FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	:	**CAM/42UG/LSC/2020/0004**
HMCTS code (paper, video, audio)	:	**P:PAPERREMOTE**
Property	:	**29 The Malt Yard, Old Maltings Approach, Melton, Woodbridge Suffolk IP12 1FL**
Applicants	:	**Dr Michael Anthony Barrett**
Respondent	:	**Lifestory Group Limited**
Respondent's representatives	:	**Gateley Legal**
Type of application	:	**Liability to pay service charges**
Tribunal members	:	**Judge David Wyatt**
Date of decision	:	**8 July 2020**

DECISION

<u>Covid-19 pandemic: description of hearing</u>

A This has been a determination on the papers which the parties have consented to. The form of determination was P:PAPERREMOTE. A hearing was not held because, on review of the documents produced by the parties for the determination, I was satisfied that a hearing was not necessary and all issues could be determined on paper.

B The documents that I was referred to are in two hard copy bundles of 454 pages in total, numbered sequentially, the contents of which I have noted. The decision made is described below.

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Decisions of the tribunal

(1) The tribunal determines that:

a. the fair and reasonable proportion of the Running Costs attributable to the Property comprises, as proposed by the Respondent: (a) the metered cost of providing heating and hot water to the Property; and (b) 5.203057% of other relevant costs; and

b. the Respondent was not obliged to comply with the statutory consultation requirements under section 20 of the Landlord and Tenant Act 1985 (the "**1985 Act**") in respect of the arrangements with the new managing agent and the new gas supplier, because they were not qualifying long-term agreements.

(2) The tribunal makes no order under section 20C of the 1985 Act or paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002 (the "**2002 Act**"). Nor does the tribunal make any order for payment by the Respondent of the application fee or any other costs incurred by the Applicant.

(3) The reasons for these decisions are explained in detail below. The relevant legal provisions are set out in the Appendix to this decision.

The application

1. The Applicant sought determinations pursuant to section 27A of the 1985 Act in respect of service charges payable by him from 2020 as to:

   (i) whether the Respondent can change from floor-area apportionment to a differentiated service charge, where the Applicant is charged separately for individual usage of under-floor heating and hot water but on a floor-area basis for all other relevant costs (examined below as **issue 1**); and

   (ii) whether the Respondent has breached statutory consultation requirements by not consulting leaseholders before: (a) appointing a new managing agent, Rendall and Rittner Limited (**issue 2**); and (b) entering into a new gas supply agreement using the services of the new managing agent (**issue 3**).

2. The Applicant also sought:

   (i) an order for limitation of the Respondent's costs in these proceedings, under section 20C of the 1985 Act;

(ii) an order to reduce or extinguish liability to pay an administration charge in respect of litigation costs, under paragraph 5A of Schedule 11 to the 2002 Act;

(iii) an order for reimbursement of the tribunal fees paid; and

(iv) an order that the Respondent pay his reasonably incurred preparation costs.

Procedural history

3. The tribunal gave case management directions that:

   (i) this application would be determined without an inspection unless by 3 April 2020 either party requested one; and

   (ii) this application would be determined based entirely on the papers, without a hearing, unless by 28 April 2020 either party requested a hearing.

4. No such requests were made. The tribunal gave various extensions of time for preparation of the requisite documents. The bundles required by the directions were duly filed for the tribunal to make its determinations.

5. Accordingly, having considered all the documents provided, the tribunal has made determinations of the relevant issues. These are explained below.

The Building, the Property and the Estate

6. The **Building** (Malt Yard) is a four-storey residential building, with extensive facilities on the ground and lower-ground floors (including a library, reception area, gym, cinema room, lounge with supplies, laundry room and office for the part-time host), 29 residential apartments (which all have one or two bedrooms but vary in size) on the upper floors for residents of 55 or more years of age, and a guest suite.

7. The apartments and other internal areas in the Building are served by a communal "*district*" under-floor heating and hot water system, powered by gas-fired twin boilers, which uses gas and electricity to pump hot water through insulated pipes to heat exchanger units for the apartments.

8. The apartments and other internal areas are also served by ventilation systems, reducing the need for opening windows, which mitigate heat loss by using heat from the extracted air to warm the fresh air.

9. The **Property** (29 Malt Yard) is a two-bedroom apartment on the top floor. With a floor area of 105 sq. m, it is the largest of the apartments in the Building. It is also a loft-style apartment, with high ceilings.

10. The **Estate** includes the Building, gardens and parking accommodation.

<u>The parties</u>

11. The Applicant holds a long Lease of the Property. This Lease requires the Respondent to provide services as landlord and the Applicant leaseholder to contribute towards their costs by way of a variable service charge. The key provisions of the Lease are summarised below.

12. The Respondent, Lifestory Group Limited, is the landlord under the Lease. Until 30 September 2019, it was named Pegasus Life Limited. It is a developer specialising in house building and retirement schemes for those over the age of 55.

13. The Respondent acquired the site in 2013 and redeveloped it, completing the development in 2015/2016.

14. The Lease was granted pursuant to an Agreement for Lease exchanged between the parties on 27 July 2018. The Respondent says that the Applicant was, at the time of exchange and at least until completion, represented by solicitors in relation to the transaction.

<u>The Lease</u>

15. The Lease is dated 6 August 2018 and made between Pegasus Life Limited and the Applicant. It has an unexpired term of about 995 years.

Service Charge definitions/proportions

16. Under the terms and conditions incorporated into the Lease:

    (i) the "*Running Costs*" are monies expended or anticipated to be expended by the Respondent in connection with the provision of the Services;

    (ii) the "*Services*", as set out in part 4, include paying charges in relation to the supply of heating and hot water to the Building through any district heating system (clause 4.20) and the supply of electricity, gas and other utilities to and from the Building (clause 4.21);

    (iii) the "*Service Charge*" means a fair and reasonable proportion of the Running Costs attributable to the Property as determined by

the Respondent acting reasonably and unless the Respondent notifies the Applicant otherwise such proportion is to be based primarily by reference to the proportion that the floor area of the Property bears to the aggregate floor area of the Building (including the Property) leased or intended to be leased.

Covenants to pay Service Charges and provide Services

17. In clauses 1.1 and 1.2, the Applicant agrees to pay:

    (i) the Respondent's estimate of the Service Charge in respect of each service charge year by equal monthly instalments in advance on the first day of each calendar month; and

    (ii) if in any service charge year the estimate is less than the actual Service Charge, the difference on demand.

18. In clause 3.4, the Respondent agrees to use reasonable endeavours to provide the Services "*or such of them as we consider appropriate in accordance with the principles of good estate management*", subject to various qualifications.

19. Clauses 3.5 to 3.7 set out the service charge certification mechanism and related matters.

Covenant to pay outgoings and utilities

20. Clause 1.4 of the terms and conditions also includes a specific agreement by the Applicant to pay all outgoings and assessments of whatever nature payable in respect of the Property or by its owner or occupier which "*shall for the avoidance of doubt include the supply of heating and hot water*" to the Property.

21. In the same clause, the Applicant further agreed to pay "*a fair and reasonable contribution on demand*" of any costs incurred by the Respondent in providing utility services to the Property, including the cost of the utility itself.

Examination of issue 1: apportionment of heating/hot water costs on a metered basis and all other costs on a floor-area basis

22. From completion of the development in 2015/16 until 2019, service charges at the Building have been apportioned on a floor-area basis. The Applicant discovered in October 2019 that the Respondent was planning to arrange to "link up" individual heating meters (which he had not realised were already installed, out of sight) to charge separately for the

under-floor heating and/or hot water supplied to the Property through the district heating system.

23. The Applicant believes that this change will affect him unfairly. As explained below, he believes he is already paying a disproportionate share of other costs because his apartment has the largest floor area of all the apartments in the Building. He asserts that, if measured by volume (which he says is a key factor in a heat requirement calculation) rather than by floor area, the Property is proportionally even larger than the other apartments, so will necessarily take more thermal energy to heat to the same level as an apartment with lower ceilings.

24. The Applicant gives detailed descriptions of the background, which I have noted. He makes several specific arguments, which are examined individually below.

Pre-sale information

25. The Applicant says that he purchased the Property on the express understanding, through sales material, a service charge statement for a previous year, and discussions with the Respondent's estate agent, that under-floor heating and hot water were included as part of a floor-area apportionment of service charge costs. The main contemporaneous evidence produced by the Applicant for these assertions is:

    (i) a manuscript note of an annual service charge of £4,767.54, which seems to have been based on or provided with an annual estimate of £91,625 for the running costs of the Building and the service charge statement for the previous year; and

    (ii) a property running costs comparison document, which appears to have been produced to seek to justify the level of service charges and has been amended in manuscript to show "heating" as being included in the service charge - but does not by itself say anything about how that service charge will be apportioned.

26. The Respondent says that these matters are not relevant to the construction of the Lease. The Respondent refers the tribunal to authorities including <u>Arnold v Britton</u> [2015] UKSC 36. The Respondent says (in summary) that the tribunal must focus on the meaning of the words used in the Lease and identify what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean, disregarding subjective evidence of any party's intentions.

27. That is correct in relation to construction (the other arguments from the parties about that are examined below), but it appears the Applicant may

have been arguing (in effect) that he had been induced by a misrepresentation to enter into the Agreement for Lease or that the Respondent was estopped from claiming Service Charges against him based on a different apportionment. The tribunal would only have jurisdiction in respect of such matters where: (a) another court or tribunal does not have exclusive jurisdiction; and (b) determination of them is essential to determining the relevant question under section 27A of the 1985 Act. For the following reasons, I am not satisfied that determination of these matters/claims is essential to my determination and, even if they were, I would on the evidence produced have dismissed them.

28. The Respondent says that, even if the pre-sale information is relevant, the indications given in the documents produced will be true because heating will be included in the service charge; it will simply be apportioned on a metered basis. In isolation that seems an unduly technical argument; the running costs comparison document was obviously provided to justify what would have seemed a high level of service charges, by indicating that the figure given in 2018 included heating – and other costs – of types which leaseholders would otherwise be paying for individually in addition to the service charge. Both parties seem to anticipate that the change may increase the cost to the Applicant of supplying heating and hot water to his apartment.

29. However, it was not necessarily wrong to give this indication in 2018. The heating costs had been apportioned on a floor-area basis in each year since 2015/2016 and there is no suggestion that when these documents were provided in 2018 there was any plan to change the basis on which the heating charges were apportioned.

30. The main reason that the Applicant's argument about the pre-sale information does not merit further examination is that the terms of the Lease (as attached to the Agreement for Lease) clearly state that:

    (i) the landlord could <u>change</u> the basis of apportionment at any time by simply notifying the leaseholder - and even until then the apportionment need only <u>primarily</u> be based by reference to floor area (as set out in the Service Charge definition); and

    (ii) the leaseholder would be separately liable to pay <u>all</u> outgoings demanded in respect of the Property, including the supply of heating and hot water to the Property (clause 1.4).

31. The Respondent says and the Applicant does not deny that the Applicant was legally represented in his purchase of the Property, in the usual way. It was open to the Applicant, directly or through his conveyancing solicitors, to seek to negotiate a change to these provisions or the commercial terms or, if the developer would not negotiate about these matters and if the provisions outlined above were unacceptable to the

Applicant, not to purchase the Property. Since he chose to proceed and exchange the agreement to take the Lease in these terms, he must be taken to have accepted that the basis of charging for supplying heat and hot water to his apartment could be changed in future.

32. Accordingly, for the purposes of the determination I have been asked to make, the Applicant cannot avoid the terms of the Lease based on the evidence he has provided about the information given to him before he decided to accept the terms set out in the Lease.

Custom and practice

33. The Applicant seems to be arguing that the Respondent cannot change the basis of apportionment because the floor-area apportionment has been adopted and becoming binding as "custom and practice", since 2015 in respect of other leaseholders and since August 2018 in his case.

34. For the same reasons as those given above, the Respondent has not become bound by a course of dealing or the like to apportion all costs on a floor-area basis. The terms of the Lease expressly provided for this initial primary basis of apportionment and (subject to the following matters) for it to be changed in future.

Section 27A(6) of the 1985 Act

35. The Applicant refers to section 27A(6) of the 1985 Act and suggests that, following Windermere Marina Village Ltd v Wild and others [2014] UKUT 163 (LC) and Gater and others v Wellington Real Estate Ltd [2014] UKUT 561 (LC), aspects of the Lease which purport to give the Respondent power to determine the apportionment may be void.

36. The Respondent acknowledges these authorities and rightly admits that the tribunal has jurisdiction to decide how the Respondent is to apportion the service charges under the Lease. However, the parties have left it to the tribunal to decide the effect of section 27A(6) on the precise wording in the Lease.

37. In Gater, where the relevant service charge proportion was a "*…due and fair proportion of the Service Cost ~~(such proportion to be determined by the Landlord or its surveyor (in each case acting reasonably)~~ and taking into account the relevant floor areas within the Building or other reasonable factors in making the determination…*", the Deputy President held that the words shown struck through in the extract above were void but added (at para. 75) that:

> "*In carrying out an apportionment the appropriate tribunal will have regard to the parties' agreement, so far as it remains. In this case the parties agreed that the Tenant's Share would*

> *be a due and fair proportion of the service costs which would be apportioned "taking into account the relevant floor areas within the Building or other reasonable factors". That is not a provision the effect of which is to provide for a determination "in a particular manner" and it survives the intervention of section 27A…*"

38. In this case, applying section 27A(6) of the 1985 Act to the definition of Service Charge in the Lease, the provision for the Respondent to determine the service charge proportion is void. The fair and reasonable proportion of the Running Costs attributable to the Property is to be determined by the tribunal if this is not agreed by the parties. This leaves at least the following wording in the Service Charge definition:

> "*… a fair and reasonable proportion of the Running Costs attributable to the Apartment ~~as determined by us acting reasonably~~ and [unless we notify you otherwise] such proportion is to be based primarily by reference to the proportion that the floor area of the Apartment bears to the aggregate floor area of the Building (including the Apartment) leased or intended to be leased*."

39. The provision in the first part of the text underlined above, for the Respondent to unilaterally change the basis of apportionment simply by giving notice, could perhaps be challenged under section 27A(6). However, bearing in mind the confirmation from the Deputy President at para. 40 of Windermere Marina Village that the purpose of section 27A(6) is "*…to avoid agreements excluding the jurisdiction of the first-tier tribunal on questions which could otherwise be referred to it for determination*", it seems to me that this text is not in that sense providing for a *determination* to be made in a particular manner. It is not purporting to oust the jurisdiction of the tribunal; it simply gives an option to remove the primary floor area element, leaving the question open. The provision is, following Gater, the agreement between the parties that the apportionment is to be based primarily on leased floor area, unless the Respondent gives notice to disapply that, in which case all bets are off and the apportionment is simply to be the fair and reasonable proportion of the Running Costs attributable to the Property, as determined by the tribunal.

40. For the same reasons, the provision in the second part of the text underlined above, for the proportion to be based primarily by reference to leased floor area, will survive section 27A(6). If I am wrong about the previous provision, it will *require* the apportionment to be so based, whether or not the Respondent purports to give notice to change it. In any event, while a lease of this length may need to allow for flexibility over the long term, this Lease was granted less than two years ago, so the floor area provision is at least a significant factor to which I should have regard when determining the fair apportionment.

Consumer Rights Act 2015

41. The Applicant asks the tribunal to consider his “consumer rights”, particularly regarding any covenants or conditions in the Lease which are unfair or lacking in transparency. He refers specifically to sections 62 and 68 of the Consumer Rights Act 2015 (the “**2015 Act**”) and produces grammatical or plain English analysis of the language used in the Lease to argue that it is verbose and/or less than transparent.

42. The Respondent says (in essence) that none of the relevant provisions create, contrary to the requirement of good faith, a significant imbalance between the parties to the detriment of the Applicant in the sense required (i.e. under section 62 of the 2015 Act), so they are not “unfair” in the technical sense.

43. The same points made above about the jurisdiction of this tribunal (when considering the pre-sale information) apply here. Subject to the question of jurisdiction and only for the purposes of this determination:

    (i) The relevant provisions of the Lease were transparent for the purposes of clause 68 of the 2015 Act (because they were expressed in plain and intelligible language, and legible) as summarised above;

    (ii) I might otherwise have been troubled by the one-sided nature of the wording in the Service Charge definition - allowing the landlord to determine and change the basis of apportionment simply by giving notice - but that is cut back by the opening requirement in the definition that the apportionment must be fair and reasonable and moreover by section 27A(6) of the 1985 Act. The relevant surviving terms of the Lease are not unfair for the purposes of section 62 of the 2015 Act.

Construction of the provisions of the Lease

44. The Respondent says that under the terms of the Lease it is entitled to apportion the charges for heating and hot water based on the actual metered usage of the Property as part of the Service Charge or, if that is wrong, to recover these costs on a metered basis under clause 1.4 (outgoings and utilities) of the Lease. It says that the Service Charge proportion is to be based “primarily”, not solely, based on floor area, and only if the Respondent has not notified the Applicant otherwise. It says that it has given such notification to the Applicant of its intention to apportion the charges for heating and hot water based on actual usage, rather than by floor area, and that this is fair and reasonable.

45. The Applicant says that if terms have more than one meaning, they are generally construed restrictively in a manner favourable to the tenant.

He also says that the Respondent cannot change from floor-area apportionment without moving entirely away from floor-area and "*calculating it (fairly) otherwise*". He is arguing, in effect, that under the Service Charge definition there can only be one type of apportionment, not floor area apportionment for some costs and another for others, and that the Service Charge definition should be read as if "*primarily*" were omitted or allowed only insubstantial deviation. He also says (in effect) that clause 1.4 (for outgoings and utilities) should be given a very narrow construction, and that the heating and hot water costs must be part of the Service Charge, so cannot be recoverable under clause 1.4, because he says the Respondent is obliged to provide this as part of the Services.

46. Assuming that the provisions in the Service Charge definition for apportionment primarily by reference to floor area, unless the Respondent notifies the Applicant that this will no longer apply, survive section 27A:

    (i) it is not clear whether the Respondent has so notified the Applicant; the Respondent does not point to a specific notice and appears to rely on information given at meetings and in the new service charge estimate(s)/demands, which may not suffice, but

    (ii) that does not matter because, for the reasons given below, the apportionment would still be based *primarily* by reference to floor area if the heating and hot water costs were apportioned on a metered basis and all other costs were apportioned on a floor area basis.

47. In context, I do not accept that I should narrowly construe the words "*based primarily by reference*" (to leased floor area). The language is clear. Following Arnold v Britton, as mentioned above, there is nothing in the background knowledge which a reasonable person would have had at the relevant time in 2018 (even if I assumed general knowledge of the level of service charges and the running costs comparison document produced by the Respondent) which would have made any significant difference to what the reasonable person would have understood the parties to be using these words to mean. None of the other factors mentioned in Arnold v Britton change this; the expression is to be given its natural meaning.

48. The heating costs were less, or substantially less, than 25% of the total service charges for each of the service charge years. The service charge information does not generally give a separate cost of heating for the apartments, which is included in the overall figures for all utilities. Even the total figures for utilities were less than 25% of the total service charges for each of the years 2016 to 2018. Some would say that "*primarily*" means anything more than 50% and some would say that it means a higher proportion, with scope for argument about the flexibility

of "*based*" and "*by reference*". I do not need to consider precisely where the threshold might be in this case because I am sure that the service charge apportionment would still be *based primarily by reference* to floor area if more than 75% of the relevant costs were apportioned on that basis and the remaining heating and hot water charges were charged on a metered basis.

49. I do not accept that only one type of apportionment may be used for all costs at any one time. A fair and reasonable service charge proportion may be comprised of more than one proportion for different types of cost. If it is fair and reasonable to charge for heating on a metered basis and charge on a floor area basis for other costs (a question which is examined below), such an apportionment will be in accordance with the part of the Service Charge definition which survives section 27A(6).

50. If I am wrong about the above points, the result will be the same because clause 1.4 is not to be given a narrow construction. The language is clear and it is to be given its natural meaning. The Applicant is wrong to say that heating must be provided as part of the Services and the corresponding Service Charge machinery in the Lease, because the Respondent's obligation to provide the Services is qualified (by reference to good estate management and other matters, as summarised above). As long as the Respondent continued to provide heat to the Property in accordance with the principles of good estate management, it could seek to charge directly for the costs of the heat supplied to the Property as a separate service charge under clause 1.4, rather than under the general Service Charge machinery in the Lease.

Fair and reasonable proportion – metered apartment heating/hot water

51. In isolation, it is obvious that charging for heating and hot water on a metered basis is fair and reasonable. In PAS Property Services Ltd v Hayes [2014] UKUT 0026(LC), HHJ Robinson indicated that identification of a fair and proper proportion of outgoings may require an assessment of how much heat each apartment uses, whether by using meters or otherwise: "*Simply apportioning the cost by floor area would not be a fair and proper proportion because it will not necessarily bear any relation to the amount of gas used or consumed in an individual apartment. This will relate to matters such as the number of occupants (more people use more hot water), whether an apartment is occupied all of the time and personal choice as to the level of heating required*."

52. Those observations were made in the very different circumstances of that case, where the landlord was in effect seeking to recover from the leaseholders of two buildings the costs of a communal heating system in only one of those buildings. Subject to that contextual qualification, I bear those observations in mind and note that in East Tower Apartments Ltd v No.1 West India Quay (Residential) Ltd [2016] UKUT 553(LC), the Deputy President confirmed that the best method of determining

consumption (the word used in the leases in that case) is by direct metering.

53. Further, although this seems to be an explanation given after the event, the Respondent says that, as a "*heat supplier*" under the Heat Network (Metering and Billing) Regulations 2014 in respect of the district heating system at the Building, it is obliged to ensure meters are installed to measure the consumption of heating and hot water by each final customer. This seems to be correct and is not disputed by the Applicant.

54. Apart from questions about the ventilation systems and the apportionment of all other service charge costs, which are examined below, the Applicant does not - and on the information provided could not reasonably - deny that charging for heating on a metered basis is the fairest approach. Although he asserts that heating and hot water were the only costs which it was reasonable to apportion on a floor area basis, he rather contradicts this by saying (as noted above) that because the Property is a loft-style apartment it will necessarily take more thermal energy to heat to the same level as an apartment with lower ceilings.

Fair and reasonable proportion - ventilation/heat management systems

55. The Applicant points to what he describes as a communal heat exchanger on the lower floors. As explained above, the apartments and other internal areas are served by ventilation systems which extract stale air and replace it with fresh air, reducing heat loss in that process. The Applicant states that a single heat exchanger unit with communal ducting serves the communal areas and the apartments on the lower floor, but individual units serve each apartment on the top floor and are paid for by each upper-floor leaseholder through their electricity supply contracts, outside the service charge. Accordingly, the Applicant believes that he is in effect subsidising the cost of heating/ventilating the apartments on the lower floor through the service charge, by paying for the operation of the communal heat exchanger and because he believes the apartments on the lower floor are sharing the heat generated for the communal areas.

56. The Respondent challenges the Applicant's description of these systems and how they work. It says that in fact the lower-floor apartments each have their own ventilation unit, powered by the apartment's own electricity supply, each of which has a heat recovery facility to reduce heat loss in the ventilation process, without sharing the heat/ventilation with the communal areas. The Applicant disputes this, saying that the Respondent is wrong to describe the systems in each apartment as "*Villavent*" systems and that they are in fact "*SystemAir*" systems.

57. However, the documents produced by the Applicant with his reply (at page 398 in bundle 2) indicate that "*Villavent*" is manufactured by "*SystemAir*" and is primarily a ventilation unit, with a heat exchanger to

reduce loss of heat from the extracted air. Both the models referred to appear to be single units, the first for installation in houses and the second for installation in apartments where duct runs to external vents will be involved. That will be the case for single apartments in some buildings; it does not indicate that the unit is designed to be connected to communal areas or other apartments. Even if (as seems unlikely) the Applicant is right and there is a single unit serving the lower floors and so heated air does pass between the communal areas and the apartments, those apartments would be helping to heat the communal areas just as the communal areas were helping to heat the flats, although the question of ventilation costs would then be uncertain.

58. Even allowing for the fact that it may be difficult for the Applicant to provide evidence for his assertions, the only evidence he has produced seems to contradict what he is saying and is consistent with the more specific explanation given by the Respondent. On the information provided, the explanations given by the Respondent are more credible and I accept them as more likely to be true. Accordingly, these arguments from the Applicant will not have any significant effect on the service charge apportionment.

Fair and reasonable proportion – other costs on a floor area basis

59. The Applicant says that the floor area apportionment of other costs must be changed if heating is charged on a metered basis. He believes that the floor area apportionment means that he pays a disproportionate share of other costs and that if this is no longer offset by the benefit to him of (in effect) paying less than his fair share of heating costs that will be unfair.

60. That argument runs into some difficulty with the Service Charge wording in the Lease. If heating costs are apportioned on a metered basis and recovered through the Service Charge, this might leave little scope for other costs to be apportioned on anything other than a floor area basis. As explained above, the Service Charge wording probably does not require the costs to be based primarily by reference to floor area if the Respondent gives notice to change this (or the Respondent could seek to charge the heating costs under clause 1.4 and so gain more scope for different apportionment of costs through the Service Charge even without giving such notice), but it is a significant factor to be kept in mind.

61. The Applicant says that he pays service charges of more than double those paid by the smallest apartment in the Building. I can see from the documents in the bundle that he is correct. His Property is the largest apartment in the Building by floor area (at 105 sq. m) and, with a floor area apportionment of 5.203057%, does pay more than double the service charge paid by eight of the 29 apartments (seven at about 46 sq. m, who pay about 2.3%, and one at about 47.7 sq. m who pays about 2.4%). However:

(i) the Applicant does not challenge the accuracy of any of these measurements or apportionments;

(ii) seven of the apartments also pay a much higher proportion (three with at least 97 sq. m, who pay more than 4.8%, two with at least 95 sq. m, who pay about 4.7%, and two with at least 87 sq. m who pay 4.3% or more); and

(iii) the remaining 13 apartments are in the middle, with nine at 3.4% and four at 3.1%.

62. In his main statement of case, the Applicant did not identify the basis on which he says other costs should be apportioned, but he did appear to be arguing for a 1/29 (i.e. just under 3.45%) proportion, an equal share for each apartment. He asserts that he does not use any more than 1/29 of any of the other services within the service charge and so there is no justification for apportionment based on floor area.

63. In his reply, the Applicant takes a different approach and suggests a more complex apportionment with different components, by reference to guidance from Switch 2 Energy Limited. This suggests:

(i) billing and administration apportioned per apartment;

(ii) gas and electricity apportioned mainly by meter but partly by floor area;

(iii) maintenance costs split between floor area, per apartment and metered charge apportionments;

(iv) capital expenditure apportioned on a floor area basis; and

(v) operational costs split between metered and floor area apportionments.

64. Particularly in the absence of a detailed analysis of such costs and proper workable proposals, I am not persuaded by what the Applicant has suggested. I take his point that he personally may not use or benefit any more than any other apartment from some of the costs in the service charge, such as interior cleaning costs and the lifestyle costs (flowers, newspapers, cinema, on-site host and so on) which make up a substantial part of the service charge. However, as explained below, it seems to me that this potentially disproportionate share of some costs is offset by the fact that the Property will (in effect) use a greater share than the smaller apartments of other significant service charge costs.

65. The larger apartments are likely to use or benefit rather more than smaller apartments from some of the most substantial service charge costs (such as the boilers and plant for the district heating system, buildings insurance, roof repairs and other major works in future,

window cleaning and management/professional costs relating to such matters) because they rely on a greater area of the building for protection, put a greater proportional demand on the heating boilers, represent a greater part of the building valuation for insurance purposes, have more/larger windows and so on. To give examples only, I note that the estimated costs for 2020 include: (a) boiler and plant maintenance work at £12,000; (b) insurance at over £9,000; and (c) a striking £4,000 on window cleaning alone. I have been given no real indication of future major works such as roof repairs and there may be no need for such works for a long time because the Building is only about five years old, but the cost of such works may of course be substantial.

66. Given the Applicant's point that the Property is a loft apartment with higher ceilings and so greater overall proportions, it is likely to benefit more than even the floor area would suggest from some of these significant service charge costs. Accordingly, it is fair and reasonable for the Property to pay a greater share.

Determination

67. In all the circumstances and on the information provided by the parties, it seems to me that a floor area apportionment of the other costs would be the fair and reasonable approach, even if it is not required by the wording of the Lease.

68. Accordingly, I have determined that the fair and reasonable proportion of the Running Costs attributable to the Property comprises, as proposed by the Respondent: (a) the metered cost of providing heating and hot water to the Property; and (b) 5.203057% of other relevant costs.

Commentary

Process – lack of consultation

69. The minutes of a meeting on 5 December 2019 recorded that an owner had raised a challenge about the heating changes and whether consultation should have taken place. The Applicant says that he discussed this with the Respondent's representatives at this meeting and was told that the reason for the lack of any consultation as recommended by the Association of Retired Housing Managers and/or the Royal Institution of Chartered Surveyors was that the floor-area apportionment for heating and hot water was a "mistake".

70. The Applicant refers to paragraphs 7.1 to 7.12 of the Code of Practice of the Association of Retirement Housing Managers, which advise that custom and practice should not be changed (such as a variation of the charges for a service or facility) without specific consultation, including

a meeting and a secret ballot with (broadly speaking) at least 66% in favour and not more than 25% of leaseholders against.

71. The Respondent suggests that it did consult the leaseholders about the matters which are the subject of this application. However, it seems to me that it informed the leaseholders of its decision about apartment heating/hot water costs and answered questions about that, rather than engaging in any real consultation. It appears that it did have good reasons for making the change and I have in effect upheld it. The correspondence from the Applicant in the bundle also suggests that most leaseholders were in favour of, or not opposed to, the change. However, that failure to consult was unfortunate, as it may have contributed to the dispute between the parties.

72. While I make no determination about this, it may be sensible for the Respondent to review the service charge arrangements after a reasonable period to assess how the new heat charging arrangements have worked and then to consult leaseholders properly about whether they are happy with the operation of the new apportionments and in particular about apportionment of other costs in future.

General observations

73. The Applicant makes a separate allegation that the change of apportionment is a device to reduce the aggregate service charge bill, which has increased substantially from 2019 to 2020 (with a service charge estimate for the 2020 year of £6,104.03 for the Property, based on estimated Running Costs of £117,316 for the Building) even after removing the heating and hot water costs. He estimates that the change to metered heating and hot water is likely to cost him an extra £750 each year in addition to the already high level of service charges. The Applicant says that such high annual costs make the Property unsaleable, but he provides no evidence of this.

74. On the face of it, the service charges do seem to be very high, even bearing in mind the basic information provided about the facilities and additional services provided as part of the service charge. However, in these proceedings, the Applicant has not challenged whether any of these costs are payable under the Lease or were reasonably incurred, so the Respondent has provided no case or evidence in this respect. Accordingly, it is not appropriate for me to make any finding in these proceedings about the level of the service charges.

75. This determination relates solely to the issues identified. It does not prevent the Applicant from making a new application for determination of the service charges, but it may be sensible for him to take professional advice, obtain alternative like for like quotations to test the relevant prices and promptly raise any concerns he has with the Respondent, or its managing agents, as appropriate.

Examination of issue 2

76. The Applicant states that until 31 July 2019 the Estate was managed by Helicon Limited, which was owned by the Respondent, and that new managing agents, Rendall and Rittner Limited, were appointed on 1 August 2019. It seems there were good reasons for the change, not least because the former agent was not collecting the requisite direct debits from leaseholders for their service charges, leaving them in substantial arrears when they had been trying to pay.

77. On 20 December 2019, the Respondent informed the Applicant that the Respondent was in the process of finalising the appointment of the new managing agent, but that the agreement involved would be for less than 365 days.

78. The Applicant asserts that the agreement must be for 17 months, beginning on 1 August 2019 and ending at the end of the service charge year on 31 December 2020, since that fee has been demanded as part of the estimated service charge. The Applicant refers to section 20 of the 1985 Act and asserts, in effect, that the agreement with the managing agent must be a qualifying long-term agreement about which leaseholders were not consulted and accordingly the relevant contribution which can be recovered from each leaseholder in relation to this agreement is limited to £100.

79. By section 20ZA of the 1985 Act, a qualifying long-term agreement is (subject to various exceptions) an agreement entered into by the landlord for a term of more than 12 months. In Corvan (Properties) Ltd v Abdel-Mahmoud [2018] EWCA Civ 1102, McFarlane LJ indicated (at paragraph 38, without deciding the point but by reference to the earlier decided cases) that the deciding factor is the *minimum commitment*; the issue is the duration of the term the parties have *entered into* in the agreement.

80. The Respondent says that the new managing agent was appointed on 1 August 2020 in respect of its property portfolio for a 12-month period. It states that the terms of the agreement with the new managing agent are still under negotiation and it has not entered into and does not intend to enter into an agreement with the new managing agent for a term of more than 12 months, for the purposes of section 20 of the 1985 Act. It also observes (in effect) that budgeting for the 2020 management fee mentioning the name of the new managing agent does not bind it to the relevant manager for all of 2020.

81. The Applicant invites me to be suspicious about that and demand to see the document(s), but it is unfortunately common practice for property managers to take up, or be asked to take up, appointments before a management agreement has been signed and for negotiation over the

finer points in the terms of that agreement to take a long time. Demanding to see a succession of drafts is unlikely to be helpful.

82. I accept as more likely to be true the evidence of the Respondent that the managing agent has been appointed for a term of 12 months, that an agreement has not been entered into for a term of more than 12 months and that accordingly this is not (as matters stand) a qualifying long-term agreement.

Examination of issue 3

83. The Applicant also asserts that the Respondent has entered into a new qualifying long-term agreement for supply of gas (using the services of the new managing agent to procure this) without consulting leaseholders.

84. The Applicant says that the gas contract includes two components: (a) the supply of gas to heat communal areas; and (b) the supply of gas for provision of under-floor heating and hot water to the individual apartments, pointing out that this would make consultation particularly important, since the nature of the communal heating arrangements mean that leaseholders have no choice of gas supplier.

85. Again, the Respondent denies that it has entered into an agreement with the gas supplier for a term of more than 12 months for the purposes of section 20 of the 1985 Act. It also points out in passing that it did as a matter of good estate management engage in discussion with leaseholders at the Building, with an e-mail from the agent on 21 October 2019 and residents' meetings on 5 and 12 December 2019, but there is no suggestion that this would have been sufficient to comply with the statutory consultation requirements which would have applied if this was a qualifying long-term agreement.

86. Again, I accept the evidence of the Respondent as more likely to be true. For the same reasons as those in relation to issue 2, this is not a qualifying long-term agreement.

87. I take the Applicant's point about the importance for leaseholders of the gas supply arrangements, but that is something to be considered when he (or the tribunal, if in future a new application is made for determination of the relevant service charges) decides whether the relevant heating costs have been properly market tested and reasonably incurred.

Applications under s.20C and para.5A

88. The Applicant applied for an order under section 20C of the 1985 Act. He says that the Respondent failed and/or refused to carry out any prior

consultation, statutory or otherwise, to enter into any form of proper discussion or dialogue to resolve or clarify the issues, to agree early neutral evaluation or offer any alternative dispute resolution, or to implement the dispute resolution procedure set out in the Lease.

89. If the Respondent does seek to recover any costs incurred in connection with these proceedings through the service charge, and if any of those costs are not payable under the Lease and/or are unreasonable, a new application can of course be made to the tribunal for a determination of the relevant service charges.

90. However, I do not consider it just and equitable to make an order under section 20C of the 1985 Act in respect of the costs of the proceedings to date, because:

(i) the Respondent engaged with the Applicant to explain the reasons and basis for their decision; they simply were not prepared to change their proposed approach because they considered it was the right one;

(ii) that was reasonable of the Respondent; on the issues raised by the Applicant in this application, he has been unsuccessful;

(iii) although it is unfortunate that the Respondent did not consult leaseholders about the change and this may have contributed to the dispute, it seems likely that in this case the result of proper consultation would have been the same outcome (I have determined that the proposed change is appropriate and the correspondence in the bundles suggests that other leaseholders were in favour of, or not opposed, to it) and/or that the Applicant would not have been satisfied with the outcome of such consultation;

(iv) the Applicant prepared helpful bundles for this determination, but did take a rather lengthy, argumentative and repetitive approach; he was entitled to do so and he has not been unreasonable, but this inevitably created more work and is reflected in the length of this decision; and

(v) I must consider the financial consequences of an order under section 20C; it would not be just and equitable for the other leaseholders to have to pay any costs of these proceedings through the service charge if the Applicant does not.

91. The Applicant also applied for an order under paragraph 5A of Schedule 11 to the 2002 Act on the same grounds. I do not make an order on this application: (a) because I have not been informed of any particular administration charge in respect of costs incurred by the Respondent in

these proceedings before this tribunal; and (b) for the same reasons (other than the last reason), that I have not made an order under section 20C of the 1985 Act.

Application for an order for costs/fee reimbursement

92. Finally, on the same grounds, the Applicant asks the tribunal to order the Respondent to pay his reasonably incurred costs, and to reimburse him for the tribunal application fees.

93. Under Rule 13 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, in this type of case the tribunal may make an order in respect of costs only, in essence: (1) if the relevant party has acted unreasonably in conducting the proceedings; or (2) as a wasted costs order. The tribunal has general discretion in respect of reimbursement of the tribunal application fees.

94. For the same reasons that I have not made an order under section 20C of the 1985 Act (other than the last reason), on the information provided the Respondent has not acted unreasonably and there are no grounds for a wasted costs order. Nor would reimbursement of the application fees be appropriate. I do not order the Respondent to reimburse the application fee paid by the Applicant and I do not order the Respondent to pay the Applicant's costs.

Name: **Judge David Wyatt** **Date:** **8 July 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).

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.

...

(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.

(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 of an application under subsection (1) or (3).