FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	:	**LON/00BE/LSC/2014/0509 and 0583**
Property	:	**15 Cronin Street, London SE15 6JJ**
Applicant	:	**London Borough of Southwark**
Representative	:	**Mr P Cremin**
Respondent	:	**Clarissa Yambasu**
Representative	:	**None**
Type of application	:	**Determination as to the payability of service charges**
Tribunal members	:	**Judge T Cowen** **Mr Jarero BSc FRICS** **Mrs Hart**
Venue	:	**10 Alfred Place, London WC1E 7LR**
Date of decision	:	**1 December 2017**

DECISION

Decision of the tribunal

(1) The Tribunal determines that the sum of **£259.37** is payable in place of the figure of £649.84 which appears in the section 20 notice dated 6 December 2013.

(2) The Tribunal determines that the sum of **£577.96** is payable in place of the figure of £675.05 which appears in the section 20 notice dated 15 September 2014.

(3) The reasons for the orders made above are set out in the remainder of this decision.

The Referral to this Tribunal

1. We made a decision on this matter on 17 July 2015. The decision was appealed to the Upper Tribunal, which rejected the appeal, but also decided that this Tribunal had not fully considered all the issues referred to it. The Upper Tribunal therefore sent the matter back to this Tribunal for the purposes solely of deciding those unresolved issues.

2. The issues which remain to be considered in this decision, and which we have been directed to decide by the Upper Tribunal, are the payability of service charges relating to boiler replacement and the repair of underground heating pipes in the service charge years 2013/14 and 2014/15. The sums as claimed by the Applicant Council are as follows:

    a. The sum of £649.84 which appears in the 2013 section 20 notice in respect of replacing two of the boilers in the North Peckham boiler house

    b. The sum of £675.05 which appears in the 2014 section 20 notice in respect of underground pipework replacement.

3. As well as the question of whether the costs of these items were reasonable to incur, the Tribunal is also asked to consider whether the apportionment of costs has been reasonably allocated.

4. A description of the property, the parties' respective title and the background to the dispute is set out in our previous decision of 17 July 2015. We also cited the relevant covenants in the lease, particularly those relating to service charges and we described the service charge demands and section 20 notices.

The Evidence

5. We heard evidence at this further hearing from John Marenghi, Diana Lupelesc and Gloria Johnson of the Applicant Council and from the Respondent herself. Gloria Johnson gave evidence about the section 20 consultation process. Her evidence was not challenged. The evidence of the other witnesses was the subject of considerable discussion as set out below.

Discussion

Apportionment

6. It makes sense to deal with the issue of apportionment first, so that the correct apportionment method can be applied to whatever we decide on the other issues. We described the apportionment system in some detail in paragraphs 33 and 34 of our previous decision.

7. Ms Lupelesc gave evidence at this hearing on the question of apportionment. She explained that different methods of calculation were used for different types of works. The bed-weighting method described in our previous decision is used for most works. But for some capital works programmes (such as the replacement of the boilers), the apportionment is done by number of property units. This has the effect of giving each property unit a value of one rather than the variable figures reached by the bed-weighting method. The rationale is that each unit connected to the utility benefits equally from improvements in the capital infrastructure. This means that the Respondent in this case is being charged 1/731 of the cost of the works, because 731 (including the school as one unit) is the corrected number of properties which are connected to the district heating system.

8. The Respondent challenged this reasoning on the basis that (a) it makes no sense to differentiate between pipework and boiler installation as they both benefit each property in the same way; and (b) it is not reasonable to suggest that a school benefits from heating infrastructure to the same extent as a flat – or that a one bedroom flat derives the same benefit as a five bedroom flat.

9. We prefer the reasoning of the Respondent. The bed-weighting apportionment system is a reasonable one as it takes account of the relative sizes and usages of the different types of residential and non-residential properties across the estate. We are of the view that it makes no sense (and is therefore unreasonable) to apportion some works differently from others and to equate the benefit derived by different sizes and types of properties, for the reasons given by the Respondent.

10. The Respondent made a further challenge to the apportionment method on the grounds that the total number of bed-weighting units, across the entire area served by the district heating system, was too small because it did not include a number of non-residential properties. This is important because that total number forms the denominator of the fraction out of which the Respondent's six bed-weighting units are divided to reach the apportionment figure.

11. In particular the Respondent asserted that the North Peckham Boiler House also served St Luke's Church, the United Children's Pop-in Centre, the Blake Street Council Office and the Education resource Centre (until it was demolished in 2016) and that notional bed-weighting units for all of these should be added to the denominator of the apportionment fraction. When questioned further about her evidence for these assertions, it seems that they are based on a mixture of (i) misinterpretation of symbols on a plan (in particular by arguing that a schematic diagram on the side of a plan was part of the geographic part of the plan) (ii) assumptions based on being unable to find a boiler when looking inside the relevant buildings or asking a caretaker or (iii) assumptions based simply on proximity of a council office to the boiler house. One of the buildings, a church, was not owned by the Applicant Council. In our judgment, there is no evidence to suggest that any of these sites is, or was at the material times, served by the North Peckham boiler-house.

12. Mr Marenghi gave evidence that the TMO Office in Gloucester Grove is served by the North Peckham boiler house. That did not appear on the revised apportionment list produced by the Applicant Council. When asked, the Applicant Council submitted that the TMO Office would be worth 8 units under the apportionment system. We have therefore decided to add 8 units to the denominator of the apportionment fraction to reflect the TMO office.

13. We have previously decided that 29 units should be added to the denominator in respect of a school. There was no further argument about that at the present hearing.

14. On the basis of all of the above and the conclusions we reached in our previous decision, we have decided that a reasonable apportionment for the Respondent's property for the service charges which are the subject of this decision is: 6/4589. The denominator of that fraction incorporates 29 units in respect of the school and 8 units in respect of the TMO office. The 6 bed-weighting units in respect of the Respondent's own flat were not the subject of any challenge.

Boilers

15. There was extensive discussion about the condition and usage of the boilers during the evidence of Mr Marenghi, who is a Senior Mechanical Engineer for the Applicant Council. He gave evidence that

the North Peckham district boiler house originally contained 5 boilers. As a result of a major redevelopment in 1993 the number of properties served by the boiler house was drastically reduced to about 740. As a result, only 2 working boilers were now necessary to service the estate. He said that 2 other boilers were kept in working order in the boiler house as back-up, in the case of failure of one or both of the main boilers.

16. The original 5 boilers dated from 1968. Only one of the original boilers is still in situ. It is presently used as one of the back-up boilers until such time as it needs replacing. It is at or past the end of its expected life, but it is still passing its maintenance inspections and is therefore operational. It is good enough to act an emergency back-up boiler and sits unused for the rest of the time.

17. One of the boilers was replaced in 2008. It is therefore towards the beginning of its expected life and ought to last for several more decades, but Mr Marenghi's evidence was that this 2008 boiler had been damaged as a result of leaks in the pipework. The Respondent submitted that this damage was caused as result of the Applicant Council's negligence in pouring in raw water instead of treated water. She cites the Phoenix report in support of that submission.

18. However, the 2008 boiler is also still passing its maintenance inspections. It is currently being used as the other back-up boiler. Mr Marenghi gave evidence that the life expectancy of the 2008 boiler would have been reduced by the damage which it had suffered, but he was not able to say how much that reduction would be. Since the normal life expectancy of one of these boilers, according to Mr Marenghi, was 30-40 years, we have no reason to doubt that the 2008 boiler could not continue to run as a main boiler for very many years into the future. Even if its life expectancy was reduced by half (for which there was no evidence) it could be expected to be fully operational until 2028. There was no evidence why this boiler could not be used as a main boiler.

19. The other two boilers were newly replaced in 2014. The cost of supplying and installing them is the subject of the charges which are being challenged. At present, they are being used as the main boilers in continuous use.

20. The way the back-up boilers are used is very simple. If one of the main boilers breaks down, a back-up boiler is brought on line. The back-up boilers effectively sit idle at all other times.

21. The Respondent submitted that it was not necessary to install two new boilers, because there is no need to have two back-up boilers on stand-by for two working boilers. She points out that on the Applicant Council's own evidence, when the system served a much larger number

of properties earlier in its life, there were five boilers in the boiler house. Four of them were fully working and needed to serve the estate and one of them was kept off line as back-up. There is no evidence that this arrangement was unsatisfactory. If one back-up boiler was needed for four working boilers, it is unreasonably excessive to keep two off-line boilers as back-up for two working boilers. Even Mr Cremin in his closing submissions for the Council conceded that it was an "excess of caution". Mr Marenghi was not able to point to any evidence that two back-up boilers are currently necessary.

22. We agree with the Respondent on this issue. As long as the 2008 boiler and the 1968 boiler are passing their maintenance inspections, the entre system requires only three boilers: one of the new boilers, the 2008 boiler and the 1968 boiler as back-up. The other new boiler is unnecessary and therefore the cost of supplying and installing it was unreasonable and an unnecessary expense. There is no evidence that either the 2008 boiler or the 1968 boiler is due for imminent replacement (especially since the latter would be mostly unused save for temporary back-up in emergencies). There is no reason to believe that an arrangement using one new 2014 boiler, the 2008 boiler and the 1968 back-up boiler could not last for many years into the future. Having any more boilers as back-up is an unnecessary luxury.

23. There is no evidence that the Applicant Council made substantial (or any) savings on fitting two boilers at the same time rather than one, despite their assertions that that would be the case. The boilers are individually made to order. There is no evidence of economies of scale in making two rather than one at a time. In any event, even if there was evidence of substantial savings, that does not of itself make the purchase of two boilers reasonable if one of them may not be needed for a decade or more. In our judgment, a hypothetical reasonable property owner who is personally responsible for the cost of maintaining the district heating system would have replaced only one boiler at this stage rather than two.

24. We do not have evidence of how much the contractor would have charged to supply and fit one boiler instead of two. Given the amounts involved in respect of the charges payable by the Respondent, it would not be proportionate for us to enter into a detailed and speculative breakdown of the elements of the work. Doing the best we can, we have decided that 50% of the cost of the two boiler should be attributed to the unreasonable extra cost of the second boiler. We therefore determine that the amount reasonable payable in respect of boiler replacement is £259.37. This is calculated by taking half of the figure of £396,743.00 (being the total cost of the works) and applying the bed-weighted apportionment fraction of 6/4589.

25. The sum of **£259.37** is therefore payable instead of the figure of £649.84 which appears in the section 20 notice dated 6 December 2013.

Underground Pipework

26. The Respondent challenged the payability of the charges in respect of underground pipework on the grounds that they were a duplicated expense, because they were followed by a further invoice for primary and secondary mains-work in a sum in excess of £2 million. These further works were set out in a new section 20 notice served in July 2015 resulting in an estimated service charge of £4,375.96 for the Respondent. That further section 20 notice is not the subject of these proceedings.

27. She alleged that the pipework being replaced in the July 2015 section 20 notice was the same pipework which was the subject of the earlier section 20 notice (in the sum of £675) and that there was therefore duplication in the works. She also claimed that the works were not of a reasonable standard because she continues to suffer from loss of hot water supply for 72 hour periods or more.

28. The Applicant Council's response to that challenge was that the proposed mains-work relates to different pipes and that there is therefore no duplication in the work. Mr Marenghi explained that the pipes had urgently needed replacing and that there was not time for a full tender process. The work which was the subject of this challenge related to a small section of the primary mains.

29. He also explained that the reason for the loss of supply to the Respondent's flat was that there were problems in the parts of the pipework which have yet to be replaced. In other words, the hot water problems were not a result of poor workmanship of the works already done - they are evidence of the need for the planned further works.

30. We accept the Applicant Council's case on the pipework. There is no evidence to suggest that the position is not exactly as they have described it and there is no evidence of poor workmanship in the work done.

31. Even if the section 20 notice dated 29 June 2015 does consist of duplicated work, that would not be grounds for challenging the 2014 section 20 notice. It would potentially be grounds for challenging the 2015 section 20 notice. Any such application would be unlikely to succeed without expert evidence in support, even if the costs involved would mean that leaseholders would need to band together. We say that only so that tribunal time and the parties' time and money is not wasted with further applications which are doomed to fail.

32. We therefore determine that the amount payable in respect of the underground pipework renewal which is the subject of the 15 September 2014 section 20 notice is the sum of **£577.96** being the application of the apportionment fraction 6/4589 to the estimated cost of £442,041. This is instead of the cost of £675.05 which is specified in the section 20 notice itself.

33. We realise that (because of the nature and date of the original application and the subsequent Upper Tribunal referral) our decision relates only to section 20 notice figures, which may already have been superseded by actual costs. We hope that the parties will have the sense to apply the principles and reasoning of our decision to the actual figures in order to save the unnecessary time and costs of further litigation.

34. The Respondent also gave general evidence on the question of reasonableness. She explained that the property is her main asset and that the relevant parts of the 1985 Act legislation are there to protect her rights against the large institution which is her landlord. She also told us about her efforts to resolve the situation through her local MP. She also asked us to consider the financial and social impact of our decision on the community of which the Respondent's property is part. W have taken account of all of the parties' submissions when reaching our decision.

35. The Respondent again raised the claim that it would be more economical for the Applicant council to disconnect her (and others) from the district heating system and fit them with combi-boilers, but we have already dealt with that claim in our previous decision.

36. We have calculated the amounts payable as a result of the decisions made above and the resulting figures appear in the record of our decision at the beginning of this judgment.

37. As we indicated at the hearing, if the Respondent wish to make an application under section 20C of the Landlord and Tenant Act 1985, they should do so in writing setting out the reasons for the application and should also send a copy to the Applicant.

Dated this 6th day of December 2017

JUDGE TIMOTHY COWEN

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 20

(1) Where this section applies to any qualifying works or qualifying long term agreement, the relevant contributions of tenants are limited in accordance with subsection (6) or (7) (or both) unless the consultation requirements have been either—

(a) complied with in relation to the works or agreement, or
(b) dispensed with in relation to the works or agreement by (or on appeal from) the appropriate tribunal .

(2) In this section "relevant contribution", in relation to a tenant and any works or agreement, is the amount which he may be required under the terms of his lease to contribute (by the payment of service charges) to relevant costs incurred on carrying out the works or under the agreement.

(3) This section applies to qualifying works if relevant costs incurred on carrying out the works exceed an appropriate amount.

(4) The Secretary of State may by regulations provide that this section applies to a qualifying long term agreement—

(a) if relevant costs incurred under the agreement exceed an appropriate amount, or
(b) if relevant costs incurred under the agreement during a period prescribed by the regulations exceed an appropriate amount.

(5) An appropriate amount is an amount set by regulations made by the Secretary of State; and the regulations may make provision for either or both of the following to be an appropriate amount—

(a) an amount prescribed by, or determined in accordance with, the regulations, and
(b) an amount which results in the relevant contribution of any one or more tenants being an amount prescribed by, or determined in accordance with, the regulations.

(6) Where an appropriate amount is set by virtue of paragraph (a) of subsection (5), the amount of the relevant costs incurred on carrying out the works or under the agreement which may be taken into account in determining the relevant contributions of tenants is limited to the appropriate amount.

(7) Where an appropriate amount is set by virtue of paragraph (b) of that subsection, the amount of the relevant contribution of the tenant, or each of the tenants, whose relevant contribution would otherwise exceed the amount prescribed by, or determined in accordance with, the regulations is limited to the amount so prescribed or determined.]

Section 20B

(1) If any of the relevant costs taken into account in determining the amount of any service charge were incurred more than 18 months before a demand for payment of the service charge is served on the tenant, then (subject to subsection (2)), the tenant shall not be liable to pay so much of the service charge as reflects the costs so incurred.

(2) Subsection (1) shall not apply if, within the period of 18 months beginning with the date when the relevant costs in question were incurred, the tenant was notified in writing that those costs had been incurred and that he would subsequently be required under the terms of his lease to contribute to them by the payment of a service charge.

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.

Commonhold and Leasehold Reform Act 2002

Schedule 11, paragraph 1

(1) In this Part of this Schedule "administration charge" means an amount payable by a tenant of a dwelling as part of or in addition to the rent which is payable, directly or indirectly—

(a) for or in connection with the grant of approvals under his lease, or applications for such approvals,

(b) for or in connection with the provision of information or documents by or on behalf of the landlord or a person who is party to his lease otherwise than as landlord or tenant,

(c) in respect of a failure by the tenant to make a payment by the due date to the landlord or a person who is party to his lease otherwise than as landlord or tenant, or

(d) in connection with a breach (or alleged breach) of a covenant or condition in his lease.

(2) But an amount payable by the tenant of a dwelling the rent of which is registered under Part 4 of the Rent Act 1977 (c. 42) is not an administration charge, unless the amount registered is entered as a variable amount in pursuance of section 71(4) of that Act.

(3) In this Part of this Schedule "variable administration charge" means an administration charge payable by a tenant which is neither—

(a) specified in his lease, nor

(b) calculated in accordance with a formula specified in his lease.

(4) An order amending sub-paragraph (1) may be made by the appropriate national authority.

Schedule 11, paragraph 2

A variable administration charge is payable only to the extent that the amount of the charge is reasonable.

Schedule 11, paragraph 5

(1) An application may be made to the appropriate tribunal for a determination whether an administration 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) Sub-paragraph (1) applies whether or not any payment has been made.

(3) The jurisdiction conferred on the appropriate tribunal in respect of any matter by virtue of sub-paragraph (1) is in addition to any jurisdiction of a court in respect of the matter.

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

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

(6) An agreement by the tenant of a dwelling (other than a post-dispute arbitration agreement) is void in so far as it purports to provide for a determination—
(a) in a particular manner, or
(b) on particular evidence,
of any question which may be the subject matter of an application under sub-paragraph (1).