12186

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**LON/00AC/LSC/2016/0329** **LON/00AC/LSC/2016/0382**
Property	:	**Flat 28, Wendover Court, Finchley Road, London NW2 2PG**
Applicant	:	**Wendover and Moreland Courts Ltd**
Representative	:	**Dale and Dale Solicitors** **Mr Kynoch of counsel**
Respondent	:	**Mr Shahrokh Koussari**
Representative	:	**Mr Demachkie of counsel**
Type of Application	:	**For the determination of the reasonableness of and the liability to pay a service charge**
Tribunal Members	:	**Judge L Rahman** **Mr Taylor FRICS** **Mr Ring**
Date and venue of Hearing	:	**13 & 14 March 2017, 10 Alfred Place, London WC1E 7LR**
Date of Decision	:	**26/5/17**

DECISION

Decisions of the tribunal

(1) The tribunal makes the determinations as set out under the various headings in this decision.

(2) The tribunal does not make an order under section 20C of the Landlord and Tenant Act 1985.

(3) The tribunal determines that the respondent shall reimburse within 28 days any tribunal fees paid by the applicant.

(4) This matter should now be referred back to the County Court.

The application(s)

1. The applicant seeks and following a transfer from the county court (two separate sets of proceedings which have been consolidated at the county court) the tribunal is required to make a determination pursuant to s.27A of the Landlord and Tenant Act 1985 ("the 1985 Act") as to the amount of service charges payable by the respondent in respect of the service charge years 2012 to 2014 and the estimated service charges for 2015. The respondent sought to challenge the boiler costs from 2007 and subsequently made a separate section 27A application. Both applications have been consolidated.

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

The hearing

3. The applicant was represented by Mr Kynoch of counsel. Also in attendance for the applicant were Mr Comport (solicitor) from Dale & Dale Solicitors and Mr Michael Yun (a director of Trust Property Management Limited which has been the applicants managing agents for many years). The respondent appeared and was represented by Mr Demachkie of counsel. The respondent also relied upon oral evidence from Mr Clarke (a Director of a firm of engineering consultants called FHP Engineering Services Solution Ltd) and his report dated February 2017, and Ms Mozam Safarzadeh of flat 9 at Wendover Court.

4. Immediately prior to the hearing the parties handed in further documents in addition to the two lever arch files already submitted, namely, a 180 page bundle submitted by the applicant and referred to as bundle three, a 64 page bundle containing documents the respondent wished to rely upon and referred to as bundle four, and a skeleton argument on behalf of the respondent.

5. The respondent made an application at the start of the hearing for permission to rely upon a new matter, namely, alleged "accounting errors". It was argued that the service charge accounts were confusing, several issues remained unclear, and the service charge accounts were littered with errors and there were instances of double counting or overcharging. Mr Demachkie stated that he was instructed late last week and it appeared to him that the various figures did not add up. He notified the respondent late on Thursday night and the respondent contacted the applicant's representative on Friday and raised these issues. Since then, Mr Demachkie has identified these issues in his skeleton argument, which was handed to the applicant at the hearing. However, the points raised at paragraphs 7 to 12 of the skeleton argument were all sent to the applicant on Friday and the applicant became aware of the points raised at paragraphs 13 to 17 of the skeleton argument at the hearing. Mr Demachkie acknowledged that these points had not been raised by the respondent in his witness statement or in the Scott schedule. However, he submitted that the respondent was not legally represented except at the case management hearing on 4 October 2016.

6. The applicant resisted the application. The applicant argued that the alleged accounting errors were only raised at a very late stage and the applicant was unable to properly consider the issues and to get any relevant evidence in rebuttal. An email was received at 2:45 PM on Friday referring to "overcharging" of £3,706.12 and a letter detailing the alleged overcharging. The skeleton argument raises yet further points. The points now raised by the respondent had not previously been pleaded anywhere. The points had not even been raised in the respondents recent witness statement dated 1/3/2017. The applicant therefore had no warning of these points and it was unacceptable to prepare a major part of the respondents case so late on. The respondent had stated at the case management hearing in October 2016 that he had not seen relevant invoices and therefore he reserved his position. In the circumstances the tribunal directed that the respondent shall inspect relevant documents supporting the accounts and shall identify which documents he required copies of and shall send to the applicant a Scott schedule setting out by reference to each service charge year the item and amount in dispute, the reasons why he disputed the amount, and the amount he thought he should pay for each item. The applicant submitted that the directions were very clear and the appellant was legally represented. The applicant further argued that the respondent had made a separate application dated 13 October 2016 in which he challenged the heating costs. It was argued that the respondent is a partner in a solicitors firm specialising in employment law, the respondent was legally represented at the case management hearing, and the respondent had inspected all relevant invoices at the end of November 2016. In the circumstances, if the respondent wanted to raise issues concerning alleged accounting errors, this should have been done at an early stage and not on Friday. The applicant stated that it would need an additional two hours to consider the points raised by the

respondent. The applicant would have to contact the relevant person in the accounts department, which could take a further two hours and would be dependent on whether a person was available in the accounts department to deal with the issue at such short notice.

7. Both parties agreed that the tribunal would need a further two hours of hearing time to deal with the new point raised by the respondent.

8. The tribunal reminded itself of the overriding objective to deal with cases *fairly* and *justly*, which included amongst other things, dealing with cases in ways which were proportionate to the importance of the case, the complexity of the issues, the anticipated costs, the resources of the parties and of the tribunal, and avoiding delay so far as compatible with a proper consideration of the issues. The tribunal reminded itself that where a party failed to comply with a direction, the tribunal may take such action as the tribunal considered just, which may include waiving the requirement or for the failure to be remedied or refusing to allow the evidence to be relied upon.

9. Having considered the arguments from both parties the tribunal refused the respondents application for the following reasons. The tribunal had issued very clear directions at the case management hearing in October 2016. The respondent had kept his position open and had considered all relevant invoices by the end of November 2016. The respondent is a partner in a solicitors firm and was legally represented at the case management hearing. The respondent had chosen to instruct Mr Demachkie only last week. The alleged accounting errors have been raised at a very late stage and therefore the applicant cannot adequately deal with the matters today and would need to make further enquiries with its accounts department concerning accounts which stretch over a number of years. Allowing the application at such a late stage would result in the applicant having to spend approximately four additional hours to prepare for the hearing and the tribunal would need an additional two hours or so to deal with the alleged accounting errors. It was therefore likely that the two days set aside for this hearing would be insufficient and the matter may have to be adjourned part heard to another date.

The background

10. Wendover Court is a purpose built five storey building comprising 56 two and three-bedroom flats constructed in the 1930s with part mock Tudor and brick elevations with a tiled mansard roof within which are the top floor flats. It is located on the corner of the very busy junction of Finchley Road and Hendon Way and we understand that there are a number of garages and parking spaces on site. The subject two bedroom flat number 28 is located on the top floor.

11. Photographs of the building were provided in the hearing bundle. Neither party requested an inspection and the tribunal did not consider that one was necessary, nor would it have been proportionate to the issues in dispute.

12. The respondent holds a long lease of the property which requires the landlord to provide services and the tenant to contribute towards their costs by way of a variable service charge. The specific provisions of the lease will be referred to below, where appropriate.

The issues

13. The respondent confirmed at the start of the hearing that points raised concerning the "major works" were no longer an issue. The respondent accepted that the statutory consultation requirements had been complied with and that he could make a fresh application if he was unhappy with the standard of work once it had been completed.

14. The respondent confirmed at the start of the second day that he accepts there was no overcharge concerning the cost in relation to the windows.

15. The parties identified the relevant issues for determination as set out under each of the sub-headings below.

16. Having heard evidence and submissions from the parties and considered all of the documents provided, the tribunal has made determinations on the various issues as follows.

Porters cost

17. The respondents evidence can be summarised as follows. The same arguments were relied upon for each of the disputed service charge years. The cost for the year ending 2012 was approximately £20,000 resulting in a contribution on his part in the sum of approximately £300. The respondent initially stated that the cost was too high and not value for money. The respondent then clarified that the overall cost was reasonable but the service provided was below standard and therefore there should be a reduction in the amount paid. The respondent stated that the porters needed to provide a service at all times but were not available when needed and were difficult to get hold of. He further stated that the porters were unhelpful and had been rude to certain tenants. In particular the respondent relied upon a letter dated 9 April 2015 from the occupant of flat 27 detailing complaints made about the service provided and also relied upon the evidence from Ms Safarzadeh.

18. The respondent stated that he had made various complaints to people at Trust Property Management Ltd. However, the respondent agreed that he had never complained in writing that the service provided was

below standard. Up until January 2016 there were two porters but due to budget constraints there is now only one porter. The two porters were responsible for Wendover Court and Moreland Court but in the respondents view Wendover Court should have had more. On numerous occasions the respondent noted that the doors to the buildings were left open and he felt it was the porters job to ensure that doors were safeguarded.

19. The applicant's evidence can be summarised as follows. The porters daily duties were to clear away rubbish from the front of each flat. There were 56 flats in Wendover Court and 90 flats in Moreland Court. Twice a day the porters checked the stairs, checked whether people had left rubbish, checked whether anybody was undertaking building works, checked the light bulbs, monitored the standard of cleaning, and looked out for trip hazards because of the major works. The porters dealt with the contractors, the maintenance people, and employees from the company providing fuel for the boilers. The porters dealt with emergencies on site, for example break-ins and loss of power. The porters distributed newsletters and various other bundles. Major works were being undertaken at the property which meant there were contractors on site. The porters liaised with the site manager for deliveries and parking.

20. The issue concerning doors being left open was a security problem. The applicant therefore installed a secondary device to pull the door shut. However, these devices were tampered with by residents. The porters were not there to check every door. There are four doors in Wendover Court and seven doors in Moreland court.

21. For the relevant years, there were two full-time porters and an additional part-time cleaner (the wages for the part-time cleaner were included in the total provided as the porters salary). Both the porters had been there since 2006. The applicant rarely received complaints about the porters. Generally speaking the porters provide a good service and there were minimal complaints. No disciplinary matters had been raised about the porters. If complaints were made about the porters this would be passed onto the Board to deal with. In the previous 10 years, two complaints by the occupant of flat 27 and a further complaint by another lessee were investigated.

22. The porters were not resident. The porters office was in the basement area of Wendover Court and was not a publicly viewed office.

23. The tribunal noted the following. The porters duties were labour intensive. The porters were not being paid to provide a 24 hour service. The porters were not employed to provide a "concierge service" and their office was in the basement of Wendover Court out of public view. It was not the porters duty to monitor the 11 doors between Wendover Court and Moreland Court and the applicant had installed a secondary

device as a security measure to pull the doors shut. The porters had been there since 2006 and in the previous 10 years only three complaints had been made about their service. The respondent had not made any written complaints about the service provided. In the circumstances, the tribunal is satisfied that the service provided was to a reasonable standard. The tribunal therefore found the cost to be reasonable and payable.

Cleaning

24. The respondent's evidence can be summarised as follows. The same arguments were applicable for each of the relevant years. The cleaning of the windows in each flat is not chargeable under the lease. The landlord's responsibility is limited to the common parts. The cleaning was less than satisfactory and of a poor standard as demonstrated by attached photographs. The lift and the outside windows were not cleaned during the relevant service charge years. The respondent had never complained in writing about the standard of the cleaning. When asked which of the photographs provided by the respondent demonstrated that the internal cleaning was inadequate, the respondent replied "none show exactly that but they show the state of the windows in the common parts". However, the respondent then accepted that he had no photographs of the internal common parts or the communal windows or the lift or the carpet to show that the cleaning was of a poor standard.

25. Ms Safarzadeh stated the cleaning was unsatisfactory, in that there was always dust and rubbish.

26. The applicant's evidence can be summarised as follows. The issue concerning cleaning generally comes up but no complaints had been made about the standard of cleaning in Wendover Court. The cleaning had been provided by an individual called Sandra who had been employed for more than 20 years and a sole trader operating under the name "Big Splash". Both were familiar with the property and the residents. The cleaning has been provided to a reasonable standard.

27. The tribunal noted the following. The respondent claimed to have photographs demonstrating the poor standard of the cleaning. However, the respondent accepted at the hearing that he had no photographs of the internal common parts or the communal windows or the lift or the carpet to show that the cleaning was of a poor standard. The respondent had never complained in writing about the standard of the cleaning. The majority of the lessees living at the property have not complained about the standard of the service provided either. In the circumstances, the tribunal is satisfied that the service provided was to a reasonable standard. The tribunal therefore found the cost to be reasonable and payable.

Heating

28. Both parties agreed that the tribunal should address the four questions set out below. Both parties made detailed submissions on each question and referred the tribunal to the relevant oral evidence from the respondent, Mr Clarke, Ms Safarzadeh, and Mr Yun. Both parties also referred the tribunal to relevant documentary evidence in the bundles. The tribunal has noted the oral and documentary evidence which is not repeated here save for specific reference.

(1) How is the obligation on the applicant, pursuant to clause 5(7) of the lease dated 27/10/1970, to be construed?

29. On behalf of the respondent it was submitted that the heating system was very old and decades past its life expectancy and was providing inefficient and ineffective heating. Numerous complaints had been made since 2006. The problems were due to the system being old, leaks, corrosion, and build up of sludge as confirmed by Mr Clarke and the report by WR Associates. There was no credible evidence that the failure in the system was due to the respondent or to the acts of any other tenants. The applicant was aware of all these problems since at least 2006.

30. The tribunal should construe the relevant clause as it was intended to be read in 1970. The words "adequate and sufficient" have the same meaning now as they did in the past, namely, to provide a person warmth in winter. It was accepted that in 1970 not all the rooms had radiators therefore the respondent accepts there was no obligation for the landlord to provide adequate heating for the whole flat but adequate heating to the radiators. However, there must be sufficient and adequate heat to the radiator to warm the room sufficiently and adequately otherwise there would be no point in having radiators. Sufficient and adequate heat, which must mean hot to the touch, was not provided to the radiators or to the room. Only a tiny amount of heat was provided, which was negligible and therefore insufficient and inadequate.

31. On behalf of the applicant it was submitted that the relevant clause meant there had to be sufficient and adequate heat to the radiators. The radiators were warm. The tribunal must consider the system that was in place at the date of the lease, namely, 1970. By that date the system was already 40 years old. A "Rolls-Royce" performance cannot be expected from an aged system. The tribunal must construe the words "sufficient and adequate" heat by reference to the old system in place. The old system in place cannot be equated to the performance of a modern boiler. The tribunal must consider the age and condition of the system. Under clause 5(8) of the lease the tenants are responsible for maintaining and repairing the radiators within their own flats and the

landlords obligation is to maintain the central heating apparatus not within the demised premises.

32. Mr Clarkes report was based upon an inspection of the communal heating system after it had already been shut down. The invoice from "A&G Heating Contractors" dated 10 December 2010 confirms attendance at the respondents flat on 6/12/10 to investigate the cause of complaints of a lack of heating. It states "*Two of the radiators in the living room which are on their individual private system had the TRV's stuck. Eased and adjusted the TRV's to unstuck them. The two radiators located in the bedroom are running off the communal system. They are warm but have cold patches on them indicating furring inside. They were not the original radiators installed by the building... We would recommend that they either have the original radiators fitted back in and if this is not possible the radiators should be renewed with new pre-steel ones*". This confirmed the two radiators running off the communal system were "warm" and they recommended the fitting of the original and "wider" radiators, which under the terms of the lease were the tenant's responsibility. The report by WR Associates did not state that the system should be decommissioned. Both of these are more persuasive and reliable as they are more contemporaneous compared to the report prepared by Mr Clarke.

33. Furthermore, the emails generated as a result of the complaints made by the respondent in 2009 and 2010 concerning the heating demonstrates the heating provided by the communal system was to a reasonable standard. The respondent raised a complaint about the radiator in his main room not working, heated by the communal system, in an email dated 12 November 2009. In an email dated 16 November 2009 Mr Yun stated that he would arrange for a heating engineer to contact the respondent and requested the best contact details for the respondent. The respondent provided his contact details and Mr Yun confirmed in an email dated 16 November 2009 that the job would be issued to A&G Heating "today". In an email dated 23 November 2009 the respondent informed Mr Yun that no one had contacted him yet about the radiator. Mr Yun provided a response on the same date stating that the contractor had been contacted and confirmed that he had attended "last Tuesday and rectified the problem" (pages 269-273 of bundle 1).

34. The respondent complained that he had no heating from the central boiler in an email dated 29 November 2010 at 21:55. In an email dated 1 December 2010 Mr Yun replied "*A plumber did attend yesterday and reported that there were no issues with the communal boilers. Do you still have an issue? If so, it may be necessary that the engineer inspects your flat. If you still have an issue, can you please advise how we can arrange access for the contractor*". An email from AG Heating dated 6 December 2010 states they had attended the respondents flat and found two radiators in the living room had their TRV's stuck but the two radiators were not related to the communal system. The two

radiators located in the bedroom were running off the communal system and they were warm but had cold patches on them indicating that there was furring inside the radiators. They recommended that either the original radiators be reinstalled or the radiators be renewed with new pre-steel radiators. (The email goes on to state that with respect to flat 35, the two radiators in the flat running off the communal system were working as they should but the radiators had been fitted with covers and glass on top and therefore the air could not circulate to bring the heat out of the boxings). The information provided by AG Heating was forwarded to the respondent in an email dated 7 December 2010 and the respondent was informed that the works would have to be carried out by himself as they were not chargeable through the service charges (pages 278-284 of bundle 1). The applicant submitted there were no further complaints from the respondent therefore the assumption must be that there were no problems since that date. The applicant submitted that the respondent is a solicitor by profession and had demonstrated that he could send emails when problems arose yet there were no further complaints since 2010.

35. The tribunal found as follows. The relevant clause states the landlord will at all times during the term of the lease "*Provide at all reasonable hours during the period from the first day of October to the first day of May in every year sufficient and adequate heat to the radiators for the time being fixed in the demised premises...*" The tribunal found the words clear and unambiguous, namely, to provide sufficient and adequate heat to the radiators. The relevant clause does not refer to providing sufficient and adequate heat to the "room" and the lease does not stipulate whether the original radiators that were provided were to obtain a particular temperature in the room. In the circumstances, the tribunal does not accept the argument put forward on behalf of the respondent that the obligation on the landlord was to provide adequate and sufficient heat to the room.

(2) By reference to s.19(1)(a) of the 1985 Act, was the decision making process (to continue charging these sums) reasonable and was the sum to be charged reasonable by reference to market evidence?

36. On behalf of the respondent it was submitted that the decision-making process was not reasonable. Reliance was placed upon a quote from "Service Charges and Management - 3rd Ed, at 16-005" set out at paragraph 22 of the respondents skeleton argument (which the tribunal has read in full). It was submitted that there is no evidence of the landlords decision-making process therefore the tribunal should find that the landlord did not consider whether it was reasonable to provide heat from 2006 up until 2011. There was no evidence of a thought process at all. The landlord commissioned a report by WR Associates in 2011. This demonstrates that the landlord considered in 2011 decommissioning the whole boiler and the costs involved. With respect to the costs involved, Mr Yun could not explain the difference between the figures put forward in the sum of approximately £107,000 and

£199,000. The relevant report showed that the heating was not working and therefore in 2011 it was in the interest of all the tenants for the boiler to be decommissioned, as had happened eventually in 2016. The applicant argued that the heating could not be turned off in 2011 as there was a positive obligation under the terms of the lease to provide heating. However, the applicant was not complying with the obligation under the lease in any event as sufficient and adequate heating was not being provided, therefore the whole system should have been turned off. As stated in "Service Charges and Management - 3rd Ed, at 16-004", "*The decisions show that even though a landlord may be entitled, or even obliged, to carry out works or provide services, the decision to do so may not be a reasonable one*". The applicant therefore cannot argue that it could not decommission the boiler until all leaseholders had agreed to vary their leases as it was obliged to provide heating under the terms of the old leases.

37. Approximately £350,000 had been spent by the applicant on the heating system over the relevant service charge years. This money could have been used to replace the whole system twice over.

38. It was conceded on behalf of the respondent that he had no alternative quotes and therefore he did not doubt that the cost of the fuel and repairs were at market rate.

39. The applicant submitted as follows. The applicant relied upon the "Survey report on central heating" dated April 2011 by WR Associates. This stated "*The boilers are approaching the end of their useful life, such that it is not possible to give any indications of how long they may last*". The report did not conclude that the system had reached the end of its life and therefore had no use. The report suggested that the system was "approaching" the end of its life and it was not possible to state how long it may last. This was consistent with the evidence from Mr Yun, who stated that in or around 2009 the contractor who repaired the boiler advised that the boiler had "reached or was very near the end of its natural life". In the circumstances, it cannot be argued that the system should have been shut down in 2006 as the system was still considered to be "approaching" the end of its life in 2011.

40. According to the report from WR Associates, the budget cost for replacement of the boiler plant was approximately £141,000 inclusive of fees and VAT. Although Mr Yun exhibited the document on page 88 of the second bundle to his witness statement, which referred to an estimated cost of £191,000 from WR Associates, even if that were incorrect, £141,000 was a significant amount of money.

41. Having obtained the report in 2011, the option of decommissioning the heating system was put to the tenants. Between 2011 and 2016 there was full consultation but the respondent did not respond or engage in this process whatsoever. The respondents reasons for failing to engage

or to respond was "incredible". The respondent claimed to be very concerned about the heating yet he chose not to express a view on any of the forms sent to him therefore it is unreasonable for the respondent to say that the heating system should have been switched off earlier. Furthermore the respondent made no complaints about the heating after 2010.

42. Mr Yun stated there were ongoing rolling repairs to the external envelope of the building which were more urgent than attending to the heating problem.

43. The landlord was under a positive obligation to provide heating therefore the applicant could not simply turn off the heating without being in breach of covenant. The heating system could only be shut off once all lessees had agreed to a variation of the old lease (as happened in 2013). Mr Yun stated that none of the lessees, including the respondent, engaged with the applicant therefore the applicants decision was made over a number of years. In any event, the heating system was still working in light of its age and condition. The respondent had not made any complaints about the heating since 2010 therefore it can be implied that the heating was working adequately.

44. The tribunal found as follows. The respondent and his witness were unhappy with the heating. However, there is no evidence before the tribunal that any of the other lessees had complained or had challenged this particular item of expenditure by way of an application to this tribunal. The respondent is a solicitor by profession and had demonstrated that he could send emails when problems arose yet there were no further complaints since 2010. Regular AGMs were held and the applicant twice put the question to lessees as to whether the communal heating system should be decommissioned and received no response. This demonstrates that other lessees were not particularly concerned about the heating provided. In particular, the tribunal notes the respondent himself refused to engage in this process and has failed to provide a satisfactory explanation for his failure to do so. The respondent stated that the applicant had not adequately dealt with problems he had previously raised with them. However, the exchange of emails between the applicant and the respondent, referred to under question 1 above, demonstrates that the applicant had adequately dealt with the problems reported by the respondent. The applicant company includes other leaseholders who are paying service charges and live at Wendover Court therefore they too would have been concerned if the heating provided was inadequate. The 2011 report by WR Associates identified a lot of problems with the communal heating system but did not state that the central heating system should be decommissioned. The tribunal notes the applicant had a planned programme of works, including repairs to the external envelope of the building which were more urgent, therefore the works were spread. The tribunal further notes the applicant did consult with lessees about the option of discontinuing the communal heating system. On balance, the tribunal

is satisfied the applicant's decision-making process was reasonable in all the circumstances.

(3) By reference to s.19(1)(b) of the 1985 Act, was the heating service of a reasonable standard?

45. It was submitted on behalf of the respondent that the heating provided was not to a reasonable standard. The lessees did not get their "monies worth". The heat received by the respondent was negligible. Mr Yun accepted that others had also complained about the heat. Mr Yun accepts that what was provided was "background heating". However, the lease does not refer to background heat but states that sufficient and adequate heat shall be provided. No complaints have been made since the heating had been turned off in 2016. This demonstrates that the heating should have been turned off years ago. Approximately £350,000 had been spent by the applicant on the heating system over the relevant service charge years. This money could have been used to replace the whole system twice over.

46. It was submitted on behalf of the applicant that the heating provided was to a reasonable standard in light of the system in place.

47. The tribunal noted the following. The respondent was told in 2010 that the two radiators connected to the communal boiler had furred up, that he would need to change the two radiators, and that under the terms of the lease the radiators within his flat were his responsibility. The contemporaneous emails and the invoice from AG Heating states there were no problems with the communal heating. There is no evidence of significant numbers of other leaseholders complaining about inadequate heating. There is no evidence that the respondent had complained about the heating since he last complained in 2010. In the circumstances, on balance, the tribunal is satisfied that the heating must have been working satisfactorily to provide sufficient and adequate heating in light of the old system in place as described by the experts.

(4) If the answer to any of the above questions was in the negative, i.e. unreasonable decision making process / heating provided was not to a reasonable standard, what should be the consequence, if any?

48. It was submitted on behalf of the respondent that had the heating system been turned off in 2007, no costs would have been incurred. Therefore, all costs incurred since 2007 should not be paid. It was submitted on behalf of the applicant that if there was no benefit to the respondent, he should pay nothing. However, if there was some benefit to the respondent but not to a reasonable standard, there should be no deduction as the respondent had not provided any value to whatever he had received. The respondent's claim was put on the basis of "all or nothing".

49. The tribunal has found that the decision-making process was reasonable and the heating provided was to a reasonable standard. The tribunal therefore found the cost to be reasonable and payable.

Gardening

50. The respondent's evidence can be summarised as follows. The maintenance of the garden is quite bad, as demonstrated by the photographs he had taken in September 2015. The trees are very badly kept and the photographs show that they are affected by disease and the applicant has failed to address this. Dead leaves are not collected and the weeds are in an unsatisfactory state.

51. The photograph on page 247 is of a diseased tree. The respondent has not obtained any expert report, the respondent does not claim to be "a great gardener", but in his lay opinion he considers the marks to represent a diseased tree. The respondent did not know how long the tree had been diseased. When it was put to the respondent that the applicant had a long-term plan for tree surgery, the respondent stated that he did not ask.

52. The photograph on page 249 is of a wheel plate in the hedge. The respondent saw this in the hedge a couple of times over a couple of days. The respondent accepts that this could be a one-off incident. The respondent further accepts that if the gardeners attended once a week, it may be that the gardeners had removed it at their next visit.

53. The photograph on page 250 shows damage to leaves on a particular plant. The respondent is unable to state what percentage of the plant had damaged leaves. The respondent did accept that he was not expecting there to be no damage to the leaves. The respondent further accepts that he had not returned to check whether the gardeners had dealt with this particular plant.

54. The photograph on page 251 shows leaves on the floor and a particular plant which had not been cut or shaped properly. The respondent is unable to state whether the photograph shows Wendover Court or Moreland Court.

55. The photograph on page 254, of Moreland Court, shows leaves and weed everywhere.

56. The photograph on page 256, of Moreland Court, shows a broken fence and the plants to be in a terrible shape with leaves everywhere.

57. The photographs on page 258 and 259 show more weeds and leaves everywhere. The respondent was not sure but accepted that the photograph on page 258 could be of Moreland Court.

58. The photograph on page 260, taken at Moreland Court, shows leaves and weeds on the left side.

59. The photograph on page 261, taken at Moreland Court, shows a can of beer. The respondent did not know how long it had been there.

60. The photograph on page 262 shows weeds and stones. The respondent did not know whether it was taken at Wendover Court or Moreland Court. When it was put to the respondent that the photograph was of Moreland Court, the respondent agreed.

61. The photograph on pages 268 and 269 shows leaves on the ground and weed.

62. The photograph on page 271 shows damaged leaves on a plant.

63. The photograph on page 283 shows the messy state the garden is in. The respondent did not know whether this photograph represented Wendover Court or Moreland Court.

64. With respect to the photographs of the leaves, the respondent did not know how long the leaves had been on the ground. The respondent further accepts that in September you would expect to find leaves on the floor in any garden.

65. The respondent accepts that when looking at the Garden from a distance, the gardens look beautiful as shown in the photograph on page 284. When it was put to the respondent that the photographs he had provided of Moreland Court were misleading as they did not represent the state of the garden in Wendover Court, the respondent stated it was an unfair comment. The respondent stated that he had selected particular pictures but he had other photographs of Wendover Court which showed the bad state it was in. When asked where those photographs were, the respondent stated that he had not provided them to the tribunal and perhaps he should have been more careful and not randomly select photographs.

66. The respondent did not know how often the gardeners attended. When it was put to the respondent that the gardeners attended once a week, the respondent had nothing to say. The respondent confirmed he had never asked in writing or complained about the service provided by the gardeners. The respondent accepts that if concerned about the state of the garden he could have made enquiries but he did not make enquiries or complaints as he felt the management were dismissive and therefore there would be no point in making any complaints. However, the respondent complained to Donna, one of the directors. Furthermore, others who attended AGMs also complained. The "Board" also lived there and would therefore know what state the garden was in.

67. Not only was the service of a poor standard such that the gardeners should not be paid anything, but the cost was also excessive. The respondent has not provided any alternative quotes to show that the costs are excessive.

68. Ms Safarzadeh stated that she did not care much about the gardening, however it was not nice. But the gardening was not as bad as the cleaning service provided.

69. Mr Yun stated as follows on behalf of the applicant. The gardeners attended once a week. The contract on page 177 of bundle four sets out what needs to be done. It was up to the gardener to determine how many hours and men were employed. However, on average two men attended for a whole day. The gardeners used their own equipment and took away all garden waste. Donna Hirsch, one of the directors, kept an eye on the gardeners. The same gardener had been used for the relevant service charge years. The standard of gardening is reflected by the limited funds available and the time the gardener can spend attending to the garden. Prior to having this particular gardener, the garden was overgrown. The gardener had made a significant impact with respect to the quality and standard of the garden. However, these were not meant to be formal gardens.

70. The tribunal noted the following. A lot of the photographs provided by the respondent relate to Moreland Court and not to Wendover Court and were therefore irrelevant. With respect to some of the photographs the appellant was unable to state whether they related to Wendover Court. The respondent argued that the state of Moreland Court represented the state of Wendover Court. However, if that were correct, the tribunal found it very surprising that no such photographs had been provided of Wendover Court. The respondent provided no expert evidence of any tree damage and in any event the applicant had a long-term plan for tree surgery. The respondent accepts that the wheel plate in the hedge may have been removed by the gardener at his/her next visit. With respect to the photograph showing damage to the leaves on a particular plant, the respondent expects there to be some damage to leaves and the respondent was unable to state whether the gardeners had subsequently dealt with this particular plant. With respect to leaves on the ground, the respondent did not know how long the leaves had been on the ground and the respondent accepts that in September you would expect to find leaves on the floor in any garden. The respondent accepts that when looking at the garden from a distance, the gardens "look beautiful". The tribunal notes the respondent had not made any written complaints or enquiries regarding the gardening service provided. The tribunal notes that the majority of the other lessees have not complained about the gardening service. The tribunal notes that the Board members also pay for the gardening service and live at the relevant property and would therefore be aware of the service provided. In the circumstances, in light of the gardeners being paid to attend on average once a week, the tribunal is satisfied that the service provided

was to a reasonable standard. The respondent has not provided any alternative quotes to show that the gardening cost is unreasonable. The tribunal determines the cost of the gardening to be reasonable and payable.

Application under s.20C and refund of fees and costs

71. Having heard the submissions from the parties and taking into account the determinations above, the tribunal determines the applicant acted reasonably in connection with the proceedings and was successful on all the disputed issues, therefore the tribunal decline to make an order under section 20C and further order that any tribunal fees paid by the applicant be reimbursed by the respondent.

The next steps

72. This matter should now be returned to the County Court.

Name: Mr L Rahman **Date:** 26/5/17

ANNEX - RIGHTS OF APPEAL

1. If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber) then a written application for permission must be made to the First-tier Tribunal at the Regional office which has been dealing with the case.

2. The application for permission to appeal must arrive at the Regional office within 28 days after the Tribunal sends written reasons for the decision to the person making the application.

3. If the application is not made within the 28 day time limit, such application must include a request for an extension of time and the reason for not complying with the 28 day time limit; the Tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed despite not being within the time limit.

4. The application for permission to appeal must identify the decision of the Tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal, and state the result the party making the application is seeking.

Appendix of relevant legislation

Landlord and Tenant Act 1985 (as amended)

Section 18

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

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

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

Section 19

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

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

Section 27A

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

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

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

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

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

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

Section 20C

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

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

(c) in the case of proceedings before the Upper Tribunal, to the tribunal;

(d) in the case of arbitration proceedings, to the arbitral tribunal or, if the application is made after the proceedings are concluded, to a county court.

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