FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00BK/LSC/2018/0345**
Property	**:**	**Arthur Court, Queensway, London W2 5HW**
Applicants	**:**	**Arthur Court Freehold Limited (1) Arthur Court Management Limited (2)**
Representative	**:**	**Mr Jonathon Upton of Counsel instructed by Howes Percival LLP**
Respondents	**:**	**The lessees listed in the application**
Representative	**:**	**In person**
Type of application	**:**	**For the determination of the reasonableness of and the liability to pay a service charge**
Tribunal members	**:**	**Judge N Hawkes** **Mr L Jarero BSc FRICS** **Mr T Sennett MA FCIEH**
Venue	**:**	**10 Alfred Place, London WC1E 7LR**
Date of decision	**:**	**15 April 2020**

DECISION

Decisions of the Tribunal

The Tribunal makes the determinations as set out under the various headings in this Decision.

The background

1. Arthur Court, Queensway, London W2 5HW ("Arthur Court") is a 1930s residential block which is served by a communal heating and hot and cold water system ("the System"). Arthur Court contains 93 flats which are let on long leases of varying lengths. The lessees of 54 of the flats at Arthur Court have shares in the First Applicant ("the Landlord"), and all lessees are members of the Second Applicant ("the Management Company").

2. The Applicants seek a determination pursuant to section 27A(3) of the Landlord and Tenant Act 1985 ("the 1985 Act") as to the amount of estimated service charges which are payable by the Respondents in respect of proposed work to the System at Arthur Court ("the Application").

3. Section 27A(3) of the 1985 Act provides:

   (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. The 93 Respondents to this application do not comprise a single group with a common representative. Many different lessees and/or their non-legally qualified representatives attended the hearing in person in order to address the Tribunal; some of them made representations as individuals and some made representations on behalf of various different groups of lessees.

5. Part-way through the hearing, an extremely unpleasant and threatening anonymous letter dated 23 July 2019, which runs to five pages, was received

by two current directors, by a former director of the Management Company, and by a lessee ("the Letter").

6. The writer of the Letter threatened to throw acid in their faces and those of their solicitors, families and friends. The Letter also contains appalling homophobic abuse. The Letter has resulted in a Metropolitan Police investigation and the writer of the Letter appeared to be seeking to coerce the current directors of the Applicant companies to resign.

7. The Letter was considered by the Tribunal in application reference *LON/00BE/LAM/2019/0023* and the decision in that case records:

"The Letter was condemned by lessees at the hearing. The [lessees] state that, on being made aware of the Letter, by return emails the majority of the lessees 'deplored the contents of this letter'. They described the letter as 'appalling' and as 'written by a total nutter'.

...

In response, the Tribunal was referred to two emails as lacking in sympathy. However, it was accepted that a significant number of lessees had responded to the Letter by publicly stating that the Letter is abhorrent and that the writer of this Letter, which is the subject of an ongoing police investigation, cannot be considered to be representative of the lessees at Arthur Court."

8. The Tribunal recognises the impact which the appalling threats and abuse which were contained in the Letter will have had on those who were targeted.

9. The subject matter of this litigation is clearly of very great importance to all of those who attended and/or were represented at the hearing. At times, there were so many participants and observers that chairs and tables had to be moved and the door to the hearing room kept open in seeking to accommodate them.

10. Many of those who addressed the Tribunal very properly stressed that they only represented themselves or a limited group of others. However, there were some recurring themes. These included concerns that lessees would be unable to pay the service charges which have been demanded and will be forced to sell their homes. One of the lessees stated that he had received a bill seeking payment in the region of £270,000 in respect of the entirety of the Applicants' proposed capital expenditure programme ("CAPEX") for Arthur Court.

11. The subject matter of this Application is limited to service charges which are, on average, in the region of £18,000 (excluding VAT and professional) fees per flat. Further, the Tribunal accepts that it is not for the Applicants or for the Tribunal to investigate the financial means of particular individual lessees

although we can consider financial impact in broad terms (see *Waaler v Hounslow London Borough Council* [2017] 1 WLR 2817 which is considered below).

12. Accordingly, the Tribunal is unable to take into account the statements made by individuals concerning the entirety of the CAPEX service charge demands with reference to their specific personal circumstances. These included statements that they will be forced out of their family homes; will have insufficient equity in their properties to cover the total service charge bills; and that, if the total sums demanded are found to be payable, they will have insufficient funds left available to put down the deposit for a rental property. However, we have heard all that has been said and recognise that these pressing concerns will have significantly increased the stress of conducting this complex litigation.

13. The recurring themes also included reports of periods when flats were without a supply of heating and hot water; reports of other defects to the System; statements that there has been a history of underinvestment in Arthur Court; and the Tribunal was also informed that no adequate reserve fund has been built up. Some of these matters were raised both by the Applicants and by certain of the Respondents. However, although there is some common ground, it was also clear that distrust has arisen between the parties.

14. There are a number of other Court and Tribunal proceedings concerning Arthur Court which are ongoing, including but not limited to proceedings in the High Court, a no-fault right to manage application, and this Tribunal made a determination in respect of application reference *LON/00BE/LAM/2019/002*, an appointment of manager application, on 4 February 2020.

15. The Tribunal sets out these matters by way of background and in order to put the hearing in context. As was explained at the hearing, the jurisdiction of the Tribunal is limited to the subject matter of this application, which the Tribunal must determine in accordance with the relevant legislation and case law. Accordingly, the Tribunal cannot determine all of the disputes which were referred to during the course of the hearing, including concerning dealings with the reserve fund and the company law matters which fall to be determined by the Court rather than by the Tribunal.

16. As indicated above, the subject matter of this application has a value of approximately £18,000 (excluding VAT and professional fees) on average per flat, although it should be noted that the service charge costs are not divided equally between the Respondents.

The hearing

17. This application was originally listed before a differently constituted Tribunal in January 2019. In January 2019, the proceedings were adjourned and the

final hearing took place before this Tribunal on 12 July 2019, 15 July 2019, 24 September 2019, 26 September 2019, 30 September 2019, 1 October 2019, 3 October 2019, 28 January 2020 and 29 January 2020.

18. The Tribunal carried out an inspection on the afternoon of 8 November 2019 and reconvened in order to reach its determinations on 7 February 2020.

19. The Applicants were represented by Mr Jonathan Upton of Counsel at the hearing and the Respondents were not legally represented. As stated above, many of the Respondents attended and made submissions, and some of those who spoke made submissions on behalf of themselves and others.

20. In particular, Mr Mumford represented himself and a number of other lessees. Mrs Saada also made representations on behalf of a number of lessees. She relied upon her own submissions and also upon a skeleton argument which was prepared by Mr Richard Granby of Counsel for the hearing of January 2019. Mr Granby did not attend the hearing before this Tribunal.

21. Attendance at the hearing varied from day to day in accordance with the lessees' other commitments and the degree to which they were active participants. Those who attended in order to actively participate in the proceedings included Mr Mumford, Mr Loha, Mrs Saada, Mr Kalagouris, Ms Birkinshaw and Mr Gazaleh. Professor Puvia also attended and participated in July.

22. The Tribunal Case Officer's attendance sheets, which include further information including the details of Counsel who attended on behalf of Mrs Saada on 24 September 2019 are located at Alfred Place, which has been closed due to the Covid 19 pandemic. Accordingly, the Tribunal is unable to incorporate this information into its decision.

23. Some of the Respondents attended as observers. References to "the Respondents" below are references to those Respondents who were making representations and on whose behalf representations were being made at the material time.

24. The hearing, inspection and reconvene in this matter lasted 10 and a half days in total and the material before the Tribunal is extensive. Following 7 February 2020, further communications have, of course, taken place between the Tribunal members in order to prepare this decision.

25. In reaching this decision, the Tribunal has spent a considerable amount of time reviewing evidence, notes and submissions. In order to keep the decision to a manageable length, the Tribunal has not sought to reproduce all of this material below and has focussed on setting out the information which is needed in order to understand the determinations which have been made.

The proposed work

26. The communal heating and hot water plant serving Arthur Court is located inside a boiler room which is situated at basement level. The cold water tanks which serve the flats are located in a tank room which is situated on the roof of the block. Pipework is built into the structure of the building which extends from the plant in the basement up to roof level. Some of the plant is thought to have been manufactured around 30 years ago and other elements of the System are believed to date back to the 1930s, when the block was constructed. At the time of the hearing, two out of three boilers in the boiler room were working.

27. As regards the pipework, the Tribunal was informed that the heating pipework is routed through the basement at high-level in the corridors. It then rises in several locations at the perimeter of the building with branches serving radiators at ground floor level. The Tribunal was told that pipework runs within the structure of the building in a ladder type system with vents at roof level.

28. The Tribunal was informed that hot water circulation to the flats is provided by flow and return pipework with Pullen secondary hot water pumps. The pipework rises in the structure of the building to serve the taps in the kitchens and bathrooms. The main cold water pipework rises through the building to the six cold water storage tanks on the roof. It is thought that a branch at each level provides drinking water in the kitchens. Cold water service pipework is extended down from the roof tanks through the block to serve the non-drinking water outlets.

29. The Applicants state that:

(i) The heating system has an inherent fault in that it is unbalanced. In other words, the flats situated on the higher floors in the building receive worse flow than those on the lower floors. It is not possible to balance the heating system because there are no commissioning valves installed.

(ii) The cold water pressure is low and when the water utility company occasionally reduces the pressure further the mains water pressure is too low to fill the tanks on the roof. This effectively isolates the mains water supply to the upper floor flats.

(iii) Residents have complained that they cannot isolate the hot and cold water services serving their flats as valves are now seized up or concealed in boxing.

30. During the course of the hearing, the Tribunal was referred to photographs of cross-sections of corroded pipework samples, the origin of which was unclear. The Applicants' case that the pipework requires replacement is not simply

based on these photographs. They assert that there are problems with flow and cross overs and point to the age of the System.

31. It is common ground that there have been periods of time when flats have been without a heating or hot water supply and when the service has been unsatisfactory due to defects in the System.

32. The Tribunal was informed that new boards of directors of the Applicant companies were elected in 2016. In 2017, the Applicants instructed Flatt Consulting Limited ("Flatt Consulting") to conduct a review of the System at Arthur Court. Flatt Consulting prepared their first report in May 2017 and, at this stage, set out three options for replacing the System.

33. Extensive flushing of the existing System was carried out in the summer of 2017. The Applicants state that the flushing failed to remove blockages in the pipework. Some of the Respondents state that the System has functioned much better since the flushing was carried out.

34. In March 2018, Flatt Consulting recommended the replacement of all of the heating and hot water pipework and boiler plant at Arthur Court with new boilers installed at roof level, the installation of a new cold water booster set and break tank and heat meters installed in a heat interface unit ("HIU") inside each flat. The Applicants accepted Flatt Consulting's proposal and it is their intention to run both the new and the existing systems in tandem until all flats are connected to the new system.

35. Further possible options were subsequently reviewed by Flatt Consulting but their recommended option is the installation of new communal gas boilers at roof level with an HIU serving each flat.

36. The function of the HIU is said to be the equivalent of a combi-boiler on a communal system and the Tribunal was informed that it includes a meter as required by The Heat Network (Metering and Billing) Regulations 2014. However, unless the leases are varied, the charges payable in respect of the provision of services will remain as set out in the Respondents' leases. It was initially proposed that the HIUs would be located inside the Respondents' flats but it is now the Applicants' intention to locate the HIUs in the communal corridors.

37. Mr Levy, a Director of the Applicant companies and a lessee, was called to give evidence of fact concerning communications with leaseholders regarding the Applicants' proposals. Mr Upton stated that it was always intended that the works to connect the flats to the new system would be undertaken as a separate phase. For example, the Management Company stated in a notice of estimates dated 23 October 2018:

"Once phase 1 of the proposed works is completed the new boilers will be connected to the existing pipework to continue to provide services through

these pipes allowing flat owners time to transfer to the new system … Flat owners will be aware that the current state of the existing system is very poor and [the Company] will ensure it meets its lease obligations."

The procedural issues

12 July 2019

38. The Applicants' estimate of the cost of the proposed work to the elements of the communal heating and hot and cold water system which are situated outside the Respondents' flats ("Phase 1") has increased following completion of the tender process, which took place after the Application had been issued. Further, no determination in respect of the proposed work within the Respondents' flats in connection with the new system ("Phase 2") was sought by the Applicants in the Application.

39. The Applicants' position had initially been that it would be for the Respondents' to carry out the Phase 2 work themselves. However, the Applicants now accept that the Management Company is responsible for carrying out the Phase 2 work. At the commencement of the hearing, the Applicants estimated the cost of Phase 2 to be £1,536,000, excluding VAT.

40. On 12 July 2019, Mr Upton applied to amend the scope of the Application to cover both Phase 1 and Phase 2 and to reflect the increase in the estimated cost of the Phase 1 work following the completion of the competitive tender process.

41. In the Application, which is dated 18 September 2019**,** the cost of the Phase 1 work was estimated to be in the region of £903,000 but, following the completion of the competitive tendering process, the estimated cost increased to £1,251,812.29 (excluding VAT) plus the cost of preliminaries.

42. The Respondents opposed Mr Upton's application to amend on the grounds that they would have insufficient time in which to prepare their case if the scope of the Application changed. They informed the Tribunal that they had only become aware of the Applicants' proposal to seek a determination in respect of the Phase 2 work the day before the hearing when they received Mr Upton's skeleton argument.

43. In response, Mr Upton stated that the Respondents had been aware of the revised estimated cost of the Phase 1 work since October 2018, having been served with the notice of estimates on 23 October 2018. The Tribunal was referred to evidence that the Respondents had also been served with service charge demands which reflected the revised increased cost of the Phase 1 work. This was not disputed by the Respondents who, as indicated above, were extremely concerned by the sums claimed by the Applicants in the service charge demands which they had received.

44. In addition, the Tribunal was informed that the Applicants' updated case concerning Phase 1 had been set out in the Applicants' January 2019 skeleton argument and that the Respondents had therefore had some months in which to consider it.

45. The Tribunal accepted the Respondents' submissions that the scope of the Application should not be extended so as to include a determination in respect of the estimated cost of the Phase 2 work, and dismissed the Applicants' application to amend insofar as it related to Phase 2.

46. The estimated cost of the Phase 2 work, including VAT, was over £1.8 million and an average of approximately £20,000 per flat. The Respondents who were present had only received notice of the Applicants' proposal to seek a determination in respect of Phase 2 the day before the hearing was due to start. It was not clear that those Respondents who were not actively participating in the proceedings had received any notice that the Applicants no longer maintained that the lessees should carry out the Phase 2 work themselves (a position which, if correct, would have given the lessees a degree of control over both the timing and the cost).

47. The Tribunal was of the view that, in all the circumstances, any lessees who had chosen not to actively participate in these proceedings on the basis that they concern Phase 1 alone should have the opportunity to participate in any further application concerning the payability of the sums now claimed in respect of the Phase 2 costs from the directions stage.

48. For these reasons, the Tribunal concluded that it would not make any determination in respect of the payability by the lessees of the estimated Phase 2 costs, whilst recognising that it might be asked to consider the nature of the proposed Phase 2 work in the course of making a determination in respect of Phase 1.

49. Some of the Respondents argued that, if it could be established that Phase 2 could not be carried out, the Phase 1 costs would not be reasonably incurred. In the absence of the successful completion of both Phases 1 and 2, the Respondents would be left with an incomplete system.

50. The Tribunal notes that this submission does not appear to be dependent upon whether Phase 2, which was always contemplated, is to be carried out by the Applicants or by the lessees themselves as originally proposed. Further, it was not explained why it might potentially not be possible to carry out work within the flats to connect them to a new communal system.

51. In any event, the Tribunal made it clear that it would remain open to the Respondents at the hearing of this Application to challenge any aspect of the Applicants' expert evidence concerning Phase 1, including on the basis of any matters relating to Phase 2. All challenges to the Phase 1 work, including on

the basis of any evidence that Phase 2 would be impossible, fell to be considered at this hearing.

52. As regards the proposed amendment of the Application to reflect the revised, post-tender estimated cost of the Phase 1 work, the figure initially put forward could only ever have been regarded as provisional until the tender process had taken place. The Respondents had been aware of the revised estimated cost of the Phase 1 work since October 2018 and a determination concerning the Applicants' pre-tender estimate would be unlikely to be of any benefit to the parties.

53. Due to the parties' limited availability, the hearing dates were spread out. The break between 15 July 2019 and 24 September 2019 would give the Respondents further time in which to prepare their case in respect of the Phase 1 work, taking into account the up to date figures and any matters they wished to raise concerning the impact of the proposals for Phase 2 on the reasonableness of Phase 1.

54. In all the circumstances, the Tribunal found that it was fair and just in accordance with the overriding objective to allow the Applicants' application insofar as it concerned the Phase 1 work.

55. The Tribunal granted the Applicants permission to amend the application to claim the relief sought at paragraphs 1, 54(i) and 54(ii) of the Applicants' skeleton argument dated 11 July 2019. The Tribunal was informed that this document had been served on the Respondents and the relevant paragraphs were also read out loud at the hearing. They provide as follows (the "Proposed Works" are the Phase 1 works):

1. This is the hearing of an application dated 18.9.18 ("the Application") made pursuant to s.27A(3) of the Landlord and Tenant Act 1985 ("the 1985 Act") for a determination that, if costs were incurred on works to replace the heating and hot water system at Arthur Court, Queensway, London, W2 5HW ("Arthur Court"), a service charge would be payable and the amount payable.

54. In the premises, the tribunal is invited to make a determination that:

(i) if costs were incurred on the Proposed Works, a service charge would be payable for the costs by the Respondents to the Company on account in advance in accordance with the Sixth Schedule to the lease.

(ii) The estimated cost of the Proposed Works in the sum of £1,251,812.29 excluding VAT (to be apportioned between leaseholders in accordance with the percentages in the leases of the flats) is reasonable.

56. As the Respondents had sought to take issue with many of the charges contained in the service charge demands and the Applicants had sought a

determination in respect of Phase 2, the Tribunal emphasised that it was open to any of the parties to issue a further application concerning matters which were not currently before the Tribunal.

57. Mrs Saada stated that lessees who were not in attendance and who were not represented by any person who was present at the hearing might wish to seek an adjournment in light of the amendment of the application to reflect the increased cost of the Phase 1 work. She said that some of the Respondents live abroad. The Tribunal explained that it could only consider an application from such a lessee if the lessee made the application or instructed another person to make the application on their behalf. The Tribunal could not determine an application which had not been made.

58. One of the Respondents unfortunately fell ill during the afternoon of 12 July 2019. The hearing was immediately brought to an end and an ambulance was called. The Tribunal was subsequently informed that the lessee had thankfully made a good recovery and he was present on all further hearing dates. The hearing ended at 3.10pm on 12 July 2019.

15 July 2019

59. On the morning of 15 July 2019, the Tribunal was provided with numerous emails from lessees requesting an adjournment of the hearing. None of these lessees attended the hearing or sent a representative to attend on their behalf.

60. It was clear that there was considerable concern regarding the total sums demanded by the Applicants by way of service charges as well as concern regarding the amendment to the Application to reflect the revised, post-tender, estimated cost of the Phase 1 work.

61. The Tribunal reiterated that it was only going to make a determination in respect of the estimated Phase 1 costs and that any person seeking a determination in respect of any of the other sums claimed in the service charge demands would need to make a separate application.

62. The Tribunal determined that it would not be in accordance with the overriding objective to adjourn the hearing. The Application as originally drafted had concerned the proposed work in connection with the communal System up to the door of the Respondents' flats, that is the Phase 1 work.

63. The lessees had been aware of the Applicants' revised estimate of the cost of the Phase 1 work since October 2018. Accordingly, although the figure now relied upon was not in the application, it was not new to the Respondents. The proceedings were at an early stage and it was still open to the absent lessees to either attend or to instruct another person to attend on their behalf for the remainder of the hearing.

64. It was common ground that the lessees of some flats had experienced periods without any heating and hot water and it was of practical importance that progress be made in determining the disputes concerning the proposed work to the communal boilers.

65. Further, an adjournment on day two of the trial would result in significant wasted legal costs which would be likely to be payable by some or all of the Respondents, whether as lessees or as shareholders of one or both of the Applicant companies. In all the circumstances, the Tribunal determined that it was fair and just to proceed with the hearing.

66. On 15 July 2019, the Tribunal heard oral evidence of fact from Mr Levy. Mr Levy started to give evidence just after 11 am, when the Tribunal permitted Mr Upton to ask him some supplemental questions. The Tribunal took an extended lunch adjournment from 12 noon until 1.25pm to give the Respondents additional time to prepare their cross-examination. This was with a view to seeking to ensure that their approach was focussed and that questions were not duplicated. The Tribunal sat late until shortly before 5 pm to enable the Respondents to conclude their cross-examination of Mr Levy.

67. Some of the questions which were asked of Mr Levy by the Respondents concerned privileged information or were matters for the heating experts, for the managing agents, or for legal submissions from Mr Upton. This was understandable because the Respondents were acting in person and they were unfamiliar with Tribunal proceedings. However, the Tribunal sought to make clear the limited nature of Mr Levy's role in these proceedings.

68. Following a general discussion, Mr Upton stated that between 15 July 2019 and the resumption of the hearing on 24 September 2019, the Applicants would carry out a competitive tender in respect of both Phases 1 and 2 together. This was in order that any reduction in the cost of the Phase 1 work caused by enlarging the scope of the project could be taken into account by the Tribunal.

69. It was agreed that a copy of the specification would be provided to the Respondents as soon as it had been drawn up in order to enable them to simultaneously obtain alternative quotations based on the specification should they wish to do so. The Applicants stated that they would also invite the Respondents to nominate contractors. However, the Respondents indicated that they would prefer to obtain their own alternative quotations based on the Applicants' specification.

70. It was agreed that, if the Respondents proceeded in this manner, the parties would simultaneously exchange quotations. The Tribunal stated that it would admit the proposed additional evidence on this basis. The Tribunal's determination would therefore be in respect of the updated evidence supplied by the parties concerning the Phase 1 costs and would include all matters concerning Phase 1. The provision of a full specification for Phase 2 would enable the Respondents to consider further whether or not they wished to

raise any objections to Phase 1 based on the Applicants' proposals in respect of Phase 2.

24 and 26 September 2019

71. Prior to the resumption of the hearing on 24 September 2019, the threatening and abusive Letter which is referred to above was sent out. At the commencement of the hearing on 24 September 2019, the Tribunal informed the parties that it was aware of the Letter and stressed that the Tribunal would not tolerate threats or abuse of any kind in the conduct of these proceedings.

72. Further applications on the part of the Respondents to adjourn the hearing then fell to be considered. It was submitted that:

(i) most people at Arthur Court did not want the proposed work to go ahead;

(ii) the condition of the building had changed since the application had been made because a second boiler serving the block had since been repaired and there were proposals to repair the third boiler;

(iii) the application was founded on a fallacy;

(iv) the proposed work could not take place for fire safety reasons;

(v) the hearing should not go ahead when the scope of the Application kept changing; and

(vi) there was also an attempt to raise company law issues concerning the directors of the Applicant companies.

73. Counsel attended on behalf of the lessees who were represented by Mrs Saada, with instructions limited to requesting an adjournment. He submitted that the hearing should be adjourned for the following four reasons:

(i) Phase 1 should not be considered in the absence of a costing in respect of Phase 2.

(ii) He had been informed that there were lessees who had not received notice of the proceedings.

(iii) There were ongoing proceedings in the Companies Court and the relief sought in those proceedings included an order compelling the Applicants to call general meetings and table resolutions for the removal of the current boards

of directors. In all the circumstances, Mr Upton did not have a true mandate to make submissions on behalf of the Applicants.

(iv) Fourthly, he had been informed that the hearing had come to an end on 15 July 2019 when Mr Loha was only half way through his cross-examination of Mr Levy.

74. The Tribunal determined that it would not adjourn the hearing. As regards Counsel's submissions, firstly, the costings in respect of Phase 2 had now been obtained. Secondly, any person who wished to make an application for an adjournment would have to do so in their own name, either themselves or through a representative. It would not be appropriate to adjourn part-way through a lengthy and costly hearing on the basis of general assertions concerning unnamed tenants.

75. As regards the third point, Mr Upton confirmed that his solicitors had given notice pursuant to Rule 14 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 ("the 2013 Rules") that they represented the Applicants. He also confirmed to the Tribunal that both he and his solicitors remained authorised to represent the Applicants. The Respondents did not seek to dispute Mr Upton's statement that notice had been given pursuant to Rule 14 but rather some of the Respondents took issue with the conduct of the current directors of the Applicant companies.

76. Rule 14 of the 2013 Rules was considered by the Upper Tribunal in *Arnaldo Rotenberg, Sandra Rotenberg and Others v Point West GR Limited [2019] UKUT 68 (LC).* At paragraphs [34] to [36] of the judgment in that case, the Deputy Chamber President stated:

"34. Representation is dealt with by rule 14. The following parts of the rule are relevant to this appeal:

'Representatives

(1) A party may appoint a representative (whether legally qualified or not) to represent that party in the proceedings.

(2) If a party appoints a representative, that party must send or deliver to the Tribunal and to each other party written notice of the representative's name and address.

(3) Anything permitted or required to be done by or provided to a party under these Rules, a practice direction or a direction may be done by or provided to the representative of that party except—

(a) signing a witness statement; or

(b) sending or delivering a notice under paragraph (2), if the representative is not a person who, for the purposes of the Legal Services Act 2007 , is an authorised person in relation to an activity which constitutes the exercise of a right of audience or the conduct of litigation within the meaning of that Act.

(4) A person who receives due notice of the appointment of a representative—

(a) must thereafter provide to the representative any document which is required to be sent to the represented party, and need not provide that document to the represented party; and

(b) may assume that the representative is and remains authorised until receiving written notification to the contrary and an alternative address for communications from the representative or the represented party.'

35. The reference in rule 14(3)(b) to a representative who is an authorised person for the purposes of the Legal Services Act 2007 in relation to the exercise of a right of audience or the conduct of litigation means a person authorised by an approved regulator under the Act (section 18 , 2007 Act). As one would expect, the Law Society is an approved regulator and a solicitor is an authorised person in relation to the activities specified in the rule (Sch.4, para. 1, 2007 Act).

36. The effect of rule 14(3)(b) is therefore that a solicitor who has been authorised by the Law Society to conduct litigation is able to give notice to the FTT and to every other party that he or she has been appointed as the representative of a party, with the consequences provided for by rule 14(4). A party who is informed by a solicitor that they represent another party in proceedings is obliged to communicate directly with the solicitor, and may assume that the solicitor is and remains authorised to act in the proceedings for that party until they receive written notification to the contrary and an alternative address for communications from the solicitor or the represented party. No further assurance is required than the statement of the solicitor that he or she has been appointed."

77. The Tribunal was satisfied that Mr Upton and his instructing solicitor were authorised to act on behalf of the Applicants on the basis of their statements that they had been and continued to be appointed by the Applicants. It was not open to the Tribunal to go behind a notice served pursuant to Rule 14 of the 2013 Rules and any company law disputes fall to be determined by the Court rather than by the Tribunal.

78. The Tribunal noted that two people had cross-examined Mr Levy on 15 July 2019 after Mr Loha and that the last person to do so had been Mrs Saada. Accordingly, the Tribunal did not accept that the day had ended half-way through Mr Loha's cross-examination. Further, the Tribunal noted that the Respondents had had the opportunity to cross-examine Mr Levy for over 3

hours; and that Mr Levy had a limited role because he was solely a witness of fact when the issues in dispute primarily turned on the expert evidence. In all the circumstances, it would not have been a proportionate use of the Tribunal's time to hear further questioning of Mr Levy in any event.

79. As regards the further submissions, the Tribunal reiterated that it had no jurisdiction to determine disputes concerning directors' duties and/or any other company law matters. The Tribunal had dismissed the Applicants' application to amend the Application to include a determination in respect of the payability of the estimated cost of the Phase 2 work. The Tribunal had allowed the application to amend to reflect the revised post-tender costing in respect of Phase 1 and had then agreed to admit further evidence of costings from both parties. There were no further applications before the Tribunal to alter the scope of the Applicants' application.

80. The fact that assertions were being made concerning the weakness of the Applicants' case was not a good reason for granting an adjournment because the Tribunal would need to hear the evidence and submissions in order to assess the merits of the Applicants' case.

81. Further, an adjournment on day three of the trial would result in significant wasted legal costs which would be likely to be payable by some or all of the Respondents, whether as lessees or as shareholders of one or both of the Applicant companies. In all the circumstances, the Tribunal determined that it was fair and just to proceed with the hearing.

82. The Tribunal began to hear evidence from Mr Sales of Flatt Consulting at 12.10 pm. The Tribunal granted Mr Upton permission to ask Mr Sales supplemental questions and the evidence in chief continued until 1.12 pm. The Respondents cross-examined Mr Sales from 3.17 pm until around 4.30 pm on 24 September 2019 and for the whole of the day, that is until about 4.30 pm, on 26 September 2019.

83. There were certain questions which the Respondents asked of Mr Sales, for example concerning the presence of asbestos at Arthur Court, which Mr Sales was unable to answer because they related to matters which were outside the scope of his instructions. The Applicants had instructed the current managing agents of Arthur Court, Ringley Group ("Ringleys"), to attend to these matters.

84. Following the conclusion of the cross-examination of Mr Sales, the Respondents applied for permission to rely upon expert evidence out of time. They proposed to call Mr Sharpless, a heating engineer who has carried out repair and maintenance work to the System at Arthur Court over a long period of time, to give expert evidence on their behalf. If Mr Sharpless were not permitted to give evidence, the Respondents would have had no expert evidence to put before the Tribunal.

85. Mr Upton stated that he was instructed to oppose the Respondents' application on the grounds that the Respondents had had ample time in which to instruct an expert; no reason had been given for the delay; the Applicants' application has at all times been an application concerning the Phase 1 work; and, insofar as the Respondents may seek to argue that they had anticipated that their applications to adjourn the hearing would be successful, those applications were clearly misconceived.

86. Mr Upton also expressed concern that, in documents already contained in the hearing bundle, Mr Sharpless had made comments about conversations with Mr Levy which had not been put to Mr Levy when he had given evidence. However, Mr Upton indicated that his opposition to the Respondents' application was tempered by the fact that he was instructed to seek permission to call Mr Banyard of Ringleys in order to cover aspects of the expert evidence which were outside the scope of Mr Sales' instructions.

87. The Respondents stated that it had been difficult for them to instruct an expert because they were not a single group of people with a common representative. They had only just become aware that Mr Sharpless was potentially available to give evidence and they had not had sufficient financial resources to instruct any other expert.

88. Mr Mumford stressed that, for the Respondents, these proceedings are not an intellectual exercise but rather they are a life changing event. He stated that he had been asked to pay a service charge of £270,000 in total and £105,000 in respect of proposed work to the communal heating and hot and cold water system (this is understood to be a reference to both Phases 1 and 2). He submitted that Mr Sharpless's evidence should be admitted having regard to the importance of this case to the Respondents. Mr Loha stated that the Tribunal should have regard to the asymmetry between the parties both in terms of relevant experience and in terms of financial resources.

89. In considering the two applications to admit expert evidence, the Tribunal had regard to the overriding objective and noted that this case is of high value, with well over £1 million in total in dispute; it is of sufficient complexity to have been listed for a number of days; and (although limited to a determination in respect of the estimated Phase 1 costs) the outcome will potentially have a significant financial impact on lessees, particularly in a context in which further work to Arthur Court is likely to be required.

90. The Tribunal was satisfied that Mr Sharpless was qualified to give expert evidence by virtue of his extensive experience as a heating engineer and his knowledge of the System in the building. The Tribunal considered that it would be of assistance to hear from an expert put forward by the Respondents and also to hear from an expert whose role it was to answer the questions which had been raised by the Respondents concerning matters which fell outside the scope of Mr Sales' instructions.

91. Neither party would be wholly taken by surprise by the additional expert evidence because some documentation setting out Mr Sharpless's opinion and some documentation concerning the matters to be covered by Mr Banyard had already been disclosed. Further, the parties would be directed to file and serve expert reports which would be limited to no more than 5 pages (not including the matters required by Rule 19 of the 2013 Rules); the content of the reports would be limited to specific relevant issues; and the parties would have time in which to consider each other's expert reports before the experts gave oral evidence.

92. Mr Sharpless's evidence would be limited to his expert opinion concerning the proposed work to the communal System and any evidence of fact concerning conversations which had taken place would be excluded.

93. Mr Banyard's evidence would be limited to his expert opinion concerning the building works which are associated with Phase 1. The Tribunal asked that any relevant fire safety reports and asbestos reports held by the Applicants be disclosed together with Mr Banyard's report because the Respondents had asked to have sight of these documents and the Tribunal accepted that they were potentially relevant.

94. The Tribunal determined that, on the basis set out above, it was fair and just in all the circumstances to allow the applications to extend time for the service of expert evidence.

30 September 2019

95. On 30 September 2019, Mr Sales was re-examined and questioned by the Tribunal. He finished giving his evidence at 2.40 pm. Mr Banyard started giving evidence immediately following the conclusion of Mr Sales' evidence and he was questioned until 4.50 pm.

96. On 30 September 2019, the Tribunal noted that a key concern on the part of the Respondents was the affordability of the proposed work to the System. The Tribunal put the parties on notice that it would welcome submissions from the parties, in due course, concerning whether it would be open to the Tribunal to take affordability into account, for example, in the context of the scheduling of the proposed work. The question had arisen following a consideration of paragraph 26.580 of Emmet & Farrand on Title and the Tribunal provided the parties with copies.

2 October 2019

97. On the morning of 2 October 2019, the Tribunal was informed that Mr Sharpless had very limited availability for personal reasons. The Tribunal therefore permitted the Respondents to call Mr Sharpless immediately, even though Mr Banyard was part-way through giving his evidence.

98. Mr Sharpless started giving evidence shortly after 10 am and he gave evidence for the whole day. The Tribunal is grateful to Mr Sharpless for attending in what were difficult circumstances.

3 October 2019

99. Mr Banyard gave evidence from 10.30 am until around 12.20 pm on 3 October 2019. Mrs Saada then made an application for the Tribunal to carry out an inspection. Mrs Saada's application was supported by all parties, including by Mr Upton on behalf of the Applicants.

100. The Tribunal determined that it would be in the interests of justice for the Tribunal to carry out an inspection in order to enable the Tribunal to see first-hand the layout of the communal System, the nature of the block, and a number of sample flats.

101. In light of the question raised by the Tribunal on 30 September 2019, Mr Upton applied for permission to call expert evidence concerning the possibility of scheduling the proposed work over a longer period of time in order to spread the costs payable by the lessees. His clients' primary position remained that the proposed work should be carried out as soon as possible but they were open to exploring the possibility of carrying out the work over a longer period.

102. This application was opposed by certain of the Respondents, including by Mr Mumford and Mr Loha. They were of the view that the best possible option for the lessees would be for the Applicants' Application to be dismissed and for any proposal which might be considered to be more reasonable than the Applicants' primary case (such as to have the Phase 1 work scheduled over a longer period of time) to be the subject of a fresh application.

103. Mr Mumford explained that, with the benefit of hindsight, he would have presented his own case differently and that a fresh application would give him the opportunity to do this. Mr Loha stressed the difficulties of being a litigant in person and expressed the view that the Applicants' experts had not given independent evidence.

104. Mr Upton did not accept that the Applicants' experts had not been independent and stated that representations concerning the evidence were, in any event, a matter for submissions rather than a reason for refusing to grant permission for evidence to be adduced concerning scheduling.

105. The Tribunal reiterated that, if the work were scheduled over a longer period of time, the service charge payments would be spread out, potentially making them more manageable for lessees. To dismiss the application and to require the Applicants to issue a fresh application concerning the Phase 1 work scheduled over a longer period of time than initially proposed would result in extensive wasted legal costs. Some or all of these costs would be likely to be

payable by the Respondents themselves, whether as lessees or as shareholders of the First and/or Second Applicant companies.

106. The Tribunal had already heard many hours of evidence concerning the proposed Phase 1 work and the proceedings were time consuming, in part due to the number of different people and groups of people cross-examining and making submissions and applications.

107. The Tribunal had, from the outset, asked the Respondents to consider whether or not they could appoint one or two common representatives in order to save time and expense. They had not done so and the Tribunal accepted that individual Respondents had a right to make their own representations and to ask their own questions, if these were not a repetition of what had already been said by others. There remained numerous different advocates and any further proceedings were likely to be conducted at a similar pace.

108. The Tribunal noted the practical importance of the heating and hot and cold water System to the residents of Arthur Court and considered that it was important to seek to avoid further delay. Some of the Respondents had pointed out that Phase 1 will not result in a fully functioning new heating system because the Phase 2 work will still need to be carried out. The Tribunal accepted this proposition but was not satisfied that this was a valid reason for delaying the making of a determination in respect of Phase 1.

109. Phase 1 includes the important issue of the work which is needed to the communal boilers serving Arthur Court and, if Phase 1 takes place, this will clearly bring a full new system much closer to fruition. The Applicants' proposals in respect of Phase 2 had been specified and costed and any objections to Phase 1 based on the proposals in respect of Phase 2 could and should be made at the hearing. There would then be a limited amount of material to consider in respect of any further application concerning Phase 2.

110. In all the circumstances, the Tribunal determined that the most efficient and proportionate use of its resources and of the resources of the parties would be to consider all issues relevant to the reasonableness and payability of the estimated cost of the Phase 1 work, including whether or not the work should be scheduled over a longer period of time, without requiring a second application to be issued.

111. However, the Tribunal determined that, instead of giving directions for the simultaneous exchange of expert evidence, it would order the Applicants to serve their expert evidence concerning the issue of scheduling first. The Tribunal would then give the Respondents time to review this evidence and to obtain any independent advice before deciding whether or not they wished to incur the expense of serving expert evidence in response. The Applicants were directed to serve their additional expert evidence on the Respondents by 25 October 2019.

112. The Tribunal determined that it would carry out the inspection on 8 November 2019 and that the proceedings would be adjourned until January 2020 in light of representations made by some of the actively participating Respondents concerning their lack of availability until January 2020.

8 November 2019

113. The Tribunal inspected Arthur Court on the afternoon of 8 November 2019, having met with the parties' representatives at the north entrance to Arthur Court. The Tribunal then viewed the roof and a brick structure which houses the water storage tanks. The Tribunal noted an extensive arrangement of system pipework which extends over the flat roof of the building.

114. After inspecting the roof, the Tribunal viewed a corridor on the seventh floor followed by the interiors of Flat 16 and Flat 3. The widths of sections of corridor were measured. The Tribunal crossed to the south side of Arthur Court via a corridor at ground floor level and viewed the service staircase from the seventh-floor rear exit by the goods lift. Following this, the Tribunal saw the interiors of Flat 135, Flat 95 and Flat 84 and observed the fire exit staircase.

115. The Tribunal is grateful to the parties for cooperating with each other in order to ensure that the Tribunal was able to see a representative sample of flats. Whilst a significant amount of work had clearly been carried out to some flats, others were unmodernised.

116. Finally, the Tribunal inspected the boiler room in the basement and an external area above the car park. The boiler room was cramped and would not be easy to work in. It had not been well maintained, there being boiler parts and debris on the floor. Two boilers were working and a third was largely disassembled with its casing, burner and control panel missing. The boilers discharged products of combustion via a single flue into a chimney discharging at roof level to the rear of the building.

117. Asbestos had been sealed but would need to be removed before any work could safely be carried out in the boiler room. The heat exchanger was working but was delivering domestic hot water below the recommended temperature and was showing a digital reading of 45 degrees centigrade at the time of the inspection. The basement boiler room incorporated a substantial redundant oil tank dating from when the boilers had been powered by fuel oil.

118. The Tribunal concluded, having regard to the nature and location of the property, that the occupants of Arthur Court are likely to include lessees of limited means.

28 and 29 January 2020

119. From just after 11 am until 1.20 pm on 28 January 2020, the Tribunal heard oral evidence on behalf of the Applicants from Mr Sales and Mr Banyard on the issue of scheduling. The Respondents did not call an expert to give oral evidence on the issue of scheduling but they sought to make reference to a report prepared by Gasways, which had not been served in accordance with the Tribunal's directions.

120. For the following one and a half days, the Tribunal heard closing submissions. The Tribunal heard from Mr Upton in reply for approximately two and a half hours, including the time spent by Mr Upton in responding to the Tribunal's questions. The rest of the time available was, with Mr Upton's agreement, allocated exclusively to the Respondents.

121. The Respondents agreed amongst themselves how a period of 3 hours, during which they had the opportunity to speak without interruption, would be divided between them. The remainder of the time allocated to the Respondents was spent in discussions with the Tribunal and in responding to the Tribunal's questions.

122. Some of the Respondents wished to extend the time which was available to them for their closing submissions. The Tribunal was, however, satisfied that one and a half days was a sufficient period of time for closing submissions, far greater than would ordinarily be available, and that this time had been fairly allocated. It would not have been proportionate to incur the considerable time, expense and delay of adjourning the hearing to a future date in order to enable further closing submissions to be made by the Respondents.

The substantive issues

General principles

123. During the course of the hearing, the Tribunal was referred to and considered numerous legal authorities. In order to keep this decision to a manageable length, the Tribunal has not sought to reproduce all of this material and has focussed on setting out the information which is needed in order to understand the determinations which have been made. Most of the authorities set out below were referred to both by the Applicants and by the Respondents.

124. Due to the value, complexity and importance to the parties of these proceedings, the expert evidence was given orally so that it could be tested through questioning. There was some discussion during the course of the hearing concerning the role of the Tribunal as an expert Tribunal. Some of the Respondents raised queries, for example, concerning whether the proposed works set out in the Applicants' specification would fully comply with all fire safety, planning, building control etc. requirements. They may have been of the view that, because the Tribunal is an expert Tribunal, it would be the role

of the Tribunal experts to provide the necessary fire safety, planning, building control etc. expertise to answer each question which they raised.

125. Assertions were also made by some of the Respondents concerning matters requiring specialist evidence, notwithstanding that they were acting as advocates rather than as expert witnesses (for example, that HIUs are not suitable for this particular block). Certain of the Respondents may also have been of the view that it is the function of the Tribunal to carry out an investigation into any matter asserted by a party, the necessary expert evidence being derived from the Tribunal experts' own knowledge and experience, and that the estimated cost of the proposed works could only be found to be reasonable if all such questions and assertions were answered in the Applicants' favour.

126. The Tribunal notes that these are complex proceedings concerning a communal System which serves 93 flats. The Tribunal experts may use their expertise in order to test the expert evidence adduced by the parties and may (in certain circumstances and in a manner which is procedurally fair) raise issues concerning the expert evidence of their own motion. However, it is not their function to provide the expert evidence in this case on behalf of the parties or to be specialists in every area.

127. It is for the party making such an assertion to put forward the expert evidence which is relied upon in support. This could have been done by calling a suitably qualified expert to give evidence. Alternatively, a party may seek to rely upon the expert evidence of the opposing party's expert; for example, if that expert accepts a proposition when it is put to them in cross-examination. Accordingly, the Respondents were given time to thoroughly question the Applicants' expert witnesses. It is not enough for an advocate to ask questions or to make assertions; the expert evidence which is relied upon in support must be put before the Tribunal.

128. In *Arrowdell Ltd v Coniston Court (North) Hove Ltd* 10 WLUK 797, the Upper Tribunal stated (emphasis supplied):

"It is entirely appropriate that, as an expert tribunal, an LVT should use its knowledge and experience to test, and if necessary to reject, ***evidence that is before it****. But there are three inescapable requirements. Firstly, as a tribunal deciding issues between the parties,* ***it must reach its decision on the basis of evidence that is before it****. Secondly, it must not reach a conclusion on the basis of evidence that has not been exposed to the parties for comment. Thirdly, it must give reasons for its decision."*

129. This application concerns the estimated, on-account costs of the Phase 1 work. The Applicants will, of course, remain obliged to comply with all mandatory fire safety, building control etc. requirements when they carry out the work, regardless of whether any expert evidence concerning these matters has been put before this Tribunal. The Tribunal notes that, should they consider that there are grounds for doing so, it will remain open to the Respondents to make

an application challenging the actual costs of the Phase 1 work on the basis that the work was not carried out to a reasonable standard. Any such application would have to be supported by evidence.

130. The 1985 Act includes the following provisions (emphasis supplied):

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

...

(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

...

(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.

131. In *Waaler v Hounslow London Borough Council [2017] 1 WLR 2817 CA*, the Court of Appeal stated at [37] and [39] (emphasis supplied) that:

"37. In my judgment, therefore, whether costs have been reasonably incurred is not simply a question of process: it is also a question of outcome. That said it must always be borne in mind that where the landlord is faced with a choice between different methods of dealing with a problem in the physical fabric of a building (whether the problem arises out of a design defect or not) there may be many outcomes each of which is reasonable. I agree with Mr Beglan that ***the tribunal should not simply impose its own decision.*** *If the landlord has chosen a course of action which leads to a reasonable outcome the costs of pursuing that course of action will have been reasonably incurred, even if there was another cheaper outcome which was also reasonable.*

....

In considering whether the final decision is a reasonable one, ***the tribunal must accord the landlord what, in other contexts is described as 'a margin of appreciation'.*** *As I have said there may be a number of outcomes, each of which is reasonable, and it is for the landlord to choose between them."*

132. In *Avon Ground Rents Limited v Cowley* [2019] EWCA Civ 1827, referring to *Knapper v Francis* [2017] L. & T.R. 20, the Court of Appeal stated at [29]:

"As was observed by the Deputy President in Knapper (above), the contractual position is the starting point, it is then for the court to consider the relevant statutory provisions, in this case section 19(2) of the 1985 Act. Section 19 provides a statutory overlay to regulate the leasehold arrangements. Its effect is to modify the contractual obligation of the tenant so that no greater amount than is reasonable is payable before the relevant costs are incurred."

133. The Tribunal will adopt this two-stage process.

The contractual position between the parties

134. The Applicants state that the leases of the flats in Arthur Court are, so far as is relevant, in similar form.

135. The Demised Premises are defined in the First Schedule as including *"all conduits which are laid in any part of the Main Building and serve exclusively the Demised Premises"* but excluding *"any conduits in the Main Building which do not exclusively serve the Demised Premises"*.

136. Paragraph 6 of the recitals defines *"the Main Building"* as the building of which the Demised Premises [i.e. the flats] form part. Paragraph 8 of the recitals defines *"Conduits"* as *"the cisterns tanks water and supply pipes (including gas pipes) sewers drains tubes meters soil pipes waste pipes …"*.

137. By clause 3 the Company covenanted, among other things, with the Landlord and (subject to the payment by the Tenant of the Interim Charge and of the Service Charge at the times and in the manner herein provided) as a separate covenant with the Tenant (emphasis supplied):

"3.1 During the said term to keep … the structure of the walls dividing the Demised Premises from the adjoining premises … and other parts of the Main Building … and the conduits thereof … in good and sufficient repair …"

…

3.6 During the period from October to April in each year inclusive to use its best endeavours ***to provide hot water and heating*** *to the Demised Premises and the common parts of the Main Building through the apparatus installed therein and throughout the whole year* ***to provide a reasonable supply of hot water for domestic use*** *in the Demised Premises through the existing hot water system PROVIDED NEVERTHLESS that the Company shall not be liable hereunder for any failure in respect thereof beyond its control."*

…

3.8 To maintain … the boilers and heating and hot water equipment and the lifts and all other services and equipment in good order and repair …"

138. By clause 4 the tenant covenanted with the Company and as a separate covenant with the Landlord to pay the Interim Charge and the Service Charge (as defined) at the times and in the manner provided in the Sixth Schedule.

139. The Fifth Schedule is headed "*The Company's Expense and Outgoings and other Heads of Expenditure in respect of which the Tenant is to pay a proportionate part by way of Service Charge*". Paragraph 1 provides:

"The expense of maintaining repairing and renewing redecorating amending cleaning … the Main Building or any part thereof whether inside or outside and all the appurtenances plant and other fixtures and fittings and things thereto belonging …"

140. Paragraph 2 provides:

*"The cost of periodically inspecting maintaining overhauling repairing **and where necessary replacing** the whole of the boilers and other plant and machinery used for the supply of hot water to the heating and domestic hot water systems serving the Main Building and the conduits and other pipes valves and radiators in the common parts of the Main Building …"*

141. Paragraph 10 provides:

"The amount which the Company shall spend in making repairing maintaining rebuilding and cleansing all conduits or other sewers drains pipes watercourses … which may belong to or be used for the Demised Premises in common with other Flats or premises."

142. The *Sixth Schedule* is headed *"The Service Charge"*. The Service Charge is defined as being the specified percentage of the total expenditure incurred by the Company in carrying out its obligations under clause 3 and any other costs and expenses reasonably and properly incurred in connection with the Main Building (including those specified in the Fifth Schedule). It provides further that:

(i) the tenant shall pay by two equal payments on 24 June and 25 December each year such sum on account of the Service Charge as the Company shall specify at its discretion ("the Interim Charge");

(ii) the Company shall within 6 months of the expiration of each Accounting Period provide an audited Certificate of the Company's Auditors containing a written summary of the costs incurred for that Accounting Period together with the amount of any surplus carried forward from the previous Accounting Period and any excess or deficiency of the Service Charge over the interim Charge;

(iii) The tenant shall, if the Service Charge exceeds the Interim Charge, pay the excess to the Company within 28 days of service of the Certificate.

143. Mrs Saada disputed that the leases are, so far as is relevant, in similar form. She did so on two grounds. Firstly, she submitted that, in the case of the short leases, VAT cannot be charged to lessees and, secondly, she submitted there is no provision in the short leases requiring the lessees to make reserve fund contributions. The short leases do not state that VAT is irrecoverable, they simply do not make reference to VAT.

144. In response, Mr Upton submitted that that the ordinary and natural meaning of a covenant requiring payment is that the total sum which makes up the relevant expense is payable, including any VAT. He submitted that this is the case whether or not there is an express reference to VAT in the covenant. The Tribunal accepts this submission. As regards the reserve fund issue, Mr Upton explained that payment of the estimated service charges will be sought on a year by year basis. The Applicants are not asking the Tribunal to make any determination that reserve fund payment contributions are payable.

145. Both Mrs Saada and Mr Mumford drew a distinction between repairs and improvements, asserting that the proposed works would amount to works of improvement rather than works of repair and that the estimated cost of these works are therefore not contractually recoverable. During Mrs Saada's cross-examination, the Applicants' witnesses had accepted her case that the proposed works would result in "an improvement."

146. In response, Mr Upton stated that clause 3.6 is a covenant to provide services, not a covenant to repair. The distinction was recognised in *London Borough of Southwark v Baharier* [2019] UKUT 73 (LC). In that case the Deputy Chamber President, Martin Rodger QC, said at [29]-[31]:

> *"29. A covenant to provide services is not the same as a covenant to repair; it imposes a wider and potentially more onerous obligation. As the authors of Dowding & Reynolds on Dilapidations say at para.13-17 of their book, such a covenant*
>
> > *'may require the covenantor to carry out whatever work is necessary to provide the service, even though that work goes beyond what would ordinarily be called repair'.*
>
> *30. As a matter of contract, it is for the Landlord to decide how to supply the central heating/hot water service. That principle is firmly established in the case of covenants to repair (Lewison LJ included it as one of the uncontroversial propositions in [14] of his judgment in Hounslow v Waaler citing Plough Investments Ltd v Manchester City Council [1989] 1 E.G.L.R. 244 in support). It applies equally to covenant to provide a service. In Yorkbrook Investments Ltd v Batten (1986) 52 P. & C.R. 51 at pp.61–62, the Court of Appeal applied the principle to a covenant very similar to cl.4(5) of the lease in this case:*

'The [landlords]' covenant was, and is, to provide 'a good sufficient and constant supply of hot water and an adequate supply of heating in the hot water radiators.' How they achieved this was a matter for them.'

31. Because a covenant to provide a service of heating and hot water imposes an obligation to take whatever steps are required to achieve an outcome it is not relevant to consider in any detail what those steps are. ***The distinction between repairs and improvements, and the question of whether a particular programme or item of work goes beyond repair, is therefore irrelevant****."*

147. In *Baharier,* the tenant argued that she was under no obligation to pay for anything which goes beyond a repair by reason of the fact that the landlord had also covenanted to keep the installations in connection with the provision of the services in repair. In rejecting that submission, the Deputy President said at [34]-[36]:

"34. We do not accept [Counsel's] submissions on this point. It is true that cl.4(5) also obliges the Landlord 'to keep in repair any installation connected with the provision of those services', but if the repair of those installations is insufficient to maintain the service at a reasonable level the covenant as a whole clearly obliged the Landlord to take additional steps to satisfy its primary obligation of providing the service. It is the service which is to be maintained, not the installations by which it is provided.

35. In any event, it is unrealistic to suggest that the parties entering into the lease intended the building to remain unchanged throughout the term. When the lease was granted in 2008 the heating and hot water installations were already almost 40 years old and unable to provide a reasonable level of heating. The lease was for a term of 125 years and the only sensible expectation would have been that the existing installations would be replaced in their entirety in the relatively short term, and would probably be replaced again during the remainder of the term. In that context the parties cannot have intended that the Landlord's only obligation should be to repair what was present or replace it with something satisfying modern requirements at its own expense. Nothing in the lease suggests that there was intended to be any potential for a gap to exist between the Landlord's obligation to provide services and the Tenant's obligation to pay for them. It would be most unusual for a lease to entitle the Landlord to recover the cost of providing only part of the cost of a service, and had that been intended it would have been spelled out in the clearest possible language.

36. We are therefore satisfied that the FTT directed itself and the parties by reference to the wrong question. ***It ought not to have asked whether the costs of the replacement system were costs of repair or costs of improvement, but rather whether they were costs and expenses of or incidental to proving the services of heating and hot water, or***

of ensuring so far as practicable that those services were maintained at a reasonable level." *(Emphasis added.)*

148. The Tribunal accepts Mr Upton's submission that these principles are applicable in the present case.

149. Mr Mumford submitted that the Applicants will not be entitled to carry out any work to the pipework inside the flats because the flats are demised to the Respondents. On his case, it will not be possible for the Management Company to carry out the Phase 2 work and he submitted that, for this reason, the Phase 1 costs cannot be reasonably incurred.

150. In response, Mr Upton stated as follows. The Demised Premises are defined in the First Schedule to the leases as including *"all conduits which are laid in any part of the Main Building and serve exclusively the Demised Premises"* but excluding *"any conduits in the Main Building which do not exclusively serve the Demised Premises"*.

151. Paragraph 6 of the recitals defines *"the Main Building"* as the building of which the Demised Premises, i.e. the flats, form part. Paragraph 8 of the recitals defines *"Conduits"* as "*the cisterns tanks water and supply pipes (including gas pipes) sewers drains tubes meters soil pipes waste pipes …"*.

152. The existing System has been described as a "ladder system" by the experts and it follows that the pipework which is inside a flat does not exclusively serve that flat; it is part of the pipework system that serves all of Arthur Court. The Tribunal has heard expert evidence that it is not possible to separate internal pipework from risers because there is no isolation valve.

153. Clause 3.1 of the leases expressly recognises that Management Company is obliged to keep pipes within the flat in repair: *"To keep … the conduits thereof [i.e. in the Main Building] in good and sufficient repair but so that the Lessor shall not be under any liability for damage arising by reason of any default or negligence on the part of the Tenant or any of his family servants or visitors in the user of any such conduits within the Demised Premises …"*.

154. Mr Upton submitted that the reference to *"such conduits within the Demised Premises"* must mean that conduits within the flat are conduits which the Management Company is obliged to keep in repair. The Tribunal accepts this submission.

155. Further, the Applicants primarily rely upon the covenant to provide services. A covenant to provide the services of heating and hot water imposes an obligation to take the necessary steps to achieve an outcome. It is for the Management Company to decide how to supply the central heating/hot water service.

156. Mr Upon placed reliance upon *Baharier* at [35] (which is set out above), and submitted that it is unrealistic to suggest that the parties entering into the leases would have intended the building to remain unchanged throughout the term.

157. The parties knew when the leases were granted that parts of the System had been installed in the 1930s. The expectation must have been that the existing installations would be replaced in their entirety when they reached the end of their lifespan and, as regards the longer leases, that they would be replaced again and again during the remainder of the term. The parties cannot have intended that the Management Company's only obligation would be to repair a part of the System; simply bringing a supply to the boundary of each flat.

158. Having considered the covenants which have been referred to, the Tribunal is satisfied that there is a right to carry out work to elements of the communal System which are situated within the flats. Accordingly, the Tribunal does not to accept the submission that the proposed Phase 1 costs cannot be reasonable because the terms of the leases will prohibit the Applicants from carrying out a Phase 2. Having considered the ordinary and natural meaning of the covenants, the Tribunal accepts Mr Upton's submission that the Management Company has a contractual right to carry out the proposed Phase 1 work and to recover the estimated costs of doing so through the service charge.

The statutory limit imposed by section 19(2) of the 1985 Act

The scope and cost of the proposed Phase 1 work

159. As stated above, Respondents raised a number of questions and made a number of assertions concerning the nature and scope of the proposed Phase 1 work. These included, but were not limited to, issues concerning whether locating HIUs in the corridors would render the corridors too narrow making them unsafe for disabled tenants and breaching fire safety requirements; whether the Applicants' proposals would comply with building control requirements; and whether the proposed works are reasonable in light of technical developments in the heating industry; and it was asserted that HIUs are not suitable for this particular block.

160. Mr Upton submitted in closing that there had been a lot of submission and assertion but that there was no expert evidence before the Tribunal in support of the challenges raised.

161. The Tribunal was referred to *Avon Ground Rents Limited v Cowley* [2019] EWCA Civ 1827, in particular at [31] to [33], and notes that at [33] the Court of Appeal stated (emphasis supplied):

"As to what is 'reasonable' is for the relevant tribunal to determine, as was done by the FTT in these proceedings. It is an exercise which the tribunal is

well-equipped to perform, assessing the relevant facts of each individual case and arriving at a determination ***based upon the evidence."***

162. The Tribunal is bound to decide this application on the evidence and cannot reach a decision which is based upon assertions which are not supported by evidence.

163. The Applicants' expert witnesses maintained that the proposed works are reasonable in scope and in cost under extensive and detailed cross-examination. They did not accept the validity of the Respondents' challenges.

164. As stated above, the Tribunal was satisfied that Mr Sharpless was qualified to give expert evidence on behalf of the Respondents by virtue of his experience. During the course of the hearing, Mr Sharples stated that he has worked in the industry for 47 years, that is since the age 16. He is on the Gas Safe Register; that he has undertaken a 5-day professional training course in Belfast; and he has worked on the System at Arthur Court for around 25 years.

165. The Tribunal's note of Mr Sharpless's oral evidence includes the following:

(i) He confirmed that he has personal experience of fitting systems similar to that proposed by Flatt Consulting, although he does not have experience of designing such a system.

(ii) He has worked on communal heating and hot and cold water systems which are similar to the existing System at Arthur Court in other blocks, for example, in Belsize Park. He flushed the system at one of these blocks and then re-attended and found that all of the radiators were working fine. This block still has the original pipework and is pretty much the same as Arthur Court. He was not saying that the system in that block would last forever but he thought that it would last for 5-10 years.

(iii) He was of the view that the two boilers which are currently working at Arthur Court could probably continue to operate for a further 5 to 10 years.

(iv) In December 2018, when he carried out work to keep the System functioning, Mr Sharpless did not find any leaks even though he had been told that there were leaks and blockages. However, he accepted that in the future leaks will be likely due to the age of the System and stated "it is something that you cannot foresee really". When Mr Sharpless was instructed in 2018, only one boiler was functioning and he found that someone had left the boiler room in a very disordered state.

(v) He was of the view that the flushing at Arthur Court had been effective. However, he could not comment on the assertion that some flats still have limited heating.

(vi) He accepted that there is an issue with cross-overs but stated that this is a common problem.

(vii) He agreed that there is low mains water pressure at Arthur Court and stated that Thames Water is reducing the pressure so this problem is likely to become worse.

(viii) He stated: "In buildings of this age we do recommend they replace all hot and cold services and heating pipework if feasible, also the waste pipes are all lead. This stops future problems."

(ix) When asked at what stage he would recommend replacing the entire heating system at Arthur Court, Mr Sharpless stated that he believed he could keep the current System running on a temporary basis for maybe five years or so, so that residents would have a chance to build up a pot of money for complete renewal, and said "I do not rule out complete renewal at all."

(x) He stated that he was proposing a 5 to 10 year solution in order to give the Respondents' time to build up a fund for major works similar to that recommended by Flatt Consulting.

(xi) When asked by Mr Mumford in re-examination what the reason was for his opinion that a wholesale replacement would be needed after 5 years he said, "Age of the system, there's no denying that the services need to be replaced in the foreseeable future". He explained that the pipework at upper basement level would have a lifespan of 5 to 10 years and that where the risers go into the building it is impossible to guarantee their lifespan.

(xii) He stated that he would not expect anything "catastrophic" for five years. After that, what is needed is a "full scale replacement" of the type recommended by Flatt Consulting. He confirmed that he had a sufficient understanding of the Flatt Consulting proposal from what he had heard during the course of the hearing.

(xiii) He accepted that the current boilers have been running on maximum for some time and that this causes wear but he still maintained that they would last for 5 to 10 years. As

regards the other parts of the System, there is no indication of major blockages and his opinion that replacement is required is based on "good practice".

166. Accordingly, Mr Sharpless consistently maintained under thorough questioning that it was likely that the System could be kept functioning on a temporary basis for at least 5 years. His recommendations for a new system differed in some respects from the Flatt Consulting proposal. He stated that he would not recommend moving the boilers from the basement to the roof and he proposed different pipe runs (passing though the common parts of the building rather than over the fire escape). However, although he expressed different preferences in these respects, Mr Sharpless did not assert outcome of the Flatt Consulting proposal fell outside the range of reasonable options.

167. It is accepted that not every landlord would choose to completely renew the System. However, the Tribunal does not find it surprising that both experts recommended the complete renewal of the System, albeit within different timescales, given that some of the heating plant is approximately 30 years old and the pipework is 90 years old.

168. There was some debate during closing submissions concerning precisely what Mr Sharpless had said when giving oral evidence, with some of the Respondents having recollections which differed from the Tribunal's notes and from the notes of the Applicants' representatives. However, none of the Respondents asserted that Mr Sharpless had given evidence that the Flatt Consulting proposal (and, in particular, its outcome) fell outside the range of reasonable options, that is outside the margin of appreciation that is afforded to a landlord.

169. It is not open to the Tribunal to impose its own decision; the Tribunal is required to give the Applicants a "margin of appreciation"; and the Tribunal must determine this application on the expert evidence before it. On the basis of the evidence which has been presented, the Tribunal considers that it is bound to find the scope and cost of the Phase 1 work is within the reasonable range, subject to the matters which fall to be considered below.

170. The Tribunal accepts that the Applicants' specification is sufficiently detailed to enable the Tribunal to make a determination and notes that Mr Sharpless did not contend that the level of detail was insufficient. In *Kensington and Chelsea RLBC v Lessees of 1-124 Pond House, Pond Place, London SW23* [2015] UKUT 395 (LC); [2016] L. & T.R. 10 the Upper Tribunal held at [82] that:

"precision as to the extent of the works, the duration of the works and the terms of the lease which support the obligation to carry out the work is still required to support a s.27A(3) determination."

171. In *Pond House*, the detail of most of the proposed work had been put in doubt and it was impossible to say whether any of the work fell within the terms of the leases (see [82]).

172. In the present case, the level of detail has been sufficient to enable the Tribunal to determine that the proposed work falls under the terms of the leases and the Tribunal does not read *Pond House* as requiring a level of detail which goes beyond the specification, as revised, upon which the Applicants rely upon the present case. A point was raised that the location of every pipe run has not been specified. However, this is an application to determine the estimated, on-account costs of a large-scale project and Mr Sharpless did not give evidence that it is not possible to express an expert opinion to enable the Tribunal to make a determination in the absence of this information.

Consultation

173. Mr Mumford submitted that the Tribunal must determine whether or not the Service Charges (Consultation Requirements)(England) Regulations 2003 ("the 2003 Regulations") have been complied with. He referred, in particular, to *Pond House* at [68]:

"68. The questions that this Tribunal has to consider were identified by Mr Bhose as follows:

(1) What works of repairs, decoration and maintenance are proposed to each block;

(2) Is the Applicant required (or permitted) by the leases of the individual Pond House lessees, to undertake these proposed repairs and maintenance;

(3) Has the Applicant complied, thus far, with its obligation to consult the Pond House lessees under the Act and the Service Charges (Consultation Requirements)(England) Regulations 2003 ("the Consultation Regulations");

(4) Would the estimated contribution of each Pond House lessee towards these proposed works be a reasonable sum to demand from them, on account?"

174. The Upper Tribunal went on to consider these issues and Mr Mumford submitted that whether or not there has been compliance with the 2003 Regulations therefore falls to be considered by the Tribunal in the present case.

175. In *Pond House,* the applicant was seeking a determination that certain framework agreements were qualifying long term agreements for the purposes of the statutory consultation requirements and that it was therefore entitled to follow a restricted form of consultation with lessees before embarking on

specified works of repair. The value of the contracts for the works could potentially have reached £130 million over a four to six year period. Further, since procurement through framework agreements was a practice which had already been adopted by a number of local authorities, clear general guidance on what consultation was required was needed.

176. The applicant in *Pond House* contended that the works of repair would be carried out under qualifying long-term agreements and that the consultation requirements were therefore limited. However, the respondents asserted that the framework agreements were not qualifying long term agreements and that the applicant's consultation had been and would be inadequate.

177. The Upper Tribunal stated at paragraph [69]:

"There is no doubt, in our view, that although this is a section 27A(3) application, the main purpose was to obtain a determination on the consultation issue. However, we are satisfied that the application under section 27A(3) was an appropriate way to secure such a determination and we consider that issue first."

178. At paragraph [66], the Upper Tribunal stated that the Tribunal's jurisdiction under section 27A(3) of the 1985 Act "may" include a consideration of whether, at a particular point in time, the correct consultation has been carried out in accordance with the 2003 Regulations. The Upper Tribunal did not state that, unless it is satisfied that the statutory consultation process has been carried out, the Tribunal has no jurisdiction to make a determination pursuant to section 27A(3) of the 1985 Act.

179. Mr Upton submitted, in reliance upon *23 Dollis Avenue (1998) Limited v Vejdani* [2016] UKUT 0365, that it is not necessary for the Tribunal to determine whether the 2003 Regulations have been complied with in the present case. The Tribunal accepts this submission.

180. At [33] of the judgment in *23 Dollis Avenue*, the Upper Tribunal stated (emphasis supplied)

"a. We agree with Mr Adams that the limitation in s 20 to the contribution payable by the tenant is referable to costs incurred by the landlord in carrying out the work rather than in respect of work to be carried out in the future. This is clear from the wording of ss 20(2) and 20(3).

b. In our view therefore there is no statutory limit to the amount that can be recovered by way of an on account demand under the lease other than under s 19(2). ***It is, in our view, not necessary that there should be a valid consultation process before a sum in excess of £250 can be recovered by way of a service charge in respect of intended works."***

181. Mr Upton invited the Tribunal to nonetheless determine whether or not there has been compliance with the 2003 Regulations. However, there was insufficient time remaining at the conclusion of the hearing to hear representations on this issue and the Tribunal therefore makes no determination concerning the validity of the consultation which has taken place.

Scheduling

182. In *Waaler* the Court of Appeal referred with approval (see paragraph [46]) to the Upper Tribunal decision of *Garside v RFYC Ltd* [2011] UKUT 367 (LC). At [35] and [36] of *Waaler,* Lewison LJ stated:

"35. In the Garside case [2011] UKUT 367 (LC) the UT listed a number of potentially relevant factors and said, at para 19:

'These are only examples of factors that may or may not be relevant and there may be others to take into account. All are factual issues and matters of judgment for the LVT to weigh up against the hardship of substantial increased costs when deciding on the evidence before it whether the service charge costs are reasonably incurred.'

36. This does not suggest that the function of the tribunal is simply to review the landlord's decision-making process. The interests of the tenants are to be taken into account in 'weighing up' the relevant factors."

183. The extent of the interests of the lessees is one of the potentially relevant factors. Mrs Saada stated that, whilst 54 lessees at Arthur Court have 999 year leases, 39 have leases with around 50 years remaining. She submitted that there will a greater burden on the lessees with shorter leases and the Tribunal was invited to take judicial notice of the fact that, in the case of the shorter leases, it will be harder to potentially raise funds relying upon the lease as security.

184. Mr Upton was instructed that there are thirty-eight 999 year leases, twenty-three leases with between 99 and 999 years unexpired, seventeen leases with 99 years unexpired and fifteen leases with 52 years unexpired. However, on either party's case, there are a significant number of short leases.

185. As regards the financial impact of the proposed work on the lessees, a matter which is of very great concern to the Respondents, Lewison LJ stated at [45] of *Waaler* (emphasis supplied):

"The third of the criteria is that the landlord must take into account the financial impact of the works. ***It is important to stress that the UT was not saying that the landlord should investigate the financial means of particular lessees.*** *That would indeed have been both impractical and intrusive. However, in broad terms the landlord is likely to*

know what kinds of people are lessees in a particular block or on a particular estate. Lessees of flats in a luxury block of flats in Knightsbridge may find it easier to cope with a bill for £50,000 than lessees of former council flats in Isleworth. This accords with the view of the UT in the Garside case [2011] UKUT 367 (LC) at [16] in which it was said:

*'In many cases financial impact could no doubt be considered **in broad terms** by reference to the amount of service charge being demanded having regard to **the nature and location of the property** and as compared with the amount demanded in previous years. Reasonable people can be expected to make provision for some fluctuations in service charges but at the same time would not ordinarily be expected to plan for substantial increases at short notice.'"*

186. The Applicants accept that, under their proposals, there will be a substantial increase in the service charges payable by Respondent lessees in the present case.

187. In *Garside* at [14] and [20] the Upper Tribunal stated (emphasis supplied):

"… there is nothing in the 1985 Act to limit the ambit of what is reasonable in this context so as to exclude considerations of financial impact. In my judgment, giving the expression 'reasonable' a broad, common sense meaning in accordance with Ashworth Frazer, the financial impact of major works on lessees through service charges and whether as a consequence works should be phased is capable of being a material consideration when considering whether the costs are reasonably incurred for the purpose of section 19(1)(a) .

….

*It is important to make clear that liability to pay service charges cannot be avoided simply on the grounds of hardship, even if extreme. If repair work is reasonably required at a particular time, carried out at a reasonable cost and to a reasonable standard and the cost of it is recoverable pursuant to the relevant lease then the lessee cannot escape liability to pay by pleading poverty. As the Lands Tribunal made clear in Southend-on-Sea Borough Council v Skiggs LRX/110/2005 (a decision on section 27A of the 1985 Act), **the LVT cannot alter a tenant's contractual liability to pay. That is a different matter from deciding whether a decision to carry out works and charge for them in a particular service charge year rather than to spread the cost over several years is a reasonable decision and thus the costs reasonably incurred for the purpose of section 19(1)(a) of the 1985 Act."***

188. The Tribunal invited submissions as to whether these principles are equally applicable under section 19(2) of the 1985 Act. The Respondents, in

particular Mr Loha, submitted that they are and Mr Upton states at paragraph 28 his Note on Final Costings dated 28 January 2020:

"The Applicants accept that, in principle, the financial impact of major works on lessees including other planned expenditure (such as works identified in the Capex plan) and whether as a consequence works should be phased is capable of being a material consideration under s.19(2)."

189. Accordingly, it is common ground that the Tribunal can take into account the financial impact of the proposed work on the Respondents, and the context that other substantial and costly work to Arthur Court is said to be required, when considering whether or not the Phase 1 work should be phased over a longer period of time than is proposed by the Applicants.

190. Whilst the Applicants' primary case remains that the proposed work should be carried out as soon as possible, the Tribunal heard oral expert evidence from the Applicants' experts, on 28 January 2020, concerning the possibility of scheduling the proposed work over a longer period of time. They gave evidence as to how the Phase 1 work could be scheduled over 4 years or over 6 years in the context of a proposed capital expenditure programme of in the region of £7 million.

191. The Respondents did not call an expert on 28 January 2020 to give oral evidence on the issue of scheduling but they sought to refer to a document prepared by Gasways concerning an alternative proposal for carrying out the Phase 1 work. The Tribunal noted that Gasways has not carried out full survey. Further, the Gasways document is brief and is not comparable with the Applicants' more detailed specification.

192. This document was produced after the Tribunal had already heard evidence from Mr Sharpless and Mr Sales and, as pointed out by Mr Upton, it was not served in accordance with any direction given by the Tribunal. The only issue in respect of which further expert evidence was to be given on 28 January 2020 was the issue of scheduling.

193. The Tribunal considers that a prudent building owner would ensure that each flat has the benefit of a fully functioning, reliable heating and hot and cold water system regardless of the length of the lessees' lease. However, the Tribunal accepts in broad terms Mrs Saada's submission that the Respondents who have not extended their leases are likely to be particularly burdened by the proposed costs.

194. On inspecting Arthur Court, the Tribunal noted that the sample flats differ considerably in both character and size. Having regard to the nature of the property, the Tribunal finds that the occupants of Arthur Court are likely to include lessees (for example, lessees of unmodernised flats held on short leases) of very limited means who would find it extremely difficult or impossible to immediately pay in full the on-account, estimated charges

relating to the Phase 1 work in the context of the proposed capital expenditure plan. The interests of these lessees must be taken into account when considering the issue of scheduling, together with the need for work to be carried out and the interests of others.

195. The Applicants informed the Tribunal that the total Phase 1 costs, including preliminaries but excluding VAT and professional costs, will be £1,635,073 (based on average of tenders) if the works are not phased and £1,649,100 if the works are phased. Accordingly, the increase in the cost of the work resulting from phasing over a longer period of time is not substantial.

196. The Tribunal accepts the expert evidence of Mr Sharpless that, whilst there can be no absolute guarantee, it is likely on the balance of probabilities that a temporary solution can be put in place and maintained for a number of years. Further, Mr Banyard gave evidence which the Tribunal accepts that a temporary solution will have to be put in place, in any event, whilst the moneys for the proposed major works were collected.

197. On the basis of Mr Sharpless's expert evidence, the Applicants' costings and expert evidence concerning scheduling, and the findings of the Tribunal which are set out above, the Tribunal accepts the Respondents' case that the Phase 1 work can and should be scheduled over a longer period of time than is proposed Applicants and finds that the appropriate period is 6 years, as set out in the table at Appendix 4 at page 2283 of the trial bundle ("Appendix 4").

198. The Tribunal determines that the Phase 1 costs in the sum of £1,649,100, excluding VAT and professional fees, phased over a period of 6 years in accordance with Appendix 4 would be reasonably incurred. Accordingly, if costs were incurred on the Phase 1 works, a service charge would be payable in respect of these costs by the Respondents to the Management Company on-account, in advance, in accordance with the Sixth Schedule to the leases. The total cost is to be apportioned between Respondents in accordance with the percentages in their leases.

199. By **14 May 2020** the Applicants shall file and serve a schedule setting out the amounts and the dates of the payments which are to be made by each Respondent in accordance with this determination.

Additional matters

200. By **14 May 2020**, any party seeking an order under section 20C of the Landlord and Tenant Act 1985 and/or an order under paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002 and/or an order for the reimbursement of Tribunal fees should notify the Tribunal and the other parties that a determination is sought, following which the Tribunal will consider the procedure to be adopted. No representations in support of any such application should be made at this stage.

Name: Judge N Hawkes **Date:** 15 April 2020

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).