UPPER TRIBUNAL (LANDS CHAMBER)

UT Neutral citation number: [2014] UKUT 0144 (LC)
UTLC Case Number: LRX/151/2011

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT – service charges – lengthy delay by utility provider in delivering invoices to new landlord – invoices delivered to previous landlord - when costs "incurred" – section 20B Landlord and Tenant Act 1985 – service charge certificate conclusive of the amount of the service charge – whether landlord entitled to increase service charge for years previously certified – appeal allowed

IN THE MATTER OF AN APPEAL AGAINST A DECISION OF THE LEASEHOLD VALUATION TRIBUNAL FOR THE LONDON RENT ASSESSMENT PANEL

BETWEEN

GROUND RENTS (REGISPORT) LIMITED **Appellant**

(1) MR HAMISH DOWLEN
(2) MR ANDREW GREENE
(3) MR WILLIAM ROSE **Respondents**

Re: Vista House, Independence House and Prospect House, Chapter Way, Merton, London SW19 2RY

Before: Martin Rodger QC, Deputy President

Sitting at: 43-45 Bedford Square, London WC1A 3AS
on
26 March 2014

Stephen Murch, instructed by BTMK, solicitors, for the Appellant
The Respondents in person

The following cases are referred to in this decision:

Gilje v Charlegrove Securities Limited [2004] 1 All ER 91
Burr v OM Property Management Limited [2013] 1 WLR 3071.

DECISION

Introduction

1. This appeal concerns a large bill for the supply of water to three blocks of flats, known collectively as Abbey Mills and individually as Prospect House, Vista House and Independence House at Chapter Way, Merton, London SW19. The bill, which exceeds £65,000, relates to water supplied to the three blocks between June 2005 and April 2011. It built up because for many years Thames Water Utilities Ltd delivered invoices for water consumed at two of the buildings to the developer originally responsible for their construction while the appellant, which acquired the freehold of Abbey Mills on 1 October 2006, received invoices only for the third building. The appellant's managing agents, in the mistaken belief that the invoices they received related to all three buildings, apportioned those sums and collected them through the service charges payable by all 164 leaseholders of flats at Abbey Mills. The developer did not pay the invoices for the other two buildings delivered to it, nor did it pass them on to the appellant. Both the appellant and the individual leaseholders believed that all of the sums due from them in respect of water had been paid. The mistake was eventually discovered in 2010 and since then Thames Water has sought to recover the arrears from the developer and from the appellant, which in its turn has sought to pass them on in full to its 164 leaseholders.

2. By a decision given on 6 September 2011 the Leasehold Valuation Tribunal for the London Rent Assessment Panel ("the LVT") decided that the leaseholders were *not* liable to contribute to the historic water bill through their service charge to the extent that the water invoices had first been raised before 30 January 2009. The LVT reached that decision because the appellant had first included the arrears of water charges in the service charges demanded in June 2010, and in reliance on section 20B(1) of the Landlord and Tenant Act 1985 ("the 1985 Act") which provides as follows:

> "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 sub-section (2)), the tenant shall not be liable to pay so much of the service charge as reflects the costs so incurred."

3. With the permission of the Tribunal granted on 31 July 2013 the appellant now appeals against the decision of the LVT on the grounds that the disputed water charges were only "incurred" by it when it was first sent an invoice for those charges by Thames Water in May 2010. The fact that invoices for the same charges had been sent to the appellant's predecessor is, the appellant submits, of no significance when applying the 18 month limitation period provided for by section 20B of the 1985 Act.

4. The appellant was represented before me by Mr Stephen Murch of counsel, while the respondents appeared in person. The respondents did not formally represent the remaining leaseholders who had been party to the proceedings before the LVT and who had not responded to the appeal, but in the course of the proceedings they made submissions which apply equally to all of

those who have been asked to pay the water charges. I am grateful to all parties and counsel for their assistance.

The facts

5. The LVT undertook a thorough investigation of the relevant facts, which were not contested by either side on the appeal. I therefore take the following summary of the relevant facts substantially from the LVT's decision supplemented by the documents prepared for the appeal.

6. Abbey Mills is a modern development of purpose built flats comprising Vista House (69 flats), Prospect House (55 flats) and Independence House (40 flats) making 164 flats in total. The development also includes an undercroft car park and external parking spaces. Abbey Mills was built by Countryside Properties (UK) Limited ("CPL"), the then freeholder. The earliest of the flats to be completed was occupied in about July 2005 and the last was completed and sold in September 2006. The freehold interest in Abbey Mills was transferred by CPL to the appellant in August 2006 and when the transfer was subsequently registered on 1 October 2006 CPL became landlord of the 164 flats.

7. On 25 February 2004 Countryside Properties (Merton Abbey Mills) Limited ("Countryside"), an associated company of CPL, had entered into a "Common Billing Agreement" with Thames Water for a bulk metered water supply to be provided to Abbey Mills. The effect of the Common Billing Agreement was that Countryside (referred to in the agreement as "the consumer") was responsible to Thames Water for the payment of all charges for water and sewage services supplied to Abbey Mills. The Common Billing Agreement provided that the consumer was not entitled to assign the benefit of the agreement without first obtaining the written consent of Thames Water.

8. Thames Water installed three meters to record the consumption of water by the occupants of each of the three blocks and water first began to be supplied in June 2005.

9. When CPL transferred its interest in Abbey Mills to the appellant it appears not to have assigned the benefit of the Common Billing Agreement, nor to have asked Thames Water for its consent to such an assignment.

10. The leases of the flats at Abbey Mills are in common form and provide for the leaseholder to pay an agreed proportion of the total costs of certain services described in the fifth and sixth schedules which the landlord covenants to provide. The aggregate of those costs is referred to as "the Service Charge" and the leaseholder's contribution is "the Proportion" which is made payable by clause 4.3 by half-yearly instalments in advance in accordance with the terms of the fourth schedule to the lease. The services listed in the fifth and sixth schedules include the supply of water.

11. In each lease the demised flat is referred to as "the Property". The provisions of the fourth schedule relating to the computation of the service charge provide, at paragraph 1, that the Service Charge is to be "a sum equal to the total cost of the aggregate Service Charge for the whole of the

Block for each Service Charge Year (computed in accordance with this Schedule) and the sum due in respect of the Property shall be the Proportion." Thus each leaseholder is responsible for paying the Proportion appropriate to his or her flat of the cost of providing the services.

12. Paragraph 2 of the fourth schedule requires that the Service Charge for each year is to be computed in accordance with paragraph 3 of that schedule not later than the beginning of June immediately preceding the commencement of that Service Charge Year.

13. Paragraph 3 provides for the Service Charge to consist of a sum comprising the aggregate of four components, including "the expenditure estimated as likely to be incurred in the Service Charge Year" by the landlord for the purposes mentioned in the fifth and sixth schedule, and an amount to cover the landlord's management expenses. The provision relating to management expenses in paragraph 3.3 of the fourth schedule may be relevant; it provides that the Service Charge is to include:

> "A reasonable sum to remunerate the Lessor for its administrative and management expenses in respect of the Estate (including a profit element) such sum if challenged by any lessee to be referred for determination by an independent Chartered Accountant … acting as an expert."

14. After the end of the Service Charge Year on 30 June a "Service Charge Adjustment" falls to be made, either in the form of a credit or an additional payment due on demand from the leaseholder. Paragraph 4 of the fourth schedule provides for the calculation of that Adjustment as follows:

> "After the end of each Service Charge Year the Lessor shall determine the Service Charge Adjustment calculated as set out in the following paragraph:
>
> > 4.1 the Service Charge Adjustment shall be the amount (if any) by which the respective estimates under paragraphs 3.1 of this Schedule shall have exceeded or fallen short of the actual expenditure in the Service Charge Year.
> >
> > 4.2 the Lessee shall be allowed or shall on demand pay as the case may be the proportion appropriate to the Property the Proportion of the "Service Charge Adjustment."

It is apparent that something has gone wrong in paragraph 4.2, but it is nonetheless clear that that paragraph creates a liability on the part of the leaseholder (or an entitlement to a credit) equal to the Proportion of the Service Charge Adjustment appropriate to the Property.

15. Paragraph 5 of the fourth schedule is also significant, and provides as follows:

> "Subject to the provisions of paragraph 3.3 of this Schedule a certificate signed by the Lessor and purporting to show the amount of the Service Charge or the amount of the Service Charge Adjustment for any Service Charge Year shall be conclusive of such amount save as regards manifest errors."

16. When it acquired its freehold interest in Abbey Mills the appellant appointed Johnson Cooper Limited as its managing agent. That firm went into administration in 2007 and was replaced by R M G Limited which was in its own turn replaced as managing agent with effect from 1 October 2008 by Countrywide Estate Management Limited ("Countrywide").

17. Between June 2005 and about March or April 2010 the successive managing agents failed to appreciate that each of the three blocks had its own meter to record the consumption of water in that block, or, if they appreciate that fact, they failed to appreciate that no bills were being paid for the water consumed in Prospect House and Independence House. From August 2006 until May 2010 the only bills received by the appellant's managing agents were in respect of the supply of water to Vista House, which was clearly identified in the "property address" line of successive invoices. The managing agents incorrectly assumed that the invoices were for the supply of water to all three blocks at Abbey Mills, and divided the bills for Vista House amongst all of the leaseholders on the estate. In the annual service charge accounts for Abbey Mills the expenditure on each of the three blocks was shown separately, with a figure for "water & sewage" being provided for each block.

18. The bills for water supplied to Prospect House and Independence House between June 2005 and May 2010 were left unpaid and substantial arrears accumulated. Thames Water may have sent reminders and demands for payment to CPL in accordance with the Common Billing Agreement but, if it did, there is no evidence that they were forwarded to the appellant or its agents. The appellant has not been provided by Thames Water with copies of invoices addressed over the years to CPL. The precise amount of the arrears is therefore unclear. Thames Water has threatened proceedings against CPL to recover £65,299.06 claimed to be due up until 20 April 2011. Larger sums of up to £79,167.00 have also been mentioned by Thames Water to the appellant's agents.

19. The existence of a problem came to light in April 2010 when Mr Daniel Harrison of the appellant's agents, Countrywide, inspected the blocks and noticed for the first time that each had its own separate water meter. On reviewing the invoices received from Thames Water he noticed for the first time that they referred only to Vista House. Thereafter Countrywide received demands from Thames Water for the payment of outstanding arrears for the supply of water to Prospect House and Independence House. The first demand addressed to the appellant for Prospect House was dated 12 April 2010 and claimed £18,428.62 for the period 30 September 2008 to 6 April 2010; the first for Independence House was dated 1 June 2010 and claimed £32,087.16 for the period 1 October 2006 to 4 May 2010. Each of the invoices was marked with the statement "this is your first bill for this property".

20. On 2 June 2010 Countrywide informed the leaseholders of the estimated service charge for the forthcoming service charge year and included in it a provision to meet the arrears of water charges for the preceding period of 18 months. In meetings with leaseholders and letters of explanation sent on 18 October and 16 December 2010 Countrywide asserted the appellant's entitlement to recover the whole of the arrears. Its efforts to negotiate an acceptable reduction eventually came to nothing. Thames Water was willing to enter into a repayment plan spreading the cost over 24 months, but after initially making a number of payments the appellant ceased complying with the payment plan until the issue of the leaseholder's liability to contribute is resolved.

21. On 26 January 2011 Thames Water informed the leaseholders that with effect from 14 January 2011 it would no longer supply water to Abbey Mills on a bulk basis but would charge each leaseholder individually at a significantly higher rate that had previously applied. Faced with demands for higher charges in the future from Thames Water and demands for payment of many years arrears by the appellant, the three respondents applied to the LVT under section 27A of the 1985 Act for a determination of whether the service charges demanded of them were payable and, if so, the amount which was payable. The three original appellants were subsequently joined by the leaseholders of 145 of the remaining flats at Abbey Mills.

The LVT's decision

22. The leaseholders submitted to the LVT that the cost of providing water was "incurred" each time a six-monthly bill was submitted by Thames Water to CPL or its agent for payment from June 2005 onwards. Accordingly, they argued, section 20B of the 1985 Act limited the leaseholders' liability to contribute to charges which had been incurred more than 18 months before the first demand for payment by the appellant's agent, Countryside, in the estimated Service Charge for the year from 30 June 2010. The LVT came to its decision on that issue in paragraphs 20-22, where it said this:

> "20. We are satisfied that the tenants are entitled to the benefit of a limitation period of 18 months prior to the demand of them for payment of the arrears on or about 30 June 2010. We are satisfied that, as a matter law, costs are "incurred" within the meaning of section 20B of the Act when the landlord becomes liable to pay them, which is normally, and is in this case, when the bill in question is first presented for payment to the landlord for the time being. It seems to us that nothing can deprive the tenants of the benefit of that limitation period (in the absence of proper notification under section 20B(2)) which is there for their protection and rightly so, and that no decision by a freeholder to sell its interest can deprive them of that protection. As Etherton J as he then was, said in *Gilje v Charlegrove Securities Limited* [2004] 1 All ER91 at paragraph 27, "the policy behind section 20B of the Act is that the tenants should not be faced with a bill for expenditure of which he or she was not sufficiently warned to set aside provision." We consider that this policy is relevant to these arrears.
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> 21. The tenants do not, in our view, have to show that [the appellant] the current landlord, rather than CPL, the previous landlord, is at fault in failing to draw the arrears to their attention and demand a service charge in respect of them, but, as it happens, they can show that both of them, by their managing agents were at fault. [The LVT then analysed the faults of the various managing agents and concluded that each of them should have realised that "something was amiss"].
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> 22. In these circumstances it is clear that, whether or not [the appellant] is ultimately held liable to pay the arrears for which CPL is being pursued by Thames, the tenants ought not to be prejudice, and that they are not liable for any water charges incurred, which is to say first billed prior to 30 January 2009. The tenants have conceded that they are liable for water charges first build between 30 January 2009 and January 2011, when Thames decided to terminate the Common Billing Agreement and to bill them direct. The bills for the three blocks are pooled for service charge purposes and they are therefore each liable to pay the percentage of the total

water charges for the eighteen month period prior to 30 June 2010, less the amounts they have already paid."

The appellant's submissions

23. The appellant's case on the facts, which was accepted by the LVT and which I also accept, is that it only received regular invoices for water charges in respect of Vista House, and none in respect of Prospect House or Independence House until April and June 2010 respectively. On that basis the appellant had not incurred a cost, for the purpose of section 20B, until April 2010 at the earliest and should not be prevented from recovering the whole of the amount it is eventually liable to pay.

24. Mr Murch submitted that the LVT had stated the law correctly in paragraph 20 of its decision when it said that "costs are "incurred" within the meaning of section 20B of the Act when the landlord becomes liable to pay them, which is normally, and is in this case, when the bill in question is first presented for payment *to the landlord for the time being.*" He relied on the decision of the Court of Appeal in *Burr v OM Property Management Limited* [2013] 1 WLR 3071 as confirming that that was the correct approach.

25. The facts of *Burr* have some similarities to this case. A development had a swimming pool heated by gas. For seven years the landlord had been incorrectly invoiced for gas by the wrong supplier but the invoices which it had received and had paid were for less than the amount due to the correct supplier. Eventually the correct supplier demanded payment for the gas supplied in the previous seven years and the landlord sought to recover from its residential leaseholders the shortfall between the sums it had already paid and the greater sums which it now accepted it was liable to pay. The leaseholders relied on section 20B of the 1985 Act and asserted that the costs for the gas supplied by the true supplier had been "incurred" when the gas was provided and not when an invoice for the supply of that gas was received or paid. The Court of Appeal (upholding the decision of the Tribunal (His Honour Judge Mole QC)) held that as a matter of ordinary language a liability had to crystallise before it became a cost; that distinction between a liability and a cost was reflected in section 20B. The relevant costs were not "incurred" within the meaning of section 20B of the 1985 Act simply on the provision of services or supplies to the landlord or its management company, but only on the presentation of an invoice or other demand for payment or on payment being made.

26. Mr Murch submitted that, despite having correctly stated the effect of section 20B, the LVT had wrongly applied it to the facts of this case. The "landlord for the time being" referred to in paragraph 20 of the LVT's decision was the appellant at all times from 1 October 2006 when it became registered as the proprietor of the freehold interest in Abbey Mills. No invoice in respect of water supplied to Independence House or Prospect House had been presented to the appellant until April 2010. Invoices presented to CPL, the appellant's predecessor as landlord, did not cause a relevant cost to be "incurred" by the purpose of section 20B.

27. The respondents in their written and oral submissions pointed out that the arrears of water charges were an obligation of CPL under its Common Billing Agreement with Thames Water and that no contract existed for the supply of water between the appellant and Thames Water. The

Common Billing Agreement had not been terminated until 2011 and CPL's rights and obligations had never been assigned to the appellant. Thus it was CPL which was liable for the cost of water supplied to Abbey Mills, and not the appellant. Until CPL discharged that liability to Thames Water and brought a claim against the appellant for reimbursement of such charges as it paid, the appellant had itself incurred no relevant costs which it was entitled to pass on to the leaseholders. At the hearing of the appeal there was no clarity regarding the extent of CPL's liability, nor whether the appellant had paid any sums to Thames Water in its own right, nor whether CPL would succeed in passing any sums for which it was eventually found liable to the appellant.

28. The respondents also pointed out that the leaseholders in Independence and Prospect Houses had paid all of the water charges included in their annual service charges since 2005. They had not been warned by the appellant or its agents until 2010 that additional sums may be due from them. Although the leaseholders had had the benefit of the water supplied to the buildings, the sums now claimed from them were very significant (up to £1,133.00 per flat in some cases, although credit was due against this figure for the contributions made towards the cost of water supplied to Vista House). This unanticipated liability was due to the errors or defaults of others, namely their successive landlords and their respective agents.

29. Many of the original leaseholders who had owned the flats between 2005 and 2010 had sold their interests. In many cases the current leaseholders were now being faced with additional charges for water which had not been supplied to them but to their predecessors. Section 20B of the 1985 Act was intended to provide protection for leaseholders against unexpected bills for which they had not been warned to make provision. In the circumstances, the respondents submitted, the decision of the LVT ought to remain undisturbed.

30. In reply to the respondents' submissions Mr Murch explained that Thames Water was thought to rely on the Water Industry Act 1991 as entitling it to recover the water charges from the appellant. A water undertaker has power under section 142(1)(b) to demand and recover charges for the supply of water from any persons to whom the undertaker provides services. By section 144(1)(a) supplies of water provided by a water undertaker are to be treated for all purposes as services provided "to the occupiers for the time being of any premises supplied". Mr Murch understood that Thames Water would contend that the appellant was the "occupier" of the premises, although he was unable to point to any specific provision of the 1991 Act which made that status clear. Section 144(8) distinguishes between owners of premises and their occupiers, but it may be Thames Water's position that, where water is supplied in bulk to a residential building under the management of the owner of the freehold, that owner is the occupier to whom the water is supplied. I was informed that Thames Water has decided to await the outcome of this appeal before deciding on its preferred course of action, and that no proceedings have yet been commenced against either the appellant or CPL. The delay in bringing any claim for water supplied more than six years ago may give rise to a defence of limitation

Discussion

31. Three distinct questions arise on this appeal:

(1) Whether the fourth schedule of the lease permits the appellant to charge leaseholders for water supplied during a Service Charge Year for which accounts have already been finalised, demands issued and payments made in full by the leaseholders;

(2) Whether, assuming such a charge is permitted by the parties' contract, the leaseholders are entitled to rely on section 20B as a defence to their liability to pay part of those charges.

(3) In light of the answers to the previous questions, how much, if anything, is payable by the respondents to the appellants by way of service charges for water supplied.

32. The LVT focused on the second of these questions and it is convenient to take the first and second questions in reverse order. As Mr Murch submitted, in paragraph 20 of its decision the LVT posed the correct legal test for ascertaining when a cost is taken to have been "incurred" for the purpose of section 20B of the 1985 Act. The Court of Appeal confirmed in *Burr* that although a liability to pay for a service, such as the supply of gas or water, may exist when the service is provided, that liability does not give rise to an incurred cost for the purpose of section 20B until it is quantified or crystallised by the presentation of an invoice or the making of a payment.

33. The LVT was therefore plainly correct when it said "costs are "incurred" within the meaning of section 20B of the Act when the landlord becomes liable to pay them, which is normally, and is in this case, when the bill in question is first presented for payment …"; it seems to me that it was also correct when it added the words "… to the landlord for the time being …" to complete its statement of the test it proposed to apply. Section 20B is concerned with "relevant costs" to be taken into account in determining the amount of a service charge and, as section 18(1) of the 1985 Act makes clear, "relevant costs" are costs or estimated costs incurred or to be incurred on behalf of the landlord or a superior landlord. Costs incurred by a former landlord in respect of a period after it ceased to be landlord are not relevant costs, unless they are costs for which the landlord for the time being is also liable in its own right. Where successive landlords are liable for the same costs (as may be the case here, as CPL's liability under the Common Billing Agreement may coexist with a liability (not yet established) on the part of the appellant under the Water Industry Act) it is the liability of the landlord for the time being which is material since only costs incurred by a person in the capacity of landlord may be included in the service charge.

34. As the respondents submitted, the invoices addressed to CPL or its managing agents after 1 October 2006, when it ceased to be the landlord for the time being, were a contractual liability of CPL and gave rise to no liability on the part of the appellant. No claim for payment was addressed by Thames Water to the appellant until April 2010, nor was any claim for an indemnity made by CPL against the appellant whether under the terms of the original contract of sale of Abbey Mills or on restitutionary principles. Section 142 of the Water Industry Act 1991 does not appear to create a liability to pay for water until a demand is received by the occupier. The appellant therefore had no existing liability to make a payment for the water supplied to Prospect House or Independence House at any time until at least April 2010. On the assumption that section 142 of the 1991 Act creates a liability on the appellant to pay sums demanded of it for water supplied to Prospect House and

Independence House, for the purposes of section 20B no relevant cost was incurred by the appellant until it received the first demands for payment in April and June 2010.

35. It is not clear from the LVT's reasoning why it reached the opposite conclusion. It was right to note in paragraph 21 that the leaseholders did not have to show fault on the part of either the appellant or CPL in order to take the benefit of section 20B. Equally, however, the fact that the LVT found fault with both landlords, and their managing agents, was not relevant to the question when the relevant costs had been incurred. It is the policy of the Act to provide protection for leaseholders against claims to recover historic charges of which notice has not been given, but as the Master of the Rolls, Lord Dyson, explained in *Burr* at paragraph 16, the extent of that protection is that the leaseholder is not liable to pay so much of a service charge as reflects costs incurred more than 18 months after an invoice is presented or payment is made by the landlord or management company. It is immaterial, for the purpose of section 20B, whether any party was at fault for the delay in presentation or payment of the invoice.

36. I am therefore satisfied that the LVT reached the wrong conclusion when it applied section 20B to the facts of this case.

37. That still leaves open the first of the two questions identified in paragraph 31 above. On reading the papers for this appeal it seemed to me that paragraph 5 of the fourth schedule to the lease, which makes the landlord's certificate conclusive of the amount of the Service Charge and Service Charge Adjustment for any Service Charge Year (except as regards manifest errors), may be relevant to the leaseholders' argument that, they having paid the sums demanded of them each year, it is not open to the appellant now to demand payment for water supplied, but not billed, in earlier years. I drew the parties' attention to paragraph 5 in advance of the hearing and I received submissions on it.

38. The purpose of paragraph 5 of the fourth schedule is similar in some respects to section 20B. By making the landlord's certificate conclusive of the sums payable by the leaseholders for any Service Charge Year, it provides certainty and protection against historic claims. The certainty which it provides is only partial, because of the exclusion of manifest error and, more importantly, because of the impact of section 19(1) of the 1985 Act, which restricts service charges by reference to a test of reasonableness. A certificate under paragraph 5 of the fourth schedule cannot be conclusive of the question whether a relevant cost taken into account in determining the amount of a service charge was reasonably incurred, or related to services or works of a reasonable standard. An agreement by the tenant of a dwelling (other than a post-dispute arbitration agreement) is rendered void by section 27A(6) of the 1985 Act in so far as it purports to provide for a determination of any question which could be the subject of an application to the first-tier tribunal under section 27A(1) in a particular manner or on particular evidence. Since the amount payable as a service charge can be the subject of such an application, the lessor's certificate under paragraph 5 of the fourth schedule to the lease could not bind the tenants since, to that extent at least, it would be avoided by section 27A(6).

39. Paragraph 5 of the fourth schedule to the lease is not only an agreement by the tenant, but also by the landlord. Section 27A(6) of the 1985 Act avoids only an agreement by the tenant, and it remains open for consideration whether it has any effect on the binding force of a certificate as against a

landlord. On the view I take of the contractual arrangements in the fourth schedule it is not necessary for me to determine that question, and I do not do so. Subject to the impact of the statutory regime such a certificate performs a useful function. Once the amount of the Service Charge has been certified it is not possible for the landlord, if it becomes aware that the estimate it made under paragraph 3.1 was too low, to re-open the estimate and increase the amount of the six-monthly Service Charge instalments. If, after certifying the Service Charge Adjustment for the Service Charge Year, the landlord subsequently discovers that a particular payment has been overlooked in compiling the annual accounts used in preparing the certificate, paragraph 5 would also prevent a revised Adjustment from being demanded.

40. In this case, however, the Service Charge Adjustment to be determined under paragraph 4 and certified under paragraph 5 is the amount by which the estimate of expenditure likely to be incurred in a particular service charge year falls short "of the actual expenditure in the service charge year". Before June 2010 there was no "actual expenditure" on the supply of water to Prospect House and Independence House. A certificate given by the appellant purporting to record expenditure on water and sewage charges for the year ending 30 June 2010 might be conclusive of the amounts actually expended in that year (save as regards manifest errors), but that would not prevent the inclusion in a certificate for a future year of expenditure in that future year which related to the water supplied in a previous year. I am satisfied therefore that it is open to the appellant, when calculating and certifying the Service Charge Adjustment for the year ending 30 June 2011 and for subsequent years, to include expenditure actually incurred in those years in discharging any liability which the appellant may be shown to have for water supplied in the period from 1 October 2006 until it began to receive demands in its own right in April and June 2010.

Conclusion

41. Although this appeal was directed to be determined by way of a review with a view to re-hearing, neither party came sufficiently prepared to enable the Tribunal to determine the amounts due in respect of water charges as part of the service charges payable by the respondents. Responsibility for that omission must lie principally with the appellant since it alone has access to the demands it has received from Thames Water and knowledge of the payments it has made.

42. Because of the inconclusive state of the evidence I invited the parties at the conclusion of the hearing of the appeal on 26 March to seek to reach agreement within 21 days on what sums had been paid by the appellant and when. Although both parties have submitted further material no agreement has been reached between them and in those circumstances it is necessary that (if agreement cannot now be reached) the quantification of the service charges be remitted to the first tier-tribunal for it to hear evidence and determine the extent of each leaseholder's liability.

43. The appeal is therefore allowed and the decision of the LVT dated 6 September 2011 is set aside so far as it relates to water charges. The application made to the LVT by the respondents and 92 additional leaseholders under section 27A, Landlord and Tenant Act 1985 is remitted to the First-tier Tribunal (Property Chamber) for reconsideration. The appellant is directed within one month of the

date of this decision to apply to the First-tier Tribunal for further directions for the conduct of that application.

Martin Rodger QC

Deputy President

22 April 2014