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FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**BIR/00FN/LSC/2013/0003**
Property	:	**Apartment 202, The Exchange, 5 Lee Street, Leicester LE1 3AH**
Applicants	:	**Andrew Trevor Davies and Katherine Louise Davies**
Respondent	:	**Wharf Street South Developments Limited**
Representation	:	**Mr Glenn Willetts of counsel**
Type of Application	:	**(1) To determine whether service charges are payable and if so as to their reasonableness under section 27A of the Landlord and Tenant Act 1985 ('the Act') (2) For an Order under section 20C of the Act**
Tribunal Members	:	**Judge W J Martin** **J E Ravenhill F.R.I.C.S**
Date and venue of Hearing	:	**Leicester Magistrates Court on 14th and 15th November 2013**
Date of Decision	:	16 DEC 2013

DECISION

Determination

Reasons For the Tribunal's Decision

Preliminary

1 The Decision recorded in this document was made by the First-tier Tribunal (Property Chamber) rather than the leasehold valuation tribunal, to whom the application had been made, because by virtue of The Transfer of Tribunals Function Order (2013 No 1036) ('the Transfer Order') the functions of leasehold valuation tribunals were, on 1st July 2013, transferred to the First-tier Tribunal (Property Chamber). By virtue of the transitional provisions, applications to leasehold valuation tribunals in respect of which a decision had not been issued before the 1st July 2013, automatically became proceedings before the First-tier Tribunal (Property Chamber). The Transfer Order also amended the relevant legislation under which leasehold valuation tribunals were referred to by substituting the words 'First-tier Tribunal' for 'leasehold valuation tribunal' within the relevant parts of the legislation. The extracts from the legislation applicable to the present applications that appear below incorporate the changes made by the Transfer Order. In this Decision the expression 'the Tribunal' means the First-tier Tribunal (Property Chamber) or the leasehold valuation tribunal, as the context admits.

2 On 4th February 2013 Andrew Trevor Davies and Katherine Louise Davies ('the Applicants') applied to the Tribunal ('the Application') for a Determination under section 27A of the Act as to whether a service charge was payable and if so as to the amount thereof in respect of the utility charges from a common supply serving the whole of the Exchange Building ('the Exchange') levied by Wharf Street South Developments Limited ('the Respondent') in accordance with provisions in the lease of Apartment 202, The Exchange, Lee Street, Leicester LE1 3AH ('the Property'). The Application also requested an Order under section 20C of the Act.

3 The Lease of the Property ('the Lease') is dated 16th December 2011 and is made between the Respondent (1) and the Applicants (2). The Lease (in consideration of a premium) demises the property to the Applicants for a term of 120 years from 1st February 2011 at an initial ground rent of £200 per annum. The relevant parts of the Lease, and the legal provisions relevant to the Application are respectively set out in Parts 1 and 2 of the Appendix to this Decision.

4 Arising out of the Application, the Respondent challenged the jurisdiction of the Tribunal, on the basis that the sums payable under the provisions of Part 2 of the Seventh Schedule to the Lease (containing the provisions relating to the utility charges), do not vary according to

relevant costs, and therefore are outside of the definition of 'service charge' contained in section 18 of the Act.

5 By a Decision dated 2013 ('the Preliminary Decision') the Tribunal determined that, in respect of utility charges the subject of the Application the Tribunal does have jurisdiction, because included within those utility charges are the costs of maintaining the infrastructure of the communal supplies within the Exchange. However, in respect of any future utility charges, which exclude such costs, the Tribunal determined that it would not have jurisdiction.

6 The following extract from the Preliminary Decision records the inspection of the Exchange Building made by the Tribunal immediately prior to the Hearing of the preliminary issue:

> '***Inspection***
>
> *4 The Tribunal inspected the Property, the Boiler Room and part of the communal areas at The Exchange Building on 13th June 2013, in the presence of the Applicants, Mr John Richard Baker (a Director of the Respondent) and Mr Glenn Willetts, counsel for the Respondent.*
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> *5 The members of the Tribunal were shown first the Boiler Room at the Exchange Building. This contains three gas boilers, which are the main providers of water heating, and a biomass boiler, which is fuelled by wood chips, and acts as an auxiliary to the main boilers as demand requires. The whole system is automated. From the boiler room hot water and cold water are supplied to every apartment, of which there are 108 on the three original floors of the Exchange Building. However, the apartments are 'duplex', and so there is an additional floor between each of the three original floors, making six in all. It is this factor which lead to the communal system being installed, as building and fire safety regulations do not permit individual gas boilers in residential buildings of more than three storeys.*
>
> *6 The Tribunal was told that there are three meters for each apartment, providing readings in respect of the hot water serving the radiators installed in each apartment, the hot water supply for each apartment and the cold water supply. These meters are situated in the ceiling areas of the common passageways and are not accessible by the occupiers of the apartments (many of which are shorthold tenants) but may be inspected by the leaseholders by appointment.'*

7 Although not recorded in the Preliminary Decision, the Tribunal had also inspected the interior of the Property. The members of the Tribunal were shown the two radiators served by the communal heating system, situated in the living room and the kitchen. The bedrooms are on the upper floor of the apartment, but have no radiators within them. The Tribunal was also shown the position of the meters. As mentioned above,

these are housed in compartments above the ceiling of the communal passages serving the apartments, and can only be read by the concierge, who needs to use a stepladder with a torch. The Tribunal was told at the Hearing of the substantive issue by Mr Baker that one of the reasons for the positioning of the meters is that the Exchange was constructed originally in 1953 as a telephone exchange in its upper storeys, but that it also housed in its basement one of the only two secure nuclear bunkers in England (the other being in London), and because of this the walls, even in the upper stories, are massively thick.

8 As a result of the Preliminary Decision, there are three invoices for utility charges which are to be determined. The Tribunal was told that the other leaseholders at the Exchange have received accounts for the current period. However, Mr Baker said that, with regard to the Applicants, the Respondent preferred to await the outcome of the case before issuing accounts to the Applicants for these periods. The relevant parts of the three invoices are reproduced below:

1. Date: 28/06/2012

Description	Amount
Cold Water Supply - Period from 16/12/2011 to 28/06/2012 Volume Used - 21m3 x £2.46	£51.66
Used water/ Sewerage - 21m3 x £1.88	£39.48
Hot Water Supply - Period from 16/12 2011 to 28/06/2012 Volume Used 13m3 = 148 kWh x £0.27	£39.96
Heating - supply - Period from 16/12/2011 to 28/06/2012 Volume Used 22m3 = 250 kWh x £0.16	£40.00

2. Date: 16/08/2012

Description	Amount
Cold Water Supply - Meter No 377 - Period from 30/10/2012 to 08/01/2013 - Previous Meter Reading - 00021- New Meter reading - 0043 Volume Used - 22m3 x £2.46	£54.12
Used water/ Sewerage - 22m3 x £1.88	£41.36
Hot Water Supply - Meter No 193 Period From 28/06/2012 to	

30/10/2012 - Previous Meter Reading - 00013 - New Meter Reading - 00026 Volume Used 13m3 = 147.68 kWh x £0.27	£39.87
Heating - supply Meter No - Period from 28/06/2012 to 30/10/2012 - No New Meter Reading Taken as Yet Volume Used 0m3 = 0 kWh x £0.16	£0

3. Date 14/01/2013

Description	Amount
Cold Water Supply - Meter No 377 - Period from 28/06/2012 to 30/10/2012 - Previous Meter Reading - 00043- New Meter reading - 00055 Volume Used - 12m3 x £2.46	£29.52
Used water/ Sewerage - 12m3 x £1.88	£22.56
Hot Water Supply - Meter No 193 Period From 30/10/2012 to 08/01/2013 - Previous Meter Reading - 00026 - New Meter Reading - 00036 Volume Used 10m3 = 147.68 kWh x £0.27	£30.67
Heating - supply Meter No - Period from 30/10/2012 to 08/01/2013 - Previous Meter Reading 01258 - New Meter Reading 01656 Volume Used 398m3 = 4,521.8 kWh x £0.16	£723.40

Submissions and Hearing

9 In accordance with the Directions of the Tribunal the parties had provided written submissions prior to the Hearing. The Hearing was attended by the Applicants in person, and, as witnesses for the Applicants, by Mr Samuel Smithers (tenant) and Mr Eric Mace (consulting engineer). On behalf of the Respondent, the Hearing was attended by Mr John Richard Baker (Director), with legal representation by Mr Willetts.

10 The Applicants presented their case jointly. The Property had been purchased in December 2011 as a buy to let property, and was let by their then Agents, Barkers, to Mr and Mrs Smithers ('the Tenants') at the end of January 2012. The arrangement with the Tenants was that they would pay the utility bills, as is normal in residential lettings. Neither the

Applicants, nor the tenants were concerned as to the level of the charges until invoice number 3, which shows a usage for heating costing £734.79 for a period of 69 days. The Applicants' are not heating experts but their research has shown that the average cost per annum for the heating and hot water in the average house is about £1,400. They therefore wished to query this very large account.

11 The Energy Performance Certificate provided at completion of the Applicants' purchase (exhibited in the Applicants' bundle) shows that the heating cost per annum is estimated at £267 per annum, and hot water at £87 per annum. The Applicants then drew the Tribunal's attention to a document entitled 'Community Heating - A guide' provided by the Energy Saving Trust. This document indicates that community heating should provide affordable warmth, as bulk purchase savings can be passed on to residents. However, it also says that 'individual room control, as well as programmable heating and hot water, are standard features on modern community heating' and that 'Modern metering can ensure that residents only pay for the heat they use'. This was contrasted with the situation at the Exchange, where the only control the residents have is an on/off switch. There are thermostats on the two radiators, but these only have the effect of lowering the temperature in the Property, and have no effect upon the bill received. Additionally, of course, there is no easy way for residents at the Exchange to monitor how much the provision of the utilities is costing them because of the positioning of the meters, and the fact that they have to be read by the concierge.

12 The Applicants also maintain that the Respondent, as a reseller of energy, must comply with the regulations of OFFWAT, OFFGEN with regard to the pricing of the resale. In particular, the residents should not be charged VAT at 20%, but should be charged the lower rate of 5%. As evidence that they are being charged 20%, the Applicants referred to they only account disclosed by the Respondent, which is an account from Severn Trent Water dated 28th November 2012. This shows a price for the supply of water at 152.20 per m3 totalling £1143.02 plus VAT at 20% (£232.88). There is in addition a standing charge of £21.36, which is also subject to 20% VAT. The whole of this VAT is included within the unit rate set by the Respondent for the supply of water. According to the Applicants, only 5% should be passed on.

13 The Applicants were also unhappy that, when they queried the level of invoice 3, they were told that if they did not pay it immediately the supply would be cut off, and that continued use knowing that the account was unpaid amounted to theft. The supply was subsequently cut off, although the Applicants maintain they have paid the invoices. However, they have found it expedient to provide two oil filled radiators powered by electricity and a fan heater. The Applicants said that this was far more economical to run than the communal heating system.

14 The Applicants provided a copy of the annual statement received from EDF, who are the suppliers of both gas and electricity to their own home in Retford. This is a four bedroom detached bungalow, and yet the actual

cost for the dual fuel for a complete year is £1,450.32. In view of the fact that the Property is considerably smaller, and only has two radiators, the Applicants felt that there must be something wrong with the supply of the Heating and Hot Water, or the metering of them, at the Property.

15 With the above in mind, the Applicants commissioned a report from a qualified Heating Engineer, Mr Eric Mace. Mr Mace's qualifications and experience are extensive. The report he provided is comprehensive and detailed. The conclusions from the report are summarised below:

01. The charges for the supply of cold water are reasonable. If anything the actual amounts used are below average.
02. The heating of the hot water has been undercharged by the Respondent. Firstly, the Respondent has used a conversion factor of 11.36 rather than 11.63. The correct figure is arrived at by converting the energy requirement for heating one kilogram (1000 litres) of water by 1 degree centigrade in one second (4186 kilojoules) into kilowatt-hours. This is done by dividing 4186 by 3600 (i.e. by 60 minutes and by 60 seconds). The resulting value is 1.163.
03. Additionally the Respondent has only applied the (incorrect) figure of 11.36 to the cost of heating the water by 10 degrees C, whereas he should have applied it to the cost of heating the water from 10 degrees C (the temperature at which it enters the building) to 60 degrees C.
04. With regard to the heating for the radiators, however, Mr Mace has great difficulty in agreeing that the metered charge is accurate. The reading in Invoice Number 1 is 0022 from a starting figure of 0000. This is shown in the concierge's records. This means that 22 m3 of heated water flowed through the meter between 16/12/11 and 28/6/12. At 16/08/12 the concierge's records also show a reading of 0022. Therefore there was no movement between 28/6/12 and 16/08/12. This is understandable as the system is switched off in summer. However, at 21/09/12 there is recorded by the concierge a reading of 01036. This indicates that 1014 m3 was used in 36 days during summer. This equates to 327 kilowatt hours per day and the system would have to run at 50 hours per day to achieve this figure. This is obviously incorrect. The meter must have malfunctioned or it was incorrectly read.
05. Invoice 2 states that no readings were taken between 28/06/12 and 30/10/12. This is incorrect, as the concierge's records show the reading of 01036 on 21/09/12. However, using this figure as a starting point, the Respondent's Invoice number 3 shows that 398 m3 were used between 30/10/12 and 08/01/13. Mr Mace says that this equates to 66 kilowatt hours used every day which would involve the heating being run at between full and half power for 11 to 22 hours daily. The Respondent's opinion confirmed in a letter dated 25th April 2013 is that the heating was running on full power for 12 hours per day. If it were used in this way, the usage of 398 m3 would be about right. However, this is not the opinion

of the Tenants who assert that they did not use the heating in the manner suggested by the Respondent.

06. Mr Mace comments also upon the instructions given to the Applicants and the Tenants by the Respondent. In effect this was a 'handover' sheet apparently signed by the former concierge. Mr Mace reports that the Agent (Barkers) and the Applicants both say they were not given adequate instructions as to how to operate the system properly. Mr Mace says that the 'tick boxes' in the handover sheets are totally inadequate. The Respondent has now issued (17th January 2013) written instructions to all occupiers explaining how the system should be operated.

07. Mr Mace also reported that there has been a breach of the building regulations in that there is no time switch or room thermostat. The minimum standard is contained in Building Regulations Part L and BS 5449, both of which were in force when the building was constructed. The system in place, i.e. an on/off switch and thermostatic radiator valves do not comply, are inefficient and do not support energy efficiency.

08. Mr Mace also criticised the fact that the meters cannot be read by the Tenants, so that they can monitor their consumption. In the case of the Property the heating meter can only be read by the concierge, with the result that the Tenants have no way of monitoring consumption or checking the accuracy of the heating bills.

16 Mr Mace gave evidence at the Hearing, but as this related in part to the Respondent's evidence, it is dealt with in paragraph 31 et seq below.

17 Mr Samuel Smithers and Mo He (Mr Smithers' wife) had provided a witness statement, and Mr Smithers also gave evidence at the Hearing. The evidence arising from the statement and the Hearing are summarised as follows:

01. Mr and Mrs Smithers (i.e. the Tenants) moved in to the Property in late January 2012. There were problems with the system from the start. The kitchen radiator did not work at all. The Tenants report that the Respondent's heating engineer (Mr Somerton) told them that this radiator was in fact connected to the adjoining property initially, and so was switched off. This issue was remedied fairly quickly.

02. The amount charged for heating by Invoice number 1 was considered reasonable, in view of the energy performance certificate, and the apparently superior efficiency of a communal system. This modest charge of £40.00 set the expectation of the Tenants for the future.

03. When the communal heating was switched on again following its summer switch off the Tenants were once again without a fully functioning system. After some time a large amount of water was pulled through the system by the concierge in order to try to remedy the problem. At this time (in November 2012) Mr Somerton notified the Tenants (and other occupiers at the Exchange) that the system should not be regulated by the

thermostatic valves on the radiators. The isolator switch should be used. This was confirmed shortly afterwards by the notice put into everyone's pigeonhole by the concierge (17th January 2013 as also referred to by Mr Mace). From the time that Mr Somerton informed the Tenants of the above, great vigilance was employed. The heating was always switched off when the Tenants were away. When they were at home, they would not switch the system on in the morning, but use it for a few hours after their return from work at the university (say 5 hours on working days). Until Mr Somerton explained the system to them, the tenants confirm that they did leave the isolator switch on for long periods. However Invoice number 1 lead them to believe that the system was indeed economical.

04. The Tenants obtained a comparison from Scottish Power based upon the meter readings between 30/10/12 and 19/01/13 (454 m3). The figure given by Scottish Power was £214.78 before VAT, which is considerable less than the supposedly efficient communal system.

05. The Tenants are adamant that the suggestion in the Respondent's submissions that the heating was reported to be on by his plumber while the windows were open is false, and in any case is not supported by Mr Somerton's own statement.

18 Upon questioning by the Tribunal, the Applicants confirmed that, when they first visited the Property in mid January 2012, it did not seem cold, thus presupposing the isolation switch was in the 'on' position following legal completion in mid December 2013.

19 For the Respondent Mr Willetts commenced by reminding the Tribunal that the burden of proof as to the reasonableness of the service charges lies with the Applicants, and that providing the actions taken by the Respondent are within a range of reasonable actions, the Tribunal has no power to substitute its own version of what it considers would be reasonable. In support of the above, Mr Willetts referred to *Forcelux v Sweetman [2001] 2 EGLR 173* and the recent Upper Tribunal case of *Carey Morgan v De Walden [2013] UKUT 0134 (LC).*

20 In the present case the provisions of Part 2 of the Seventh Schedule to the Lease require the Respondent to set a unit charge, acting reasonably. The Respondent has an obligation to make the utilities available and for this purpose must purchase the fuel for the boilers. The Respondent is a commercial company and as such has to purchase such fuel at commercial rates, and to pay VAT at the rate of 20% on those purchases. It does not yet have the turnover under which it would be required to register for VAT, although when more of the apartments in the Exchange Building are sold, this may well change. If the Respondent were registered it is accepted that it would have to charge VAT on the utility charges at 5%, but it would be able to recover the difference between the 5% and the 20% from H M Customs and Excise. However, at the present time the Respondent has no power to charge VAT, it is simply including

in its calculation of the unit price the VAT it has been obliged to pay for the fuel purchased.

21 When considering the Exchange Building it should be born in mind that it is a large and unique building operating on a commercial scale. There is no market norm. There are two different types of boiler and extensive large bore pipe work. Mr Willetts referred to the Applicants' own costings, said to be in compliance of the Tribunal's Directions of 15th March 2013, which are exhibited with the Applicants' second witness statement. This is divided into sections relating to Cold Water, Waste Water, Hot Water and Heating.

22 In the Cold Water section, the three invoices amounts are totalled at £135.30, based on 55 m3 at 2.46 per m3. This has been recalculated using Mr Mace's recommendations allowing for 5% VAT as opposed to 20%, leaving a total of £110.45. The Waste Water section is dealt with similarly, reducing the total of the three invoices (£103.40) to £84.06.

23 With regard to the Hot Water, the Applicants have recalculated the amounts to show a slight reduction (£110.60 as opposed to £112.32). This applies EDF's rates as supplied by the Respondent.

24 With regard to the Heating, the Applicants have recalculated Invoice 3 alone. According to the invoice, 4,521.8 kilowatt hours (kWh) have been used. Divided by the number of days in the invoice period, this equates to approximately 66 (kWh) per day, or 5.5 kWh per hour for 12 hours. As the Tenants say they have not used this volume the maximum which should be applied is 7 hours x 5.5 kWh. Applying EDF rates and 5% VAT this produces a total of £196.10. Over a 12 month period, this becomes £397.48 to which should be added the standing charge at 0.25 per day, giving an overall total of £488.73. The total charge to the Applicants (including the period from 08/01/20133 to 19/01/2013) was £865.28. The overcharge is therefore £376.55.

25 The reason Mr Willetts referred the Tribunal to the above document is because it shows that the Applicants have admitted the amounts shown as due to the Respondent upon it, and, because of the operation of section 27A (4) (a) of the Act the Tribunal should not therefore make a findings in respect of any of the four items of a lower figure than that shown in the Applicants' own document.

26 It is in any case clear that, apart from the VAT point, there is no real issue with regard to the Cold Water Supply and Used Water charge. With regard to the Hot Water there has in fact been a massive undercharge, as confirmed by Mr Mace. However, the Respondent will not attempt to recover this undercharge by a supplemental account. This has already been confirmed to the other Leaseholders. The Applicants were not sent the same letter purely because the Respondent wished to await the Tribunal's determination before making direct communication with the Applicants.

27 This leaves the Heating Charge as the major issue between the parties. Mr Willetts referred the Tribunal to Mr Somerton's witness statement in which Mr Somerton confirms that he was asked to test the meter at the Property in view of the high readings being given. Having performed the test, Mr Somerton said that the meter was working correctly. Regrettably, Mr Somerton was not available to give evidence personally. Nevertheless, even if there had been a fault with the meter, it would be more likely that it would under record rather than over record. Mr Mace had confirmed that sometimes debris gets into the meter which stops it working and therefore, on the balance of probabilities, Mr Willetts contended that the meter was more likely to have been accurately recording than not. Accordingly the usage of 420 m3 for the period to 17/01/2013 is likely to be correct.

28 The other element contributing to the amount of the account is the rate of £0.16 per unit. The Respondent has set this, based upon advice from the consultants employed at the time of the conversion, at a level which fairly covers the following:

- The purchase of water for the system
- Replacing evaporated water
- Heating water initially from 10 - 70C, because it has to arrive at the apartments at 60C.
- The water will lose 11C as it passes through the Apartment as confirmed by Mr Mace. It must then return to the boiler room through 200 metres of pipes.
- The cost of maintaining the system
- The cost of meter readings etc.

This is a bespoke system and it is not reasonable to make direct comparisons with the domestic tariffs of suppliers such as EDF. However, if one looks at the rates charged by EDF for electricity, as exhibited in Mr Baker's witness statement, the rate per kWh for the East Midlands is shown as 18.38p for band A (to 900 kWh per annum) and 10.88 for Band B, is commensurate with the 16p rate charged by the Respondent.

29 Mr Baker was questioned as to the above by the Applicants. The Applicants are of the view that it is not fair to compare electricity prices. The gas rate is 7.35p per kWh plus VAT at 5%. Mr Baker said in reply that the electricity comparison was fairer, but in any case 7.35p plus 20% VAT is 8.82p. When added to the other costs listed in paragraph 27 above, the rate of 16p is reasonable.

30 On questioning by the Tribunal, Mr Baker confirmed that the whole system is designed to operate efficiently when the building is fully occupied. The Applicants were one of only a handful of Leaseholders at the time the Lease was completed. There are about half of the Apartments sold now. When setting the rate, he had to start somewhere; the building cannot make a loss and if it is found that the unit rate is producing a surplus, it will be revised.

31 Mr Mace confirmed in his oral evidence and a further statement provided just before the Hearing that in his opinion there is something very suspicious about the meter readings. His firm view was that there was either a malfunction, or the meter had been switched at some point or there had a series of reading errors. In any case, the type of meter being used is only accurate if the system has been properly adjusted and balanced. Mr Mace disputes the 2.5 m3 per hour flow capacity of the system. There is no supporting evidence for this figure. 2.5 m3 per hour x 11.63 kW per m3 equates to 29 kW per hour. The radiators in the flat cannot absorb 29 kW per hour. In any case the heat requirement of the flat is less than one third of this figure and the thermostats would close automatically. If 2.5 m3 per hour is being used, then the system has not been balanced.

32 Mr Mace amplified the statement he had made regarding the building regulations. He had reported the matter to Mr Bott at Leicester City Council, who was now in communication with the Respondent. Mr Baker confirmed that the installation of the timers is now in hand, but it is hardly the Respondent's fault if the certificate of compliance with Building Regulations was issued in error.

33 Mr Mace also made the point strongly that a better system of metering would be by Heat Meters, which would provide a far more accurate measurement of the heat actually used in each flat. Although he understood why, because of the construction of the Exchange, the pipe work is housed within the ceiling compartment, he considered that the all of the meters could nevertheless have been installed on the walls of the flats at a height that could be read by the occupiers, by simply bringing the pipes down from the ceiling chamber for this purpose. Mr Baker, in reply to this suggestion said that he thought that the fire regulations would not permit this.

34 Mr Baker had made a third witness statement, following the Preliminary Decision, which with regard to the Heating and the Meter readings is summarised below (using the paragraph numbers from the statement):

- (17) Mr Mace has not said the heating charge is wrong.
- (18) The Applicants say that the logic is that the water goes round the building and when it comes out of the apartment it enters the return pipe at 11 - 20 degrees lower than when it came from the supply pipe.
- (19) At minimum the cost of heating is going to be the cost of heating the water between 11 and 20 degrees plus the loss through the pipe work.
- (20) The system is off in the summer when it is drained. It then has to be filled and heated and, even if no one were using the system, it still circulates, cools and has to be re-heated.

- (21) The pressure in the system is also constantly changing and water is lost through evaporation. Fresh water must be added and heated.
- (22) The only people to pay for the cost of heating are the Leaseholders or their tenants. The cost has to be covered by the bills.
- (23) The unit charge is reasonable to cover the costs. In future the bills may be lower. However, this is the first year with a new heating system and the Respondent needs to be sure that its costs are covered.
- (24) 10 units have been sold since February 2012. As the use increases so will the efficiency of the system.
- (25) Mr Baker has spoken to a large number of people, including Pick Everard Heating Consultants with regard to the level of the unit charge. The message has been consistent. No one can say for certain what the usage of a system will be at the outset. It is necessary for the system to progress to large scale usage and it is a case of monitoring and observing the use of the system and the energy required to run it.
- (26) (27) The formula chosen is one that should cover the system use. An alternative suggestion was that there should be a standing charge paid by everyone with a lower unit charge. Mr Baker believes a higher unit charge with no standing charge is fairer. For the future the costs will exclude maintenance, so the utility charges will not be service charges.
- (50) Mr Baker acknowledges that the readings taken by the concierge might be incorrect, but based on Mr Mace's examination of the concierge's records, the readings would have been as follows:

16/12/11	0000
28/06/12	0022
16/08/12	0022
21/09/12	01036
30/10/12	01258
08/01/13	01656
20/01/13	01712

- (51) and (52) Mr Baker thought it probable that the middle digit had been omitted in the reading 28/06/12, and that it should have read, say 00822 or 00922. However, Mr Baker is certain that throughout the whole period 01712 m3 of hot water have been used. Mr Baker understands that the flow capacity is set at maximum 2.5 m3 per hour, and therefore the heating may have been on over a 6 - 8 month period for 684.8 hours

35 In his supplemental statement, Mr Mace commented upon the above as follows:

- (17) Mr Mace has not said the heating charge is right or wrong. What he has said is (a) that the figure of 11.63 per kWh per m3

can be applied where the property is taking 11 degrees C out of that one cubic meter; (b) it can only be determined whether the property is taking 11 degrees C from the cubic meter if the system has been correctly commissioned by adjusting the balancing valves to produce 11 degrees C difference between the temperature of the heating water entering the property and it leaving the property; (c) the correct balancing of the system is a skilled operation involving the removal of the thermostatic valve heads and the utilisation of an electronic contact or similar, which is a time consuming activity; and (d) if the property is taking less than 11 degrees C from each cubic meter of water recorded, then using this method of charging the customer is over charged. If the property is taking more than 11 degrees C there is an under charge.

- (18) and (19) Neither the Applicants nor the Respondent appear to understand the basic principles of calculating the amount of heat used under the circumstances of using a flow meter to monitor usage.
- (20) The Respondent's statement is factually incorrect. The heating system does not need to be drained and refilled each year. In fact this is detrimental to the system. If no flat uses the system it still has to operate to supply heat for circulation and the access areas.
- (21) It is detrimental continually add fresh water to a system. If it is found necessary to do this, there must be a malfunction.
- (22) In Mr Mace's view a methodology of charges should be devised so that the service charge covers all costs excluding the metered charges per flat.
- (25) Mr Mace agrees with this. However, a Consulting Engineer would normally be capable of determining budget figures for the initial charges.
- (52) Mr Mace disputes the capacity of 2.5 m3 per hour. There is no supporting evidence of this. 2.5 m3 per hour x 11.63 kW per m3 = 29 kW per hour. The radiators installed in the Property cannot absorb 29 kW per hour. The heat requirement of the Property is less than a third of this figure and the thermostats would close automatically preventing this amount of flow. Further, if 2.5 m3 were being used, then the system has not been balanced correctly to provide 11 degrees C loss across the system as referred to in paragraph 17 above.

36 On being questioned by Mr Davis, Mr Baker confirmed that the timers were now being installed. He had understood that the 'instant' nature of the isolation switches was sufficient. Mr Davis also asked if he would be allowed to fit a heat meter as recommended by Mr Mace, at his own expense (said to be about £500). He would then have confidence in using the system. Mr Baker said that he had no objection in principle to this unless there are technical issue which would make it unfeasible.

37 The Tribunal questioned Mr Baker about the readings on the heating flow meter. Given that all the meters will have started at zero, it is very surprising that a reading of the meter showed 0022 in June 2012, but had risen to 01306 by September of the same year. Mr Baker had said in his third witness statement that he thought the discrepancy might have been caused by the omission of the middle digit from the June reading. However, at the Hearing he very fairly conceded that the inconsistencies in the readings were not easily explainable. He did not think the meter had been changed, as he had checked that it is the same meter originally installed, as they all have numbers. However, he also produced a document showing the readings of all of the similar apartments to the Property that have been sold (numbers 201 to 228). The reading of 01715 for the Property is almost double that of the next highest (apartment 227 - 00861), with most of the others showing readings of well below 00500. This is purely a snapshot, of course, because the Applicants were one of the first purchasers, and therefore the heating flow meter will have been recording for a longer time than the majority.

The Tribunal's Determination

38 The Tribunal is faced with a task of some difficulty in this case because there is no evidence available to assist it in deciding whether the unit prices of the Utilities have been set at a level which is reasonable within the terms of section 19 of the Act. The Exchange is a recently converted building and the Tribunal agrees with the comments of Mr Baker, supported by Mr Mace, that no one can know the usage of a development such as the Exchange at the outset, and that it is necessary to monitor the system as it progresses to large scale usage. Mr Mace commented that a competent Heating Engineer will be capable of advising on an initial budget figure and Mr Baker confirmed in oral evidence that the rates he is using are those advised by his original Heating Engineers.

39 Additionally, Mr Baker was not able to give any figures for the element within the unit charges which is for the maintenance of the Utility infrastructure. There are no actual figures available for these costs as the accounts for the first service charge period are not yet available.

40 The Tribunal's approach, in the absence of such evidence, is therefore to consider in the broader sense whether the charges actually levied on the Applicants are reasonable, taking account of the evidence brought forward, and applying its knowledge and experience as an expert Tribunal.

41 Within each of the three accounts are charges for four separate utilities, namely Cold Water Supply, Used Water Costs, Hot Water Supply and Heating. In the following paragraphs the Tribunal makes its finding with regard to each of these, but before doing so it is necessary to deal with a point very strongly argued by the Applicants which is common to all of them: i.e. whether the VAT rate that the Applicants pay within the utility charges should be 5%, or whether the Respondent is correct in 'passing on' the 20% rate of VAT it is obliged to pay for its supplies of energy.

42 As Mr Mace made plain in his oral evidence, if the Respondent was registered for VAT it would add the lower rate of 5% to the utility charges billed to the leaseholders, even though it had been obliged to pay 20% VAT to its energy suppliers. However, it would in those circumstance be able to reclaim this 20% VAT, so that the net result for the leaseholders would be a lower charge. However, the Respondent is not registered for VAT because its turnover is below the threshold, and accordingly, whilst it is not charging VAT to the leaseholders, one of its costs which must be recouped through the utility charge, is the VAT it has paid. The Tribunal agrees with the Respondent in this respect. The Applicants' challenge in respect of VAT is misconceived. It would not be reasonable that a tax which the Respondent is obliged by law to pay cannot be passed on in full to the leaseholders as part of the utility charges.

43 Mr Mace had made the suggestion whilst giving his oral evidence, that it might be possible, because of the special nature of the Respondent company, to voluntarily register for VAT, in which case, if its application to do so was accepted by HM Customs and Excise, it would be obliged to operate the VAT regime referred to above.

44 The above comment by Mr Mace was made 'off the cuff' at the Hearing, and no evidence had been brought forward as to how likely it would be that HM Customs and Excise would have agreed to an application to register. Additionally, whilst registration might produce lower utility charges, there may well be knock on effects with regard to the service charge accounts themselves. The Tribunal has no evidence as to this and finds accordingly that the decision by the Respondent not to make such an application is within the range of reasonable options open to it.

45 For the above reasons, the Tribunal's findings as to the VAT included within the utility charges is that it is properly paid by the Respondent and lawfully charged back as part of the utility charges.

46 Cold Water

The amounts charged in the three Accounts are as follows:

1. (28/06/2012)	21m3 x £2.46	£51.66
2. (16/08/2012)	22m3 x £2.46	£54.12
3. (28/06.2012)	12m3 x £2.46	£29.52
	55m3	£135.30

Mr Mace in his written report concluded that the actual use of water (hot and cold combined) was below the national average for water usage, and that the percentage of hot to cold is within the national average band. The hot water usage was 36 m3, giving an approximately 60%/40% split. Accordingly, as regards the usage Mr Mace confirmed that the meter readings are probably accurate and that the amount of cold water charged for is therefore reasonable.

47 Mr Mace had not commented upon the level of the unit charge of £2.46 per m3, other than to say in the summary to his written report that he considered the cold water charges to be reasonable. In their written

submissions, the Applicants had provided a calculation based up the unit price of £2.46 per m3, reducing this by 20% (£1.968) and then deducting from this figure the £1.522 per m3 actually charged by Severn Trent Water. The resulting figure of £0.446 per m3 is the 'standing charge' i.e. the costs added on by the Respondent to its actual cost of the water purchased to cover its costs other than the water itself. When multiplied by the usage (55m3) the actual standing charge payable by the Applicants on the three invoices is £24.53. This should be added to the sum of £85.92 representing the cost of the water at £1.522 x 55 m3 plus 2.64% (a figure apparently recommended by Mr Mace but not actually explained, put presumable a calculation based on the lower VAT rate of 5% - although the Tribunal notes that this percentage happens to be the same as that by which the Respondent undercharged in respect of the heating of water as a result of using the incorrect conversion factor (see paragraph 53 below)). As a result the Applicants consider there has been an over charge of £24.85.

48 The above calculation, although not fully understood, is concerned with the proper rate of VAT. The Tribunal has already determined that it is reasonable for the Respondent to include the VAT it is charged within the unit charge, and in the absence of any challenge as to the cost of the elements within the standing charge the Tribunal finds that the amounts charged within the three invoices for cold water supplies are all reasonable.

49 Used Water/Sewerage

The amounts charged in the three Accounts are as follows:

1. (28/06/2012)	21m3 x £1.88	£39.48
2. (16/08/2012)	22m3 x £1.88	£41.36
3. (28/06.2012)	12m3 x £1.88	£22.56
	55m3	£103.40

The charges for the used water are the additional costs in respect of the disposal of the water supplied to the Property. Mr Mace did not comment upon the used water charge specifically in his written report. However, it is clear that he does not consider the water charges in general to be unreasonable.

50 The Applicants had in their submissions, provided a similar calculation to that in respect of the Cold Water supply itself, establishing, according to the Applicants, that they have been overcharged by £19.34. However, once again, whilst identifying the 'standing charge' net of VAT, the Applicants do not challenge the level of the costs within this standing charge. Accordingly, the Tribunal, for the same reasons as in respect of the Cold water supply itself, find that the amounts charged by the Respondent in respect of the Waste Water/Sewerage within the three invoices are all reasonable.

51 Hot Water Supply

The amounts charged in the three Accounts are as follows:

1. (28/06/2012)	13m3 = 148 kWh x £0.27	£39.48
2. (16/08/2012)	13m3 = 147.68 kWh x £0.27	£39.87
3. (28/06.2012)	10m3 = 113.60 kWh x £0.27	£30.67
	36m3 409.28	£110.02

52 It is abundantly clear from the evidence of Mr Mace that the charges which have been levied by the Respondent in respect of the supply of Hot Water are far less than the actual cost, owing to mistaken calculations by the Respondent.

53 One of the factors which lead Mr Mace to the conclusion that there has been an undercharge, is that the Respondent has applied a conversion factor of 11.36 in his calculations leading to the unit price of £0.27 per kWh. Mr Mace provided the calculations, but the result he arrived at is that the correct conversion factor should be 11.63, as 1.163 kWh are required to raise the temperature of 1M3 of water through 1 degree C. This mistaken application of the wrong conversion factor produces an undercharge of 2.64%. Further compounding the error, the Respondent has only charged for raising the temperature through 10 degrees C, whereas he should have charged for raising it through 50 degrees C. On top of all this, the Respondent has not included an element for the cost of the supply of the water itself.

54 As the Respondent has confirmed that it will not seek to recoup the losses it has made with regard to the undercharge, the Tribunal therefore has no hesitation in finding that the charges in respect of the Hot Water supply in the three invoices are all reasonable. For completeness, the Tribunal also confirms that, as in respect of the Water charges, the Respondent has correctly included within its (mistaken) calculations the 20% VAT it has been obliged to pay in respect of the supplies of gas and bio fuels to heat the water, and in respect of the water supply itself.

55 Communal Heating

The amounts charged in the three Accounts are as follows:

1. (28/06/2012)	22m3 = 250 kWh x £0.16	£40.00
2. (16/08/2012)	Nil	£00.00
3. (28/06.2012)	398m3=4,521.8 kWh x £0.16	£723.40
	420m3 4,771.8	£763.40

56 The dispute in respect of the Communal Heating charge centres largely around whether the Applicants have in fact used the amounts of heated water through the radiators in the Property that the Respondent alleges, and as the meter in respect of the Communal Heating indicates. Once again, the challenges from the Applicants include their submission that only 5% VAT should be passed on to them, but there are also substantive issues between the parties as to the accuracy of the meters, and the calculations used by the Respondent.

57 Mr Mace confirmed that with regard to the Heating Charge unit price, the Respondent has, as with the Hot Water supply, used the incorrect

conversion factor of 1.136 (as opposed to 1.163) as the cost of heating 1 1m3 through 1 degree C. The result is that the unit charge in respect of the supply of the Communal Heating is lower than it should be.

58 Mr Mace also made the point, however, that there is some doubt as to whether the Flow meters which measure the amount of hot water entering the Property are accurate. The use of this type of meter is acceptable in principle, but applying the conversion factor of 11.63 per kWh per m3 can only be used if the apartments through which the hot water flows are taking 11 degrees C out of that 1m3, and that this can only be determined if the system has been commissioned correctly. It is clear that Mr Mace did not consider that either party fully understood this. Certainly, there is no evidence from the Respondent as to the correct commissioning of the system, and in view of the other errors relating to the conversion factors etc, the Tribunal concludes that there must at least be a question mark over the accuracy of this type of meter as used in the Exchange.

59 There must, in the opinion of the Tribunal, also be considerable doubt as to the accuracy of the meter readings shown in the invoices, particularly invoice number 3. It is common ground that the Heating flow meters at all of the apartments commenced with a zero reading at the date of the completion of the respective leases. The evidence from the invoices themselves is that there was a reading taken at or near 28th June 2012, showing that 13m3 had been used. The Heating was turned off during the summer months and only switched on again in September or October (Mr Baker was not clear as to the exact date). However, during the initial period (from January 2012 until when the heating was switched off for the summer), when the Tenants were unaware of how the Communal Heating system should be used, their evidence was that they used the radiator valves to control the heat, and that the isolation switch was left in the on position. However, from a date early in the next winter season, after they had been told by Mr Somerton how to use the system correctly, they say they were rigorous in only turning the isolation switch on when they came home from work, that they switched it off at night and did not even switch it on in the morning, before they left for work.

60 The Tribunal found Mr Smithers to be a credible witness, and accepts that the above version of events is broadly correct, although neither party has been able to supply the exact dates of either the switch off period during the summer of 2012, or the date upon which Mr Somerton appraised the Tenants of how to use the system economically. In their written statement the Tenants said that the advice from Mr Somerton was followed 'shortly' by the letter put in their pigeonhole by the Respondent. This is dated 17th January 2013, i.e. after the reading for invoice 3. On being questioned by the Tribunal at the Hearing, Mr Smithers said that the advice from Mr Somerton was given in 'October or November'.

61 From the above, the Tribunal concludes that there may have been a considerable period between the 'switch on' and the advice from Mr Somerton when the isolation switch would have been left in the 'on' position.

62 Mr Baker had said in evidence that he was sure the meter had not been switched at any point, because they are all numbered, and he had checked. However, the Tribunal observes that invoices 2 and 3 both show the meter number in respect of the Cold Water supply (no 377) and the Hot water supply (no 193), whereas in the case of the Heating, the meter number is left blank in both of these invoices.

63 Mr Baker said that, even if there have been inaccuracies in the recording of the meter readings by the concierge, he was convincedthat throughout the period covered by the invoices 1712 m3 had been used, which could equate to the heating having been on for 684.8 hours at a maximum flow of 2.5 m3 per hour. However, Mr Mace made it plain that in his opinion this was most unlikely, for the reasons set out against the final bullet point in paragraph 35 above.

64 In the light of this positive evidence by Mr Mace, the Tribunal finds that the discrepancies in the readings are, on the balance of probabilities, unlikely to arise in the manner suggested by Mr Baker. As a contributory factor to the making of this finding, the Tribunal also notes the very large discrepancy between the use recorded in the Flow meter at the Property and the next largest user, as disclosed in the schedule provided by Mr Baker at the end of the Hearing, referred to in paragraph 37 above.

65 Taking the above factors into consideration, the Tribunal finds that the readings as to the usage by the Property of the Heating cannot be relied upon. The Tribunal concludes that, in order to achieve a just and fair determination, it is therefore necessary for the Tribunal to substitute its own figure as to what it considers reasonable as the Heating Charge in respect of the entire period covered by the three invoices, in substitution for the aggregate sum of £763.40 contained in invoices 1 and 3.

66 The Tribunal notes the comments of Mr Willetts, that the Exchange is a bespoke system in a unique building and that there is no direct comparator. However, in order to make its determination, the Tribunal considers that it is reasonable to take into account the following:

01. The fact that no one has used even half of the quantity of Heating in the other apartments shown on the schedule referred to in paragraph 37.
02. The evidence, which the Tribunal accepts, that the average cost of heating and electricity for a house is £1400 per annum.
03. The evidence of the Energy Performance Certificate that the heating cost is estimated at £267 per annum and the advice from the Energy Saving Trust that communal systems should provide 'affordable warmth'.
04. The actual cost for dual fuel for a complete year at the Applicant's own four bedroom bungalow at £1,450.32.

05. The evidence from the Tenants, that from the readings for the period 30/10/2012 to 19/01/2013 Scottish Power would have charged £214.74 before VAT.
06. The evidence of the Tenants that, until they were told how to use the system correctly, they had indeed left the isolator switch in the 'on' position.
07. The evidence of the Applicants that when they first visited the Property some 3 to 4 weeks after legal completion in the middle of January 2012 they did not find the Property cold. As the completion handover had been to Barkers, the letting agents employed by the Applicants, the Tribunal finds that is it likely the heating was left on, to facilitate the letting of the Property.
08. With regard to the question of timers, whilst it is accepted that the Exchange was given a certificate of compliance, the fact is that the Applicants were not provided with timing devices for the control of the Heating as is required by the regulations and British Standards Institute. This inevitably meant that, given the fact that the only way of controlling the system is by the isolator switch, and that the evidence shows that there were no proper instructions given to the occupiers as to how to use the system economically until the note provided by the Respondent in January 2013, the occupiers were more likely than not to use the system in an inefficient manner.
09. The Applicants' own submissions (referred to in paragraph 24) to the effect that the Heating Charge should be no more than £488.73. The Tribunal agrees with Mr Willetts that this represents a sum 'agreed or admitted' for the purposes of section 27A (4) (a) of the Act.

67 Taking all of the above factors into consideration, the Tribunal finds that in all the circumstances of the case, a reasonable sum for the provision of Heating to the Property during the period covered by the invoices is £500.

68 Although the following does not form part of the Tribunal's determination, the Tribunal makes the following observations and recommendations with regard to the provision of utilities at the Exchange which, if implemented by the Respondent, might have the effect of reducing the number of disputes surrounding the utility charges:

01. The Tribunal was impressed by the Exchange as a whole, and by the obviously 'high tech' nature of the boiler room. In the view of the Tribunal there is no reason why the communal system for the supply of utilities should not run efficiently to the benefit of the residents at the Exchange.
02. However, it is clear that the proper commissioning of the system required expert guidance, as is clear from the report of Mr Mace.
03. Consideration should be given to the installation of Heat Meters for monitoring the heat used in the apartments. It is possible that

this could be funded through the service charge, and legal advice should be sought on this point.

04. If the provision of Heat Meters is not possible, or considered undesirable for other reasons, it is clear that the existing system should be balanced by Heating Engineers as recommended by Mr Mace, so that confidence in the Flow meters is established. A certificate from the Heating Engineer that this has been correctly done should be obtained and a copy provided to the leaseholders.

05. If it is not possible to move the meters (meaning all three) into a position so that they can be read by the occupiers of the apartments, the concierge should be instructed to provide regular (say monthly) readings from all of the meters to the occupants, together with the current unit rates, so that the occupiers can monitor the cost of their usage.

69 The determinations made by the Tribunal are in respect of the utility charges only. There have been no accounts as yet for the remainder of the service charges. The Applicants are not precluded by reason of this Decision from challenging any of the other service charges when the amounts of them are known.

The Section 20C Application

70 The Applicants have made an application under section 20C of the Act for an order that the costs of the Respondent with regard to the Tribunal proceedings shall not form part of any future service charge. This application remains before the Tribunal, but in fact neither party has made any representations in respect it, other than that by the Applicants shown on the Application form.

71 The Tribunal considers that in order to achieve a just and fair determination, the parties should be permitted to make written representations with regard to the section 20C Application. Accordingly, before making a determination in respect of it, the Tribunal will consider any written submissions from either party received by the Tribunal within 14 days of the date of this Decision.

72 In reaching its decisions the Tribunal took account of its inspection of the subject property, the submissions of the parties, the relevant law and its knowledge and experience as an expert tribunal, but not any special or secret knowledge.

73 If either party is dissatisfied with this decision they may apply for permission to appeal to the Upper Tribunal (Lands Chamber). Any such application must be made within 28 days of this decision (Rule 52 (2)) of The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013.

Judge W. J. Martin – Chairman

16 DEC 2013

APPENDIX

Part 1 - The Relevant Provisions of the Lease

Clause 1 – Definitions

"The Maintenance Expenses"	*means the monies actually expended or reserved for periodical expenditure by or on behalf of the Lessor at all times during the Term in carrying out the obligations in the Sixth Schedule*
"The Maintained Property"	*means those parts of the Estate which are more particularly described in the Second Schedule the maintenance of which is the responsibility of the Lessor*
"Service Installations"	*all sewers drains channels tanks watercourses rainwater pipes gutters mains pipes wires cables and all apparatus for the supply of water gas (if any) telephone or television signals or for the disposal of foul or surface water and all other conducting media which are now constructed or which may be constructed within 80 years from 1st February 2011 in on under or over the Estate which serve the Apartments but which do not serve any of the Apartments exclusively*
"Utility Expenses"	*means the sum payable for utilities consumed from the common supply payable by the Lessee in accordance with the provisions of Part 2 of the seventh Schedule*

Clause 6 - Agreements and Declarations

IT IS HEREBY AGREED AND DECLARED as follows;

6.8 If at any time (including retrospectively) it shall become necessary or equitable to do so the Lessor (acting reasonably) shall recalculate on an equitable basis the percentage figure(s) comprised in the Lessee's Proportion appropriate to all the Apartments and shall then notify the lessees accordingly and in such case as from the date specified in the said notice the Lessee's Proportion so recalculated and notified to the Lessee in respect of the

Property shall be substituted for that set out in Paragraph 1 of Part 1 of the Seventh Schedule and the Lessee's Proportion as so recalculated in respect of the said Apartments shall be notified by the Lessor to the lessees thereof and shall be substituted for those set out in their leases

The Second Schedule - The maintained Property

1. The maintained Property shall comprise (but not exclusively)

.....

1.5 All Service Installations not used exclusively by any individual Apartment

.....

2. EXCEPTING AND RESERVING from the Maintained Property

.....

2.3 All Service Installations utilised exclusively by individual Apartments

The Fourth Schedule – Rights included in the demise

.....

8. Subject first to payment of all sums due under this lease, the right to receive services from the communal utility supply

The Sixth Schedule – The Maintenance Expenses

Part A

.....

3. Repairing maintaining inspecting and as necessary reinstating renewing or improving the Service Installations forming the common parts of the Estate including those serving the access ways and including all lighting systems lighting columns and any installations ancillary thereto

.....

8. Repairing maintaining inspecting and as necessary reinstating renewing or improving the Service Installations forming part or parts of the internal and/or external common parts of the Estate

.....

Part B

(Costs applicable to any or all of the previous parts of this Schedule)

.....

11. Providing inspecting maintaining repairing reinstating renewing and improving any other equipment and providing any

other service or facility in connection with the Maintained Property which in the opinion of the Lessor it may become reasonable to provide

.....

14. Operating maintaining and (if necessary) renewing any lighting water heating and power supply apparatus from time to time in connection with the Maintained Property and providing such additional lighting water heating or power supply apparatus as the Lessor may reasonably think fit AND ALSO the payment of all costs whatsoever relating thereto

The Seventh Schedule

PART ONE

The Lessor's Proportion of Maintenance Expenses

1. The Lessee's Proportion means:

After deduction of any contributions from third parties, 108th of the amount attributable to the Estate in connection with the matters mentioned in Part A of the Sixth Schedule and whatever of the matters referred to in Part B of the said Schedule are expenses properly incurred by the Lessor which are relative to the matters mentioned in Part A of the said Schedule

2. 2.1 Without prejudice to the generality of the forgoing provisions of paragraph 1 of this Schedule the Lessor shall be entitled from time to time to vary the amounts or percentages which constitute the Lessee's Proportion in the interests of good estate management

2.2 Without prejudice to the generality of the provisions of this Lease, the Lessor shall be entitled (but not obliged) to add to the Lessee's Proportion the cost of enforcing or attempting to enforce the observance of covenants entered by the Lessee in this Lease

3. The certification of the accountant referred to in paragraph 9 of Part B of the Sixth Schedule shall (subject as hereinafter mentioned) be binding on the Lessor and Lessee unless manifestly incorrect

4. [Arbitration]

5. The amount of the maintenance expenses shall be adjusted to take into account any sums received by the Lessor as contribution towards the cost of the matters mentioned in the sixth Schedule from the owners lessees or occupiers of any adjoining or neighbouring properties to the estate

6. An account of the Maintenance Expenses (distinguishing between actual expenditure and reserve for future expenditure) for the period ending on the last day of April 2012 and for each subsequent year ending on the last day of April throughout the term (or on any other date as shall be notified to the Lessee by the Lessor in writing at any time) shall be prepared as soon as is practicable and the Lessor shall then serve on the Lessee copies of such account and the Accountant's certificate

7. The Lessee shall pay to the Lessor the Lessee's Proportion of the Maintenance Expenses in manner following that is to say:

7.1 In advance on the First day of May and the First day of November in every year throughout the term (or on any other date as shall be notified to the Lessee by the Lessor in writing at any time) one half of the Lessee's Proportion of the amount estimated from time to time by the Lessor or its managing agents as the Maintenance Expenses for the forthcoming year the first payment to be apportioned (if necessary) from the date hereof

7.2 Within fourteen days after the service by the Lessor on the Lessee of a certificate in accordance with Paragraph 6 of this Schedule for the period in question the Lessee shall pay to the Lessor the balance by which the Lessee's Proportion received by the Lessee pursuant to Sub-Paragraph 7.1 of this Schedule falls short of the Lessee's Proportion payable to the Lessor as certified by the said certificate during the said period and any overpayment by the Lessee shall (at the discretion of the Lessor and acting reasonably at all times) either be credited against future payments due from the Lessee or shall be transferred to the reserve fund more particularly detailed in the Sixth Schedule

8.

8.1 Notwithstanding the forgoing provisions of this Schedule the Lessor reserves the right at any time during the period commencing from the first day in may in any current year and ending on the last day of April for each subsequent year throughout the Term (or such other period as the Lessor shall see fit) to serve a written notice on the Lessee requesting a one-off payment to take account of any actual or expected increases in the Maintenance Expenses

8.2 The Lessee shall pay the sums referred to and contained in the Lessor's written notice pursuant to Clause 8.1 above within 7 days of receipt of such notice

PART TWO
The Utility Expenses

1. The Utility Expenses means the sum payable for, heat, gas, cold water or hot water used by the Property from the common supply

2. The use of the utilities referred to in 1 above by the Property shall be recorded on one or more meters installed by the Lessor

3. The Lessor shall read the meters recording utility uses at least twice per annum, or more frequently at the Lessor's absolute discretion and will notify the Lessee of the sum payable.

4. The recording on the meters will, save in the case of manifest error, be conclusive as to the use made of the utilities by the Lessee

5. The sum payable by the Lessee will be calculated by the Lessor, applying a charge per unit of consumption, set by the Lessor from time to time, acting reasonably

The Eighth Schedule

Covenants by the Lessee
Covenants Enforceable by the Lessor Only

.....

2. To pay to the Lessor or its authorised agent the Lessee's Proportion at the times and in manner herein provided and without deduction or set-off and free from any equity or counterclaim

3. To pay to the Lessor or its authorised agent the Utility Expenses at the times and in manner herein provided and without deduction or set-off and free from any equity or counterclaim

.....

The Tenth Schedule

Further covenants on the part of the Lessor

1. Conditional on the Lessor having first received payment of the Lessor's Proportion then to carry out the works and do the acts and things set out in the Sixth Schedule as appropriate to each type of Apartment .....

Part 2 - The relevant legal provisions

LANDLORD AND TENANT ACT 1985

18 Meaning of "service charge" and "relevant costs"

(1) In the following provisions of this Act "service charge" means an amount payable by a tenant of a dwelling as part of or in addition to the rent-

(a) which is payable, directly or indirectly, for services, repairs, maintenance, improvements or insurance or the landlord' cost of management, and

(b) the whole or part of which varies or may vary according to the relevant costs.

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

(3) For this purpose-

(a) "costs" includes overheads

(b) costs are relevant costs in relation to a service charge whether they are incurred, or to be incurred, in the period for which the service charge is payable or in an earlier or later period.

19 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.

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

27A Liability to pay service charges: jurisdiction

(1) An application may be made to the appropriate tribunal for a determination whether a service charge is payable and, if it is, as to-

(a) the person by whom it is payable,

(b) the person to whom it is payable,

(c) the amount which is payable,

(d) the date at or by which it is payable, and

(e) the manner in which it is payable

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

(3) An application may also be made to the appropriate tribunal for a determination whether if costs were incurred for services, repairs, maintenance, improvements, insurance or management of any specified description, a service charge would be payable for the costs and, if it would, as to-

(a) the person by whom it would be payable,

(b) the person to whom it would be payable,

(c) the amount which would be payable,

(d) the date at or by which it would be payable, and

(e) the manner in which it would be payable

(4) No application may be made under subsection (1) or (3) may be made in respect of a matter which -

(a) has been agreed or admitted by the tenant,

(b) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,

(c) has been the subject of a determination by a court, or

(d) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement

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

(6)- (7) not relevant to this application

20C 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 leasehold valuation tribunal... 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 person specified in the application.

(2) The application shall be made....

> *(b) in the case of proceedings before a leasehold valuation tribunal or the First-tier Tribunal to the tribunal in which the proceedings are taking place or, if the application is made after the proceedings are concluded, to any leasehold valuation tribunal....*
>
> *(ba) in the case of proceedings before the First-tier Tribunal, to the tribunal*

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