11090

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**LON/00BG/LSC/2014/0329**
Property	:	**East Tower Apartments, 1 West India Quay E14**
Applicant	:	**East Tower Apartments Limited**
Respondent	:	**No. 1 West India Quay (Residential) Limited**
Representatives	:	**Ms L Mattsson (Counsel) instructed by Penningtons Manches Solicitors (Applicant)** **Mr J Bates (Counsel) instructed by King & Wood Mallesons (Respondent)**
Type of Application	:	**Service Charges [section 27A Landlord and Tenant Act 1985]**
Tribunal	:	**Mr M Martynski (Tribunal Judge)** **Mr M Cartwright JP FRICS**
Dates of Hearing	:	**6,7 & 8 July 2015**
Date of Decision	:	**1 September 2015**

DECISION

DECISION SUMMARY

1. The fixed charges and availability charges can be included in the AC electricity unit rate charged to leaseholders.

2. Fixed charges can be included in the gas unit rate charged to leaseholders.

3. There is a contractual obligation on the part of the Applicant to pay fixed charges (all fuels).

4. The charges for Switch 2 were not demanded in accordance with the lease on the basis of the arguments put to us by the parties.
5. Demands for utility charges based on estimated consumption are valid.

6. The Applicant is acting within the OFGEM guidance in relying on estimated meter readings.

BACKGROUND

7. Number 1 West India Quay ('the Building') is a large prestige 33-storey block sitting adjacent to the quay and close to Canary Wharf. The lower part of the block (floors 1-12) is used as a hotel (with rooms and apartments currently operated by the Marriott hotel group). The upper floors consist of 158 residential apartments.

8. The Applicant Company holds the long leasehold interest in a number of the apartments in the Building. At the date of the hearing it is believed that the Applicant owned 33 apartments (but has in the past owned more).

9. The Respondent Company (the Applicant's direct landlord) has a long lease of all of the residential parts of the Building granted by the freeholder.

10. The freehold of the Building is owned by West India Quay Development Company (Eastern) Limited ('the Freeholder').

11. Water, gas and electricity are supplied to the Building as a whole by the relevant utility companies. Those utilities are then re-supplied within the Building to the hotel and the residential flats. The residential flats enjoy air conditioning.

12. There are a number of meters in the Building measuring the supply of the services. There are four main meters, two for electricity, one for gas and one for water. These measure the main supply to the Building as a whole. These meters are owned by the relevant utility companies.

13. There are then a number of sub-meters throughout the Building to measure usage in various parts. Each individual residential apartment has four meters to measure heating/cooling, hot water and electricity.

14. We cannot say with certainty that the Building was originally built with the above-described utility structure but we can say with confidence that this is the structure that was in place when the relevant leases were made as this appears to match the way in which the lease is drafted in terms of utility supply.

15. There is no dispute that for many years, the Respondent Company has been complaining about the level of charges it was having to pay in respect of utilities.

16. The Freeholder employed a company, Switch 2, to read the meters in the Building and to apportion the costs of the supplies. The Freeholder is billed by the utility companies for the supply to the Building, a proportion of that cost is then re-charged to the residential leaseholders.

17. The demands to the Applicant for utility charges between 31 May 2008 and 1 March 2012 are based on meter readings.

18. The demands to the Applicant for utility charges for the period after 1 March 2012 are estimated. From that time there were only two estimated demands dated 7 February 2014 and 27 November 2014. The parties agreed that the latter invoice should be included within the tribunal's deliberation and decision.

THE APPLICANT'S APPLICATION

19. The Application sought a determination for the periods;
31.05.2008 – 31.08.2009
01.12.2010 - 01.03.2012
01.03.2012 – 31.12.2013
by agreement at an earlier Case Management Conference this was then extended to include utility bills from 1 January 2014 to 31 October 2014.

20. For each period, the challenge to the Service Charge was the same and was set out in the Applicant's application form as follows:-

> The utility charges are payable in respect of the utilities consumed by the individual apartments as well as the plant and air conditioning systems serving the building.
>
> **Description of the questions you wish the Tribunal to decide:**
>
> Whether the utility charges were reasonable
> A determination of the correct unit charge for electricity supplies
> On what basis the Respondent have calculated the charges, whether by reference to meters or not
> On what basis the Respondent should have apportioned the charges between the various apartments
> Procedure for repayment of any excess charges paid under protest
>
> **Any further comments you wish to make:**

There is a complex metering system within the building, which has failed to operate effectively for a number of years. The Respondent became aware of this in March 2009 and has acknowledged that it is defective. The Applicant believes that this has led to excessive charges.
The Applicant has made requests for evidence about the way in which the Respondent has calculated the utility charge, including evidence of the total cost to the Respondent and how the costs have been apportioned. This information has not been provided.

THE LEASES

21. The Respondent's lease of the residential part of the Building is dated 5 August 2004 and is for a term of 999 years from the same date. The parties to the lease are the Freeholder and the Respondent.

22. For the purposes of this decision, the relevant clauses of the Respondent's lease are as follows.

23. In the definitions section of the lease, "Residential Energy Charge" is defined as;

> the cost of that proportion of AC Energy attributable to the provision of hot water and chilled water to the air conditioning systems within the Demised Premises as evidenced by meters installed for the purpose of measuring such proportion

24. The Respondent is obliged to pay, as a rent;

> 2.2 the Service Charge in accordance with Schedule 4 and any further sums as referred to and payable in accordance with the Fourth Schedule
>
> 2.3 the Residential Energy Charge in accordance with clause 3.2.2

25. The Lessee's covenants include:

> 3.2.2 To pay for all electricity gas water telephone and other data supplies and facilities consumed within the Demised Premises and to pay to the Lessor (or as it shall otherwise direct) within 15 working days of written demand therefore (supported by reasonably sufficient evidence of the amount of AC Energy consumed in the Demised Premises for the relevant period) the Residential Energy Charge

26. Schedule 4 of the lease sets out those heads of cost that comprise the Service Charge. These include;

> Any other services relating to the Building or any part of it provided by the Lessor from time to time during the Term on the basis of good estate management and/or which the Lessor acting reasonably shall think proper for the better and more efficient management or upkeep of the Building and/or the convenience of the Lessees or occupiers of it and not otherwise mentioned or referred to in this Lease
> [Part C, clause 9]
>
> The reasonable and proper fees and disbursements (and any Value Added Tax payable thereon which is not recoverable by the Lessor) payable by the Lessor

to procure the proper management of the Building as contemplated by the provisions of this lease, the provision of services .....
[Part D, clause 1]

All rates taxes assessments duties charges impositions and outgoings which are now or during the Term shall be charged assessed or imposed on the whole of the Retained Premises or any part of them including but without prejudice to the generality of the above non-residential accommodation for caretaker engineers and other staff employed in connecting with providing the Services to the Building
[Part D, clause 4]

The cost of the supply of electricity gas oil or other fuel for the provision of the Services and for all purposes in connection with the Retained Premises but excluding for the avoidance of doubt the cost of AC energy
[Part D, clause 5]

27. The Applicant's leases are in similar form. The example lease that we were referred to is for apartment 22.02. This lease is dated 17 August 2004 and is for a term of 999 years (less three days) from 24 June 2004. The parties to the lease are the Respondent and the Applicant.

28. For the purposes of this decision, the relevant clauses of the Applicant's leases are as follows.

29. In the definitions section of the lease, "AC Energy" and "Apartment Energy Charge" are defined as;

"AC Energy" means the quantities of electricity and gas consumed from time to time by those elements of the Plant whose function is the generation of hot water and chilled water for the operation of the air conditioning systems within the Residential Premises as evidenced by meters installed for the purpose of measuring such consumption

"Apartment Energy Charge" means the cost of that proportion of AC Energy attributable to the provision of hot water and chilled water to the air conditioning systems within the Demised Premises as evidenced by meters installed for the purpose of measuring such proportion (being a metered proportion of the Residential Energy Charge (as defined in the Headlease))

30. The Applicant is obliged to pay, as a rent;

2.2 the Service Charge payable in accordance with the provisions of Part B of Schedules 4 and 5 and

2.3 the Apartment Energy Charge in accordance with clause 3.2.2

2.4 on demand any other sums due to the Lessor under the terms hereof

31. The Lessee's covenants include:

3.2.2 To pay for all electricity gas water telephone and other data supplies and facilities consumed within the Demised Premises and to pay to the Lessor (or as it shall otherwise direct) within 7 working days of written demand therefore the Apartment Energy Charge

32. Schedule 4 of the lease deals with the Service Charge, Part B of that schedule concerns payment of the Service Charge and provides as follows:

> 1.1 The Lessee shall pay for the period from the date hereof to the Computing Date next following the date of this Underlease and for the next and each subsequent financial year a provisional sum calculated upon the Service Charge Percentage of an estimate by the Lessor's Surveyor acting as an expert and not as an arbitrator of what the Annual Expenditure is likely to be for that financial year in advance by four equal quarterly payments on the usual quarter days the first payment being a proportionate sum in respect of the period from and including the date hereof to and including the day before the next quarter day thereafter to be paid on the date of this Underlease

33. Part C of Schedule 4 sets out the heads of costs that are payable by way of a Service Charge and include:

> 10. Any other services relating to the Residential Premises or any part of it provided by the Lessor from time to time during the Term on the basis of good estate management and/or which the Lessor acting reasonably shall think proper for the better and/or efficient management or upkeep of the Residential Premises and/or the convenience of the Lessees or occupiers of them and not otherwise mentioned or referred to in this Underlease

34. Part D of Schedule 4 sets out some additional heads of costs that are payable by way of a Service Charge and include:

> 1. The reasonable and proper fees and disbursements (and any Value Added Tax payable thereon which is not recoverable by the Lessor) payable by the Lessor to procure the proper management of the Residential Premises as contemplated by the provisions of this underlease, the provision of services, the calculation of service charges and .....
>
> 4. The cost of entering into any contracts for the carrying out of all or any of the Services and other functions and duties that the Lessor may in the interest of good estate management properly and reasonably deem desirable or necessary
>
> 5. All rates taxes assessments duties charges impositions and outgoings which are now or during the Term shall be charged assessed or imposed on the whole of the Residential Common Parts or any part of them including but without prejudice to the generality of the above non-residential accommodation for caretaker engineers and other staff employed in connecting with providing the Services to the Residential Premises
>
> 6. The cost of the supply of electricity gas oil or other fuel for the provision of the Services and for all purposes in connection with the Residential Premises
>
> 9. All of the costs charges and expenses and outgoings incurred or incidental to the provision of services set out in Part C of this Schedule

EVIDENCE

Experts

35. Both parties instructed experts (Mr Lowndes for the Applicant and Mr Hamilton for the Respondent) to consider the metering of utilities at the

Building and the billing for the utilities. Those experts both produced written reports. They then discussed matters between themselves and produced a joint written report. In that written report they agreed the majority of issues between them. The relevant points (so far as are necessary for this decision) coming out of the experts' joint report are as follows;

(a) The meter measuring Direct Hot Water input was registering zero throughout the period in question

(b) Approximately 10% of the meters to the individual apartments in the Building have estimated readings ~~(caused by zero readings)~~

(c) Apartment 2710 had spurious meter readings

(d) The monetary values used by Switch 2 for utility costs related to the total bill costs for gas, water and electricity and that these values included high rate (non-domestic) VAT (on gas and electricity) and Climate Change Levy ['CCL'] (on gas and electricity) and all fixed /other charges. This is based upon the monetary values contained within the Switch 2 cost recovery reports and comparing them with the actual utility invoices for the same period.

(e) It was agreed that VAT and CCL costs had been wrongly charged to leaseholders and that these costs needed to be excluded.

(f) There was disagreement as to whether some fixed charges should be included in the re-billing for utilities to the leaseholders.

(g) There was however agreement that neither CCL or high distribution levy should be re-charged to lessees

(h) As to charges since 1 March 2012, the experts agreed that there was no reason why they could not continue to use the individual apartment readings to work out the split of charges between the residential apartments and the hotel. They also both agreed that the best method to work out the bill for each individual apartment for that period was to base that on previous consumption.

(i) The experts agreed on the way to calculate the overcharge for utilities to apartment 27.10.

(j) There was agreement to continue the split of utility charges between the hotel and residential apartments from June 2008 to March 2012 (approximately 65/35) – this split was not necessarily agreed by the Applicants (who considered that the split was weighted unfairly to the benefit of the hotel but they had no evidence on which to base an alternative split

(k) There was agreement as to the method of arriving at a unit charge for the utilities (subject to decisions made by the tribunal) and so the experts should be able to agree on the amounts of the overcharge (in respect of VAT and CCL) to the residential apartments over the years.

(l) There was agreement between the experts that the fixed charges for water should be apportioned by reference to levels of consumption.

36. One direct result of the experts' investigations therefore was that the Applicant, by agreement, was due a very large refund in respect of being charged VAT on its energy use at a commercial rate and being charged the CCL.

37. The evidence given by the experts at the hearing before this tribunal is dealt with below in the reasons given for our decisions.

Mr Livingstone

38. Mr Livingstone is an employee of Switch 2, he provided some information in writing before the hearing and was then witness summonsed to the hearing to give evidence. Essentially Mr Livingstone was of the view that it may well be possible to obtain a number of useful readings from meters in the Building for the period since 1 March 2012.

THE ISSUES AND OUR DECISIONS

39. As a result of the disclosure that took place between the parties prior to the hearing and the discussions between the experts, the issues put to us for decision were narrowed somewhat and are dealt with, so far as we are able, below. We only deal with the issues that appear to us to have been in dispute by the conclusion of the hearing.

40. Unfortunately, we were left in the position of not being entirely clear as to the decisions we were being asked to make. This resulted from firstly, the evidence from the experts being understood differently by the parties and secondly, from a miss-match between the submissions made by the parties' respective Counsel on various issues.

41. So far as we understand them therefore, the issues and our decisions are as follows[1].

The utility charges 31 May 2008 and 1 March 2012

Is the Respondent entitled to charge a higher unit rate for electricity that the rate charged to the Respondent by the utility companies?

42. To some extent we do not understand the question raised by the Applicant in the light of the agreed expert evidence given to us.

43. We understood from the experts that they had agreed the splits between the hotel and the residential units in terms of consumption. They had agreed that commercial rate VAT and CCL should be stripped out of the unit cost. Going on from there, subject to decisions made by the tribunal, they had agreed a method for taking that percentage of usage

[1] We have followed the Applicant's description and order of issues (that we consider to have been still outstanding at the close of the hearing) as set out in Ms Mattsson's skeleton argument

attributed to the residential apartments and apportioning the cost of it amongst the residential leaseholders.

44. We were referred to the guidance produced by the Office of Gas and Electricity Markets ('OFGEM')[2] for the re-sale of gas and electricity. The guidance states that it includes leaseholders who buy their supplies from a freeholder. It provides that the maximum price at which the supply can be sold is the same as was paid by the re-seller.

45. This is not an issue that appears to be of contention between the experts; they had arrived at a method of calculation of a unit price. The re-seller is entitled in certain circumstances (dealt with later in this decision) to estimate the purchaser's consumption of energy. The experts were not examined regarding the potential difference between the unit cost charged to the freeholder/Respondent and the unit charge to the residential leaseholders.

46. Ms Mattsson referred to the issue of the 'lost' energy coming into the Building. This appears to be an energy supply that has been recorded by the Utility company but then 'lost' somewhere in the Building. No one knows where this energy has been used or by whom. It may be that the leaseholders have had the benefit of this energy, it may be the hotel, it could have been used by both residential and commercial in equal or unequal proportion. Quite what we are asked to about this we do not know. The experts have agreed the split of cost between the hotel and the residential apartments. The experts were not examined on this issue in the hearing itself and in the absence of further expert evidence directly on the issue we can make no further comment.

Should fixed charges and availability charges be included in the AC electricity unit rate charged to leaseholders? (Heating, cooling and DHW)

47. *Availability Charges*: This is a charge to secure the availability of electricity to the Building. The utility company guarantees that the Building will have a certain amount of energy available to it at any given time. It is usually a charge associated with commercial use of electricity; the reason for this is that a domestic user does not require such a large amount of energy so as to require a special allocation. We were told by the experts that this charge accounted for something in the order of 6% of the cost of AC electricity.

48. The Applicant's objection to this charge is that it is for the benefit of the hotel rather than the residential leaseholders. If the supply were just a domestic supply to the leaseholders, no such charge would be payable.

49. We reject this challenge for the following reasons:-

    (a) The Building is set up in such a way that energy is supplied to it as a whole and then that energy is distributed where required

[2] As updated 14 October 2005

within the Building. That was the arrangement from the time that the leases were created and possibly since the Building was constructed. That requirement for a bulk supply therefore is just a product of the nature of the Building.

(b) The Building is substantial by any measure and will require a very large energy input however it is used. The hotel will of course be a major user of energy but so will the residential leaseholders and the common parts[3]. As noted above, all the residential flats benefit from air conditioning (which is generated for the whole Building); the residential flats are serviced by lifts.

(c) It may be that the Building would require, in any event and however it is used, an Availability service. There was no clear evidence one way or the other on this.

(d) Mr Hamilton, the Respondent's expert, pointed out that if there were not an Availability Charge, the unit rate charged for electricity may be higher.

(e) It is clear from the terms of the residential lease that the leaseholder is obliged to pay for all of the costs of the supply for utilities. The Availability Charge is in our view therefore a necessary cost of that supply.

50. In closing submissions, Ms Mattsson referred to the fact that the Freeholder had gone on to, at some point, a 'Green Tariff' thus avoiding the CCL (which it of course could not recover from leaseholders). She pointed out that as a result, the utility company had imposed other charges that were payable by leaseholders. This, she said, was unfair; the residential leaseholders had no control over the choice of supply to the Building.

51. This submission appeared to be a point not previously specifically raised. We do not feel able to take it any further. There was no evidence before us as to the cost of alternative suppliers/tariffs.

52. *Reactive Charges*: This is a charge made by the utility company in respect of the electricity and the inefficiency of equipment in a building; that is the difference between the amount of energy coming into a building and the energy used by the machinery in that building; some of the energy is lost due to inefficiency. We were told that this charge makes up approximately 1% of the total charge for AC electricity.

53. The same objection is made by the Applicant on this point as was made in respect of the Availability Charge.

54. We reject this challenge for many of the same reasons as for the Availability Charge. Further to those reasons, we have no evidence as to what extent the inefficiently is of equipment directly relating to the hotel

[3] There is no dispute that the residential leaseholders are obliged to contribute to the cost of the energy supplied to and used by the common parts of the Building

and which can be attributed to the equipment that is used directly or indirectly by the residential apartments.

Should fixed charges be included in the gas unit rate?

55. The gas supplier levies a fixed charge. Such a charge covers the supplier's costs of maintaining its structure and managing the supply. There is no dispute that; (a) this is a charge at a commercial rate, and; (b) that a domestic user would pay a fixed charge of some kind.

56. There was no evidence as to what the difference in terms of cost would be between the two charges.

57. Again we reject the challenge on this issue. We do so for the same reasons as given for the fixed charges in relation to electricity. Further, even if we considered that the charge should be borne in the main part by the hotel, we have no evidence as to the proportion it should bear.

58. It was contended on behalf of the Applicant that, in the circumstances, it should not bear any part of the charge. Given that the Applicant accepts that it would be liable for some sort of fixed charge in any event, this cannot be right.

59. As to the OFGEM guidance as it relates to standing charges, it provides that the re-seller must divide standing charges pro-rata amongst the purchasers according to the amount of energy used, or estimated to have been used by the purchaser. It seems to us that this is exactly what is being done in this case.

Contractual obligation to pay fixed charges (all fuels)

60. Ms Mattsson appears to have argued that the fixed charges described above are not payable as per the terms of the Applicant's leases. She relied on clause 3.3.2 of the Applicant's lease. That clause obliges the leaseholder to pay for energy *consumed*, not for fixed charges.

61. If our understanding of this objection is correct, we reject it. It appears to us that at other parts of the lease, it is clear that the leaseholder is liable to pay for the costs of supply of energy, not just the actual consumption; in particular those clauses at Part D of Schedule 4 set out earlier in this decision.

Are Switch 2's standing charges irrecoverable pursuant to section 20B(1) Landlord and Tenant Act 1985 ('the Act')?

62. This challenge concerns the standing charges made by Switch 2 for the period between 31 May 2008 and 1 March 2012. This standing charge is the charge for the work done by Switch 2 in reading the meters and working out the bills. This standing charge appears to have been demanded as part of the demand for the energy bills sent out in accordance with clause 3.2.2 of the Applicant's lease.

63. It was argued on behalf of the Applicant that the standing charge could not be claimed by the Respondent pursuant to clause 3.2.2 as that charge did not form part of the energy *consumed* (as per the wording of clause 3.2.2) nor was it part of the cost of AC Energy for the air conditioning (as evidenced by meters ((as per the definition of *Apartment Energy Charge* in the lease).

64. Accordingly, argued Ms Mattsson, the standing charge for Switch 2 could only be claimed within the Service Charge provisions. If that was the case, then the charges had to be claimed in accordance with Part B, Clause 1.1 of Schedule 4 to the lease (set out above - which provides for an annual estimate of expenditure and then quarterly payments in accordance with that estimate).

65. Ms Mattsson particularly relied upon *Southwark LBC v Woelke* [2013] UKUT 349 (LC). The facts of that case are more straightforward than is the case in this matter. In *Woelke*, all Service Charges were payable in only one way, that being by way of four quarterly payments based on the landlord's annual estimate of expenditure. The local authority however was in the practice of demanding charges for works on an ad hoc basis outside of the lease provisions. The Upper Tribunal found that, as the ad hoc demands had not been made in accordance with the lease, they had not been properly demanded and were accordingly not payable.

66. The first question for us must be therefore; is the standing charge capable of being demanded in accordance with clause 3.2.2?

67. From the terms of the lease, it is clear that there was intended to be some flexibility concerning the demand for service charges. It was clearly intended by clause 3.2.2 that the landlord should be able to recover the energy costs as quickly as possible. It is interesting to note that clause 2.4 of the lease provides for a payment "*on demand*" of "*any other sums due to the Lessor under the terms hereof*". The lease terms are plainly not as straight forward as those in *Wolke*.

68. Mr Bates for the Respondent argued that the costs of energy in clause 3.2.2 could include the costs of providing that service, that being the standing charge. He referred in particular to *Westleigh Properties Ltd v Grimes* [2014] UKUT 0213 (LC). In that case, the lease made no reference to a Service Charge or to a managing agent or the costs of such an agent. The main lease clause under consideration provided:-

> To contribute annually or more frequently as the Lessor shall require when called upon to do so by the Lessor a one quarter share of the costs, expenses and outgoings and matters mentioned in Clauses 3A) and 3(b) hereof

Clauses 3(a) & (b) dealt with maintenance, repair and decoration.

69. The tribunal noted what it said in its previous decision of *Waverley Borough Council v Ayra* [2013] UKUT 0501 (LC) as follows:

> It is clear from these authorities that, in principle, the costs incurred by a local authority, or by any other landlord, in arranging for the provision of services, and managing their delivery is properly regarded as part of the cost of providing the service which may be recovered from its tenants through an appropriately framed service charge covenant. The same is true of the overhead costs incurred in connection with the management and provision of services. In both cases it is necessary to respect any limits which the parties may have imposed on the categories of expenditure to which the service charge may relate

70. However, the tribunal went on to find that in this case the lease was unusually restrictive and concluded:-

> The agents did undertake some tasks for which they were remunerated. No doubt they demanded and collected ground rents, arranged for the payment of electricity and insurance invoices and the preparation of annual accounts, and prepared and despatched service charge demands. Nonetheless the original parties to the lease having signed up to the restrictive terms of clause 2(d), they agreed that none of the costs incurred by the Lessor in connection with those matters was to be passed on to the Lessee.

71. In the lease in question in this application, whilst there is, in our view, clear provision for the charging of the Switch 2 standing charge (in Parts C & D of Schedule 4 to the lease) there does appear to be a particular distinction drawn between the costs of actual usage of energy and any other costs in clause 3.2.2.

72. The definition of "AC Energy" refers to the consumption of gas and electricity. The definition of "Apartment Energy Charge" refers to the cost of energy "*as evidenced by meters installed*". Clause 3.2.2 refers to the obligation to pay for energy "*consumed*". All of this appears to be specifically restricted to the net costs of the energy.

73. A distinction therefore appears to be drawn between the landlord's ability to demand payment for energy consumed shortly after it is consumed (according to clause 3.2.2 the demand is payable within 7 days) and the costs of management of services/utilities or other contracts for the purpose of management which are within the more general Service Charge regime in the Schedules to the lease.

74. It appears to us therefore that, as in the decision in *Grimes* referred to above, the lease in question appears to be restrictive on this issue as there is no provision in clause 3.2.2 to demand, ad hoc, the charges of Switch 2. They have to be demanded in accordance with the general Service Charge.

75. Mr Bates in his written closing submissions went on to argue as follows:-

> It seems to be said that these costs had to go through the service charge mechanism and not on the regular utility statements. But here is noting to that. The lease does not prescribe such a form for a demand.

76. We disagree, the lease obliges the tenant to pay "*the Service Charge payable in accordance with the Provisions of Part B of Schedules 4 & 5*"; those provisions call for an yearly estimate followed by quarterly payments. We assume that Switch 2's charges were not included in those yearly estimates. Therefore we do not see that Switch 2's charges have been properly demanded or set out under the terms of the lease. It would appear therefore that section 20(B) Landlord and Tenant Act 1985 will apply to some previous charges meaning that they are not payable by the Applicants.

Estimated charges since 1 March 2012

77. Since March 2012 the Respondent has only issued two demands for utility charges; 7 February 2014 for the period 1 March 2012 – 31 December 2013 and on 27 November 2014 for the period 1 January – 31 October 2014. These demands are estimated demands due to the belief that meter readings could not be relied upon (which it now appears may not be the true position).

If utility charges can be evidenced by meter readings, what is the appropriate unit rate for the various energies?

78. On this issue we refer to what we have said above (under the heading - *Is the Respondent entitled to charge a higher unit rate for electricity that the rate charged to the Respondent by the utility companies?*) - which is that this question appears to go behind the expert evidence and no further questions were put to the experts on this point. We do not feel able therefore to consider this matter further.

Are demands for utility charges based on estimated consumption as opposed to consumption evidenced by meter readings valid pursuant to clause 3.2.2 of the Underlease?

79. It was the Applicant's position at the hearing that clause 3.2.2 obliged only payment for *evidenced* consumption of energy, if that consumption could not be so *evidenced* by meter readings then no payment was due in respect of it.

80. The Respondent asserted that this point had already been conceded by the Applicant earlier in the proceedings. The Respondent relied upon the following chronology.

81. 29 October 2014: At paragraph 14 of its Statement of Case in Reply, the Applicant said:-

> The Underlease therefore requires the Respondent, in support of its demands for payment, to provide evidence from meters of levels of consumption of electricity, gas and water and the Applicant is not obliged to pay sums demanded by the Respondent until this has been done.

11 December 2014: At paragraph 15 of the Respondent's Statement of Case in response to the Reply the Respondent said:-

> The case for the applicant is wide-ranging, but appears to cover the following:
> (a) there is said to be no obligation to make any payments for utilities unless and until the level of consumption is "evidenced" by meter readings (para. 14)

At paragraphs 26 to 31 the Respondent continued:-

> 26. The primary case against the respondent appears to be that nothing is payable *at all* because the consumption cannot be "*evidenced*" by meter readings.
>
> 27. This is not correct. The covenant "to pay for all electricity gas water....consumed within the Demised Premises" is not even arguably so delimited.....
>
> 28. Even the Apartment Energy Charge is not so limited.....
>
> 29. If however that is wrong, it would not follow that nothing was payable. The applicant would still be liable to pay for the costs of the utilities, whether on a *quantum meruit* basis or on an unjust enrichment basis.....
>
> 30. This latter point is important. It is not clear that money due under either basis would be within the jurisdiction of the Tribunal, *i.e.* whether or not it would be a service charge within the meaning of s.18, Landlord and Tenant Act 1985.....
>
> 31. Accordingly, given the nature of the argument advanced by the applicant, the respondent asks that the proceedings be transferred to the county court.....

7.1.15 In a case management hearing before a Tribunal Judge, an order was made with the following recital:-

> AND UPON the Applicant accepting that it has a contractual obligation to contribute to the costs of the utilities as a service charge within the meaning of section 18 of the Landlord and Tenant Act 1985 and that the issue is only one of quantum

82. Mr Bates argued that the order referred to above, when considered in the light of the chronology, made it clear that the Applicant conceded the point now being raised.

83. We do not agree. First, we do not see that the recital to the order is sufficiently clear that such a concession is being made. Second, we consider that the Applicant has always accepted that it had a contractual obligation to make a payment for energy, its argument has been that under the terms of the lease, it not so obliged to make a payment without an evidenced meter reading.

84. Onwards therefore to the substance of the point being raised by the Applicant. The Applicant points to the definitions of "AC Energy" and "Apartment Energy Charge" in the Applicant's lease. Both of these definitions refer to energy use "*as evidenced by meters*". Reference is

then made to the obligation in the Respondent's lease at clause 3.3.2 to pay for energy where payment has to be made within 15 days after a demand "*supported by reasonably sufficient evidence of the amount of AC Energy consumed in the Demised Premises*". The 'demised premises' in this case being the residential elements of the Building as a whole.

85. By contrast, clause 3.2.2 in the Applicant's lease contains no such reference to evidence of consumption. The Applicant argues therefore that it could not have been the intention that there be a distinction between how energy use is to be measured in clause 3.2.2 of the Applicant's lease and how it is to be evidenced in clause 1.6 (definition of 'AC Energy" and "Apartment Energy") of that lease.

86. We disagree. The lease terms are plain, workable and make sense as they stand. The important obligation so far as we are concerned is set out in clause 3.2.2 of the Applicant's lease. That clause imposes upon the Applicant the obligation to pay for energy consumed. The obligation to pay is not dependent upon consumption being evidenced. Clear words would be required in that clause to create a pre-condition to payment.

87. In any event, we do not consider that the words "as evidenced by meters" necessarily means actual meter readings. Evidence from meters could mean evidence of past consumption where no actual readings could (reasonably) be obtained.

88. Further, we do not consider that there is anything in either lease to suggest that the furnishing of evidence of *actual* meter readings is a pre-condition to payment by the leaseholder.

89. Finally, we note that the corresponding clause 3.2.2 in the Respondent's lease only requires "*reasonably sufficient evidence*" as to energy use. That clause seems to us to make clear the intention of the draftsman that actual meter readings were not required (and certainly not as a pre-condition to payment) in the case of this clause.

If estimated demands are permissible under clause 3.2.2 of the Underlease, what is the best method of estimating the utility charges for each apartment?

90. As noted above, according to Mr Livingstone's evidence at the hearing, it is very possible that meter readings can be obtained.

91. Whilst the experts were giving evidence, it appeared that there was agreement between them as to the methodology of estimating charges for the residential apartments; that methodology included historical use by each apartment, occupation of the apartments and the hotel and degree days data. In the light of this agreement, it is up to the experts to now make calculations and to try and reach agreement – in the absence of agreement, a further application could be made to the tribunal on the question of reasonableness and payability.

OTHER MATTERS

92. There was debate in the hearing as to the effect of the OFGEM guidance where it dealt with the position where meter readings may not be available. The guidance gives the following example:-

> If the purchaser does not have a meter, or the meter does not accurately record the number of units used within each price band, the reseller must use his reasonable endeavours to estimate what proportion of the total bill each tenant should pay.

93. Ms Mattsson for the Applicant argued that this guidance did not apply to the situation in the Building. The guidance, she argued, referred to the purchaser's meter. In this case, where the meter in question is the seller's meter, the guidance does not apply.

94. It seems to us that the OFGEM guidance is general, in principle, guidance. It could not and does not give examples that cover every situation. We consider that the guidance is intended for situations where meters are not recording properly in general. The guidance does not specifically relate to situations where just the seller's meter is faulty. We therefore consider that in this case, estimated readings do not contravene the guidance.

COSTS

Rule 13 Costs [4]

95. The Applicant, at various points in these proceedings, indicated its intention to make an application for costs against the Respondent based on alleged unreasonable behaviour on the part of the Respondent. The Applicant however had not actually made such an application prior to the hearing and did not make one at the hearing.

96. At the outset of the hearing we decided that only evidence relating to the Applicant's application pursuant to section 27A of the Act would be heard, not evidence as to any claim for costs under Rule 13.

Section 20C costs

97. Mr Bates for the Respondent indicated that the Respondent may not contest the Applicant's application for an order in respect of costs pursuant to section 20C of the Act, he did not however confirm his client's position.

Mark Martynski, Tribunal Judge
1 September 2015

---

[4] The Tribunal Procedure (First-tier Tribunal) Property Chamber Rules 2013