UPPER TRIBUNAL (LANDS CHAMBER)

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LANDLORD AND TENANT – SERVICE CHARGES – effect of agreement that charges not recoverable – whether agreement binding only for period under consideration by FTT – whether charges incorrectly included in demands for utilities costs were prevented by s.20B(1), Landlord and Tenant Act 1985 subsequently from being recovered as service charges – calculation of unit rate – recovery of costs of tribunal proceedings

IN THE MATTER OF AN APPEAL AGAINST TWO DECISIONS OF THE FIRST TIER TRIBUNAL (PROPERTY CHAMBER)

BETWEEN:

NO.1 WEST INDIA QUAY (RESIDENTIAL) LIMITED

Appellant

and

EAST TOWER APARTMENTS LIMITED

Respondent

Re: No.1 West India Quay,
26 Hertsmere Road,
London E14

Martin Rodger QC, Deputy Chamber President

24-25 February 2020

Royal Courts of Justice

Justin Bates and Kimberley Ziya instructed by DLA Piper UK LLP for the appellant
Lina Mattsson, instructed by Penningtons Manches Cooper LLP for the respondent

The following cases are referred to in this decision:

Barrett v Robinson [2014] UKUT 322 (LC)

Brent London Borough Council v Shulem B Association Ltd [2011] 1 WLR 3014

East Tower Apartments Ltd v No.1 West India Quay Residential Ltd [2016] UKUT 0553 (LC)

Finchbourne Ltd v Rodrigues [1976] 3 All E.R. 581

Freeholders of 69 Marina v Oram [2011] EWCA Civ 1258

Gilje v Charlegrove Securities Ltd [2003] EWHC 1284 (Ch)

Johnson v County Bideford Ltd [2012] UKUT 457 (LC)

Reston v Hudson [1990] 2 E.G.L.R. 51

Skelton v DBS Homes (Kings Hill) Ltd [2017] EWCA Civ 1139

Stemp v 6 Ladbroke Gardens Management Ltd [2018] UKUT 375 (LC)

Introduction

1. In December 2016 the Tribunal determined an appeal by East Tower Apartments Ltd ("ETAL") from a decision of the First-tier Tribunal (Property Chamber) ("the FTT") regarding charges for electricity and other utilities supplied to 42 apartments held by it on long leases at a building known as No.1 West India Quay, London, E14 ("the Building") by its landlord, No.1 West India Quay (Residential) Limited ("WIQR"). The 2016 appeal raised three issues and was dismissed on two but allowed on the third which related to the collection of standing charges. The proceedings were remitted to the FTT for further consideration in relation to that issue, together with outstanding issues going to the quantification of the charges payable by the company.

2. The Tribunal's decision in the 2016 appeal, *East Tower Apartments Ltd v No.1 West India Quay Residential Ltd* [2016] UKUT 0553 (LC) explained the nature of the dispute in some detail, describing the Building, the structure of the leases, and the unreliability of the meters installed to record the consumption of electricity and other utilities. I will not repeat that material in this decision other than to explain again one matter of terminology. Throughout the proceedings electricity consumed in individual apartments and measured by meters installed in those apartments has been referred to as "direct electricity", while electricity consumed by communal service installations has been termed "indirect electricity".

3. Further hearings took place before the FTT in December 2018 and March 2019. Its final decision, revised in the light of submissions received from the parties, was published on 21 June 2019. By agreement, the FTT quantified the total sum payable by ETAL as £204,821.66, and then resolved 11 further issues concerning deductions to be made from that total in respect of charges which it found not to be recoverable. The FTT invited the parties to agree the quantum of the necessary deduction based on its conclusions regarding the applicable principles.

4. Both parties sought and were granted permission to appeal different aspects of the FTT's June 2019 decision. WIQR challenges certain conclusions of the FTT as to the utility charges payable by ETAL, while ETAL argues that the FTT decision does not go far enough and should have reduced its liability further.

5. On 14 May 2019 the FTT issued a separate decision concerning the costs of the original proceedings before which had been added by WIQR to the service charges payable by ETAL. The FTT concluded that the terms of ETAL's leases did not allow WIQR to recover its costs, but it granted WIQR permission to appeal that decision.

6. At the hearing of the three appeals WIQR was represented by Mr Justin Bates and Ms Kimberley Ziya and ETAL by Ms Lina Mattsson both whom have acted in the same capacity throughout these proceedings.

Issues

7. The following issues now arise for consideration:

1. Is ETAL liable to pay certain additional utilities charges, referred to as availability and reactive charges?

2. Is WIQR prevented by section 20B(1), Landlord and Tenant Act 1985 from recouping through the service charge or as an administration charge certain costs (of reading meters and preparing energy bills) which the Tribunal found it was not entitled to demand under separate contractual provisions relating to the cost of the utilities themselves?

3. What unit rate is WIQR entitled to charge for direct electricity supplied to ETAL's apartments?

4. Do the apartment leases allow WIQR to recover the costs it incurred in the previous Tribunal proceedings through the service charge?

Issue 1: The recoverability of the additional fixed charges

8. At paragraphs 82-89 of the Tribunal's 2016 decision I determined that (subject to the resale ceiling imposed by OFGEM Guidance) certain fixed charges payable by WIQRR were recoverable from ETAL as part of the cost of electricity supplied to the building. These charges were paid initially by the freeholder to its energy supplier, and were then passed on to WIQRR, which sought to pass them on in its turn to ETAL. These were the availability charge which was paid to guarantee the availability of an uninterrupted supply of electricity to the Building, and the reactive charge which was levied by the supplier based on the efficiency of the equipment in a building.

9. The 2016 decision did not resolve all of the issues between the parties. The quantification of the charges remained in dispute and was remitted for consideration by the FTT.

10. At the time of the 2015 hearing before the FTT there had been a consensus between the parties' experts that the fixed availability and reactive charges for direct electricity used for domestic consumption in the apartments was not part of the costs associated with a domestic supply and should not be payable by ETAL. In preparation for the hearing of the 2016 appeal the parties were directed to record various concessions and agreements which had been made during the 2015 proceedings and which ETAL had argued should have been made the subject of a formal decision by the FTT. On 31 August 2016, shortly before the hearing of the 2016 appeal, a "list of issues not in dispute" was produced. It recorded the parties' agreement that the "availability and reactive charges for "direct electricity" used for domestic consumption in the apartments are not payable by [ETAL] and should be removed from any charges levied".

11. Because the same consensus had been reached between the experts in preparation for the 2015 FTT hearing, the only issue concerning fixed charges which was considered by the FTT in 2015 and by this Tribunal in 2016 concerned the application of those charges to "indirect electricity" costs.

12. The period under consideration by the FTT in 2015 had been from 31 May 2008 to 31 October 2014. When the dispute was remitted to the FTT for further consideration the parties agreed that the FTT should also quantify the charges payable for the period from 1 November 2014 to 27 February 2018 (referred to as the "third phase").

13. At the remitted FTT hearing in 2018 WIQR did not try to go back on the agreement of 31 August 2016 that fixed charges were not recoverable as part of direct electricity costs, but it sought to confine that agreement strictly to its own terms. It pointed out that the agreement had no effect on its entitlement (as confirmed by the Tribunal) to add a proportion of the fixed charges to the cost of indirect electricity. It also argued that it was free to add a proportion of the fixed charges to direct electricity costs during the third phase because that phase had not been in issue before the FTT or this Tribunal when the agreement was reached. Alternatively, it argued that it was entitled to add a share of the fixed costs to direct electricity charges after 31 August 2016, the date on which the agreement had been formalised. It later emerged that WIQR had already begun to include the fixed charges in its billing for the third phase, although that may not have been apparent on the face of the bills themselves.

14. The FTT pointed out in its June 2019 decision that this Tribunal had not distinguished between direct and indirect electricity when it decided that the fixed charges were simply part of the cost of obtaining a supply of electricity to the Building and were payable by ETAL. It agreed with WIQR that, logically, the same approach should be taken to the costs of direct and indirect electricity. It noted that WIQR's expert had conceded that he had been wrong on the question of what the service charge provisions meant, and it considered that "it would be unfair to [WIQR] not to allow it to include these charges for later billing periods". It also considered that the wording of the agreement was "plainly not sufficient to hold [WIQR] to that position for all time".

15. At paragraph 44 the FTT reached the following conclusion:

> "In our view, [WIQR] is bound by the agreement up until the end of December 2016 (that being a date by which the parties could be taken to have received and read the decision from the UT) by which time it was plain from the reasoning of the UT that such an agreement could no longer be sustained and that [WIQR] was not keeping to this position in its billing."

16. Neither party was satisfied with the FTT's decision.

17. On the appeal Mr Bates submitted on behalf of WIQR that the August 2016 agreement had been made at a time when the period under consideration ended on 31 October 2014. The agreement should therefore be understood as relating only to that period and not as limiting WIQR's right to recover contributions towards the fixed utility charges after that date.

18. On behalf of ETAL Ms Mattsson did not defend the FTT's selection of December 2016 as the expiry of the agreement but submitted that WIQR was bound by the agreement in relation to all charges which were the subject of the proceedings. As the service charges covered by the application had been extended by consent to include the third phase the agreement must be taken to relate also to that period. Alternatively, the agreement should be interpreted as

applying to charges incurred until 31 August 2016, that being the date on which the parties formally recorded their agreement.

19. Although before the FTT and in her written submissions on the appeal Ms Mattsson had suggested the issue was about the entitlement of WIQR to "resile" from its agreement, in her oral submissions she acknowledged that the real question was one of interpretation of that agreement. She did not suggest that the agreement had a permanent effect, preventing WIQR from levying the fixed charges for all time; nor did she suggest that it prevented the addition of a contribution to the fixed charges to indirect electricity. Instead, she focussed her submissions on the agreement that the fixed charges "should be removed from any charges levied" and argued that those words must include all charges for direct electricity which were being considered in the proceedings. She accepted that, when the agreement was made, those charges did not include the third phase (the scope of the proceedings was only extend by agreement in January 2018) but submitted that the agreement must have been intended to cover future charges which became the subject of the same proceedings.

20. I do not accept Ms Mattsson's submission on this issue. The agreement was prepared in response to a direction by the Tribunal that the parties should record matters which were said by ETAL to have been conceded at or before the 2015 FTT hearing. One would therefore expect that the agreement would focus on charges which were the subject of the original proceedings, and that is what the language used by the parties does. The agreement that the fixed charges for direct electricity "should be removed from any charges levied" is clearly a reference to charges which have already been billed (although not yet paid).

21. Ms Mattsson explained that before the agreement demands for utility charges for the period after October 2014 which was not part of the FTT proceedings had been withdrawn. As the Tribunal recorded in its decision in the 2016 appeal (at paragraph 35), new invoices had recently been issued for the period before October 2014, giving effect to the matters agreed between the experts. But both parties were waiting for the outcome of that appeal before considering what would be included in energy charges for the third phase. The agreement was therefore concerned only with the charges which were already the subject of the proceedings. To read into it an unspoken provision that it would also apply to future charges, not yet levied, if they later became the subject of the same proceedings (which was Ms Mattsson's position) seems to me to be illogical, since it would be contingent on a future agreement to extend the scope of the proceedings which neither party could be required to make.

22. The stronger argument might appear to be to be that the parties were intending to agree that fixed charges could never be applied to direct energy – after all, they agreed that such charges "are not payable". But Ms Mattsson did not argue in favour of that construction, which the FTT considered and rejected. An intention to agree the meaning of the lease might have been surprising given that the application of the same charges to indirect energy was the subject of a live appeal. Such an agreement would also give rise to technical difficulties if the leases or the reversion were assigned to a third party.

23. Nor does it seem to me possible to construe the agreement as applying to the payability of charges up to the date of the agreement itself, which was the construction favoured by the

FTT. The reference to removing the fixed charges "from any charges levied" militates against that construction, since the charges levied were all in respect of the period up to October 2014, and subsequent charges had been withdrawn. The intention imputed to the parties by the FTT is also inconsistent with the object of the list of matters not in dispute, which was to record concessions made before or at the 2015 hearing.

24. The only available construction of the August 2016 agreement is that the parties were reaching an agreement limited to the charges which were already within the scope of the proceedings. The agreement says nothing about the possibility of the proceedings being extended to include the third phase, and, in my judgment, nothing can be implied.

25. When the parties later agreed to extend the proceedings to include the third phase, they could have agreed that the list of matters agreed between them in August 2016 should apply also to the charges claimed in respect of the later period. But they did not do so. By that time the Tribunal had given its decision on the principle of the recoverability of fixed charges and its reasoning was inconsistent with the consensus on direct energy initiated by the experts. Ms Mattsson did not suggest that the August 2016 agreement had the effect she contended for because of anything agreed subsequently, and she was right not to do so.

26. For these reasons I allow WIQR's appeal against the FTT's finding in relation to issue 1, and I substitute a determination that the fixed charges are payable as a supplement to direct and indirect energy costs for the whole of the third phase. The sum to be deducted from the total otherwise payable by ETAL is £8,213.81.

Issue 2: The effect of section 20B(1), Landlord and Tenant Act 1985 on the Switch2 standing charge

27. One of the matters in issue in the 2016 appeal was WIQR's entitlement to recoup a charge (referred to as the "Switch2 standing charge") which it paid to the company responsible for reading the energy supply meters and for calculating energy bills. From 2008 to 2012 the practice of that company had been to add its own charge to the invoices it prepared showing energy costs for individual apartments. These were payable by ETAL within 7 days of being demanded. I was shown a sample bill for one apartment prepared by Switch2 for the quarter ending 31 August 2008. It showed a standing charge of £18.59 as one of the itemised components of the total bill.

28. That practice was considered by the Tribunal in its 2016 decision (at paragraphs 91 to 101) and was found to be inconsistent with the requirements of ETAL's leases. The FTT had also found that the Switch 2 charges could not simply be added to the energy bill, but it had found a provision in the lease which it considered allowed the charge to be recovered on demand. This Tribunal took a different view and held (in agreement with ETAL's submission) that the charge could only be recovered as part of the annual service charge.

29. Having reached that conclusion, the Tribunal remitted the issue of the recoverability of the Switch2 charges to the FTT. I suggested that the charges would first have to be demanded as service charges and, at paragraph 104 of its decision on the 2016 appeal I anticipated that

various arguments might be available to ETAL in response. One of the potential obstacles to recovery mentioned was section 20B(1), Landlord and Tenant Act 1985.

30. Section 20B imposes a statutory time limit on making demands for service charges. It provides as follows:

> 20B.— Limitation of service charges: time limit on making demands
>
> (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.

31. In its June 2019 decision the FTT held that ETAL was not liable to pay the Switch2 charges as part of the service charge because no valid demands had been made for them within 18 months of their having been incurred so they were caught by section 20B(1), 1985 Act. The FTT stated that it had no option but to follow the decision of Morgan J in *Brent London Borough Council v Shulem B Association Ltd* [2011] 1 WLR 3014, which had held that the reference in section 20B(1) to a "demand" meant a valid demand complying with the relevant contractual terms regulating the making of demands. The FTT also rejected an argument advanced by Mr Bates that in the 2016 service charge WIQR had re-apportioned and re-allocated the charges originally demanded, but had not demanded them again. The FTT held that charges incorrectly demanded as part of the electricity charge could not simply be re-assigned to the service charge as an accounting exercise without being properly demanded as a service charge, and that was no longer possible in the case of charges which related to periods before 2012.

32. Mr Bates began his submissions on the appeal by pointing out that, if section 20B(1) applied to the Switch2 charges, by the time his client became aware that its previous approach to demanding them was not been compliant with the lease more than 18 months had elapsed since the costs were incurred. There was therefore no point in re-demanding the charges as service charges. Nor could the previous demands be brought within the scope of section 20B(2), because only the contribution of the individual lessee was demanded and no reference had been made to the total cost incurred or to any requirement to contribute towards it in future. Mr Bates therefore contended that, properly construed, section 20B(1) does not operate in the way described in *Brent v Shulem B*, and does not require a contractually valid demand to stop time running against the recovery of a service charge. All that was required, he submitted, was a demand which gave sufficient details of the maximum liability that a tenant might face.

33. The purpose of section 20B is to ensure that a leaseholder (or prospective leaseholder) is not taken by surprise by an unexpected bill for services or works carried out in earlier years, as Etherton J explained in *Gilje v Charlegrove Securities Ltd* [2003] EWHC 1284 (Ch) at [27]:

> "…the policy behind s.20B of the Act is that the tenant should not be faced with a bill for expenditure, of which he or she was not sufficiently warned to set aside provision. It is not directed at preventing the lessor from recovering any expenditure on matters, and to the extent, of which there was adequate prior notice."

That explanation is consistent with paragraph 7.3.22 of the 1985 Report of the Committee of Inquiry on the Management of Privately Owned Blocks of Flats (the "Nugee Committee") whose recommendation of a time limit on the recovery of service charges of which prior warning had not been given was implemented (in part) by the introduction of section 20B (the Committee's suggestion that the Court should have a power to dispense with the time limit if satisfied that the landlord had acted reasonably was not adopted).

34. Mr Bates submitted that the section should not be allowed to become a trap for the unwary or unfortunate landlord, and suggested that, by introducing the requirement that a demand for the purpose of section 20B(1) had to be a contractually valid demand, the law had taken a wrong turn in *Brent v Shulem B.* He described the more recent decision of the Court of Appeal in *Skelton v DBS Homes (Kings Hill) Ltd* [2017] EWCA Civ 1139 as a "complicating factor". Unlike *Brent v Shulem B, Skelton* binds this Tribunal, and Mr Bates realistically did not press his submission that it should be distinguished. He therefore acknowledged that his appeal on issue 2 ought to be dismissed and that he should be left to pursue it at higher levels.

35. *Brent v Shulem B* concerned an attempt by a local authority landlord to recover through a service charge the cost of extensive works which it had carried out to five blocks of flats, fifteen of which were let on separate long leases to the respondent. There had been a delay in calculating the final cost of works but the landlord issued a demand for payment based on the estimated cost which had been provided to lessees as part of the statutory consultation which had preceded the work. The landlord warned lessees that a further demand would be made once the final cost was known and that their eventual liability might be greater than the original estimate. By the time the final liability of each tenant was calculated and the correct sum demanded, more than 18 months had passed since the costs were incurred. The lessee applied to strike out the landlord's claim to recover the cost of the work, but was refused by the Judge in the County Court who considered that the initial letter demanding the estimated amount, though it was not a demand for the purpose of section 20B(1), was a sufficient written notification for the purpose of section 20B(2) and was enough to stop time running against the landlord's claim.

36. Morgan J allowed the lessee's appeal and struck out the landlord's claim to recover the cost of the works. The landlord's principal case was that the initial letter was a sufficient demand for the purpose of section 20B(1). Morgan J first considered whether the letter was a valid contractual demand conforming to the terms of the lease; he concluded that it was not, because it did not purport to demand the lessee's share of the costs incurred by the landlord, but instead demanded a contribution towards the estimated costs, which was not what the

lease provided for (paragraph [51]-[52]). He then considered whether the same letter was "a demand for payment of the service charge" for the purpose of section 20B(1) of the 1985 Act. Having referred to the statutory definition of service charge in section 18(1), 1985 Act, as an amount payable by a tenant for services, the learned Judge said this at paragraph [53]:

> "The reference to a demand in section 20B(1) presupposes that there had been a valid demand for payment of the service charge under the relevant contractual provisions. In this case, I have held that the letter of 23 February 2006 was not a valid demand for service charge under clause 2(6) of the leases. It follows that it was not "a demand for payment of the service charge" within section 20B(1)."

No other explanation of this interpretation or consideration of alternative approaches was given in *Brent v Shulem B* and there is no reference in the decision to any contrary argument having been suggested.

37. Mr Bates submitted that Morgan J's interpretation of section 20B(1) was both unexplained and wrong. The interpolation of a condition of contractual validity was not required by the wording of the statute and was inconsistent with the policy objectives of the section. It turned section 20B into a procedural obstacle course for landlords, rather than a protection for lessees, and could lead to injustice in cases like the present, where a fatal error in a demand only becomes apparent years after the demand was made.

38. I have some sympathy with Mr Bates' submission. The approach to section 20B taken in *Brent v Shulem B* might be described as the more expansive of the two available. It allows full effect to be given to both parts of the section, but goes further than the apparent policy requires and is liable to produce injustice in cases such as this. By treating the period in section 20B(1) as ending only on the making of a valid contractual demand for payment the decision creates an 18 month limitation period for the making of such demands, a much shorter limitation period than would otherwise apply to contractual payment obligations. That could have been a legitimate policy objective but it is not the objective suggested by the Nugee Committee; section 20B(2) also shows that there was no intention to introduce a bright line limitation period.

39. Applying *Brent v Shulem B*, time will continue to run against a landlord who makes a comprehensive demand for a sum which is otherwise due but who fails to comply with some essential contractual condition of a valid demand (such as certification by the landlord's agent, as in *Finchbourne Ltd v Rodrigues* [1976] 3 All E.R. 581). If the required contractual procedure is not then completed within 18 months of the cost being incurred the right to recover the tenant's contribution will be lost, notwithstanding the tenant having had full notice of the sum claimed. The position would appear to be different, however, if the essential pre-condition is introduced by statute, such as the requirement in section 21B, 1985 Act, that a demand for the payment of a service charge must be accompanied by a summary of tenant's rights and obligations; until the required information is provided the tenant may withhold payment, but the time limit in section 20B(1) does not continue to run. In *Johnson v County Bideford Ltd* [2012] UKUT 457 (LC) this Tribunal (George Bartlett QC, President) distinguished *Brent v Shulem B* on the grounds that the effect of a failure to provide the required statutory information was only suspensory (see section 21B(2)). *Brent v Shulem B*

suggests the same would not be true if the missing information was required by a term of the lease. That difference in the application of section 20B(1) to demands rendered ineffective by non-compliance with statutory and contractual pre-conditions is difficult to explain by reference to the language or apparent statutory purpose of section 20B.

40. A more forgiving interpretation of section 20B(1), which might be thought to be consistent with the statutory purpose, would treat any demand for payment as sufficient to stop time running in relation to the sum demanded. One possible objection to that approach might be that it would reduce the scope of section 20B(2), but not to the point where it ceased to have any meaningful application. It is not obvious why, as a matter of policy, notifying the tenant of the total costs incurred and warning that a contribution towards those costs will be required in due course should be sufficient to disapply the time limit for making a demand altogether, yet demanding the precise sum which the tenant is due to contribute (without mentioning the total sum) should only have that effect if the demand also complies with any essential contractual conditions of liability.

41. Nevertheless, the decision of the Court of Appeal in *Skelton* puts the proper interpretation of section 20B(1) beyond doubt in this Tribunal. Only the tenant relying on section 20B was professionally represented in *Skelton* (the landlord being in liquidation), but the attention of the Court was drawn both to *Brent v Shulem B* and to *Johnson v County Bideford.* Arden LJ, with whom David Richards LJ agreed, approved Morgan J's interpretation of section 20B(1) without commenting on, or supplementing, his reasoning. Despite the fact that payment of the Switch2 charge was demanded as soon as the cost was incurred, WIQR is therefore prevented by section 20B(1) from recovering the charge because it was notified to ETAL as part of the utility charge and not in compliance with the contractual machinery for demanding service charges.

42. For these reasons I dismiss WIQR's appeal against the FTT's decision on issue 2.

Issue 3: What unit rate is WIQR entitled to charge for direct electricity supplied to ETAL?

43. In its decision on the 2016 appeal the Tribunal ruled that a demand for payment based on an estimate of direct electricity consumed in an apartment was capable of being a valid demand. The use of estimated consumption as the basis of charging was objected to in principle by ETAL and was said to be prohibited by the terms of the lease. That argument was not accepted (2016 appeal, paragraphs [49]-[81]).

44. At paragraph [90] of the decision on the 2016 appeal the Tribunal noted that any charge based on estimated consumption would be subject to the maximum resale price imposed by guidance issued by OFGEM (which has statutory force by virtue of section 44, Electricity Act 1989). The effect of that guidance is that the unit rate payable by ETAL may not exceed the rate paid by the reseller, WIQR. The Tribunal directed that, if an appropriate rate could not be agreed the application should be restored for further consideration by the FTT. That is what eventually happened.

45. A relatively straightforward disagreement between the experts about the most appropriate way of calculating a unit rate for electricity consumed by leaseholders in their apartments

has been unnecessarily complicated by the use of tendentious and unhelpful shorthand. In particular the parties framed the issue over the appropriate unit rate for electricity consumed as as being whether WIQR was entitled to charge ETAL for "lost energy". The answer to that question is obviously no; the leases require ETAL to pay for electricity and other utilities "consumed within the Demised Premises". Analysing the problem in terms of a liability to contribute to anything else is likely to confuse and should be avoided. There was no dispute about the quantity of electricity which had been consumed in each apartment, the issue was over the rate which should be applied to that quantity. Different tariffs applied to electricity consumed during the day and at night, but the apartment meters do not record consumption by reference to time, hence a judgment needed to be applied to determine an appropriate unit rate.

46. ETAL's case was that the unit rate calculated by Switch2 was too high. The FTT agreed and concluded that the "blended rate" suggested by ETAL's expert, Mr Lowndes, should be preferred to the approach of Mr Hamilton, WIQR's expert, which relied on apportioning the total cost of electricity recorded as having been consumed in the whole building. The FTT considered that the individual flat meters, rather than the utility supplier's "fiscal meters", provided the most reliable starting point for calculating a unit rate.

47. The FTT was entitled to come to that conclusion on the evidence. Mr Hamilton's approach was driven by the objective of ensuring full recovery for WIQR of the cost it incurred for electricity supplied to the building as a whole. That led him to work from the total quantity of electricity supplied (which was accurately measured using the fiscal meters), to apportion the total cost of that supply between domestic and non-domestic users, and then to apportion the total consumption attributed to domestic users between the individual apartments. In contrast, Mr Lowndes worked from the consumption recorded by the individual apartment meters, most of which were found by the FTT to be reliable (in fact, Mr Bates acknowledged, only apartment 27.10 had a faulty meter).

48. The exercise of apportionment undertaken by Mr Hamilton had the consequence that reliable consumption figures for individual apartments were overlooked in favour of inaccurate estimates. Mr Hamilton's criticism of Mr Lowndes' "blended rate" was that it failed to secure full recovery for WIQR of energy costs for the building as a whole, but the contractual focus ought to be on an assessment of the cost of electricity "consumed within the Demised Premises". Where a meter accurately measures the consumption of an individual apartment, there should be no need to use any other data to estimate consumption, nor any reason to calculate the unit rate for direct electricity by reference to consumption in the building as a whole.

49. Mr Bates presented WIQR's appeal on this issue on the basis that an estimate of consumption was permitted by the OFGEM guidance. But that is not the point. The method used by Switch 2 is not faithful to the contractual object and is inaccurate for the reasons identified by Mr Lowndes in his July 2018 report which I have summarised above. In his reply to Ms Mattsson's submissions Mr Bates recognised that the approach taken by Switch 2 was not consistent either with the charging provisions in the leases or the guidance provided by OFGEM. I agree, and I dismiss the appeal on issue 3.

50. The unit rate applicable to electricity supplied to ETAL's apartments, which varied over time, is therefore the "blended" rate shown in column J of Mr Lowndes' report appended to ETAL's amended statement of case to the FTT dated 25 July 2018.

51. There is a final loose end, which resulted in a separate ground of appeal by ETAL. Mr Lowndes calculated that the charges invoiced by or on behalf of WIQR between 31 May 2008 and 31 October 2014 exceeded the sum calculated using the blended rate by £70,201.86. The FTT made no such finding but invited the parties to agree the amount of the resulting overcharge. Ms Mattsson (in a disappointing echo of grounds of appeal which failed before this Tribunal in the 2016 appeal) complained that the FTT's "unwillingness" to quantify the relevant sum was a serious procedural irregularity. It was no such thing.

52. Eleven separate allegations of overcharging were raised by ETAL in its statement of case, two of which overlapped. The experts failed to comply with directions given by the FTT before the 2018 hearing that they should agree the alternative outcomes applying their different methods of calculation. The FTT was perfectly entitled to require professionally represented parties to agree the arithmetical consequences of its decisions on questions of principle. In the event it was acknowledged by ETAL that the figure of £70,201.86 included part of a sum of £45,013.14 which the FTT found to be irrecoverable by reason of section 20B, 1985 Act (a figure in respect of which there was no appeal). It was not entitled to credit for both sums. The parties agreed that the overlap between the two issues was worth £32,243.58. I therefore determine that the credit to which ETAL is entitled as a result of being charged an inappropriately high rate for direct electricity is £37,958.28.

53. Mr Bates submitted that there may be other issues concerning quantification of the blended rate which WIQR wished to raise. It is not entitled to raise new issues at this late stage. As Ms Mattsson pointed out, the parties had been directed to provide their calculations and Mr Lowndes had set out ETAL's contentions on each issue. WIQR had had the opportunity to challenge both the principle of his blended rate and the calculations giving effect to his approach. They chose not to do so before the FTT and they cannot do so now.

54. I therefore dismiss ETAL's appeal on the suggested procedural irregularity.

Issue 4: Do the apartment leases allow WIQR to recover costs incurred in previous tribunal proceedings through the service charge?

55. In its May 2019 decision the FTT concluded that the terms of ETAL's leases did not allow WIQR to collect contributions towards the costs incurred by WIQR in previous tribunal proceedings as service charges. The FTT recorded that service charge demands issued in 2018 included sums totalling a little under £500,000 in respect of legal fees incurred over five years. The FTT was not asked to consider the detail of those costs, but only the issue of construction of provisions of ETAL's leases under which it was said by WIQR that its legal costs were recoverable.

56. Mr Bates argued that the costs were recoverable under each of three different provisions of the leases. The first of these was clause 3.10.1 which provides that ETAL must pay to WIQR as Lessor:

> "… on demand all proper costs charges and expenses (including legal costs and surveyors' fees) which may be incurred by the Lessor under or in contemplation of any proceedings under Sections 146 or 147 of the Law of Property Act 1925… and arising out of any default on the part of the Lessee notwithstanding that forfeiture is avoided otherwise than by relief granted by the Court"

57. This clause is not one of the provisions of the lease concerned with service charges. It provides the Lessor with a right to recover the whole of its proper legal costs from an individual leaseholder, rather than recouping those costs by proportionate contributions from all leaseholders. The FTT had jurisdiction to consider the recoverability of such costs under paragraph 5 of Schedule 11, Commonhold and Leasehold Reform Act 2002 which concerns the payability of administration charges. An administration charge, as defined in paragraph 1(1) of the same Schedule, includes an amount payable by a tenant directly or indirectly in respect of a failure by the tenant to make a payment to the landlord, or in connection with a breach of a covenant or condition of the lease.

58. To be recoverable under this provision legal costs incurred by the Lessor must satisfy two conditions. First, they must have been incurred under or in contemplation of any proceedings under Sections 146 or 147 of the Law of Property Act 1925; secondly, they must arise out of some default on the part of the leaseholder.

59. The FTT found that the legal costs have not been incurred in contemplation of a proceedings under sections 146 or 147. At paragraph 42 it gave as a reason for rejecting WIQR's reliance on clause 3.10.1 that "…at no point has the Respondent ever evinced an intention to forfeit or to take proceedings for forfeiture." It considered that such an intention was an essential pre-requisite to reliance on the clause.

60. WIQR did not challenge the FTT's finding of fact. Mr Bates argued instead that it was irrelevant. It was enough for WIQR to show that the costs of the tribunal proceedings had had to be incurred before it would be in a position to forfeit the lease for non-payment of utilities charges. Service of a section 146 notice was a necessary step before WIQR could bring forfeiture proceedings to enforce its entitlement to be paid the utilities charges. Section 81, Housing Act 1996 made it a condition precedent to the service of a section 146 notice that a determination of the amount payable must first be obtained from the FTT. That was sufficient to bring the costs within the first requirement of clause 3.10.1. The FTT was wrong to attach any significance to whether or not there had been an intention to forfeit the lease. The clause did not refer to any such intention. The only requirement was that the costs be incurred "under" or "in contemplation of any proceedings" under section 146.

61. Mr Bates supported his argument by reference to the decision of the Court of Appeal in *Freeholders of 69 Marina v Oram* [2011] EWCA Civ 1258 which concerned a similarly worded clause. A freeholder sought to recover the cost of works of repair through a service charge but its tenants refused to pay. The freeholder began proceedings in the leasehold valuation tribunal to quantify the sum payable and to obtain dispensation from statutory consultation requirements. The freeholder then commenced proceedings in the County Court to recover the service charge and its costs of the tribunal proceedings. While those proceedings were in progress the freeholder served notice under section 146. The Court of

Appeal held that the freeholder had been prevented by section 81, Housing Act 1996 from recovering the service charge by forfeiture proceedings without first obtaining a determination by the tribunal of the amount which was payable. At paragraph [21] Sir Andrew Morritt C, giving the only judgment, specifically agreed with the decision of the County Court Judge that it was irrelevant that the section 146 notice had not yet been served because the District Judge had decided that they were incidental to or in contemplation of the preparation and service of such a notice.

62. In *Barrett v Robinson* [2014] UKUT 322 (LC), I held that a clause permitting the recovery of costs incurred in, or in contemplation of, proceedings under section 146 could only be relied upon if, at the time the expenditure was incurred, the landlord had in fact contemplated forfeiture proceedings (paragraph [52]). The FTT relied on that authority, but Mr Bates submitted it should not have done so because *Barrett* was inconsistent with *69 Marina* and was wrongly decided.

63. In *69 Marina* at paragraph [18] Sir Andrew Morritt C said that the enforcement of the liability of the tenants to contribute towards the cost of repairs "required first the determination of the tribunal and second a section 146 notice". At paragraph [21] he said that the exact nature of the tenant's liability for costs incurred in contemplation of proceedings under section 146 had not been spelled out by the Judges below, but he considered there was no doubt of their conclusions with which he agreed. I do not read that concise reasoning as obviating the requirement that at least the service of a notice under section 146 must actually have been contemplated before costs can be brought within the scope of such a clause.

64. For these reasons I agree with the FTT that the costs incurred in the tribunal proceedings do not fall within the first limb of clause 3.10.1. On that basis it is not necessary to consider the other reasons given by the FTT why the clause could not be relied on (which included that any right to forfeit had been waived, a proposition challenged by Mr Bates on grounds that included that *Stemp v 6 Ladbroke Gardens Management Ltd* [2018] UKUT 375 (LC) was wrongly decided by this Tribunal).

65. I will explain my conclusions on the second limb of clause 3.10.1 on which the FTT did not reach a firm conclusion, because they overlap completely with my views on the second contractual provision on which Mr Bates relied, namely clause 3.10.5. This clause provides for the payment of:

> "… all proper costs charges and expenses (including legal costs and surveyors' fees) which may be incurred by the Lessor as a result of any default by the Lessee in performing or observing the Lessee's obligations in this Underlease."

66. The second limb of clause 3.10.1 and clause 3.10.5 require that the costs must have arisen out of or been incurred as a result of some default on the part of the leaseholder. I do not consider that is an accurate characterisation of these proceedings. As Ms Mattsson pointed out, the proceedings were commenced by ETAL in an attempt to establish the extent of overcharging by WIQR, which denied that its charges for utilities were excessive. It has now clearly been established that ETAL was right, and that the sums demanded by WIQR

were excessive, although not to the extent that ETAL maintained. Only when the facts had been thoroughly investigated, and the complex provisions of the lease pored over to distraction, could the balance of entitlement and liability finally be struck. There is no suggestion that ETAL has ever been unwilling or unable to pay what it properly owes, once that has finally been quantified.

67. Mr Bates submitted that on any view a net payment would be made by ETAL to WIQR, because ETAL had not made payments on account after it stopped making payments. It should be remembered however that billing was erratic, at different times invoices have been withdrawn, and sums were demanded by WIQR without following the correct contractual procedure. It would be a complex matter to determine at what point the net balance between the parties tipped over in WIQR's favour, and to what extent costs were incurred before and after that tipping point. That exercise was not undertaken by the FTT and, in my judgment, it is not required because whatever the balance between the parties, the costs incurred by WIQR did not arise out of a default on the part of ETAL.

68. The final contractual provision on which Mr Bates relied was contained in Schedule 4 of the lease, which comprises the provisions for calculation and payment of the service charge. The leaseholder is required to pay a percentage of the Annual Expenditure which includes two items on which Mr Bates relied:

> "all costs expenses and outgoings whatever properly and reasonably incurred by the Lessor during that Financial Year in or incidental to providing all or any of the Services"
>
> and
>
> "all costs properly and reasonably incurred by the Lessor during that Financial Year in relation to the Additional Items"

69. The "Services" are defined in Part C of the Schedule. They relate to services to the common parts of the Building and do not include the provision of utilities, which are dealt with outside the service charge by the separate provisions of clause 3.2.2 of the lease. Even if the provision of utilities had been part of the Services, I would not have accepted Mr Bates' submission that the litigation costs were "incidental" to "providing" utilities.

70. The "Additional Items" are specified in Part D of the Schedule. They include a number of general provisions relating to the management of the residential floors of the building including "reasonable and proper fees and disbursements payable by the Lessor to procure the proper management of the residential premises as contemplated by the provisions of this underlease, the provision of services, the calculation of service charges and the provision of service charge accounts". In my judgment, although the charges of Switch2 for calculating utilities charges would fall within this formulation, the cost of litigating about those charges does not. The language is directed towards the provision of management services, not litigation.

71. Mr Bates submitted that litigation of this complexity and going to such fundamental issues about the management of the building and meaning of the lease was itself an aspect of management, and he referred to *Reston v Hudson* [1990] 2 E.G.L.R. 51 as an example of a case in which litigation to establish the scope of repairing covenants in a lease had been held to fall within the scope of "management".

72. I do not accept Mr Bates' submission. The professional costs recoverable as Additional Items do not include the costs of litigating to establish the meaning of the lease. On the contrary, they cover only costs incurred in procuring "proper management … as contemplated by the provisions of this underlease". This presupposes that the meaning of the lease is already clear enough not to require expensive elucidation. The proper management referred to must be taken already to have been within the joint contemplation of the parties because they understood the meaning of their bargain. The language does not seem to me to be apt to extend to the costs of advice or litigation over the meaning of the lease.

73. Mr Bates also submitted that it was premature for the FTT to determine that no part of the costs of the litigation could be Additional Items. It should have waited until specific items of expenditure could be scrutinised. In my judgment it is too late to suggest that approach. The FTT was asked to determine an agreed preliminary issue, which is what it did. If WIQR had considered that the matter should be approached on a different basis it should not have consented to the determination of a question of principle.

74. For these reasons I dismiss WIQR's appeal on issue 4.

Disposal

75. I have allowed WIQR's appeal on the meaning of the agreement of 31 August 2016 and dismissed ETAL's cross appeal. I have dismissed WIQR's appeal on the effect of section 20B(1), Landlord and Tenant Act 1985 on the unit rate and on the recoverability of its litigation costs. I have dismissed ETAL's appeal on the suggested procedural irregularity.

76. To reflect the findings of the FTT, and the conclusions of this appeal, the total sum to be deducted from the invoiced (but previously unpaid) utilities charges of £212,604.68 is £166,084.88 leaving a total sum payable by ETAL of £46,519.80.

Martin Rodger QC,

Deputy Chamber President

26 May 2020