FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case Reference	**:**	**LON/00BK/LSC/2019/0390**
Property	**:**	**Flat 4, 22/23Hyde Park Place, London. W2 2LP**
Applicants	**:**	**David Renton and Giulia Renton**
Representative	**:**	**David Renton in Person**
Respondent	**:**	**22/23 Hyde Park Place Freehold Limited**
Representative	**:**	**Mr. Alex Shattock of counsel instructed by DAC Beachcroft LLP**
Type of Application	**:**	**For the determination of the reasonableness of and the liability to pay service charges and/or administration charges**
Tribunal Members	**:**	**Tribunal Judge Stuart Walker (Chairman)** **Mr. Stephen Mason BSc FRICS**
Date and venue of Hearing	**:**	**15 January 2020 at** **10 Alfred Place, London WC1E 7LR**
Date of Decision	**:**	**14 February 2020**

DECISION

Decisions of the Tribunal

(1) The Tribunal determines that the sum of £7,442.34 in respect of boiler replacement works demanded of the Applicants as an on-account service

charge in respect of the service charge year ending 25 December 2019 is payable by the Applicants.

(2) The parties reached agreement in respect of the administration charges sought by the Respondent and so the Tribunal makes no decision in relation to these.

(3) The application for an order under section 20C of the Landlord and Tenant Act 1985 so that none of the landlord's costs of the Tribunal proceedings may be passed to the lessees through any service charge is refused.

(4) The application for an order under paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002, so that none of the landlord's litigation costs can be recovered as an administration fee is refused.

Reasons

The Application

1. The Applicants seek a determination pursuant to s.27A of the Landlord and Tenant Act 1985 ("the 1985 Act") as to the amount of service charges payable by them in respect of the service charge year ending 25 December 2019.

2. The application was made on 4 October 2019. The issues identified in the application concerned three areas of dispute. The first concerned the cost of replacing the gas boilers at the premises, at a total cost of £43,778.47. The second issue concerned company expenditure incurred by the Respondent which totalled £8,703, and the third was in connection with legal fees of £787.20 incurred by the Respondent. The Applicants also sought orders under section 20C of the 1985 Act and paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002. Directions were issued on 22 October 2019.

3. With regard to the boiler replacement, the Applicants' case was that proper consultation as required under section 20 of the 1985 Act had not been carried out and also that the costs incurred were not reasonable. In their statement of case the Respondent made it clear that they no longer sought to recover the disputed company expenditure, and this was not an issue before the Tribunal. As will be explained in what follows, the parties reached an agreement in respect of the claimed legal fees.

4. The directions provided for the Applicants and the Respondent to each send bundles of documents on which they relied to the Tribunal by 29 November and 20 December 2019 respectively. The Tribunal was, therefore, in receipt of two bundles. References to pages in that of the Applicants will be preceded by the letter A and those to pages in that of the Respondent by the letter R. The Applicants and the Respondent both provided a statement of case. There were no witness statements from the Applicants but there were statements in the Respondent's bundle from Ms. Jaqui Katz from the managing agents and Mr. Mark Arena the chairman of the Respondent's board of directors.

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

The Hearing

6. Mr. Renton appeared in person at the hearing accompanied by his daughter. The Respondent was represented by Mr. Alex Shattock of counsel. Ms. Katz and Mr. Arena attended, as did another of the Respondent's directors, Mr. Simon Burns.

7. At the start of the hearing Mr. Shattock raised the issue of consultation. He explained that the Respondent's case was that the statutory consultation requirements did not apply in this case as the sums demanded were on-account sums. However, he also contended that the consultation requirements had been met in any event, and he made it clear that there was no application by the Respondent under section 20ZA of the Act.

8. Despite this, Mr. Shattock indicated that the Respondent was happy for the Tribunal to make findings about the consultation process as this would be of assistance to the parties when the final service charge accounts for 2019 were produced. Mr. Renton agreed with that proposed approach, and this was the first issue which the Tribunal dealt with.

9. Having heard submissions from the parties and having considered all the documents provided (whether specifically referred to or not), the Tribunal has made determinations on the various issues as set out below.

The Background

10. The property which is the subject of this application is a flat in a residential building containing 11 flats located in central London. The Respondent is the freeholder owner of the building. The Applicants are the leasehold proprietors of flat 4. Mr. Renton was formerly a director of the Respondent, but he resigned his position in July 2018.

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

The Lease

12. By a lease dated 24 May 1995 the Applicants hold the property for a term expiring on 2 January 2101 at a current annual rent of £600. After the grant of this lease the Respondent acquired the building following the exercise of the tenants' rights of collective enfranchisement. Negotiations were entered into by the Applicants (together with the other tenants) and the Respondent for the surrender of their existing leases and the grant of new leases from the Respondent for a term of 999 years. It seems that in the case of the Applicants this new lease has yet to be executed. In any event, it was accepted by the parties that all relevant terms of the lease in this case were to be found in the 1995 lease. This appears at pages A26-50.

13. The lease requires the Applicants to pay the "maintenance rent". This is defined as being 17% of the landlord's costs incurred pursuant to its covenants contained in Schedule 2 of the lease. The services to be provided under Schedule 2 include the maintenance of a sinking fund for future expenditure (paragraph 2) and;

> "*Maintaining repairing and renewing the boiler situate in the Property for the purposes of providing central heating to all parts of the Property between the dates 1st October and 1st May in each year between the hours of 6.00am and 11.00pm….*"(paragraph 13)

14. Paragraph 17 of Schedule 2 provides as follows;

> "*The cost of the foregoing services shall be ascertained and certified by the Lessor's Managing Agents (whose certificate shall be final and binding on the parties hereto) to the Maintenance Year End* [defined as 25 December] *and payment shall be made within one month of the production of such certificate and until verified by the Managing Agent the Lessee shall pay on account of the Maintenance Rent the amount of the On Account Payment by equal payments on the Payment Dates in each year and shall receive credit therefor against the next Maintenance Rent Payment.*"

15. The payment dates are defined in the lease as the usual quarter days and the on-account payment is defined as £3,128 per annum. However, paragraph 11 of Schedule 2 also provides as follows;

> "*If in the reasonable opinion of the Lessor's Managing Agents the amount of the On Account Payment shall be insufficient to cover the costs of the items contained in this Schedule they shall be entitled to serve one month's notice requiring an increase in the On Account Payment which shall upon the expiry of such notice become the future On Account Payment*"

Consultation

The Applicants' Case

16. The Applicants accepted that on 17 April 2019 two initial section 20 notices were sent to them. One concerned external decoration and does not concern the Tribunal. The second concerned the replacement of the boilers. A copy of the notice in relation to the boilers is at page A76. This notice states the works to be carried out are "*communal boiler replacement*". The notice goes on to state that a description of the works to be carried out may be inspected at a given address. This is the address of the previous managing agents who ceased to be involved in the management of the building on 24 July 2019. The notice stated that the consultation period ended on 24 May 2019.

17. The Applicants' case was that the day after this notice was given their daughter went to inspect the description of the works referred to in the notice and was told that this was not available and that descriptions would be sent when they became available. No such documents were sent. The next information they received was a notice dated 2 September 2019 (page A203) which was a notice of the estimates received in respect of the proposal to replace the boilers. This

notice indicated that the estimates could be inspected and invited written observations in relation to the estimates received.

18. The Applicants contended that the failure to make available the description of the works to be done rendered the initial notice invalid and, therefore, meant that the consultation process was defective.

19. Mr. Renton argued that the failure to provide this information meant that he was not able to make any sensible comments about the proposal to replace the boilers. He accepted that he did not make any later attempts to inspect the documents referred to in the notice. No documents had been sent to him and he presumed that none were available.

20. In their statement of case the Applicants also drew attention to the reasons given in the initial notice for the proposal to replace the boilers. The notice stated "*we consider it necessary to carry out the works because of the stated lease terms*". Mr. Renton argued that this, too, was inadequate.

21. Mr. Renton was asked what he expected such additional documents to contain. He said that he expected a lot more information. This would include whether or not there was going to be a like-for-like replacement and whether or not additional maintenance would be done to prolong the life of the boilers. He said the information he expected would also include whether it was proposed to continue with two boilers as at present or whether they would be replaced by a single boiler. He considered that the general description given in the notice was not sufficient and that he felt there was no point in making observations on a speculative basis when he had been told he would be provided with additional information.

22. The Tribunal asked Mr. Renton what prejudice he considered the Applicants had suffered as a result of the absence of this additional information. He said that they had been unable to influence the decision about what to do with the boiler. There may have been other options which were cheaper, such as procuring one boiler instead of two. He said he was prejudiced by the lack of technical evidence and that he would have been able to comment on whether it was necessary to replace the boilers at all. Later Mr. Renton was asked if he had made any comments after the second notice was sent. He said that he had asked for further information but not commented. He had not pointed out that one boiler would be better at that stage. He then said that he would have raised issues if he had been given an opportunity to do so but he did not do so because he had no background information and no access to materials.

23. In his closing comments on this issue Mr. Renton accepted that he could have commented if the notice had simply said that the boilers would be replaced without reference to additional documents. He also said he did not comment because he did not believe that the consultation was genuine and that there was no point in commenting.

The Respondent's case

24. The Respondent's arguments were that a) there had been no failure to abide by the consultation requirements and b) that even if there had been non-compliance, dispensation should be granted as there had been no real prejudice to the leaseholders as a result of that non-compliance. The process undertaken was set out at para 27 of their statement of case (page R6).

25. Mr. Shattock drew attention to paragraph 14 of Ms. Katz's statement (page R13) in which she refers to the minutes of the Respondent's AGM on 13 June 2019. These minutes show that Mr. Renton attended, that the meeting was informed that the boiler works were out for tender and that Mr. Renton did not make any representations about the works nor raise any concerns about the consultation process. The minutes are at pages R27 to 29.

26. In his evidence Mr. Arena accepted that the previous managers, Kay & Co., did not in fact produce any further documentation in relation to the boiler replacement proposal, despite what was said in the initial consultation notice.

27. Mr. Shattock accepted that it could be said that the initial notice was not accurate as it referred to documents which did not exist. However, he argued that if the notice had not mentioned additional documents it would have been sufficient. The notice would have informed the leaseholders that it was intended to replace the boilers and this would be enough to enable comments to be made. The Respondent's case was that there was, in any event, no prejudice to the Applicants and that therefore dispensation should be granted.

The Tribunal's Decision

28. The Tribunal bore in mind what is required by the Service Charges (Consultation Requirements) (England) Regulations 2003 and, in particular, Part 2 of Schedule 4 of those Regulations. Paragraphs 8(2)(a) and (b) require an initial notice to;

> "*(a) describe, in general terms, the works proposed to be carried out, or to specify the place and hours at which a description of the proposed works may be inspected;*
>
> *(b) state the landlord's reasons for considering it necessary to carry out the proposed works*"

It is clear from these requirements that a description in general terms of the proposed works is all that is required. If this is provided there is no obligation also to make documents available.

29. The Tribunal also bore in mind that the 1985 Act allows for consultation requirements to be dispensed with where it is reasonable to do so. It had regard to the decision of the Supreme Court in Daejan Investments Ltd -v- Benson [2013] UKSC 14, which was referred to in the Respondent's statement of case. This decision makes it clear that the purpose of the consultation requirements is to protect tenants from paying for inappropriate works and from paying more than would be appropriate for such works. It follows that the issue when considering dispensation is the extent to which the tenants are prejudiced as

regards these two protections. This, rather than the gravity or otherwise of any breach, is what is determinative.

30. The Tribunal was not satisfied that there had been a failure to comply with the consultation requirements. It was clear from what was stated in the notice of intent that what was proposed was the replacement of the boilers. This was a description in general terms of the work to be carried out and, in the view of the Tribunal, was self-explanatory. The Tribunal considered that this was a sufficient description to enable the Applicants to make representations about whether or not the boilers should be replaced or about what the existing boilers should be replaced by. Whilst the reference to additional documents which, it appears, did not in fact exist, was unhelpful, it did not detract from the general description already given.

31. The Tribunal accepted that the Applicants may have wished to have more detailed technical information about the performance of the boilers and the proposed replacements but, at this stage, the consultation process only requires a description in general terms of what is proposed, and that had been provided.

32. The Tribunal also considered the requirements of paragraph 8(2)(b). The reasons given for replacing the boilers were stated to be the terms of the lease. Whilst this was not an ideally clear reason, the lease does contain an obligation on the landlord to provide central heating during prescribed periods and the Tribunal considered that the notice should be taken as referring to this requirement. The notice was sufficient to show that the landlord considered that the works were required in order to comply with the obligations under the lease.

33. Whilst the initial notice was not the best, the Tribunal was satisfied that it met the necessary minimum requirements and so there had not been a failure to consult properly. There was no criticism of any other part of the consultation process.

34. Even if the Tribunal was wrong to reach that conclusion, it was satisfied that the failures identified did not give rise to any real prejudice to the Applicants. Taking the notice as a whole, it was clear on its face that it was the Respondent's intention to replace the boilers, and representations could have been made about that issue without knowing any greater detail. The notice was self-explanatory. The relevant protection here is the protection from being asked to pay for inappropriate works. The notice that was given was sufficient to enable the Applicants to put forward representations to the effect that the replacement of the boilers was not appropriate in principal or to make representations about what an appropriate replacement would be. The protection against being required to pay for inappropriate work remained intact.

35. The Tribunal therefore concluded that if an application had been made for dispensation from the consultation requirements in this case it would have been granted without condition.

Payability of the Interim Charge for the Boiler Replacement

36. The Applicants accepted in the course of the hearing that whether or not there had been proper consultation was not relevant to the issues which were before the Tribunal, as the application concerned an interim charge.

37. The Applicants raised two distinct challenges to the Respondent's claim to recover that charge. The first was that it was not justified under the terms of the lease, and the second was concerned with the reasonableness of the decision to replace the boilers.

The Lease Terms

The Applicants' Case

38. Mr. Renton's case was that the Respondent was not permitted to make the interim charge which they sought. He argued that such a charge was limited by the terms of the lease and that he had already paid everything that was owed for 2019. There was, he argued, an issue of timing. He argued that paragraph 11 of Schedule 2 of the lease had not been complied with, and that it did not cover future payments. He argued that the costs had not yet been incurred and that the terms of this clause did not permit charging in advance.

39. Mr. Renton also argued that any demand made for an increase in the on-account payment must be reasonable. He argued that the Respondent could rely simply on a final notice under paragraph 17 of Schedule 2 and need not rely on paragraph 11.

The Respondent's Case

40. On behalf of the Respondent Mr. Shattock argued that paragraph 11 of Schedule 2 of the lease did permit the making of charges in advance of expenditure. It was, he argued, of necessity forward looking. In addition, he pointed out that the costs to be covered by the on-account payment included the costs of maintaining a sinking fund for future expenditure in paragraph 2 of Schedule 2.

41. Ms. Katz explained that as a result of a number of insurance claims in respect of water damage to the building, the excess on the policy was £10,000 and there was, at the time of the demand for further payment, insufficient in the funds held by the Respondent to cover both the cost of the boiler replacement and any such excess payment.

42. Mr. Shattock argued that the demand for payment (page R134) amounted to a notice under paragraph 11 of Schedule 2 of the lease increasing the On Account Payment. Although it did not state this in terms, neither did any of the notices which had been given historically.

The Tribunal's Decision

43. It was clear to the Tribunal from paragraph 17 of Schedule 2 of the lease, which is set out above, that the intended payment mechanism provided for in the lease is that quarterly on-account payments are to be made by the tenants to cover the total costs to be incurred for providing the services set out in the Schedule

during the course of a year. It is clear, therefore, that the intention is for payments to be made in advance of expenditure, and this is what the lease provides for.

44. In any event, paragraph 2 of Schedule 2 of the lease expressly provides for the maintenance of a sinking fund which, of itself, must require the making of payments in advance of expenditure.

45. Paragraph 11 of Schedule 2 of the lease, which is also set out above, is designed to cover the circumstances in which it is anticipated that the payment of the specified on-account payments will not be enough, by the end of the maintenance year, to cover all the costs incurred under the Schedule. This again is obviously forward-looking. The effect of this term in the lease is that it enables the managing agents to increase the amount of the on-account payment when, in their reasonable opinion, the amount of the on-account payment would otherwise be insufficient to cover the costs to be incurred. These costs include the costs of a sinking fund under paragraph 2.

46. The Tribunal was satisfied that paragraph 11 of Schedule 2 of the lease allows the managing agents to increase the on-account payment in order to cover higher than expected future expenditure. It rejected Mr. Renton's arguments that future expenditure cannot be included.

47. Mr. Renton did not expressly challenge the decision of the managing agents that the prescribed (or indeed the previous) on-account payment would not be sufficient to cover the expected costs. In any event, on the basis of what Ms. Katz told the Tribunal, it was satisfied that there was insufficient money to cover the costs of the boiler replacement plus any possible insurance excess and so it was reasonable for the managing agents to reach the opinion that an increase in the on-account payment was required.

48. Paragraph 11 requires one month's notice to be given of any increase in the on-account payment, and the on-account payment is to be made on each quarter day. In this case the relevant quarter day is 29 September 2019. The notice that was given (page R134) is dated 28 August 2019 and requires payment on 29 September 2019. No issue was raised as to service. The Tribunal is, therefore, satisfied that sufficient notice had been given.

49. This then leaves the question of whether the notice that was sent was, in fact, a notice under paragraph 11. The Tribunal accepted that it does not state this in express terms, but paragraph 11 does not prescribe the form of a notice served under it. All that is required is notice of an increase in the amount of the payment. Whilst, once again the documentation could have been clearer, the Tribunal was satisfied that the clear effect of the notice that was served was to increase the amount of the on-account payment to be made and that the Respondent had served a valid notice increasing the amount of the on-account payment as required by paragraph 11.

50. It follows that the Tribunal was satisfied that the demand for payment complied with the requirements of the lease.

Was Replacing the Boilers Reasonable?

The Applicants' Case

51. Mr. Renton accepted that the proposed boiler replacement fell within the scope of paragraph 13 of Schedule 2 of the lease.

52. In their statement of case the Applicants contended that the Respondent had provided no evidence that the existing boilers could not have continued to operate for at least another year, thereby saving money. It was also argued that any defects to the gas flue terminals could have been rectified at minimal cost.

53. In his oral submissions Mr. Renton argued that it was not reasonable to replace the boilers and contended that there was no evidence that there were problems with them. He accepted that the Respondent has a discretion to decide when to replace the boilers but argued that in exercising that discretion regard must be given to whether the existing boilers could continue to be operated efficiently and safely. He made reference to a report from a gas engineer who attended the boilers on 16 November 2018 in which it was stated that boiler 1 was showing an error code but was reset, lit first time and continued to run and modulate as normal (page A69).

54. Mr. Renton accepted that the same report showed that the boiler was "at risk" because of poor circulation around the flue terminals but argued that this could be rectified simply by altering the flues without making any changes to the boilers themselves.

55. The Applicants' case, as explained by Mr. Renton, was that there were two distinct issues affecting the boilers. The first was their safety and the second was the way they were operating. He submitted that as regards the former, this could be addressed by changing the flues. The replacement boilers were to be located in the same place, a narrow light well, and the problem with the flues was to be addressed by putting in taller flues and by having the fumes pumped out into the street. He argued that a similar solution could have resolved the problems with the existing boilers.

56. With regard to the issue of reliability, Mr. Renton submitted that there had been no boiler failures in the 2018/2019 winter season. He accepted, though, that British Gas, who maintained the boilers, had spent a lot on them and that the cover obtained had been downgraded to what is known as Care Plan 1. It was accepted that this meant that British Gas would no longer cover the cost of replacement parts for the boilers.

57. Mr. Renton also raised issues about the specification that had been produced in respect of the boiler replacement. He complained that it was unreasonable for the specification to have specified the installation of Hamworthy Stratton boilers (see page A91) rather than inviting proposals to supply different boilers. He accepted, though, that he had no objection to Hamworthy boilers and that he had not produced any technical information relating to any alternative boilers.

58. In his statement of case Mr. Renton also challenged the decision to replace the boilers on the basis that the decision had been motivated by an ulterior motive on the part of one of the Respondent's directors (see paras 13 and 14 of the Applicants' statement of case - page A3). This was not pursued at the hearing.

59. There was no issue as to the actual cost of the boiler replacement works being unreasonable, and no issue that the Applicants' share of that sum is £7,442.34.

The Respondent's Case

60. The Respondent's case was that it was reasonable to replace the boilers. The reasons for deciding to do so were set out in paragraph 19 of their statement of case.

61. In paragraph 19(a) it was asserted that the previous managing agents had advised that the boiler system was beyond economic repair. The Tribunal enquired whether there was any written evidence of this advice but was told that none was available.

62. The Respondent relied on the inspection report already referred to, which stated that the boiler system was at risk (page A68), and on the evidence of Mr. Arena.

63. In his witness statement, which he adopted at the hearing (pages R75 to 78) Mr. Arena stated that the boiler system had been a source of complaints and anxiety in recent years. Contractors have to be engaged every year to start them. There have been problems getting the parts and the heating breaks down on average three times each winter, when it is off for 1 to 4 days. He understood from his previous managing agents that the boilers were beyond economic repair.

64. In his oral evidence Mr. Arena said that the heating broke down 3 or 4 times every winter season and there were at least 3 occasions last winter when there was no heating. The situation was such that the sub-tenants in flat 5 were threatening to move out. In cross-examination he was asked about an e-mail from another tenant (page R84). He accepted that this showed that heating was being provided some of the time with one boiler. He said that this tenant was consistently annoyed because she was cold in her flat. He explained that the Respondent took advice and decided that it was no longer tenable to continue with the existing boilers. He accepted that there was no similar documentary evidence showing breakdowns in 2018/19 to that showing problems in 2017/18, but insisted that the boilers were breaking down in both seasons.

65. Mr. Shattock argued that there was no evidence to support the Applicants' assertion that the replacement of the boilers could have been avoided simply by changing the flues. He invited the Tribunal to bear in mind that the Applicants had produced no expert evidence. He argued that replacement of the boilers was necessary because of their poor reliability and because the costs of replacement parts for the boilers would no longer be borne by British Gas.

The Tribunal's Decision

66. The Tribunal was satisfied that it was reasonable for the Respondent to decide to replace the boilers in the building.

67. The Tribunal was satisfied that the flues to the old boilers made them unsafe. This is made clear by the inspection report (pages A67 to 69). Indeed, in an e-mail from Mr. Renton to Ms. Katz on 4 September 2019 he himself complained that the boilers were allowed to operate for 5 months in a dangerous condition (page A192).

68. The Tribunal was also satisfied that the boilers were unreliable. The inspection report following the failure of one boiler in November 2018 (page A67) shows that the boilers were 16 years old and in poor condition.

69. The Tribunal accepted the evidence of Mr. Arena that there was a history of breakdowns with an average of 3 failures a season with the period without heating lasting from 1 to 4 days. The evidence, including the e-mails at pages R83 to 89 showed that there had been an ongoing need to replace parts in the boilers and that there was a concern that replacement parts may become unavailable. In 2017 the cost of parts was born by British Gas as the boilers were on a full maintenance contract (see page R85). However, this changed following the inspection in October 2018 when it was recommended that the contract be downgraded to what is known as Care Plan 1, which, it was accepted, would oblige the Respondent to pay for parts (see page A69).

70. The Tribunal accepted Mr. Arena's evidence that such failures occurred in the 2018/19 season, even though this was disputed by Mr. Renton. He gave cogent and credible evidence of the complaints he had had from tenants about the heating failures at that time. In any event, the failures in 2017/2018 were not disputed by Mr. Renton himself, and the inspection report shows that one boiler had failed in October 2018.

71. The Applicants have produced no expert evidence to show that the boilers could continue to be operated efficiently.

72. In summary, the building was served by two old boilers in poor condition which by 2017/18 were failing on several occasions, and which required frequent intervention with the replacement of parts. There was a risk that parts would cease to be available. The boilers continued to fail again in 2018/2019, by which time British Gas, who maintained them, were no longer prepared to do so on a full maintenance basis, meaning that the Respondent would in future be liable for the cost of replacement parts. All this, combined with the undoubted unsafe condition of the flues, was sufficient to justify any reasonable landlord in taking the decision to replace them. The Tribunal was satisfied that it was reasonable for the Respondent to replace the boilers.

73. Although the Applicants have objected to the restriction of the specification to Hamworthy boilers, no objections have been made about such boilers per se, nor has it been shown that the option of other boilers would be cheaper. A detailed and structured specification was prepared and tenders obtained. No

issue has been taken with either, and the actual costs of the proposed replacements has also not been challenged.

74. Although the issue of ulterior motive was not pursued, the Tribunal was in any event not satisfied that any such motive was present. The allegation was that a director wished the boilers to be replaced to enable him to relocate the gas meters with consequent benefit to himself. The specification shows that it was proposed to move the gas meters as their existing position meant that they could only be accessed with the agreement of one of the tenants (page A91). This is reasonable. In addition, the costs of this work were expressly omitted from the tender figures (see page A168).

75. In conclusion, therefore, the Tribunal was satisfied that the cost of replacing the boilers, the sum of £7,442.34 is reasonable and payable.

Legal Fees

76. Having heard evidence and submissions on the issues affecting the boiler replacement, the Tribunal invited the parties to consider whether or not agreement could be reached as regards the claim for legal fees and allowed them time to discuss this issue between them.

77. When the hearing resumed the Tribunal was informed that an agreement had been reached. It was told that the Respondent had agreed not to pursue the recovery of the legal fees that it had previously sought from the Applicants on the understanding, which was accepted by Mr. Renton, that no objection would be taken to the recovery of those fees through the service charge mechanism in due course.

78. As the Respondent no longer sought to recover these costs the Tribunal made no further findings in respect of this issue.

Applications under s.20C of the 1985 Act and Para 5A of the Commonhold and Leasehold Reform Act 2002.

79. In their application form, the Applicants applied for orders under section 20C of the 1985 Act and under para 5A of the Commonhold and Leasehold Reform Act 2002. At the hearing Mr. Renton argued that as he had won on a couple of issues it was not fair to allow the Respondents to recover their costs through the service charge.

80. Mr. Shattock resisted the applications. He drew attention to the Applicants' previous conduct, having already made three unsuccessful applications to the Tribunal for the appointment of a manager. He submitted that whilst the Respondent had withdrawn its claim in respect of company expenditure, and whilst the dispute as regards legal fees had now been settled, by far the largest issue was the renewal of the boilers and that that issue was the central issue in the appeal. He argued that the Respondent had had to incur costs in order to answer what, he submitted, was a weak case in respect of the boilers. He accepted that the Respondent has refused the opportunity to mediate the dispute but argued that this was because of the previous history of applications by the Applicants.

81. The test for whether orders should be made under section 20C and paragraph 5A is whether or not the making of such an order is just and equitable. The Tribunal considered that in this case it was not just or equitable to make such an order.

82. The Tribunal accepted that the issue of company expenditure had been withdrawn. That was done before the hearing and was made clear in the Respondent's statement of case. The sum at issue under that head was £870.30, compared with £7,442.34 in respect of the boiler renewal. The issue of the legal costs was not a victory for the Applicants but, rather, the parties had reached an agreement between themselves which would still see the Applicants making some payment.

83. It was clear to the Tribunal that the boilers were by far the main issue in this application, and the Applicants had been entirely unsuccessful in that part of their case. Further, the Applicants had raised in their application a number of matters, such as issues to do with rainwater ingress and the execution of the new lease, which were not before the Tribunal for determination but nevertheless required some response from the Respondent.

84. Considering all matters in the round the Tribunal concluded that the making of an order under either provision was not justified.

Name: Tribunal Judge S.J. Walker **Date:** 14 February 2020

ANNEX - RIGHTS OF APPEAL

- The Tribunal is required to set out rights of appeal against its decisions by virtue of the rule 36 (2)(c) of the Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013 and these are set out below.

- If a party wishes to appeal against 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.

Appendix of relevant legislation

Landlord and Tenant Act 1985 (as amended)

Section 18

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

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

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

Section 19

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

   and the amount payable shall be limited accordingly.

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

Section 27A

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

(e) the manner in which it is payable.

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

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

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

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

Section 20

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

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

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

(4) The Secretary of State may by regulations provide that this section applies to a qualifying long term agreement—
  (a) if relevant costs incurred under the agreement exceed an appropriate amount, or
  (b) if relevant costs incurred under the agreement during a period prescribed by the regulations exceed an appropriate amount.

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

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

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

Section 20B

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

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

Section 20C

(1) A tenant may make an application for an order that all or any of the costs incurred, or to be incurred, by the landlord in connection with proceedings before a court, residential property Tribunal or the Upper Tribunal, or in connection with arbitration proceedings, are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant or any other person or persons specified in the application.

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

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

Commonhold and Leasehold Reform Act 2002

Schedule 11, paragraph 1

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

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

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

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

Schedule 11, paragraph 2

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

Schedule 11, paragraph 5

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

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

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

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

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

(6) An agreement by the tenant of a dwelling (other than a post-dispute arbitration agreement) is void in so far as it purports to provide for a determination—
  (a) in a particular manner, or
  (b) on particular evidence,
  of any question which may be the subject matter of an application under sub-paragraph (1).

Schedule 11, paragraph 5A

5A(1)A tenant of a dwelling in England may apply to the relevant court or Tribunal for an order reducing or extinguishing the tenant's liability to pay a particular administration charge in respect of litigation costs.

(2)The relevant court or Tribunal may make whatever order on the application it considers to be just and equitable.

(3)In this paragraph—

(a)"litigation costs" means costs incurred, or to be incurred, by the landlord in connection with proceedings of a kind mentioned in the table, and

(b)"the relevant court or Tribunal" means the court or Tribunal mentioned in the table in relation to those proceedings.