

**HER MAJESTY'S COURTS AND TRIBUNALS SERVICE****LEASEHOLD VALUATION TRIBUNAL****LANDLORD AND TENANT ACT 1985, SECTIONS 27(A), 19 AND 20(C).****IN THE MATTER OF 33, 36, 49 and 68, WHITE CROFT WORKS, FURNACE HILL, SHEFFIELD, S3 7AF.****APPLICANTS** MR. AND MRS. S. D. HAYES**RESPONDENT** P. A. S. PROPERTY SERVICES LTD.**HEARING** 13/8/2012, WITH DELIBERATIONS IN THE ABSENCE OF THE PARTIES ON 1/10/12.**TRIBUNAL MEMBERS:** MR. C. P. TONGE, LLB, BA.

MR. J. PLATT, BSC, EST MAN, FRICS, FIRPM

MRS. B. MANGLES, BA.

**SUMMARY OF THE DECISION**

1. The service charges in so far as they relate to electricity for the years 2007 to 2012 are payable by the Applicants as demanded by the Landlords and if not already paid should be paid to the Respondent.

The Tribunal has been provided with figures of how much has been demanded by the Respondent for the years 2009, 2010 and 2011, no figures have been provided for 2012, but provided they are calculated in the same manner as the 3 earlier years they too will be payable. (Page references are to the Respondents bundle.)

| Apartment number: | 33          | 36      | 49      | 68      |         |
|-------------------|-------------|---------|---------|---------|---------|
| Year              | pages       |         |         |         |         |
| 2009              | 33/34/35/36 | £38.49  | £54.89  | £31.86  | £66.25  |
| 2010              | 63/65/67/69 | £150.37 | £128.54 | £124.49 | £258.83 |
| 2011              | 122 to 128  | £147.08 | £209.78 | £121.12 | £253.18 |

2. The services charges in so far as they relate to gas for the years 2007 to 2012 are not payable by the Applicants and any payments already made should be credited to the Applicants service charge account. This figure to be agreed between the parties with liberty to apply to this Tribunal in the event that the figure cannot be agreed.
3. The Respondent withdrew the claim for payment of Administration charges, so such charges are not payable. If already paid they should be credited to the Applicants service charge account.
4. The Respondent withdrew the charges for late payment of service charges, so they are not payable. If already paid they should be credited to the Applicants service charge account.
5. **Regulation 9 of the Leasehold Valuation Tribunal (Costs) (England) Regulations 2003, SI 2003/2098.** It is ordered that the Respondent reimburse the Applicants half of the £70 application fees that the Applicants have paid to the Tribunal.
6. **Section 20c of the Landlord and Tenant Act 1985.** The Applicant having raised this matter the Tribunal decided that it was just and equitable to make an order that the Respondents costs incurred in connection with these proceedings are not be considered as relevant costs to be taken into account in determining the amount of service charges payable.

## THE BACKGROUND TO THE APPLICATION

7. This application came before the Leasehold Valuation Tribunal by an application from the Leaseholder of apartments 33, 36, 49 and 68, White Croft Works, Furnace Hill, Sheffield, S3 7AF, dated 24/3/2012 and received by the Tribunal on 30/3/2012. The application was for the Tribunal to consider service charge years 2007, 2008, 2009, 2010, 2011 and 2012. Year 2007 was limited to consideration of apartment 49. The whole of the application was limited to consideration of the proportion of the service charge that related to the gas and electricity use by the Landlord within this complex, late payment charges and administration charges.

8. On 2/5/12 the Tribunal received four cases upon transfer from the Sheffield County Court, these cases related to the same apartments and had been brought by the Landlord for non payment of service charges that were included in the application that was already before the Tribunal. The County Court had stayed the matters pending a decision by this Tribunal as to whether or not the service charges claimed by the Landlord were reasonable.
9. The Tribunal wrote to the County Court to notify them that the Tribunal would hear the application already before it and that in doing so would also deal with the matters transferred.
10. The Applicants held the remainder of 4 leases that had been let for a period of 125 years on 4 apartments in a complex of 74 apartments and a "retail area".
11. Directions were given on 20/6/2012.
12. Both parties served a statement of case and hearing bundle and these were served on the other party.
13. The Landlord Respondents made the Tribunal aware of a decision taken by a differently constituted Tribunal on 15/10/2010 relating to a different apartment at the same complex.
14. The case was given a hearing date of 13/8/2012, at Sheffield Magistrates Court. The Applicants and Mr. McDonald, of the McDonald Partnership of Chartered Surveyors, the Management Partnership, were present at the hearing. Also present was Mrs. J. Brown from the Tribunal Service who was present as an observer taking no part in the hearing or deliberations.

## THE INSPECTION

15. The Tribunal inspected the premises at 1000hrs on 13/8/12. Present at the inspection were the Applicants and on behalf of the Respondents Mr. McDonald.
16. The complex had a new build area and a refurbished area with 2 of the apartments subject to this application in each area. The "retail area" was situated in the new build area. Apartments 33 and 36 were in the new build area, apartments 49 and 68 were in the refurbished area. There was also a car park in the new build area with parking spaces that were all let out for the sole use of individual Tenants of

apartments or the “retail area”. The exterior common driveways, walkways and internal common parts were all provided with electric lighting.

17. The new build area had a ground floor and five further floors. The common areas included an entrance, corridors, stairs and a lift. There was a boiler room that provided hot water to the apartments in that area. Each apartment had a hot water cylinder that permitted the hot water from the common boiler room to be used to heat the water in that apartment’s cylinder or to not use the common hot water at all. Each apartment had an ultrasonic heat meter that had been fitted when these new build apartments were built. The meters were measuring the amount of heat from the common hot water that was used in each apartment. This system was capable of providing an individual bill for the use of the common hot water to each apartment in that area. The common parts of the new build area were provided with radiators. The Tribunal noted that the whole of the new build area was uncomfortably hot. Electricity meters were in a common meter room.
18. The bathrooms of apartments 33 and 36 were inspected and there was no sign of any damage having been caused by water leakage.
19. The parking area was also used as a bin store area for the complex and was provided with a fire door for use by all occupiers and visitors.
20. The refurbished area contained the remainder of the apartments and all the apartments in this area had their own gas and electric meters. There were common parts in this area, but they were not provided with heating.

## **THE LAW**

### **Landlord and Tenant Act 1985**

#### **S27A Liability to pay service charges: jurisdiction**

- (1) An application may be made to a leasehold valuation tribunal for a determination whether a service charge is payable and, if it is, as to—
  - (a) the person by whom it is payable,
  - (b) the person to whom it is payable,
  - (c) the amount which is payable,
  - (d) the date at or by which it is payable, and
  - (e) the manner in which it is payable.
- (2) Subsection (1) applies whether or not any payment has been made.
- (3) An application may also be made to a leasehold valuation tribunal for a determination whether, if costs were incurred for services, repairs, maintenance, improvements, insurance or management of any specified description, a service charge would be payable for the costs and, if it would, as to—
  - (a) the person by whom it would be payable,
  - (b) the person to whom it would be payable,
  - (c) the amount which would be payable,

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

**S19 Limitation of service charges: reasonableness.**

- (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.

**S20C "Limitation of service charges: costs of proceedings.**

- (1) A tenant may make an application for an order that all or any of the costs incurred, or to be incurred, by the landlord in connection with proceedings before a court or leasehold valuation tribunal, or the Lands Tribunal, or in connection with arbitration proceedings, are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant or any other person or persons specified in the application.
- (2) The application shall be made—
  - (a) in the case of court proceedings, to the court before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to a county court;
  - (b) in the case of proceedings before a leasehold valuation tribunal, to the tribunal before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to any leasehold valuation tribunal;

*Reimbursement of fees*

**Reg. 9**

- (1) Subject to paragraph (2), in relation to any proceedings in respect of which a fee is payable under these Regulations a tribunal may require any party to the proceedings to reimburse any other party to the proceedings for the whole or part of any fees paid by him in respect of the proceedings.
- (2) A tribunal shall not require a party to make such reimbursement if, at the time the tribunal is considering whether or not to do so, the tribunal is satisfied that the party is in receipt of any of the benefits, the allowance or a certificate mentioned in regulation 8(1).

THE EIGHTH SCHEDULE  
The Service Charges

1. Service Charge

1.1 Definitions

1.1.1 The terms defined in this sub-paragraph shall for all purposes of this Lease have the meanings specified:

1.1.2 the "Part I Services" means:

1.1.2.1 renewing repairing maintaining decorating or otherwise treating rebuilding replacing and keeping free from and remedying all defects whatsoever in the Estate

1.1.2.2 providing installing inspecting servicing maintaining repairing cleansing emptying draining amending overhauling replacing and insuring (save in so far as insured under other provisions of this Lease) all Service Media apparatus plant machinery and equipment within the Estate from time to time including (without prejudice to the generality of the above) stand-by generators closed-circuit television entrance barrier and other security systems

1.1.2.3 cleaning and lighting the Estate to such standard as the Landlord may from time to time reasonably consider adequate

1.1.2.4 providing and maintaining (at the Landlord's reasonable discretion) any architectural decorative or ornamental features and any plants shrubs trees or garden or planters in the Estate and keeping the same planted and free from weeds and the grass cut as appropriate

1.1.2.5 maintaining operating and replacing any signs or close-circuit television or the like in the Estate as the Landlord shall reasonably determine

1.1.2.6 supplying providing purchasing hiring maintaining renewing replacing repairing servicing overhauling and keeping in good and serviceable order and condition all fixtures and fittings bins receptacles tools appliances materials equipment and other things which the Landlord may reasonably deem desirable or necessary for the maintenance appearance upkeep or cleanliness of the Estate or any part thereof

1.1.2.7 collecting and disposing of refuse from the Estate

1.1.2.8 any other services relating to the Estate or any part of it reasonably provided by the Landlord from time to time during the Term and not expressly mentioned

1.1.3 the "Part II Services" means:

1.1.3.1 maintaining repairing amending altering rebuilding renewing and reinstalling and where appropriate treating washing down painting and decorating to such standard as the Landlord may from time to time reasonably consider adequate the main structure of the Building including the foundations roof and load bearing walls thereof together with the gutters and rainwater pipes thereof and the Common Parts

1.1.3.2 providing installing inspecting servicing maintaining repairing cleansing emptying draining amending overhauling replacing and insuring (save

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in so far as insured under other provisions of this Lease) all Service Media apparatus plant machinery and equipment within the Building and the Common Parts from time to time including (without prejudice to the generality of the above) stand-by generators and boilers and items relating to cable or satellite television or telecommunications mechanical ventilation heating cooling and closed-circuit television and other security systems

- 1.1.3.3 providing installing maintaining inspecting repairing amending altering rebuilding renewing reinstating cleansing decorating and insuring to such standard as the Landlord may from time to time reasonably consider adequate the lift in the Building and any ancillary plant and equipment
- 1.1.3.4 providing electricity and lighting to the lift and the lift lobbies
- 1.1.3.5 maintaining and renewing any fire alarms and/or burglar alarms and ancillary apparatus fire prevention and fire fighting equipment and any other apparatus in the Building and the Common Parts
- 1.1.3.6 cleaning treating polishing and lighting the Building and the Common Parts to such standard as the Landlord may from time to time reasonably consider adequate
- 1.1.3.7 providing and maintaining (at the Landlord's reasonable discretion) any architectural decorative or ornamental features and any plants or planters in the Common Parts
- 1.1.3.8 maintaining operating and replacing any signs or close-circuit television or the like in the Common Parts as the Landlord shall reasonably determine
- 1.1.3.9 supplying providing purchasing hiring maintaining renewing replacing repairing servicing overhauling and keeping in good and serviceable order and condition all fixtures and fittings bins receptacles tools appliances materials equipment and other things which the Landlord may reasonably deem desirable or necessary for the maintenance appearance upkeep or cleanliness of the Building and the Common Parts or any part thereof
- 1.1.3.10 cleaning as frequently as the Landlord shall reasonably consider adequate the exterior of all windows and window frames in the Common Parts and in any apartments within the Building where the same cannot reasonably be accessed from the interior of any apartment within the Building
- 1.1.3.11 collecting and disposing of refuse from the Common Parts
- 1.1.3.12 any other services relating to the Building and the Common Parts or any part of them reasonably provided by the Landlord from time to time during the Term and not expressly mentioned

1.1.4 "Services" means the Part I Services and the Part II Services

1.1.5 "The Additional Items" means:

- 1.1.5.1 the reasonable and proper fees and disbursements (and any VAT payable on them) reasonably and properly incurred of:

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- 1.1.5.1.1 any Surveyor or Accountant and/or any other individual firm or company (including the Landlord and its servants and agents) employed or retained by the Landlord for or in connection with such surveying or accounting functions in connection with the management of the Building
- 1.1.5.1.2 the managing agents where such functions are undertaken by the Surveyor for or in connection with:
  - 1.1.5.1.2.1 the management of the Building and/or the Estate
  - 1.1.5.1.2.2 the performance of the Services and any other duties in and about the Building and/or the Estate or any part relating to (without prejudice to the generality of the above) the general management administration security maintenance protection and cleanliness of the Building and/or the Estate
- 1.1.5.1.3 the cost of such proceedings as the Landlord shall in its absolute discretion deem necessary to recover any arrears of the Service Charge and Insurance Rent including instructing solicitors in connection therewith
- 1.1.5.1.4 any individual firm or company providing caretaking and security arrangements and services to the Building and/or the Estate
- 1.1.5.1.5 any other individual firm or company (including the Landlord and its agents) reasonably employed or retained by the Landlord to perform (or in connection with) any of the Services or any of the functions or duties referred to in sub-paragraph 1.1.2 and/or 1.1.3
- 1.1.5.2 the reasonable fees of the Landlord or a Group Company for any of the Services or the other functions and duties referred to in sub-paragraph 1.1.5.1 that shall be undertaken by the Landlord or a Group Company and not by a third party
- 1.1.5.3 the reasonable cost of employing (whether by the Landlord a Group Company the managing agents or any other individual firm or company) such staff as the Landlord may in its reasonable discretion deem necessary for the performance of the Services and the other functions and duties referred to in sub-paragraph 1.1.5 and all other incidental expenditure directly attributable to such employment including but without prejudice to the generality of the above:
  - 1.1.5.3.1 insurance pension and welfare contributions
  - 1.1.5.3.2 transport facilities and benefits in kind
  - 1.1.5.3.3 the provision of uniforms and working clothing
  - 1.1.5.3.4 the provision of vehicles tools appliances cleaning and other materials fixtures fittings and other equipment for the proper performance of their duties and a store for housing the same and

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- 1.1.5.3.5 a notional rent (not exceeding the market rent such rent to be determined by the Surveyor acting as an expert and not as an arbitrator) for any premises in the Building provided rent free for every such person
- 1.1.5.4 the cost of entering into any contracts for the carrying out of all or any of the Services and the other functions and duties that the Landlord may in its reasonable discretion deem desirable or necessary
- 1.1.5.5 all rates water rates taxes assessments duties charges impositions and outgoings which are now or during the Term shall be charged assessed or imposed upon the whole of the Estate and/or the Building and/or the Common Parts or any part of them
- 1.1.5.6 the cost of the supply of electricity gas oil or other fuel and water for the provision of the Services and for all purposes in connection with the Estate and/or the Building and/or the Common Parts or any part thereof
- 1.1.5.7 the amount which the Landlord shall be called upon to pay as a contribution towards the expense of making repairing maintaining decorating rebuilding and cleansing any ways structures Service Media or anything which may belong to or be used for or benefits the Building and/or the Estate or any part of them exclusively or in common with other neighbouring or adjoining premises
- 1.1.5.8 the reasonable costs charges and expenses of preparing and supplying to the tenants copies of any regulations made by the Landlord relating to the Estate and/or the Building or their use
- 1.1.5.9 the reasonable and proper cost of taking all steps deemed desirable or expedient by the Landlord for complying with or making representations against or otherwise contesting the incidence of the provisions of any statute bye-law or notice concerning town planning public health highways streets drainage or other matters relating to or alleged to relate to the Building and/or the Estate or any part of them for which any tenant is not directly liable
- 1.1.5.10 the cost to the Landlord of abating a nuisance in respect of the Estate and/or the Building or any part in so far as the same is not the liability of any individual tenant
- 1.1.5.11 any interest and fees in respect of money reasonably borrowed to finance the provision of the Services or the Additional Items
- 1.1.5.12 such provision (if any) (whether by way of sinking fund reserve fund or otherwise) for anticipated expenditure in respect of any of the Services or the Additional Items as the Landlord shall in its reasonable discretion consider appropriate

1.1.6 "The Part I Annual Expenditure" means:

- 1.1.6.1 all reasonable and proper costs expenses and outgoings whatever reasonably and properly incurred by the Landlord in or incidental to providing all or any of the Part I Services and shall for the avoidance of doubt include not only those costs expenses and outgoings which the Landlord shall have actually incurred or made during the year in question but also a reasonable sum on account of those items of expenditure which are of a periodically recurring nature (whether recurring by

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regular or irregular periods) whenever disbursed incurred or made and whether prior to the commencement of the Term or otherwise including a sum or sums of money by way of reasonable provision for anticipated expenditure in respect thereof as the Landlord may in its reasonable discretion allocate to the year in question as being fair and reasonable in all the circumstances and

1.1.6.2 all reasonable and proper sums reasonably and properly incurred in relation to the Additional Items but excluding any Additional Items relating exclusively to the provision of the Part II Services

and any VAT payable on such items but excluding any expenditure in respect of any part of the Estate for which the Tenant or any other tenant shall be wholly responsible and including any sums incurred in relation to a larger area but properly apportionable to the Estate

1.1.7 "The Part II Annual Expenditure" means:

1.1.7.1 all reasonable and proper costs expenses and outgoings whatever reasonably and properly incurred by the Landlord in or incidental to providing all or any of the Part II Services and shall for the avoidance of doubt include not only those costs expenses and outgoings which the Landlord shall have actually incurred or made during the year in question but also a reasonable sum on account of those items of expenditure which are of a periodically recurring nature (whether recurring by regular or irregular periods) whenever disbursed incurred or made and whether prior to the commencement of the Term or otherwise including a sum or sums of money by way of reasonable provision for anticipated expenditure in respect thereof as the Landlord may in its reasonable discretion allocate to the year in question as being fair and reasonable in all the circumstances and

1.1.7.2 all reasonable and proper sums reasonably and properly incurred in relation to the Additional Items as relate exclusively to the provision of the Part II Services

and any VAT payable on such items but excluding any expenditure in respect of any part of the Building for which the Tenant or any other tenant shall be wholly responsible and including any sums incurred in relation to a larger area but properly apportionable to the Building

1.1.8 "Computing Date" means 31st December in every year of the Term or such other date as the Landlord may from time to time nominate and

1.1.9 "Financial Year" means the period:

1.1.9.1 from the commencement of the Term to and including the first Computing Date and subsequently

1.1.9.2 between two consecutive Computing Dates (excluding the first Computing Date but including the second Computing Date in the period)

1.1.10 "Service Charge" means the aggregate of:

(a) the Part I Service Percentage of the Part I Annual Expenditure; and

(b) the Part II Service Percentage of the Part II Annual Expenditure

## THE WRITTEN REPRESENTATIONS

### THE APPLICANTS

21. The applicants submitted that they had bought the long leases to these apartments , “off plan”, as a financial investment and had sublet them to sub-tenants. They had expected to pay small service charges for lighting the common parts but expected that each apartments sub tenant would be billed directly from the gas or electricity provider for the heating and lighting internal to that apartment. The original Landlord had not included anything in the service charges for heating the interior of apartments.
22. In July 2009 the Respondents had bought the freehold to the complex and therefore became the Landlords of the complex. They had taken the view that each apartment in the complex should pay towards the common heating provided in the new build area. The Applicants communicated with the new management agent pointing out that this was unfair and Mr McDonald had agreed by letter dated 23/12/09 that it was in fact unfair. (Document 22.)The letter written as management agents for the Landlord included these words “As we discussed on the telephone, it has now become apparent that the refurbished apartments do not enjoy the benefits of the communal heating and it will therefore be necessary in the coming weeks to readjust all the service charge demands for 2010 and split the service charges more fairly between the new build and the refurbished apartments within the site.”
23. Irrespective of that letter and telephone conversations the management agent had continued to claim that the service charges demanded were payable. There had not been any readjustment for that year or any other year.

### THE RESPONDENT

24. The Respondent had bought a complex in which there was a common heating system and sought to charge as a service charge the cost of that heating system. It should be charged to all the apartments and the Landlord had decided that the charge would be calculated depending upon the square footage of the floor space of each apartment.
25. The Landlord sought to rely upon the earlier Tribunal decision made on 15/10/10 in the case of Dr. And Mrs. Moon and P. A. S. Property Services Ltd reference MAN/OOCG/LSC/2010/0071.
26. In that case the differently constituted Tribunal had decided that in relation to an apartment in the new build area the Landlord could charge as a service charge the cost of the gas used in providing common hot water to the new build apartments.

## THE HEARING

27. The hearing commenced at Sheffield Magistrates Court at 11:30 am on 13/8/12. The Applicants were present. The Landlord did not appear but was represented by his management agent, Mr McDonald.
28. The Applicants gave evidence to the effect when they purchased these apartments they had expected all 4 apartments to be separately metered and they thought that the sub-tenants were paying gas and electric bills to the utility provider. As such in relation to gas there should be no service charge but there would be a small charge in relation to electricity for the common parts.
29. During the purchase procedure they had been provided with a Legal Hand Book (Document 5 of their bundle). This had been provided by the Solicitor for the Vendor Landlord and it dealt with expected service charges, providing a schedule of the estimated cost of services to be provided in relation to the apartments. It stated that there would be a charge for communal electricity, but did not mention a service charge in respect of gas. It did not mention any service charge for a communal heating system in the new build area. The initial service charge demands from purchase to May 2009 had made no mention of charges for gas. (Documents 10 to 15).
30. The first mention of a service charge for gas had been in the demand for payment of 8/6/2009, followed by a notification of sale of the freehold dated 13/8/2009.
31. Further, they took the view that the refurbished area and the new build area should be treated separately in so far as service charges were concerned, because the reasonable costs in relation to each of those 2 parts would be different. They did agree that upon looking at the leases that they had signed that the leases were all in exactly the same terms and that the leases provided that the complex should be treated as one whole unit.
32. In short they stated that no service charges should be payable at all for gas but agreed that there would be some cost for common electricity.
33. They then went through the years covered by the Application.
34. In relation to most years they said that because of a lack of information they had decided to calculate their own cost of service charges. Recently there were differences in accounts for the same period as produced by the present management agents, making it difficult to establish the correct figures. They had paid what they had calculated was due and as disclosed on their statement of case up to September 2009.

35. In July of 2009 the present management agent had been appointed by the new Landlord. They were notified that the budget for gas had increased by £5000. After that there were telephone discussions as to why there was a charge for gas at all. They were told that it was for the common parts and the internal heating of the apartments. This led to the management agent writing the letter dated 23/12/2009(Document22), already partly transcribed above.
36. In relation to 2010 they contended that no service charges at all should be payable because no demand had been served. They were shown a demand dated 21/9/2010 and agreed that they had received it.
37. They went on to start to give evidence relating to late payment charges, but Mr. McDonald helpfully indicated that these were not in issue because he did not intend to claim any such fees.
38. They commenced to give evidence about administration charges relating to water damage to the bathrooms in apartments 33 and 36, but again Mr. McDonald indicated that these were not in issue because he did not wish to claim any such fees.
39. Mr. McDonald gave evidence as management agent on behalf of the Landlord.
40. The purchase of the complex by this Landlord had been completed on 1/8/2009. He had been appointed as the management agent on 1/9/2009. He therefore could not give evidence about anything that had happened at the complex before 1/9/2009. In so far as he could establish the facts the prior Landlord had never paid NPower for the gas and electricity that NPower had provided to the first Landlord. He considered that to be an issue between the prior Landlord and the provider. In relation to electricity and gas since he took over he had just negotiated a reduction of the NPower bill by about £10000. That was done on 31/10/2011, but there had not yet been any reconciliation of service charge demands. The County Court Claims included the full amount, giving no allowance for the fact that £10000 should be deducted from the overall service charge figure.
41. The letter (Document 22) was put to Mr. McDonald and he indicated that he agreed that the service charges were unfair, but that he was obliged to follow the terms of the lease. That he relied upon paragraph 1.1.5.6 of the lease and the earlier Tribunal decision. Mr. McDonald was asked about what he had done following writing the letter and he indicated that Switch 2 had been contacted in relation to the provision of individual gas bills for tenants, but that he must act upon his instructions from the Landlord and gave his opinion, "That's why we are here."
42. In relation to the common heating system he said that the meters that could be operated by Switch 2 would permit Switch 2 to bill each individual tenant with bills to cover the whole of the period that he was responsible for and to carry on raising

bills into the future. He agreed that this would be a fairer way of dealing with this cost. He indicated that the reason that this had not been done was that Switch 2 wanted the Landlord to be responsible for payment if the tenants failed to pay. The Landlord refused to do this so the contract could not be signed.

43. He agreed that by making all the tenants pay the internal heating costs of only half the tenants that this meant that the tenants who were being subsidised had no reason to be economical with their internal heating.
44. He agreed that the circumstances were such that there was always going to have to be a second Tribunal decision in this matter.
45. The case was then adjourned for deliberations in the absence of the parties on 1/10/2012.

#### THE DELIBERATIONS

46. It was common ground that the lease in relation to each apartment to be considered by the Tribunal was in exactly the same terms and it did not matter for the purposes of the content of the lease whether or not the apartment was in the new build area or the refurbished area. That being the case if the Tribunal decided that the service charge being demanded for the gas was payable, then it would be payable by all the tenants of all the apartments. This would be case even though approximately half of the tenants gained no service at all for that part of the charge.
47. The Tribunal then considered the earlier Tribunal decision already referred to above.
48. The Tribunal decided that it would be wrong in this case to apply that decision. This Tribunal noted that the earlier Tribunal had not inspected the property and that the earlier Tribunal had not had the benefit of receiving oral evidence. This Tribunal could not know the full extent of the written evidence the earlier Tribunal had before it, but it was obvious that in paragraph 18 of that judgement the earlier Tribunal had either misunderstood the evidence that was put before it or that it had been misled. In that paragraph the earlier Tribunal states that this Landlord had indicated to the Tribunal that the apartments in the refurbished area were not equipped with functioning gas meters. That was not correct then and it is not correct now. As such this Tribunal decided that what in other circumstances might have been a persuasive prior decision was of no assistance in this case.
49. The Tribunal deliberated on the issue of whether or not the cost of electricity used in the common areas was a recoverable service charge. The Tribunal considered this issue first because both parties had indicated that this was not really at issue.

50. The Tribunal noted that clause 1.1.2.3 of the leases provided for “the provision of lighting the estate”. Clause 1.1.3.4 provided for “electricity and lighting to the lift and the lift lobbies.”
51. These provisions of the leases were clear and unambiguous. The Landlord was to provide these services to the common parts and they were to be paid for through service charges levied against each apartment on the estate. The Tribunal was fortified in this matter by looking at all the available supporting evidence. At the time when the apartments were being purchased “off plan” both the Landlord and the Tenants were expecting this to happen and the Tenant had been informed via(Document 5 ) the Legal Hand Book and associated estimate of service charges that electricity for the common parts would be dealt with in this way. As such the Tribunal decided that service charges in respect of electricity as demanded were payable.
52. The Tribunal went on to consider whether these charges were payable as in the manner in which they were being charged, i.e. to take the whole of the cost for the complex and divide it between the tenants of all the apartments. The Tribunal noted that the parking area referred to above was also a bin store and gave access to a fire escape. The Tribunal further noted that the leases did not prohibit the charge from being calculated in this way. The Tribunal decided that bearing in mind the clear terms of the leases the Landlord could charge this part of the service charge in this way.
53. The Respondent has calculated the electricity element of the service charge by taking the square footage of each apartment and calculating a cost to each apartment on that basis. The Tribunal considers the level of electricity charges as demanded to be reasonable.
54. The Tribunal then considered the service charge for the use of gas. This was a more contentious issue.
55. The starting point for the Tribunal's deliberations was the terms of the leases. Was it a clear term of the leases that the Landlord would provide a communal heating system or district heating system to be fuelled by gas? Was it a clear term of the leases that this system would only heat the interior of the apartments in the new build area, but that the cost of the provision of that system should be divided amongst all the apartments on the complex, even apartments that derived no benefit from that system?
56. There is no clear term in the leases that provides for such a system. The words communal heating or district heating are not mentioned. The only mention of gas is in clause 1.1.5.6 upon which the Landlord seeks to rely. This is a very general “sweeper clause”

57. The Tribunal reminded itself that in the case of *Investors' Compensation Scheme Limited v West Bromwich Building Society* [1998] 1 WLR 896, at 912H to 913F, Lord Hoffman had set the rules for interpretation. "The principles may be summarised as follows: Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract."
58. Taking this approach it is clear to the Tribunal that these leases do not convey to a reasonable person that they would be expected to pay through a service charge for the cost of heating leaseholders' apartments by way of paying towards a communal heating or district heating scheme. This view is enhanced when taking into account the additional information available to the leaseholder at the time of the contract, namely, the Sales Handbook and service charges budget, neither of which made any reference to such a scheme.
59. Further, it is evident from the physical features and subsequent actions that the Landlord did not intend to recover these costs as service charges. He installed Switch 2 monitoring equipment to enable billing of actual consumption directly to the occupants of each apartment; no provision was made to recover the costs within the original budget. No costs were included in the service charge accounts for the early years.
60. The Landlord now seeks to rely upon a very general sweeper clause. The Tribunal reminded itself as to the approach to be taken to such clauses. They will usually be narrowly construed. *Lloyds Bank plc v Bowker Orford* [1992] 2 EGLR 44. Especially so where the Landlord seeks to recover costs not specifically referred to elsewhere. *Jacob Isbicky and Co v Goulding and Bird* [1989] 1 EGLR 236.
61. The communal heating system and Switch 2 monitoring meters were not added at a later stage, they were planned as part of the development.
62. Further there is guidance provided in the RICS Service Charges 2<sup>nd</sup> Edition published in 2008 by the RICS where at 1.7.2 the following is written, "A sweeper clause cannot be used to make good a drafting defect in the lease nor can it be used to create an additional obligation on the part of the tenant to pay for a service that was in contemplation at the date of the grant of the lease but was not included within the service charge provisions."
63. The Tribunal decided that there is no clear and unambiguous term of these leases that authorises the Landlord to charge for the gas used in a service charge. The sweeper clause referred to and the whole of the lease was considered by the Tribunal and the Tribunal decided that there was no provisions that could make such a service charge payable.



64. The Tribunal finds it difficult to calculate the amounts paid in relation to gas charges since the figures provided by the Applicants are figures that they have calculated. The accounts as provided by the Respondent do not appear to be reliable since they differ in their content and do not at any stage allow for the reconciliation necessary because of the reduction in expected expense by virtue of Npower reducing its bill.
65. The Tribunal then went on to deliberate upon the issue raised as to whether the Landlord should be prohibited from considering his costs in responding to this application to be a relevant cost in calculating service charges in the future. It was clear that Mr McDonald, the management agent on behalf of the Landlord accepted that it was always going to be necessary for this Tribunal to resolve these issues and as such the Tribunal had no difficulty in deciding that it was fair and just to make such an order.
66. Further, since it was the case that this application was viewed as necessary by both parties to the proceedings the Tribunal considered it fair and just to make an order under the Leasehold Valuation Tribunals (Fees) (England) Regulations 2003 SI 2003/2098, regulation 9, that the Respondent reimburse the Applicant half of the application fee paid.

#### THE TRIBUNALS DECISION

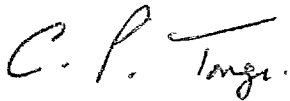
67. The service charges in so far as they relate to electricity for the years 2007 to 2012 are payable by the Applicants as demanded by the Landlords and if not already paid should be paid to the Respondent.

The Tribunal has been provided with figures of how much has been demanded by the Respondent for the years 2009, 2010 and 2011, no figures have been provided for 2012, but provided they are calculated in the same manner as the 3 earlier years they too will be payable. (Page references are to the Respondents bundle.)

| Apartment number: | 33          | 36      | 49      | 68      |         |
|-------------------|-------------|---------|---------|---------|---------|
| Year              | pages       |         |         |         |         |
| 2009              | 33/34/35/36 | £38.49  | £54.89  | £31.86  | £66.25  |
| 2010              | 63/65/67/69 | £150.37 | £128.54 | £124.49 | £258.83 |
| 2011              | 122 to 128  | £147.08 | £209.78 | £121.12 | £253.18 |

68. The services charges in so far as they relate to gas for the years 2007 to 2012 are not payable by the Applicants and any payments already made should be credited to the Applicants service charge account. This figure to be agreed between the parties with liberty to apply to this Tribunal in the event that the figure cannot be agreed.
69. The Respondent withdrew the claim for payment of Administration charges, so such charges are not payable. If already paid they should be credited to the Applicants service charge account.

70. The Respondent withdrew the charges for late payment of service charges, so they are not payable. If already paid they should be credited to the Applicants service charge account.
71. **Regulation 9 of the Leasehold Valuation Tribunal (Costs) (England) Regulations 2003, SI 2003/2098.** It is ordered that the Respondent reimburse the Applicants half of the £70 application fees that the Applicants have paid to the Tribunal.
72. **Section 20c of the Landlord and Tenant Act 1985.** The Applicant having raised this matter the Tribunal decided that it was just and equitable to make an order that the Respondents costs incurred in connection with these proceedings are not be considered as relevant costs to be taken into account in determining the amount of service charges payable.



Mr. C. P. Tonge. LLB. BA.

Chairperson.