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FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	:	**LON/00AG/LSC/2017/0346** **LON/00AG/LSC/2017/0328**
Property	:	**Hillsborough Court, Mortimer Crescent, London NW6 5NT**
Applicant	:	**The lessees listed in the applications**
Representative	:	**Mr Mir represented himself and Ms Belinda Evans represented the remaining applicants**
Respondents	:	**Northumberland and Durham Property Trust Limited**
Representative	:	**Mr P Letman of Counsel instructed by Seddons Solicitors**
Type of application	:	**Application for orders pursuant to s20C of the Landlord and Tenant Act 1985 and paragraph 5A of Sch11 to the Commonhold and Leasehold Reform Act 2002**
Tribunal members	:	**Judge N Hawkes** **Mr L Jarero BSc FRICS** **Mrs J Hawkins BSc MSc**
Date and venue of reconvene	:	**15 November 2018, 10 Alfred Place, London WC1E 7LR**
Date	:	**19 November 2018**

DECISION

Decisions of the Tribunal

The Tribunal does not make orders under section 20C of the Landlord and Tenant Act 1985 or under paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002.

The determination

1. By a decision dated 16 July 2018, the Tribunal found that 10% falls to be deducted from the costs of the Phase 3 works which have been charged to the applicants in order to reflect that fact that this work was not carried out to a reasonable standard.

2. The Tribunal otherwise found that the service charge costs which form the subject matter of these proceedings are payable.

3. It should be noted that the Tribunal's decision did not concern proposed set offs and/or counterclaims on the part of the applicants and that the applicants have expressly reserved their right to bring their proposed claims in separate proceedings.

4. The applicants represented by Ms Evans ("the applicants") seek orders under section 20C of the Landlord and Tenant Act 1985 ("section 20C") and under paragraph 5A of the Schedule 11 to the Commonhold and Leasehold Reform Act 2002 ("paragraph 5A). Ms Evans is herself one of the lessees.

5. The parties have submitted extensive written submissions concerning the applicants' section 20C and paragraph 5A applications, including submissions in reply on the part of the applicants.

6. The Tribunal granted the applicants permission to file and serve these submissions in reply in September 2018, notwithstanding opposition from the respondent and notwithstanding that there was no right of reply at paragraph (3) of the Tribunal's Decision of 16 July 2018.

7. After the submissions in reply had been received by the Tribunal, the parties were notified that the first date on which all members of the Tribunal were available to convene to determine this application was 15 November 2018.

8. This decision should be read together with (i) the Tribunal's decision of 16 July 2018 and (ii) both parties' written submissions. The legal authorities which are referred to in this decision are authorities of a higher court which are binding on this Tribunal.

9. Section 20C provides that 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 residential property 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 persons specified in the application.

10. Paragraph 5A states that:

(1) A tenant of a dwelling in England may apply to the relevant court or tribunal for an order reducing or extinguishing the tenant's liability to pay a particular administration charge in respect of litigation costs.

(2) The relevant court or tribunal may make whatever order on the application it considers to be just and equitable.

11. These provisions provide the Tribunal with a wide discretion to exercise having regard to all the circumstances of the case.

12. The respondent has not identified a provision of the lease which is said to enable the costs of the Tribunal proceedings to be passed to the lessees through the service charge.

13. However, in *Tedla v Cameret Court Residents' Association Limited* [2015] UKUT 0221 (LC) it is stated:

"47. It is one thing to say that if the costs of proceedings are not recoverable as a matter of contract there is no need to spend time considering section 20C, but it is quite a different thing to say that it is therefore necessary to consider the meaning of the lease before it is possible to make a determination under section 20C. Clearly it is not necessary to do so, although there may be circumstances in which it is appropriate. There were good reasons in Daejan for the Tribunal to begin its consideration of the section 20C appeal by looking at the terms of the various charging provisions, but we did not thereby intend to suggest that that should be the invariable starting point, or even that it would be a useful point of departure in most cases."

14. Accordingly, it is not necessary for the Tribunal to consider the meaning of the lease before making this determination and this determination does not include any ruling on the issue of whether or not the respondent's costs are contractually recoverable.

15. This is a matter in respect of which the Tribunal did not hear oral argument at the hearing, the determination of which would require further directions and further submissions. The Tribunal notes that any dispute concerning the payability and/or reasonableness of the

respondent's litigation costs may potentially be determined in accordance with section 27A of the Landlord and Tenant Act 1985.

16. As regards the principles to be applied, in *Tenants of Langford Court v Doren Ltd (LRX/37/2000)*, HHJ Rich QC stated at [28] to [31] (emphasis supplied):

"In my judgement the only principle upon which the discretion should be exercised is to have regard to what is ***just and equitable*** *in all the circumstances ... Where, as in the case of the LVT there is no power to award costs, there is no automatic expectation of an order under s.20C in favour of a successful tenant... Excessive costs unreasonably incurred will not, in any event, be recoverable by reasons of s.19 of the Landlord and Tenant Act 1985."*

17. Accordingly, the question for the Tribunal under both section 20C and paragraph 5A is what is "just and equitable". Further, there is no automatic expectation of an order in favour of a successful tenant i.e. had the Tribunal found that no service charge was payable by the applicants, it would not follow that the applicants' application for orders under section 20C and paragraph 5A would automatically succeed.

18. In *Schilling v Canary Riverside Development PTE Limited* LRX/26/2005, at [14] HHJ Rich QC stated, of the outcome of proceedings (emphasis supplied):

"... in service charge cases, ***the "outcome" cannot be measured merely by whether the applicant has succeeded in obtaining a reduction.*** *That would be to make an Order "follow the event". Weight should be given rather to the degree of success, that is the proportionality between the complaints and the determination, and to the proportionality of the complaint, that is between any reduction achieved and the total of service charges on the one hand and the costs of the dispute on the other hand"*

19. The Tribunal recognises that the significance of the Tribunal's decision to the applicants is not limited to its financial value and, also, that the financial value of the reduction in service charge is not insignificant to the applicants. However, applying this principle to the facts of the present case, the reduction of 10% of the Phase 3 costs does not comprise a successful outcome on the part of the applicants within the meaning of *Schilling*.

20. Further, at [13] of *Schilling* stated, HHJ Rich QC stated:

"So far as an unsuccessful tenant is concerned, it requires some unusual circumstances to justify an order under section 20C in his favour."

21. The Tribunal has taken all of the parties' submissions and its own knowledge of the procedural history of this litigation into account. No party has conducted this litigation to a standard of procedural perfection.

22. The Tribunal recognises that the applicants have faced challenges and have, understandably, found these proceedings difficult, stressful and time consuming.

23. The Tribunal recognises that the respondent has also faced challenges including significant oral expert evidence which was not recorded in the written expert opinion served on the respondent in advance of the hearing, the calling of Mrs Bax at short notice, and changes of advocate during the course of the hearing. On 21 June 2018, one of the applicants sought to introduce further evidence and submissions after the conclusion of the hearing.

24. The Tribunal is grateful to all representatives who attended the hearing, both lay and professional, for their constructive approach to this litigation.

25. Further, if the Tribunal were to accede to the applicants' application, only the lessees who are applicants in this application would receive the benefit of the orders (see *Conway v Jam Factory Freehold Limited* [2013] UKUT 0592 (LC) at [71]). Accordingly, if the respondent's litigation costs are contractually recoverable, the other lessees would have to make up the shortfall created by the respondent's inability to recoup an equal share from the applicants (see *Conway* at [73]).

26. At [75] of *Conway* the Deputy President, Martin Roger QC, stated

"In any application under section 20C it seems to me to be essential to consider what will be the practical and financial consequences for all of those who will be affected by the order, and to bear those consequences in mind when deciding on the just and equitable order to make."

27. Accordingly, the Tribunal is bound to consider the potential consequences of making the orders sought on other lessees at Hillsborough Court who are not applicants in this application.

28. Having carefully considered the parties' submissions and all of the circumstances of this case, including:

(i) the relative financial success of the respondent in the substantive proceedings;

(ii) the consequence of making the orders sought for the lessees who are not applicants who would have to make up the shortfall if the Tribunal were to accede to the applicants' application; and

(iii) the fact that the respondent as well as the applicants have faced challenges in conducting this litigation;

the Tribunal is not satisfied that it is just and equitable to make the orders sought.

Name: Judge N Hawkes **Date:** 19 November 2018

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	:	**LON/00AG/LSC/2017/0346** **LON/00AG/LSC/2017/0328**
Property	:	**Hillsborough Court, Mortimer Crescent, London NW6 5NT**
Applicant	:	**The lessees listed in the applications**
Representatives	:	**Mr Mir represented himself and Ms Belinda Evans represented the remaining applicants**
Respondent	:	**Northumberland and Durham Property Trust Limited**
Representative	:	**Mr P Letman of Counsel instructed by Seddons Solicitors**
Type of application	:	**For the determination of the reasonableness of and the liability to pay a service charge**
Tribunal members	:	**Judge N Hawkes** **Mr L Jarero BSc FRICS** **Mrs J Hawkins BSc MSc**
Dates and Venue	:	**25, 26, 27 April 2018, 29 May 2018 and 14 June 2018 at 10 Alfred Place, London WC1E 7LR**
Date of decision	:	**16 July 2018**

DECISION

Decisions of the Tribunal

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

(2) Any applications under section 20C of the Landlord and Tenant Act 1985 and/or under paragraph 5A of Schedule 11 of the Commonhold and Leasehold Reform Act 2002 and/or for the reimbursement of hearing fees should be made in writing to the Tribunal and served on the respondent by 6 August 2018.

(3) The respondent's reply to any such applications should be filed and served by 27 August 2018. The Tribunal will then determine any such applications on the papers.

(4) Since the Tribunal has no jurisdiction over County Court costs, application reference LON/00AG/LSC/2017/0328 should be returned to the County Court sitting at Brentford following the determination of any applications made in accordance with paragraph (2) above, or if no such application is made by 6 August 2018, following that date.

The applications

1. The applicants are lessees at Hillsborough Court, Kilburn Park, London NW6 ("Hillsborough Court"). The respondent has at all material times since 4 April 1989 been the registered freehold owner of the Block.

2. The applicants seek a determination pursuant to s.27A of the Landlord and Tenant Act 1985 ("the 1985 Act") as to the reasonableness and/or payability of certain service charges demanded by the respondent in respect of the service charge years 2012 to 2018.

3. There are two applications before this Tribunal, application reference LON/00AG/LSC/2017/0328, which solely concerns Mr Mir, and application reference LON/00AG/LSC/2017/0346, to which the remaining applicants are party.

4. As regards application reference LON/00AG/LSC/2017/0328, proceedings were originally issued by the respondent against Mr Mir in County Court under Claim Number C43YY805.

5. By order of the County Court sitting at Brentford dated 16 August 2017, a transfer was made to this Tribunal for *"the determination of the entitlement to levy the invoices relating to the reserve fund found within the statement of case."* Directions were issued by the Tribunal on 31 August 2017.

6. Application reference LON/00AG/LSC/2017/0346 is an application dated 4 September 2017 which was issued by the remaining applicants against the respondent. An oral case management hearing took place in this application on 24 October 2017 and directions were then issued.

7. The two applications were subsequently consolidated and it was expressly agreed at the hearing that the Tribunal would not seek to differentiate between the two applications in this decision.

8. Hillsborough Court is a five-storey building which is believed to have been constructed in the 1930s. The Tribunal inspected Hillsborough Court on the morning of 25 April 2018, before the commencement of the hearing.

9. The block is diamond-shaped and arranged around an internal communal garden. It is entirely residential and contains 123 flats. The flats are accessed from external walkways which are located on the internal, garden side of the Hillsborough Court.

10. The Tribunal has been informed that the leases are in similar form, save in relation to certain storage units which are not relevant to the issues which it has been agreed will be determined by this Tribunal. The Tribunal has been referred to a sample lease.

11. The "Maintenance Year" is the period from 25 December to 24 December, or such other period as the landlord may in its discretion from time to time determine.

12. Hillsborough Court is "the Property" and the "Common Parts of the Property" comprise "the whole of the Property save such parts thereof as comprise the Flat and the equivalent parts of all other flats comprising the Property".

13. The "Maintenance Contribution" is "the percentage stated in paragraph 6 of the First Schedule of the cost to the Landlord in each Maintenance Year of complying with the obligations on its part contained in the Sixth Schedule and hereunder and shall be calculated in accordance with the provisions of the Seventh Schedule".

14. The First Schedule contains the Particulars of the lease. The Second Schedule sets out the demise. The demise excludes the central heating and hot water system within the Property.

15. The Fifth Schedule contains the tenant's covenants. Those covenants include, at 1(b), a covenant "to pay the Maintenance Contribution at the times and in the manner provided for in the Seventh Schedule".

16. The landlord's covenants contained in the Sixth Schedule include covenants:

(i) to "maintain repair or renew the structure of the Common Parts of the Property ... the central heating boiler pipes and radiators and drains and electric cables and wires" (paragraph 2);

(ii) to redecorate the Block on a seven year internal cycle and on a four year external cycle (paragraph 3);

(iii) "to pay all expenses of providing maintaining repairing renewing servicing or otherwise relating to ... boilers and heating equipment" (paragraph 8); and

(iv) "to keep proper books of account and have an account taken at the end of each Maintenance Year" (paragraph 10).

17. By paragraph 11 of the Sixth Schedule, the landlord is entitled to create a reserve fund and the Seventh Schedule contains the machinery pursuant to which the service charge regime at Hillsborough Court is operated.

The hearing

18. The hearing of the applications took place on 25, 26, 27 April 2018, 29 May 2018 and 14 June 2018.

19. Mr Syed Mir represented himself and the remaining applicants were represented by Ms Belinda Evans, occasionally assisted by other lessees. The respondent was represented by Mr Paul Letman of Counsel instructed by Seddons Solicitors.

20. The hearing bundles in this matter run to in excess of ten lever arch files. The Tribunal recognises the considerable amount of time and effort which Ms Evans and her team have put into the preparation of their case, in addition to being engaged in full-time employment and/or having other commitments.

21. Mr Mir's input was, at times, limited for reasons which were made known to the Tribunal and to the other parties. However, he participated in the hearing to the extent that he was able to.

22. The Tribunal is grateful to the applicants and to Mr Letman of Counsel for their assistance in dealing with this application.

The scope of the applications

23. The applicants' applications concern service charges demanded by the respondent in respect of:

    (i) works which have been carried out to the communal hot water and heating system serving Hillsborough Court;

    (ii) reserve funds contributions collected by the respondent;

    (iii) managing agents' fees;

    (iv) accountants' fees;

    (v) the inclusion of a nominal rent for a porter's flat in the service charge; and

    (vi) the estimated and on-account service charge demands for the year 2017-2018.

24. The issues pleaded in the applicants' Statement of Case also included proposed set offs and/or counterclaims in respect of what the applicants assert are serious breaches of covenant on the part of the respondent.

25. There was a discussion concerning the applicants' proposed set offs and/or counterclaims at the commencement of the hearing. There are thirty-nine applicants and time had not been allowed in the Tribunal directions for the determination of thirty-nine separate damages claims.

26. Further, the applicants had not properly particularised and provided evidence in support of each proposed damages claim. For example, there was no evidence before the Tribunal as to the rental value of each of the applicants' flats.

27. It was agreed, expressly without prejudice to the applicants' right to bring their proposed claims in separate proceedings, that the proposed set offs and/or counterclaims would not fall to be determined by the Tribunal in these proceedings.

28. The Tribunal's jurisdiction under section 27A of the Landlord and Tenant Act 1985 ("the 1985 Act") is limited to determining the reasonableness and/or payability of charges which have been demanded by the respondent.

29. Insofar as the applicants in their closing submissions seek other forms of relief, for example, an order requiring the respondent to carry out specified actions in the future, the Tribunal has no power to make such orders pursuant to section 27A of the 1985 Act. Further, where charges have not been demanded by the respondent, there is nothing which potentially falls to be reduced.

30. It has been made clear to the parties that the issues to be determined by the Tribunal are limited to the issues in respect of which the parties adduced evidence and made submissions at the hearing.

31. The parties were given the opportunity to file written closing submissions in addition to making oral closing submissions at the hearing, on 14 June 2018.

32. This was to ensure that, should any party run out of time when making oral closing submissions, they would have had the opportunity to explain the entirety of the case which they wished the Tribunal to consider in their written closing submissions.

33. Notwithstanding this, certain of the parties have sought to file further submissions and/or evidence following the conclusion of the hearing. The late evidence and submissions which parties have sought to file (despite the absence of any direction permitting them to do so) have not been taken into consideration by the Tribunal in making its determinations.

34. Further, it should be noted that it is not open to the Tribunal to consider any wholly new arguments raised for the first time in closing submissions of which other parties have had no prior notice and in respect of which evidence has not been presented.

Procedural matters

35. At a case management stage, the applicants represented by Ms Evans were restricted to calling four witnesses of fact. On 26 May 2018, Ms Evans sought the Tribunal's permission to call Ms Harrison to give evidence based upon Ms Harrison's father's witness statement. Ms Harrison would have been the fourth witness of fact to be called by Ms Evans.

36. The respondent objected to Ms Evans calling Ms Harrison on the grounds that:

(i) the witness statement of Ms Harrison's father was not Ms Harrison's evidence;

(ii) no witness statement containing Ms Harrison's own evidence had been served notwithstanding that there were numerous witness statements of fact in the hearing bundle; and

(iii) the respondent had had no notice of the applicants' intention to call Ms Harrison or of the nature of Ms Harrison's evidence and so Counsel was not in a position to cross-examine her.

37. The Tribunal accepted the respondent's submissions and declined to grant Ms Evans permission to call Ms Harrison to give evidence based upon another person's witness statement.

38. It has been intended that the parties' experts would give oral evidence on 27 April 2018. However, on the morning of 27 April 2018, the respondent formally requested an adjournment of the remainder of the hearing insofar as it related to the expert evidence.

39. The Tribunal was informed that the respondent's expert's mother was seriously ill in intensive care in Wales and that he was therefore unable to attend the hearing on 27 April 2018.

40. It was considered preferable for both experts to give oral evidence on the same day and the Tribunal was informed that the parties had agreed to the proposed adjournment, subject to the Tribunal's approval.

41. The Tribunal considered this agreement to be sensible and determined that it would to adjourn the hearing of the expert evidence to 29 May 2018, on the basis that the remaining witness evidence of fact would be heard on 27 April 2018. The Tribunal was, at this stage, part-way through hearing the respondent's witness evidence.

42. Ms Evans then sought the Tribunal's permission to call Mrs Bax, the lessee of Flats 103 and 107, to give oral evidence of fact. A witness statement prepared by Mrs Bax was in the hearing bundles.

43. The respondent objected Ms Evans calling Mrs Bax the grounds that:

(i) there should be finality in the giving of evidence;

(ii) if Mrs Bax were to be called after the respondent's witnesses had given evidence she would essentially be giving evidence in reply; and

(iii) the respondent had not received advance notice that Mrs Bax was going to give oral evidence and so would be taken by surprise.

44. The Tribunal determined that it would grant Ms Evans permission to call Mrs Bax.

45. The Tribunal noted that the applicants are litigants in person representing themselves in complex litigation. The applicants represented by Ms Evans had been permitted call four witnesses of fact but they had only called three witnesses.

46. Ms Evans informed the Tribunal that she had not been in a position to call Mrs Bax on 26 April 2018 because Mrs Bax had been in hospital on that date.

47. It should, at this point, be recorded that the information which was provided to the Tribunal concerning the respondent's expert's absence on 27 April 2018 and Mrs Bax's absence on 26 April 2018 was not in any way challenged during the hearing and the Tribunal entirely accepts what was said.

48. One of the applicants subsequently sought to correspond with the Tribunal concerning the position of respondent's expert. As stated above, the issues to be determined by the Tribunal are limited to those in respect of which the parties adduced evidence and made submissions at the hearing. No permission was given to any party to make further submissions by way of correspondence.

49. In considering Ms Evans' application to call Mrs Bax, the Tribunal noted that, as a result of the adjournment of the expert evidence, the Tribunal potentially had time to hear Mrs Bax's evidence on 27 April 2018.

50. In this context, the Tribunal considered the Overriding Objective which provides that dealing with cases fairly and justly includes "avoiding unnecessary formality and seeking flexibility in the proceedings" and also "ensuring so far as practicable that the parties are able to participate fully in the proceedings."

51. Further, rule 6(1)(i) of The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 provides that the Tribunal may "decide the form of any hearing".

52. Whilst the Tribunal considered there to be force in the respondent's objections to Mrs Bax being permitted to give oral evidence, it concluded that two of the respondent's three concerns could potentially be met.

53. Mrs Bax was not present on 26 April 2018 and she therefore did not hear the evidence of the respondent's first witness of fact. The Tribunal noted that, if Mrs Bax were to be called before the respondent's second witness, she would not be giving evidence in reply to the respondent's witness evidence.

54. The Tribunal accepted that Counsel for the respondent had been taken by surprise by the applicants' application to call Mrs Bax and that this was undesirable. However, a limited amount of evidence was contained in Mrs Bax's witness statement and there was sufficient time available for the Tribunal to adjourn for as long as was required for the preparation of the respondent's cross-examination.

55. As regards the general point that there should be finality in the giving of evidence, this is generally desirable and it is one of the matters which the Tribunal took into account. However, weighing up all of the factors set out above and applying the Overriding Objective, the Tribunal determined that it would exercise its discretion to permit Mrs Bax to give oral evidence.

56. The Tribunal heard oral witness evidence of fact on behalf of the applicants from:

(i) Dr Rosan Meyer of Flat 104 (on 25 April 2018);

(ii) Mr Syed Mir of Flat 72 (on 26 April 2018);

(iii) Ms Belinda Evans of Flat 31 (on 26 April 2018);

(iv) Mr Simon Gallimore of Flat 106 (on 26 April 2018); and

(v) Mrs Bax of Flats 103 and 107 (on 27 April 2018).

57. The Tribunal heard oral witness evidence of fact on behalf of the respondents from:

(i) Mr David Goldberg who, between August 2011 and May 2015, was a Director and Head of Estate Management at Chestertons. From around 2012 to August 2017, Chestertons were the respondent's managing agents in respect of the Hillsborough

Court. Mr Goldberg was the primary point of contact for the respondent in relation to all Hillsborough Court matters from 2012 until May 2015. He gave evidence on 26 April 2018.

(ii) Mr Ross O'Donovan, a Senior Property Manager employed by Grainger Plc since 1 June 2015. Mr O'Donovan's duties include overseeing the management of the freehold of the Hillsborough Court. The respondent is a wholly owned subsidiary of Grainger Plc. Mr O'Donovan gave evidence on 27 April 2018 after Mrs Bax had given evidence.

58. Further, on 29 May 2018, the Tribunal heard oral expert evidence from:

(i) Mr Charles Reynolds MRICS, of RSWE Chartered Surveyors, on behalf of the applicants; and

(ii) Mr Jeremy Prosser, a Consultant to Quinn Ross Consultants, on behalf of the respondent.

The communal hot water and heating system

59. The case advanced by the applicants under this heading relates to the standard of the work carried out by the respondent. The applicants do not contend that the work should not have been carried out and that the costs (so far as reasonable) should not have been incurred, but rather it is the applicants' position that work should have been carried out at an earlier date.

60. It is common ground that works to the hot water and heating system serving Hillsborough Court were in either the planning or implementation stage for nearly 10 years.

61. The parties have differing opinions as to the reasons for the long history to this matter. The reasons put forward by the respondent include "vast arrears" and delays resulting from lack of funds. The applicants allege fault on the part of the respondent and this is denied. The Tribunal is mindful of the fact that the breach of covenant claims are not before it and the Tribunal therefore makes no comment in respect of this issue.

62. A new heating and hot water system is now in place which includes:

(i) three large boilers;

(ii) two heat-plate exchangers;

(iii) one 500 litre buffer vessel with associated pumps and controls;

(iv) a primary pipework distribution network; and

(v) secondary supply pipework within the individual flats.

63. The work was carried out in three phases. In 2007, Phase 1 works were carried out and, at this stage:

(i) four gas fired hot water heaters were installed, replacing three hot water cylinders;

(ii) a side stream filter was installed to improve the water quality in the heating system; and

(iii) works to the main headers were carried out to allow future connections of the new heating distribution.

64. In 2014, Phase 2 works were carried out which included:

(i) works in the boiler room;

(ii) the block-wide installation of the new heating and hot water service distribution pipework; and

(iii) a block-wide booster of potable cold water was also installed.

65. In 2015, Phase 3 works were carried out which included:

(i) the replacement of the existing heating and hot and cold water services in each flat;

(ii) the connection of each flat to the new block-wide heating, hot water and boosted cold water distributions; and

(iii) the Tribunal has been informed that it appears that commissioning valves for the heating system were installed.

66. Mr Prosser states in the summary to his expert report dated 27 February 2018:

"... we (Quinn Ross) have investigated the Phase 1-Phase 3 (enabling works) contracts and installed works.

This investigation established that there was a series of faults and omissions to the systems installed and these have been set out and reviewed in Section 3.0.

The (QR) recommended remedial works have been set out in Section 4.0. These remedial works were assembled into a contract and implemented between November 2017 & January 2018.

These works are now considered by Quinn Ross to be practically complete leaving the hot and cold water services operating reliably and providing services meeting recognised industry standard criteria for the benefit of residents."

The performance of the new system

67. It is the respondent's case that, by carrying out recommended remedial work at its own expense, it has now delivered a fully functioning communal hot water and heating system at no additional cost to the applicants. The respondent contends that there is therefore no basis for reducing the costs which have been charged to the service charge.

68. The remedial work carried out by the respondent included increasing the buffer vessel capacity from about 500 litres to 2000 litres and introducing commissioning and local pressure/thermal regulating valves in order to bring the system up to standard.

69. The applicants assert that they have suffered very serious loss of amenity as a result of the poor performance of the system. The applicant's expert, Mr Reynolds, is very critical of the work which the respondent initially carried out.

70. Mr O'Donovan stated that the managing agents should potentially have notified the freeholder of complaints which were being received about the system and he stated that there was a problem which was "not passed up the chain of command".

71. In her closing submissions, Ms Evans stated:

"The omission of these valves was not only a huge mistake, it was a disaster leading to a breach of covenant when the leaseholders were left to suffer three winters without sufficient heating or hot water and it remains to be seen whether their retrofit, combined with other remedial work will allow the full functioning of the system. We cannot

know this until winter 2018 and a sustained period of low outside temperatures."

72. The serious loss of amenity which the applicants state that they experienced prior to the carrying out of remedial works by the respondent is a matter for the proposed breach of covenant claims which are not before this Tribunal.

73. As regards the submission that the condition of the system cannot be known until the winter of 2018/19, the Tribunal must make its decision on the basis of the evidence which was presented to it at the hearing.

74. The current state of the communal hot water and heating system is a matter for expert evidence. Neither of the experts provided the Tribunal with expert evidence that the hot water and heating system is currently defective. Accordingly, there is no expert evidence before the Tribunal that the system now in place is not of a reasonable standard and the Tribunal therefore has no basis for reducing the charges in respect of the cost of the Phase 1 works.

75. Whether or not the applicants may be entitled to damages to compensate them for loss of amenity and/or other loss and damage experienced prior to and/or during the remedial works is not a matter for this Tribunal.

The standard of the Phase 2 works

76. During the course of its inspection of Hillsborough Court, silver distribution pipework in the communal walkways was pointed out to the Tribunal. This pipework has not been concealed and the applicants consider the unconcealed pipework to be unsightly and out of keeping with a 1930s development. The Tribunal agrees with this assessment.

77. Mr Reynolds gave evidence that silver pipework is more appropriate for an industrial setting. Lessees described the pipework as "hideous" and "ugly" and one of the lessees expressed the view that the unconcealed silver pipework made their 1930s block look like a space ship.

78. The respondent informed the Tribunal that the sums charged to the applicants do not include any charge in respect of work to conceal the silver pipework. The respondent accepts that there should be no such charge because it is common ground that no concealment work has been carried out.

79. The Tribunal is not satisfied on the evidence presented to it that there has been any charge to the applicants in respect of work to conceal the silver pipework. As stated above, where sums have not been charged by the respondent, there is nothing which falls to potentially be reduced by

the Tribunal. Accordingly, there can be no reduction in the service charge pursuant to section 27A of the 1985 Act to reflect the fact that work to conceal the silver pipes has not yet been carried out.

80. The applicants initially contended that the positioning of the pipework rendered it impossible to conceal. However, Mr Prosser was of the opinion that a suspended ceiling could be put in place, at a cost of approximately £50,000, to conceal the silver pipework and Mr Reynolds stated in giving oral expert evidence that he did not disagree with this assertion.

81. Upon both experts agreeing that a suspended ceiling would constitute a reasonable aesthetic solution, the Tribunal is not satisfied that the positioning of the silver pipework makes it impossible to conceal. It is unclear why work to conceal the silver pipes has not yet been carried out. However, any claim in respect of loss of amenity is not a matter for this Tribunal and, accordingly, this matter was not canvassed during the hearing.

82. A suggestion was made during the course of the hearing that the silver pipework could have been positioned at basement level rather than at first floor level. It is unclear whether or not this point is being pursued. In any event, the Tribunal accepts evidence which it heard that to have positioned the pipework at basement level would have been more expensive and less practical than positioning it at first floor level, and it accepts the evidence of both experts that the pipework in its current position can be concealed.

83. Accordingly, the Tribunal makes no deduction to the costs of the Phase 2 works.

The standard of the Phase 3 works

84. The Phase 3 works included the replacement of the existing heating and hot and cold water services in each flat. On the basis of the Tribunal's own observations on the basis of evidence from the applicants which the Tribunal accepts, that the Tribunal finds that the Phase 3 work was not carried out to a reasonable standard. In particular, the Tribunal finds that there was:

(i) poor planning;

(ii) poor finishing;

(iii) a lack of skill and care in soldering technique;

(iv) excess bends and joints around sockets in certain cases (for example, around redundant sockets);

(v) inadequate making good and, in some instances, the absence of making good;

(vi) poor communication with the lessees; and

(vii) inadequate supervision of the contractors.

85. By way of example, Ms Evans gave evidence that on the morning on which the Phase 3 work was due to take place inside her flat she met with the contractors and went through where the pipes were going to run.

86. Ms Evans was satisfied with the proposed pipe routes and she ensured that she was potentially available by telephone whilst the work was being carried out, in case anything needed to be changed. She waited in a café close to Hillsborough Court for seven hours and she was not contacted by the contractors during this time.

87. However, when Ms Evans returned to her flat, she found that the pipe runs had been re-routed. The contractors apologised for this and explained to Ms Evans that they had re-routed the pipes because they were short of time. One of the contractors stated to Ms Evans "Oh, this is not ideal is it". No written explanation has been received by Ms Evans for the change to the pipe routes.

88. There was also evidence of poor workmanship, for example, in Ms Evans' living room the contractors had piped around a redundant media socket.

89. Further, snagging did not take place and Ms Evans was forced to cut back protruding pipes herself. Whilst the Tribunal accepts that the respondent had concerns regarding the presence of asbestos, the Tribunal saw photographs and, on inspection, examples of old pipework left above floor level. The Tribunal does not consider that the distance above floor level is justified by the potential presence of asbestos.

90. The Tribunal accepts the evidence given by Ms Evans and it also accepts the evidence of other lessees that the Phase 3 work was not carried out to a reasonable standard. The Tribunal heard extensive evidence from Ms Evans and from other witnesses. What is set out above does not purport to be a full account of Ms Evans' evidence; it is simply a summary.

91. One of the reasons given by the respondent for re-routing Phase 3 pipework was the presence of a beam above a window. Beams follow a pattern and, in a block of this type, there would be consistency of design. The Tribunal is of the opinion that the location of the beams should have been clearly identified at the planning stage and that any valid reasons for re-routing pipework should then have been applied to all flats with a similar layout. The Tribunal is not satisfied that the planning of the Phase 3 works was carried out to a reasonable standard.

92. Mr Reynolds gave evidence that it would cost in the region of £20,000 to remedy defects to the Phase 3 pipework, alternatively, that a 10% reduction in the charges in respect of the Phase 3 works should be applied. Ms Evans submits that a global reduction, applicable to all of the applicants, is appropriate.

93. The respondent submits that the matter can only be considered on a flat by flat basis; that there are no appropriate details or costings on this basis; and that not all lessees make complaint about the pipework within their flat. Further, the respondent has borne the cost of remedial works carried out earlier this year and it submits that there is no scope for making any additional reduction.

94. Whilst defects to the pipework within individual flats are not complained of by every applicant, the Tribunal's findings in relation to poor planning, supervision and communication apply to the entirely of the Phase 3 works. Accordingly, the Tribunal finds that it is appropriate to make a global reduction as contended for by the applicants.

95. The Tribunal accepts Mr Reynolds' expert opinion, doing his best on the basis of the limited evidence available, that 10% should be deducted from the costs of the Phase 3 works which have been charged to the applicants in order to reflect that fact that the work was not carried out to a reasonable standard. In making this finding, the Tribunal has taken into account the remedial work which the respondent has carried out at no additional cost to the lessees.

The Reserve Fund

96. The Tribunal notes that the funds which were collected have now been expended and that no challenge is made to the actual costs incurred. The evidence before the Tribunal focussed on the Phase 2 and Phase 3 works. The Tribunal is not satisfied on the basis of the evidence which it heard that the respondent has unreasonably collected reserve fund monies.

The Managing Agents' fees

97. The applicants complain of the general standard of service provided by the managing agents and they make specific complaints concerning the repair and maintenance of the boilers. A complaint relating to unlawful subletting was not pursued by the applicants at the hearing.

98. The respondent accepts that there were problems with the level of service provided by the managing agents from about June 2016. In order to recompense the lessees for any problems which they may have encountered with the managing agents, the respondent has agreed to repay the entirely of the managing agents' charges for the year to the end of 2016, save for those relating to a section 20 consultation (a total reduction of £49,694). The respondent points out that this is equivalent to a 50% reduction in the managing agents' fees over two years or 25% over four years.

99. It is apparent from the details of expenditure which have been provided to the Tribunal that this is far from a case in which no management has been carried out and the applicants do not seek to contend that nothing was done by the managing agents. Putting the applicants' case at its highest, the Tribunal is satisfied that the reduction already made by the respondent is sufficient to reflect the deficiencies in the standard of management which are complained of insofar as they have been adequately particularised.

The Accountants' Fees

100. The Tribunal accepts that there appears to have been a delay in the provision of the accounts. However, the issue for the Tribunal under this heading is whether or not the accountants' fees are within a reasonable range for the work which the accountants undertook. The accountants clearly carried out work and the Tribunal is not satisfied on the evidence that the charges levied for this work are unreasonable. Accordingly, the Tribunal makes no deduction in respect of the accountants' fees.

The inclusion of a nominal rent for a porter's flat in the service charge

101. As stated above, the "Maintenance Contribution" is "the percentage stated in paragraph 6 of the First Schedule of the cost to the Landlord in each Maintenance Year of complying with the obligations on its part contained in the Sixth Schedule and hereunder and shall be calculated in accordance with the provisions of the Seventh Schedule".

102. By paragraph 6 of the Sixth Schedule to the leases, the landlord covenants "to employ such staff or contractors as may be reasonably

required to carry out all necessary works of maintenance cleaning and repairs and such other duties as are necessary for the proper running and management of the Property".

103. Paragraph 8 of the Seventh Schedule to the leases states: "provided always and notwithstanding anything herein contained it is agreed and declared as follows that the cost of the Landlord of fulfilling its obligations hereunder shall also be deemed to include ... (ii) the cost of all other services which the Landlord may in its absolute discretion provide or install in the Property for the comfort and convenience of the tenants."

104. The respondent submits that where the lease enables a landlord to recover its "costs" a notional rent will be recoverable (the Tribunal was referred to *Lloyds Bank PLC v Bowker* [1992] 2 EGLR 44 at 47E-H and to the decision of the Court of Appeal in *Agavil Investment v Corner* (1975) (unreported) relied upon therein).

105. The respondent accepts that, by contrast, where the governing provision is restricted in its terms to "expenses and outgoings incurred" or "the other heads of expenditure" then such a notional rent is not recoverable (in this regard, the Tribunal was referred to the decision of the Lands Tribunal in *Hildron v Greenhill* (LRA/120/2006) at paragraphs 61 to 70).

106. However, the respondent submits that, in the instant case, where the terms of the Lease entitle it to recover a Maintenance Charge defined as "the cost to the Landlord" and the supporting Schedules include "costs" as well as "expenses and outgoings," on a proper construction of this particular Lease a notional rent is recoverable. The Tribunal accepts these submissions and finds that the sums claimed under this heading are payable.

107. The Tribunal notes that it was informed that the lessees do not actually pay extra in this regard because the porter receives a reduced salary to reflect the provision of accommodation as part of his remuneration package.

The estimated and on-account service charge demands for the year 2017-2018.

108. The Tribunal is not satisfied on the basis of the evidence which it heard that these charges are unreasonable.

Applications under s.20C of the Landlord and Tenant Act 1985 and under paragraph 5A of Schedule 11 of the Commonhold and Leasehold Reform Act 2002 and/or for the reimbursement of hearing fees

109. Any such applications should be made in writing to the Tribunal (setting out the applicants' full written submissions) and served on the respondent by 6 August 2018. The respondent's reply to any such applications should be filed and served by 27 August 2018. The Tribunal will then determine these applications on the papers.

The next steps

110. The Tribunal has no jurisdiction over ground rent or County Court costs. Application reference LON/00AG/LSC/2017/0328 should therefore be returned to the County Court sitting at Brentford following the determination of any applications made pursuant to paragraph 109 above, or if no such application is made by 6 August 2018, following that date.

Name: Judge Hawkes **Date:** 16 July 2018

Rights of appeal

By rule 36(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, the tribunal is required to notify the parties about any right of appeal they may have.

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.

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.

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.

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.

If the tribunal refuses to grant permission to appeal, a further application for permission may be made to the Upper Tribunal (Lands Chamber).