9687

FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference:	**LON/00BG/LSC/2012/0343** **LON/00BG/LSC/2013/0367** **LON/00BG/LSC/2013/0416**
Properties:	65 Bowsprit Point, Isle of Dogs, London E14 63 The Quarterdeck, Isle of Dogs, London E14 55 Topmast Point, Isle of Dogs, London E14
Applicant:	One Housing Group
Representative:	The legal department of One Housing Group
Respondents:	Abdul Moner and Afruja Begum David Wright Jason Pye and Lisa Golding
Representative	David Wright for all respondents
Type of application:	Claims for arrears of service charges transferred from the county court and specified as lead cases
Date heard:	9, 10, 11, 13 and 16 December 2013 (revised Scott Schedule submitted on 13 January 2014)
Appearances:	Jon Holbrook, counsel, instructed by the landlord's legal department, for the landlord David Wright for the respondents
Tribunal:	Margaret Wilson Dallas Banfield FRICS John Francis QPM

DECISION

Introduction

1. These are three claims for arrears of service charges which were brought in the county court and transferred to the Tribunal under paragraph 3 of Schedule 12 to the Commonhold and Leasehold Reform Act 2002. By directions dated 8 August 2013 the claims were specified as lead cases by virtue of rules 23 and/or 6(3)(b) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 ("the Rules"). The landlord has also, with the consent of the respondent tenants ("the tenants"), applied under section 27A of the Landlord and Tenant Act 1985 ("the Act") for the Tribunal to determine the tenants' liability to pay service charges between the date of the respective county court claims and the date of this determination, which includes their liability to pay actual service charges for the year from 1 April 2012 to 31 March 2013, the accounts for which had become available at the date of the hearing but were not available at the dates of the claims. That application is also treated as a lead case.

2. The applicant in each case is One Housing Group, a housing association, and the tenants hold long leases of flats on the landlord's Barkantine Estate on the Isle of Dogs. One of the claims is against Abdul Moner and Afruja Begum who hold a lease of 63 The Quarterdeck. The claim is for £3032.58 by way of unpaid service charges plus ground rent, interest and costs. The claim was issued on or about 8 May 2012 and transferred to the Tribunal on 19 February 2013. Another claim is against David Wright who holds a lease of 65 Bowsprit Point. It is for £5881.92 by way of unpaid service charges plus interest and costs. The claim was issued on or about 4 March 2013 and transferred to the Tribunal on 7 May 2013. The third claim is against Jason Pye and Lisa Golding who hold a lease of 55 Topmast Point and is for £4006.49 plus interest and costs. It was issued on or about 4 March 2011 and was transferred to the Tribunal on 17 May 2013.

3. A further claim against Elizabeth Alexander, the leaseholder of 58 Bowsprit Point, was stayed by the Tribunal's direction of 8 August 2013 by virtue of rule 23(2) of the Rules and/or the Tribunal's case management powers under rule 6.

Background

4. Bowsprit Point, Topmast Point and The Quarterdeck are blocks of flats on the Barkantine Estate. Bowsprit Point and Topmast Point are virtually identical high rise blocks, each of 82 flats; the Quarterdeck is a four-storey

block of 46 two-storey maisonettes. The estate comprises 25 blocks of flats in respect of which the landlord provides similar services, together with other properties such as the landlord's office and a leisure centre. A significant number of the flats on the estate are occupied by long leaseholders who, or whose predecessors, acquired the leases under the Right to Buy scheme and the remainder are occupied by periodic tenants of the landlord. The estate, together with three other estates on the Isle of Dogs, was transferred to Toynbee Island Homes by the London Borough of Tower Hamlets in December 2005. Toynbee Island Homes is now part of One Housing Group.

5. The leases of the flats with which we are concerned are effectively in common form. By clause 4(4) the tenant covenants to pay an interim service charge and a service charge at the times and in the manner provided by the fifth schedule, the charges recoverable as rent in arrear. Paragraph 1(2) of the fifth schedule defines the service charge as such *reasonable proportion of total expenditure as is attributable to the demised premises.* The proportions demanded of the tenant are, by the landlord's choice, based on rateable value and that method of apportionment is not challenged. The rateable value of The Quarterdeck is 18108 (although its rateable value given in the landlord's statement of case is 14388), and the rateable value of Flat 63 is 310, and so the percentage of the block costs which Mr Moner and Mrs Begum are liable to pay is 1.712%. The rateable value of Bowsprit Point is 23212 and the rateable value of Flat 65 is 232, and Mr Wright is liable to pay 1% of the block costs of Bowsprit Point. The rateable value of Topmast Point is 23212 and the rateable value of Flat 55 is 310, and Ms Golding and Mr Pye are liable to pay 1.336% of the block costs of Topmast Point. The total rateable values of the flats on the Barkantine Estate as shown on the title plan of the landlord's freehold title EGL 500533 is 222724, but the landlord also charges some costs across its four estates on the Isle of Dogs (namely St John's, Kingsbridge, Samuda and Barkantine) the combined rateable value of which is 563346. In respect of estate charges, Mr Moner and Mrs Begum pay 0.139% of the Barkantine costs and 0.055% of the costs referable to the four estates; Mr Wright pays 0.104% of the Barkantine costs and 0.041% of the costs referable to the four estates; and Mr Pye and Ms Golding pay 0.139% of the Barkantine costs and 0.055% of the costs referable to the four estates.

6. By paragraph 1(1) of the fifth schedule "total expenditure" means the total expenditure incurred by the landlord in any accounting period in carrying out its obligations under clause 5(5) of the lease and in insuring the block, less sums expended from any reserve fund and less the cost of any repairs specified in the sixth schedule. Paragraph 1(3) of the fifth schedule defines the interim service charge as *such sum to be paid on account of the service charge in respect of each accounting period as the lessors or their managing agents shall specify at their discretion to be a fair and reasonable interim payment.* By paragraph 3 of the fifth schedule the interim charge is to be paid on 1 April, 1 July, 1 October and 1 January in each year (although, as a concession, the landlord permits the interim charge to be paid monthly) and, by paragraph 5 of the fifth schedule, if the actual service charge for the year exceeds the interim charge, together with any surplus carried forward, the tenant must pay the excess to the landlord within 28 days of service upon the tenant of a certificate as described in paragraph 6 of the fifth schedule. The certificate is

required to contain the information set out in paragraph 6. Paragraph 6 provides that the certificate must contain the amount of the "total expenditure" for the relevant accounting period and the amount of the interim charge paid by the tenant, together with any surplus carried forward from the previous accounting period. By paragraph 7 of the fifth schedule the tenant is entitled at his own expense and on prior payment of any costs to be incurred by the landlord or its agents at any time within the month after service of the certificate to inspect the receipts and vouchers relating to the payment of the total expenditure.

7. At a case management conference on 29 November 2013 Mr Wright, who represents the tenants, agreed:

> i. that all the services which are the subject of these lead cases were of a standard which was reasonable in the circumstances;
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> ii. that all the service charges which are the subject of these lead cases are, subject to their reasonableness, recoverable as service charges under the relevant leases with the sole exception of charges for heat and power payable to Tower Hamlets in respect of its obligations to the Barkantine Heat and Power Company ("BHP") for the maintenance of the plant required to produce the heat and power;
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> iii. that the tenants' cases, save insofar as they relate to charges for heat and power, are concerned exclusively with whether the landlord has correctly added the costs and allocated them between the blocks and the estate.

8. In its directions made after the case management conference on 29 November the Tribunal directed that neither the landlord nor the tenants could at the hearing raise any issues which had not been clearly identified in a revised Scott Schedule to be produced before the hearing or in the statements served for the purpose of the determination.

9. At the hearing on 9, 10, 11, 13 and 16 December 2013 the landlord was represented by Jon Holbrook, counsel, instructed by the landlord's legal department, who called Matthew Saye, the landlord's Assistant Director of Citystyle Services, to give evidence, and the tenants were represented by Mr Wright, assisted on the first day by Kong Lee, a leaseholder. Mr Wright also gave evidence. Accompanied by Mr Holbrook, Mr Saye and Mr Wright, we inspected the relevant parts of the Barkantine Estate in the morning of 13 December.

10. As directed, the landlord provided a core bundle of documents and a hard copy of the revised Scott Schedule. All the invoices and ledgers which would, we were told, otherwise have occupied some 19 bundles of documents, were provided on memory sticks. At the conclusion of the hearing it was agreed that a further revised Scott Schedule showing the positions at which the parties had arrived in the course of the hearing would be supplied for the purpose of the determination, many of the issues having been resolved as the case progressed. Two versions of the Schedule were duly supplied in January

2014 but Mr Wright's version, and the accompanying written submissions which he supplied, unasked, appeared to show that Mr Wright had changed his mind and that he sought to dispute a number of issues which he had said at the hearing that he agreed. In addition, some concessions which the landlord had made at the hearing in relation to the costs attributable to Bowsprit Point in respect of the concierge in 2007/2008, electricity for 2007/2008, 2008/2009 and 2010, and the management fee for 2009/2010 were also omitted from the revised Scott Schedule.

The statutory framework

11. By section 27A of the Act an application may be made to the Tribunal to determine whether a service charge is payable and, if it is, the amount which is payable. A *service charge* is defined by section 18(1) of the Act as *an amount payable by the tenant of a dwelling as part of or in addition to the rent (a) which is payable, directly or indirectly, for services, repairs, maintenance, improvements or insurance or the landlord's costs of management, and, (b) the whole or part of which varies or may vary according to the relevant costs.* Relevant costs are defined by section 18(2) and (3). By section 19(1), *relevant costs shall be taken into account in determining the amount of a service charge payable for a period (a) only to the extent that they are reasonably incurred, and (b) where they are incurred on the provision of services or the carrying out of works, only if the services or works are of a reasonable standard, and the amount payable shall be limited accordingly.* By section 19(2), *where a service charge is payable before the relevant costs are incurred, no greater amount than is reasonable is so payable, and after the relevant costs have been incurred, any necessary adjustment shall be made by repayment, reduction of subsequent charges or otherwise.*

The issues

General

12. The tenants' main concern had been whether the landlord had correctly calculated the disputed service charges. Until the last day of the hearing Mr Wright, on the tenants' behalf, alleged that the landlord had deliberately and dishonestly inflated its costs in order to maximise the service charges it could recover from leaseholders. On several occasions he suggested that the landlord was guilty of theft and false accounting in respect of which the Tribunal should report it to the Director of Public Prosecutions. As the hearing proceeded and a large number of the landlord's costs were investigated in great detail, it became clear to Mr Wright that the tenants' suspicions were misplaced, that the landlord had not defrauded or sought to defraud the leaseholders by dishonestly inflating its costs and that, by and large, the costs which had been taken into account in calculating the service charges had been accurately accounted for, and any errors in such calculations

had been but minor and innocent mistakes. To his considerable credit, Mr Wright, who has for a number of years represented a large number of leaseholders in relation to their service charge disputes with the landlord, early in the afternoon of the last day of the hearing said that his suspicions and those of the many tenants he represented were unfounded. He said that the tenants were now willing to accept that the landlord had a "credible accounting system" and that its figures were "95% right", that the tenants had been wrong in their suspicions and they were sorry. He said that the only remaining disputes in respect of all the service charges which were the subject of these proceedings related to BHP, limitation, electricity charges, the allocation of charges between the blocks and the estate, administration charges, grounds maintenance and day-to-day maintenance. Later that afternoon he said that he no longer disputed the costs of day-to-day maintenance.

13. We accept that the suspicions of Mr Wright and the tenants he represents were genuinely held and were not borne of a desire to avoid paying the service charges they were properly liable to pay. We also accept that the tenants' suspicions in the early years were fuelled by a report from the Audit Commission in 2008 which suggested that the landlord's service charge accounts were inadequate. We also accept Mr Wright's evidence that he and other tenants had, each year, asked, as they were entitled under paragraph 7 of the fifth schedule to their leases and under the Act to do, to inspect the invoices and vouchers which supported the service charges but the invoices and vouchers were not always provided to them, which was wrong. Indeed, the landlord was unable to produce either to us or to the tenants any receipts or other similar documents whatever in respect of its costs for the year 2006/2007, all of them having been lost or destroyed.

14. It is also fair to say that some of the landlord's accounting procedures in the years preceding 2010/2011 were, though not deliberately false, in some respects confusing and difficult to follow. In particular, the service charge accounts in annex 11 to the landlord's statement of case include a mixture of statements relating to individual flats, statements relating only to the leasehold flats in the block, and statements relating to the whole block. Where figures are not given for a whole block we have had, with some difficulty and not always, we think, with perfect accuracy, to gross them up to arrive at the figures for the whole block for the purpose of assessing their consistency and reasonableness. A lot of the problems we, and the tenants, have faced have arisen from the landlord's failure until 2010/2011 to supply to the tenants service charge certificates giving the landlord's total expenditure for the whole block as the leases require.

15. Mr Holbrook conceded, correctly, that the service charge certificates provided by the landlord for the years prior to 2010/2011 did not comply with the requirements of the lease in that they did not show the amount of the *total expenditure* as defined by paragraph 1(1) of the fifth schedule but only the costs referable to the leasehold flats in the block at the time the certificates were prepared (example at page 210 of the core bundle). He also conceded that the provision of valid certificates was a condition precedent to the payment of balancing charges. He accordingly conceded, correctly, that any

balancing charges due for the years 2005/2006, 2006/2007, 2007/2008, 2008/2009 and 2009/2010 would not become recoverable until compliant certificates had been served. Mr Wright agreed that the certificates for the years for 2010/2011 onwards complied with the requirements of the lease.
16. It is unfortunate that the tenants' suspicions have led to a large number of disputes and much litigation, of which the present claims are but a small proportion. It is to be hoped that the very detailed investigation we have undertaken will have finally allayed what have proved to be the unjustified suspicions of the tenants whom Mr Wright represents that the landlord has been guilty of fraud and theft or any other dishonesty. We are quite satisfied that, although its accounting procedures have not always been flawless, the landlord has not deliberately inflated any of the costs which were the subject of this dispute. We are satisfied that at any rate since 2010 the landlord has made available to the tenants the receipts and vouchers supporting the service charge costs and it is essential that it continues to do so in order that the tenants can be assured that its accounting is as transparent as possible.

17. At the outset of the hearing there were a very large number of disputes in respect of the service charges for each of the years before us, namely 2005/2006, 2006/2007, 2007/2008, 2008/2009, 2009/2010, 2010/2011, 2011/2012 and 2012/2013, the accounting year in each case running from 1 April. Based on Mr Wright's concessions on the last day of the hearing the only issues which remain to be determined are:

i. whether the landlord is entitled to recover from the tenants of the flats in Bowsprit Point and Topmast Point the sums it is required to pay to Tower Hamlets towards the costs of maintaining plant owned by BHP and used for supplying heat and hot water to some of the properties on the Barkantine Estate;

ii. whether claims for any, and, if so, which service charges are time-barred by virtue of the Limitation Act 1980;

iii. whether the landlord has correctly allocated costs for grounds maintenance between individual blocks and the Barkantine Estate;

iv. the allocation of the costs of caretaking, cleaning and grounds maintenance;

vi. administration charges.

18. In addition, we accept that Mr Wright was consistent in submitting that where invoices could not be provided by the landlord the costs were not *incurred* within the meaning of the Act and that he did not resile from that submission, which we will therefore address.

19. However, as we have said in paragraph 10, in written submissions provided, unasked, after the hearing and in entries on the Scott Schedule submitted after the hearing, Mr Wright sought to reopen disputes about a number of other charges which he had at the hearing unequivocally and clearly agreed. While we bear in mind that he is not a lawyer, we are satisfied

that in the absence of exceptional circumstances it is not open to him to withdraw concessions after the conclusion of the hearing, and we are also satisfied that there are no exceptional circumstances which would justify the withdrawal of the clear concessions which he made. We repeatedly told Mr Wright that he should not feel rushed at any time during the hearing, and that if he wished for more time we would, within reason, allow it to him. After five days of very careful scrutiny in which he was given the fullest opportunity to put the tenants' cases as he wished, we are quite satisfied that it would be inappropriate for him now to withdraw the concessions he freely made. We have read his further submissions but see nothing in them which might lead us to permit him to withdraw his concessions, although on a point of law raised by Mr Holbrook in relation to limitation we have taken into account, and indeed agree with, the further submissions Mr Wright has made in the light of the researches he was able to carry out after the hearing but did not have time to carry out during the hearing.

20. As we have said, during the hearing Mr Saye made concessions in relation to a few of the costs referable to Bowsprit Point which are not reflected in the final version of the Scott Schedule which the landlord submitted after the hearing. As with Mr Wright, we are satisfied that no exceptional circumstances exist which would justify the withdrawal of the concessions which Mr Saye made at the hearing, and in the completed Scott Schedule attached to this decision we have held not only Mr Wright but also the landlord to their concessions.

21. Some of the service charges which the subject of the present disputes have been the subject of previous determinations of different leasehold valuation tribunals, but we decided, and Mr Holbrook and Mr Wright agreed, that we should take a fresh look at all the charges in dispute. We therefore do not regard ourselves as in any way fettered by previous decisions.

22. It was agreed that the reasonableness of the landlord's legal costs incurred in the course of service charge disputes and passed to the leaseholders as service charges would be considered if sufficient time was available. In the event sufficient time was not available and that issue will be considered at a later stage if it remains in dispute.

Absence of invoices

23. Mr Holbrook acknowledged that the landlord was unable to produce any invoices to support its charges for the accounting year 2006/2007 and that some invoices for other years were also missing. He said that the only explanation the landlord was able to offer for the missing invoices was that they must have been lost or destroyed during the various amalgamations of the landlord's predecessor housing associations and in moves of offices. But, he submitted, the invoices must have existed at one time because each year the service charge accounts were examined and approved by Beever and Struthers, independent chartered accountants, who certified that they had performed *an examination, on a test basis, of evidence relevant to the*

amounts included in the statement and their disclosure. It also included an assessment of the significant estimates and judgements made by the landlord in the preparation of the service charge statement. In their annual certificates (at pages 193 - 199 of the core bundle) Beever and Struthers expressed themselves satisfied that *the service charge statement presents a fair summary of the income and expenditure for the year ended* [as the case might be], *is sufficiently supported by accounts, receipts and other documents and has been prepared in accordance with section 25(1) of the Landlord and Tenant Act 1985.* Mr Holbrook also relied on schedules of expenditure which Mr Wright had been given by the landlord, on the memory stick under the heading "David Wright's invoices", but which the landlord appeared to have mislaid, which gave detailed breakdowns of the some of the landlord's expenditure in most years.

24. Mr Wright submitted that if invoices could not be produced the costs which the invoices might have supported were not *incurred* within the meaning of the Act, although in respect of 2006/2007 he offered to agree that one half of the costs charged had actually been spent. In support of the proposition that, without invoices, the costs could not be said to have been incurred, Mr Wright relied on *Burr v OM Property Management Limited* (Court of Appeal) [2013] 1 WLR 3071 (Lord Dyson MR, Elias and Patten LJJ). In that case the landlord had for years inadvertently made payments to the wrong gas supplier. When eventually the correct supplier demanded payment, the tenant claimed that the charges were time-barred by virtue of section 20B of the Act. The Court of Appeal, upholding the decision of the Upper Tribunal, (reported as *OM Property Management Limited v Thomas Burr* [2012] UKUT 2 (LC)), held that that the costs were "incurred" for the purpose of section 20B when the landlord was invoiced and became liable to pay the correct supplier, and not when the gas was supplied. The present situation is different. Mr Wright does not suggest that the landlord was never invoiced for the costs for which invoices cannot be produced, but only that the landlord cannot produce them to the tenants and to the Tribunal. In that he is correct, but it is not the same as saying that the landlord was never invoiced for the costs it says it incurred. We are satisfied that, generally speaking, the landlord was invoiced for the costs recorded in the accounts prepared by Beever and Struthers, that it was liable to pay and did pay the various costs on or shortly after the dates when it received the invoices, but that it has subsequently lost or destroyed the invoices.

25. In those circumstances we broadly accept the accuracy of the accounts and are satisfied that the costs included within them were incurred.

Charges payable to Tower Hamlets for BHP

26. These charges relate to Bowsprit Point and Topmast Point but not to The Quarterdeck, which does not receive heating and hot water from BHP.

27. Heating and hot water were formerly supplied to parts of the Barkantine Estate by means of a district heating system. In or about 2001, prior to the

transfer of the estate to Toynbee Island Homes, Tower Hamlets made a 25 year private finance initiative ("PFI") agreement with the London Electricity Board (now EDF Energy) to replace the existing system for the provision of heat and power to the Barkantine Estate with a new system, powered by plant located in a building just outside the boundary of the estate. The building and plant are owned by BHP, a company associated with and managed by EDF Energy. The plant currently supplies heat and power to 495 flats on the Barkantine Estate and also to a school, a nursery, a leisure centre and community hall, all on the Barkantine Estate. The system works by pumping very hot water under pressure through a network of pipes within the estate, and then into the buildings. Within each flat which benefits from the system there is a meter into which residents insert pre-payment cards for which they receive heating and hot water.

28. BHP invoices Tower Hamlets for the cost of maintaining the plant, and Tower Hamlets invoices the landlord for the full amount it has to pay. Until 2012 the landlord, and previously Tower Hamlets, met the cost but since 2012 the landlord has passed to the leaseholders whose flats are linked to the system the unit cost set out in the pricing matrix which is at page 617 of the core bundle. Each of the 495 flats bears the same cost, which, for the financial year 2011/2012 (year 12 of the PFI agreement), was £296.82 plus VAT, or £356.82 including VAT. The pricing matrix shows that the "housing share" of the total sum payable by the landlord to Tower Hamlets is a constant 57% of the whole annual cost of £176,311.08.

29. Mr Holbrook submitted that the landlord was entitled to pass this cost to the tenants by virtue of clause 5(g) of the lease by which the landlord covenants *to maintain and renew when required any existing central heating and hot water apparatus in the building and all ancillary equipment thereto other than that contained in and solely serving the demised premises.* He submitted that paragraph 5 of the third schedule, which reserves to the landlord *full right and liberty ... upon giving notice to the lessee to discontinue the supply of heat and hot water from the lessor's district heating scheme subject to the lessors bearing the cost of adaptations to alternative methods of supply of heat and hot water,* showed that the draftsman contemplated the renewal of the district heating system by another system, the obligation to maintain which would arise under clause 5(g). He said that he did not rely on clause 5(h), which requires the landlord to maintain a supply of hot water and heating *through any system existing at the date hereof.* The words *existing at the date hereof* were, he submitted, distinguishable from the word *existing* in clause 5(g) which meant *existing from time to time* and therefore included the present system, which in most cases did not exist at the date of the lease. He submitted that the fact that the plant was not owned by the landlord was irrelevant, and that the overall cost to the tenants of heat and power, including the cost of the payments to BHP, was reasonable by comparison with the cost which an occupier would be likely to have to pay for heat and hot water supplied by a different system. He said that, if necessary, he would rely on the sweeping-up clause 5(o) which provides that the landlord can *without prejudice to the foregoing ... do or cause to be done all such works installations acts matters and things as in the absolute discretion of the lessors may be considered necessary or*

advisable for the proper management safety amenity or administration of the building, but he did not consider that it was necessary for him to do so because, he submitted, clause 5(g) was sufficient to cover the charge.

30. Mr Wright submitted that the lease did not permit the landlord to pass this charge to the tenants. He said that the landlord did not own or have any interest in the plant which produced the heat and hot water, and that what the tenants were being asked to pay was the cost of a PFI agreement over which neither the landlord nor the tenants had any control. He said that the payments which the landlord made to Tower Hamlets under the PFI agreement were not for *maintenance* of the system but for what was in effect a financing agreement to repay the capital cost, with a profit. He said that when the new system was first introduced the leaseholders were told that they would be charged for fuel, and no mention was made of having to contribute to the payments under the PFI agreement.

31. In our view Mr Holbrook's submission is correct. The sums payable to Tower Hamlets are clearly, in our view, for the maintenance of the plant required to produce heat and hot water and fall squarely within clause 5(h) of the lease. It makes no difference in our view that the plant is not the property of the landlord or that it is not situated within the Barkantine Estate. It is true that the payments include an element (15%) of profit but, as Mr Holbrook said, all suppliers of energy make a profit, but the profit element is normally built into the unit cost and is not obvious to the consumer. Mr Wright did not suggest that the sums payable to Tower Hamlets were unreasonably high, or that the aggregate costs of maintenance of the plant and of the heat and hot water was excessive. We are satisfied that the aggregate of the cost payable under the PFI agreement and the unit costs payable by the residents of the flats are not unreasonable by comparison with those of heat and hot water paid under more usual arrangements.

Limitation

32. Mr Holbrook accepted, correctly, that the landlord's claims for arrears of service charges were to be treated as claims for arrears of rent for the purpose of section 19 of the Limitation Act 1980 (see *Escalus Properties v Robinson* [1996] QB 231, Court of Appeal) and were thus subject to a limitation period of six years from the date when they were due for payment up to the dates of the respective county court claims. He submitted, however, that none of the present claims were time-barred. He said that all the service charges due from Mr Wright were fully paid as at 1 April 2008 because the landlord was entitled to apply and had applied all payments Mr Wright had made from time to time in satisfaction of the earliest arrears, and that the same applied to Mr Moner and Mrs Begum. No question of limitation arises in respect of the arrears due from Mr Pye and Ms Golding because they date only from 4 March 2011.

33. Mr Holbrook submitted that the landlord is entitled to apply all payments to the earliest debt unless the indebted tenant specifies, when making

payment, that the money was to be applied to a particular debt. For that proposition he relied on *Chitty on Contracts, 30th edition,* para 21 - 059-061.

34. Mr Wright did not have the opportunity to research the point at the hearing but in subsequent written submissions received after the hearing he cited the following observation in *Chitty,* para 21-061 : "an entry in the creditor's books applying a payment to a particular debt does not constitute an election [by the creditor to appropriate a payment a particular debt] *unless the entry has been communicated to the debtor* [emphasis added]*: Simson v Ingham (1823) 2 B & C 65*". Mr Wright had at the hearing submitted, in effect, that the landlord had communicated to the debtors the entries in its running accounts which showed debts going back to the earliest year and that the landlord had produced no evidence that it had appropriated sums paid by the tenants to their earliest debts. He referred to the statement of account which was attached to the particulars of the claim against him which shows a debt dating back to 5 December 2005, and to the similar schedule attached to the particulars of claim against Mr Moner and Mrs Begum which also shows a debt dating back to 5 December 2005. Both statements of account show that the landlord regarded Mr Wright and Mr and Mrs Begum as having been in arrear with service charges since that date and there is no suggestion in any of the landlord's books of account that we have seen that such payments as Mr Wright and Mr Moner and Mrs Begum made towards service charges were applied by the landlord to discharge the earliest arrears. Insofar as there are interest calculations they are made on the basis that the debts have existed from the earliest date. Indeed, Mr Holbrook opened the case to us on the basis that the arrears owed by Mr Wright and Mr Moner and Mrs Begum dated from December 2005.

35. On the basis of the evidence put before us it is clear to us that the landlord has in its accounts always applied payments made by Mr Wright and Mr Moner and Mrs Begum to the most recent service charges outstanding at the time payment was made and has not, prior to the hearing, appropriated payments to the earliest debts. It is also clear to us that that position was communicated to the tenants concerned - certainly no evidence was put before us to suggest otherwise, either at the hearing or in the brief submissions provided by the landlord in response to Mr Wright's submissions made after the hearing, which did not address Mr Wright's submissions on the point. In those circumstances we are satisfied that the landlord cannot at this late stage elect to change its allocation by attributing payments to the earliest arrears and that Mr Wright is correct to say that recovery of all arrears owed at a date six years prior to the issue of proceedings, namely at 8 May 2006 in the case of Mr Moner and Mrs Begum and at 4 March 2007 in the case of Mr Wright, are time-barred by virtue of section 19 of the Limitation Act 1980. As Mr Holbrook and Mr Wright invited us to do, we will nonetheless determine the reasonableness of the time-barred charges because these are lead cases and because we have the material on which we can do so and we did in fact consider them at the hearing.

Allocation of costs of grounds maintenance between block and estate

36. In each lease *the building* is defined as the block in which the demised flat is situated and *the common parts* are defined as *all main entrances passages landings staircases (internal and external) gardens gates access yards roads footpaths parking areas and garage spaces (if any) passenger lifts (if any) means of refuse disposal (if any) and other areas included in the title above referred to or comprising part of the lessors' housing estate and of which the building forms part provided by the lessors for the common use of residents in the building and their visitors and not subject to any lease or tenancy to which the lessors are entitled in the reversion.* The landlord covenants to maintain the block and the common parts and the tenant covenants to pay a service charge in respect of the costs of performance of the landlord's obligations. Unusually, the proportions in which such service charges are to be paid are not specified in the lease, although, as we have said, the landlord in fact charges what it considers to be block service charges on the basis of the proportion which the rateable value of the flat bears to the rateable value of all the flats in the block and it charges what it considers to be estate service charges on the basis of the proportion which the rateable value of the flat bears to the rateable value of all the flats on the estate or, in some instances, of the landlord's four estates on the isle of Dogs.

37. The landlord has chosen in some instances to treat as block charges the cost of upkeep of grassed areas and trees adjacent to or close to particular blocks. For example, charges of £459.19, £396.53 and £515.46 made in 2008 for pruning some trees near to Bowsprit Point which were, apparently, restricting light to that block were treated as block charges and allocated to the leaseholders of flats in Bowsprit Point rather than estate charges shared between the leaseholders of flats on the whole of the Barkantine Estate although the trees are on a public walkway used, we would assume, by many people who are not residents of flats in Bowsprit Point. Mr Wright submitted that such an approach was unfair and unreasonable. Mr Holbrook submitted that it was for the landlord to choose how charges should be allocated, and that provided that the method chosen was not outside the range of reasonable methods, the Tribunal could not interfere.

38. We agree with Mr Holbrook's analysis of the correct approach which is that we should accept the landlord's allocation unless it is outside the range of reasonable allocations. Were the decision ours to take we would take the view that the better and fairer course is to treat all grounds maintenance as an estate charge, because no block has defined grounds attached to it and all residents are entitled to use all parts of the grounds.

39. We hope that the landlord may consider a different method of allocation in future, but, reluctantly, we find ourselves unable to say that to allocate the cost of grounds maintenance to the nearest block is outside the range of reasonable decisions. In any event, even if we had concluded that all charges for grounds maintenance must be treated as estate charges, we do not have the material which we would need in order to reallocate such charges for the

years under review and to order that it be produced would require a considerable amount of work on the landlord's part which would be disproportionate to the minimal difference it would make to the service charges payable by each tenant.

Electricity

40. These were the charges for which we found it the most difficult to reconcile the figures. We have done our best.

41. Mr Saye said that this cost is for communal lighting, power to the lifts in Bowsprit Point and Topmast Point (there is no lift in The Quarterdeck), power to the closed circuit television systems and to the door entry systems within the blocks. It is in each case a block charge; no charge appears to have been made to leaseholders for lighting the grounds. Except where we have indicated otherwise we have taken the costs from the Island Homes Income and Expenditure file on the memory stick under the heading "Service Charge Summary" in the landlord's invoices file. Where the figures are taken from the annual service charge accounts for the years prior to 2010/2011 they relate only to the leasehold flats and not to all the flats in the block, because that was the way they were presented by the accountants. Where the number of leasehold flats was given in the accounts we have shown it below. In some instances, additional information has been provided by the landlord or by Mr Wright which has enabled us to give what we regards as reasonable estimates of the costs for the whole block. The totals set out below are thus not always the total expenditure on electricity but are of use for the purposes of comparison between the blocks.

42. The relevant totals are:

The Quarterdeck

2005/2006 (part year only, from 5 December 2005 to 31 March 2006):
£1602.09 (25 flats)

2006/2007: £1377 (25 flats)

2007/2008: £14,739.76 (26 flats)

2008/2009: £2632.32 (26 flats)

2009/2010: £111.71 (26 flats)

2010/2011: £1314.73 (taken from accounts at page 232)

2011/2012: £554.22 (from accounts at page 233)

2012/2013: £6642.81 (estimated); zero (actual)

Total for seven years and approximately 3 months: £28,674.64 (estimated), £22,331.83 (actual)

Bowsprit Point

2005/2006 (part year): £2053.66 (36 flats)

2006/2007: £1816.90 (38 flats)

2007/2008: £31,608.75

2008/2009: £22,859.48 (38 flats)

2009/2010: £31,364.03 (40 flats)

2010/2011: £23,423.45 (estimated) and zero (actual)

2011/2012: £5093.67

2012/2013: £8515.18 (estimated); £2637.43 (actual)

Total £126,735.12 (estimated), £97,433.92 (actual)

Topmast Point

2005/2006 (part year): £2053.66 (38 flats)

2006/2007: £1960.23 (38 flats)

2007/2008: £15,538.66 (40 flats) This is the figure in the summary accounts)

2008/2009: £10,912.34 (40 flats)

2009/2010: £11,421.88 (taken from the schedule of invoices)

2010/2011: £16,786.84

2011/2012: £3729.21

2012/2013: £8515.18 (estimated); £13,921.59 (actual)

Total £70,918 (estimated), £76,324.41 (actual)

43. It is apparent that these figures show very considerable fluctuations between the years. Mr Saye said that the fluctuations were explicable by the

fact that the meters were not read regularly. He made the following concessions in relation to 65 Bowsprit Point at the hearing, although his concessions are not reflected in the landlord's version of the Scott Schedule submitted after the hearing: that the charge for 2007/2008 should be £316.51 and not £484.03, that the charge for 2008/2009 should be £228.48 and not £229.05, and that the charge for 2009/2010 should be £313.47 and not £333.08. He said those concessions were based on the invoices available and summarised in the ledgers. He said if the annual charges for all three blocks were averaged, the total for each year (for example, around £130 per annum for 65 Bowsprit Point) was reasonable. Mr Wright said the average was considerably higher than that, and he submitted that the Tower Hamlets estimate for 2004/2005 should be applied throughout the period.

44. As we have said, the figures we have been given come from a variety of sources and are not as easy to interpret as they could and should have been, but, doing the best we can, and with some misgivings, we have concluded that because the average annual cost of electricity supplied to three blocks, so far as we have been able to discern it from the partial information supplied to us, appears to have been not unreasonable, on the balance of probabilities the charges to each of the tenants in each year are, on the whole, accurate. We accept Mr Saye's evidence that the inconsistencies between the years were caused by the landlord's failure to read the meters regularly. On the basis of the information available to us, we are reasonably satisfied that the sums charged for electricity were, subject to Mr Saye's concessions at the hearing, accurately accounted for, and we see no good reason to disallow any of them.

Caretaking and cleaning and grounds maintenance

45. These costs are categorised as either block costs or estate costs. The costs given below we have taken, except where otherwise shown, from the Island Homes Income and Expenditure sheet on the memory stick under the heading "Service Charge Summary" in the landlord's invoices file. It is not easy to analyse the figures because until 2010/2011 there is a combined figure for "cleaning and ground maintenance services" (a block charge) together with an "estate cleaning and grounds maintenance" charge. In 2011/2012 there is one charge for "block cleaning", one charge for "gardening and grounds maintenance" and one "estate cleaning and grounds maintenance". We have aggregated all these costs in the list of costs given below.

The Quarterdeck

2005/2006 (part year only, from 5 December 2005 to 31 March 2006): zero for block and estate;

2006/2007: £2248.24 for "cleaning and ground maintenance services", which appears to be a block charge, and £173.38 for "estate cleaning and maintenance";

2007/2008: £10,942.59 for "cleaning and ground maintenance services" which appears to be a block charge, and £107.98 for "estate cleaning and maintenance ";

2008/2009: £12,827.39 for "cleaning and ground maintenance services", which appears to be a block charge, and £1951.26 for "estate cleaning and maintenance";

2009/2010: £13,923.06 under 'block costs" for "cleaning and ground maintenance services" and £5659.43 under estate costs for "estate cleaning and grounds maintenance";

2010/2011: £11,990.34 (taken from accounts at page 232) for "cleaning and ground maintenance services", a block charge, and £6108.08 for "estate cleaning and grounds maintenance";

2011/2012: "cleaning" £15,289.986 and "gardening and grounds maintenance" £739.86, both block charges, and, under estate services, "estate cleaning and grounds maintenance" £1168.07;

2012/2013: (estimated) there is a charge for "caretaking staff - services" £18,136.57, "cleaning materials" £515.43, yet another for "gardening and grounds maintenance" £1836.21, one for "gardening and grounds maintenance - equipment" £805.35, one for "grounds and gardening staff - services" £1997.28, and, possibly, "caretaker van costs" £644.28. For 2012/2013 (actual) there are three categories: "cleaning of block and areas": "cleaning" £16,053.04, "gardening and grounds maintenance" £1093.27, and "estate services" zero.

Bowsprit Point

2005/2006 (part year only, from 5 December 2005 to 31 March 2006): "cleaning and ground maintenance services" zero and "estate cleaning and maintenance" £6078.83;

2006/2007: £2719.03 for "cleaning and ground maintenance services", which appears to be a block charge, and £291.61 for "estate cleaning and maintenance";

2007/2008: £19,506.36 for "cleaning and ground maintenance services", apparently a block charge, and £125.07 for "estate cleaning and maintenance";
2008/2009: £20,187.20 for "cleaning and grounds maintenance services", a block charge, and £1371.18 for "estate cleaning and maintenance";

2009/2010: £18,054.52 under "block costs" for "cleaning and grounds maintenance " and £7254.62 under estate costs for "estate cleaning and grounds maintenance";

2010/2011: £15,340.32 (taken from accounts at page 232) for "cleaning and grounds maintenance", apparently a block charge, and £7829.73 for "estate cleaning and grounds maintenance";

2011/2012: £12,553.80 for "cleaning" and £815.10 for "gardening and grounds maintenance", both apparently block charges, and, under estate services, "estate cleaning and grounds maintenance" £1497.31;

2012/2013: (estimated) £23,248.63 for "caretaking staff - services", £1232.14 for "cleaning materials", £2353.77 for "gardening and grounds maintenance", £1032.35 for "gardening and grounds maintenance - equipment", £2560.24 for "grounds and gardening staff - services" and, possibly, £825.88 for "caretaker van costs". For 2012/2013 (actual) there are three categories: £13,180.33 for "cleaning", £1204.45 for "gardening and grounds maintenance" and £1585.45 for "estate cleaning and grounds maintenance".

Topmast Point

2005/2006 (part year only, from 5 December 2005 to 31 March 2006): "cleaning and ground maintenance services" zero and "estate cleaning and maintenance" £6078.83;

2006/2007: £4450.67 for "cleaning and ground maintenance services", which appears to be a block charge, and £343.24 for "estate cleaning and maintenance";

2007/2008: £10,577.47 for "cleaning and ground maintenance services" and £375.65 for "estate cleaning and maintenance";

2008/2009: £9895.53 for "cleaning and grounds maintenance services" and £1664.66 for "estate cleaning and maintenance";

2009/2010: The figures do not appear to be available on the memory stick. We have considered the best information we have, which is the individual charge to Ms Golding and Mr Pye, grossed up for the block, and arrive at £18,152.53 under "block costs" for "cleaning and ground maintenance services" and £7254.87 under estate costs for "estate cleaning and grounds maintenance";

2010/2011: £15,340.31 (taken from accounts at page 207) for "cleaning and ground maintenance services" and £7829.73 for "estate cleaning and grounds maintenance";

2011/2012: "cleaning" £12,553.80 and "gardening and grounds maintenance" £815.10, and under estate services, "estate cleaning and grounds maintenance" £1497.31;

2012/2013: In 2012/2013 (estimated) there is a charge for "caretaking staff - services" £23,248.63, "cleaning materials" £1232.14, yet another for

"gardening and grounds maintenance" £2353.77, one for "gardening and grounds maintenance - equipment" £1032.35, one for "grounds and gardening staff - services" £2560.24 and, possibly, "caretaker van costs" £825.88. For 2012/2013 (actual) there are three categories: "cleaning" £13,180.33, "gardening and grounds maintenance" £1204.45 and "estate cleaning and grounds maintenance" £1585.45.

46. Mr Saye said that until 2011/2012 these costs were apportioned according to rateable value but from 2011/2012 onwards they were apportioned according to an analysis carried out by a time and motion expert. He explained that such a methodology was a way of allocating the total known costs fairly between the different blocks and estates according to an estimate of the time spent on such activities in each block and was not intended to reflect the actual time spent on each task.

47. Mr Wright said that he did not challenge the total caretaking salary costs (£341,103.45) shown in the time and motion study expert's analysis at pages 301 and 302 of the core bundle, nor did he challenge the caretaking agency costs of £158,400.50, although he suggested at one stage that the landlord's use of agency staff was excessive. He did not accept that the cost of cleaning materials (£12,232.85) and vehicles (£5062.76) could be aggregated with the cost of salaries and agency staff for the purpose of calculating the hourly rate of £21.64 used in the analysis at page 302 although he did not dispute that those sums were spent. He asserted that that hourly rate was excessive and he carried out his own analysis of caretaking costs in 2011/2012, summarised at page 510 of the core bundle. His analysis was to the effect that in 2011/2012 there were 11 caretaking staff, each of whom worked a 41 hour week for 52 weeks a year, producing 23,452 man-hours in the year. He added 9428.6 agency workers' hours, arrived at by dividing the total cost of agency staff in the year by an hourly rate of £16.80, giving a total of 32,880.6 caretaking hours, which, he submitted, was excessive. He said that the hours referable to each block must have included an element for grounds maintenance which should have been only an estate charge, because no block had its own exclusive grounds, and that there was an element of double counting in the landlord's calculations. In the early stages of the hearing he also submitted the number of hours said to have been spent on caretaking of blocks and the estates was so excessive that the leaseholders of flats on the landlord's four estates on the Isle of Dogs must have been paying for the caretakers' work on other properties owned by the landlord, although he later withdrew that suggestion, for which he had no evidence.

48. The main flaw in Mr Wright's analysis seems to be that he has assumed that the figure of 23,883.60 used in the time and motion study expert's analysis is intended to be the actual hours worked, whereas it is merely a method of apportioning the total costs between the different blocks. He withdrew any suggestion that the landlord was illicitly charging to the leaseholders of its estates on the Isle of Dogs hours spent by the caretakers elsewhere, and he did not really suggest, and certainly provided no evidence, that the caretakers' tasks could have been carried out more cheaply or quickly. Having accepted that the total costs were as the landlord claimed, he fell into error in asking us to deduce from them an hourly rate, when the hourly rate

was purely a hypothetical method of attributing the total to the different blocks.

49. As we understand his submissions, Mr Wright's case in relation to these costs at the end of the hearing amounted simply to the assertion that there must have been an element of double-counting between the costs of grounds maintenance treated as block costs and the costs of grounds maintenance treated as estate costs, because he did not accept that any such costs could properly be regarded as block costs and the aggregated hours were excessive. While it may be, as we have said at paragraph 38 above in relation to apportionment, that it would in our view be fairer if, in future, all costs referable to grounds maintenance were treated as estate costs, we are not prepared to say that the method of allocation used in the past, which is to attribute to each block an area of land close to the block, was so unreasonable as to justify the mammoth task, which we do not have the material to perform ourselves, of re-allocating to the estate all the costs of grounds maintenance.

50. Accordingly we are satisfied that the costs of caretaking and grounds maintenance have been accurately accounted for and allocated and that there is no good reason for concluding that any of them were unreasonably incurred.

Administration

51. Charges under this head were made only in the years 2011/2012 and 2012/2013. They are for the fee charged by Beever and Struthers for preparing the service charge accounts. None of the fee was passed to leaseholders prior to 2011/2012 but in that and the subsequent year it it emerged at the hearing that the whole fee (£9000 including VAT for the year 2011/2012 and a slightly higher sum - the precise figure was not given to us - for 2012/2013 for preparing the service charge accounts for, we understand, the landlord's four estates on the Isle of Dogs) was divided between the leaseholders on the basis, we were told, that the services of an independent accountant benefited only the leaseholders and that if there were no leaseholders the services of an accountant would not be necessary.

52. Mr Wright submitted that the tenants should not contribute to this charge because they obtained no benefit from it and it was a service to the landlord and not to the leaseholders.

53. Clause 5(j)(ii) of the lease permits, but does not require, the landlord *to employ direct or enter into contracts with all such ... accountants or other professional persons as may be necessary or desirable for the proper maintenance safety and administration of the building.* As we have said, paragraph 1(2) of the fifth schedule to the lease defines *the service charge* as *such reasonable proportion of total expenditure as is attributable to the demised premises,* and the landlord accordingly has a discretion to decide what proportion of a particular cost it should attribute to individual leaseholders and it can in our view decide that a particular service which is

provided exclusively for the benefit of leaseholders should be charged exclusively to leaseholders. However that discretion must not be exercised unreasonably, and in our view it is outside the range of the reasonable exercises of the landlord's discretion to allocate the accountants' fees solely to the leaseholders. We consider that it is clearly of benefit to the landlord that its costs should be scrutinised and independently verified. We are satisfied it was reasonable for the landlord to instruct an accountant to prepare the service charge accounts and we are also satisfied that the amount of the fee, which Mr Wright did not challenge, was reasonable, assuming that it was for preparing the accounts for all four estates on the Isle of Dogs. The fee should, however, in our view be shared between the landlord and the leaseholders and it is unreasonable and wrong in principle that the whole fee should be passed to the leaseholders, who collectively own fewer than half the flats on the landlord's four estates on the Isle of Dogs. Doing the best we can, we have concluded that one half of the accountants' fees should be allocated to the leaseholders and shared between them on the basis of rateable value.

Conclusions

54. Our conclusions on the costs which are the subject of this dispute incurred by the landlord in all years from 5 December 2005 to date, and taking into account the concessions made by the landlord and Mr Wright, are summarised in our version of the Scott Schedule attached to this decision.

Judge: Margaret Wilson