UPPER TRIBUNAL (LANDS CHAMBER)

UT Neutral citation number: [2017] UKUT 449 (LC)
UTLC Case Number: LRX/15/2017

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT – SERVICE CHARGES – s.20B(1), Landlord and Tenant Act 1985 – whether 18 month time limit on demands for service charges is repeated for each intermediate landlord – appeal allowed

IN THE MATTER OF AN APPEAL AGAINST A DECISION OF THE FIRST-TIER TRIBUNAL (PROPERTY CHAMBER)

BETWEEN:

WESTMARK (LETTINGS) LIMITED

Appellant

and

ELIZABETH PEDDLE AND OTHERS

Respondents

Re: 22-25 Queen Square Apartments, Bell Avenue, and 42-43 Welsh Back, Bristol BS1 4AP

Martin Rodger QC, Deputy Chamber President

Royal Courts of Justice, Strand, London WC2A 2LL
19 October 2017

Justin Bates, instructed by CMS, Solicitors, for the appellant.
Ms E Peddle and *Mr M Bird*, for the respondents.

The following cases are referred to in this decision:

Oakfern Properties Ltd v Ruddy [2006] EWCA Civ 1389; [2007] Ch. 335

OM Property Management v Burr [2013] EWCA Civ 479; [2013] 1 W.L.R. 3071

Leaseholders of Foundling Court and O'Donnell Court v Camden LBC [2016] UKUT 366 (LC); [2017] L&TR 7

Brent London Borough Council v Shulem B Association Ltd [2011] EWHC 1663 (Ch); [2011] 1 WLR 3014

Introduction

1. This appeal raises an issue of general importance to residential leaseholders who are liable to pay to their immediate landlord a charge for services provided by a superior landlord.

2. Section 20B(1), Landlord and Tenant Act 1985 imposes a time limit on the making of demands for service charges, by providing that a tenant is not liable to pay so much of the "relevant costs" included in a service charge as were incurred more than 18 months before a demand for payment of the service charge was served on the tenant.

3. The issue in the appeal is this: where a cost is incurred by a superior landlord in providing services for which a charge is passed down a chain of intermediate landlords before ultimately being paid by the occupational leaseholder, do successive 18 month time limits apply to each demand made in the chain, or does section 20B(1) impose a single 18 month limit from the date on which the cost was first incurred by the superior landlord?

4. On 30 November 2016 the First-tier Tribunal (Property Chamber) ("the FTT") decided that the occupational leaseholders of 29 flats at Queen Square Apartments in Bristol, were not liable to pay service charges for accounting periods before 31 May 2014 because more than 18 months had elapsed between the date on which the relevant costs had first been incurred by the superior landlord responsible for the provision of services and the receipt by the occupational leaseholders of demands for payment from their own immediate landlord. The FTT recognised that its decision raised a point of principle of some importance on which there is no authority, and granted permission to appeal to this Tribunal.

Parties

5. The appellant, Westmark (Lettings) Limited, which I will refer to as "Westmark", sits in the middle of a chain of leasehold relationships at Queen Square. Its superior landlords are trustees of the Epic (Colmore Row) Trust (and will be referred to as "Epic"); beneath Westmark in the chain is Queen Square (Bristol) Residential Management Company Limited ("the Management Company") and beneath it are the occupational leaseholders of the individual flats.

6. Both Epic and the Management Company were joined as parties to the proceedings before the FTT and this appeal. Epic was represented and participated fully at first instance, but chose not to take any active part in the appeal. The Management Company (which until very recently was controlled by Westmark) played no part at either stage of the proceedings.

7. At the hearing of the appeal Westmark was represented by Mr Justin Bates of counsel. The respondent leaseholders were represented by two of their number,

Miss Elizabeth Peddle and Mr Mark Bird. I am grateful to all representatives for their assistance in this appeal.

8. Before referring to the facts in more detail it will be convenient to put section 20B(1) in its statutory context.

The relevant statutory provisions

9. Sections 18 to 30 of the 1985 Act are concerned with residential service charges. By section 18(1) a "service charge" is defined as an amount payable "by a tenant of a dwelling" for services, repairs, maintenance, improvements or insurance or the landlord's costs of management and the whole or part of which varies or may vary according to "the relevant costs". A "dwelling", as defined in section 38, is "a building or part of a building occupied or intended to be occupied as a separate dwelling".

10. The expression "a tenant of a dwelling", which is employed in section 18(1) as part of the definition of "service charge", was considered by the Court of Appeal in *Ruddy v Oakfern Properties Ltd* [2007] Ch. 335, at [69]-[81], where it was held to include an intermediate landlord holding a lease of a building which contained a number of dwellings. It was not necessary that the tenant be in occupation of a dwelling, so the expression "a tenant of a dwelling" was apt to include a tenant which had sublet and had thus become an intermediate (or "mesne") landlord. Such a landlord was the tenant of part of a building intended to be occupied as a separate dwelling, and was not prevented from being "a tenant of a dwelling" by the fact that it was also tenant of the remainder of the building, or by anything in the statutory context.

11. By sections 18(2) and (3) the meaning of "relevant costs" is explained as follows:

> (2) The relevant costs are the costs or estimated costs incurred or to be incurred by or on behalf of the landlord, or a superior landlord, in connection with the matters for which the service charge is payable.
>
> (3) For this purpose –
>
> (a) costs includes overheads, and
>
> (b) costs are relevant costs in relation to a service charge whether they are incurred, or to be incurred, in the period for which the service charge is payable or in an earlier or later period.

12. The following six sections of the Act deal with different limitations on the recoverability of service charges. Section 20B limits recoverability by reference to time. It provides as follows:

20B – Limitation of service charges: time limit on making demands

(1) If any of the relevant costs taken into account in determining the amount of any service charge were incurred more than 18 months before a demand for payment of the service charge is served on the tenant, then (subject to sub-section (2)), the tenant shall not be liable to pay so much of the service charge as reflects the costs so incurred.

(2) Sub section (1) shall not apply if, within the period of 18 months beginning with the date when the relevant costs in question were incurred, the tenant was notified in writing that those costs had been incurred and that he would subsequently be required under the terms of his lease to contribute to them by the payment of a service charge.

13. To apply section 20B(1) to any relevant cost it is necessary to know the date on which that cost was "incurred". If that date was more than 18 month before the date on which a demand for payment was served on the tenant then, subject to section 20B(2), the tenant will not be liable to pay so much of the demand as was attributable to that cost.

14. The leading case on identifying when a cost is incurred for the purpose of section 20B(2) is *OM Property Management v Burr* [2013] 1 W.L.R. 3071, in which the Court of Appeal distinguished between a liability and a cost and held that a costs is "incurred" once an underlying liability to pay for a service crystallises and is made certain. Approving the decision of the Tribunal that it is the cost that must be incurred, the Court explained (at [8]) that a liability to pay for a service does not become a cost for the purpose of section 21B(1) until it is made concrete, "either by being met or paid or possibly by being set down in an invoice or certificate". At [13] Lord Dyson (with whom Moses LJ and Pill LJ agreed) said:

> "the incurring of costs entails the existence of an ascertained or ascertainable sum which is capable of being adjusted by repayment, reduction etc. The mere provision of services or supplies does not without more entail anything which is capable of being adjusted in this way."

15. Sections 21 and 22 make provision for tenants (and recognised tenants' associations) to obtain information from landlords about relevant costs which have been incurred.

16. By section 21(1) "a tenant may require the landlord" to supply a written summary of costs incurred in the previous 12 month accounting period "which are relevant costs in relation to the service charges payable or demanded as payable in that or any other period." By section 21(4) a landlord who receives such a request must comply with it within 1 month of the request or within 6 months of the end of the last accounting period, whichever is the later. The summary must include details of any costs in respect of which no demand for payment has been received by the landlord in the relevant period (section 21(5)(a)) (*i.e.* costs incurred *after* the service charge year in question). If the service charge is payable by the tenants of

more than four dwellings the summary must be certified as a fair summary by a qualified accountant (section 21(6)).

17. By section 22 a tenant who has obtained a summary of relevant costs using the procedure in section 21(1) may, within 6 months of obtaining the summary, require the landlord to provide reasonable facilities for inspecting the accounts, receipts and other documents supporting it. The landlord must then provide those facilities for a period of 2 months beginning not later than 1 month after the request is made.

18. Section 23 anticipates that some relevant costs about which tenants may wish to obtain information may have been incurred not by the tenants' own landlord, but by a superior landlord. It provides as follows:

> 23 – Request relating to information held by superior landlord
>
> (1) If a request under section 21 (request for summary of relevant costs) relates in whole or in part to relevant costs incurred by or on behalf of the superior landlord, and the landlord to whom the request is made is not in possession of the relevant information –
>
> (a) he shall in turn make a written request for the relevant information to the person who is his landlord (and so on, if that person is not himself the superior landlord),
>
> (b) the superior landlord shall comply with that request within a reasonable time, and
>
> (c) the immediate landlord shall then comply with the tenant's or secretary's request, or that part of it which relates to the relevant costs incurred by or on behalf of the superior landlord, within the time allowed by section 21 or such further time, if any, as is reasonable in the circumstances.

19. The tenants' section 22 entitlement to reasonable facilities to inspect accounts and supporting documents also applies to any summary of costs obtained from a superior landlord using the section 23 procedure (section 23(2)).

20. By section 25(1), failure to comply with a request under sections 21, 22 or 23 without a reasonable excuse is an offence.

The facts

21. Queen Square, Bristol, was named in honour of Queen Anne, the last Stuart monarch, and was laid out as a garden square early in the 18th century. On the east side of the square the surviving Georgian facades at numbers 22 to 25 now front a mixed modern development of offices, shops and residential units, the rear of

which is on Welsh Back, overlooking Bristol harbour. The development includes 29 long leasehold flats on 5 upper floors.

22. The complicated leasehold structure under which the Queen Square development is held was described by the FTT in its comprehensive decision. For the purpose of resolving the single issue in this appeal it is not necessary to refer to that structure in detail. It is enough to know that there are five layers of ownership, beginning with the freehold which is owned by Bristol City Council. In 2005 the City Council granted a lease of the whole of the development for a term of 150 years ("the Headlease") which is now vested in Epic. The residential units and their associated common parts were then let together on an underlease granted in June 2007 ("the Underlease") which has been vested in Westmark (or an associate) since November 2009. The Underlease was granted subject to a concurrent underlease of the same residential parts which had been granted to the Management Company in May 2007 (the "Concurrent Underlease"). The Concurrent Underlease sits in the title structure between the Underlease and the occupational sub-underleases of the 29 flats in the development ("the Occupational Leases").

23. No services are provided by the freeholder. As tenant under the Headlease, Epic is obliged to insure the development, to keep it in good and substantial repair and condition, and to manage it in accordance with principles of good estate management.

24. Epic is entitled to pass on the costs it incurs in complying with its own obligations through a service charge payable by Westmark as a term of the Underlease. In its turn Westmark is entitled to recoup the greater part of the same costs from the Management Company through the service charge in the Concurrent Underlease. The Management Company is then entitled to pass those costs on to the respondents through the service charge in the Occupational Leases. The Management Company is also obliged to undertake management functions in relation to the common parts of the residential parts of the development (there is no dispute about those costs in this appeal).

25. A proportion of the costs incurred by Epic are thus billed successively down a chain of liability before finally being picked up by the respondents as occupational leaseholders. At each point in the chain a tenant receives a demand from its own landlord, which it is required to pay, and for which, in the case of Westmark and the Management Company, it is also entitled to seek reimbursement from the tenant below it in the chain.

26. Epic and Westmark have been in dispute over the Queen Square development for many years. Mr Bates explained that Westmark's pursuit of this appeal was connected to that dispute, but he gave no further details other than that the dispute had involved litigation over the charges payable by Westmark.

27. A substantial part of the FTT's decision was concerned with problems which had been experienced in the management of the development. When the development was completed in 2007 it had been intended that ownership of the Management Company would be vested in the occupational leaseholders of the flats, giving them significant control over expenditure on the common parts and the exclusively residential elements of the service charge. For reasons which are not relevant to the issue in the appeal, it was not until 2017 that the respondents were permitted to acquire the Management Company.

28. Two symptoms of the mismanagement of the development led to these proceedings. The first was that between 2009 and 2011 no attempt was made to reconcile estimated service charges paid by the occupational leaseholders with the total costs actually incurred in the provision of services; the second was that after 2011 the practice of collecting estimated charges was abandoned and no demands for payment were made at all.

29. The second omission was finally addressed on 30 November 2015 when each of the occupational leaseholders received five invoices from the Management Company for service charges, one for the accounting years 2008 to 2011 and one each for the years from 2012 to 2015. The demands were described simply as being for "Epic service charges total liability" and were subdivided into lump sums attributable to insurance, car park and building services. No further breakdown of those charges was supplied until shortly before the hearing by the FTT of the application brought under section 27A of the 1985 Act by the respondents on behalf of 24 of the occupational leaseholders for a determination of the extent of their liability for service charges. At that hearing the leaseholders argued that the 18 month time limit in section 20B(1) of the 1985 Act had begun to run when the relevant costs were incurred by Epic and not when the Management Company became liable to pay Westmark; as a result, the leaseholders argued, they had no liability to pay the service charges for 2011, 2012 and 2013; and that for the year 2014 they had no liability in respect of any costs incurred by Epic before 31 May 2014.

The FTT's decision

30. The FTT listed 14 separate issues which it had been asked to determine and which it had examined in detail during a hearing lasting three days. Some concerned the relationships between Epic, Westmark and the Management Company, while others raised more conventional questions about the reasonableness of the cost and quality of services. The FTT dealt with the impact of section 20B(1) on the respondents' liability at paragraphs 102 to 115 of the decision.

31. The FTT first found that all of the costs included in the invoices delivered on 30 November 2015 had been incurred by Epic in the accounting year to which the invoices related. It noted the occupational leaseholders' case that section 20B(1) provided a defence to a claim to recover from them a contribution towards any

costs incurred before 31 May 2014, and Mr Bates' submission in response that the relevant date was when the Management Company incurred its own cost, which was not until it received (presumably from Westmark) a demand for payment of the Concurrent Underlease service charge which had not been until about August 2015.

32. At paragraph 111 of its decision the FTT found in favour of the occupational leaseholders and rejected Mr Bates' submissions. Its reasoning was as follows:

> (1) There is a distinction between a liability to pay and a cost, as the Court of Appeal had explained in *OM Property Management v Burr*. The fact that the liability to pay a service charge being charged "down the chain" only arises when a demand is received, does not prevent the cost from arising earlier. Once a cost had been incurred by Epic "it cannot cease to be a cost and somehow arise a second time when, at a later date, the intermediate landlord or a management company are called upon to pay."
>
> (2) Costs incurred by a superior landlord are "relevant costs", as is clear from section 18(2). The costs included in the invoices delivered to the occupational leaseholders were costs incurred by Epic, the superior landlord, and "were incurred at the time that superior landlord became liable to pay."
>
> (3) Mr Bates' construction of section 20B(1) would negate much of the protection it was intended to provide against stale claims, whereas the leaseholders' submission would produce a result consistent with that intention. On the facts of this case Mr Bates' approach could result in leaseholders being required to contribute towards costs incurred as much as four and a half years before they received a demand.
>
> (4) Section 20B(2) provided a solution for intermediate landlords who could make an estimate of the sums they were likely to be called on to pay and give notice to their own tenant or tenants of that anticipated liability within 18 months of the costs in question being incurred by the superior landlord which provided the services. Such an estimate need not be precise and would not be invalid just because it exceeded the sum eventually found to be due.
>
> (5) The facility to collect estimated service charges which appears routinely in residential leases substantially mitigated the risk to intermediate landlords of the FTT's preferred construction of section 20B(1). The potential shortfall for in this case would have been much less if Westmark and the Management Company had taken the opportunity to collect estimated service charges in advance.

33. The FTT therefore concluded that the leaseholders were not liable to pay the service charges demand for 2012 and 2013, or for 2014 to the extent they reflected costs incurred before 31 May. There had been demands for estimated service charges in 2011 on which section 20B(1) had no impact. It was unable to make any alternative finding as to the extent of the leaseholders' liability if Mr Bates' submission proved to be correct, since there had been no evidence of the date when Epic had issued a demand to Westmark.

The parties' submissions

34. On behalf of Westmark (which had controlled the Management Company before 2017) Mr Bates submitted that where relevant costs are passed down a chain of title they are "incurred" for the purposes of section 20B(1) at different times by different landlords. At each stage in the chain a cost was therefore incurred by a landlord to which a separate period of 18 months applied.

35. The protection in section 20B(1) is afforded to a "tenant" who pays a "service charge". Applying section 18(1) in the light of *Oakfern v Ruddy*, it was clear, Mr Bates suggested, that Westmark was a tenant of a dwelling and that the sums which it was required to pay to Epic were therefore service charges to which section 20B(1) applied.

36. Costs were incurred by Epic when it received an invoice or demand from an insurer or the supplier of some other service. Epic then had 18 months to make a demand of its own tenant, Westmark. For its part, Westmark did not incur a relevant cost until it received a demand from Epic. The receipt of Epic's demand crystallised Westmark liability, and only then could it be said to have incurred a relevant cost. Westmark, as landlord under the Concurrent Underlease, was then in a position to demand payment from its own tenant, the Management Company. Under section 20B(1) a separate period of 18 months applied to that demand and ran from the date on which Westmark incurred its own cost.

37. The same was true of the demand made by the Management Company. It incurred a cost when, as tenant, it received Westmark's demand; the receipt of that demand started a new period of 18 months within which the Management Company, as landlord, could make its own demand of the respondents.

38. Mr Bates accepted that one consequence of his submission was that the ultimate paying party (*i.e.* the occupational leaseholder) might receive a demand for a contribution towards the costs of items of work which had been carried out many years earlier. He suggested that there were a number of different routes by which that possibility could be mitigated or avoided.

39. First, as the Tribunal had held in *Leaseholders of Foundling Court and O'Donnell Court v Camden LBC* [2016] UKUT 366 (LC), where the service charge contribution related to qualifying works or qualifying long term agreements, the occupational leaseholders should have been consulted in advance by the superior landlord which intended to undertake the works, as required by regulations made under section 20ZA(4), so would have had some warning of the likely costs.

40. Secondly, under section 21, the occupational leaseholders were entitled to request from their own immediate landlord a summary of all of the costs incurred in the preceding annual accounting period. If their own landlord is unable to supply the relevant information because the costs were incurred by a superior landlord, it

would be required by section 23(1) to make a corresponding request of the person who is its landlord (and so on, if that landlord is not the superior landlord which originally incurred the cost). The summaries must also include details of any costs in respect of which no demand for payment has yet been received in the relevant period (section 21(5)(a)) (*i.e.* costs incurred *after* the service charge year in question). Thus, Mr Bates suggested, the occupational leaseholders have a means by which they may obtain information about future costs.

41. Thirdly, the occupational leaseholders in a chain of leasehold interests could make an application to the FTT under section 27A to determine the amount of the service charge payable by their own immediate landlord to the superior landlord ultimately responsible for the provision of services. That was what had occurred in *Oakfern v Ruddy*, and the Court of Appeal had approved the procedure (at [82]). If the superior landlord could not justify the costs it had incurred then the FTT would determine that some or all of those costs were not recoverable by the superior landlord from the intermediate landlord and so could not be passed on down the chain to the occupational leaseholder.

42. Finally, Mr Bates submitted, any argument about the unfairness to an occupational leaseholder must be balanced against the unfairness to the intermediate landlord. If the 18 month period runs for all purposes from the date on which the superior landlord incurs a cost, an intermediate landlord is at risk that it may fall foul of section 20B(1) before it is in a position to make any demand of its own. On the FTTs construction, Epic could incur costs at the beginning of an accounting period for which no demand might be presented to Westmark for perhaps 17 months; Westmark would then have only 1 month to deliver its own demand to the Management Company, leaving the Management Company hardly any time to make a demand of the occupational leaseholders within the permitted total of 18 months. At the later stages in the chain it would become increasingly difficult to deliver a demand within the diminishing time available. It may also be contractually impossible to make a valid demand within a very short period of time, as where, for example, complex apportionments were required, or certification procedures had to be completed.

43. In their moderate and constructive submissions on behalf of the respondents, Mr Bird and Ms Peddle first emphasised the practical difficulties which they had all faced during the period before 2011 when budgets were not reconciled against actual expenditure and then between 2011 and 2015 when no service charge demands at all were issued. Acute problems had been experienced by leaseholders who had wanted to sell their flats during this extended period of uncertainty. For leaseholders faced with those difficulties section 20B(1) provided what Mr Bird referred to as "a backstop protection in an opaque situation."

44. The purpose of section 20B was to protect tenants against stale claims. Allowing successive periods of up to 18 months for each interest between the original provider of the service and the person ultimately liable to pay for it would make that protection ineffective. It would also seriously impair the ability of

leaseholders to mount effective challenges under section 19(1) to the cost of inadequate services, since it would require them to establish as long as five years after a service had been provided that it not been of reasonable quality. That was a significantly more onerous burden than to mount a similar challenge to the cost of services provided within the previous 18 months.

45. Mr Bird also took issue with the various mitigation strategies Mr Bates had suggested were available to leaseholders. As to the first, consultation would only take place for major works or qualifying long term agreements and would not give warning of the level of more routine expenditure.

46. As to the second, reliance on section 21, repeated requests for information had been made by the respondents, but without success. Evidence had been given by Westmark's representative at the FTT that information it had obtained in response to one such request had not been passed on to the respondents. The fact that it was a criminal offence not to comply with a request under section 21 did not provide the same practical assistance to leaseholders as section 20B(1).

47. As for the suggestion that leaseholders could bring their own proceedings under section 27A against superior landlords, that was what had been done in the present case (to which each of the landlords had been made a party) but the procedures were not straightforward and the prospect had been daunting. Even then, the FTT had only been able to provide a clear answer to the issue of liability by enforcing the 18 month cut-off. Despite both Epic and Westmark's active participation in the proceedings, the details of the demands passing between them had not been disclosed.

48. In any event, Ms Peddle pointed out, a determination of the total costs incurred by Epic in providing services to the whole development would not enable the leaseholders to calculate their own liability, since they did not know the proportion of that expenditure for which Westmark was liable in respect of the residential parts.

Discussion and conclusion

49. In *OM Property Management v Burr* the Court of Appeal held that for the purpose of section 20B(1) "costs [are] incurred" when the landlord providing the service receives a bill from its supplier or contractor. As a result, the section provides less protection against stale claims than if the period of 18 months began at the earlier date when the service itself is provided. As Lord Dyson MR pointed out at [16], the question is the extent of the protection which Parliament intended the section to provide, and "merely to assert the obvious fact that section 20B(1) is intended to protect tenants from stale claims does not answer the critical question that arises in this appeal." The same can be said of the question in this appeal.

50. On the other hand, practical difficulties such as those experienced by the respondents while the dispute between Epic and Westmark has been going on out of their sight, underpin the policy of providing protection against stale service charges and make it important that the effect of section 20B(1) should be clearly defined. Those difficulties should not be underestimated, especially for a leaseholder wishing to sell his or her flat, who may be unable to sell, or have to accept a substantially discounted price or provide an indemnity against as yet unknown charges in order to do so.

51. Mr Bates' researches into the policy underlying section 20B revealed that the 1985 Nugee Committee report on problems in the management of blocks of flats had recommended a 12 month time limit for the making of demands for service charges, subject to a power for the County Court to disapply it. Parliament had not taken that course, but section 20B had been inserted in the 1985 Act by the Landlord and Tenant Act 1987 (section 41, Sch.2, para 4), without any meaningful explanation being provided to Parliament at the Committee stage which might be relied on to explain its intended scope.

52. The proper approach to understanding the section is not to begin by considering its policy, but to focus on the natural or ordinary meaning of the language in which that policy is expressed, as Lord Dyson did in *OM* and as Parker LJ did in *Oakfern v Ruddy* when construing section 18(1) and the meaning of the expression "tenant of a dwelling". In that context, having noted that a decision either way would lead to anomalies, Parker LJ continued, at [69]:

> "In such circumstances, it seems to me that the right approach must be to attempt to construe the relevant statutory provision in its legislative context, and having reached a provisional conclusion as to what it means, to test that meaning to see whether it would, if adopted, lead to such absurd consequences in practice that Parliament cannot possibly have intended it. If the provisional conclusion would lead to absurd consequences, then it may be necessary to revisit it."

53. Two preliminary points can be made about sections 18 to 30, the group of sections in the 1985 Act concerning service charges.

54. The first is that these sections were drafted with an appreciation that services might be provided by a superior landlord and paid for ultimately by a tenant several links below it on a chain of title, as happens in this case. That appreciation is suggested first by the definition of service charges in section 18(1), which refers to an amount payable "directly or indirectly" for services and which may vary according to the relevant costs. It is clearer still, and most importantly, in the definition of relevant costs in section 18(2), which are costs incurred or to be incurred "by or on behalf of the landlord, or a superior landlord." It is also the basis of section 23, which imposes obligations on an immediate landlord to take steps to obtain information about costs "incurred by or on behalf of a superior landlord" and which contemplates requests made successively up a chain of title "to

the person who is his landlord (and so on, if that person is not himself the superior landlord)."

55. Although section 20B was inserted by amendment to the 1985 Act as originally enacted, it must nevertheless be taken to have been intended to function in the relatively common circumstances illustrated by this case, where costs are incurred in the provision of services by a superior landlord and passed on down a chain of title.

56. Secondly the draftsman also appreciated that it may take time before the amount of a service charge can be stated clearly. That is apparent from section 21(4) which allows a landlord six months from the end of its annual accounting period within which to provide a written summary of the relevant costs incurred in that period in response to a request under section 21(1). Where relevant costs are incurred at the start of an accounting period, a landlord cannot therefore be required to include them in the summary to which a tenant is entitled until up to 18 months after they have been incurred. It may not be coincidence that the same period, 18 months, is included in section 20B(1) as the maximum allowed for a landlord to present a demand for payment of a service charge taking such costs into account.

57. The same appreciation is apparent in section 23. Where costs have been incurred by a superior landlord, and information is only available by making a request which has to pass up through successive landlords, the six months allowed by section 21(4) for a reply is extended by "such further time, if any, as is reasonable in the circumstances." The Act therefore contemplates that where there are several levels of title it may take more than six months from the end of an accounting period for information to become available about costs incurred by a superior landlord; the Act necessarily therefore contemplates that it may be reasonable to allow more than 18 months for information to be forthcoming about costs incurred at the start of the accounting period.

58. Turning then to section 20B itself, its effect is to provide a time limit running backwards from the date of a demand and to relieve the tenant from liability in respect of so much of a service charge as "reflects" "relevant costs … incurred more than 18 month before" the demand which were "taken into account in determining the amount of" the service charge.

59. Although the section does not say so in terms, it is obvious that the tenant who is to be relieved of liability to pay the service charge is the tenant who receives the demand. That tenant is the only person mentioned in the section, and it is notable that there is no reference to the landlord who makes the demand. In particular the section does not say that the "relevant costs" to which the time limit is to apply are costs incurred by the landlord making the demand. Instead the feature of the relevant costs which is used to identify those which are within the scope of the section is simply that the costs are reflected in, or were taken into account in determining the amount of, the service charge which is the subject of the demand.

60. The reference in section 20B(1) to a service charge which "reflects" relevant costs, and the description of costs as having been "taken into account in determining the amount of any service charge", is consistent with the reference in section 18(1) to a service charge being an amount payable "directly or indirectly" for services. The language of both provisions allows for some separation between the person who incurs the cost of providing the service and the person entitled to receive payment of the service charge. As I have already pointed out, that potential separation is acknowledged most clearly in the definition of "relevant costs" as costs "incurred, or to be incurred, by or on behalf of a landlord, or a superior landlord."

61. In the context of a service charge payable by the tenant referred to in section 20B(1), on whose liability the 18 month time limit might bite, relevant costs therefore include costs incurred by a superior landlord. Reading the definition of relevant costs in section 18(2) into section 20B(1) (omitting, for the sake of simplicity, the references to estimated costs or costs to be incurred) produces the following result:

> "If any of the [costs … incurred by or on behalf of the landlord, or a superior landlord] taken into account in determining the amount of any service charge were incurred more than 18 months before a demand for payment of the service charge is served on the tenant, then (subject to subsection (2)), the tenant shall not be liable to pay so much of the service charge as reflects the costs so incurred."

62. Reading the extended meaning of "relevant costs" into section 20B(1) in this way provides some support for the construction favoured by the FTT. To the extent that the service charge reflects costs incurred by the superior landlord, their recovery will be barred if they were incurred more than 18 months before the demand made of the tenant.

63. But that is not the end of the analysis. Relevant costs are not only costs incurred by a superior landlord, but include costs incurred by the immediate landlord as well. That is obvious from section 18(2). In this case, for example, the Management Company did not simply pass on costs incurred by Epic, *via* Westmark, it also provided services of its own in the residential common parts. Those entirely separate costs were incurred by the Management Company and were clearly relevant costs for the purpose of section 18(1) and 20B(1). The service charges payable by the occupational leaseholders therefore reflected two streams of costs incurred by different landlords at different levels in the chain of title. One stream was originally incurred by Epic, the other by the Management Company.

64. The critical question is whether costs incurred by the Management Company in discharging its liability to Westmark in respect of services provided by Epic, are to be treated for the purpose of section 20B as being the same costs as those incurred by Epic itself. Mr Bates' argument is that they are not the same costs, but

are distinct costs incurred for the first time by the Management Company; the respondents and the FTT took the contrary view. They considered, in effect, that there was only one set of costs referable to the services provided by Epic and that those costs were simply passed on from one landlord to the next without losing their status as costs incurred by Epic. As a result, when recovery of those costs was barred by the passage of time since they were incurred by Epic, it was barred for all purposes.

65. In contractual terms each of the landlords in the chain had a distinct liability of its own. Westmark's liability to pay the service charge demanded by Epic was not the same as Epic's liability to pay its own contractors. The liability of the Management Company under the Concurrent Underlease was not the same as Westmark's liability under the Underlease. In each case the liability was owed to a different person and was payable at a different time and in different amounts (Westmark was liable to contribute only a proportion of the total incurred by Epic, and was entitled to recoup only part of its contribution from the Management Company).

66. In the language of section 20B, at each level in the contractual chain, a cost was incurred by each landlord in turn when it received a demand for payment of its liability.

67. In terms of section 18, the payments made up the chain by Westmark and the Management Company were service charges. They were payable "directly or indirectly, for services" etc and they varied according to the relevant costs. Each of Westmark and the Management Company was a "tenant of a dwelling", as the Court of Appeal held in *Oakfern v Ruddy*.

68. The payments made up the chain by the Management Company were also "relevant costs" in their own right. They were incurred by a superior landlord in connection with the matters for which the service charge was payable, namely the services provided by Epic.

69. The relevant costs taken into account in determining the service charges payable by the occupational leaseholders were the costs incurred by the Management Company under the Concurrent Underlease. If Epic had incurred costs, but failed to bill Westmark, or if Westmark had paid Epic but omitted to make a demand of the Management Company, the Management Company would have incurred no costs of its own (except in relation to its own expenditure on the residential common parts) and would have been unable to add any of the costs incurred by Epic to its own service charge demands.

70. There therefore seems to me to be no reason to treat the costs incurred by Westmark and the Management Company as if they were costs incurred at any earlier time than when each of those companies received a demand for payment from its superior landlord. In particular there is no reason to treat the relevant costs

incurred by the Management Company as if they had been incurred when Epic received invoices from its contractors and suppliers.

71. I am also struck by the absence of any provision, similar to that in section 23(1), adjusting the period allowed by section 20B(1) to permit additional reasonable time for a demand where the relevant costs are incurred by a superior landlord. If a single period of 18 months was intended, which commenced on the date on which a cost was incurred by the superior landlord, it is very surprising that some flexibility was not allowed for. The obvious justification for allowing in section 23(1) such additional time for the provision of information as may be reasonable in the circumstances is the recognition that such information may not be available as quickly from a superior landlord as from the tenant's own immediate landlord. The same considerations might have justified some accommodation of the position of the intermediate landlord in section 20B(1), whether by a fixed extension of the period, an apportionment of it between successive landlords, or a power of dispensation. The fact that no such accommodation was allowed suggests to me that Parliament did not intend to place the intermediate landlord in the precarious position the FTT's construction of the section would create.

72. I therefore respectfully disagree with the FTT's view that once a cost had been incurred by Epic "it cannot cease to be a cost and somehow arise a second time when, at a later date, the intermediate landlord or a management company are called upon to pay." My preferred view is that a new relevant cost arises at each stage, notwithstanding that at each stage the new cost is payable in respect of the same service provided by Epic and its contractors. It follows that my provisional view on the issue of construction is that section 20B(1) has a renewed effect at each level in the chain of liabilities.

73. It is next necessary to consider whether that provisional conclusion based on the effect of the language of section 20B(1) produces a result which is so absurd that it must be rejected.

74. Whichever construction is given to the section, potentially harsh and probably unforeseen consequences are liable to ensue. If my provisional view is correct the relatively common structure of leasehold titles exemplified by this case can result in the ultimate paying party, the occupational leaseholder, being at risk of receiving demands for payments in respect of work carried out years earlier by the superior landlord. That risk is a serious one and the consequences of the resulting uncertainty can be damaging. Nevertheless, as Mr Bates submitted, it must be balanced against the risk created by the alternative construction, namely that an intermediate landlord may be required to meet the costs incurred by a superior landlord but prevented, by a delay not of its making, from recovering that expenditure from the occupational leaseholders, on whose behalf the services are principally provided.

75. If anything, the risk to the intermediate landlord of non-recovery seems to me to be a more serious defect than the risk to the occupational leaseholder of being called upon to pay for a service long after it was provided, with all the consequent uncertainty in the interim. Both risks will be diminished if payments on account are collected, as will usually occur, although not in this case.

76. I have considered whether the power conferred on a landlord by section 20B(2) ought to be accorded decisive weight in support of the FTT's preferred construction. That provision dis-applies section 20B(1) if, within 18 months of the date when relevant costs are incurred, the landlord gives notice that those costs have been incurred and that the tenant would subsequently be required to contribute to them by the payment of a service charge. Because section 20B(1) allows no opportunity for dispensation after the expiry of the 18 month deadline, section 20B(2) provides an important mitigation of the risk faced by landlords generally. An intermediate landlord therefore has some opportunity to protect itself against the risk that its own superior will significantly delay in making a demand.

77. In *Brent London Borough Council v Shulem B Association Ltd* [2011] 1 WLR 3014, Morgan J considered what was required on an effective notification under section 20B(2) and concluded (at [57]) that one such requirement was that the lessor must "state the costs it has actually incurred." A lessor who knows that some cost had been incurred but cannot state it with precision could, it was suggested (at [58]), "include a figure which it feels will suffice to enable it to recover in due course its actual costs, when all uncertainty has been removed." Such an estimate, it was further suggested, could "err on the side of caution." Although the point did not arise for determination Morgan J's view was that any amount actually incurred in excess of the sum so estimated would not enjoy the benefit of notification under section 20B(2) and so would be irrecoverable.

78. To construe section 20B(2) in this way seems to me significantly to diminish its usefulness to an intermediate landlord. That landlord may have very little information on which to base an estimate, even one which errs on the side of caution, and may have no way of knowing when costs have been incurred by a superior landlord who may be several links further up the chain of title. Mr Bates also suggested that the effect of the reasoning in *Brent v Schulem B* was that section 20B(2) does not apply until a cost has actually been incurred by the landlord giving the notification, and only then does the period of 18 months within which notification can be given start to run. That submission depends on Mr Bates' being right that at each level a new cost is incurred, which is the issue in this appeal. What can be said is that section 20B(2) caters no more than section 20B(1) for the position of an intermediate landlord which has not itself directly incurred the cost of a service but is obliged to pay and pass on the cost. In any event, I am not persuaded that the availability of this protection is sufficient to permit or require a different reading of section 20B(1) than that which I consider to be its natural meaning.

79. Nor do I consider that any of the tactics suggested by Mr Bates as ameliorating the tenants' position weighs significantly in the balance one way or the other. Each of them is available to both the occupation leaseholders and their immediate landlord as ways of obtaining, or attempting to obtain, clarity over their likely liability. Thus, in this case, Epic will have been obliged by the regulations made under section 20ZA to consult Westmark, the Management Company and the occupational leaseholders if it wished to recover more than a nominal contribution towards the costs of major works or long term qualifying agreements. It was open to Westmark, just as it was open to the occupational leaseholders, to seek information under section 21 or a determination of the extent of their liability under section 27A.

80. None of these solutions is perfect but they have the same capacity to benefit each party. An intermediate landlord could use information obtained as a result of a consultation, or under the section 21 procedure, to prepare a notice under section 20B(2) soon after the end of the superior landlord's accounting period informing its own tenants that costs have been incurred and to make a genuine estimate of the amount to which the tenant will be called upon to contribute. The fact that costs have been incurred (or at least that work has been done) may be obvious in many cases of both routine and exceptional expenditure. The occupational leaseholder could use information obtained by the same routes to make provision for future liabilities if a demand for payment became overdue. In each case the estimate may be very imprecise, but the fact that the same tools are available to all those likely to be affected by the anomalies identified by the parties and by the FTT seems to me to detract from their significance as aids to resolving the issue in this appeal.

81. My conclusion is therefore that none of the anomalies or policy considerations identified by the parties requires that a different construction be given to section 20B(1) than that which seems to me to emerge most clearly from the language. For the purpose of section 20B(1) a relevant cost is incurred when an intermediate landlord receives a demand for payment from its own landlord for services provided by it or a superior landlord, and not on the earlier date on which the superior landlord incurs its own separate cost of providing those services.

Disposal

82. I am therefore persuaded that the FTT reached the wrong conclusion and that the period of 18 months referred to in section 20B(1) ran, in this case, from the date of the invoices delivered by or on behalf of the Management Company on 30 November 2015. The date on which costs were incurred for the purpose of the time limit was the date on which they were incurred by the Management Company when it received a demand from Westmark, and not when costs were incurred by Epic.

83. In paragraph 115 of its decision the FTT recorded that if it had taken the view I have taken it would have found that the leaseholders were not yet liable to pay anything in respect of the invoices served in November 2015. This was because,

despite three days of evidence and argument, it had not been shown that Epic had ever made a valid demand of Westmark, or it of the Management Company.

84. After this decision was released to the parties in draft representations were made by Ms Peddle in favour of remitting the matter to the FTT for further consideration and determination of what amount, if any, was payable by the leaseholders in service charges for the years 2008 to 2015 having regard to the Tribunal's explanation of the effect of section 20B(1). On behalf of Westmark Mr Bates explained that it was its case that it had received no valid demands from Epic and had therefore not be in a position to make demands of its own of the Management Company, or it of the leaseholders. He suggested that the appropriate disposal of the appeal was that it should be allowed and that an order should be made that unless Epic applied to the FTT within one month for directions then (as Mr Bates put it) "the case is at an end."

85. I am concerned to achieve a final determination of the leaseholders' application under section 27A at as early a date as possible. Epic and Westmark were both parties to the proceedings before the FTT and it would have been open to either of them to provide evidence that demands had been made, on specific dates, for the costs which were then passed on to the leaseholders in the invoices delivered on 30 November 2015. They each chose not to provide that evidence, and it is Westmark's affirmative case that such evidence cannot be provided because no valid demands were ever made.

86. In my judgment the appropriate order in those circumstances is that the appeal is allowed, and that the Tribunal additionally determines that the respondents are not liable to contribute towards the service charges demanded of them by the invoices served on 30 November 2015.

87. Finally, the FTT made an order under section 20C, Landlord and Tenant Act 1985, that no part of the costs of the proceedings should be included in any service charge payable by any of the occupational leaseholders. Mr Bates informed the Tribunal that Westmark was content for an order to be made in the same terms in respect of the costs of the appeal, and I so direct.

Martin Rodger QC
Deputy Chamber President

22 November 2017