Neutral Citation Number: [2021] EWCA Civ 1119

Case No: C3/2020/1406

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL (LANDS CHAMBER)
(MR MARTIN RODGER QC, DEPUTY CHAMBER PRESIDENT)
[2020] UKUT 163 (LC)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/07/2021

Before :

LORD JUSTICE UNDERHILL
(VICE PRESIDENT OF THE COURT OF APPEAL, CIVIL DIVISION)
LORD JUSTICE HENDERSON
and
LORD JUSTICE DINGEMANS

- -

Between :

NO. 1 WEST INDIA QUAY (RESIDENTIAL) LTD	**Appellant**
- and -	
EAST TOWER APARTMENTS LTD	**Respondent**

- -

Mr Justin Bates & Ms Kimberley Ziya (instructed by **DLA Piper UK LLP**) for the **Appellant**
Ms Lesley Anderson QC & Ms Lina Mattsson (instructed by **Penningtons Manches Cooper LLP**) for the **Respondent**

Hearing date:15 April 2021

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Approved Judgment

Lord Justice Henderson :

Introduction

1. This appeal raises two unrelated, but each significant, main issues concerning recovery by the landlord from tenants of residential property held on long leases of (a) service charges, and (b) legal costs incurred by the landlord in litigation with the tenant.

2. The first main issue concerns the application and proper interpretation of section 20B(1) of the Landlord and Tenant Act 1985 ("the 1985 Act"), which imposes an eighteen month time limit on the service of a demand for the recovery of service charges running from the date when the relevant costs were incurred. The issue arises in circumstances where a demand for payment of a specified sum potentially falling within the scope of the relevant service charge provisions was served on the tenant during the eighteen month period, but the demand was made under the wrong provisions in the lease, and the sum in question has never been the subject of a contractually valid demand for payment as a service charge.

3. The second main issue turns on the construction of three separate cost recovery provisions in the leases, in reliance on which the landlord seeks to recover from the tenant a proportionate share of the landlord's own legal costs incurred in the present litigation with the tenant, which started in 2014 and has been vigorously contested ever since.

4. The appellant landlord ("WIQR" or "the Landlord") is No. 1 West India Quay (Residential) Ltd. It owns the head leasehold interest in the residential parts of a 33-storey building ("the Building") at that address in Canary Wharf, London, E14. The twelve lower floors of the Building comprise a Marriott Hotel and 57 associated apartments. The twenty-one upper floors consist of 158 residential flats, a large number of which (originally 42, but now 30) are let on 999-year underleases in substantially the same terms ("the Leases") to the respondent, East Tower Apartments Ltd ("ETAL" or "the Tenant"). The flats are then sub-let by ETAL to residential occupiers, on terms which are for present purposes immaterial.

Background

5. The litigation has its origin in a long-running dispute arising from the arrangements for the supply of utilities and the metering of consumption of gas, electricity and water at the Building. As the Upper Tribunal (Lands Chamber) (Martin Rodger QC, Deputy Chamber President) explained in an earlier appeal in 2016 ("the 2016 UT Decision", [2016] UKUT 0553 (LC)):

> "16. Gas, electricity and water are supplied to the Building as a whole by commercial utility companies. The total quantities of these supplies are metered by four bulk meters (one each for gas and water and two for electricity).
>
> 17. Sub-meters have been installed throughout the Building to measure the consumption of utilities in different areas, including

> the hotel, the common parts, the car park and the individual apartments.
>
> 18. Each of the apartments on the upper floors has four individual meters intended to measure the consumption of heating, cooling, electricity and domestic hot water; there is no supply of gas to the individual apartments. The electricity measured by the apartment meters has been referred to in the proceedings as "direct electricity" to distinguish it from electricity consumed in connection with the common parts and communal service installations, which is known as "indirect electricity".
>
> 19. The quantities of gas, indirect electricity and water consumed by the communal service installations in the provision of heating and cooling to the apartments are not separately metered as a supply to the individual apartments but, rather, the output of heating and cooling provided for each apartment is metered and a composite energy rate is applied to the units consumed.
>
> 20. Data from the meters throughout the Building is transmitted electronically to a remote collection point where it is collated and a calculation is performed to identify the utility usage attributable to the various parts of the Building including the individual apartments. For the period under consideration in this appeal the task of gathering the usage data and calculating the charges appropriate to each unit of occupation has been undertaken by a company known as ENER-G Switch2 Ltd ("Switch2")."

6. Once Switch2 had read the meters, it would calculate the sums payable by each occupier and prepare a statement (said to be "for information purposes only") itemising the charges. These statements were then delivered by the Landlord's managing agents to the individual tenants accompanied by an application for payment of the total sum, to which VAT at the standard rate was added. Each statement included a so-called "Standing Charge" the nature of which was not explained, but was in fact intended to cover Switch2's costs of reading the meters and calculating the sums due: see the 2016 UT Decision at [26] and [27].

7. As the 2016 UT Decision went on to record, there were at least three problems with which this basic system had to contend. The first problem was that, by 2008, some of the meters recording consumption in certain parts of the building were known to be defective, so it became necessary to make estimates of usage for certain areas, and eventually for the whole of the upper floors. The second problem was that the sub-meters did not record all of the energy consumed in the Building, and Switch2 sought to recoup the cost of this "lost" energy from the individual tenants, although there was no reason to believe that it had been consumed in their flats. The third problem was that the utility companies' bills for energy supplied to the Building as a whole included charges which are payable by commercial consumers (in particular the climate change levy and VAT at the standard rate) but are not payable by domestic consumers (who

are exempt from the former, and who pay VAT on energy at a reduced rate of 5%): see [29] to [31].

8. Most of these problems only came to light after ETAL issued proceedings in 2014 in the First-tier Tribunal (Property Chamber) ("the FTT") taking issue with a number of aspects of the utility costs which had been charged. Those proceedings led to a three-day trial before the FTT in July 2015. Shortly before that hearing, the Landlord conceded that it had wrongly included commercial rate VAT and climate change levy in the unit rates for heating, cooling and domestic hot water, and then further added VAT at the residential rate, thus overcharging the Tenant (and all other lessees of the Building) by approximately 26%. The Landlord also admitted some other overcharging, but a number of issues remained in dispute and were the subject of the trial. Following an appeal to the Upper Tribunal in 2016, which resulted in the 2016 UT Decision, certain matters were remitted to the FTT for determination. Further hearings then took place before the FTT in December 2018 and March 2019, leading to a final decision after review which was released on 21 June 2019. One of the issues dealt with in that decision was the recoverability of Switch2's standing charges. The FTT held that they were not recoverable, because there had never been a contractually valid demand for them as service charges, and it was not open to the Landlord to "re-allocate" them as general service charges.

9. In a separate decision issued on 14 May 2019, after a hearing on 30 April 2019, ("the Costs Decision") the FTT considered the question whether the terms of the Leases permitted the Landlord to claim its legal costs from the Tenant in respect of the proceedings between the parties in the FTT and the Upper Tribunal. The FTT answered this question in the negative, but granted the Landlord permission to appeal that decision.

10. The Landlord's appeal on the costs issue, together with appeals by both parties against various aspects of the FTT's June 2019 decision for which permission had been granted, came on for hearing before the Deputy Chamber President (Martin Rodger QC) in February 2020. In his decision released on 26 May 2020 ("the 2020 UT Decision", [2020] UKUT 0163 (LC)), he identified four issues which he had to consider, including the two main issues which I have identified at the start of this judgment. He decided each of those two issues in favour of the Tenant, and therefore dismissed the Landlord's appeal on them.

11. The Landlord now appeals on both issues to this court, with permission granted by the Upper Tribunal for a second appeal. Permission to appeal on a third ground was refused by the Upper Tribunal, and again by Phillips LJ on 15 October 2020.

12. With this introduction, I will now consider the two main issues in turn.

Issue 1: does section 20B(1) of the 1985 Act prevent the Landlord from recovering the Switch2 "standing charges" between 2008 and 2012?

13. The rents payable by the Tenant under clause 2 of each Lease consist of a ground rent, and:

> "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 3.2.3
>
> 2.4 on demand any other sums due to the Lessor under the terms hereof
>
> 2.5 value added tax payable on any of the foregoing."

14. By clause 3.2.2, the Tenant covenanted with the Landlord:

> "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 therefor the Apartment Energy Charge."

The "Apartment Energy Charge" is defined in clause 1 by reference to the cost of the relevant proportion of electricity and gas "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…"

15. As I have explained, the statements produced by Switch2 between 2008 and 2012 included a so-called "Standing Charge", payment of which was demanded by the managing agents from the Tenant as part of the charges payable by the Tenant under clause 3.2.2 of the Lease. In the 2016 UT Decision, the Upper Tribunal commented at [91] that it was not clear how the standing charge was calculated, but it was described by the FTT "as a charge for the work done by Switch2 for reading the meters and working out the bills". The FTT found that the charge was not payable under clause 3.2.2, because it was not part of the cost of electricity or gas consumed in the apartment, nor could it fit within the Apartment Energy Charge which was also related to consumption: see [92]. The Upper Tribunal continued:

> "93. The FTT was nevertheless satisfied that the same charge could be included as part of the general service charge, although that had never been done. The service charge regime in Schedule 4 included ample provisions in Part C (covering services in connection with the common parts) and Part D (covering additional items) to allow the cost of metering and billing to be recovered."

16. On that basis, the FTT had taken the view that the standing charges were recoverable under clause 2.4 of the Lease under the rubric "any other sums due to the Lessor". The Upper Tribunal overturned this conclusion on appeal, however, holding that if the charges were properly recoverable as part of the service charge under clause 2.2, they could not also constitute an "other" sum due to the Landlord under clause 2.4: see [97]. The Deputy President also rejected an alternative argument for the Landlord that the charges were payable on demand under clause 3.3.2 (see [98] to [100]), before concluding at [101]:

> "I therefore allow the appeal in relation to the Switch2 standing charge and find that it is payable only as part of the service charge and has not yet been properly demanded."

The Upper Tribunal went on to observe, at [104], that if the Landlord wished to recover the standing charges, it would be necessary to include them in an end of year service charge reconciliation, which had not yet been done; and even then, there would be "a variety of points" which the tenant might wish to take "including by relying on section 20B(1) of the 1985 Act to argue that the charges were incurred more that 18 months before they were demanded".

17. What then happened was described as follows by the FTT in its June 2019 decision, at [49]:

> "… the [*Landlord*] dealt with the issue by re-apportioning and re-allocating the standing charges. The charge, which had been charged as a fixed sum in demands to leaseholders under clause 3.2.2 was replaced with a proportionate charge to leaseholders under the general Service Charge in 2016. The [*Landlord*] did not re-demand the charges. Mr Bates, for the [*Landlord*], argued that there was no need for the charges to be re-demanded as there is no need to re-create a liability that already exists."

Section 20B of the 1985 Act

18. Section 20B imposes a statutory time limit on making demands for service charges, as follows:

> "20B. **Limitation of service charges: time limit on making demands**.
>
> (1) If any of the relevant costs taken into account in determining the amount of any service charge were incurred more than 18 months before a demand for payment of the service charge is served on the tenant, then (subject to subsection (2)), the tenant shall not be liable to pay so much of the service charge as reflects the costs so incurred.
>
> (2) Subsection (1) shall not apply if, within the period of 18 months beginning with the date when the relevant costs in question were incurred, the tenant was notified in writing that those costs had been incurred and that he would subsequently be required under the terms of his lease to contribute to them by the payment of a service charge."

19. Section 20B was inserted into the 1985 Act by section 41 of, and paragraph 4 of Schedule 2 to, the Landlord and Tenant Act 1987. The section operates by imposing a strict time limit of 18 months in subsection (1), which begins to run from the date when

the relevant costs taken into account in determining the amount of a service charge were incurred. If more than eighteen months have elapsed before a demand for payment of the service charge is served on the tenant, the tenant will not be liable to pay the charge to the extent that it reflects the relevant costs, unless the landlord can bring itself within the limited exception in subsection (2). That exception requires written notification to have been given to the tenant, within the same eighteen month period, that the costs in question "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."

20. It is common ground that section 20B was enacted in the light of the report (in 1985) of the Committee of Inquiry on the management of privately owned blocks of flats, chaired by Mr Edward Nugee QC ("the Nugee Report"). It should be noted, however, that the terms of the section do not mirror any precise recommendation in the Nugee Report. As the Committee recorded at paragraph 7.3.20, where costs incurred by the landlord appear in the service charge account, residents already had the right to challenge their reasonableness (under Schedule 19 to the Housing Act 1980). The Committee therefore confined itself to making two further recommendations in relation to the landlord's costs, the second of which was as follows:

> "7.3.22 Secondly, a landlord should not be able to demand any payment for expenditure incurred in a prior period unless notification has been given in an earlier demand or summary of costs that certain items of expenditure would appear in a later demand. A prospective purchaser of a flat should then be able to look to his solicitor to check that there are no outstanding bills or unpaid service charges for previous years in respect of the flat. This should overcome the problem raised by some tenants in evidence that they had been faced with unexpected bills for services or works carried out in earlier years about which they knew nothing. However, we think it advisable to enable a court to dispense with this requirement if satisfied that the landlord acted reasonably."

21. The general mischief identified in this recommendation was the problem for tenants of finding themselves faced with unexpected bills, and this is clearly reflected in the wording of section 20B(1) as enacted. But Parliament also chose not to enact a general dispensing power from the severity of the eighteen month time limit in cases where the court is satisfied that the landlord acted reasonably. Instead, the exception in subsection (2) is much more narrowly framed and applies only if a written notice containing the specified information is given to the tenant during the eighteen month period. We were informed by Mr Bates, appearing as he did below for the Landlord, that a search of Parliamentary materials has not revealed why Parliament decided to adopt this narrower exception to the general rule.

22. In Gilje v Charlegrove Securities Ltd [2003] EWHC 1284 (Ch), [2004] 1 All ER 91, Etherton J (as he then was) said at [27], in agreement with the submission of counsel for the lessor in that case:

> "that, so far as discernible, the policy behind section 20B of the Act is that the tenant should not be faced with a bill for expenditure, of which he or she was not sufficiently warned to

> set aside provision. It is not directed at preventing the lessor from recovering any expenditure on matters, and to the extent, of which there was adequate prior notice."

While this statement is helpful as far as it goes, it did not form part of the ratio of the case, nor does it suggest that what constitutes "adequate prior notice" can be determined otherwise than by examining the wording of section 20B itself. The issue in Gilje was a different one, namely whether the section has any application in circumstances where (a) payments on account are made to the lessor in respect of service charges pursuant to express provisions in the lease, (b) the actual expenditure of the lessor does not then exceed the payments on account, and (c) no request is made by the lessor for any further payment by the tenant. In those circumstances, section 20B has nothing to bite upon, because the original payment on account was itself payment of a service charge as defined in section 18 of the 1985 Act, and a further demand which might have engaged section 20B would only have been needed if the actual expenditure of the lessor had then exceeded the payment on account: see the judgment of Etherton J at [20] to [24].

Does there need to be a contractually valid demand?

23. The next question which I will consider is whether "a demand for payment of the service charge" within the meaning of section 20B(1) must be a demand which complies with the service charge provisions of the lease. In particular, is it necessary for the amount in question to be demanded as part of the service charge pursuant to the relevant contractual machinery contained in the lease? The relevance of this question is that it is common ground, in the present case, that the Switch2 standing charges have never been demanded from the Tenant under the service charge provisions in the Leases. They have only been demanded under the covenant to pay outgoings contained in clause 3.2.2, and it was decided in the 2016 UT Decision that such demands were invalid. The amounts should have been demanded, if at all, as part of the service charge, but that never happened, let alone within eighteen months after the standing charges were incurred. The purported re-allocation of the standing charges to the service charge in 2016 was not accompanied by the making of any fresh demand for them from the Tenant in accordance with the service charge machinery in the Leases, and in any event the eighteen month period had by then already long expired.

24. Even if the matter were free from authority, I would have little hesitation in concluding that a demand for the purposes of section 20B(1) must be a contractually valid demand which is served in accordance with the service charge provisions of the relevant lease. It is of the nature of a limitation period that it prevents reliance upon a cause of action or other legal right which the claimant would otherwise be entitled to assert. This is reflected, in the present context, by the requirement that the relevant costs should have been "taken into account in determining the amount of any service charge", which can only be interpreted as a reference to the operation of the contractual service charge machinery in the Lease (subject, of course, to any relevant statutory constraints). Similarly, the consequence, if the eighteen month period has expired, that "the tenant *shall not be liable* to pay so much of the service charge as reflects the costs so incurred" (emphasis supplied) presupposes that the tenant *would* be liable to pay the relevant portion of the service charge had the period not expired. Again, such liability could only arise if the amount in question were one which the tenant would otherwise be contractually liable to pay. If, as I consider, this is both the natural and the correct reading of the language of section 20B(1), it cannot in my judgment make any

difference if the amount in question was in fact demanded from the tenant otherwise than as a component of the service charge, and *a fortiori*, if it has never been the subject of a valid contractual demand at all. But that, it is now conceded by the Tenant, is the position in the present case: see [23] above.

25. I now turn to authority. In Brent London Borough Council v Shulem B Association Ltd [2011] EWHC 1663 (Ch), [2011] 1 WLR 3014, ("Shulem") one of the matters which Morgan J had to consider was whether a letter dated 23 February 2006 was a "demand for payment of the service charge" within section 20B(1). The basic facts (for present purposes nothing turns on the details) are conveniently summarised in the headnote:

> "The claimant landlord was the freehold owner of five blocks of flats to which it carried out extensive works. In February 2006, after the works had been completed, the landlord sent each tenant a letter informing them that the actual cost of the works had not yet been calculated, referred to an attached schedule setting out the amount which it estimated each tenant would have to contribute to the works by way of service charge, but warned that the actual costs might be greater than those shown in the schedule. In December 2006 the landlord sent each tenant a second letter notifying them of the actual cost of the works and the amount which they would have to contribute by way of service charge, which was less than the estimated amount set out in the schedule attached to the earlier letter… The landlord brought a claim against the defendant tenant, which was the lessee of 15 of the flats, to recover service charges due in relation to those flats. The tenant applied for an order striking out the claim contending that the relevant costs taken into account in determining the amount of the service charge had been incurred more than 18 months before a demand for payment of the service charge had been served on the defendant, so that, pursuant to section 20B(1), the tenant was not liable to pay so much of the service charge as reflected the costs so incurred. It was common ground that the relevant costs had been incurred more than 18 months before the December letter but most of the costs had been incurred less than 18 months before the February letter."

26. Against that background, Morgan J held that the February 2006 letter did not satisfy the requirements of clause 2(6) of the leases, which the judge described at [9] as "an early form of service charge clause." As a matter of contractual interpretation, Morgan J expressed his overall conclusion at [51]:

> "However, my overall conclusion is that the letter does not satisfy the requirements of clause 2(6) of the leases as regards the form and content of a valid demand. Clause 2(6) allows the lessor to demand a due proportion of actual expenditure. It does not allow the lessor to require payment of a figure which the lessor states is not based on actual expenditure."

27. The judge went on to hold that the letter of 23 February 2006 was not "a demand for payment of the service charge" within the meaning of section 20B(1) because, as he stated explicitly in [53]:

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

28. In Skelton v DBS Homes (Kings Hill) Ltd [2017] EWCA Civ 1139, [2018] 1 WLR 362, ("Skelton") this court (Arden and David Richards LJJ) approved and applied the principle which had been stated by Morgan J in Shulem. The basic facts are again conveniently summarised in the headnote:

> "The tenant held a long lease which required him to pay service charges on account but not until the landlord had prepared a written estimate containing a summary of the estimated service costs which it expected to incur or charge during or in respect of the accounting period which was about to begin and, within 14 days of preparation, served it on the tenant together with a statement showing the service charge payable by the tenant on account of those estimated costs. In March 2011 the landlord served a service charge notice for the first of two equal on account payments in respect of the 2011-2012 service charges, and similar demands for on account payments for the periods 2012-2013 and 2013-2014 were served in April 2012 and April 2013 respectively. None of the demands was served with an estimate. An estimate covering all the periods in question was eventually supplied in April 2014. The tenant applied under section 27A(1) of the Landlord and Tenant Act 1985, as inserted and amended, for a determination of his liability to pay the service charges."

Both the FTT and the Upper Tribunal held that the tenant was liable to pay the sums demanded. Although more than eighteen months had elapsed between the service of the demands and the belated provision of an estimate covering all the relevant periods in April 2014, the Upper Tribunal took the view that section 20B of the 1985 Act did not apply to a demand for payment of estimated service charges on account of costs to be incurred in the future.

29. This court's reasons for allowing the tenant's second appeal are contained in the judgment of Arden LJ, with which David Richards LJ agreed. Arden LJ first held, in disagreement with the Upper Tribunal, that section 20B clearly applies to service charges in respect of costs to be incurred as much as costs that have been incurred: see [17], where Arden LJ distinguished the decision of Etherton J in the Gilje case.

30. Arden LJ continued:

> "18. Further, in my judgment, it is not enough under section 20B that the tenant has received the information that his landlord

> proposes to make a demand. As Morgan J held in [*Shulem*], para 53, there must be a valid demand for payment of the service charge. In that case, the landlord had served several different demands for payment but they were all invalid because they did not comply with the terms of the parties' contract. The content of the alleged demand did not comply with the service charge provisions of the lease. So there was no valid demand for the purposes of section 20B(1) of the 1985 Act.
>
> 19. Ms Gourlay [*counsel for the tenant*] draws our attention to the fact that it follows from her submissions that, if, having received the demand but not the estimate, Mr Skelton had assigned his leasehold interest to a purchaser, the purchaser would become liable for the service charge when the estimate was served, subject to section 20B. Purchasers of leases will need to be mindful of this possibility, but, even if it is correct, it is not, in my judgment, a reason for holding that her interpretation of section 20B is wrong.
>
> 20. Ms Gourlay also draws to our attention that retrospective correction of a demand is possible in certain situations. Thus, in *Johnson v County Bideford Ltd* [2012] UKUT 457 (LC), the landlord had failed to comply with the requirement in section 47(1) of the Landlord and Tenant Act 1987 to provide his name and address. The Upper Tribunal held that, by serving fresh demands, the landlord had provided the information required by section 47(2) to validate the original demands. Section 47(2) allows for this possibility. Ms Gourlay submits that the *Johnson* case is about statutory validity not contractual validity. I agree. We have not been shown any authority for the proposition that as a matter of contract law the delivery of the estimate validated the demands in this case as of the date of the demand.
>
> 21. If in the situation in this case, the tenant receives a windfall, that is the result of the landlord not having complied with the terms of the lease for service of a valid demand."

31. In my judgment, it is clear that the endorsement by Arden LJ, in [18], of the principle stated by Morgan J in Shulem that "there must be a valid demand for payment of the service charge" forms part of the ratio of the decision. Once the ground relied on by the Upper Tribunal had been disposed of, it was necessary for the court to consider whether the original demands for the payments on account for the three relevant years were sufficient to satisfy section 20B(1) of the 1985 Act, notwithstanding the absence of the accompanying estimate which was required by the lease until April 2014. The Upper Tribunal judge had held that the demand for payment of the service charge became contractually valid from the date when the estimate was finally served. He had also held that the demand did not need to be served with the estimate. There was no appeal to this court on either of those points: see [15]. That then left the question whether the validation of the original demands could take effect retrospectively, because only in that way could the validated demand be brought within the limitation period. This possibility was then considered, and rejected, by Arden LJ in [20], where she

distinguished Johnson v County Bideford Ltd as being a "case… about statutory validity not contractual validity". As a matter of contract law, the validation of the original demands did not take effect retrospectively, with the result that the eighteen month limit (which had already expired before the estimate was served in April 2014) could not be circumvented.

32. Although it is not strictly necessary to do so, I would add that Arden LJ was, in my opinion, correct to distinguish the decision of the then President of the Upper Tribunal (Lands Chamber), Mr George Bartlett QC, in Johnson v County Bideford Ltd as she did. In that case, service charge demands were served, between October 2008 and July 2010, which failed to comply with the requirement that any written demand must contain the name and address of the landlord pursuant to section 47(1)(a) of the 1987 Act. This omission was then rectified in fresh demands for the same sums in June 2011, following a determination by the FTT that the amounts in question, to the extent that the FTT had found them to be reasonable, were not payable "pending service of valid service charge demands compliant in all respects with the law including section 47": see the decision of the Upper Tribunal at [1].

33. Section 47(2) of the 1987 Act provides that:

> "(2) Where—
>
> (a) a tenant of any such premises is given such a demand, but
>
> (b) it does not contain any information required to be contained in it by virtue of subsection (1),
>
> then… any part of the amount demanded which consists of a service charge or an administration charge… shall be treated for all purposes as not being due from the tenant to the landlord at any time before that information is furnished by the landlord by notice given to the tenant…."

As the President went on to hold, the effect of this language in section 47(2) is that a failure to comply with the requirements of section 47(1) is one that can be corrected with retrospective effect: see [10]. In this respect, there was a distinction from the issue of contractual invalidity which Morgan J had considered in Shulem, because the invalidity in that case was not capable of retrospective correction: ibid.

34. Returning to Skelton, it seems clear to me (as I have already said) that the endorsement by this court of the principle stated by Morgan J in Shulem forms part of the ratio of the decision, and as such is binding on us, just as it was binding on the Upper Tribunal. As a matter of precedent, that conclusion is not altered either by the fact that this court was sitting in a constitution of two, or by the fact that the respondent landlord did not appear and was not represented (because it was in liquidation). The result of this was, as Arden LJ recorded at [1], that counsel for the tenant had been obliged to draw to the court's attention any relevant legislation or authority which supported the landlord's case or which was, or might be, inconsistent with her submissions. Counsel had duly fulfilled that obligation by, among other matters, drawing attention to the points discussed by Arden LJ in her judgment at [19] and [20], including the grounds for distinguishing Johnson v County Bideford Ltd.

The decision of the Upper Tribunal

35. The Upper Tribunal dealt with this issue in the 2020 UT Decision at [27] to [42]. At [32], the Upper Tribunal set out some of the basic submissions of Mr Bates for the Landlord, which in substance he repeated to us:

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

36. Mr Bates had then referred to the policy of the section, as explained by Etherton J in the Gilje case, submitting that it was consistent with paragraph 7.3.22 of the Nugee Report. He contended that the section "should not be allowed to become a trap for the unwary or unfortunate landlord", and said that the law "had taken a wrong turn" in Shulem. He then described the decision of this court in Skelton, with some understatement in my view, as a "complicating factor". But as the Upper Tribunal recorded, at [34]:

> "… *Skelton* binds this Tribunal, and Mr Bates realistically did not press his submission that it should be distinguished. He therefore acknowledged that his appeal on [*this issue*]ought to be dismissed and that he should be left to pursue it at higher levels."

37. The Upper Tribunal said that it had "some sympathy with Mr Bates' submission" that Morgan J's interpretation of section 20B(1) in Shulem was "both unexplained and wrong". It said, at[38]:

> "By treating the period in section 20B(1) as ending only on the making of a valid contractual demand for payment the decision creates an 18 month limitation period for the making of such demands, a much shorter limitation period than would otherwise apply to contractual payment obligations. That could have been a legitimate policy objective but it is not the objective suggested by the Nugee Committee; section 20B(2) also shows that there was no intention to introduce a bright line limitation period."

38. The Upper Tribunal then pointed out some of the consequences of the decision in Shulem, including that if the required contractual procedure is not complied with within eighteen months of the cost being incurred, the right to recover the tenant's contribution will be lost, even where the tenant has full notice of the sum claimed: see [39]. The Upper Tribunal then concluded its discussion as follows:

> "40. A more forgiving interpretation of section 20B(1), which might be thought to be consistent with the statutory purpose, would treat any demand for payment as sufficient to stop time running in relation to the sum demanded. One possible objection to that approach might be that it would reduce the scope of section 20B(2), but not to the point where it ceased to have any meaningful application….
>
> 41. Nevertheless, the decision of the Court of Appeal in *Skelton* puts the proper interpretation of section 20B(1) beyond doubt in this Tribunal…. Arden LJ, with whom David Richards LJ agreed, approved Morgan J's interpretation of section 20B(1) without commenting on, or supplementing, his reasoning. Despite the fact that payment of the Switch2 charge was demanded as soon as the cost was incurred, WIQR is therefore prevented by section 20B(1) from recovering the charge because it was notified to ETAL as part of the utility charge and not in compliance with the contractual machinery for demanding service charges."

Discussion

39. Mr Bates did not repeat before us his apparent concession below that his appeal on this issue ought to be dismissed, but if, as I would hold, the ratio of Skelton requires the service of a contractually valid demand to stop time running under section 20B(1), the same consequence must in my judgment follow. We are bound by Skelton, just as the Upper Tribunal was bound. No demand for payment of the Switch2 charges as service charges has ever been made, and that is in my view the end of the matter.

40. Many of the submissions advanced by Mr Bates seem to me, with respect, to miss the point, because they are directed towards the establishment of a limitation regime which would be different from the one that Parliament has explicitly chosen to enact. As I have explained, section 20B is only partly based on the recommendations contained in the Nugee Report, and importantly it does not include a general power of dispensation based on reasonableness. Instead, the section as enacted lays down a bright line rule in subsection (1), to which there is only a limited exception in subsection (2), which it is rightly conceded cannot apply in the present case. This structure may sometimes produce results which appear harsh, but that is inherent in almost any limitation provision. The basic eighteen month period clearly reflects a policy decision that tenants should know where they stand in relation to potential service charge liability within a relatively short period of the relevant costs having been incurred. As a general policy objective, that was exclusively a matter for Parliament, and it is not for the courts to criticise it. It has the effect that landlords know where they stand, and must ensure that they act in accordance with the terms of the service charge provisions if they are not to be at risk of being unable to recover charges through failure to serve a valid

demand. The problem in the present case is that the Landlord failed to construe correctly and apply the service charge provisions contained in the Leases, against a backdrop of serious overcharging and defects in the system for metering the consumption of utilities at the Building.

41. It is perhaps symptomatic of this confusion that the charges now in issue were misdescribed in the statements produced by Switch2 as "standing charges". This language might be thought to imply that they were imposed by the suppliers of the utilities in question, and not that they were intended to reimburse Switch2 for its own work in reading the meters and preparing the bills. Moreover, as Ms Lesley Anderson QC leading Ms Lina Mattsson for the Tenant pointed out, the charges could never have constituted a valid service charge demand, because there was no explanation of how they were calculated, nor was the burden of the charges divided rateably between the flats and other parts of the Building in accordance with the relevant service charge percentages. The charges have only ever been demanded (wrongly) as a utility charge pursuant to clause 2.2.3 of the Leases. In those circumstances, the argument that the Tenant was not prejudiced, because it had all the information it needed to possess about the charges, is in my judgment a hollow one.

42. The point which we have to decide is ultimately a short one. For the reasons which I have given, I am satisfied that the Upper Tribunal came to the right conclusion on this issue. We are bound by Skelton, but even if we were not, I would remain unpersuaded by the Landlord's arguments that we should adopt a construction of section 20B which would somehow enable belated collection of the Switch2 "standing charges" through the mechanism of the service charge provisions in the Leases. I would therefore dismiss this ground of appeal.

Issue 2: are the Landlord's litigation costs in the tribunal proceedings recoverable under the Leases?

43. In the Costs Decision, the FTT explained that when the case was remitted to it following the 2016 UT Decision, the parties asked it to rule on several matters, including (as we have seen) the Switch2 charges. The FTT's decision on all of those matters was contained in its April 2019 decision, finalised in June 2019. Meanwhile, during the course of 2018, the Landlord sent various demands to the Tenant in respect of the Landlord's legal fees incurred in the proceedings to date. Those fees were said to amount to a little under £500,000. By an application dated 7 November 2018, the Tenant applied for a declaration as to the payability of the charges, whether or not as part of the service charge. Following correspondence with the parties, that application was then set down for a preliminary hearing on the question whether, under the terms of the Leases, the Landlord was entitled to levy the charges in the first place: see the Costs Decision at [10].

44. A question arose before us about the scope of the preliminary issue, and at our request we were supplied after the hearing with copies of the relevant correspondence and the direction made by the FTT. It appears from this that the direction was contained within a letter dated 14 February 2019 from the FTT to the Tenant's solicitors, which said:

> "Judge Martynski considers that there should be a preliminary determination of the terms of the lease in the costs Administration Charges application and then later, if necessary,

> a hearing on the application and the costs themselves at some point later."

The letter went on to say that, if the preliminary issue could not be determined by the judge on the papers, it could be dealt with at a hearing on 30 April 2019, with an agreed bundle and skeleton arguments to be served within the previous week. That is what then happened, and at the hearing the Landlord was represented by Mr Bates and the Tenant by Ms Mattsson. There was no oral evidence, and the question was determined as a pure issue of construction of the Leases. The FTT concluded that the Landlord's legal costs were not recoverable under any of the three covenants upon which the Landlord relied. This conclusion was then upheld by the Upper Tribunal.

(1) The Tenant's covenant to pay costs under clause 3.10.1 of the Lease

45. The first provision upon which the Landlord relies is the covenant in clause 3.10.1, which obliges the Tenant:

> "To pay to the Lessor on demand all proper costs charges and expenses (including legal costs and surveyors' fees) which may be incurred by the Lessor: -
>
> 3.10.1 under or in contemplation of any proceedings under Sections 146 or 147 of the Law of Property Act 1925 by the Lessor in the preparation or service of any notice thereunder respectively and arising out of any default on the part of the Lessee notwithstanding that forfeiture is avoided otherwise than by relief granted by the Court."

46. As the Upper Tribunal correctly observed in the 2020 UT Decision:

> "57. This clause is not one of the provisions of the lease concerned with service charges. It provides the Lessor with a right to recover the whole of its proper legal costs from an individual leaseholder, rather than recouping those costs by proportionate contributions from all leaseholders. The FTT had jurisdiction to consider the recoverability of such costs under paragraph 5 of Schedule 11, Commonhold and Leasehold Reform Act 2002 which concerns the payability of administration charges. An administration charge, as defined in paragraph 1(1) of the same Schedule, includes an amount payable by a tenant directly or indirectly in respect of a failure by the tenant to make a payment to the landlord, or in connection with a breach of a covenant or condition of the lease.
>
> 58. To be recoverable under this provision legal costs incurred by the Lessor must satisfy two conditions. First, they must have been incurred under or in contemplation of any proceedings under Sections 146 or 147 of the Law of Property Act 1925; secondly, they must arise out of some default on the part of the leaseholder."

47. As is well known, section 146(1) of the Law of Property Act 1925 provides that:

> "A right of re-entry or forfeiture under any proviso or stipulation in a lease for a breach of any covenant or condition in the lease shall not be enforceable, by action or otherwise, unless and until the lessor serves on the lessee a notice—
>
> (a) specifying the particular breach complained of; and
>
> (b) if the breach is capable of remedy, requiring the lessee to remedy the breach; and
>
> (c) in any case, requiring the lessee to make compensation in money for the breach;
>
> and the lessee fails, within a reasonable time thereafter, to remedy the breach, if it is capable of remedy, and to make reasonable compensation in money, to the satisfaction of the lessor, for the breach."

48. In the case of residential tenancies, further restrictions are imposed by statute before a landlord may exercise a right of re-entry or forfeiture for failure by the tenant to pay a service charge or administration charge: see section 81 of the Housing Act 1996, which relevantly provides that:

> "(1) A landlord may not, in relation to premises let as a dwelling, exercise a right of re-entry or forfeiture for failure by a tenant to pay a service charge or administration charge unless—
>
> (a) it is finally determined by (or on appeal from) the appropriate tribunal… that the amount of the service charge or administration charge is payable by him, or
>
> (b) the tenant has admitted that it is so payable.
>
> (2) The landlord may not exercise a right of re-entry or forfeiture by virtue of subsection (1)(a) until after the end of the period of 14 days beginning with the day after that on which the final determination is made.
>
> (3) [*This explains the meaning of "finally determined"*]
>
> …
>
> (4A) References in this section to the exercise of a right of re-entry or forfeiture include the service of a notice under section 146(1) of the Law of Property Act 1925 (restriction on re-entry or forfeiture).
>
> (5) In this section

> (a) "*administration charge*" has the meaning given by Part 1 of Schedule 11 to the Commonhold and Leasehold Reform Act 2002,
>
> …
>
> (d) "*service charge*" means a service charge within the meaning of section 18(1) of the Landlord and Tenant Act 1985…"

49. It follows from the provisions of section 81 of the 1996 Act that, if the Landlord wished to initiate forfeiture proceedings under section 146 of the 1925 Act for breach by the Tenant of its obligation to pay service charges and then seek to recover the costs under clause 3.10.1 of the Lease, it could not do so until fourteen days after the final determination by the FTT (or by a court on appeal therefrom) in favour of the Landlord on the issue whether the service charges which it sought to recover were payable by the Tenant. Furthermore, the only legal costs which the Landlord is contractually entitled to recover under 3.10.1 are costs which it has incurred "under or in contemplation of any proceedings" under section 146 (section 147 of the 1925 Act relates to decorative repairs, and may for present purposes be ignored). As to that, the FTT accepted the submission for the Tenant that there was no evidence of such an intention on the part of the Landlord. In paragraph [42] of the Costs Decision, the FTT said:

> "We conclude that clause 3.10.1 is of no assistance to the [*Landlord*] in claiming its costs. We agree with Ms Mattsson that at no point has the [*Landlord*] ever evinced an intention to forfeit or to take proceedings for forfeiture. We consider this to be an essential pre-requisite to reliance on the clause in question…"

50. If this conclusion is properly to be characterised as a finding of fact, it has never been challenged by the Landlord, as the Upper Tribunal pointed out in the 2020 UT Decision at [60]. In my view, the conclusion is indeed a finding of fact, albeit one reached at a hearing dealing with questions of construction of the Lease where there was no pleaded issue whether such proceedings were in contemplation by the Landlord. It seems to me that, since the parties had agreed to the determination of the issue of construction of clause 3.10.1 as a preliminary issue without oral evidence, it was open to the FTT to form a conclusion on the point based on the material before it and its experience of dealing with all of the issues canvassed in the proceedings to date, including the subject-matter of the June 2019 FTT decision. It is an issue raised by the wording of clause 3.10.1 itself, and the FTT was in my view fully entitled to conclude that no such proceedings were in contemplation by the Landlord when the relevant costs were incurred, bearing in mind that the origin of the proceedings before the FTT lay in an application made by *the Tenant* (not the Landlord) in 2014 to establish its liability for utility charges in the very confusing and unsatisfactory circumstances which I have outlined in the background section of this judgment, and also bearing in mind that no notice of intention to bring forfeiture proceedings had ever been intimated by the Landlord to the Tenant.

51. Before the Upper Tribunal, Mr Bates argued that this did not matter, because the FTT's finding of fact "was irrelevant". As the Upper Tribunal recorded his argument, at [60]:

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

52. Mr Bates supported his argument before us, as he did before the Upper Tribunal, by reference to the decision of this court in Freeholders of 69 Marina, St Leonards-on-Sea v Oram [2011] EWCA Civ 1258, [2012] L. & T. R. 4 ("69 Marina"). As the Upper Tribunal explained, at [61], that case:

> "concerned a similarly worded clause. A freeholder sought to recover the cost of works of repair through a service charge but its tenants refused to pay. The freeholder began proceedings in the leasehold valuation tribunal to quantify the sum payable and to obtain dispensation from statutory consultation requirements. The freeholder then commenced proceedings in the County Court to recover the service charge and its costs of the tribunal proceedings. While those proceedings were in progress the freeholder served notice under section 146. The Court of Appeal held that the freeholder had been prevented by section 81, Housing Act 1996 from recovering the service charge by forfeiture proceedings without first obtaining a determination by the tribunal of the amount which was payable. At paragraph [21] Sir Andrew Morritt C, giving the only judgment, specifically agreed with the decision of the County Court Judge that it was irrelevant that the section 146 notice had not yet been served because the District Judge had decided that they were incidental to or in contemplation of the preparation and service of such a notice."

53. The Deputy President then referred, at [62], to a decision of his own in Barrett v Robinson [2014] UKUT 322 (LC), [2015] L. & T. R. 1, where he had held that a clause permitting the recovery of costs incurred in, or in contemplation of, proceedings under section 146 could only be relied upon if, at the time the expenditure was incurred, the landlord had in fact contemplated forfeiture proceedings: see the decision in that case at [52]. In reaching that conclusion, the Deputy President observed, in [51], that:

> "proceedings before the First-tier Tribunal for the determination of the amount of a service or administration charge need not be a prelude to forfeiture proceedings at all… proceedings are often

> commenced in the County Court for the recovery of service charges without a claim for forfeiture being included. A landlord may or may not commence proceedings before the First-tier tribunal with a view to forfeiture; a landlord may simply wish to receive payment of the sum due, without any desire to terminate the tenant's lease, or may not have thought far enough ahead to have reached the stage of considering what steps to take if the tenant fails to pay after a tribunal determination has been obtained."

I respectfully agree with those observations, and would reject Mr Bates' submission to us that Barrett v Robinson was wrongly decided.

54. Nor, in my judgment, can Mr Bates obtain any assistance from 69 Marina. The factual circumstances of that case were very different from the present case, not least because the proceedings in the county court were begun by the landlord, and the District Judge had concluded in her judgment that the tenants were liable under the relevant clause in the lease whether or not a notice had been served under section 146 (which, at the date of the hearing before her, it had not). Moreover, if a section 146 notice was needed, one was served before the hearing of the first appeal to the circuit judge. In those circumstances, Sir Andrew Morritt C concluded at [20] that the district judge had rightly concentrated on the terms of clause 3(12), which imposed liability for:

> "(a) expenses… incurred by the landlord… in or in contemplation of proceedings under s. 146… ; and
>
> (b)… all solicitors costs… incurred by the landlord of and incidental to the service of all notices and schedules relating to wants of repair…"

55. Sir Andrew Morritt C continued (ibid):

> "Given that the determination of the tribunal and a s. 146 Notice are cumulative conditions precedent to enforcement of the Lessees' liability for the Freeholders' costs of repair as a service charge it is, in my view, clear that the Freeholders' costs before the tribunal fall within the terms of cl. 3(12). If and insofar as any of them may not have been strictly costs of the proceedings they appear to be incidental to the preparation of the requisite notices and schedules."

56. I would add that the decision of this court in 69 Marina has proved controversial, but not on the point with which we are now concerned. The controversial proposition, which this court endorsed in 69 Marina without having been referred to earlier Court of Appeal authority which arguably cast doubt on it, was that the enforcement by forfeiture of a tenant's obligation to pay a service charge is subject to the provisions of section 146 of the 1925 Act, even if the lease treats the service charge as an additional rent recoverable as such: see the decision of the Deputy President in Barrett v Robinson at [55] and [56].

57. For these reasons, I am satisfied that 69 Marina is clearly distinguishable on its facts, and it does not establish, either expressly or by necessary implication, that legal costs are incurred by a landlord in contemplation of proceedings under section 146, in a clause similar to clause 3.10.1 in the present case, merely because they are incurred in relation to proceedings before the FTT which could in theory be the necessary prelude to service of a notice under section 146. The words "in contemplation of any proceedings" in clause 3.10.1 do in my view require an investigation of the landlord's state of mind at the time when the costs were incurred, although any intention formed at that stage to serve a section 146 notice will of necessity be contingent upon the conditions of section 81 of the 1996 Act being satisfied.

58. The conclusion which I have reached on the contemplation of proceedings under section 146 is alone sufficient to explain why the Landlord cannot in my judgment rely on clause 3.10.1 to recover the disputed costs. It is therefore strictly unnecessary to consider whether the Landlord also failed to satisfy the second condition identified by the Upper Tribunal, namely that the costs must arise out of some default on the part of the Tenant. I will, however, consider this question, both because it was fully argued, and because the same issue is also central to the construction of the second provision in the Leases upon which the Landlord wishes to rely. That provision forms the final limb of the covenant to pay costs in clause 3.10, namely:

> "3.10.5 as a result of any default by the Lessee in performing or observing the Lessee's obligation in this Underlease."

Nobody has suggested that the words "and arising out of any default on the part of the Lessee" in clause 3.10.1 should bear a different meaning from the words "as a result of any default by the Lessee" in clause 3.10.5. For my part, I would accept that the concept of "default" by the Tenant must be given the same meaning in each sub-clause, although clause 3.10.5 is explicit in requiring the default to be one that has arisen in performing or observing any of the Tenant's obligations in the Lease.

59. The FTT considered, in the context of clause 3.10.5, that there had been no relevant default by the Tenant. In [55] of the Costs Decision, it said:

> "In any event, we do not consider that the circumstances of the [*Tenant's*] application and appeal can be properly viewed "as a result of any default by the tenant" and we repeat what we have said earlier in this decision regarding that."

The reference back appears to be to [43], where the FTT had considered the question of "who won?" in relation to the costs, and said:

> "At the very least, the answer to that question is unclear. It is certainly arguable that, by taking the proceedings in this tribunal and pursuing the appeal to the Upper Tribunal, the [*Tenant*] has reduced, by some considerable amount, the Service Charges it is liable to pay to the [*Landlord*]. Also, the converse of the idea that the proceedings have established the extent to which the [*Tenant*] is in breach of covenant (by way of non-payment of Service Charges) is that the proceedings have established that the

> [*Tenant*], had it paid all the sums demanded of it, would have been paying Service Charges which were not due or payable."

60. The Landlord did not appeal against those findings to the Upper Tribunal, which itself came to the same conclusion. The Upper Tribunal explained its reasoning on this point in the 2020 UT Decision as follows:

> "66. The second limb of clause 3.10.1 and clause 3.10.5 require that the costs must have arisen out of or been incurred as a result of some default on the part of the leaseholder. I do not consider that is an accurate characterisation of these proceedings. As Ms Mattsson pointed out, the proceedings were commenced by ETAL in an attempt to establish the extent of overcharging by WIQR, which denied that its charges for utilities were excessive. It has now clearly been established that ETAL was right, and that the sums demanded by WIQR were excessive, although not to the extent that ETAL maintained. Only when the facts had been thoroughly investigated, and the complex provisions of the lease pored over to distraction, could the balance of entitlement and liability finally be struck. There is no suggestion that ETAL has ever been unwilling or unable to pay what it properly owes, once that has finally been quantified.
>
> 67. Mr Bates submitted that on any view a net payment would be made by ETAL to WIQR, because ETAL had not made payments on account after it stopped making payments. It should be remembered however that billing was erratic, at different times invoices have been withdrawn, and sums were demanded by WIQR without following the correct contractual procedure. It would be a complex matter to determine at what point the net balance between the parties tipped over in WIQR's favour, and to what extent costs were incurred before and after that tipping point. That exercise was not undertaken by the FTT and, in my judgment, it is not required because whatever the balance between the parties, the costs incurred by WIQR did not arise out of a default on the part of ETAL."

61. I agree with counsel for the Tenant that three strands can be discerned in this reasoning. First, the proceedings were begun by the Tenant to establish the extent of overcharging by the Landlord which denied that its charges for utilities were excessive; secondly, the proceedings have clearly established that, to a substantial extent, the Tenant was right and the Landlord wrong; and thirdly, there is no suggestion that the Tenant has ever been unwilling or unable to pay what it properly owes, once that amount has finally been quantified. In the light of those considerations, each tribunal was in my opinion fully entitled to conclude that there had been no "default" by the Tenant within the meaning of either of the relevant sub-clauses of clause 3.10. The short point is that the Tenant cannot sensibly be regarded as a party in default under the Lease when it was the Tenant which started proceedings to clarify the confusion and uncertainty surrounding the payment of utility charges, when it achieved a very substantial measure of success in those proceedings, and when its willingness to pay the correct amount, when ascertained and quantified, has never been in doubt.

62. In their written submissions to us on this issue, counsel for the Landlord make three main points. First, it is said that the Landlord "was forced to defend these proceedings in order to recover any service charge payment from the lessee". This seems to me an implausible assertion, unsupported by any findings of fact. I agree with counsel for the Tenant that, if the Landlord had not defended the Tenant's application under section 27A of the 1985 Act, the likelihood is that there would have been a swift determination of the Tenant's liability to pay a reduced amount in 2014.

63. Secondly, the Landlord repeats a submission which it made to the Upper Tribunal, challenging the conclusion that the Tenant has always been willing and able to pay what it properly owes, on the basis that it allegedly refused to make any payment on account pending the final determination of the charges properly due. The answer to this point is in my judgment to be found in the 2020 UT Decision at [67]. It is simply unrealistic to regard the Tenant as being in default in the circumstances described by the Upper Tribunal, and we do not have the evidence to determine at what point, if any, a payment on account might arguably have been appropriate.

64. The third point challenges the conclusion of the FTT, kept alive before us by a respondent's notice, that clause 3.10.5 is not engaged because the alleged default of the Tenant was non-payment of "rents", widely defined in clause 2 of the Lease as including the Service Charge, the Apartment Energy Charge and "on demand any other sums due to the Lessor under the terms hereof". If the relevant costs were incurred in connection with the recovery of rent, as so defined, they would have been recoverable under clause 3.10.3 as costs incurred "in connection with any action against the Lessee for recovery of any arrears of rent", and therefore (so the argument runs) could not also fall within clause 3.10.5 as costs incurred as a result of any default by the Tenant in performing or observing its obligations under the Lease.

65. I am unpersuaded by this argument, which presupposes that the obligations in sub-clauses 3.10.3 and 3.10.5 are mutually exclusive, with the former taking priority over the latter. I can see no good reason to make any such assumption, and find nothing objectionable in a degree of overlap between the two obligations. I am therefore inclined to agree with counsel for the Landlord that the Landlord is not precluded from reliance upon clause 3.10.5 by the fact that the costs in question might also have been recoverable, in whole or in part, under clause 3.10.3. However, that conclusion would not assist the Landlord in the absence of any default by the Tenant within the meaning of clause 3.10.5.

66. Given my conclusion on the absence of "default" by the Tenant, it is unnecessary to deal with a further argument for the Tenant that, if there was a default, it was waived by the continuing demand and receipt of rent and service charges by the Landlord since the Tenant began these proceedings in 2014.

(2) Clause 3.10.5 of the Lease

67. I have already dealt with the Landlord's reliance on clause 3.10.5 in my discussion of the issue of "default" under clause 3.10.1. The absence of any default is in my judgment the core reason why the Landlord is unable to rely on clause 3.10.5. I am not persuaded, as I have explained, by the Tenant's further argument that clause 3.10.5 cannot in any event apply because any default would have amounted to non-payment of rents within the scope of clause 3.10.3, to the exclusion of clause 3.10.5.

(3) Costs relating to the calculation and payment of the Service Charge: Schedule 4, Part A, paragraphs 6.1 and 6.2

68. The third provision on which the Landlord relies forms part of the machinery in Schedule 4 to the Lease concerning the residential common parts service charge. The Tenant is required to pay a percentage of the Gross Annual expenditure, which is defined in paragraph 6 of the Schedule as meaning in relation to any Financial Year the aggregate of:

> "6.1 all costs expenses and outgoings whatever properly and reasonably incurred by the Lessor during that Financial Year in or incidental to providing all or any of the Services
>
> 6.2 all costs properly and reasonably incurred by the Lessor during that Financial Year in relation to the Additional Items
>
> …"

69. The "Services" are defined in Part C of the Schedule. They mostly consist of services to the common parts of the building, but do not include (at any rate expressly) the provision of utilities to the individual flats, which is dealt with outside the service charge by the separate provisions of clause 3.2.2 of the Lease.

70. The "Additional Items" are defined in Part D of the Schedule, which includes a number of general provisions relating to the management of the "Residential Premises". That expression includes the apartments on the upper floors of the Building, but none of the provisions expressly permits the recovery of legal or litigation costs. Under the heading "Fees", paragraph 1 of Part D covers:

> "The reasonable and proper fees and disbursements… payable by the Lessor to procure the proper management of the Residential Premises as contemplated by the provisions of this Underlease, the provision of services, the calculation of service charges and the provision of service charge accounts…"

In the 2020 UT Decision, the Deputy President said of this language, at [70]:

> " In my judgment, although the charges of Switch2 for calculating utilities charges would fall within this formulation, the cost of litigating about those charges does not. The language is directed towards the provision of management services, not litigation."

71. It is apposite, in this connection, to have regard to the decision of this court (Dillon and Taylor LJJ) in Sella House Ltd v Mears (1988) 21 H. L. R. 147, where it was held that generally worded provisions in the service charge machinery contained in a residential long lease of a flat in Central London did not include litigation costs incurred by the landlord. Dillon LJ felt some hesitation on the point, but concluded at 156 "that the judge was right in his view that the fees of solicitors and counsel are outside the contemplation of either limb of [*the relevant clause in*] the lease". Taylor LJ agreed, saying (ibid):

> "I add only a few words on the issue whether legal fees can be included in the service charge under this lease. Nowhere in Clause 5(4)(j) is there any specific mention of lawyers, proceedings or legal costs. The scope of (j)(i) is concerned with management. In (j)(ii) it is with maintenance, safety and administration. On the respondent's argument a tenant, paying his rent and service charge regularly, would be liable via the service charge to subsidise the landlord's legal costs of suing his co-tenants, if they were all defaulters. For my part, I should require to see a clause in clear and unambiguous terms before being persuaded that that result was intended by the parties."

I consider that, *mutatis mutandis,* the same points may be made about the provisions with which we are now concerned. I cannot see any error in the approach of the Upper Tribunal to this issue, or to the conclusion which it reached.

72. Mr Bates sought to rely on the decision of His Honour Judge Hague QC, sitting as a judge of the High Court, in Reston Ltd v Hudson [1990] 2 EGLR 51, where on very different facts the judge held that costs incurred by the landlord in bringing proceedings to clarify the scope of a badly drafted covenant in the lease fell within a generally worded service charge provision. However, the point was not the subject of adversarial argument, as the tenants played no part in the litigation and were unrepresented. The judge dealt with the matter very briefly in the final paragraph of his judgment, and there is no indication that Sella House Ltd v Mears was cited to him. We are not bound by Reston Ltd v Hudson, and in any event it did not purport to lay down any general principles about the construction of such clauses. It is enough for me to say that, in the present case, I am satisfied that the Upper Tribunal came to the right conclusion on this point, for the reasons which it gave.

Conclusion on Issue 2

73. For all these reasons, I would dismiss the Landlord's appeal on the second main issue.

Overall conclusion

74. If the other members of the court agree, I would dismiss the Landlord's appeal.

Dingemans LJ:

75. I agree.

Underhill LJ:

76. I also agree.