the Applicants on 25/6/2012. The demand being undated. Page 17c of the " Applicants Comments upon the Respondents Statement of Case".

58. The management agent also made it clear that no service charge was being sought in relation to the demand at page 17f of the same bundle, relating to apartment 33.

59. On behalf of the Respondent the case was initially being put that the common heating system as it was installed in the common boiler room was service media as defined by the lease at page 4. The eighth schedule to the lease deals with service charges and they are properly charged for the inspection, service and repair of service media under clause 1.1.2.2. and

1.1.3.2. All service charges demanded in this case related to work done in the boiler house and were all therefore payable. They were reasonable.

60. The Respondent was at that stage limiting the common heating system to the part of the system that was not inside the individual apartments. The Applicants were seeking to suggest that this was wrong and that the whole system was one system. The hot water went from the boiler room to each apartment in turn and then eventually back to the boiler broom. However the Applicants made it clear that they took the view that the common heating system was not service media.

61. On behalf of the Respondent it was submitted that promissory estopple had no bearing on this case. The Applicants had been provided with a common heating system that persons using apartment 33 and 36 could use. That would have to be inspected, serviced maintained and repaired. This was a benefit to the Applicants and there had not been any promise by words or conduct not to charge a service charge for the cost of this work.

62. The Applicants had completed the contract with the common heating system already installed in the new build area. They had not asked a court to consider rescission of the contract of conveyance.

63. At the end of the first day of the hearing the Tribunal asked both parties if they had considered the case of London Borough Of Camden, Flat 8 and Flat 45 Kennistoun House [2010] UKUT 194(LC) in which the Upper tribunal had concluded that a similar general heating system serving the whole of the block of flats remained the responsibility of the Landlord to repair and a maintain.

THE SECOND DAY OF THE HEARING

64. On the second day of the hearing the parties had both considered the above case and the Respondents changed their submissions so that they now claimed that the whole (possibly excepting the pipes that ran between apartments) of the common heating system remained the property of the Landlord and was the Landlords responsibility to inspect, maintain, service and repair. That included the parts of the system inside the apartments.

65. On behalf of the Respondent, Mr Wood served a copy of the above case and sought to rely upon it as supporting the representations that he was now making.

66. The Applicants had used the time between the hearing days to give the case further thought. They now agreed that the whole of the common heating system did fall within the definition of service media, contained within the leases. As a result the Applicants also agreed that the service media was retained as the property of the Landlord.

67. The Applicants had brought two new documents with them to the second day of the hearing and served them upon the Tribunal. The first was 24 pages in length and set out the questions

that they wished to put to the management agent. The second was 25 pages in length that dealt with liability to pay, reasonableness and the section 20C point. Both parties were heard briefly in relation to the admissibility of these documents.

68. The tribunal decided that the first document was not evidence it simply noted the areas that the Ares in relation to which the Applicants wished to ask question. The Tribunal decided that the second document was not evidence but was in fact an amended skeleton argument that took into account the fact that the Applicants had now chosen to accept that the common heating system was part of the service media as defined by the lease. The document explained why that was the case and went on to state why it was that even though that concession was being made the Applicants did concede that the service charges being considered were not payable and if payable not reasonable.

69. The Tribunal admitted both documents and gave time for all concerned to consider the content of them.

70. Under cross examination by the Applicants the management agent stated that the service charges reflected the cost of servicing and that this year he expected the cost to reduce. He agreed that the lease for each apartment was binding but said that the legal handbook that had been produced by the Applicants was not. He said that in his view the costs were reasonable. He had employed persons to work on the common heating system who were qualified to do the work that they carried out. He said that the percentage calculation of costs had been done as agreed with the Applicants. He said that the common heating system was functioning on a day to day basis and produced a commissioning certificate for the boilers. It was put to Mr McDonald that in fact the management agents should have had more work done by way of inspections in earlier years. The Tribunal pointed out that if that were the case the result would have been higher costs that the Respondents might have charged as service charges.

71. It was put to the management agent that he was negligent in employing Mr Lamb to work on the common heating system, that he would not have been insured because he was not properly qualified. Mr McDonald indicated that this was not the case.

72. The management agent clarified that he took over management in August 2009. In so far as he was aware no service costs had been charged in 2008. In 2009 there were no service costs.

73. In 2010, 2011 and 2012 there were service charges. These were set out in his statement of case and supported by invoices from the firm completing the work. The service charge for 2013 was an estimate only based on the cost of the work done in 2012. All costs had been calculated using the proper percentage calculation for each apartment and had been demanded by service charge demands. He referred to documents served by him to substantiate this evidence.

THE APPLICANTS ORAL EVIDENCE

74. Evidence both in chief and under cross examination was mainly given by Mr Hayes who consulted with his wife when he felt the need to do so.

75. The Applicants agreed that the leases were binding and said that they now accepted that the common heating system was part of the service media as defined by the lease.

76. The applicants accepted that the service charges detailed in the Respondents case had all been demanded and took no issue with the procedure by which this had been done.

77. The applicants gave evidence that in their opinion the management agents had not acted reasonably because they had failed to carry out inspection in 2009. They had failed to have a gas safety certificate inspection at any time. These failures could have led to extra expense when the servicing did start in 2010. The Applicants agreed that they had no expert evidence on this point so that they really could not say one way or the other as to whether a failure to inspect in 2009 would have resulted on more cost later. They did point out that they would expect some of the common heating system to be under warranty and that warranties may be affected. That carrying out work that was not within the manufactures instructions should result in a finding that the work was done unreasonable and cannot be charged as a service charge.

78. The Applicants maintained that in their view the lease lacked clarity, but the legal handbook that they had been provided with during the purchase procedure by the vendors clearly did not refer to a common heating system.

79. The Applicants referred to enquires that had been made by their solicitor during the purchase procedure and made the point that there was no mention of a common heating system. The Applicants had not known during the purchase procedure that there was to be a common heating system.

80. The Applicants were prepared to concede that the apartments in the new build area could be charged a service charge for the service of the common heating system in the new build area. They maintained that the apartments in the refurbished area that derived no benefit from the common heating system could not be charged a service charge relating to the service of that system. It was not common sense for the persons living in the refurbished area to pay toward the service of a system from which they could never benefit.

81. In relation to the percentage used to calculate what should be charged against each apartment the Applicants gave evidence that in relation to apartment 68 the Respondents statement of

case was incorrect. The statement of case at pages 3, 4 and 5 indicates that that the Respondent used a percentage of 0.96%. That was incorrect, the Respondent had used the correct figure of 2.1% in these calculations and the higher figure had been demanded in service charge demands. The Applicants referred to the Respondents bundle page 258, that document making it clear that 2.1% had been used.

82. The Applicants asked the Tribunal to make an order under section 20C of the Act in their favour. They pointed out that the position of the Respondent during the hearing had changed. Initially they had claimed that they only had responsibility for the common heating system before in entered the apartments, but now accepted responsibility for the system in the apartments.

83. The Applicants pointed out that the Respondents had been late in the service of their case and witness statement.

84. The Tribunal addressed both parties as to whether in fact they were of the view that the lease did provide for expenditure relating to a Leasehold Valuation Tribunal case to be considered as a relevant cost in calculating service charges. Neither party were in a position to address the Tribunal with any certainty on this point. It was agreed that the Tribunal would deal with the point on the basis that the lease might provide for this, without actually determining whether in fact the lease did provide for this.

85. The Tribunal adjourned the case for deliberations to take place in the absence of the parties on 4/6/2013.

THE DELIBERATIONS

86. The Tribunal first considered the issue as to whether or not service charges for the inspection, service, maintenance and repair of the common heating system in the new build area of the complex were payable under the lease.

87. The Tribunal took into consideration the fact that only the apartments in the new build area had access to the hot water provided by this system.

88. Both parties had rightly agreed that the lease was binding and it was common ground that the leases for all apartments were drafted in the same terms.

89. The Tribunal decided that paragraph 2.1 of the Demise at page 5 of the lease provided for service charges to be calculated and they were made payable in accordance with the eighth schedule of the lease.

90. The Tribunal then considered the definitions section of the lease, pages 3 and 4 of the lease.

91. "The Estate" was wide enough to include the whole of the complex but excluded the apartments and common parts.

92. "Service media" was widely drafted and included the individual parts of the common heating system although the actual words, common heating system, were not used. The Tribunal noted that both parties had agreed on day two of the hearing that service media did include the common heating system.

93. The third schedule of the lease, page 9, describes what is included in the apartment and paragraph 9 excludes service media.

94. The eighth schedule, pages 25 and 26 deals with what can be charged as a service charge. Part 1 deals with the estate and Past 2 the main structure of the building and common parts.

95. Paragraph 1.1.2.2. includes inspecting, maintaining and repairing service media in the estate.

96. Paragraph 1.1.3.2. includes inspecting, maintaining and repairing service media within the building or common parts.

97. The Tribunal decided that linking all these provisions together, giving particular consideration to the definition of service media and the terms of paragraph 1.1.3.2., the lease gives very clear express consent for the Respondent to charge as a service charge the reasonable cost of inspecting, maintaining and servicing the common heating system.

98. The Tribunals conclusion is supported by the case Upper Tribunal decision in London Borough of Camden and Flat 8 and 45 Kennistoun House [2010] UKUT 194(LC), already referred to, paragraph 63 above and the concessions made by the Applicants during day two of the hearing referred to above.

99. The Tribunal notes that the Respondent waived any service charges relating to the bills at pages 17c and 17f of the "Applicants Comments on the Respondents Statement of Case".

100. The Tribunal decided that no service charges had been demanded for inspecting, servicing, maintaining or repairing the common heating system during 2008 and 2009.

101. The Tribunal decided that promissory estopple did not prevent the Respondent form charging reasonable service charges for the work. There had not been any promise or representation made to the effect that the Respondent would levy these charges.

102. The Applicant had challenged the qualifications and insurance cover of Mr Lamb who had been instructed to carry out at least some of the work. It was clear from the identity badge that had been provided in the bundle that Mr Lamb was a highly skilled plumber. The real question was as to whether he would have insurance to carry out this type of work and there was no evidence on this point.

103. The Applicants had argued that more work should have been done by servicing earlier and that failure to do so might have increased the cost. There was no evidence to suggest that was correct.

104. The Tribunal was satisfied that the correct percentage per apartment had been used in calculating the service charges that were demanded in respect of apartments 33, 36 and 49. The Tribunal accepted the Applicants evidence that in relation to apartment 68 the Respondent had made an error in pages 3, 4 and 5 of his statement of case. The proper percentage was 2.1%. The Tribunal therefore recalculated the service charge figures for flat 68.

105. The Tribunal was satisfied that demands for payment had properly been made in relation to each service charge demanded. See the Applicants concession in this regard above.

106. The Applicants had not actually challenged the service charges as unreasonable and the Tribunal decided that the service charges as demanded by the Respondents were reasonable. The work had been done at a reasonable cost.

107. As such the Tribunal decided that the service charges as demanded by the Respondent and particularised in the Respondents statement of claim but modified as a result of the calculations made by the Tribunal in respect of apartment 68, were both payable and reasonable.

108. All the leases are in the same terms so all the apartments are liable to pay reasonable service charges for this work.

109. The service charges listed in the Tribunals Decision of this judgement are payable by the Applicants forthwith, if they have not already paid.

110. Tribunal then considered the application in respect of section 20C of the Act. The Tribunal agreed with the Applicants that the Respondent had breached the Directions given in this case by late service of documents and failure to paginate Mr McDonald's statement and exhibits. However, the Respondents had succeeded in recovery of the whole amount that had been demanded. Payability was decided based upon consideration of very clearly drafted terms in the lease. In these circumstances the Tribunal decided to make no order.

THE TRIBUNALS DECISION

111. The following service charge amounts are payable now, if they have not already been paid by the Applicants.

112. Service charge year 2010 (total Respondents expenditure £4018.33). Payable by Applicants:

• Apartment 33	(1.22%)	£49.02
• Apartment 36	(1.74%)	£69.92
• Apartment 49	(1.01%)	£40.59
• Apartment 68	(modified to 2.1%)	£84.38

113. Service charge year 2011 (total Respondents expenditure £1033.38). Payable by Applicants:

• Apartment 33	(1.22%)	£12.61
• Apartment 36	(1.74%)	£17.98
• Apartment 49	(1.01%)	£10.44
• Apartment 68	(modified to 2.1%)	£21.70

114. Service charge year 2012 (total Respondents expenditure £304.38). Payable by Applicants:

• Apartment 33	(1.22%)	£3.71
• Apartment 36	(1.74%)	£5.30
• Apartment 49	(1.01%)	£3.07
• Apartment 68	(modified to 2.1%)	£6.40

115. Service charge year 2013 (total Respondents estimated expenditure £1442). Payable by Applicants:

• Apartment 33	(1.22%)	£17.59
• Apartment 36	(1.74%)	£25.09
• Apartment 49	(1.01%)	£14.36
• Apartment 68	(modified to 2.1%)	£30.28

116. **Section 20c of the Landlord and Tenant Act 1985.** The Applicant having raised this matter the Tribunal decided that it was just and equitable to make no order.

Mr C. P. Tonge. LLB. BA.

Chairperson.