FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case Reference	**:**	**LON/00BG/LSC/2019/0131**
Property	**:**	**The So Bow Estate, London E3 2LL**
Applicant	**:**	**Danesdale Land Limited**
Representative	**:**	**Sampson Coward solicitors**
Active respondents	**:**	**Dineschand Shah (flat 44 Windsor House)** **Alex Ehrenzweig (flat 50)** **Ashley Wang (flat 52)** **Sonia Wisinger (flat 61)** **Peter Rowson (flat 63)** **Greg O'Connor (flat 68)** **Joanna Yeoh (Flat 80)** **Hemel Shah (flat 109)** **Noora Shalaby and Tarek Shalaby (flat 119)** **Edward Robert Spurway (flat 130)** **Eleanor Wiseman (flat 10 St Agnes House)** **Manjulah Shah (flat 34 St Chloe's House)**
Other respondents	**:**	**The remaining 132 lessees**
Type of application	**:**	**For the determination of the reasonableness of and the liability to pay a service charge**
Tribunal members	**:**	**Judge Pittaway** **Mr S Mason BSc FRICS FCIArb**
Venue	**:**	**10 Alfred Place, London WC1E 7LR**
Date of decision	**:**	**25 July 2019**

DECISION

Decisions of the tribunal

The tribunal determines that

(1) the cost of repairing renewing and maintaining the Communal Heating System is recoverable by the landlord by way of service charge.

(2) the Communal Heating System includes the pipes and radiators located within the flats.

(3) 3% of the total cost of repairing renewing and maintaining the Communal Heating System shall be apportioned to the Communal Facility Area and the area for the concierge.

(4) 3% of the total cost of the charges assessments and outgoings of the Communal Heating System shall be attributed to heating the Communal Facility Area and the area for the concierge.

The application

1. The applicant seeks a determination under section 27A of the Landlord and Tenant Act 1985 as to whether certain communal boiler costs (namely flushing the entire system, including the parts that are within the flats of certain of the leaseholders) are recoverable by way of service charge; whether a percentage of such cost (if a service charge item) is recoverable as a service charge expense payable by all the flats (not just those in Windsor House); and if so the relevant percentage so chargeable to the whole estate.

2. Directions were issued on 3 April 2019 which required the applicant landlord by 12 April 2019 to notify each of the 144 leaseholders of the So Bow estate of the application and the directions and display both in a prominent position in the common parts of the estate, confirming to the tribunal that this had been done. The directions required any leaseholder who wished to make representations (in support of or opposition to the application) to do so by 26 April 2019, with provision for a case management hearing on 7 May 2019.

3. By the date of the case management hearing sixteen leaseholders had responded; the twelve listed in this decision as respondents elected to be active respondents. Only one, Mr O'Connor of Flat 68, opposed the application but without specifying his grounds of opposition. The other active leaseholders supported the freeholder's application but raised issues as to the freeholder having historically required leaseholders to maintain radiators and pipes in their individual flats.

Issues

4. Whether the maintenance, repair and renewal of the radiators, pipes, conduits and differential & control valves in the individual flats is the responsibility of the landlord (and thus recoverable by way of service charge) or the individual tenants.

5. If the responsibility of the landlord, how the costs of providing the should be apportioned between Windsor House and the whole Estate (including Windsor House).

The Law

6. The relevant legal provisions are set out in the Appendix to this decision.

The hearing

7. The applicant was represented by Mr Knight of Sampson Coward solicitors at the hearing. No respondent appeared or was represented.

8. At the end of the hearing Mr Knight handed the tribunal a copy of the decision in *Peterson v Pitt Place (Epsom) Limited* [2001] EWCA CIV 86 ("***Peterson***") to which he referred in his submissions.

Background

9. The "So Bow" development is a purpose-built estate which was constructed in 2008 and 2009 and consists of three blocks of 144 luxury apartments with undercroft parking, 24-hour concierge, landscaped gardens.

    (i) Blocks 1 and 2 are Nos.43-144 Windsor House, E3 2LL ("**Windsor House")** and include the Communal Facility Area and the concierge areas for the whole development. Communal boilers supply heating and hot water to the flats in Windsor House and heating to the Communal Facility Area and concierge areas. It is understood that there are approximately 408 radiators in the 102 flats in Windsor House and 13 radiators in the Community Facility Area and the concierge area.

    (ii) Block 3 is Nos.1-14 At Agnes House, E3 2HN; Nos.15-18 St Brides House, E3 2HN; and Nos.29-42 St Chloe's House, E3 2HN (**"Block 3"**). There are no communal boilers serving these flats.

10. Neither party requested an inspection and the tribunal did not consider that one was necessary, nor would it have been proportionate to the issues in dispute.

11. The respondents hold long leases in either Windsor House or Block 3 which requires the landlord to provide services and the tenant to contribute towards their costs by way of a variable service charge. The specific provisions of the lease and will be referred to below, where appropriate.

12. The Windsor House leases divide the respective tenant's "Annual Contribution" to service charge into two parts; a percentage for the "Estate" and a (larger) percentage for the Lifts and Communal Heating System. The "Annual Contribution" in the Block 3 leases simply provides for the tenant to contribute a percentage to the cost of complying with the landlord's covenants in clause 4 of the lease.

13. All leases contain covenants by the tenant at clause 3;

"(1) to pay (ii) to the Landlord the Annual Contribution towards the expenditure from time to time incurred by the Landlord in carrying out its obligations under clause 4….; and

(3) From time to time and at all times during the term (except and insofar as such liability is imposed on the Landlord by the provisions of Clause 4) well and substantially to repair and maintain cleanse amend and renew in every respect the Property ……..and all pipes wires ducts conduits cisterns tanks drains and other services exclusively serving the Property…."

14. All the leases contain covenants by the landlord at clause 4 (1);

"(c) Keep all the pipes wires ducts conduits cisterns tanks drains and sewers in under or upon the Estate in good repair except those pipes wires ducts conduits cisterns tanks drains and sewers serving exclusively the Property or serving exclusively any other flat in the Estate and which are the responsibility of the tenant or other tenants as appropriate….

(h) to repair renew and maintain the Communal Heating System so far as necessary for the Communal Facility Area and the area for the concierge.

(i) Pay and discharge the charges assessments and outgoings incurred in heating the Communal Facility Area and the area for the concierge by way of the Communal Heating System."

15. The Windsor House leases (but not the Block 3 leases) contain the following further landlord's covenant at clause 4(2)

"(b) To repair renew and maintain the Communal Heating System

(c) Pay and discharge the charge assessments and outgoings (including electricity) incurred in heating Blocks 1 and 2"

16. "Estate" is defined as "*the development of 144 flats…"* and "Communal Heating System*"* as the *"communal hot water and heating system for Blocks 1 and 2 the area for the concierge and the Community Facility Area…"*

The tribunal's decision

17. Having heard evidence and submissions from Mr Knight and considered the documents provided, including *Peterson,* the tribunal has made determinations on the various issues as follows.

The tribunal's jurisdiction

18. The tribunal accept Mr Knight's submission that it has jurisdiction to hear the application by reason of Mr O'Connor's opposition to the application, albeit on unspecified grounds.

Responsibility for the maintenance, repair and renewal of the radiators, pipes, conduits and differential & control valves in the individual flats

19. Mr Knight provided a report from Cook & Associates (mechanical & electrical consultants) which he submitted confirmed that the heating system for Windsor House comprises a single loop that flows in and out of each flat in Windsor House. Any issue with water contamination affects everyone on the circuit. He therefore submitted that as the radiators, pipes and other items in the individual flats are connected in one large circuit it is the Landlord's responsibility to maintain them under clause 4.

20. On the basis of Cook & Associates report and Mr Knight's submissions the tribunal have no difficulty in determining that the pipes in the individual flats are part of the one large circuit which does not exclusively any individual flat and which therefore fall within the landlord's responsibility under clause 4(1).

21. The tribunal notes that neither the tenant's obligations in clause 3 nor the landlord's obligations in clause 4 referred to by Mr Knight refer to "radiators". They are not expressly referred to in the demise of each flat. The report refers to them as part of the "one large circuit". The tribunal further notes that if the radiators are treated independently of the remainder of the circuit (as it is understood they have been in the past) this results in problems affecting the system as a whole. Accordingly the tribunal determine that the radiators should also be treated as falling within the landlord's obligations under clause 4(1) of the leases.

22. A number of the active respondents have asked the tribunal to consider the issue of past costs incurred by individual tenants. This is not an issue set out in the present application, and is therefore not a matter for this tribunal to determine.

Apportionment of the cost of repairing the Communal Heating System

23. Mr Knight explained to the tribunal that the proposed basis of apportionment is a percentage calculated on the number of radiators serving the Community Facility Area and the concierge area (13) as a percentage of the total number of radiators in the flats and these areas (421). This basis of calculation results in 3% of the cost being borne by the Estate as a whole.

24. No other basis of apportionment has been suggested and the tribunal determines that the suggested basis of apportionment is reasonable.

Name: Judge Pittaway **Date:** 25 July 2019

Rights of appeal

By rule 36(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, the tribunal is required to notify the parties about any right of appeal they may have.

If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber), then a written application for permission must be made to the First-tier Tribunal at the regional office which has been dealing with the case.

The application for permission to appeal must arrive at the regional office within 28 days after the tribunal sends written reasons for the decision to the person making the application.

If the application is not made within the 28 day time limit, such application must include a request for an extension of time and the reason for not complying with the 28 day time limit; the tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed, despite not being within the time limit.

The application for permission to appeal must identify the decision of the tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal and state the result the party making the application is seeking.

If the tribunal refuses to grant permission to appeal, a further application for permission may be made to the Upper Tribunal (Lands Chamber).

Appendix of relevant legislation

Landlord and Tenant Act 1985 (as amended)

Section 18

(1) In the following provisions of this Act "service charge" means an amount payable by a tenant of a dwelling as part of or in addition to the rent -
   (a) which is payable, directly or indirectly, for services, repairs, maintenance, improvements or insurance or the landlord's costs of management, and
   (b) the whole or part of which varies or may vary according to the relevant costs.

(2) The relevant costs are the costs or estimated costs incurred or to be incurred by or on behalf of the landlord, or a superior landlord, in connection with the matters for which the service charge is payable.

(3) For this purpose -
   (a) "costs" includes overheads, and
   (b) costs are relevant costs in relation to a service charge whether they are incurred, or to be incurred, in the period for which the service charge is payable or in an earlier or later period.

Section 19

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

   and the amount payable shall be limited accordingly.

(2) Where a service charge is payable before the relevant costs are incurred, no greater amount than is reasonable is so payable, and after the relevant costs have been incurred any necessary adjustment shall be made by repayment, reduction or subsequent charges or otherwise.

Section 27A

(1) An application may be made to the appropriate tribunal for a determination whether a service charge is payable and, if it is, as to -
   (a) the person by whom it is payable,
   (b) the person to whom it is payable,
   (c) the amount which is payable,

(d) the date at or by which it is payable, and
(e) the manner in which it is payable.

(2) Subsection (1) applies whether or not any payment has been made.

(3) An application may also be made to the appropriate tribunal for a determination whether, if costs were incurred for services, repairs, maintenance, improvements, insurance or management of any specified description, a service charge would be payable for the costs and, if it would, as to -
(a) the person by whom it would be payable,
(b) the person to whom it would be payable,
(c) the amount which would be payable,
(d) the date at or by which it would be payable, and
(e) the manner in which it would be payable.

(4) No application under subsection (1) or (3) may be made in respect of a matter which -
(a) has been agreed or admitted by the tenant,
(b) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,
(c) has been the subject of determination by a court, or
(d) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.

(5) But the tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment.

Section 20

(1) Where this section applies to any qualifying works or qualifying long term agreement, the relevant contributions of tenants are limited in accordance with subsection (6) or (7) (or both) unless the consultation requirements have been either—
(a) complied with in relation to the works or agreement, or
(b) dispensed with in relation to the works or agreement by (or on appeal from) the appropriate tribunal .

(2) In this section “relevant contribution”, in relation to a tenant and any works or agreement, is the amount which he may be required under the terms of his lease to contribute (by the payment of service charges) to relevant costs incurred on carrying out the works or under the agreement.

(3) This section applies to qualifying works if relevant costs incurred on carrying out the works exceed an appropriate amount.

(4) The Secretary of State may by regulations provide that this section applies to a qualifying long term agreement—

(a) if relevant costs incurred under the agreement exceed an appropriate amount, or
(b) if relevant costs incurred under the agreement during a period prescribed by the regulations exceed an appropriate amount.

(5) An appropriate amount is an amount set by regulations made by the Secretary of State; and the regulations may make provision for either or both of the following to be an appropriate amount—
(a) an amount prescribed by, or determined in accordance with, the regulations, and
(b) an amount which results in the relevant contribution of any one or more tenants being an amount prescribed by, or determined in accordance with, the regulations.

(6) Where an appropriate amount is set by virtue of paragraph (a) of subsection (5), the amount of the relevant costs incurred on carrying out the works or under the agreement which may be taken into account in determining the relevant contributions of tenants is limited to the appropriate amount.

(7) Where an appropriate amount is set by virtue of paragraph (b) of that subsection, the amount of the relevant contribution of the tenant, or each of the tenants, whose relevant contribution would otherwise exceed the amount prescribed by, or determined in accordance with, the regulations is limited to the amount so prescribed or determined.]

Section 20B

(1) If any of the relevant costs taken into account in determining the amount of any service charge were incurred more than 18 months before a demand for payment of the service charge is served on the tenant, then (subject to subsection (2)), the tenant shall not be liable to pay so much of the service charge as reflects the costs so incurred.

(2) Subsection (1) shall not apply if, within the period of 18 months beginning with the date when the relevant costs in question were incurred, the tenant was notified in writing that those costs had been incurred and that he would subsequently be required under the terms of his lease to contribute to them by the payment of a service charge.

Section 20C

(1) A tenant may make an application for an order that all or any of the costs incurred, or to be incurred, by the landlord in connection with proceedings before a court, residential property tribunal or the Upper Tribunal, or in connection with arbitration proceedings, are

not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant or any other person or persons specified in the application.

(2) The application shall be made—
- (a) in the case of court proceedings, to the court before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to a county court;
- (aa) in the case of proceedings before a residential property tribunal, to that tribunal;
- (b) in the case of proceedings before a residential property tribunal, to the tribunal before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to any residential property tribunal;
- (c) in the case of proceedings before the Upper Tribunal, to the tribunal;
- (d) in the case of arbitration proceedings, to the arbitral tribunal or, if the application is made after the proceedings are concluded, to a county court.

(3) The court or tribunal to which the application is made may make such order on the application as it considers just and equitable in the circumstances.

Commonhold and Leasehold Reform Act 2002

Schedule 11, paragraph 1

(1) In this Part of this Schedule "administration charge" means an amount payable by a tenant of a dwelling as part of or in addition to the rent which is payable, directly or indirectly—
- (a) for or in connection with the grant of approvals under his lease, or applications for such approvals,
- (b) for or in connection with the provision of information or documents by or on behalf of the landlord or a person who is party to his lease otherwise than as landlord or tenant,
- (c) in respect of a failure by the tenant to make a payment by the due date to the landlord or a person who is party to his lease otherwise than as landlord or tenant, or
- (d) in connection with a breach (or alleged breach) of a covenant or condition in his lease.

(2) But an amount payable by the tenant of a dwelling the rent of which is registered under Part 4 of the Rent Act 1977 (c. 42) is not an administration charge, unless the amount registered is entered as a variable amount in pursuance of section 71(4) of that Act.

(3) In this Part of this Schedule "variable administration charge" means an administration charge payable by a tenant which is neither—
  (a) specified in his lease, nor
  (b) calculated in accordance with a formula specified in his lease.

(4) An order amending sub-paragraph (1) may be made by the appropriate national authority.

Schedule 11, paragraph 2

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

Schedule 11, paragraph 5

(1) An application may be made to the appropriate tribunal for a determination whether an administration charge is payable and, if it is, as to—
  (a) the person by whom it is payable,
  (b) the person to whom it is payable,
  (c) the amount which is payable,
  (d) the date at or by which it is payable, and
  (e) the manner in which it is payable.

(2) Sub-paragraph (1) applies whether or not any payment has been made.

(3) The jurisdiction conferred on the appropriate tribunal in respect of any matter by virtue of sub-paragraph (1) is in addition to any jurisdiction of a court in respect of the matter.

(4) No application under sub-paragraph (1) may be made in respect of a matter which—
  (a) has been agreed or admitted by the tenant,
  (b) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,
  (c) has been the subject of determination by a court, or
  (d) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.

(5) But the tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment.

(6) An agreement by the tenant of a dwelling (other than a post-dispute arbitration agreement) is void in so far as it purports to provide for a determination—
(a) in a particular manner, or

(b) on particular evidence,

of any question which may be the subject matter of an application under sub-paragraph (1).