



**FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)**

Case Reference : **CHI/OOML/LAM/2020/0017**

Property : **Lainson House Dyke Road Brighton
BN1 3JS**

Applicants : **(1) Suzanne Eames
(2) Sylvie Riot and Keith Exall**

Respondent : **RAQ Estate Management Ltd.**

Representative : **Dean Wilson Solicitors**

Type of Application : **Landlord and Tenant Act 1987,
Section 24**

Tribunal Member : **Judge M Davey**

**Date of Decision
with reasons** : **11 April 2021**

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DECISION

Section 24 Landlord and Tenant Act 1987

The respondent was in breach of the Lease by turning off the CHP Equipment (The Communal Heating and Hot Water system) and suspending or terminating the provision of heating and hot water to the building in June 2020.

REASONS

The Applications

1. By an application dated 6 October 2020 (and received on 22 November 2020) Ms Suzanne Eames, applied to the First-tier Tribunal (Property Chamber) (“the Tribunal”), under section 24 of the Landlord and Tenant Act 1987 (“the 1987 Act”) for the appointment of a Manager of Lainson House Dyke Road Brighton BN1 3JS (“the Building”). Ms Eames’ Application was also made on behalf of Mr Keith Exall and Ms Lucy Riot. (References to the Applicant hereafter include Mr Exall and Ms Riot unless otherwise stated).
2. The Applicant, Suzanne Eames, is the lessee of Flat 2 Lainson House, under a tri-partite 125 year lease dated 26 June 2015 and made between (1) Taylor Wimpey UK Ltd (2) Suzanne Eames (3) Chamonix Estates Ltd. (“the Lease”). The Applicants, Keith Exall and Lucy Riot, are the joint lessees of Flat 1 Lainson House under an identical lease dated 30 April 2015, also made with Taylor Wimpey UK Ltd. and Chamonix Estates Ltd. By a deed of assignment, dated 22 February 2018, the Respondent, RAQ Estate Management Limited, (“RAQ”) took an assignment of Chamonix Estates Ltd.’s interest, as Management Company, in the Lease. RAQ, a leaseholder owned Management Company, appointed Pepperfox Limited as Managing Agents on 1 October 2018. We are told that RMB 102 Limited (formerly E&J Ground Rents 9 Limited) is now the freeholder of the Building.
3. We are also told that the Directors of R & Q are Anna Durand (Taaffe House), Andrew Metcalf (Thomas House), Deborah Price (Taaffe House), Carolina Rodriguez (Taaffe House) and Michael Turner-Samuels (Lainson House). (The Applicant says that there were other Directors at the time of the shutdown in 2020, as to which see below, who have since resigned).

4. The Applicant additionally seeks orders, under section 20C of the Landlord and Tenant Act 1985 (“the 1985 Act”) and paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002 Act (“the 2002 Act”), preventing the Landlord (i.e. RAQ in this case) from recovering the whole or part of the costs of these proceedings by way of a future service charge or administration charge demand.
5. Following a case management hearing on 8 January 2021, Judge Tildesley OBE issued Directions on the same date. The Directions stated that the Tribunal considered it should determine first as a preliminary matter whether the Respondent has committed a breach of the lease by turning off the CHP Equipment (The Communal Heating and Hot Water system) and suspending or terminating the provision of heating and hot water to the Building.
6. In those Directions the Tribunal directed that once the preliminary matter was determined the Tribunal would issue Directions to progress or complete the Application and deal with the section 20C (and by implication the paragraph 5A) Application.
7. The Tribunal decided that the preliminary matter should be dealt with on the papers but reserved the right to hold a hearing by video or telephone to resolve significant factual disputes. In the event the matter was decided on the papers.
8. The Directions provided that the Applicant was to send to the Respondent a Statement of Case, together with all documents relied on, and any witness statements, by 5 February 2021. The Respondent was directed to send a Statement of Case and accompanying documents to the Applicant by 5 March 2021 and the Applicant permitted to send a concise Reply to the Respondent’s Statement of Case by 12 March 2021. The Applicant was to be responsible for preparing the bundle of relevant documents, the contents of which should be agreed by the parties, and by 12 March 2021 sending one copy to the other party and one copy (electronically) to the Tribunal.
9. By an Application dated 22 March 2021, and before the Tribunal had determined the matter, the Respondent sought to introduce further evidence, out of time. The reason given was that an email of 19 July 2019 had been included in the Applicant’s Reply, which, in the Respondent’s submission, needed to be read in the context of a chain of two other emails, dated 18 July 2019, of which it was a part.
10. The Applicant, Ms Eames, commented on the Respondent’s Application in a Response dated 24 March 2021 in which she stated that the evidence, which the Respondent sought to introduce, was not focused on the requirements of the Directions of 8 January 2021.
11. The Tribunal having considered the Respondent’s Application and the Applicant’s Response, decided that it would grant the Application and add both documents to the bundle of documents submitted.

The Premises

12. The development (“the Estate”) of which Lainson House forms part is a Taylor Wimpey development completed between 2013 and 2015 on the site of a former children’s hospital (the Royal Alexandra) in central Brighton. There are six Blocks containing 119 flats. They are Cawthorne House (35 flats), Blanche House (23 flats), Thomas House (18 flats), Taaffe House (9 flats), Beves House and Lainson House (20 flats). Beves House contains 14 flats and is owned by Clarion, a registered social housing provider. The five Blocks other than Lainson House are new whilst Lainson House is a converted former hospital Grade II listed building with an extension. The flats owned by the Applicants are in Lainson House. It is understood that the long leases of the flats on the Estate are all in substantially the same terms.
13. The six Blocks are served by a Combined Heat and Power plant (“CHP”), which supplies hot water and space heating to all flats on the Estate via a Heat Interface Unit (“HIU”) located in each flat which measures the fuel consumption of the flat. That measurement is recorded monthly and remotely from each flat’s meter by Heatlink Client Services. The Respondent receives monthly gas bills from the energy supplier and then bills each flat quarterly. The CHP is located in the underground car park directly below Cawthorne House.
14. In 2019 the Respondent turned off the CHP heat supply to one of the Blocks (Cawthorne House) for one summer month and in the summer of 2020 turned off the heat supply to all of the Estate for the summer quarter. It is this second shutdown that is alleged by the Applicant to amount to a breach of covenant by the Respondent.

The Lease

15. Clause 5.1 of the Lease contains a covenant by the Management Company

“in relation to the Buildings and the Common Parts in the terms specified in the Fifth Schedule.”

In so far as relevant that Schedule contains the following obligations.

“8. To operate maintain repair and renew (or procure the operation maintenance repair and renewal) the CHP Equipment for the benefit of the owners and occupiers from time to time of the Property and the Estate (including any part or parts thereof).

9. To provide Heat to the Property and the rest of the Block together with meter reading, the collection of charges and associated billing as appropriate or necessary.”

16. Clause 1.1 of the Lease defines

“Heat” as: “the heat and hot water provided by the Management company using the CHP equipment in accordance with clause 9 of the Fifth schedule”

By the same clause “CHP Equipment is defined as

“The combined heat and power plant and all boiler heat interface units meters pipes watercourses wires cables conduits tanks pumps and any conducting media and all ancillary apparatus plant and equipment necessary for the provision of heat to the block”

17. As noted above, the preliminary issue is whether the Management Company is in breach of the Lease by reason of having turned off the CHP Equipment and suspended/terminated the provision of heating and hot water to the Building in June 2020.

The Applicant’s case

18. Put simply, it is the Applicant’s case that the plain wording of Clause 5.1 of the Lease and paragraphs 8 and 9 of the Fifth Schedule to the Lease place an unqualified obligation on the Respondent Management Company to supply heat for space heating and hot water to the flats by means of the CHP equipment. It follows therefore, says the Applicant that the active withdrawal by RAQ of that heating by switching off the supply to all Blocks, including Lainson House, in June 2020, amounted to a breach of covenant by the Respondent. The Applicant also asserts that this action amounts to a breach of the covenant for quiet enjoyment contained in the Lease.
19. The Applicant says that paragraph 8 obliges the Respondent to “operate” the heating system and this does not extend to turning off the system. She says that the need to turn off the system for repair or maintenance or in an emergency is catered for by the obligation to repair or renew. The Applicant says that the obligation to operate the system for the benefit of the owners and occupiers simply identifies the recipients of the benefit and that it does not give the Respondent the right to determine what is for the benefit of the owners and occupiers.
20. The Applicant submits that the words “appropriate or necessary” in paragraph 9 only qualify the service of meter reading, collection of charges and associated billing. Furthermore, the Applicant says the Lease provides that the Heating Charge is that element of the Maintenance Charge attributable to heating and if the actual costs of the Heating Charge exceed the estimated costs there will need to be an adjustment of the sum due and the flat owner billed as appropriate for the extra charges. The Applicant says that this explains the reference in paragraph 9 to “collection of charges and associated billing as appropriate or necessary.”

21. The Applicant also relies on other parts of the Lease to support her interpretation. First, that the HIU, which provides hot water to the taps and radiators, is a Service installation, which is included in the demise of the Flat being an installation comprised therein (First Schedule to the Lease, Part I (e)). She says that if the heating system is closed down flat owners are deprived of the use of the HIU. Second, that the owners have the right to use other Service installations comprised in the Estate for the passage of water sewage gas electricity and other services (Second Schedule to the Lease Part 1 (c) and that this includes the pipework and the hot water thereby delivered from the boilers to the flat HIUs. Third, that the Maintenance Charge does not include costs of shutting down the system and standing charges whilst the system is shut off. The Applicant says that the Tenants Manual for the Heating System says that the boiler plant remains operational at all times to ensure that all properties will have heating/hot water when they require it.
22. The Applicant argues in the alternative, that even if the Lease did permit the Respondent to operate the system in any reasonable way, the shutting down of the system was not a reasonable action taken for the benefit of the tenants. Ms Eames takes issue with the Respondent's assertion that savings are made by switching off the system in the summer quarter and seeks to demonstrate that the methodology and costs used by the Respondent are flawed. She also submits that electric immersion heaters (which do not have timers) are expensive to run and only produce hot tap water. Timers would cost around £100 per flat. (The Applicant's submission on this matter is dealt with in paragraphs 57 and 58 below).
23. The Applicant further disputes that elevated indoor temperatures are a problem and says that there are no elevated indoor temperatures "within the confines of our flats". She says that there was a historic problem with the corridors of the upper flats in Cawthorne House in 2015 but none of the solutions recommended in the 25 November 2015 Report of Osborn Associates (see paragraph 65 below) had been implemented.
24. The other Applicants, Mr Exall and Ms Riot, provided a witness statement. They bought Flat 1 Lainson House in 2015 and until then owned flat 43 in Cawthorne House from 2013. They state that their former neighbours in Cawthorne House had been surprised at the 2019 shutdown, of which they had not been warned. Mr Exall and Ms Riot stated that intra-Board communications show that even before the August 2019 shutdown there was a Board strategy to close down the system. Mr Exall and Ms Riot state that they expressed opposition, in writing, to the proposed shutdown of the whole Estate in 2020, as did 17 of the 20 owners in Lainson House.
25. Mr Exall and Ms Riot also argue that the shutdown is in breach of the Lease for the same reasons given by Ms Eames. They further submit that the following consequences flow from the shutdown.

- Summer shutdowns affect the investment value and saleability of flats and EPC ratings are invalidated.
- It is a health hazard to shut down the CHP pipe network for a lengthy period because of the risk of water contamination.
- Heating engineers call out fees, electricity charges for flat owners, on going gas standing charges and extra gas charges to refire the system on start up are all incurred.
- Flat immersion heaters are designed for back up only, are inefficient and costly, have no heaters and timers and are prone to breakdown (as happened in the case of one flat)
- The Covid lockdowns in 2020 had meant more people were working from home and school necessitating increased use of hot water.

The Respondent's case

26. The Respondent explained the background to its actions. It says that it is required by the Lease to set the fuel charge for each flat at a rate that will enable it to recover from owners and occupiers the cost of heat to the Estate charged by the energy supplier. The Respondent says that by the summer of 2019 it had become apparent that there was a problem with the heating system on the Estate. The problem is said to stem from the fact that there is a kilometre of pipework in the Blocks on the Estate running from the boilers to each Block and then up to and around each floor of each Block.
27. The Respondent says this means that in hot weather the buildings become insufferably hot thereby posing a threat to the comfort and health and safety of residents in some of the Blocks. It also means, it is argued, that much of the fuel cost relates to heat loss from the piping network rather than the fuel consumed within the flats. Because the overall cost needs to be recovered from flat owners it means that owners are paying not just for the fuel consumed in the flat but also the cost of the "heat loss" referred to above. The Chairman of the Respondent's Board of Directors, Mr Michael Turner-Samuels, stated that his flat at 19 Lainson House is on the third floor and in the summer months the air temperature increases towards the top of the building. He says that on the third floor the temperature can be quite uncomfortable both in the stairwell and in the lobby corridor serving three flats including number 19. Mr Turner-Samuels says that this can make sleeping difficult and uncomfortable at times.
28. The Respondent also seeks to justify the shutdown by claiming that it effects savings of fuel costs for flat owners. The Respondent calculated that if the heating system were switched off in the summer months it would be more economical for flat owners to use the electric immersion heaters installed in the hot water cylinder of each flat during that period.
29. Mr Turner Samuels did a calculation, which he claims shows that on average each flat will have saved £30 in the summer shutdown of 2020. He did so by taking the amount of gas supplied to the boilers each month and deducting from that the amount of fuel consumed by the flats. He

says that the difference is 40,000 kWhs of heat each month, which is said to be “lost” to the system outside the flats because the CPH is producing heat that is not being used by the radiators.

30. The differential between the cost of this heat loss and heat consumed by the flats is said to be higher in the summer when the flat radiators are unlikely to be used than in the winter. Mr Turner-Samuels says that the flat owners are therefore billed at a rate of 5 times the cost of gas (4.4p per kWh in 2020) in the summer and 2 times the rate in the winter. He says that in this way the Respondent recovers the total cost of the gas supply billed to the Respondent by the energy company.
31. Mr Turner-Samuels argues therefore that the rate of 22p per kWh in the summer is more expensive than the cost of electricity, when using the immersion heaters, at 14p per kWh. It follows he says that flat owners would save on their energy bills. He calculated that on average a flat would save £21 in consumption costs in the summer months and each flat would also save £25 by avoiding Heatlink’s meter reading charge for that period. After allowing for the cost of engineers closing down and re-starting the system and the gas supplier’s monthly standing charge, the Respondent calculated that on average a flat would save £30 in the summer quarter.
32. The Respondent says that in August 2019 it conducted a shutdown for a limited trial period of one month with one block (Cawthorne House) asking residents to use their immersion heaters instead. After three days of the system being switched on again internal temperatures in the block are stated to have risen by up to 6 degrees.
33. The Respondent says that the residents of Cawthorne House were generally co-operative and appreciative during the 2019 test. This limited trial was followed by an entire estate shutdown trial in the summer of 2020 to establish that the action was in the best interests of all those within the Estate. The Respondent says that it gave notice to residents on 23 March 2020 of its intention to implement the trial shutdown and that a confirmatory reminder was sent in May 2020. Mr Turner-Samuels says that little or no adverse response was received, save from owners at Lainson House. The Respondent states that after the trial concluded, a questionnaire was issued to the 105 flat owners of Blanche, Cawthorne, Lainson, Taaffe and Thomas Houses. It said that only five flats responded that they did not want summer shutdowns in the future.
34. Mr Turner-Samuels said that during the summer of 2020, whilst the trial period was in place, he and his wife were resident in their flat for a period of time, including some of the August heatwave. He said that the stairwell and corridors were noticeably cooler compared to previous summers despite the heat outside and this was also reflected in the flat. Mr Turner-Samuels said that he found it very straightforward to have hot tap and shower water by turning on the immersion heater.

35. The Respondent further argued that the 2020 summer shutdown also saved around 20 tonnes of CO₂ emissions. It considered that if the summer overheating problem was not addressed this could have an adverse effect on the saleability of flats at the development.
36. Several flat owners provided witness statements in support of the Respondent's case. One of these witnesses, Ms Anna Durand, stated that she owned two flats in Taaffe House. Taaffe House comprises nine flats all of which are privately owned. Ms Durand stated that she was aware of the proposed trial for the shutdown of the heating system over the summer months of 2020. She understood that the Respondent had explained that one of the reasons for the system being shutdown was the indirect heat produced as a result of the pipework "running" whether or not heat was required within a flat. This is said to have led to levels of heat in Taaffe House that she described as "unbearable." Ms Durand explained that in 2019 her son and his girlfriend, who were staying at one of the flats, had decided that the flat was too hot to live in because of the excess levels of heat in the building.
37. Ms Durand said that she serves on the Board of Directors of the Respondent Company and was happy that the decisions made by the Respondent in relation to the shutdown of the heating were taken having regard to the needs and interests of the Blocks as a whole balancing them with any inconvenience that may be caused to some of the objectors in Lainson House. She was concerned that tenants would not wish to occupy the property due to the significant levels of heat in the summer months.
38. Mr Russell Dopson, who has been a joint owner of investment flats at 10 and 15 Blanche House since 2014, also provided a witness statement. Mr Dopson was a member of the Board of RAQ between January 2019 and 9 March 2020 when he resigned due to other commitments.
39. Mr Dopson explained that he had been aware for many years that the buildings on the Estate were uncomfortably hot during the summer months. He said that when he joined the Board this was a major issue that had to be discussed by the Directors due to problems faced by residents. He said that he and his fellow Directors, Alan Ackers, Jenni Davies and Michael Turner-Samuels, formed a Heating Sub-Committee which he led until he left the Board in March 2020.
40. Mr Dopson said that a report had been prepared in November 2015 by a heating consultant firm (Osborn Associates) on behalf of Taylor Wimpey. The recommendation of the Report that the problem should be addressed by increased ventilation, had been rejected by residents and was not pursued any further. Indeed, the Respondent says that alternative solutions to shutting down the system in hotter months involve considerable capital expenditure that may be considered to be an improvement and potentially not recoverable through the service charge as well as increased service charges due to the additional heat being lost

into the environment. Mr Dopson explained that MCA Ltd. of Horsham, the consulting engineers who worked for the developer on the design for the Estate, and Premier Energy of Billingshurst, another firm of consulting engineers he had consulted, stated that the only way to ultimately fix the problem was to switch off the heating in the summer months. He said that the Managing Agents had confirmed that this was the position also at other sites that they managed, including ones owned by the NHS, which have a similar system.

41. Mr Dopson stated that the limited trial carried out at Cawthorne House in 2019 received positive feedback from the residents. However, this was only a partial shutdown because it wasn't possible to shutdown all of the heat. It did however isolate secondary hot water pipes. Primary heating continued to pass through the building but they were able to isolate the secondary hot water pipes throughout the building. The trial results motivated the Board to proceed with a full system shutdown in the summer of 2020 involving all five Blocks. He said that the handful of dissenters to the proposed shutdown across the Estate were largely from Lanson House which is the original building and where the overheated hallways are less of an issue. Mr Dopson said that from his own dealings with other owners in Blanche House and occupiers with whom he had spoken both during the summer of 2020 and subsequently he received positive feedback including from his own tenants. He considered therefore that it would be irresponsible not to continue shutting down the heating system in subsequent years during periods of hot weather.
42. In her witness statement, Ms Stephanie Cooper, joint owner of flat 35 Cawthorne House, confirmed that there had been a heat problem and that the action taken in the summers of 2019 and 2020 had considerably alleviated the problem. She said that whilst initially she would have preferred constant hot water she felt that the sacrifice of its loss was worth it when compared with the suffocating heat that had been avoided by the shutdowns.
43. Mr Andrew Metcalf who has lived in the top floor of Thomas House since January 2019, but before that lived in flat 27 Cawthorne House from January 2018, also provided a witness statement. Mr Metcalf said that the excess heat in Cawthorne House was extremely uncomfortable and one of the reasons why he removed from Cawthorne House to the top floor of Thomas House. Unfortunately, the heat problems continued in that Block also. He said it was clear that the pipework was the main factor in raising the temperature of his flat. Mr Metcalf said that during the trial shutdown of summer 2020 the temperature dropped significantly by 6°C or more. He said that the difference is substantial, especially in the entrance to the flat, which is next to the riser cupboard.
44. The Respondent denies that its action amounted to a breach of covenant. It says that operation of the heating system and the supply of heat to the Premises is not an absolute obligation in all circumstances. Furthermore, it is the Respondent's case that the "operation" of the

equipment (as provided for by paragraph 8 of the 5th Schedule to the Lease) includes the power to switch off the supply and services from time to time (subject to the question of benefit to the owners and occupiers) and the Heat services are to be provided subject to the obligation being as “appropriate or necessary” (paragraph 9 of the 5th Schedule). The Respondent says that clauses in a lease have to be construed in the context of the lease as a whole. Furthermore words used must be construed in their ordinary and natural meaning unless the context otherwise requires (*Arnold v Britton* [2015] AC 1619).

45. The Respondent contrasts the position with that in the case of *Yorkbrook Investments v Batten* (1985) 52 P&CR 51 CA) where the covenant was to supply “a good sufficient and constant supply of hot water and an adequate supply of heating in the hot water radiators.” By contrast in the present case the Respondent argues that the plain meaning of the covenant (in paragraph 8) is to operate the equipment for the benefit of the owners and occupiers. It is argued that this gives the Respondent the ability, acting reasonably, to determine what may be for the benefit of the owners and occupiers having regard to Estate wide needs. The Respondent says that an obligation to provide a constant supply cannot be implied into the Lease.
46. The Respondent argues in similar fashion that the obligation, in paragraph 9 of the 5th Schedule, to provide Heat, is qualified by what is appropriate or necessary. The Respondent says that the requirement to do what is appropriate or necessary applies to each element of that provision including the supply of Heat. Alternatively, it could be argued that the obligation to provide heat is grammatically the only part of the clause which is qualified by the words “as appropriate or necessary.”
47. The Respondent submits that the correct approach is to read the relevant paragraphs in the context of the Lease as a whole. Indeed it argues that, on the plain reading of these provisions, the Respondent’s actions were permitted but in the event that it is wrong about that it should be implied that the Respondent is permitted to interrupt supply in order to give business efficacy to the Lease and of necessity.
48. With reference to the Applicant’s entitlement to use the Service Installations the Respondent says that this relates to the CPH and the ability to utilise the pipes conduits wires and cables. It does not impose an obligation on the Respondent to deliver supplies through them, rather to the Applicants to make use of what is provided.
49. The Board denies that it has acted autocratically and says that at all times it sought to act in consultation with and obtaining feedback from the leaseholders of all the Blocks on the Estate.
50. In conclusion the Respondent argues that it may, acting reasonably, operate the equipment and supply the service as appropriate and taking into account what is for the benefit of the owners. The

Respondent believes that the evidence is sufficient to establish that it reached its decision acting reasonably and has not acted arbitrarily. It says that this has been demonstrated by the fact that the trial had achieved savings in all areas. Financial savings were approximately £25 to £30 per flat; a reduction of 20 tonnes of CO₂ emissions across the estate and a reduction in excessive heat of 6 degrees.

The Applicant's Response

51. The Applicant's primary contention remains that the Respondent is in breach of its absolute obligation to provide Heat. However the Applicant also argues that the Respondent did not, in any event, have reasonable grounds for taking the action that it took.
52. The Applicant says that the Respondent has produced no evidence of formal consultation with leaseholders on the issue of shutting down the CHP equipment, nor has it provided scientific evidence of overheating in all parts of the Buildings and Estate of the RAQ. She says that the witness statements produced by the Respondent referred mostly to feelings of more or less heat in a particular flat/corridor during hot summer days, which hardly justifies shutting down the services for 119 flats. Both Applicants suggested that the Respondent's witness statements were provided by former or current Board members of RAQ, who as such were compromised and who were mostly investor owners and thereby absent for most or all of the time.
53. Ms Eames says that the Osborn Heating Engineer Report of November 2015 identified some occasional overheating in corridors, not flats, in Cawthorne House only, with recommendations to ventilate the corridors and lag some pipes. She says that one witness, Mrs Cooper, was one of the Cawthorne House residents who had adamantly rejected the recommendations made in the Osborn Report to deal with elevated corridor temperatures in Cawthorne house at no cost to the leaseholders. The Applicant says that there were some intra Board email communications containing further Osborne Associates and Heatlink suggestions that were disregarded by the Board. She included the relevant documents with her Reply to the Respondent's Statement of Case.
54. One of those documents was an email from Russell Dopson to Michael-Turner Samuels stating, "Alan was not saying that we could shut down the system but could back it off with a minimum flow rate and less gas consumption to keep the flow water temperature at 60C."
55. The Respondent then, with the Tribunal's permission, introduced the chain of emails, of which this email was part, to enable it to be read in context. That chain began with an email from Mr Dopson to Mr Turner-Samuels on 18 July 2019, stating that he had had a chat with Alan Barber of Heatlink who had suggested that the boilers could be backed off at night and at times of higher temperatures. Mr Turner-Samuels replied indicating that he understood it was being said that there was a

possibility of upgrading the system to shut down at night and during warmer days. Mr Dopson's reply (see paragraph 54 above) was sent to correct that misunderstanding.

56. Ms Eames commented, in response to the Respondent's application to introduce the extra evidence, that it was still the case that Alan Barber of Heatlink had not suggested that the system be shutdown. She also included intra Board emails dated 25 and 26 July 2019, which she says support the claim that the 2019 trial was not preceded by a consultation with owners in Cawthorne House. Ms Eames further reiterated that in so far as the Respondent's case for fuel cost savings is based on the premise that 80% of the heat is being pumped into the buildings and thereby "wasted" it is flawed reasoning because that premise is wrong for the reasons set out in her Statement of Case.
57. In that Statement of Case Ms Eames seeks to refute the Respondent's calculation as to the savings achieved by the shutdown of 2020. She does so by arguing that Mr Turner Samuels' methodology is fundamentally flawed. Ms Eames says that the actual net cost of heat can be calculated simply as follows. It is the annual estimated cost of raw gas consumption in kilowatt-hours (including standing charge) divided by the total annual estimated units of heat delivered to flats in a year. That will produce the average cost for one unit of heat. She says that the gas supplier/managing agent nominated 820,663 kWh of raw gas for 2020. Heatlink estimated that the annual heating unit consumption (in the flats) is around 363,069 units (2019 estimates).
58. Thus taking estimated annual raw gas consumption of 820,663 kWhs at 0.03572 (the rate negotiated for 2020) gives an estimated raw gas bill total of £29,314.08 p.a. When the standing charge of £4,974.36 p.a. is added, the combined total for the provision of raw gas is £34,288.44 p.a. The unit of heat to be charged for 2020 is therefore £34,288.44 divided by 331,357 (i.e. the total heat units delivered in 2019) which equals £0.1034 which is valid throughout the year). The Applicant therefore concludes that the savings claimed by the Respondent are illusory and that the rate of 22p pkWh in the summer is clearly wrong. (The Applicant also argues that energy costs have increased as a result of the Respondent switching supplier mid contract from eOn to Scottish Hydro whose rates were higher).

Consideration

59. The Applicant, by way of an application to the Tribunal under section 24 of the 1987 Act) seeks the appointment of Geoffrey Hollywood as manager of the Building. The Applicant has served a valid preliminary notice on the Landlord under section 22 of the 1987 Act.

60. With regard to the present preliminary issue, the relevant circumstance in which an order can be made is where the Tribunal is satisfied that the Landlord is in breach of any obligation owed by him to the Tenant under his tenancy and relating to the management of the Building (i.e. Lainson House). The Applicant argues that the Landlord (that is to say in this case the Respondent Management Company) is in breach of the obligation contained in Clause 5.1 and paragraphs 8 and 9 of the 5th Schedule to the Lease with regard to the provision of Heat to the Building from the CPH.
61. The Applicant and the Respondent have diametrically opposed views as to whether the heating system at the Estate was lawfully closed down during the summer quarter of 2020. Indeed at times each has accused the other of having ulterior motives in adopting their respective positions. Although the Respondent described the shutdown as a “one off trial” it clearly believes that there are sound reasons for closing down the heating system at the Estate in the summer months. It cites cost savings for the residents, and health and environmental considerations as being the determining factors when coming to its decision.
62. The Respondent argues that there has been a long-standing issue with regard to overheating of the common areas in the Blocks caused by the running of the CPH system in the summer months when the weather is warmer. It says that the overheating is caused by the heating of the network of pipes in the Blocks producing unacceptably high temperatures during that period in those common parts especially on the upper floors and in some of the adjoining flats.
63. Mr Turner-Samuels said that the corridor and stairs and his flat on the top floor of Lainson House were uncomfortably hot in 2019 when the summer heating was on and noticeably cooler during the period of the 2020 trial shutdown. Ms Durand described a similar experience at Taaffe House where she owns two flats. Mr Andrew Metcalf reported a similar experience at Cawthorn House (as did Ms Stephanie Cooper) and Thomas House. Mr Russell Dopson’s evidence was that the heating problem at the Estate had been identified in the Report commissioned by Taylor Wimpey in 2015.
64. The Applicants claim that the evidence of the witnesses for the respondent is anecdotal, partial and not based on any scientific study. The Tribunal does not find these claims to be established. It is tolerably clear to the Tribunal that there is a problem with overheating in the common areas and flats, particularly at the upper levels of most if not all of the Blocks and that the lower levels of Lainson House are much less likely to be affected. The nature of the piping network is almost certainly the source of the problem. The November 2015 report of Osborn Associates, which found this to be the case, related only to Cawthorne House but it seems reasonable to infer that the same problem was likely to be the case in the other Blocks and the witness statements of the Respondent’s witnesses support this.

65. How that problem should be addressed is of course more problematic. Switching off the heating clearly ameliorated the problem to an extent and appears to have reduced temperatures in the affected areas. Mr Dopson says that expert advice that he had received, concluded that switching off the system was the only solution. However, no comprehensive scientific study appears to have been undertaken save for the Osborn investigation at Cawthorne House in 2015. Moreover, it does not necessarily follow that shutting down the CPH is the only or best solution, even if permitted by the Lease (as to which see paragraph 68 below). As the Applicant asserted, the solutions proposed in the Osborn Report were not fully implemented. If anything the evidence of that Report suggests that the underlying source of the problem is one of system design.
66. The Respondent also argued that costs savings were achieved by the 2020 summer shutdown. However, the Tribunal is not satisfied that this has been demonstrated because the Respondent failed to engage with the Applicant's alternative calculations, which on the face of them plausibly refute the Respondent's claim.
67. The Tribunal also finds that the claimed environmental benefit in the form of CO₂ reductions, even if factually correct, is not a ground for shutting down the CPH.
68. However, logically prior to the matter of whether the Respondent acted reasonably for the benefit of the owners and occupiers is the preliminary matter of whether the Lease permits the system to be shut down and if so on what conditions.
69. The Applicant argues that by shutting down the heating system in the summer quarter of 2020 the Management Company was in breach of its obligations contained in paragraphs 8 and 9 of the 5th Schedule to the Lease. That is to say
- “8. To operate maintain repair and renew (or procure the operation maintenance repair and renewal) the CHP Equipment for the benefit of the owners and occupiers from time to time of the Property and the Estate (including any part or parts thereof).
9. To provide Heat to the Property and the rest of the Block together with meter reading, the collection of charges and associated billing as appropriate or necessary.”
70. The Applicant says that the obligation in paragraph 9 is (save, by implication, in exceptional cases beyond the Respondent's control, such as to deal with breakdown of the system) an absolute obligation to provide Heat to the Property and the rest of the Block throughout the year.
71. The Applicant says that on the plain wording of the Lease the qualifying words “as appropriate or necessary” in paragraph 9 relate only to the

meter reading, the collection of charges and associated billing. Furthermore, an obligation to operate the system does not extend to switching it off. The Applicant argues that the reference to operating the system for the benefit of owners and occupiers for the time being does not allow the Respondent to choose what is or is not for the benefit of owners to the extent that it can decide that it is of benefit to those owners not to have the system at all for three months.

72. The Respondent says that its obligation is only to supply Heat “as appropriate or necessary” which words govern all of the preceding obligations in paragraph 9 including the provision of Heat. It says that in the prevailing circumstances it was within its discretion, acting reasonably, to decide what was appropriate or necessary, on the basis that paragraph 8 required it to operate the system for the benefit of the owners and occupiers.
73. The Respondent says that if this were not the case it could not withdraw the provision of Heat for any reason including an emergency or for the carrying out of repairs.
74. As a matter of law the object to be achieved in construing the contract is to ascertain what were the mutual obligations assumed by each party by the words chosen to express them. This means the meaning that the words would convey to a reasonable person having all the background knowledge of the parties. That knowledge included an awareness of the central boiler system controlled by the Respondent and on which the flat owners could be expected to rely to obtain space heating and hot water in their flats. It is doubtful that the parties would have had in mind the possibility that it permitted the shutting down of the system from time to time, even in the summer quarter, thereby throwing the residents back on emergency immersion heaters that supplied only hot water and not space heating.
75. The Tribunal finds that the obligation in paragraph 8 of the Fifth Schedule to the Lease relates to the physical equipment. That provision makes it clear that the Management Company is responsible for the operation, repair, maintenance and renewal of that equipment for the benefit of flat owners and occupiers, being the beneficiaries of that obligation. It does no more than that. That operation does not extend to switching the system off. The paragraph lacks sufficient clarity to support the interpretation contended for by the Respondent, in so far as it claims that it has the right to decide to close down the system for certain times of the year when it considers, acting reasonably, that action to be for the benefit of most owners and occupiers. That would require much clearer wording.
76. By contrast the obligation in paragraph 9 is to provide a service. The issue therefore is whether that obligation is absolute or qualified and if so to what extent. The service is the provision of Heat for space and water heating. Again it would require more explicit wording if the Management Company were to have a discretion, albeit to be exercised

reasonably, to determine when it was appropriate or necessary to provide that service. The Respondent's argument that an absolute obligation would not enable the equipment to be switched off for repair or maintenance, without the Management Company being in breach of covenant, is clearly wrong because there is an obligation to repair and maintain in the Lease (paragraph 8 of the 5th Schedule) and it is implicit that this may involve a temporary disruption to supply of Heat from the CPH.

77. It is not an implied term of the Lease that the obligation to provide Heat is qualified in circumstances where the Respondent decides to close down the system other than for circumstances beyond its control. There is no evidence that Lainson House (the Building) was affected by any such exceptional circumstance beyond the Respondent's control that necessitated a shutdown of the system.
78. The Respondent says that the words "as appropriate or necessary" provide the necessary qualification to the obligation to supply Heat. The Tribunal disagrees. Those words more naturally qualify the immediately preceding obligation to provide meter reading, the collection of charges and billing. It would have been possible to link the qualifying words directly to the obligation to provide Heat if that obligation were to be qualified in the way contended for by the Respondent. It could have read for example "To provide Heat, together with meter reading, the collection of charges and associated billing, as appropriate or necessary" or
79. If the Respondent could withdraw heat in the summer months it would leave the Applicants liable to pay standard charges in respect of a service that they are not receiving. It is no defence to say that the Applicants have an alternative source of water heating in the form of their immersion heaters. That is not what was provided for in the Lease.
80. In *Yorkbrook Investments v Batten* the landlord covenanted
"[U]nless prevented by mechanical breakdown or failure or fuel supply or other cause beyond the control of the Lessor to provide and maintain a good sufficient and constant supply of hot and cold water to the Building throughout the term granted and also an adequate supply of heating in the hot water radiators (if any) in the cold season between the dates determined by the Surveyor and to remedy any mechanical breakdown in the hot water and central heating systems."
81. The hot water system consisted of three antiquated boilers, which frequently broke down. The Court of Appeal rejected the landlord's argument that the covenant had to be construed in relation to the heating system available at the date of the lease and operated in the manner intended by its designers, and held that the landlord was in breach of covenant. The landlord was to provide hot water and heating. How they did so was up to them. On the facts they should have

replaced the boilers in order to comply with their obligation to provide the contracted for service.

82. The Respondent says that the present case is different because in *Yorkbrook* there was an express obligation to provide a constant supply of hot and cold water and an adequate supply of space heating in the cold season. Whilst that is true this does not mean that the wording used in the present case was incapable of placing an obligation to maintain a constant supply on the Management Company. There was also no restriction in the present case on the supply of Heat at certain times of the year. In so far as *Yorkbrook* afforded the landlord a choice as to how to comply with the covenant it was about how to comply with an absolute obligation to provide the service not whether the obligation was a qualified obligation.
83. In conclusion the Tribunal finds that the Respondent was in breach of an obligation in the Lease relating to the management of the building by turning off the CHP Equipment (The Communal Heating and Hot Water system) and suspending or terminating the provision of heating and hot water to the building in June 2020. The Tribunal does not accept the Respondent's suggestion that it should as a last resort imply a term in the Lease, which would have enabled the Respondent to take the action it did, on the basis of "business efficacy and efficiency." There is no room for such a term in the light of the Tribunal's finding as to the express meaning of the Lease. The Tribunal also finds that the Respondent is in breach of the covenant for quiet enjoyment.
84. Although the Tribunal is satisfied that the Respondent, which had taken the advice of its solicitor, was acting in good faith when deciding to close down the heating system, the Tribunal's finding as to the meaning of the Respondent's obligations in the present case means that it is not necessary to reach any conclusion on the matter of whether the Respondent acted reasonably for the benefit of the owners and occupiers in closing down the system.

Right to appeal

1. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application by email to rpsouthern@justice.gov.uk to the First-tier Tribunal at the Regional Office, which has been dealing with the case.

2. The application must arrive at the Tribunal within 28 days after the Tribunal sends to the person making the application written reasons for the decision.
3. If the person wishing to appeal does not comply with the 28 day time limit, that person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28 day time limit; the Tribunal will then decide whether to extend time or not to allow the application for permission to appeal to proceed.
4. The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal, and state the result the party making the application is seeking.

Annex: The relevant statute law

Landlord and Tenant Act 1987

21 Tenant's right to apply to [tribunal] for appointment of manager.

(1) The tenant of a flat contained in any premises to which this Part applies may, subject to the following provisions of this Part, apply to the appropriate tribunal for an order under section 24 appointing a manager to act in relation to those premises.

(2) Subject to subsection (3), this Part applies to premises consisting of the whole or part of a building if the building or part contains two or more flats.

(3) This Part does not apply to any such premises at a time when—

- (a) the interest of the landlord in the premises is held by
 - (i) an exempt landlord or a resident landlord, or
 - (ii) the Welsh Ministers in their new towns residuary capacity, or
- (b) the premises are included within the functional land of any charity.

(3A) But this Part is not prevented from applying to any premises because the interest of the landlord in the premises is held by a resident landlord if at least one-half of the flats contained in the premises are held on long leases which are not tenancies to which Part 2 of the Landlord and Tenant Act 1954 (c. 56) applies.

(4) An application for an order under section 24 may be made—

- (a) jointly by tenants of two or more flats if they are each entitled to make such an application by virtue of this section, and
- (b) in respect of two or more premises to which this Part applies;

and, in relation to any such joint application as is mentioned in paragraph (a), references in this Part to a single tenant shall be construed accordingly.

(5) Where the tenancy of a flat contained in any such premises is held by joint tenants, an application for an order under section 24 in respect of those premises may be made by any one or more of those tenants.

(6) An application to the court for it to exercise in relation to any premises any jurisdiction to appoint a receiver or manager shall not be made by a tenant (in his capacity as such) in any circumstances in which an application could be made by him for an order under section 24 appointing a manager to act in relation to those premises.

(7) References in this Part to a tenant do not include references to a tenant under a tenancy to which Part II of the Landlord and Tenant Act 1954 applies.

(8) For the purposes of this Part, “appropriate tribunal” means—

- (a) in relation to premises in England, the First-tier Tribunal or, where determined by or under Tribunal Procedure Rules, the Upper Tribunal; and
- (b) in relation to premises in Wales, a leasehold valuation tribunal.

24 Appointment of manager by tribunal.

(1) The appropriate tribunal may, on an application for an order under this section, by order (whether interlocutory or final) appoint a manager to carry out in relation to any premises to which this Part applies—

- (a) such functions in connection with the management of the premises, or
- (b) such functions of a receiver,

or both, as the tribunal thinks fit.

(2) The appropriate tribunal may only make an order under this section in the following circumstances, namely—

- (a) where the tribunal is satisfied—
 - (i) that any relevant person either is in breach of any obligation owed by him to the tenant under his tenancy and relating to the management of the premises in question or any part of them or (in the case of an obligation dependent on notice) would be in breach of any such obligation but for the fact that it has not been reasonably practicable for the tenant to give him the appropriate notice, and
 - (ii)
 - (iii) that it is just and convenient to make the order in all the circumstances of the case;
- (ab) where the tribunal is satisfied—
 - (i) that unreasonable service charges have been made, or are proposed or likely to be made, and
 - (ii) that it is just and convenient to make the order in all the circumstances of the case;
- (aba) where the tribunal is satisfied—
 - (i) that unreasonable variable administration charges have been made, or are proposed or likely to be made, and
 - (ii) that it is just and convenient to make the order in all the circumstances of the case;
- (ac) where the tribunal is satisfied—
 - (i) that any relevant person has failed to comply with any relevant provision of a code of practice approved by the Secretary of State under section 87 of the Leasehold Reform, Housing and Urban Development Act 1993 (codes of management practice), and
 - (ii) that it is just and convenient to make the order in all the circumstances of the case; or
- (b) where the tribunal is satisfied that other circumstances exist which make it just and convenient for the order to be made.

(2ZA) In this section “relevant person” means a person—

- (a) on whom a notice has been served under section 22, or
- (b) been dispensed with by an order under subsection (3) of that section.

(2A) For the purposes of subsection (2)(ab) a service charge shall be taken to be unreasonable—

- (a) if the amount is unreasonable having regard to the items for which it is payable,
- (b) if the items for which it is payable are of an unnecessarily high standard, or
- (c) if the items for which it is payable are of an insufficient standard with the result that additional service charges are or may be incurred.

In that provision and this subsection “service charge” means a service charge within the meaning of section 18(1) of the Landlord and Tenant Act 1985, other than one excluded from that section by section 27 of that Act (rent of dwelling registered and not entered as variable).

(2B) In subsection (2)(aba) “variable administration charge” has the meaning given by paragraph 1 of Schedule 11 to the Commonhold and Leasehold Reform Act 2002.

(3) The premises in respect of which an order is made under this section may, if the tribunal] thinks fit, be either more or less extensive than the premises specified in the application on which the order is made.

(4) An order under this section may make provision with respect to—

- (a) such matters relating to the exercise by the manager of his functions under the order, and
- (b) such incidental or ancillary matters,

as the tribunal thinks fit; and, on any subsequent application made for the purpose by the manager, the tribunal may give him directions with respect to any such matters.

(5) Without prejudice to the generality of subsection (4), an order under this section may provide—

- (a) for rights and liabilities arising under contracts to which the manager is not a party to become rights and liabilities of the manager;
- (b) for the manager to be entitled to prosecute claims in respect of causes of action (whether contractual or tortious) accruing before or after the date of his appointment;
- (c) for remuneration to be paid to the manager by any relevant person, or by the tenants of the premises in respect of which the order is made or by all or any of those persons;
- (d) for the manager’s functions to be exercisable by him (subject to subsection (9)) either during a specified period or without limit of time.

(6) Any such order may be granted subject to such conditions as the tribunal thinks fit, and in particular its operation may be suspended on terms fixed by the tribunal.

(7) In a case where an application for an order under this section was preceded by the service of a notice under section 22, the tribunal may, if it thinks fit, make such an order notwithstanding—

- (a) that any period specified in the notice in pursuance of subsection (2)(d) of that section was not a reasonable period, or
- (b) that the notice failed in any other respect to comply with any requirement contained in subsection (2) of that section or in any regulations applying to the notice under section 54(3).

(8) The Land Charges Act 1972 and the Land Registration Act 2002 shall apply in relation to an order made under this section as they apply in relation to an order appointing a receiver or sequestrator of land.

(9) The appropriate tribunal may, on the application of any person interested, vary or discharge (whether conditionally or unconditionally) an order made under this section; and if the order has been protected by an entry registered under the Land Charges Act 1972 or the Land Registration Act 2002, the tribunal may by order direct that the entry shall be cancelled.

(9A) The tribunal shall not vary or discharge an order under subsection (9) on the application of any relevant person unless it is satisfied—

- (a) that the variation or discharge of the order will not result in a recurrence of the circumstances which led to the order being made, and
- (b) that it is just and convenient in all the circumstances of the case

to vary or discharge the order.

(10) An order made under this section shall not be discharged by the appropriate tribunal by reason only that, by virtue of section 21(3), the premises in respect of which the order was made have ceased to be premises to which this Part applies.

(11) References in this Part to the management of any premises include references to the repair, maintenance, improvement or insurance of those premises.