UPPER TRIBUNAL (LANDS CHAMBER)

Neutral Citation Number: [2016] UKUT 553 (LC)
Case No: LRX/127/2015

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT – SERVICE CHARGES – liability of underlessees to pay for utilities "consumed" – meters believed to be unreliable – whether underlessees liable to pay bills based on estimated consumption – determination of unit rate – whether standing charges and other fixed charges properly included – whether recoverable charges limited by OFGEM guidance – appeal allowed in part

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

BETWEEN:

EAST TOWER APARTMENTS LIMITED

Appellant

- and -

NO.1 WEST INDIA QUAY (RESIDENTIAL) LIMITED

Respondent

Re: East Tower Apartments,
No.1 West India Quay,
London E14

Before: Martin Rodger QC, Deputy Chamber President

Royal Courts of Justice

London WC2A

On 1 September and 29 November 2016

Ms Lina Mattsson, instructed by Penningtons Manches LLP, for the appellant
Mr Justin Bates, instructed by King & Wood Mallesons, for the respondent

The following case is referred to in this decision:

Waverley Borough Council v Arya [2013] UKUT 0501 (LC)

Introduction

1. This is a dispute about payments for gas, electricity and water supplied to apartments in a building now known as No 1 West India Quay, London E14 ("the Building") pursuant to the long leases of 42 apartments granted by the respondent to the appellant in 2004. The installations for the supply and metering of energy within the Building are sophisticated but have proved to be unreliable, at least as far as the metering of energy is concerned. The terms of the leases under which the appellant is required to pay for the utilities provided for its benefit are also sophisticated, but they have proved to be difficult to implement. The result has been a dispute which has spawned numerous issues and sub-issues, conducted at very considerable expense, which has now been grinding on since 2009.

2. On 18 June 2014 the appellant made an application to the First-tier Tribunal (Property Chamber) (the FTT) seeking a determination under section 27A, Landlord and Tenant Act 1985, of its liability to pay invoices for heat, cooling, electricity, domestic hot water, standing charges and VAT for the period from 31 May 2008 to 31 December 2013 supplied in respect of the apartments which it owned in the Building. The period under consideration was subsequently extended by agreement to 31 October 2014. A recognised tenants association was subsequently added as a party to the application, but it did not participate actively either before the FTT or on the appeal.

3. After a hearing lasting 3 days during which the FTT conducted a site visit, heard expert evidence and was addressed at length by experienced counsel, it delivered a decision (in its final form) on 1 September 2015 in which it determined 6 out of a list of 15 issues which had been prepared by counsel for the appellant. The FTT explained that the remaining issues had either been agreed by the parties' experts or had ceased to be contentious by the conclusion of the hearing.

4. Permission to appeal was given by this Tribunal on 12 January 2016. At the hearing of the appeal the appellants were represented (as they had been before the FTT) by Ms Lina Mattsson and the respondents by Mr Justin Bates, both of counsel. I am grateful to counsel and their instructing solicitors for the considerable assistance they have provided the Tribunal.

The Building

5. The Building comprises 32 floors and was completed in 2004 for West India Quay Development Company (Eastern) Limited, which is still the freeholder. On 5 August 2004 the freeholder granted a headlease of part of the Building for a term of 999 years to the respondent, a company which I was told is part of the same group as, or otherwise connected to, the freeholder. The head lease is of the 158 residential apartments and common parts on the 13th to 32nd floors of the Building; I will refer to these floors as the upper floors. Shortly after taking the headlease the respondent granted individual underleases of 42 of the 158 apartments in the Building to the appellant.

6. The appellant's underleases (and the underleases of the other apartments on the upper floors) are in a standard form which obliges the lessee to pay for utilities consumed in the apartment itself, and for utilities consumed in the provision of heating and cooling to the apartment and the common parts of the upper floors through central service installations. The

underleases also oblige the lessees to pay a service charge as a contribution towards the cost of other services.

7. The lower floors of the Building, from the ground to the 12th floor, are occupied by the Marriott Hotel group; on these floors Marriott operates a hotel and occupies a further 47 apartments. I will refer to these as the lower floors, without distinction between the hotel and the apartments. I was not told the terms on which Marriott occupies the lower floors, but I was informed that the freeholder and the respondent are both part of, or connected to, the Marriott group. In the basement of the Building there is a car park, the use of which is shared between the leaseholders and Marriott, with the leaseholder of each apartment having a separate lease of a parking space in the car park.

The respondent's headlease of the upper floors

8. By clause 2.2 of the headlease of the upper floors the respondent is obliged to pay the freeholder a service charge calculated in accordance with Schedule 4. The service charge comprises 53% of the freeholder's expenditure on a conventional range of services provided to the Building. These are listed in Part D of Schedule 4 and include maintaining the structure, decorating the exterior, services relating to good estate management and professional fees in relation to the provision of services or calculation of service charges, outgoings and electricity and gas.

9. The respondent is also required by clause 3.2.2 to contribute towards the cost of energy. This obligation is in two parts. The first requires the respondent "to pay for all electricity gas water telephone and other data supplies and facilities consumed within the Demised Premises". The clause does not specify to whom these payments are to be made, but it is obvious that they must be made to the supplier of the particular service, whether that be the freeholder or a third party.

10. The second limb of clause 3.2.2 of the headlease requires the respondent to pay for energy consumed in the generation of heating and cooling for the upper floors of the Building by the central service installations (referred to as "Plant" in the headlease). This sum is referred to as the "Residential Energy Charge", an expression defined in clause 1.6 as:

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

The expression "AC Energy" used in the definition of the Residential Energy Charge is itself defined in clause 1.6 as:

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

11. By clause 3.2.2 the Residential Energy Charge is to be paid to the freeholder (or as it directs) and the payment is to be made:

"within 15 working days of written demand thereof (supported by reasonably sufficient evidence of the amount of AC Energy consumed in the Demised Premises for the relevant period)."

The appellant's underleases of individual apartments on the upper floors

12. The underleases of the apartments on the upper floors of the Building are for terms of 999 years less three days from June 24, 2004. The form of the underleases closely follows the form of the respondent's headlease and each obliges the underlessee to pay, amongst other sums: a service charge in respect of the residential common parts and the car park ascertained and payable in accordance with Part B of Schedules 4 and 5 respectively (clause 2.2); a sum referred to as the Apartment Energy Charge in accordance with clause 3.2.2 (clause 2.2); and, on demand, "any other sum due under the terms hereof" (clause 2.4).

13. The services are described in Parts C and D of Schedule 4 and include costs relating to good management, fees payable to third parties in connection with management, the provision of services, the calculation of service charges, the costs of the supply of electricity, gas, oil or other fuel for all purposes in connection with the residential parts of the Building and any incidental costs. They are payable under Part B by a simple scheme of quarterly provisional payments on account based on estimates by the respondent's surveyor with a balancing sum payable once the total annual expenditure has been ascertained.

14. Clause 3.2.2 of the underlease is structured in the same way as the same clause in the headlease. It first requires the lessee to pay for "all electricity gas water telephone and other data supplies and facilities consumed within the Demised Premises" [i.e. the individual apartment]. It also requires the lessee to pay the Apartment Energy Charge to the Lessor (or as it might direct). This charge relates to the cost of supplying hot and chilled water to the air conditioning systems in the Demised Premises, and is payable within 7 days of written demand but, unlike the corresponding provision of the headlease, there is no requirement that the demand be supported by evidence of the amount of energy consumed in the Demised Premises for the relevant period.

Metering the supply of utilities to the Building

15. The arrangements for the supply of utilities and the metering of consumption are at the heart of this appeal.

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").

21. The FTT (whose decision was seen in draft by the parties before it was finalised) recorded that Switch2 was employed by the freeholder, and that was the position adopted by Mr Bates at the hearing before me, although the respondent's statement of case for the appeal stated that Switch2 carried out its functions on its behalf. This confusion is symptomatic of a general lack of clear boundaries between the roles and responsibilities of the freeholder, Marriott, and the respondent, which in turn may be a reflection of their common ownership; for example, I was shown invoices for the supply of electricity to the whole Building by the utility supplier which were addressed to Marriott Hotels Ltd.

Bulk supply invoicing

22. Invoices for the supply of electricity to the whole Building show that the charge by the utility suppliers to the freeholder comprised three elements: energy charges, a levy charge and VAT.

23. The invoiced energy charges were based on metered consumption, for which different unit rates were applied to day units and night units. The energy charges also included sums which were not directly related to consumption: an availability charge (a sum charged by the utility provider to guarantee the availability of a certain level of supply) which seems to have fluctuated in different periods from zero to sums of several thousand pounds; a standing charge of a few pounds per day; and a reactive charge, which represents about 1% of the bill and is connected to the efficiency of the energy supply and metering systems in the Building.

24. The levy charge included in the supplier's invoices referred to the climate change levy (CCL), which was charged at a flat rate per unit of electricity consumed. In one quarterly invoice delivered in 2008, for example, the CCL of almost £4,000 represented about 4.3% of the total bill.

25. CCL and VAT were charged on the energy charges. VAT was charged at the prevailing standard commercial rate which has variously been 15%, 17.5% and 20% during the period in question.

Invoicing individual leaseholders

26. The role of Switch2 was to read the meters, calculate the sums payable by each occupier and prepare a statement itemising the charges. These statements were then delivered by the respondent's managing agents accompanied by an application for payment of the total sum containing additional information required by statute.

27. The content of the statements and applications for payment can be illustrated by one example. On 8 October 2008 Wood Management delivered a request for immediate payment of £635.53 for utilities to the appellant as leaseholder of apartment 2202 and its car parking space for the period from 31 May to 31 August 2008. The request was accompanied by a statement provided by Switch2 which purported to show the current and previous meter readings for heating, cooling, (direct) electricity and domestic hot water. The number of units consumed was shown to which a unit rate was applied to provide charges for each service. By far the greatest charge was in respect of electricity (meaning "direct" electricity consumed within the apartment) which accounted for £512.31, with heating and cooling (charges for the air conditioning plant) representing less than £75. A standing charge to cover Switch2's costs of reading the meters and calculating the sums due (which in this example was £18.59) was added to the utility charges producing a total of £605.27. VAT was stated in the Switch2 calculation to be 0.0%, but the managing agents invoice added VAT at 5% to arrive at the final charge of £635.53.

28. Any approach to apportioning the bulk charges for utilities supplied to the Building amongst its various occupiers had to be formulated in the light of at least three problems.

29. The first problem was that, by 2008, some of the meters recording consumption in certain parts of the Building were known to be defective; it was therefore necessary for to make estimates of the usage for certain areas and, eventually, for the whole of the upper floors. Up to March 2012 Switch2 estimated the consumption of energy for those apartments where it had reason to believe the meters were faulty, but used actual meter readings for the remainder. From March 2012 to October 2014 the respondent considered that so many of the meters were unreliable that it was preferable to base the charges for all of the apartments on estimated consumption (which may have been made by its own managing agents, Marathon Estates, rather than by Switch2). In arriving at estimates historic consumption data was used so that the charges for one year were based not on consumption in that year but in an earlier year which was assumed to provide a reasonably accurate guide.

30. The second problem was that the sub-meters do not record all of the energy consumed in the Building. For reasons which are not fully understood a proportion of the energy supplied through the bulk meters is "lost" within the Building (i.e. it is consumed or dissipated without being recorded by any sub-meter). In deciding what unit rate to charge individual leaseholders for the energy consumed in their apartments Switch2 sought to recoup the cost of this lost energy although there was no reason to believe that it had been consumed in those apartments.

31. 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 CCL and VAT at the standard rate) but which are not payable by domestic consumers (who are exempt from the CCL and who pay VAT on energy at a reduced rate of 5%).

32. The process by which Switch2 calculated the utilities charges for each apartment was not clear from the statements delivered to the leaseholders. It now seems that the dominant consideration in calculating the unit rate shown in the invoices was to ensure that the respondent and the freeholder recouped from the apartment leaseholders the full cost of providing energy to the Building, except to the extent that the energy was confirmed to have been consumed by the hotel or otherwise accounted for by usage on the lower floors. The unit rate therefore took account not only of the cost of the energy consumed in an apartment but also a contribution towards the additional charges levied by the utility companies (in the case of electricity the availability charge, the reactive charge, the supplier's standing charge and the CCL), a contribution towards the "lost" energy, and a contribution towards the standard rate VAT charged by the utility company. None of this was apparent from the bills received by the leaseholders.

33. One consequence of the way in which the unit rate was determined was that during some periods VAT was effectively being charged to the leaseholders at an aggregate rate of 26%. This was because concealed within the unit rate calculated by Switch2 was VAT at the commercial rate of 20% which was paid by the freeholder to the utility suppliers; a further 5% VAT charge at the domestic rate was then added by the managing agent to the sum shown in Switch2's statements when they delivered their requests for payment.

34. These anomalies only became clear with the benefit of disclosure of the suppliers' invoices by the respondent and investigation by the experts witnesses instructed by both parties.

The revised invoices

35. At the hearing before the FTT in July 2015 evidence was given by a representative of Switch2 who suggested that, contrary to the previous understanding of the parties' experts, reliable information may still be capable of being retrieved from the meters for the period from March 2012. In the light of that evidence the respondent subsequently undertook further investigations with the assistance of its expert, Mr Hamilton. Two weeks before the hearing of the appeal in September 2016 the respondent issued new invoices for the whole of the period from May 2008 to October 2014 which are said to be based on the methodology agreed between the experts for determining appropriate unit rates. These revised invoices are said to rely on actual meter readings for the period after March 2012, where only estimates had previously been used. The recalculated invoices for some apartments suggest that the respondents have been overcharged in the past for energy consumed, while those for other apartments suggest that they have been undercharged.

36. The appellant stopped paying for utilities some years ago because of the dispute over the accuracy of the bills (although it has paid for a number of apartments, under protest, as a condition of the respondent's cooperation in connection with their proposed sale). There has, so far, been no consideration by the appellant of the revised invoices and (given that years of overpayment have been followed by years of refusal to pay) it is not apparent which of the parties is likely now to be owed money by the other.

The FTT proceedings

37. The appellant's application to the FTT sought a determination of the amount payable for heat, cooling, electricity, domestic hot water, standing charges and VAT for the period from 31 May 2008 to 31 December 2013. In advance of the hearing experts instructed by the parties, Mr Hamilton for the respondent and Mr Lowndes for the appellant, were able to reach agreement on a number of issues.

38. The matters which were agreed and recorded between the experts included that approximately 10% of the meters in the apartments were unreliable, and that the domestic hot water meter had not registered consumption at all during the period under consideration (and no charge had been raised by Switch2). They agreed that where the meter readings were known to be faulty it was reasonable to base bills on estimated consumption. They agreed that VAT and CCL costs had been wrongly charged to the leaseholders and should not be included as part of their bills.

39. The experts also arrived at an agreed method of calculating an appropriate unit rate for electricity using the metering system available in the Building which stripped out the inappropriate charges. They did not agree what the appropriate unit rate should be since that depended, amongst other things, on the FTT's determination of whether the fixed charges could be recouped. They were nevertheless able to quantify the effect of the agreed errors and the respondent's expert, Mr Hamilton, calculated that for the period 31 May 2008 to 1 March 2012 the appellant had been overcharged by £61,016.56.

40. Mr Hamilton and Mr Lowndes were called to give evidence before the FTT and both parties were given the opportunity to cross-examine them. No attempt was made by the appellant in cross-examination to undermine the matters on which the experts had reached agreement. In particular it was not suggested to either expert that the methodology they had agreed upon for ascertaining the appropriate unit rate for electricity was based on some misconception or error of law.

41. No witnesses of fact gave evidence to the FTT. The respondent's counsel, Mr Bates, had successfully submitted to the tribunal that factual evidence would not be of assistance in determining the issues of principle which were all that prevented the experts from reaching agreement on the appropriate charges.

The FTT's decision

42. The FTT determined 6 issues. It was unable to specify the sums payable by the appellant for utilities between 2008 and 2014, despite that being the question posed by the application. Neither party had approached the hearing with evidence of specific figures but instead each invited the FTT to determine issues of principle. This approach had been sanctioned by the FTT at the last of a series of case management hearings, on 19 March 2015, at which it directed meetings of expert witnesses "to thrash out the core issue" with a view "if necessary, [to] having a determination from the Tribunal on areas which the experts cannot agree".

43. The "core issue" to which it had previously referred, and which the FTT did determine, was whether as a matter of contract demands for utility charges based on estimated

consumption (as opposed to properly metered consumption) were valid. The appellant had submitted that it was obliged to pay only for consumption which was evidenced by current meter readings. For reasons which I will explain later the FTT rejected the appellant's case and held that estimates based on historic meter readings were permissible.

44. The FTT also decided that there was a contractual obligation on the leaseholders to pay fixed charges for all fuels so that that the respondent was entitled to include the fixed charges for electricity and gas in the unit rates charged to leaseholders. The standing charge representing a contribution towards Switch2's services was also payable. Finally the FTT decided that there was nothing in the guidance issued by OFGEM on maximum resale prices for electricity which prevented the respondent from relying on estimated readings.

45. The FTT stated in paragraph 39 that it would not address all 15 of the issues which the appellant's counsel had listed in her skeleton argument, but only those which appeared to it to be in dispute by the conclusion of the hearing. Some of the issues had been overtaken by agreements reached by the experts or by the parties, some did not arise because of the FTT's decisions on other points, or could not be determined because no cross examination had been directed to them when the experts gave evidence. The final issue, a proposed claim by the appellants for an award of costs under rule 13 of the Property Chamber Rules 2013, was not yet the subject of an application and (correctly in my view) was not determined by the FTT for that reason.

46. In its decision at the conclusion of the final hearing the FTT noted the progress made by the experts in agreeing a method of apportionment between the upper and lower floors of the Building and of estimating figures for consumption by individual apartments where meters were faulty. It was now for the experts to implement their agreement in light of the tribunal's conclusions on the issues of principle and to agree the appropriate figures. If agreement could not be reached the FTT suggested that a further application could be made to it.

Issues

47. Permission to appeal was sought by the appellant on 6 grounds, three of which concerned the non-determination of issues which had appeared to the FTT not to arise for one or other of the reasons given in paragraph 45 above. The first ground concerned the FTT's refusal to hear oral evidence to enable it to determine the appellant's application for costs under rule 13. Permission to appeal was refused on that issue, since no costs application had been made to the FTT. Permission was given on the remaining grounds. The three substantive issues arising out of the matters which the FTT did decide were the following:

1. Are the leaseholders required by clause 3.2.2 of the underleases (or otherwise) to pay utility charges based on estimated rather than metered consumption?

2. Is the fixed charge element of the utilities charges payable by the leaseholders?

3. Is the Switch2 standing charge payable by the leaseholders?

48. Whether any of the other issues left underdetermined by the FTT will arise for consideration in this appeal will depend on the answer to those three substantive questions.

Issue 1: Are the appellants required by clause 3.2.2 of the underleases (or otherwise) to pay utility charges based on estimated rather than metered consumption?

49. The background to this issue is that for a period of 20 months from March 2012 to October 2014 the respondent's agents delivered only two requests for payment for utilities charges and in each case the requests were based on estimates of consumption. On 7 February 2014 a request for payment was made for each apartment for charges for the period from 1 March 2012 to 31 December 2013, and on 27 November 2014 a further request for the period from 1 January to 31 October 2014 was made. The estimated consumption on which both requests were based was derived from actual consumption as shown by the apartment meters in a 15 month period from December 2010 to March 2012.

50. The respondent claims to be entitled to payment of the sums requested under clause 3.2.2 of the underlease, which it is therefore necessary to consider in some detail.

Clause 3.2.2

51. Clause 3.2.2 of the underlease is a covenant by the leaseholder:

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

52. It can be seen that clause 3.2.2 is in two parts.

53. The first part is an obligation to pay for electricity etc "consumed within the Demised Premises". It therefore relates to what has been termed "direct" electricity and other direct utilities (although there is no supply of gas to the individual apartments). Electricity consumed to provide electric lighting and to operate domestic appliances is within the first limb. The obligation is, implicitly, to pay the supplier of the commodity which in the case of water and electricity would appear to be the respondent. The clause does not say when payment is to be made but this omission is supplied by clause 2.4 which provides that sums payable to the Lessor other than ground rent, service charges and the Apartment Energy Charge are payable on demand.

54. The second part of clause 3.2.2 is the obligation to pay the Apartment Energy Charge within seven days of demand. To understand this obligation it is necessary to consider four defined expressions.

55. The "Apartment Energy Charge" is defined in clause 1.6 of the underlease. It means:

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

56. The expression "AC Energy" used in that definition (which I assume is shorthand for "air conditioning energy") is itself defined in the same clause as meaning:

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

57. The "Residential Premises" are the apartments and other areas for residential use (roof terraces, corridors etc) on the upper floors of the Building (the thirteenth to thirty-second floors).

58. Finally, the "Residential Energy Charge" is an expression defined in the headlease which I have referred to in **paragraph 10 above.** It is the cost of that proportion of AC Energy attributable to the heating and chilling water for use in the air conditioning systems serving the upper floors of the Building "as evidenced by meters installed for the purpose of measuring such proportions".

59. With the assistance of these various definitions it can be seen that the Apartment Energy Charge is intended to represent the cost of that proportion of the total AC Energy i.e. the gas and electricity consumed by the central plant in the Building to generate hot and chilled water to operate the air conditioning systems serving the upper floors, as is referable to the operation of the air conditioning systems in the individual apartments. The second limb of clause 3.2.2 requires the leaseholder to meet that cost.

The FTT's conclusion

60. At paragraph 80 of its decision the FTT recorded that the appellant's submission was that no payment was due for consumption not evidenced by meter readings.

61. The FTT disagreed. It said that the relevant terms of the underlease were plain and workable. Clause 3.2.2 was the important obligation and it did not require the provision of evidence of consumption.

62. It also considered that the definitions of AC Energy and Residential Energy Charge, each of which required that consumption be "evidenced by meters", did not import a similar requirement into the calculation of the Apartment Energy Charge.

63. Finally, the FTT did not consider that the meter readings referred to needed be contemporaneous with the period covered by the payment. At paragraph 88 of its decision the FTT explained that:

> "Evidence from meters could mean evidence of past consumption where no actual readings could (reasonably) be obtained."

The appellant's case

64. The appellant's case is that clause 3.2.2 does not permit estimated bills based on past consumption. The leaseholder's obligation under the first limb of clause 3.2.2 is to pay for utility supplies "consumed" within the apartment; such consumption must be proved by reference to the individual apartment meters. Estimates unrelated to consumption recorded by the meters during the period to which the bill relates cannot form the basis of a valid demand. The various layers of the definition of the Apartment Energy Charge also showed that the

contribution towards the cost of operating the air-conditioning system must also be based on meter readings. Moreover, the appellant says, if the FTT's decision to the contrary is correct, it will be liable to pay utilities charges based on estimated consumption for the remaining 987 years of the underlease terms, which is clearly contrary to the intention of the parties when the underleases were entered into.

65. In the course of oral argument I asked Ms Mattson whether the parties must be taken to have assumed that the meters in the building would never malfunction or, if not, what they must be taken to have intended in the event of one or more meters giving false readings. Since the meter readings are the basis of an apportionment, an inaccurate reading given by even a single meter could potentially falsify the calculation for every apartment. Ms Mattsson's answer was that the parties must be taken to have anticipated the possibility of breakdown, for example if the Building was struck by lightning or if there was a software malfunction. The experts had agreed a more accurate method of estimating consumption based on occupancy information, external temperature readings and other data. It would therefore be permissible, in the event of a malfunction, for the respondent to substitute a reasonable estimate of consumption for such period as was reasonable in all the circumstances.

66. The possibility that there might be limited circumstances in which demands based on estimates of consumption would be contractually compliant was not put to the FTT although it did refer in paragraph 88 to circumstances in which "no actual readings could (reasonably) be obtained." It was not asked to determine whether the period for which the respondent relied on estimated consumption was a reasonable period in all of the circumstances. It may be that the factual evidence which the respondent persuaded the FTT not to hear (on the grounds that it was unnecessary) would have included evidence relevant to that question. The experts had not investigated the cause of the problems with the meters which remained unknown, although they noted that Switch2 had recommended for some considerable time that it be properly investigated. On behalf of the respondent Mr Bates emphasised that the meters were not under its control, but belonged to the freeholder, and Switch2 was the freeholder's agent, not the respondents. Since the respondent and the freeholder are companies within the same group and since Switch2 certainly acted for the respondent in preparing statements for the leaseholders those may not be points of significance, but the fact remains that FTT was not asked to consider whether there might be a general rule prohibiting estimation but subject to an exception in the event of a meter malfunction.

The respondent's case

67. Mr Bates submitted first that the availability of accurate meter readings was not a condition precedent to the appellant's liability to make payment for energy or other services consumed under clause 3.2.2. The experts had agreed on a method of assessment of energy consumed which compensated for the occurrence of faulty meter readings (which in any event were less prevalent than had previously been understood). The revised invoices had now been sent out, but the appellant had not yet expressed any view on them. Once the appellant accepted that the use of estimated readings was permissible for a reasonable period if the meters were known to be unreliable there was no real challenge to the decision of the FTT in paragraph 88 of its decision. The Tribunal should therefore confirm that the demands were compliant with clause 3.2.2 and then it should be left to the experts to agree how much of the sums demanded were due (applying their previously agreed methodology in the light of the Tribunal's decision on the remaining issues). If agreement was not reached the parties should

restore the application for further consideration by the FTT as it had indicated in paragraph 92 of its decision.

Discussion and conclusion

68. As already explained above, clause 3.2.2 imposes two different obligations, the first being to pay the whole cost of direct energy and services consumed within the apartment, and the second to pay a share or proportion of the cost of gas and electricity consumed by the central Plant to generate hot and chilled water for the air conditioning systems serving the upper floors.

69. The obligation to pay for direct energy is expressed in entirely general terms, with no indication of how the sum payable for energy consumed is to be ascertained. The appellant is clearly correct that that sum payable must be referable to consumption, but there is no express requirement that consumption must be measured using any particular method. No doubt it was contemplated that, initially at least, the meters installed in the apartments would be the basis of assessment, but I agree with Ms Mattsson that the parties cannot be taken to have assumed that the meters would always provide a reliable measure of consumption. For one thing, the possibility of a temporary malfunction was readily foreseeable, and for another, each underlease is for a term of 999 years and the use during that exceptionally long term of some different approach to measuring consumption cannot have been excluded. As far as direct energy is concerned, therefore, I do not accept Ms Mattsson's submission that an accurate measurement using the four meters in the apartment is a condition of the leaseholder's liability to pay for energy consumed.

70. In practice clause 3.2.2 anticipates a demand for payment by the supplier of the electricity, gas or water, so the onus is on the supplier to state how much energy has been consumed. The supplier is likely to base its demand on meter readings, but if the meters are believed to be faulty there is nothing in the language of the clause which prohibits consumption from being ascertained in some other way, including by a genuine estimate.

71. If, on receiving a demand for payment, the leaseholder considers that the sum demanded was not a proper reflection of the amount of energy consumed in the apartment it might refuse to pay and challenge the supplier to establish the level of consumption during the period to which the demand related. If agreement could not be reached it would be for the supplier to prove to the satisfaction of a court or tribunal, if necessary, how much energy had been consumed. Like any other question of fact to be determined in a civil court or tribunal, that question would fall to be proved on the balance of probability.

72. An energy supplier who was put to proof of consumption, but who could not rely on meter readings, might seek to prove that there was an earlier period for which reliable meter readings were available and to base an assessment of consumption on that period. It might be a reasonable inference that, all other things being equal, the amount of energy consumed in one year would be much the same as the amount consumed in a previous year.

73. If such a supplier was able to provide proof of consumption in that way, the onus would pass to the consumer to show that there was some reason why consumption measured accurately in a previous period could not be relied on as a reliable means of assessing consumption in the period in question. The consumer might do so by showing that the meters had always been faulty, or that the apartment had been empty or occupied less intensively in

one of the periods, or that weather conditions had been very different. If the consumer was unable to rebut the inference that proven usage in an earlier period was a reliable guide to consumption in the period under consideration, the appropriate finding of fact for the court or tribunal would be that, on balance, the sum claimed fairly represented the cost of energy consumed during that period.

74. In their joint statement the parties' experts agreed that it would be reasonable to use a previous period of consumption, making adjustments for seasonal and occupancy issues, as the best method of estimating consumption for flats with unreliable meter readings.

75. For these reasons I do not agree that the only method of determining consumption is by using accurate meter readings for the period of assessment, although that is obviously the best method. Consumption is a question of fact which can be proved on the balance of probability by any method capable of arriving at a figure which is more likely to be correct (or at least more likely to be conservative) than to be excessive. In principle, therefore, a demand for payment based on an estimate of direct electricity or water consumed in an apartment is capable of being a valid demand.

76. Is the leaseholder's obligation to pay the Apartment Energy Charge any different?

77. As a matter of construction of the underlease, the ascertainment of the Apartment Energy Charge requires the use of meters. It is a charge payable for a proportion of the Residential Energy Charge which is itself a charge for a proportion of the electricity and gas consumed by the central air-conditioning Plant serving the whole Building; in each case the relevant proportion is to be "evidenced by meters installed for the purpose of measuring such consumption".

78. The FTT considered that evidence of consumption from meters could include "evidence of past consumption where no actual readings could (reasonably) be obtained." I initially found that a difficult proposition to accept, because the evidence which the meters were intended to provide was clearly evidence of consumption during the period to which the demand for payment related and, moreover, a process of *measurement* of that consumption (rather than estimation) was contemplated. It did not seem to me to be easy to regard consumption proved only by inference from a measurement taken in a different period, and subject to adjustments to reflect changes in circumstances, as falling within the various expressions which define the Apartment Energy Charge.

79. Despite these misgivings I have come to the conclusion that the FTT was correct to allow the possibility that, exceptionally, where reliable readings were not available, the evidence of consumption on which an apportionment could be based would include evidence of consumption in a previous period. The meters installed in the Building are a tool which should not be allowed to assume a disproportionate significance. It would be wrong to make performance of the leaseholder's substantive obligation to pay for energy referable to the heating and cooling of its own apartment dependent on the reliability of the meters. I note, as did the FTT, that in its guidance on the resale of gas and electricity, OFGEM, the independent energy regulator, stipulates that where electricity is supplied by a reseller through a meter which does not accurately record the number of units used, the reseller must use reasonable endeavours to estimate what proportion of the total bill each tenant should pay. While that guidance has no contractual force, it reflects a common sense approach such as reasonable

parties are likely to have intended should be adopted in the event of inaccurate meter readings.

80. In any event, even if the obligation to pay the Apartment Energy Charge were to be interpreted as dependent on the availability of accurate metering, the consequence of a malfunction would not be that the leaseholder would be entitled to free energy. To the extent that it made use of the heating and cooling services it would be obliged to make payment on a *quantum meruit* basis. In assessing a *quantum meruit* (i.e. a reasonable sum for a service willingly received in circumstances where it cannot have been intended that no payment would be required) it would be necessary to estimate the amount of energy consumed. That requirement seems to me to point towards a limited process of estimation being permissible in ascertaining the Apartment Energy Charge.

81. I therefore dismiss the appellant's appeal on the first issue. I am satisfied that a demand for payment under clause 3.2.2, whether for direct electricity, or for the Apartment Energy Charge, is not rendered invalid by being based in part on an estimate of consumption.

Issue 2: Is the fixed charge element of the utilities charges payable by the leaseholders?

82. The fixed charges in issue are the availability charge and the reactive charges which were included in the electricity bills paid by the freeholder, which passed it on to the respondent, and which the respondent seeks to pass on to the leaseholders. The charges for gas also included a standing charge. It is common ground that the other charges concealed within the leaseholders' bills (the climate change levy and commercial rate VAT) are not payable.

83. The availability charge was found by the FTT to be a charge to secure the availability of electricity to the Building" levied by the energy supplier. The reactive charge was found to be a charge made by the electricity supplier based on the efficiency of the equipment in a building. The standing charge for gas was a charge covering the supplier's cost of maintaining its installations in the Building and managing the supply. All three charges were included by Switch2 in its calculation of the Apartment Energy Charge which appeared on the statements as separate charges for heating and cooling.

84. The appellant's case was that these charges were not charges for electricity or gas consumed or metered and so could not fall within clause 3.2.2. Moreover, they were charges which were not incurred for the benefit of the residential parts of the Building, but only because part of the Building was in commercial occupation by the Marriott hotel.

85. The FTT rejected the appellant's case on this issue, and I am satisfied that it was correct to do so for the reasons it gave. Those reasons were essentially that the availability charge was incurred because electricity was supplied in bulk to the Building as a whole, as it had been when the underleases were granted, not through any choice of the freeholder but simply because that was how the Building had been designed. Having taken a lease in a building designed in that way, the leaseholders could not avoid part of the necessary cost of procuring a supply of electricity. There was no evidence to support the assertion by the leaseholders that the availability charge was required only because of the energy consumed by the hotel.

86. The same reasoning applied to the reactive charge, which was a levy for the supply of electricity to this Building in which the appellant had chosen to take leases of apartments. It was not suggested that the reactive charge was incurred as a result of any breach by the freeholder or the respondent of any obligation.

87. In the case of gas, a building in exclusively residential occupation might have incurred a standing charge at a lower rate, but this was not such a building. The OFGEM guidance recommended that standing charges be divided amongst all occupiers in proportion to usage, which appeared to the FTT to be the approach adopted by Switch2.

88. I find that reasoning convincing and I am satisfied that the cost of electricity and gas recoverable under clause 3.2.2 properly includes an apportioned part of the availability charge, the reactive charge and the gas standing charge. On the evidence electricity and gas were supplied inclusive of these charges because of the characteristics of the Building, and they were simply part of the cost of receiving the supply. There was no evidence that the charges could have been avoided.

89. I also note the approach taken to charges of this type by OFGEM, the independent energy regulator, in its current (October 2005) guidance on the resale of gas and electricity. The maximum resale price for electricity for domestic use is the same price as that paid by the reseller, including any standing charges. The guidance gives a number of examples of how this price should be calculated and in one of these (8a) it is assumed that electricity is purchased in kVA units thus attracting an availability charges and maximum demand charges. OFGEM treats these charges as part of the permitted resale price. That approach is supportive of the view that the charges are simply part of the cost of electricity supplied.

90. I note in passing that it is said by the appellant that the unit rate agreed by the experts as payable for direct electricity exceeds the maximum resale price permitted by the OFGEM guidance (which has statutory force by reason of section 44, Electricity Act 1989). That was not a point put to the experts when they gave evidence, and the FTT made no finding in the light of their apparent agreement. Although there is no evidence that the OFGEM rate was exceeded, I nevertheless agree with Ms Mattsson's submission that an agreement between experts cannot sanction a breach of the general law (section 44). When they apply their agreed approach, the experts should therefore limit the unit rate payable by the leaseholders to the rate paid by the reseller (including in that rate the availability and reactive charges. As the OFGEM guidance acknowledges, however, arriving at a single unit rate for supplies of gas and energy can be complex because different tariffs apply to different parts of the supply and seasonal or retrospective adjustments may be required. The duty of the re-seller is said by OFGEM to be to "use reasonable endeavours to make an estimate of the applicable unit price" and to explain its calculation to the consumer. If, with the benefit of the FTT's decision on issues of principle and the assistance of the experts, the parties are still unable to agree the appropriate unit rate, it will be necessary for the application to be restored for further consideration by the FTT.

Issue 3: Is the Switch2 standing charge payable by the leaseholders?

91. The third issue argued on the appeal concerned a "standing charge" which appeared on Switch2's statements for each apartment. It is not clear how this 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. It was demanded by the respondent as part of the charges payable under clause 3.2.2 of the underlease.

92. The FTT found that this charge was not payable under clause 3.2.2. 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. It followed that it was not open to the respondent to treat the Switch2 standing charge as part of the utility charge payable within 7 days of demand under clause 3.2.2.

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.

94. In paragraphs 76 and 77 of its decision the FTT considered the consequences of the standing charge never having been included as part of the service charge. It said this:

> "76. … we do not see that Switch2's charges have been properly demanded or set out under the terms of the lease. If this were the end of the matter, then it would appear therefore that section 20(B) Landlord and Tenant Act 1985 would apply to some previous charges meaning that they are not payable by [the appellant].
>
> 77. However, it appears to us that this is all circumvented by clause 2.4 of the lease. Under the terms of that clause the leaseholders covenant to pay, *on demand*, any other sums due to the Lessor. Switch2's charges have been demanded. Even therefore if not correctly demanded under clause 3.2.2, the sums are payable pursuant to clause 2.4."

95. The term on which the FTT relied, clause 2.4, is part of the reddendum (the part of the lease reserving payments of rent). So far as is relevant clause 2 grants the term of 999 years and continues:

> "PAYING THEREFOR during the Term the following rents:-
>
> 2.1 [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 3.2.2
>
> 2.4 on demand any other sum due under the terms hereof
>
> 2.5 [VAT]"

96. For the appellant Ms Mattsson submitted that once it was accepted that the Switch2 charge could be recovered as part of the service charge, reliance on clause 2.4 was obviously impermissible. It related to "any other sum" and so could not be used as an alternative route for demanding payment of something which was not "other" but ought to have been included in the service charge.

97. I agree with Ms Mattsson's submission and I do not think the FTT was entitled to find that sums recoverable as service charges could additionally be demanded and become immediately payable by virtue of clause 2.4. If that interpretation of clause 2.4 was correct it would be hard to see what would prevent the respondent from demanding reimbursement of all service charge expenditure under the same clause, thereby circumventing the accounting and collection provisions in Part B of Schedules 4 and 5.

98. On his oral argument on behalf of the respondent Mr Bates did not seek to support the FTT's route to recovery of the Switch2 charges. He argued instead that the charges were either payable on demand under clause 3.2.2 or were payable as a service charge; in the latter case he submitted that the respondent's omission to take account of the charge when estimating its total expenditure service charge payable by quarterly instalments on account, did not prevent it from including the charge in its end of year accounting.

99. In support of his argument that the Switch2 standing charge was within clause 3.2.2 Mr Bates referred to the Tribunal's decision in *Waverley Borough Council v Arya* [2013] UKUT 0501 (LC) in which, after reviewing a series of authorities it was said that in principle the cost incurred by a landlord in arranging for the provision of services and in managing their delivery could properly be regarded as part of the cost of providing the service, but that it was necessary in every case to have regard to any limitations which the particular lease imposed on the categories of expenditure to which the service charge was intended to relate. There was no reason in principle, Mr Bates submitted, why the cost of reading the meters could not be regarded as part of the cost of electricity and gas consumed.

100. I do not accept Mr Bates submission. In agreement with the FTT I consider that the elaborate definition of the Apartment Energy Charge (which is essentially the cost of a quantity of electricity and gas) does not include the cost of employing a consultant to read the meters and calculate the energy bills. The cost of the energy itself would be the same whatever it cost to administer the system. Given that one of the components of the sum payable under clause 3.2.2 does not include administration costs, it would be cumbersome and impractical to treat the other component (direct energy) as including such costs. That is particularly so because, as the FTT pointed out, there are a number of different categories of service charge expenditure within which this cost can readily be accommodated. In Part D of Schedule 4 the cost of entering into contracts for the carrying out of any of the services or other estate management functions is within paragraph 4 and the cost of the supply of fuel for the provision of services is within paragraph 6.

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.

Consequential issues

102. Ms Mattsson invited me to rule on a number of other issues which the FTT had not found it necessary (or in some cases possible) to consider.

103. In her written submissions Ms Mattsson was critical of what she described as the FTT's refusal or failure to decide six of the issues referred to it. That criticism is unjustified. There was no requirement for the FTT to reach conclusions on issues which did not arise because of

its decisions on other issues, and the suggestion that it was wrong not to decide all issues is unsustainable. Nevertheless, some of the issues which the FTT did not feel it necessary to address may now arise because this Tribunal has taken a different view on the Switch2 standing charge, but that does not mean that the FTT was wrong not to decide them. In many cases it will be helpful for a tribunal briefly to express its conclusions on contingent or subsidiary issues (especially issues of primary fact) which would only have arisen if it had reached a different conclusion on some over-arching issue, but a tribunal can rarely be criticised for not doing so. It can certainly not be criticised where the evidence on contingent issues has not been fully investigated at the conclusion of a lengthy hearing, and where it is unclear what the tribunal is being asked to decide, as the FTT recorded was the case on a number of the issues it is now said it should have tackled.

104. If the respondent wishes to recover the Switch2 standing charge it will be necessary for it to include them in an end of year service charge reconciliation, as Mr Bates said it was able to do. It has not yet done so but if it does there are a variety of points which the appellant may wish to take including by relying on section 20B(1) of the 1985 Act to argue that the charges were incurred more than 18 months before they were demanded or by challenging the reasonableness of the service provided. In his statement of case for the appeal Mr Bates informed the Tribunal that any attempt by the leaseholders to rely on section 20B(1) would be met by evidence of notices satisfying section 20B(2). Ms Mattsson asserted that only one such notice had ever been served (not the six pleaded in the respondent's statement of case) and that there was a period from 1 March 2012 to 7 August 2012 to which no section 20B(2) notice related. She invited me to make a determination to that effect and to rule that no charge was recoverable for that period.

105. I am not prepared to determine any issue concerning section 20B in this appeal, which is a review of the decision of the FTT, not a rehearing of the section 27A application. The relevant facts have not been found by the FTT and (in the case of Switch2 charges at least) proper demands have not yet been made. Additionally, detailed issues of quantification may yet arise in these proceedings if the parties cannot now agree the appropriate unit rate, and even after the cost of the utilities supplied has been ascertained the appellant may then ask the FTT to rule that some part of the cost (including the fixed and standing charges) was not reasonably incurred so that its liability should be limited under section 19(1) of the1985 Act. Just as the FTT anticipated in its directions and decision, the resolution of issues of principle does not necessarily mean that all issues of detail have fallen away.

106. I therefore propose to remit the application to the FTT for further consideration in the light of this decision.

The other issues

107. The remaining issues are largely procedural and can be dealt with relatively shortly.

108. The appellant complains that the FTT should have recorded concessions which it says the respondent made during the hearing and issues on which the parties had agreed. Those criticisms are, once again, unjustified and fail to take into account both that the task of the FTT under section 27A of the 1985 Act is to determine what sums are payable, and that it has no jurisdiction to make declarations. If professionally represented parties have reached agreement and wish that to be recorded it is for them to provide a clear statement of what has

been agreed (as the parties in this appeal have subsequently succeeded in doing at the invitation of the FTT).

109. The complaint about unrecorded "concessions" is also misconceived. The FTT is not required to record the evidence or submissions it has heard in minute detail, but only to the extent necessary to enable the reader of its decision to understand how it has resolved the issues in dispute, and why. What appears to one side to be a significant concession may appear to be nothing of the sort to the tribunal, especially in a case where the material presented to it lacks clarity.

110. The last procedural issue arises out of the appellant's submission that it should be entitled to an order that the respondent pay its costs of the proceedings before the FTT under rule 13(1) of the Property Chamber's 2013 Rules. It is not yet clear whether the claim is intended to be pursued against the respondent's representatives for allegedly wasted costs or against the respondent itself for unreasonable conduct of the proceedings. It is submitted by Ms Mattsson in her written argument that the Upper Tribunal has jurisdiction under its own rules (rule 10 of the Tribunal Procedure (Upper Tribunal)(Lands Chamber) Rules 2010 (as amended)) to make an order in relation to the whole of the proceedings, including the proceedings before the FTT. I doubt that very much, especially in a case where the FTT itself has not been asked to consider such an application. It should surely be obvious that the appropriate tribunal to deal first with an application concerning the costs of proceedings, where complaint is made about the manner in which those proceedings have been conducted, is the tribunal before which the hearing took place.

111. Happily, it was agreed that it is not necessary for me to consider the issue of costs further, as the appellant has now made a proper application for costs to the FTT. That application is currently stayed, by the agreement of the parties, to await the outcome of this appeal. I therefore decline to entertain an application in relation to the costs of proceedings before the FTT even if I have jurisdiction to do so. If the appellant considers that there are grounds for an application in relation to the costs incurred in connection with the appeal it may make an appropriate application after it has considered this decision.

Disposal

112. For the reasons which I have given I dismiss the appeal on issue 1 (estimated charges) and issue 2 (fixed charges) but allow it on issue 3 (Switch2 standing charge). I remit the application to the FTT for further consideration and I direct that within six weeks the appellant must apply to the FTT for further directions. The parties should seek to agree draft directions which might usefully include a stay of proceedings to enable their experts further time to quantify the sums payable (subject to the various defences open to the appellant).

Martin Rodger QC
Deputy Chamber President

19 December 2016

UPPER TRIBUNAL (LANDS CHAMBER)

Neutral Citation Number: [2016] UKUT 0553 (LC)
Case No: LRX/127/2015

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT – SERVICE CHARGES – liability of underlessees to pay for utilities "consumed" – meters believed to be unreliable – whether underlessees liable to pay bills based on estimated consumption – determination of unit rate – whether standing charges and other fixed charges properly included – whether recoverable charges limited by OFGEM guidance – appeal allowed in part

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

BETWEEN:

EAST TOWER APARTMENTS LIMITED

Appellant

- and -

NO.1 WEST INDIA QUAY (RESIDENTIAL) LIMITED

Respondent

Re: East Tower Apartments,
No.1 West India Quay,
London E14

Before: Martin Rodger QC, Deputy Chamber President

Royal Courts of Justice

London WC2A

On 1 September and 29 November 2016

Ms Lina Mattsson, instructed by Penningtons Manches LLP, for the appellant
Mr Justin Bates, instructed by King & Wood Mallesons, for the respondent

The following case is referred to in this decision:

Waverley Borough Council v Arya [2013] UKUT 0501 (LC)

Introduction

1. This is a dispute about payments for gas, electricity and water supplied to apartments in a building now known as No 1 West India Quay, London E14 ("the Building") pursuant to the long leases of 42 apartments granted by the respondent to the appellant in 2004. The installations for the supply and metering of energy within the Building are sophisticated but have proved to be unreliable, at least as far as the metering of energy is concerned. The terms of the leases under which the appellant is required to pay for the utilities provided for its benefit are also sophisticated, but they have proved to be difficult to implement. The result has been a dispute which has spawned numerous issues and sub-issues, conducted at very considerable expense, which has now been grinding on since 2009.

2. On 18 June 2014 the appellant made an application to the First-tier Tribunal (Property Chamber) (the FTT) seeking a determination under section 27A, Landlord and Tenant Act 1985, of its liability to pay invoices for heat, cooling, electricity, domestic hot water, standing charges and VAT for the period from 31 May 2008 to 31 December 2013 supplied in respect of the apartments which it owned in the Building. The period under consideration was subsequently extended by agreement to 31 October 2014. A recognised tenants association was subsequently added as a party to the application, but it did not participate actively either before the FTT or on the appeal.

3. After a hearing lasting 3 days during which the FTT conducted a site visit, heard expert evidence and was addressed at length by experienced counsel, it delivered a decision (in its final form) on 1 September 2015 in which it determined 6 out of a list of 15 issues which had been prepared by counsel for the appellant. The FTT explained that the remaining issues had either been agreed by the parties' experts or had ceased to be contentious by the conclusion of the hearing.

4. Permission to appeal was given by this Tribunal on 12 January 2016. At the hearing of the appeal the appellants were represented (as they had been before the FTT) by Ms Lina Mattsson and the respondents by Mr Justin Bates, both of counsel. I am grateful to counsel and their instructing solicitors for the considerable assistance they have provided the Tribunal.

The Building

5. The Building comprises 32 floors and was completed in 2004 for West India Quay Development Company (Eastern) Limited, which is still the freeholder. On 5 August 2004 the freeholder granted a headlease of part of the Building for a term of 999 years to the respondent, a company which I was told is part of the same group as, or otherwise connected to, the freeholder. The head lease is of the 158 residential apartments and common parts on the 13th to 32nd floors of the Building; I will refer to these floors as the upper floors. Shortly after taking the headlease the respondent granted individual underleases of 42 of the 158 apartments in the Building to the appellant.

6. The appellant's underleases (and the underleases of the other apartments on the upper floors) are in a standard form which obliges the lessee to pay for utilities consumed in the apartment itself, and for utilities consumed in the provision of heating and cooling to the apartment and the common parts of the upper floors through central service installations. The

underleases also oblige the lessees to pay a service charge as a contribution towards the cost of other services.

7. The lower floors of the Building, from the ground to the 12th floor, are occupied by the Marriott Hotel group; on these floors Marriott operates a hotel and occupies a further 47 apartments. I will refer to these as the lower floors, without distinction between the hotel and the apartments. I was not told the terms on which Marriott occupies the lower floors, but I was informed that the freeholder and the respondent are both part of, or connected to, the Marriott group. In the basement of the Building there is a car park, the use of which is shared between the leaseholders and Marriott, with the leaseholder of each apartment having a separate lease of a parking space in the car park.

The respondent's headlease of the upper floors

8. By clause 2.2 of the headlease of the upper floors the respondent is obliged to pay the freeholder a service charge calculated in accordance with Schedule 4. The service charge comprises 53% of the freeholder's expenditure on a conventional range of services provided to the Building. These are listed in Part D of Schedule 4 and include maintaining the structure, decorating the exterior, services relating to good estate management and professional fees in relation to the provision of services or calculation of service charges, outgoings and electricity and gas.

9. The respondent is also required by clause 3.2.2 to contribute towards the cost of energy. This obligation is in two parts. The first requires the respondent "to pay for all electricity gas water telephone and other data supplies and facilities consumed within the Demised Premises". The clause does not specify to whom these payments are to be made, but it is obvious that they must be made to the supplier of the particular service, whether that be the freeholder or a third party.

10. The second limb of clause 3.2.2 of the headlease requires the respondent to pay for energy consumed in the generation of heating and cooling for the upper floors of the Building by the central service installations (referred to as "Plant" in the headlease). This sum is referred to as the "Residential Energy Charge", an expression defined in clause 1.6 as:

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

The expression "AC Energy" used in the definition of the Residential Energy Charge is itself defined in clause 1.6 as:

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

11. By clause 3.2.2 the Residential Energy Charge is to be paid to the freeholder (or as it directs) and the payment is to be made:

"within 15 working days of written demand thereof (supported by reasonably sufficient evidence of the amount of AC Energy consumed in the Demised Premises for the relevant period)."

The appellant's underleases of individual apartments on the upper floors

12. The underleases of the apartments on the upper floors of the Building are for terms of 999 years less three days from June 24, 2004. The form of the underleases closely follows the form of the respondent's headlease and each obliges the underlessee to pay, amongst other sums: a service charge in respect of the residential common parts and the car park ascertained and payable in accordance with Part B of Schedules 4 and 5 respectively (clause 2.2); a sum referred to as the Apartment Energy Charge in accordance with clause 3.2.2 (clause 2.2); and, on demand, "any other sum due under the terms hereof" (clause 2.4).

13. The services are described in Parts C and D of Schedule 4 and include costs relating to good management, fees payable to third parties in connection with management, the provision of services, the calculation of service charges, the costs of the supply of electricity, gas, oil or other fuel for all purposes in connection with the residential parts of the Building and any incidental costs. They are payable under Part B by a simple scheme of quarterly provisional payments on account based on estimates by the respondent's surveyor with a balancing sum payable once the total annual expenditure has been ascertained.

14. Clause 3.2.2 of the underlease is structured in the same way as the same clause in the headlease. It first requires the lessee to pay for "all electricity gas water telephone and other data supplies and facilities consumed within the Demised Premises" [i.e. the individual apartment]. It also requires the lessee to pay the Apartment Energy Charge to the Lessor (or as it might direct). This charge relates to the cost of supplying hot and chilled water to the air conditioning systems in the Demised Premises, and is payable within 7 days of written demand but, unlike the corresponding provision of the headlease, there is no requirement that the demand be supported by evidence of the amount of energy consumed in the Demised Premises for the relevant period.

Metering the supply of utilities to the Building

15. The arrangements for the supply of utilities and the metering of consumption are at the heart of this appeal.

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").

21. The FTT (whose decision was seen in draft by the parties before it was finalised) recorded that Switch2 was employed by the freeholder, and that was the position adopted by Mr Bates at the hearing before me, although the respondent's statement of case for the appeal stated that Switch2 carried out its functions on its behalf. This confusion is symptomatic of a general lack of clear boundaries between the roles and responsibilities of the freeholder, Marriott, and the respondent, which in turn may be a reflection of their common ownership; for example, I was shown invoices for the supply of electricity to the whole Building by the utility supplier which were addressed to Marriott Hotels Ltd.

Bulk supply invoicing

22. Invoices for the supply of electricity to the whole Building show that the charge by the utility suppliers to the freeholder comprised three elements: energy charges, a levy charge and VAT.

23. The invoiced energy charges were based on metered consumption, for which different unit rates were applied to day units and night units. The energy charges also included sums which were not directly related to consumption: an availability charge (a sum charged by the utility provider to guarantee the availability of a certain level of supply) which seems to have fluctuated in different periods from zero to sums of several thousand pounds; a standing charge of a few pounds per day; and a reactive charge, which represents about 1% of the bill and is connected to the efficiency of the energy supply and metering systems in the Building.

24. The levy charge included in the supplier's invoices referred to the climate change levy (CCL), which was charged at a flat rate per unit of electricity consumed. In one quarterly invoice delivered in 2008, for example, the CCL of almost £4,000 represented about 4.3% of the total bill.

25. CCL and VAT were charged on the energy charges. VAT was charged at the prevailing standard commercial rate which has variously been 15%, 17.5% and 20% during the period in question.

Invoicing individual leaseholders

26. The role of Switch2 was to read the meters, calculate the sums payable by each occupier and prepare a statement itemising the charges. These statements were then delivered by the respondent's managing agents accompanied by an application for payment of the total sum containing additional information required by statute.

27. The content of the statements and applications for payment can be illustrated by one example. On 8 October 2008 Wood Management delivered a request for immediate payment of £635.53 for utilities to the appellant as leaseholder of apartment 2202 and its car parking space for the period from 31 May to 31 August 2008. The request was accompanied by a statement provided by Switch2 which purported to show the current and previous meter readings for heating, cooling, (direct) electricity and domestic hot water. The number of units consumed was shown to which a unit rate was applied to provide charges for each service. By far the greatest charge was in respect of electricity (meaning "direct" electricity consumed within the apartment) which accounted for £512.31, with heating and cooling (charges for the air conditioning plant) representing less than £75. A standing charge to cover Switch2's costs of reading the meters and calculating the sums due (which in this example was £18.59) was added to the utility charges producing a total of £605.27. VAT was stated in the Switch2 calculation to be 0.0%, but the managing agents invoice added VAT at 5% to arrive at the final charge of £635.53.

28. Any approach to apportioning the bulk charges for utilities supplied to the Building amongst its various occupiers had to be formulated in the light of at least three problems.

29. The first problem was that, by 2008, some of the meters recording consumption in certain parts of the Building were known to be defective; it was therefore necessary for to make estimates of the usage for certain areas and, eventually, for the whole of the upper floors. Up to March 2012 Switch2 estimated the consumption of energy for those apartments where it had reason to believe the meters were faulty, but used actual meter readings for the remainder. From March 2012 to October 2014 the respondent considered that so many of the meters were unreliable that it was preferable to base the charges for all of the apartments on estimated consumption (which may have been made by its own managing agents, Marathon Estates, rather than by Switch2). In arriving at estimates historic consumption data was used so that the charges for one year were based not on consumption in that year but in an earlier year which was assumed to provide a reasonably accurate guide.

30. The second problem was that the sub-meters do not record all of the energy consumed in the Building. For reasons which are not fully understood a proportion of the energy supplied through the bulk meters is "lost" within the Building (i.e. it is consumed or dissipated without being recorded by any sub-meter). In deciding what unit rate to charge individual leaseholders for the energy consumed in their apartments Switch2 sought to recoup the cost of this lost energy although there was no reason to believe that it had been consumed in those apartments.

31. 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 CCL and VAT at the standard rate) but which are not payable by domestic consumers (who are exempt from the CCL and who pay VAT on energy at a reduced rate of 5%).

32. The process by which Switch2 calculated the utilities charges for each apartment was not clear from the statements delivered to the leaseholders. It now seems that the dominant consideration in calculating the unit rate shown in the invoices was to ensure that the respondent and the freeholder recouped from the apartment leaseholders the full cost of providing energy to the Building, except to the extent that the energy was confirmed to have been consumed by the hotel or otherwise accounted for by usage on the lower floors. The unit rate therefore took account not only of the cost of the energy consumed in an apartment but also a contribution towards the additional charges levied by the utility companies (in the case of electricity the availability charge, the reactive charge, the supplier's standing charge and the CCL), a contribution towards the "lost" energy, and a contribution towards the standard rate VAT charged by the utility company. None of this was apparent from the bills received by the leaseholders.

33. One consequence of the way in which the unit rate was determined was that during some periods VAT was effectively being charged to the leaseholders at an aggregate rate of 26%. This was because concealed within the unit rate calculated by Switch2 was VAT at the commercial rate of 20% which was paid by the freeholder to the utility suppliers; a further 5% VAT charge at the domestic rate was then added by the managing agent to the sum shown in Switch2's statements when they delivered their requests for payment.

34. These anomalies only became clear with the benefit of disclosure of the suppliers' invoices by the respondent and investigation by the experts witnesses instructed by both parties.

The revised invoices

35. At the hearing before the FTT in July 2015 evidence was given by a representative of Switch2 who suggested that, contrary to the previous understanding of the parties' experts, reliable information may still be capable of being retrieved from the meters for the period from March 2012. In the light of that evidence the respondent subsequently undertook further investigations with the assistance of its expert, Mr Hamilton. Two weeks before the hearing of the appeal in September 2016 the respondent issued new invoices for the whole of the period from May 2008 to October 2014 which are said to be based on the methodology agreed between the experts for determining appropriate unit rates. These revised invoices are said to rely on actual meter readings for the period after March 2012, where only estimates had previously been used. The recalculated invoices for some apartments suggest that the respondents have been overcharged in the past for energy consumed, while those for other apartments suggest that they have been undercharged.

36. The appellant stopped paying for utilities some years ago because of the dispute over the accuracy of the bills (although it has paid for a number of apartments, under protest, as a condition of the respondent's cooperation in connection with their proposed sale). There has, so far, been no consideration by the appellant of the revised invoices and (given that years of overpayment have been followed by years of refusal to pay) it is not apparent which of the parties is likely now to be owed money by the other.

The FTT proceedings

37. The appellant's application to the FTT sought a determination of the amount payable for heat, cooling, electricity, domestic hot water, standing charges and VAT for the period from 31 May 2008 to 31 December 2013. In advance of the hearing experts instructed by the parties, Mr Hamilton for the respondent and Mr Lowndes for the appellant, were able to reach agreement on a number of issues.

38. The matters which were agreed and recorded between the experts included that approximately 10% of the meters in the apartments were unreliable, and that the domestic hot water meter had not registered consumption at all during the period under consideration (and no charge had been raised by Switch2). They agreed that where the meter readings were known to be faulty it was reasonable to base bills on estimated consumption. They agreed that VAT and CCL costs had been wrongly charged to the leaseholders and should not be included as part of their bills.

39. The experts also arrived at an agreed method of calculating an appropriate unit rate for electricity using the metering system available in the Building which stripped out the inappropriate charges. They did not agree what the appropriate unit rate should be since that depended, amongst other things, on the FTT's determination of whether the fixed charges could be recouped. They were nevertheless able to quantify the effect of the agreed errors and the respondent's expert, Mr Hamilton, calculated that for the period 31 May 2008 to 1 March 2012 the appellant had been overcharged by £61,016.56.

40. Mr Hamilton and Mr Lowndes were called to give evidence before the FTT and both parties were given the opportunity to cross-examine them. No attempt was made by the appellant in cross-examination to undermine the matters on which the experts had reached agreement. In particular it was not suggested to either expert that the methodology they had agreed upon for ascertaining the appropriate unit rate for electricity was based on some misconception or error of law.

41. No witnesses of fact gave evidence to the FTT. The respondent's counsel, Mr Bates, had successfully submitted to the tribunal that factual evidence would not be of assistance in determining the issues of principle which were all that prevented the experts from reaching agreement on the appropriate charges.

The FTT's decision

42. The FTT determined 6 issues. It was unable to specify the sums payable by the appellant for utilities between 2008 and 2014, despite that being the question posed by the application. Neither party had approached the hearing with evidence of specific figures but instead each invited the FTT to determine issues of principle. This approach had been sanctioned by the FTT at the last of a series of case management hearings, on 19 March 2015, at which it directed meetings of expert witnesses "to thrash out the core issue" with a view "if necessary, [to] having a determination from the Tribunal on areas which the experts cannot agree".

43. The "core issue" to which it had previously referred, and which the FTT did determine, was whether as a matter of contract demands for utility charges based on estimated

consumption (as opposed to properly metered consumption) were valid. The appellant had submitted that it was obliged to pay only for consumption which was evidenced by current meter readings. For reasons which I will explain later the FTT rejected the appellant's case and held that estimates based on historic meter readings were permissible.

44. The FTT also decided that there was a contractual obligation on the leaseholders to pay fixed charges for all fuels so that that the respondent was entitled to include the fixed charges for electricity and gas in the unit rates charged to leaseholders. The standing charge representing a contribution towards Switch2's services was also payable. Finally the FTT decided that there was nothing in the guidance issued by OFGEM on maximum resale prices for electricity which prevented the respondent from relying on estimated readings.

45. The FTT stated in paragraph 39 that it would not address all 15 of the issues which the appellant's counsel had listed in her skeleton argument, but only those which appeared to it to be in dispute by the conclusion of the hearing. Some of the issues had been overtaken by agreements reached by the experts or by the parties, some did not arise because of the FTT's decisions on other points, or could not be determined because no cross examination had been directed to them when the experts gave evidence. The final issue, a proposed claim by the appellants for an award of costs under rule 13 of the Property Chamber Rules 2013, was not yet the subject of an application and (correctly in my view) was not determined by the FTT for that reason.

46. In its decision at the conclusion of the final hearing the FTT noted the progress made by the experts in agreeing a method of apportionment between the upper and lower floors of the Building and of estimating figures for consumption by individual apartments where meters were faulty. It was now for the experts to implement their agreement in light of the tribunal's conclusions on the issues of principle and to agree the appropriate figures. If agreement could not be reached the FTT suggested that a further application could be made to it.

Issues

47. Permission to appeal was sought by the appellant on 6 grounds, three of which concerned the non-determination of issues which had appeared to the FTT not to arise for one or other of the reasons given in paragraph 45 above. The first ground concerned the FTT's refusal to hear oral evidence to enable it to determine the appellant's application for costs under rule 13. Permission to appeal was refused on that issue, since no costs application had been made to the FTT. Permission was given on the remaining grounds. The three substantive issues arising out of the matters which the FTT did decide were the following:

1. Are the leaseholders required by clause 3.2.2 of the underleases (or otherwise) to pay utility charges based on estimated rather than metered consumption?

2. Is the fixed charge element of the utilities charges payable by the leaseholders?

3. Is the Switch2 standing charge payable by the leaseholders?

48. Whether any of the other issues left underdetermined by the FTT will arise for consideration in this appeal will depend on the answer to those three substantive questions.

Issue 1: Are the appellants required by clause 3.2.2 of the underleases (or otherwise) to pay utility charges based on estimated rather than metered consumption?

49. The background to this issue is that for a period of 20 months from March 2012 to October 2014 the respondent's agents delivered only two requests for payment for utilities charges and in each case the requests were based on estimates of consumption. On 7 February 2014 a request for payment was made for each apartment for charges for the period from 1 March 2012 to 31 December 2013, and on 27 November 2014 a further request for the period from 1 January to 31 October 2014 was made. The estimated consumption on which both requests were based was derived from actual consumption as shown by the apartment meters in a 15 month period from December 2010 to March 2012.

50. The respondent claims to be entitled to payment of the sums requested under clause 3.2.2 of the underlease, which it is therefore necessary to consider in some detail.

Clause 3.2.2

51. Clause 3.2.2 of the underlease is a covenant by the leaseholder:

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

52. It can be seen that clause 3.2.2 is in two parts.

53. The first part is an obligation to pay for electricity etc "consumed within the Demised Premises". It therefore relates to what has been termed "direct" electricity and other direct utilities (although there is no supply of gas to the individual apartments). Electricity consumed to provide electric lighting and to operate domestic appliances is within the first limb. The obligation is, implicitly, to pay the supplier of the commodity which in the case of water and electricity would appear to be the respondent. The clause does not say when payment is to be made but this omission is supplied by clause 2.4 which provides that sums payable to the Lessor other than ground rent, service charges and the Apartment Energy Charge are payable on demand.

54. The second part of clause 3.2.2 is the obligation to pay the Apartment Energy Charge within seven days of demand. To understand this obligation it is necessary to consider four defined expressions.

55. The "Apartment Energy Charge" is defined in clause 1.6 of the underlease. It means:

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

56. The expression "AC Energy" used in that definition (which I assume is shorthand for "air conditioning energy") is itself defined in the same clause as meaning:

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

57. The "Residential Premises" are the apartments and other areas for residential use (roof terraces, corridors etc) on the upper floors of the Building (the thirteenth to thirty-second floors).

58. Finally, the "Residential Energy Charge" is an expression defined in the headlease which I have referred to in **paragraph 10 above.** It is the cost of that proportion of AC Energy attributable to the heating and chilling water for use in the air conditioning systems serving the upper floors of the Building "as evidenced by meters installed for the purpose of measuring such proportions".

59. With the assistance of these various definitions it can be seen that the Apartment Energy Charge is intended to represent the cost of that proportion of the total AC Energy i.e. the gas and electricity consumed by the central plant in the Building to generate hot and chilled water to operate the air conditioning systems serving the upper floors, as is referable to the operation of the air conditioning systems in the individual apartments. The second limb of clause 3.2.2 requires the leaseholder to meet that cost.

The FTT's conclusion

60. At paragraph 80 of its decision the FTT recorded that the appellant's submission was that no payment was due for consumption not evidenced by meter readings.

61. The FTT disagreed. It said that the relevant terms of the underlease were plain and workable. Clause 3.2.2 was the important obligation and it did not require the provision of evidence of consumption.

62. It also considered that the definitions of AC Energy and Residential Energy Charge, each of which required that consumption be "evidenced by meters", did not import a similar requirement into the calculation of the Apartment Energy Charge.

63. Finally, the FTT did not consider that the meter readings referred to needed be contemporaneous with the period covered by the payment. At paragraph 88 of its decision the FTT explained that:

> "Evidence from meters could mean evidence of past consumption where no actual readings could (reasonably) be obtained."

The appellant's case

64. The appellant's case is that clause 3.2.2 does not permit estimated bills based on past consumption. The leaseholder's obligation under the first limb of clause 3.2.2 is to pay for utility supplies "consumed" within the apartment; such consumption must be proved by reference to the individual apartment meters. Estimates unrelated to consumption recorded by the meters during the period to which the bill relates cannot form the basis of a valid demand. The various layers of the definition of the Apartment Energy Charge also showed that the

contribution towards the cost of operating the air-conditioning system must also be based on meter readings. Moreover, the appellant says, if the FTT's decision to the contrary is correct, it will be liable to pay utilities charges based on estimated consumption for the remaining 987 years of the underlease terms, which is clearly contrary to the intention of the parties when the underleases were entered into.

65. In the course of oral argument I asked Ms Mattson whether the parties must be taken to have assumed that the meters in the building would never malfunction or, if not, what they must be taken to have intended in the event of one or more meters giving false readings. Since the meter readings are the basis of an apportionment, an inaccurate reading given by even a single meter could potentially falsify the calculation for every apartment. Ms Mattsson's answer was that the parties must be taken to have anticipated the possibility of breakdown, for example if the Building was struck by lightning or if there was a software malfunction. The experts had agreed a more accurate method of estimating consumption based on occupancy information, external temperature readings and other data. It would therefore be permissible, in the event of a malfunction, for the respondent to substitute a reasonable estimate of consumption for such period as was reasonable in all the circumstances.

66. The possibility that there might be limited circumstances in which demands based on estimates of consumption would be contractually compliant was not put to the FTT although it did refer in paragraph 88 to circumstances in which "no actual readings could (reasonably) be obtained." It was not asked to determine whether the period for which the respondent relied on estimated consumption was a reasonable period in all of the circumstances. It may be that the factual evidence which the respondent persuaded the FTT not to hear (on the grounds that it was unnecessary) would have included evidence relevant to that question. The experts had not investigated the cause of the problems with the meters which remained unknown, although they noted that Switch2 had recommended for some considerable time that it be properly investigated. On behalf of the respondent Mr Bates emphasised that the meters were not under its control, but belonged to the freeholder, and Switch2 was the freeholder's agent, not the respondents. Since the respondent and the freeholder are companies within the same group and since Switch2 certainly acted for the respondent in preparing statements for the leaseholders those may not be points of significance, but the fact remains that FTT was not asked to consider whether there might be a general rule prohibiting estimation but subject to an exception in the event of a meter malfunction.

The respondent's case

67. Mr Bates submitted first that the availability of accurate meter readings was not a condition precedent to the appellant's liability to make payment for energy or other services consumed under clause 3.2.2. The experts had agreed on a method of assessment of energy consumed which compensated for the occurrence of faulty meter readings (which in any event were less prevalent than had previously been understood). The revised invoices had now been sent out, but the appellant had not yet expressed any view on them. Once the appellant accepted that the use of estimated readings was permissible for a reasonable period if the meters were known to be unreliable there was no real challenge to the decision of the FTT in paragraph 88 of its decision. The Tribunal should therefore confirm that the demands were compliant with clause 3.2.2 and then it should be left to the experts to agree how much of the sums demanded were due (applying their previously agreed methodology in the light of the Tribunal's decision on the remaining issues). If agreement was not reached the parties should

restore the application for further consideration by the FTT as it had indicated in paragraph 92 of its decision.

Discussion and conclusion

68. As already explained above, clause 3.2.2 imposes two different obligations, the first being to pay the whole cost of direct energy and services consumed within the apartment, and the second to pay a share or proportion of the cost of gas and electricity consumed by the central Plant to generate hot and chilled water for the air conditioning systems serving the upper floors.

69. The obligation to pay for direct energy is expressed in entirely general terms, with no indication of how the sum payable for energy consumed is to be ascertained. The appellant is clearly correct that that sum payable must be referable to consumption, but there is no express requirement that consumption must be measured using any particular method. No doubt it was contemplated that, initially at least, the meters installed in the apartments would be the basis of assessment, but I agree with Ms Mattsson that the parties cannot be taken to have assumed that the meters would always provide a reliable measure of consumption. For one thing, the possibility of a temporary malfunction was readily foreseeable, and for another, each underlease is for a term of 999 years and the use during that exceptionally long term of some different approach to measuring consumption cannot have been excluded. As far as direct energy is concerned, therefore, I do not accept Ms Mattsson's submission that an accurate measurement using the four meters in the apartment is a condition of the leaseholder's liability to pay for energy consumed.

70. In practice clause 3.2.2 anticipates a demand for payment by the supplier of the electricity, gas or water, so the onus is on the supplier to state how much energy has been consumed. The supplier is likely to base its demand on meter readings, but if the meters are believed to be faulty there is nothing in the language of the clause which prohibits consumption from being ascertained in some other way, including by a genuine estimate.

71. If, on receiving a demand for payment, the leaseholder considers that the sum demanded was not a proper reflection of the amount of energy consumed in the apartment it might refuse to pay and challenge the supplier to establish the level of consumption during the period to which the demand related. If agreement could not be reached it would be for the supplier to prove to the satisfaction of a court or tribunal, if necessary, how much energy had been consumed. Like any other question of fact to be determined in a civil court or tribunal, that question would fall to be proved on the balance of probability.

72. An energy supplier who was put to proof of consumption, but who could not rely on meter readings, might seek to prove that there was an earlier period for which reliable meter readings were available and to base an assessment of consumption on that period. It might be a reasonable inference that, all other things being equal, the amount of energy consumed in one year would be much the same as the amount consumed in a previous year.

73. If such a supplier was able to provide proof of consumption in that way, the onus would pass to the consumer to show that there was some reason why consumption measured accurately in a previous period could not be relied on as a reliable means of assessing consumption in the period in question. The consumer might do so by showing that the meters had always been faulty, or that the apartment had been empty or occupied less intensively in

one of the periods, or that weather conditions had been very different. If the consumer was unable to rebut the inference that proven usage in an earlier period was a reliable guide to consumption in the period under consideration, the appropriate finding of fact for the court or tribunal would be that, on balance, the sum claimed fairly represented the cost of energy consumed during that period.

74. In their joint statement the parties' experts agreed that it would be reasonable to use a previous period of consumption, making adjustments for seasonal and occupancy issues, as the best method of estimating consumption for flats with unreliable meter readings.

75. For these reasons I do not agree that the only method of determining consumption is by using accurate meter readings for the period of assessment, although that is obviously the best method. Consumption is a question of fact which can be proved on the balance of probability by any method capable of arriving at a figure which is more likely to be correct (or at least more likely to be conservative) than to be excessive. In principle, therefore, a demand for payment based on an estimate of direct electricity or water consumed in an apartment is capable of being a valid demand.

76. Is the leaseholder's obligation to pay the Apartment Energy Charge any different?

77. As a matter of construction of the underlease, the ascertainment of the Apartment Energy Charge requires the use of meters. It is a charge payable for a proportion of the Residential Energy Charge which is itself a charge for a proportion of the electricity and gas consumed by the central air-conditioning Plant serving the whole Building; in each case the relevant proportion is to be "evidenced by meters installed for the purpose of measuring such consumption".

78. The FTT considered that evidence of consumption from meters could include "evidence of past consumption where no actual readings could (reasonably) be obtained." I initially found that a difficult proposition to accept, because the evidence which the meters were intended to provide was clearly evidence of consumption during the period to which the demand for payment related and, moreover, a process of *measurement* of that consumption (rather than estimation) was contemplated. It did not seem to me to be easy to regard consumption proved only by inference from a measurement taken in a different period, and subject to adjustments to reflect changes in circumstances, as falling within the various expressions which define the Apartment Energy Charge.

79. Despite these misgivings I have come to the conclusion that the FTT was correct to allow the possibility that, exceptionally, where reliable readings were not available, the evidence of consumption on which an apportionment could be based would include evidence of consumption in a previous period. The meters installed in the Building are a tool which should not be allowed to assume a disproportionate significance. It would be wrong to make performance of the leaseholder's substantive obligation to pay for energy referable to the heating and cooling of its own apartment dependent on the reliability of the meters. I note, as did the FTT, that in its guidance on the resale of gas and electricity, OFGEM, the independent energy regulator, stipulates that where electricity is supplied by a reseller through a meter which does not accurately record the number of units used, the reseller must use reasonable endeavours to estimate what proportion of the total bill each tenant should pay. While that guidance has no contractual force, it reflects a common sense approach such as reasonable

parties are likely to have intended should be adopted in the event of inaccurate meter readings.

80. In any event, even if the obligation to pay the Apartment Energy Charge were to be interpreted as dependent on the availability of accurate metering, the consequence of a malfunction would not be that the leaseholder would be entitled to free energy. To the extent that it made use of the heating and cooling services it would be obliged to make payment on a *quantum meruit* basis. In assessing a *quantum meruit* (i.e. a reasonable sum for a service willingly received in circumstances where it cannot have been intended that no payment would be required) it would be necessary to estimate the amount of energy consumed. That requirement seems to me to point towards a limited process of estimation being permissible in ascertaining the Apartment Energy Charge.

81. I therefore dismiss the appellant's appeal on the first issue. I am satisfied that a demand for payment under clause 3.2.2, whether for direct electricity, or for the Apartment Energy Charge, is not rendered invalid by being based in part on an estimate of consumption.

Issue 2: Is the fixed charge element of the utilities charges payable by the leaseholders?

82. The fixed charges in issue are the availability charge and the reactive charges which were included in the electricity bills paid by the freeholder, which passed it on to the respondent, and which the respondent seeks to pass on to the leaseholders. The charges for gas also included a standing charge. It is common ground that the other charges concealed within the leaseholders' bills (the climate change levy and commercial rate VAT) are not payable.

83. The availability charge was found by the FTT to be a charge to secure the availability of electricity to the Building" levied by the energy supplier. The reactive charge was found to be a charge made by the electricity supplier based on the efficiency of the equipment in a building. The standing charge for gas was a charge covering the supplier's cost of maintaining its installations in the Building and managing the supply. All three charges were included by Switch2 in its calculation of the Apartment Energy Charge which appeared on the statements as separate charges for heating and cooling.

84. The appellant's case was that these charges were not charges for electricity or gas consumed or metered and so could not fall within clause 3.2.2. Moreover, they were charges which were not incurred for the benefit of the residential parts of the Building, but only because part of the Building was in commercial occupation by the Marriott hotel.

85. The FTT rejected the appellant's case on this issue, and I am satisfied that it was correct to do so for the reasons it gave. Those reasons were essentially that the availability charge was incurred because electricity was supplied in bulk to the Building as a whole, as it had been when the underleases were granted, not through any choice of the freeholder but simply because that was how the Building had been designed. Having taken a lease in a building designed in that way, the leaseholders could not avoid part of the necessary cost of procuring a supply of electricity. There was no evidence to support the assertion by the leaseholders that the availability charge was required only because of the energy consumed by the hotel.

86. The same reasoning applied to the reactive charge, which was a levy for the supply of electricity to this Building in which the appellant had chosen to take leases of apartments. It was not suggested that the reactive charge was incurred as a result of any breach by the freeholder or the respondent of any obligation.

87. In the case of gas, a building in exclusively residential occupation might have incurred a standing charge at a lower rate, but this was not such a building. The OFGEM guidance recommended that standing charges be divided amongst all occupiers in proportion to usage, which appeared to the FTT to be the approach adopted by Switch2.

88. I find that reasoning convincing and I am satisfied that the cost of electricity and gas recoverable under clause 3.2.2 properly includes an apportioned part of the availability charge, the reactive charge and the gas standing charge. On the evidence electricity and gas were supplied inclusive of these charges because of the characteristics of the Building, and they were simply part of the cost of receiving the supply. There was no evidence that the charges could have been avoided.

89. I also note the approach taken to charges of this type by OFGEM, the independent energy regulator, in its current (October 2005) guidance on the resale of gas and electricity. The maximum resale price for electricity for domestic use is the same price as that paid by the reseller, including any standing charges. The guidance gives a number of examples of how this price should be calculated and in one of these (8a) it is assumed that electricity is purchased in kVA units thus attracting an availability charges and maximum demand charges. OFGEM treats these charges as part of the permitted resale price. That approach is supportive of the view that the charges are simply part of the cost of electricity supplied.

90. I note in passing that it is said by the appellant that the unit rate agreed by the experts as payable for direct electricity exceeds the maximum resale price permitted by the OFGEM guidance (which has statutory force by reason of section 44, Electricity Act 1989). That was not a point put to the experts when they gave evidence, and the FTT made no finding in the light of their apparent agreement. Although there is no evidence that the OFGEM rate was exceeded, I nevertheless agree with Ms Mattsson's submission that an agreement between experts cannot sanction a breach of the general law (section 44). When they apply their agreed approach, the experts should therefore limit the unit rate payable by the leaseholders to the rate paid by the reseller (including in that rate the availability and reactive charges. As the OFGEM guidance acknowledges, however, arriving at a single unit rate for supplies of gas and energy can be complex because different tariffs apply to different parts of the supply and seasonal or retrospective adjustments may be required. The duty of the re-seller is said by OFGEM to be to "use reasonable endeavours to make an estimate of the applicable unit price" and to explain its calculation to the consumer. If, with the benefit of the FTT's decision on issues of principle and the assistance of the experts, the parties are still unable to agree the appropriate unit rate, it will be necessary for the application to be restored for further consideration by the FTT.

Issue 3: Is the Switch2 standing charge payable by the leaseholders?

91. The third issue argued on the appeal concerned a "standing charge" which appeared on Switch2's statements for each apartment. It is not clear how this 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. It was demanded by the respondent as part of the charges payable under clause 3.2.2 of the underlease.

92. The FTT found that this charge was not payable under clause 3.2.2. 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. It followed that it was not open to the respondent to treat the Switch2 standing charge as part of the utility charge payable within 7 days of demand under clause 3.2.2.

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.

94. In paragraphs 76 and 77 of its decision the FTT considered the consequences of the standing charge never having been included as part of the service charge. It said this:

> "76. … we do not see that Switch2's charges have been properly demanded or set out under the terms of the lease. If this were the end of the matter, then it would appear therefore that section 20(B) Landlord and Tenant Act 1985 would apply to some previous charges meaning that they are not payable by [the appellant].
>
> 77. However, it appears to us that this is all circumvented by clause 2.4 of the lease. Under the terms of that clause the leaseholders covenant to pay, *on demand*, any other sums due to the Lessor. Switch2's charges have been demanded. Even therefore if not correctly demanded under clause 3.2.2, the sums are payable pursuant to clause 2.4."

95. The term on which the FTT relied, clause 2.4, is part of the reddendum (the part of the lease reserving payments of rent). So far as is relevant clause 2 grants the term of 999 years and continues:

> "PAYING THEREFOR during the Term the following rents:-
>
> 2.1 [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 3.2.2
>
> 2.4 on demand any other sum due under the terms hereof
>
> 2.5 [VAT]"

96. For the appellant Ms Mattsson submitted that once it was accepted that the Switch2 charge could be recovered as part of the service charge, reliance on clause 2.4 was obviously impermissible. It related to "any other sum" and so could not be used as an alternative route for demanding payment of something which was not "other" but ought to have been included in the service charge.

97. I agree with Ms Mattsson's submission and I do not think the FTT was entitled to find that sums recoverable as service charges could additionally be demanded and become immediately payable by virtue of clause 2.4. If that interpretation of clause 2.4 was correct it would be hard to see what would prevent the respondent from demanding reimbursement of all service charge expenditure under the same clause, thereby circumventing the accounting and collection provisions in Part B of Schedules 4 and 5.

98. On his oral argument on behalf of the respondent Mr Bates did not seek to support the FTT's route to recovery of the Switch2 charges. He argued instead that the charges were either payable on demand under clause 3.2.2 or were payable as a service charge; in the latter case he submitted that the respondent's omission to take account of the charge when estimating its total expenditure service charge payable by quarterly instalments on account, did not prevent it from including the charge in its end of year accounting.

99. In support of his argument that the Switch2 standing charge was within clause 3.2.2 Mr Bates referred to the Tribunal's decision in *Waverley Borough Council v Arya* [2013] UKUT 0501 (LC) in which, after reviewing a series of authorities it was said that in principle the cost incurred by a landlord in arranging for the provision of services and in managing their delivery could properly be regarded as part of the cost of providing the service, but that it was necessary in every case to have regard to any limitations which the particular lease imposed on the categories of expenditure to which the service charge was intended to relate. There was no reason in principle, Mr Bates submitted, why the cost of reading the meters could not be regarded as part of the cost of electricity and gas consumed.

100. I do not accept Mr Bates submission. In agreement with the FTT I consider that the elaborate definition of the Apartment Energy Charge (which is essentially the cost of a quantity of electricity and gas) does not include the cost of employing a consultant to read the meters and calculate the energy bills. The cost of the energy itself would be the same whatever it cost to administer the system. Given that one of the components of the sum payable under clause 3.2.2 does not include administration costs, it would be cumbersome and impractical to treat the other component (direct energy) as including such costs. That is particularly so because, as the FTT pointed out, there are a number of different categories of service charge expenditure within which this cost can readily be accommodated. In Part D of Schedule 4 the cost of entering into contracts for the carrying out of any of the services or other estate management functions is within paragraph 4 and the cost of the supply of fuel for the provision of services is within paragraph 6.

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.

Consequential issues

102. Ms Mattsson invited me to rule on a number of other issues which the FTT had not found it necessary (or in some cases possible) to consider.

103. In her written submissions Ms Mattsson was critical of what she described as the FTT's refusal or failure to decide six of the issues referred to it. That criticism is unjustified. There was no requirement for the FTT to reach conclusions on issues which did not arise because of

its decisions on other issues, and the suggestion that it was wrong not to decide all issues is unsustainable. Nevertheless, some of the issues which the FTT did not feel it necessary to address may now arise because this Tribunal has taken a different view on the Switch2 standing charge, but that does not mean that the FTT was wrong not to decide them. In many cases it will be helpful for a tribunal briefly to express its conclusions on contingent or subsidiary issues (especially issues of primary fact) which would only have arisen if it had reached a different conclusion on some over-arching issue, but a tribunal can rarely be criticised for not doing so. It can certainly not be criticised where the evidence on contingent issues has not been fully investigated at the conclusion of a lengthy hearing, and where it is unclear what the tribunal is being asked to decide, as the FTT recorded was the case on a number of the issues it is now said it should have tackled.

104. If the respondent wishes to recover the Switch2 standing charge it will be necessary for it to include them in an end of year service charge reconciliation, as Mr Bates said it was able to do. It has not yet done so but if it does there are a variety of points which the appellant may wish to take including by relying on section 20B(1) of the 1985 Act to argue that the charges were incurred more than 18 months before they were demanded or by challenging the reasonableness of the service provided. In his statement of case for the appeal Mr Bates informed the Tribunal that any attempt by the leaseholders to rely on section 20B(1) would be met by evidence of notices satisfying section 20B(2). Ms Mattsson asserted that only one such notice had ever been served (not the six pleaded in the respondent's statement of case) and that there was a period from 1 March 2012 to 7 August 2012 to which no section 20B(2) notice related. She invited me to make a determination to that effect and to rule that no charge was recoverable for that period.

105. I am not prepared to determine any issue concerning section 20B in this appeal, which is a review of the decision of the FTT, not a rehearing of the section 27A application. The relevant facts have not been found by the FTT and (in the case of Switch2 charges at least) proper demands have not yet been made. Additionally, detailed issues of quantification may yet arise in these proceedings if the parties cannot now agree the appropriate unit rate, and even after the cost of the utilities supplied has been ascertained the appellant may then ask the FTT to rule that some part of the cost (including the fixed and standing charges) was not reasonably incurred so that its liability should be limited under section 19(1) of the1985 Act. Just as the FTT anticipated in its directions and decision, the resolution of issues of principle does not necessarily mean that all issues of detail have fallen away.

106. I therefore propose to remit the application to the FTT for further consideration in the light of this decision.

The other issues

107. The remaining issues are largely procedural and can be dealt with relatively shortly.

108. The appellant complains that the FTT should have recorded concessions which it says the respondent made during the hearing and issues on which the parties had agreed. Those criticisms are, once again, unjustified and fail to take into account both that the task of the FTT under section 27A of the 1985 Act is to determine what sums are payable, and that it has no jurisdiction to make declarations. If professionally represented parties have reached agreement and wish that to be recorded it is for them to provide a clear statement of what has

been agreed (as the parties in this appeal have subsequently succeeded in doing at the invitation of the FTT).

109. The complaint about unrecorded "concessions" is also misconceived. The FTT is not required to record the evidence or submissions it has heard in minute detail, but only to the extent necessary to enable the reader of its decision to understand how it has resolved the issues in dispute, and why. What appears to one side to be a significant concession may appear to be nothing of the sort to the tribunal, especially in a case where the material presented to it lacks clarity.

110. The last procedural issue arises out of the appellant's submission that it should be entitled to an order that the respondent pay its costs of the proceedings before the FTT under rule 13(1) of the Property Chamber's 2013 Rules. It is not yet clear whether the claim is intended to be pursued against the respondent's representatives for allegedly wasted costs or against the respondent itself for unreasonable conduct of the proceedings. It is submitted by Ms Mattsson in her written argument that the Upper Tribunal has jurisdiction under its own rules (rule 10 of the Tribunal Procedure (Upper Tribunal)(Lands Chamber) Rules 2010 (as amended)) to make an order in relation to the whole of the proceedings, including the proceedings before the FTT. I doubt that very much, especially in a case where the FTT itself has not been asked to consider such an application. It should surely be obvious that the appropriate tribunal to deal first with an application concerning the costs of proceedings, where complaint is made about the manner in which those proceedings have been conducted, is the tribunal before which the hearing took place.

111. Happily, it was agreed that it is not necessary for me to consider the issue of costs further, as the appellant has now made a proper application for costs to the FTT. That application is currently stayed, by the agreement of the parties, to await the outcome of this appeal. I therefore decline to entertain an application in relation to the costs of proceedings before the FTT even if I have jurisdiction to do so. If the appellant considers that there are grounds for an application in relation to the costs incurred in connection with the appeal it may make an appropriate application after it has considered this decision.

Disposal

112. For the reasons which I have given I dismiss the appeal on issue 1 (estimated charges) and issue 2 (fixed charges) but allow it on issue 3 (Switch2 standing charge). I remit the application to the FTT for further consideration and I direct that within six weeks the appellant must apply to the FTT for further directions. The parties should seek to agree draft directions which might usefully include a stay of proceedings to enable their experts further time to quantify the sums payable (subject to the various defences open to the appellant).

Martin Rodger QC
Deputy Chamber President

19 December 2016

UPPER TRIBUNAL (LANDS CHAMBER)

Neutral Citation Number: [2016] UKUT 0553 (LC)
Case No: LRX/127/2015

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT – SERVICE CHARGES – liability of underlessees to pay for utilities "consumed" – meters believed to be unreliable – whether underlessees liable to pay bills based on estimated consumption – determination of unit rate – whether standing charges and other fixed charges properly included – whether recoverable charges limited by OFGEM guidance – appeal allowed in part

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

BETWEEN:

EAST TOWER APARTMENTS LIMITED

Appellant

- and -

NO.1 WEST INDIA QUAY (RESIDENTIAL) LIMITED

Respondent

Re: East Tower Apartments,
No.1 West India Quay,
London E14

Before: Martin Rodger QC, Deputy Chamber President

Royal Courts of Justice

London WC2A

On 1 September and 29 November 2016

Ms Lina Mattsson, instructed by Penningtons Manches LLP, for the appellant
Mr Justin Bates, instructed by King & Wood Mallesons, for the respondent

The following case is referred to in this decision:

Waverley Borough Council v Arya [2013] UKUT 0501 (LC)

Introduction

1. This is a dispute about payments for gas, electricity and water supplied to apartments in a building now known as No 1 West India Quay, London E14 ("the Building") pursuant to the long leases of 42 apartments granted by the respondent to the appellant in 2004. The installations for the supply and metering of energy within the Building are sophisticated but have proved to be unreliable, at least as far as the metering of energy is concerned. The terms of the leases under which the appellant is required to pay for the utilities provided for its benefit are also sophisticated, but they have proved to be difficult to implement. The result has been a dispute which has spawned numerous issues and sub-issues, conducted at very considerable expense, which has now been grinding on since 2009.

2. On 18 June 2014 the appellant made an application to the First-tier Tribunal (Property Chamber) (the FTT) seeking a determination under section 27A, Landlord and Tenant Act 1985, of its liability to pay invoices for heat, cooling, electricity, domestic hot water, standing charges and VAT for the period from 31 May 2008 to 31 December 2013 supplied in respect of the apartments which it owned in the Building. The period under consideration was subsequently extended by agreement to 31 October 2014. A recognised tenants association was subsequently added as a party to the application, but it did not participate actively either before the FTT or on the appeal.

3. After a hearing lasting 3 days during which the FTT conducted a site visit, heard expert evidence and was addressed at length by experienced counsel, it delivered a decision (in its final form) on 1 September 2015 in which it determined 6 out of a list of 15 issues which had been prepared by counsel for the appellant. The FTT explained that the remaining issues had either been agreed by the parties' experts or had ceased to be contentious by the conclusion of the hearing.

4. Permission to appeal was given by this Tribunal on 12 January 2016. At the hearing of the appeal the appellants were represented (as they had been before the FTT) by Ms Lina Mattsson and the respondents by Mr Justin Bates, both of counsel. I am grateful to counsel and their instructing solicitors for the considerable assistance they have provided the Tribunal.

The Building

5. The Building comprises 32 floors and was completed in 2004 for West India Quay Development Company (Eastern) Limited, which is still the freeholder. On 5 August 2004 the freeholder granted a headlease of part of the Building for a term of 999 years to the respondent, a company which I was told is part of the same group as, or otherwise connected to, the freeholder. The head lease is of the 158 residential apartments and common parts on the 13th to 32nd floors of the Building; I will refer to these floors as the upper floors. Shortly after taking the headlease the respondent granted individual underleases of 42 of the 158 apartments in the Building to the appellant.

6. The appellant's underleases (and the underleases of the other apartments on the upper floors) are in a standard form which obliges the lessee to pay for utilities consumed in the apartment itself, and for utilities consumed in the provision of heating and cooling to the apartment and the common parts of the upper floors through central service installations. The

underleases also oblige the lessees to pay a service charge as a contribution towards the cost of other services.

7. The lower floors of the Building, from the ground to the 12th floor, are occupied by the Marriott Hotel group; on these floors Marriott operates a hotel and occupies a further 47 apartments. I will refer to these as the lower floors, without distinction between the hotel and the apartments. I was not told the terms on which Marriott occupies the lower floors, but I was informed that the freeholder and the respondent are both part of, or connected to, the Marriott group. In the basement of the Building there is a car park, the use of which is shared between the leaseholders and Marriott, with the leaseholder of each apartment having a separate lease of a parking space in the car park.

The respondent's headlease of the upper floors

8. By clause 2.2 of the headlease of the upper floors the respondent is obliged to pay the freeholder a service charge calculated in accordance with Schedule 4. The service charge comprises 53% of the freeholder's expenditure on a conventional range of services provided to the Building. These are listed in Part D of Schedule 4 and include maintaining the structure, decorating the exterior, services relating to good estate management and professional fees in relation to the provision of services or calculation of service charges, outgoings and electricity and gas.

9. The respondent is also required by clause 3.2.2 to contribute towards the cost of energy. This obligation is in two parts. The first requires the respondent "to pay for all electricity gas water telephone and other data supplies and facilities consumed within the Demised Premises". The clause does not specify to whom these payments are to be made, but it is obvious that they must be made to the supplier of the particular service, whether that be the freeholder or a third party.

10. The second limb of clause 3.2.2 of the headlease requires the respondent to pay for energy consumed in the generation of heating and cooling for the upper floors of the Building by the central service installations (referred to as "Plant" in the headlease). This sum is referred to as the "Residential Energy Charge", an expression defined in clause 1.6 as:

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

The expression "AC Energy" used in the definition of the Residential Energy Charge is itself defined in clause 1.6 as:

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

11. By clause 3.2.2 the Residential Energy Charge is to be paid to the freeholder (or as it directs) and the payment is to be made:

"within 15 working days of written demand thereof (supported by reasonably sufficient evidence of the amount of AC Energy consumed in the Demised Premises for the relevant period)."

The appellant's underleases of individual apartments on the upper floors

12. The underleases of the apartments on the upper floors of the Building are for terms of 999 years less three days from June 24, 2004. The form of the underleases closely follows the form of the respondent's headlease and each obliges the underlessee to pay, amongst other sums: a service charge in respect of the residential common parts and the car park ascertained and payable in accordance with Part B of Schedules 4 and 5 respectively (clause 2.2); a sum referred to as the Apartment Energy Charge in accordance with clause 3.2.2 (clause 2.2); and, on demand, "any other sum due under the terms hereof" (clause 2.4).

13. The services are described in Parts C and D of Schedule 4 and include costs relating to good management, fees payable to third parties in connection with management, the provision of services, the calculation of service charges, the costs of the supply of electricity, gas, oil or other fuel for all purposes in connection with the residential parts of the Building and any incidental costs. They are payable under Part B by a simple scheme of quarterly provisional payments on account based on estimates by the respondent's surveyor with a balancing sum payable once the total annual expenditure has been ascertained.

14. Clause 3.2.2 of the underlease is structured in the same way as the same clause in the headlease. It first requires the lessee to pay for "all electricity gas water telephone and other data supplies and facilities consumed within the Demised Premises" [i.e. the individual apartment]. It also requires the lessee to pay the Apartment Energy Charge to the Lessor (or as it might direct). This charge relates to the cost of supplying hot and chilled water to the air conditioning systems in the Demised Premises, and is payable within 7 days of written demand but, unlike the corresponding provision of the headlease, there is no requirement that the demand be supported by evidence of the amount of energy consumed in the Demised Premises for the relevant period.

Metering the supply of utilities to the Building

15. The arrangements for the supply of utilities and the metering of consumption are at the heart of this appeal.

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").

21. The FTT (whose decision was seen in draft by the parties before it was finalised) recorded that Switch2 was employed by the freeholder, and that was the position adopted by Mr Bates at the hearing before me, although the respondent's statement of case for the appeal stated that Switch2 carried out its functions on its behalf. This confusion is symptomatic of a general lack of clear boundaries between the roles and responsibilities of the freeholder, Marriott, and the respondent, which in turn may be a reflection of their common ownership; for example, I was shown invoices for the supply of electricity to the whole Building by the utility supplier which were addressed to Marriott Hotels Ltd.

Bulk supply invoicing

22. Invoices for the supply of electricity to the whole Building show that the charge by the utility suppliers to the freeholder comprised three elements: energy charges, a levy charge and VAT.

23. The invoiced energy charges were based on metered consumption, for which different unit rates were applied to day units and night units. The energy charges also included sums which were not directly related to consumption: an availability charge (a sum charged by the utility provider to guarantee the availability of a certain level of supply) which seems to have fluctuated in different periods from zero to sums of several thousand pounds; a standing charge of a few pounds per day; and a reactive charge, which represents about 1% of the bill and is connected to the efficiency of the energy supply and metering systems in the Building.

24. The levy charge included in the supplier's invoices referred to the climate change levy (CCL), which was charged at a flat rate per unit of electricity consumed. In one quarterly invoice delivered in 2008, for example, the CCL of almost £4,000 represented about 4.3% of the total bill.

25. CCL and VAT were charged on the energy charges. VAT was charged at the prevailing standard commercial rate which has variously been 15%, 17.5% and 20% during the period in question.

Invoicing individual leaseholders

26. The role of Switch2 was to read the meters, calculate the sums payable by each occupier and prepare a statement itemising the charges. These statements were then delivered by the respondent's managing agents accompanied by an application for payment of the total sum containing additional information required by statute.

27. The content of the statements and applications for payment can be illustrated by one example. On 8 October 2008 Wood Management delivered a request for immediate payment of £635.53 for utilities to the appellant as leaseholder of apartment 2202 and its car parking space for the period from 31 May to 31 August 2008. The request was accompanied by a statement provided by Switch2 which purported to show the current and previous meter readings for heating, cooling, (direct) electricity and domestic hot water. The number of units consumed was shown to which a unit rate was applied to provide charges for each service. By far the greatest charge was in respect of electricity (meaning "direct" electricity consumed within the apartment) which accounted for £512.31, with heating and cooling (charges for the air conditioning plant) representing less than £75. A standing charge to cover Switch2's costs of reading the meters and calculating the sums due (which in this example was £18.59) was added to the utility charges producing a total of £605.27. VAT was stated in the Switch2 calculation to be 0.0%, but the managing agents invoice added VAT at 5% to arrive at the final charge of £635.53.

28. Any approach to apportioning the bulk charges for utilities supplied to the Building amongst its various occupiers had to be formulated in the light of at least three problems.

29. The first problem was that, by 2008, some of the meters recording consumption in certain parts of the Building were known to be defective; it was therefore necessary for to make estimates of the usage for certain areas and, eventually, for the whole of the upper floors. Up to March 2012 Switch2 estimated the consumption of energy for those apartments where it had reason to believe the meters were faulty, but used actual meter readings for the remainder. From March 2012 to October 2014 the respondent considered that so many of the meters were unreliable that it was preferable to base the charges for all of the apartments on estimated consumption (which may have been made by its own managing agents, Marathon Estates, rather than by Switch2). In arriving at estimates historic consumption data was used so that the charges for one year were based not on consumption in that year but in an earlier year which was assumed to provide a reasonably accurate guide.

30. The second problem was that the sub-meters do not record all of the energy consumed in the Building. For reasons which are not fully understood a proportion of the energy supplied through the bulk meters is "lost" within the Building (i.e. it is consumed or dissipated without being recorded by any sub-meter). In deciding what unit rate to charge individual leaseholders for the energy consumed in their apartments Switch2 sought to recoup the cost of this lost energy although there was no reason to believe that it had been consumed in those apartments.

31. 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 CCL and VAT at the standard rate) but which are not payable by domestic consumers (who are exempt from the CCL and who pay VAT on energy at a reduced rate of 5%).

32. The process by which Switch2 calculated the utilities charges for each apartment was not clear from the statements delivered to the leaseholders. It now seems that the dominant consideration in calculating the unit rate shown in the invoices was to ensure that the respondent and the freeholder recouped from the apartment leaseholders the full cost of providing energy to the Building, except to the extent that the energy was confirmed to have been consumed by the hotel or otherwise accounted for by usage on the lower floors. The unit rate therefore took account not only of the cost of the energy consumed in an apartment but also a contribution towards the additional charges levied by the utility companies (in the case of electricity the availability charge, the reactive charge, the supplier's standing charge and the CCL), a contribution towards the "lost" energy, and a contribution towards the standard rate VAT charged by the utility company. None of this was apparent from the bills received by the leaseholders.

33. One consequence of the way in which the unit rate was determined was that during some periods VAT was effectively being charged to the leaseholders at an aggregate rate of 26%. This was because concealed within the unit rate calculated by Switch2 was VAT at the commercial rate of 20% which was paid by the freeholder to the utility suppliers; a further 5% VAT charge at the domestic rate was then added by the managing agent to the sum shown in Switch2's statements when they delivered their requests for payment.

34. These anomalies only became clear with the benefit of disclosure of the suppliers' invoices by the respondent and investigation by the experts witnesses instructed by both parties.

The revised invoices

35. At the hearing before the FTT in July 2015 evidence was given by a representative of Switch2 who suggested that, contrary to the previous understanding of the parties' experts, reliable information may still be capable of being retrieved from the meters for the period from March 2012. In the light of that evidence the respondent subsequently undertook further investigations with the assistance of its expert, Mr Hamilton. Two weeks before the hearing of the appeal in September 2016 the respondent issued new invoices for the whole of the period from May 2008 to October 2014 which are said to be based on the methodology agreed between the experts for determining appropriate unit rates. These revised invoices are said to rely on actual meter readings for the period after March 2012, where only estimates had previously been used. The recalculated invoices for some apartments suggest that the respondents have been overcharged in the past for energy consumed, while those for other apartments suggest that they have been undercharged.

36. The appellant stopped paying for utilities some years ago because of the dispute over the accuracy of the bills (although it has paid for a number of apartments, under protest, as a condition of the respondent's cooperation in connection with their proposed sale). There has, so far, been no consideration by the appellant of the revised invoices and (given that years of overpayment have been followed by years of refusal to pay) it is not apparent which of the parties is likely now to be owed money by the other.

The FTT proceedings

37. The appellant's application to the FTT sought a determination of the amount payable for heat, cooling, electricity, domestic hot water, standing charges and VAT for the period from 31 May 2008 to 31 December 2013. In advance of the hearing experts instructed by the parties, Mr Hamilton for the respondent and Mr Lowndes for the appellant, were able to reach agreement on a number of issues.

38. The matters which were agreed and recorded between the experts included that approximately 10% of the meters in the apartments were unreliable, and that the domestic hot water meter had not registered consumption at all during the period under consideration (and no charge had been raised by Switch2). They agreed that where the meter readings were known to be faulty it was reasonable to base bills on estimated consumption. They agreed that VAT and CCL costs had been wrongly charged to the leaseholders and should not be included as part of their bills.

39. The experts also arrived at an agreed method of calculating an appropriate unit rate for electricity using the metering system available in the Building which stripped out the inappropriate charges. They did not agree what the appropriate unit rate should be since that depended, amongst other things, on the FTT's determination of whether the fixed charges could be recouped. They were nevertheless able to quantify the effect of the agreed errors and the respondent's expert, Mr Hamilton, calculated that for the period 31 May 2008 to 1 March 2012 the appellant had been overcharged by £61,016.56.

40. Mr Hamilton and Mr Lowndes were called to give evidence before the FTT and both parties were given the opportunity to cross-examine them. No attempt was made by the appellant in cross-examination to undermine the matters on which the experts had reached agreement. In particular it was not suggested to either expert that the methodology they had agreed upon for ascertaining the appropriate unit rate for electricity was based on some misconception or error of law.

41. No witnesses of fact gave evidence to the FTT. The respondent's counsel, Mr Bates, had successfully submitted to the tribunal that factual evidence would not be of assistance in determining the issues of principle which were all that prevented the experts from reaching agreement on the appropriate charges.

The FTT's decision

42. The FTT determined 6 issues. It was unable to specify the sums payable by the appellant for utilities between 2008 and 2014, despite that being the question posed by the application. Neither party had approached the hearing with evidence of specific figures but instead each invited the FTT to determine issues of principle. This approach had been sanctioned by the FTT at the last of a series of case management hearings, on 19 March 2015, at which it directed meetings of expert witnesses "to thrash out the core issue" with a view "if necessary, [to] having a determination from the Tribunal on areas which the experts cannot agree".

43. The "core issue" to which it had previously referred, and which the FTT did determine, was whether as a matter of contract demands for utility charges based on estimated

consumption (as opposed to properly metered consumption) were valid. The appellant had submitted that it was obliged to pay only for consumption which was evidenced by current meter readings. For reasons which I will explain later the FTT rejected the appellant's case and held that estimates based on historic meter readings were permissible.

44. The FTT also decided that there was a contractual obligation on the leaseholders to pay fixed charges for all fuels so that that the respondent was entitled to include the fixed charges for electricity and gas in the unit rates charged to leaseholders. The standing charge representing a contribution towards Switch2's services was also payable. Finally the FTT decided that there was nothing in the guidance issued by OFGEM on maximum resale prices for electricity which prevented the respondent from relying on estimated readings.

45. The FTT stated in paragraph 39 that it would not address all 15 of the issues which the appellant's counsel had listed in her skeleton argument, but only those which appeared to it to be in dispute by the conclusion of the hearing. Some of the issues had been overtaken by agreements reached by the experts or by the parties, some did not arise because of the FTT's decisions on other points, or could not be determined because no cross examination had been directed to them when the experts gave evidence. The final issue, a proposed claim by the appellants for an award of costs under rule 13 of the Property Chamber Rules 2013, was not yet the subject of an application and (correctly in my view) was not determined by the FTT for that reason.

46. In its decision at the conclusion of the final hearing the FTT noted the progress made by the experts in agreeing a method of apportionment between the upper and lower floors of the Building and of estimating figures for consumption by individual apartments where meters were faulty. It was now for the experts to implement their agreement in light of the tribunal's conclusions on the issues of principle and to agree the appropriate figures. If agreement could not be reached the FTT suggested that a further application could be made to it.

Issues

47. Permission to appeal was sought by the appellant on 6 grounds, three of which concerned the non-determination of issues which had appeared to the FTT not to arise for one or other of the reasons given in paragraph 45 above. The first ground concerned the FTT's refusal to hear oral evidence to enable it to determine the appellant's application for costs under rule 13. Permission to appeal was refused on that issue, since no costs application had been made to the FTT. Permission was given on the remaining grounds. The three substantive issues arising out of the matters which the FTT did decide were the following:

1. Are the leaseholders required by clause 3.2.2 of the underleases (or otherwise) to pay utility charges based on estimated rather than metered consumption?

2. Is the fixed charge element of the utilities charges payable by the leaseholders?

3. Is the Switch2 standing charge payable by the leaseholders?

48. Whether any of the other issues left underdetermined by the FTT will arise for consideration in this appeal will depend on the answer to those three substantive questions.

Issue 1: Are the appellants required by clause 3.2.2 of the underleases (or otherwise) to pay utility charges based on estimated rather than metered consumption?

49. The background to this issue is that for a period of 20 months from March 2012 to October 2014 the respondent's agents delivered only two requests for payment for utilities charges and in each case the requests were based on estimates of consumption. On 7 February 2014 a request for payment was made for each apartment for charges for the period from 1 March 2012 to 31 December 2013, and on 27 November 2014 a further request for the period from 1 January to 31 October 2014 was made. The estimated consumption on which both requests were based was derived from actual consumption as shown by the apartment meters in a 15 month period from December 2010 to March 2012.

50. The respondent claims to be entitled to payment of the sums requested under clause 3.2.2 of the underlease, which it is therefore necessary to consider in some detail.

Clause 3.2.2

51. Clause 3.2.2 of the underlease is a covenant by the leaseholder:

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

52. It can be seen that clause 3.2.2 is in two parts.

53. The first part is an obligation to pay for electricity etc "consumed within the Demised Premises". It therefore relates to what has been termed "direct" electricity and other direct utilities (although there is no supply of gas to the individual apartments). Electricity consumed to provide electric lighting and to operate domestic appliances is within the first limb. The obligation is, implicitly, to pay the supplier of the commodity which in the case of water and electricity would appear to be the respondent. The clause does not say when payment is to be made but this omission is supplied by clause 2.4 which provides that sums payable to the Lessor other than ground rent, service charges and the Apartment Energy Charge are payable on demand.

54. The second part of clause 3.2.2 is the obligation to pay the Apartment Energy Charge within seven days of demand. To understand this obligation it is necessary to consider four defined expressions.

55. The "Apartment Energy Charge" is defined in clause 1.6 of the underlease. It means:

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

56. The expression "AC Energy" used in that definition (which I assume is shorthand for "air conditioning energy") is itself defined in the same clause as meaning:

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

57. The "Residential Premises" are the apartments and other areas for residential use (roof terraces, corridors etc) on the upper floors of the Building (the thirteenth to thirty-second floors).

58. Finally, the "Residential Energy Charge" is an expression defined in the headlease which I have referred to in **paragraph 10 above.** It is the cost of that proportion of AC Energy attributable to the heating and chilling water for use in the air conditioning systems serving the upper floors of the Building "as evidenced by meters installed for the purpose of measuring such proportions".

59. With the assistance of these various definitions it can be seen that the Apartment Energy Charge is intended to represent the cost of that proportion of the total AC Energy i.e. the gas and electricity consumed by the central plant in the Building to generate hot and chilled water to operate the air conditioning systems serving the upper floors, as is referable to the operation of the air conditioning systems in the individual apartments. The second limb of clause 3.2.2 requires the leaseholder to meet that cost.

The FTT's conclusion

60. At paragraph 80 of its decision the FTT recorded that the appellant's submission was that no payment was due for consumption not evidenced by meter readings.

61. The FTT disagreed. It said that the relevant terms of the underlease were plain and workable. Clause 3.2.2 was the important obligation and it did not require the provision of evidence of consumption.

62. It also considered that the definitions of AC Energy and Residential Energy Charge, each of which required that consumption be "evidenced by meters", did not import a similar requirement into the calculation of the Apartment Energy Charge.

63. Finally, the FTT did not consider that the meter readings referred to needed be contemporaneous with the period covered by the payment. At paragraph 88 of its decision the FTT explained that:

> "Evidence from meters could mean evidence of past consumption where no actual readings could (reasonably) be obtained."

The appellant's case

64. The appellant's case is that clause 3.2.2 does not permit estimated bills based on past consumption. The leaseholder's obligation under the first limb of clause 3.2.2 is to pay for utility supplies "consumed" within the apartment; such consumption must be proved by reference to the individual apartment meters. Estimates unrelated to consumption recorded by the meters during the period to which the bill relates cannot form the basis of a valid demand. The various layers of the definition of the Apartment Energy Charge also showed that the

contribution towards the cost of operating the air-conditioning system must also be based on meter readings. Moreover, the appellant says, if the FTT's decision to the contrary is correct, it will be liable to pay utilities charges based on estimated consumption for the remaining 987 years of the underlease terms, which is clearly contrary to the intention of the parties when the underleases were entered into.

65. In the course of oral argument I asked Ms Mattson whether the parties must be taken to have assumed that the meters in the building would never malfunction or, if not, what they must be taken to have intended in the event of one or more meters giving false readings. Since the meter readings are the basis of an apportionment, an inaccurate reading given by even a single meter could potentially falsify the calculation for every apartment. Ms Mattsson's answer was that the parties must be taken to have anticipated the possibility of breakdown, for example if the Building was struck by lightning or if there was a software malfunction. The experts had agreed a more accurate method of estimating consumption based on occupancy information, external temperature readings and other data. It would therefore be permissible, in the event of a malfunction, for the respondent to substitute a reasonable estimate of consumption for such period as was reasonable in all the circumstances.

66. The possibility that there might be limited circumstances in which demands based on estimates of consumption would be contractually compliant was not put to the FTT although it did refer in paragraph 88 to circumstances in which "no actual readings could (reasonably) be obtained." It was not asked to determine whether the period for which the respondent relied on estimated consumption was a reasonable period in all of the circumstances. It may be that the factual evidence which the respondent persuaded the FTT not to hear (on the grounds that it was unnecessary) would have included evidence relevant to that question. The experts had not investigated the cause of the problems with the meters which remained unknown, although they noted that Switch2 had recommended for some considerable time that it be properly investigated. On behalf of the respondent Mr Bates emphasised that the meters were not under its control, but belonged to the freeholder, and Switch2 was the freeholder's agent, not the respondents. Since the respondent and the freeholder are companies within the same group and since Switch2 certainly acted for the respondent in preparing statements for the leaseholders those may not be points of significance, but the fact remains that FTT was not asked to consider whether there might be a general rule prohibiting estimation but subject to an exception in the event of a meter malfunction.

The respondent's case

67. Mr Bates submitted first that the availability of accurate meter readings was not a condition precedent to the appellant's liability to make payment for energy or other services consumed under clause 3.2.2. The experts had agreed on a method of assessment of energy consumed which compensated for the occurrence of faulty meter readings (which in any event were less prevalent than had previously been understood). The revised invoices had now been sent out, but the appellant had not yet expressed any view on them. Once the appellant accepted that the use of estimated readings was permissible for a reasonable period if the meters were known to be unreliable there was no real challenge to the decision of the FTT in paragraph 88 of its decision. The Tribunal should therefore confirm that the demands were compliant with clause 3.2.2 and then it should be left to the experts to agree how much of the sums demanded were due (applying their previously agreed methodology in the light of the Tribunal's decision on the remaining issues). If agreement was not reached the parties should

restore the application for further consideration by the FTT as it had indicated in paragraph 92 of its decision.

Discussion and conclusion

68. As already explained above, clause 3.2.2 imposes two different obligations, the first being to pay the whole cost of direct energy and services consumed within the apartment, and the second to pay a share or proportion of the cost of gas and electricity consumed by the central Plant to generate hot and chilled water for the air conditioning systems serving the upper floors.

69. The obligation to pay for direct energy is expressed in entirely general terms, with no indication of how the sum payable for energy consumed is to be ascertained. The appellant is clearly correct that that sum payable must be referable to consumption, but there is no express requirement that consumption must be measured using any particular method. No doubt it was contemplated that, initially at least, the meters installed in the apartments would be the basis of assessment, but I agree with Ms Mattsson that the parties cannot be taken to have assumed that the meters would always provide a reliable measure of consumption. For one thing, the possibility of a temporary malfunction was readily foreseeable, and for another, each underlease is for a term of 999 years and the use during that exceptionally long term of some different approach to measuring consumption cannot have been excluded. As far as direct energy is concerned, therefore, I do not accept Ms Mattsson's submission that an accurate measurement using the four meters in the apartment is a condition of the leaseholder's liability to pay for energy consumed.

70. In practice clause 3.2.2 anticipates a demand for payment by the supplier of the electricity, gas or water, so the onus is on the supplier to state how much energy has been consumed. The supplier is likely to base its demand on meter readings, but if the meters are believed to be faulty there is nothing in the language of the clause which prohibits consumption from being ascertained in some other way, including by a genuine estimate.

71. If, on receiving a demand for payment, the leaseholder considers that the sum demanded was not a proper reflection of the amount of energy consumed in the apartment it might refuse to pay and challenge the supplier to establish the level of consumption during the period to which the demand related. If agreement could not be reached it would be for the supplier to prove to the satisfaction of a court or tribunal, if necessary, how much energy had been consumed. Like any other question of fact to be determined in a civil court or tribunal, that question would fall to be proved on the balance of probability.

72. An energy supplier who was put to proof of consumption, but who could not rely on meter readings, might seek to prove that there was an earlier period for which reliable meter readings were available and to base an assessment of consumption on that period. It might be a reasonable inference that, all other things being equal, the amount of energy consumed in one year would be much the same as the amount consumed in a previous year.

73. If such a supplier was able to provide proof of consumption in that way, the onus would pass to the consumer to show that there was some reason why consumption measured accurately in a previous period could not be relied on as a reliable means of assessing consumption in the period in question. The consumer might do so by showing that the meters had always been faulty, or that the apartment had been empty or occupied less intensively in

one of the periods, or that weather conditions had been very different. If the consumer was unable to rebut the inference that proven usage in an earlier period was a reliable guide to consumption in the period under consideration, the appropriate finding of fact for the court or tribunal would be that, on balance, the sum claimed fairly represented the cost of energy consumed during that period.

74. In their joint statement the parties' experts agreed that it would be reasonable to use a previous period of consumption, making adjustments for seasonal and occupancy issues, as the best method of estimating consumption for flats with unreliable meter readings.

75. For these reasons I do not agree that the only method of determining consumption is by using accurate meter readings for the period of assessment, although that is obviously the best method. Consumption is a question of fact which can be proved on the balance of probability by any method capable of arriving at a figure which is more likely to be correct (or at least more likely to be conservative) than to be excessive. In principle, therefore, a demand for payment based on an estimate of direct electricity or water consumed in an apartment is capable of being a valid demand.

76. Is the leaseholder's obligation to pay the Apartment Energy Charge any different?

77. As a matter of construction of the underlease, the ascertainment of the Apartment Energy Charge requires the use of meters. It is a charge payable for a proportion of the Residential Energy Charge which is itself a charge for a proportion of the electricity and gas consumed by the central air-conditioning Plant serving the whole Building; in each case the relevant proportion is to be "evidenced by meters installed for the purpose of measuring such consumption".

78. The FTT considered that evidence of consumption from meters could include "evidence of past consumption where no actual readings could (reasonably) be obtained." I initially found that a difficult proposition to accept, because the evidence which the meters were intended to provide was clearly evidence of consumption during the period to which the demand for payment related and, moreover, a process of *measurement* of that consumption (rather than estimation) was contemplated. It did not seem to me to be easy to regard consumption proved only by inference from a measurement taken in a different period, and subject to adjustments to reflect changes in circumstances, as falling within the various expressions which define the Apartment Energy Charge.

79. Despite these misgivings I have come to the conclusion that the FTT was correct to allow the possibility that, exceptionally, where reliable readings were not available, the evidence of consumption on which an apportionment could be based would include evidence of consumption in a previous period. The meters installed in the Building are a tool which should not be allowed to assume a disproportionate significance. It would be wrong to make performance of the leaseholder's substantive obligation to pay for energy referable to the heating and cooling of its own apartment dependent on the reliability of the meters. I note, as did the FTT, that in its guidance on the resale of gas and electricity, OFGEM, the independent energy regulator, stipulates that where electricity is supplied by a reseller through a meter which does not accurately record the number of units used, the reseller must use reasonable endeavours to estimate what proportion of the total bill each tenant should pay. While that guidance has no contractual force, it reflects a common sense approach such as reasonable

parties are likely to have intended should be adopted in the event of inaccurate meter readings.

80. In any event, even if the obligation to pay the Apartment Energy Charge were to be interpreted as dependent on the availability of accurate metering, the consequence of a malfunction would not be that the leaseholder would be entitled to free energy. To the extent that it made use of the heating and cooling services it would be obliged to make payment on a *quantum meruit* basis. In assessing a *quantum meruit* (i.e. a reasonable sum for a service willingly received in circumstances where it cannot have been intended that no payment would be required) it would be necessary to estimate the amount of energy consumed. That requirement seems to me to point towards a limited process of estimation being permissible in ascertaining the Apartment Energy Charge.

81. I therefore dismiss the appellant's appeal on the first issue. I am satisfied that a demand for payment under clause 3.2.2, whether for direct electricity, or for the Apartment Energy Charge, is not rendered invalid by being based in part on an estimate of consumption.

Issue 2: Is the fixed charge element of the utilities charges payable by the leaseholders?

82. The fixed charges in issue are the availability charge and the reactive charges which were included in the electricity bills paid by the freeholder, which passed it on to the respondent, and which the respondent seeks to pass on to the leaseholders. The charges for gas also included a standing charge. It is common ground that the other charges concealed within the leaseholders' bills (the climate change levy and commercial rate VAT) are not payable.

83. The availability charge was found by the FTT to be a charge to secure the availability of electricity to the Building" levied by the energy supplier. The reactive charge was found to be a charge made by the electricity supplier based on the efficiency of the equipment in a building. The standing charge for gas was a charge covering the supplier's cost of maintaining its installations in the Building and managing the supply. All three charges were included by Switch2 in its calculation of the Apartment Energy Charge which appeared on the statements as separate charges for heating and cooling.

84. The appellant's case was that these charges were not charges for electricity or gas consumed or metered and so could not fall within clause 3.2.2. Moreover, they were charges which were not incurred for the benefit of the residential parts of the Building, but only because part of the Building was in commercial occupation by the Marriott hotel.

85. The FTT rejected the appellant's case on this issue, and I am satisfied that it was correct to do so for the reasons it gave. Those reasons were essentially that the availability charge was incurred because electricity was supplied in bulk to the Building as a whole, as it had been when the underleases were granted, not through any choice of the freeholder but simply because that was how the Building had been designed. Having taken a lease in a building designed in that way, the leaseholders could not avoid part of the necessary cost of procuring a supply of electricity. There was no evidence to support the assertion by the leaseholders that the availability charge was required only because of the energy consumed by the hotel.

86. The same reasoning applied to the reactive charge, which was a levy for the supply of electricity to this Building in which the appellant had chosen to take leases of apartments. It was not suggested that the reactive charge was incurred as a result of any breach by the freeholder or the respondent of any obligation.

87. In the case of gas, a building in exclusively residential occupation might have incurred a standing charge at a lower rate, but this was not such a building. The OFGEM guidance recommended that standing charges be divided amongst all occupiers in proportion to usage, which appeared to the FTT to be the approach adopted by Switch2.

88. I find that reasoning convincing and I am satisfied that the cost of electricity and gas recoverable under clause 3.2.2 properly includes an apportioned part of the availability charge, the reactive charge and the gas standing charge. On the evidence electricity and gas were supplied inclusive of these charges because of the characteristics of the Building, and they were simply part of the cost of receiving the supply. There was no evidence that the charges could have been avoided.

89. I also note the approach taken to charges of this type by OFGEM, the independent energy regulator, in its current (October 2005) guidance on the resale of gas and electricity. The maximum resale price for electricity for domestic use is the same price as that paid by the reseller, including any standing charges. The guidance gives a number of examples of how this price should be calculated and in one of these (8a) it is assumed that electricity is purchased in kVA units thus attracting an availability charges and maximum demand charges. OFGEM treats these charges as part of the permitted resale price. That approach is supportive of the view that the charges are simply part of the cost of electricity supplied.

90. I note in passing that it is said by the appellant that the unit rate agreed by the experts as payable for direct electricity exceeds the maximum resale price permitted by the OFGEM guidance (which has statutory force by reason of section 44, Electricity Act 1989). That was not a point put to the experts when they gave evidence, and the FTT made no finding in the light of their apparent agreement. Although there is no evidence that the OFGEM rate was exceeded, I nevertheless agree with Ms Mattsson's submission that an agreement between experts cannot sanction a breach of the general law (section 44). When they apply their agreed approach, the experts should therefore limit the unit rate payable by the leaseholders to the rate paid by the reseller (including in that rate the availability and reactive charges. As the OFGEM guidance acknowledges, however, arriving at a single unit rate for supplies of gas and energy can be complex because different tariffs apply to different parts of the supply and seasonal or retrospective adjustments may be required. The duty of the re-seller is said by OFGEM to be to "use reasonable endeavours to make an estimate of the applicable unit price" and to explain its calculation to the consumer. If, with the benefit of the FTT's decision on issues of principle and the assistance of the experts, the parties are still unable to agree the appropriate unit rate, it will be necessary for the application to be restored for further consideration by the FTT.

Issue 3: Is the Switch2 standing charge payable by the leaseholders?

91. The third issue argued on the appeal concerned a "standing charge" which appeared on Switch2's statements for each apartment. It is not clear how this 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. It was demanded by the respondent as part of the charges payable under clause 3.2.2 of the underlease.

92. The FTT found that this charge was not payable under clause 3.2.2. 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. It followed that it was not open to the respondent to treat the Switch2 standing charge as part of the utility charge payable within 7 days of demand under clause 3.2.2.

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.

94. In paragraphs 76 and 77 of its decision the FTT considered the consequences of the standing charge never having been included as part of the service charge. It said this:

> "76. … we do not see that Switch2's charges have been properly demanded or set out under the terms of the lease. If this were the end of the matter, then it would appear therefore that section 20(B) Landlord and Tenant Act 1985 would apply to some previous charges meaning that they are not payable by [the appellant].
>
> 77. However, it appears to us that this is all circumvented by clause 2.4 of the lease. Under the terms of that clause the leaseholders covenant to pay, *on demand*, any other sums due to the Lessor. Switch2's charges have been demanded. Even therefore if not correctly demanded under clause 3.2.2, the sums are payable pursuant to clause 2.4."

95. The term on which the FTT relied, clause 2.4, is part of the reddendum (the part of the lease reserving payments of rent). So far as is relevant clause 2 grants the term of 999 years and continues:

> "PAYING THEREFOR during the Term the following rents:-
>
> 2.1 [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 3.2.2
>
> 2.4 on demand any other sum due under the terms hereof
>
> 2.5 [VAT]"

96. For the appellant Ms Mattsson submitted that once it was accepted that the Switch2 charge could be recovered as part of the service charge, reliance on clause 2.4 was obviously impermissible. It related to "any other sum" and so could not be used as an alternative route for demanding payment of something which was not "other" but ought to have been included in the service charge.

97. I agree with Ms Mattsson's submission and I do not think the FTT was entitled to find that sums recoverable as service charges could additionally be demanded and become immediately payable by virtue of clause 2.4. If that interpretation of clause 2.4 was correct it would be hard to see what would prevent the respondent from demanding reimbursement of all service charge expenditure under the same clause, thereby circumventing the accounting and collection provisions in Part B of Schedules 4 and 5.

98. On his oral argument on behalf of the respondent Mr Bates did not seek to support the FTT's route to recovery of the Switch2 charges. He argued instead that the charges were either payable on demand under clause 3.2.2 or were payable as a service charge; in the latter case he submitted that the respondent's omission to take account of the charge when estimating its total expenditure service charge payable by quarterly instalments on account, did not prevent it from including the charge in its end of year accounting.

99. In support of his argument that the Switch2 standing charge was within clause 3.2.2 Mr Bates referred to the Tribunal's decision in *Waverley Borough Council v Arya* [2013] UKUT 0501 (LC) in which, after reviewing a series of authorities it was said that in principle the cost incurred by a landlord in arranging for the provision of services and in managing their delivery could properly be regarded as part of the cost of providing the service, but that it was necessary in every case to have regard to any limitations which the particular lease imposed on the categories of expenditure to which the service charge was intended to relate. There was no reason in principle, Mr Bates submitted, why the cost of reading the meters could not be regarded as part of the cost of electricity and gas consumed.

100. I do not accept Mr Bates submission. In agreement with the FTT I consider that the elaborate definition of the Apartment Energy Charge (which is essentially the cost of a quantity of electricity and gas) does not include the cost of employing a consultant to read the meters and calculate the energy bills. The cost of the energy itself would be the same whatever it cost to administer the system. Given that one of the components of the sum payable under clause 3.2.2 does not include administration costs, it would be cumbersome and impractical to treat the other component (direct energy) as including such costs. That is particularly so because, as the FTT pointed out, there are a number of different categories of service charge expenditure within which this cost can readily be accommodated. In Part D of Schedule 4 the cost of entering into contracts for the carrying out of any of the services or other estate management functions is within paragraph 4 and the cost of the supply of fuel for the provision of services is within paragraph 6.

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.

Consequential issues

102. Ms Mattsson invited me to rule on a number of other issues which the FTT had not found it necessary (or in some cases possible) to consider.

103. In her written submissions Ms Mattsson was critical of what she described as the FTT's refusal or failure to decide six of the issues referred to it. That criticism is unjustified. There was no requirement for the FTT to reach conclusions on issues which did not arise because of

its decisions on other issues, and the suggestion that it was wrong not to decide all issues is unsustainable. Nevertheless, some of the issues which the FTT did not feel it necessary to address may now arise because this Tribunal has taken a different view on the Switch2 standing charge, but that does not mean that the FTT was wrong not to decide them. In many cases it will be helpful for a tribunal briefly to express its conclusions on contingent or subsidiary issues (especially issues of primary fact) which would only have arisen if it had reached a different conclusion on some over-arching issue, but a tribunal can rarely be criticised for not doing so. It can certainly not be criticised where the evidence on contingent issues has not been fully investigated at the conclusion of a lengthy hearing, and where it is unclear what the tribunal is being asked to decide, as the FTT recorded was the case on a number of the issues it is now said it should have tackled.

104. If the respondent wishes to recover the Switch2 standing charge it will be necessary for it to include them in an end of year service charge reconciliation, as Mr Bates said it was able to do. It has not yet done so but if it does there are a variety of points which the appellant may wish to take including by relying on section 20B(1) of the 1985 Act to argue that the charges were incurred more than 18 months before they were demanded or by challenging the reasonableness of the service provided. In his statement of case for the appeal Mr Bates informed the Tribunal that any attempt by the leaseholders to rely on section 20B(1) would be met by evidence of notices satisfying section 20B(2). Ms Mattsson asserted that only one such notice had ever been served (not the six pleaded in the respondent's statement of case) and that there was a period from 1 March 2012 to 7 August 2012 to which no section 20B(2) notice related. She invited me to make a determination to that effect and to rule that no charge was recoverable for that period.

105. I am not prepared to determine any issue concerning section 20B in this appeal, which is a review of the decision of the FTT, not a rehearing of the section 27A application. The relevant facts have not been found by the FTT and (in the case of Switch2 charges at least) proper demands have not yet been made. Additionally, detailed issues of quantification may yet arise in these proceedings if the parties cannot now agree the appropriate unit rate, and even after the cost of the utilities supplied has been ascertained the appellant may then ask the FTT to rule that some part of the cost (including the fixed and standing charges) was not reasonably incurred so that its liability should be limited under section 19(1) of the1985 Act. Just as the FTT anticipated in its directions and decision, the resolution of issues of principle does not necessarily mean that all issues of detail have fallen away.

106. I therefore propose to remit the application to the FTT for further consideration in the light of this decision.

The other issues

107. The remaining issues are largely procedural and can be dealt with relatively shortly.

108. The appellant complains that the FTT should have recorded concessions which it says the respondent made during the hearing and issues on which the parties had agreed. Those criticisms are, once again, unjustified and fail to take into account both that the task of the FTT under section 27A of the 1985 Act is to determine what sums are payable, and that it has no jurisdiction to make declarations. If professionally represented parties have reached agreement and wish that to be recorded it is for them to provide a clear statement of what has

been agreed (as the parties in this appeal have subsequently succeeded in doing at the invitation of the FTT).

109. The complaint about unrecorded "concessions" is also misconceived. The FTT is not required to record the evidence or submissions it has heard in minute detail, but only to the extent necessary to enable the reader of its decision to understand how it has resolved the issues in dispute, and why. What appears to one side to be a significant concession may appear to be nothing of the sort to the tribunal, especially in a case where the material presented to it lacks clarity.

110. The last procedural issue arises out of the appellant's submission that it should be entitled to an order that the respondent pay its costs of the proceedings before the FTT under rule 13(1) of the Property Chamber's 2013 Rules. It is not yet clear whether the claim is intended to be pursued against the respondent's representatives for allegedly wasted costs or against the respondent itself for unreasonable conduct of the proceedings. It is submitted by Ms Mattsson in her written argument that the Upper Tribunal has jurisdiction under its own rules (rule 10 of the Tribunal Procedure (Upper Tribunal)(Lands Chamber) Rules 2010 (as amended)) to make an order in relation to the whole of the proceedings, including the proceedings before the FTT. I doubt that very much, especially in a case where the FTT itself has not been asked to consider such an application. It should surely be obvious that the appropriate tribunal to deal first with an application concerning the costs of proceedings, where complaint is made about the manner in which those proceedings have been conducted, is the tribunal before which the hearing took place.

111. Happily, it was agreed that it is not necessary for me to consider the issue of costs further, as the appellant has now made a proper application for costs to the FTT. That application is currently stayed, by the agreement of the parties, to await the outcome of this appeal. I therefore decline to entertain an application in relation to the costs of proceedings before the FTT even if I have jurisdiction to do so. If the appellant considers that there are grounds for an application in relation to the costs incurred in connection with the appeal it may make an appropriate application after it has considered this decision.

Disposal

112. For the reasons which I have given I dismiss the appeal on issue 1 (estimated charges) and issue 2 (fixed charges) but allow it on issue 3 (Switch2 standing charge). I remit the application to the FTT for further consideration and I direct that within six weeks the appellant must apply to the FTT for further directions. The parties should seek to agree draft directions which might usefully include a stay of proceedings to enable their experts further time to quantify the sums payable (subject to the various defences open to the appellant).

Martin Rodger QC
Deputy Chamber President

19 December 2016

UPPER TRIBUNAL (LANDS CHAMBER)

Neutral Citation Number: [2016] UKUT 0553 (LC)
Case No: LRX/127/2015

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT – SERVICE CHARGES – liability of underlessees to pay for utilities "consumed" – meters believed to be unreliable – whether underlessees liable to pay bills based on estimated consumption – determination of unit rate – whether standing charges and other fixed charges properly included – whether recoverable charges limited by OFGEM guidance – appeal allowed in part

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

BETWEEN:

EAST TOWER APARTMENTS LIMITED

Appellant

- and -

NO.1 WEST INDIA QUAY (RESIDENTIAL) LIMITED

Respondent

Re: East Tower Apartments,
No.1 West India Quay,
London E14

Before: Martin Rodger QC, Deputy Chamber President

Royal Courts of Justice

London WC2A

On 1 September and 29 November 2016

Ms Lina Mattsson, instructed by Penningtons Manches LLP, for the appellant
Mr Justin Bates, instructed by King & Wood Mallesons, for the respondent

The following case is referred to in this decision:

Waverley Borough Council v Arya [2013] UKUT 0501 (LC)

Introduction

1. This is a dispute about payments for gas, electricity and water supplied to apartments in a building now known as No 1 West India Quay, London E14 ("the Building") pursuant to the long leases of 42 apartments granted by the respondent to the appellant in 2004. The installations for the supply and metering of energy within the Building are sophisticated but have proved to be unreliable, at least as far as the metering of energy is concerned. The terms of the leases under which the appellant is required to pay for the utilities provided for its benefit are also sophisticated, but they have proved to be difficult to implement. The result has been a dispute which has spawned numerous issues and sub-issues, conducted at very considerable expense, which has now been grinding on since 2009.

2. On 18 June 2014 the appellant made an application to the First-tier Tribunal (Property Chamber) (the FTT) seeking a determination under section 27A, Landlord and Tenant Act 1985, of its liability to pay invoices for heat, cooling, electricity, domestic hot water, standing charges and VAT for the period from 31 May 2008 to 31 December 2013 supplied in respect of the apartments which it owned in the Building. The period under consideration was subsequently extended by agreement to 31 October 2014. A recognised tenants association was subsequently added as a party to the application, but it did not participate actively either before the FTT or on the appeal.

3. After a hearing lasting 3 days during which the FTT conducted a site visit, heard expert evidence and was addressed at length by experienced counsel, it delivered a decision (in its final form) on 1 September 2015 in which it determined 6 out of a list of 15 issues which had been prepared by counsel for the appellant. The FTT explained that the remaining issues had either been agreed by the parties' experts or had ceased to be contentious by the conclusion of the hearing.

4. Permission to appeal was given by this Tribunal on 12 January 2016. At the hearing of the appeal the appellants were represented (as they had been before the FTT) by Ms Lina Mattsson and the respondents by Mr Justin Bates, both of counsel. I am grateful to counsel and their instructing solicitors for the considerable assistance they have provided the Tribunal.

The Building

5. The Building comprises 32 floors and was completed in 2004 for West India Quay Development Company (Eastern) Limited, which is still the freeholder. On 5 August 2004 the freeholder granted a headlease of part of the Building for a term of 999 years to the respondent, a company which I was told is part of the same group as, or otherwise connected to, the freeholder. The head lease is of the 158 residential apartments and common parts on the 13th to 32nd floors of the Building; I will refer to these floors as the upper floors. Shortly after taking the headlease the respondent granted individual underleases of 42 of the 158 apartments in the Building to the appellant.

6. The appellant's underleases (and the underleases of the other apartments on the upper floors) are in a standard form which obliges the lessee to pay for utilities consumed in the apartment itself, and for utilities consumed in the provision of heating and cooling to the apartment and the common parts of the upper floors through central service installations. The

underleases also oblige the lessees to pay a service charge as a contribution towards the cost of other services.

7. The lower floors of the Building, from the ground to the 12th floor, are occupied by the Marriott Hotel group; on these floors Marriott operates a hotel and occupies a further 47 apartments. I will refer to these as the lower floors, without distinction between the hotel and the apartments. I was not told the terms on which Marriott occupies the lower floors, but I was informed that the freeholder and the respondent are both part of, or connected to, the Marriott group. In the basement of the Building there is a car park, the use of which is shared between the leaseholders and Marriott, with the leaseholder of each apartment having a separate lease of a parking space in the car park.

The respondent's headlease of the upper floors

8. By clause 2.2 of the headlease of the upper floors the respondent is obliged to pay the freeholder a service charge calculated in accordance with Schedule 4. The service charge comprises 53% of the freeholder's expenditure on a conventional range of services provided to the Building. These are listed in Part D of Schedule 4 and include maintaining the structure, decorating the exterior, services relating to good estate management and professional fees in relation to the provision of services or calculation of service charges, outgoings and electricity and gas.

9. The respondent is also required by clause 3.2.2 to contribute towards the cost of energy. This obligation is in two parts. The first requires the respondent "to pay for all electricity gas water telephone and other data supplies and facilities consumed within the Demised Premises". The clause does not specify to whom these payments are to be made, but it is obvious that they must be made to the supplier of the particular service, whether that be the freeholder or a third party.

10. The second limb of clause 3.2.2 of the headlease requires the respondent to pay for energy consumed in the generation of heating and cooling for the upper floors of the Building by the central service installations (referred to as "Plant" in the headlease). This sum is referred to as the "Residential Energy Charge", an expression defined in clause 1.6 as:

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

The expression "AC Energy" used in the definition of the Residential Energy Charge is itself defined in clause 1.6 as:

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

11. By clause 3.2.2 the Residential Energy Charge is to be paid to the freeholder (or as it directs) and the payment is to be made:

"within 15 working days of written demand thereof (supported by reasonably sufficient evidence of the amount of AC Energy consumed in the Demised Premises for the relevant period)."

The appellant's underleases of individual apartments on the upper floors

12. The underleases of the apartments on the upper floors of the Building are for terms of 999 years less three days from June 24, 2004. The form of the underleases closely follows the form of the respondent's headlease and each obliges the underlessee to pay, amongst other sums: a service charge in respect of the residential common parts and the car park ascertained and payable in accordance with Part B of Schedules 4 and 5 respectively (clause 2.2); a sum referred to as the Apartment Energy Charge in accordance with clause 3.2.2 (clause 2.2); and, on demand, "any other sum due under the terms hereof" (clause 2.4).

13. The services are described in Parts C and D of Schedule 4 and include costs relating to good management, fees payable to third parties in connection with management, the provision of services, the calculation of service charges, the costs of the supply of electricity, gas, oil or other fuel for all purposes in connection with the residential parts of the Building and any incidental costs. They are payable under Part B by a simple scheme of quarterly provisional payments on account based on estimates by the respondent's surveyor with a balancing sum payable once the total annual expenditure has been ascertained.

14. Clause 3.2.2 of the underlease is structured in the same way as the same clause in the headlease. It first requires the lessee to pay for "all electricity gas water telephone and other data supplies and facilities consumed within the Demised Premises" [i.e. the individual apartment]. It also requires the lessee to pay the Apartment Energy Charge to the Lessor (or as it might direct). This charge relates to the cost of supplying hot and chilled water to the air conditioning systems in the Demised Premises, and is payable within 7 days of written demand but, unlike the corresponding provision of the headlease, there is no requirement that the demand be supported by evidence of the amount of energy consumed in the Demised Premises for the relevant period.

Metering the supply of utilities to the Building

15. The arrangements for the supply of utilities and the metering of consumption are at the heart of this appeal.

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").

21. The FTT (whose decision was seen in draft by the parties before it was finalised) recorded that Switch2 was employed by the freeholder, and that was the position adopted by Mr Bates at the hearing before me, although the respondent's statement of case for the appeal stated that Switch2 carried out its functions on its behalf. This confusion is symptomatic of a general lack of clear boundaries between the roles and responsibilities of the freeholder, Marriott, and the respondent, which in turn may be a reflection of their common ownership; for example, I was shown invoices for the supply of electricity to the whole Building by the utility supplier which were addressed to Marriott Hotels Ltd.

Bulk supply invoicing

22. Invoices for the supply of electricity to the whole Building show that the charge by the utility suppliers to the freeholder comprised three elements: energy charges, a levy charge and VAT.

23. The invoiced energy charges were based on metered consumption, for which different unit rates were applied to day units and night units. The energy charges also included sums which were not directly related to consumption: an availability charge (a sum charged by the utility provider to guarantee the availability of a certain level of supply) which seems to have fluctuated in different periods from zero to sums of several thousand pounds; a standing charge of a few pounds per day; and a reactive charge, which represents about 1% of the bill and is connected to the efficiency of the energy supply and metering systems in the Building.

24. The levy charge included in the supplier's invoices referred to the climate change levy (CCL), which was charged at a flat rate per unit of electricity consumed. In one quarterly invoice delivered in 2008, for example, the CCL of almost £4,000 represented about 4.3% of the total bill.

25. CCL and VAT were charged on the energy charges. VAT was charged at the prevailing standard commercial rate which has variously been 15%, 17.5% and 20% during the period in question.

Invoicing individual leaseholders

26. The role of Switch2 was to read the meters, calculate the sums payable by each occupier and prepare a statement itemising the charges. These statements were then delivered by the respondent's managing agents accompanied by an application for payment of the total sum containing additional information required by statute.

27. The content of the statements and applications for payment can be illustrated by one example. On 8 October 2008 Wood Management delivered a request for immediate payment of £635.53 for utilities to the appellant as leaseholder of apartment 2202 and its car parking space for the period from 31 May to 31 August 2008. The request was accompanied by a statement provided by Switch2 which purported to show the current and previous meter readings for heating, cooling, (direct) electricity and domestic hot water. The number of units consumed was shown to which a unit rate was applied to provide charges for each service. By far the greatest charge was in respect of electricity (meaning "direct" electricity consumed within the apartment) which accounted for £512.31, with heating and cooling (charges for the air conditioning plant) representing less than £75. A standing charge to cover Switch2's costs of reading the meters and calculating the sums due (which in this example was £18.59) was added to the utility charges producing a total of £605.27. VAT was stated in the Switch2 calculation to be 0.0%, but the managing agents invoice added VAT at 5% to arrive at the final charge of £635.53.

28. Any approach to apportioning the bulk charges for utilities supplied to the Building amongst its various occupiers had to be formulated in the light of at least three problems.

29. The first problem was that, by 2008, some of the meters recording consumption in certain parts of the Building were known to be defective; it was therefore necessary for to make estimates of the usage for certain areas and, eventually, for the whole of the upper floors. Up to March 2012 Switch2 estimated the consumption of energy for those apartments where it had reason to believe the meters were faulty, but used actual meter readings for the remainder. From March 2012 to October 2014 the respondent considered that so many of the meters were unreliable that it was preferable to base the charges for all of the apartments on estimated consumption (which may have been made by its own managing agents, Marathon Estates, rather than by Switch2). In arriving at estimates historic consumption data was used so that the charges for one year were based not on consumption in that year but in an earlier year which was assumed to provide a reasonably accurate guide.

30. The second problem was that the sub-meters do not record all of the energy consumed in the Building. For reasons which are not fully understood a proportion of the energy supplied through the bulk meters is "lost" within the Building (i.e. it is consumed or dissipated without being recorded by any sub-meter). In deciding what unit rate to charge individual leaseholders for the energy consumed in their apartments Switch2 sought to recoup the cost of this lost energy although there was no reason to believe that it had been consumed in those apartments.

31. 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 CCL and VAT at the standard rate) but which are not payable by domestic consumers (who are exempt from the CCL and who pay VAT on energy at a reduced rate of 5%).

32. The process by which Switch2 calculated the utilities charges for each apartment was not clear from the statements delivered to the leaseholders. It now seems that the dominant consideration in calculating the unit rate shown in the invoices was to ensure that the respondent and the freeholder recouped from the apartment leaseholders the full cost of providing energy to the Building, except to the extent that the energy was confirmed to have been consumed by the hotel or otherwise accounted for by usage on the lower floors. The unit rate therefore took account not only of the cost of the energy consumed in an apartment but also a contribution towards the additional charges levied by the utility companies (in the case of electricity the availability charge, the reactive charge, the supplier's standing charge and the CCL), a contribution towards the "lost" energy, and a contribution towards the standard rate VAT charged by the utility company. None of this was apparent from the bills received by the leaseholders.

33. One consequence of the way in which the unit rate was determined was that during some periods VAT was effectively being charged to the leaseholders at an aggregate rate of 26%. This was because concealed within the unit rate calculated by Switch2 was VAT at the commercial rate of 20% which was paid by the freeholder to the utility suppliers; a further 5% VAT charge at the domestic rate was then added by the managing agent to the sum shown in Switch2's statements when they delivered their requests for payment.

34. These anomalies only became clear with the benefit of disclosure of the suppliers' invoices by the respondent and investigation by the experts witnesses instructed by both parties.

The revised invoices

35. At the hearing before the FTT in July 2015 evidence was given by a representative of Switch2 who suggested that, contrary to the previous understanding of the parties' experts, reliable information may still be capable of being retrieved from the meters for the period from March 2012. In the light of that evidence the respondent subsequently undertook further investigations with the assistance of its expert, Mr Hamilton. Two weeks before the hearing of the appeal in September 2016 the respondent issued new invoices for the whole of the period from May 2008 to October 2014 which are said to be based on the methodology agreed between the experts for determining appropriate unit rates. These revised invoices are said to rely on actual meter readings for the period after March 2012, where only estimates had previously been used. The recalculated invoices for some apartments suggest that the respondents have been overcharged in the past for energy consumed, while those for other apartments suggest that they have been undercharged.

36. The appellant stopped paying for utilities some years ago because of the dispute over the accuracy of the bills (although it has paid for a number of apartments, under protest, as a condition of the respondent's cooperation in connection with their proposed sale). There has, so far, been no consideration by the appellant of the revised invoices and (given that years of overpayment have been followed by years of refusal to pay) it is not apparent which of the parties is likely now to be owed money by the other.

The FTT proceedings

37. The appellant's application to the FTT sought a determination of the amount payable for heat, cooling, electricity, domestic hot water, standing charges and VAT for the period from 31 May 2008 to 31 December 2013. In advance of the hearing experts instructed by the parties, Mr Hamilton for the respondent and Mr Lowndes for the appellant, were able to reach agreement on a number of issues.

38. The matters which were agreed and recorded between the experts included that approximately 10% of the meters in the apartments were unreliable, and that the domestic hot water meter had not registered consumption at all during the period under consideration (and no charge had been raised by Switch2). They agreed that where the meter readings were known to be faulty it was reasonable to base bills on estimated consumption. They agreed that VAT and CCL costs had been wrongly charged to the leaseholders and should not be included as part of their bills.

39. The experts also arrived at an agreed method of calculating an appropriate unit rate for electricity using the metering system available in the Building which stripped out the inappropriate charges. They did not agree what the appropriate unit rate should be since that depended, amongst other things, on the FTT's determination of whether the fixed charges could be recouped. They were nevertheless able to quantify the effect of the agreed errors and the respondent's expert, Mr Hamilton, calculated that for the period 31 May 2008 to 1 March 2012 the appellant had been overcharged by £61,016.56.

40. Mr Hamilton and Mr Lowndes were called to give evidence before the FTT and both parties were given the opportunity to cross-examine them. No attempt was made by the appellant in cross-examination to undermine the matters on which the experts had reached agreement. In particular it was not suggested to either expert that the methodology they had agreed upon for ascertaining the appropriate unit rate for electricity was based on some misconception or error of law.

41. No witnesses of fact gave evidence to the FTT. The respondent's counsel, Mr Bates, had successfully submitted to the tribunal that factual evidence would not be of assistance in determining the issues of principle which were all that prevented the experts from reaching agreement on the appropriate charges.

The FTT's decision

42. The FTT determined 6 issues. It was unable to specify the sums payable by the appellant for utilities between 2008 and 2014, despite that being the question posed by the application. Neither party had approached the hearing with evidence of specific figures but instead each invited the FTT to determine issues of principle. This approach had been sanctioned by the FTT at the last of a series of case management hearings, on 19 March 2015, at which it directed meetings of expert witnesses "to thrash out the core issue" with a view "if necessary, [to] having a determination from the Tribunal on areas which the experts cannot agree".

43. The "core issue" to which it had previously referred, and which the FTT did determine, was whether as a matter of contract demands for utility charges based on estimated

consumption (as opposed to properly metered consumption) were valid. The appellant had submitted that it was obliged to pay only for consumption which was evidenced by current meter readings. For reasons which I will explain later the FTT rejected the appellant's case and held that estimates based on historic meter readings were permissible.

44. The FTT also decided that there was a contractual obligation on the leaseholders to pay fixed charges for all fuels so that that the respondent was entitled to include the fixed charges for electricity and gas in the unit rates charged to leaseholders. The standing charge representing a contribution towards Switch2's services was also payable. Finally the FTT decided that there was nothing in the guidance issued by OFGEM on maximum resale prices for electricity which prevented the respondent from relying on estimated readings.

45. The FTT stated in paragraph 39 that it would not address all 15 of the issues which the appellant's counsel had listed in her skeleton argument, but only those which appeared to it to be in dispute by the conclusion of the hearing. Some of the issues had been overtaken by agreements reached by the experts or by the parties, some did not arise because of the FTT's decisions on other points, or could not be determined because no cross examination had been directed to them when the experts gave evidence. The final issue, a proposed claim by the appellants for an award of costs under rule 13 of the Property Chamber Rules 2013, was not yet the subject of an application and (correctly in my view) was not determined by the FTT for that reason.

46. In its decision at the conclusion of the final hearing the FTT noted the progress made by the experts in agreeing a method of apportionment between the upper and lower floors of the Building and of estimating figures for consumption by individual apartments where meters were faulty. It was now for the experts to implement their agreement in light of the tribunal's conclusions on the issues of principle and to agree the appropriate figures. If agreement could not be reached the FTT suggested that a further application could be made to it.

Issues

47. Permission to appeal was sought by the appellant on 6 grounds, three of which concerned the non-determination of issues which had appeared to the FTT not to arise for one or other of the reasons given in paragraph 45 above. The first ground concerned the FTT's refusal to hear oral evidence to enable it to determine the appellant's application for costs under rule 13. Permission to appeal was refused on that issue, since no costs application had been made to the FTT. Permission was given on the remaining grounds. The three substantive issues arising out of the matters which the FTT did decide were the following:

1. Are the leaseholders required by clause 3.2.2 of the underleases (or otherwise) to pay utility charges based on estimated rather than metered consumption?

2. Is the fixed charge element of the utilities charges payable by the leaseholders?

3. Is the Switch2 standing charge payable by the leaseholders?

48. Whether any of the other issues left underdetermined by the FTT will arise for consideration in this appeal will depend on the answer to those three substantive questions.

Issue 1: Are the appellants required by clause 3.2.2 of the underleases (or otherwise) to pay utility charges based on estimated rather than metered consumption?

49. The background to this issue is that for a period of 20 months from March 2012 to October 2014 the respondent's agents delivered only two requests for payment for utilities charges and in each case the requests were based on estimates of consumption. On 7 February 2014 a request for payment was made for each apartment for charges for the period from 1 March 2012 to 31 December 2013, and on 27 November 2014 a further request for the period from 1 January to 31 October 2014 was made. The estimated consumption on which both requests were based was derived from actual consumption as shown by the apartment meters in a 15 month period from December 2010 to March 2012.

50. The respondent claims to be entitled to payment of the sums requested under clause 3.2.2 of the underlease, which it is therefore necessary to consider in some detail.

Clause 3.2.2

51. Clause 3.2.2 of the underlease is a covenant by the leaseholder:

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

52. It can be seen that clause 3.2.2 is in two parts.

53. The first part is an obligation to pay for electricity etc "consumed within the Demised Premises". It therefore relates to what has been termed "direct" electricity and other direct utilities (although there is no supply of gas to the individual apartments). Electricity consumed to provide electric lighting and to operate domestic appliances is within the first limb. The obligation is, implicitly, to pay the supplier of the commodity which in the case of water and electricity would appear to be the respondent. The clause does not say when payment is to be made but this omission is supplied by clause 2.4 which provides that sums payable to the Lessor other than ground rent, service charges and the Apartment Energy Charge are payable on demand.

54. The second part of clause 3.2.2 is the obligation to pay the Apartment Energy Charge within seven days of demand. To understand this obligation it is necessary to consider four defined expressions.

55. The "Apartment Energy Charge" is defined in clause 1.6 of the underlease. It means:

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

56. The expression "AC Energy" used in that definition (which I assume is shorthand for "air conditioning energy") is itself defined in the same clause as meaning:

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

57. The "Residential Premises" are the apartments and other areas for residential use (roof terraces, corridors etc) on the upper floors of the Building (the thirteenth to thirty-second floors).

58. Finally, the "Residential Energy Charge" is an expression defined in the headlease which I have referred to in **paragraph 10 above.** It is the cost of that proportion of AC Energy attributable to the heating and chilling water for use in the air conditioning systems serving the upper floors of the Building "as evidenced by meters installed for the purpose of measuring such proportions".

59. With the assistance of these various definitions it can be seen that the Apartment Energy Charge is intended to represent the cost of that proportion of the total AC Energy i.e. the gas and electricity consumed by the central plant in the Building to generate hot and chilled water to operate the air conditioning systems serving the upper floors, as is referable to the operation of the air conditioning systems in the individual apartments. The second limb of clause 3.2.2 requires the leaseholder to meet that cost.

The FTT's conclusion

60. At paragraph 80 of its decision the FTT recorded that the appellant's submission was that no payment was due for consumption not evidenced by meter readings.

61. The FTT disagreed. It said that the relevant terms of the underlease were plain and workable. Clause 3.2.2 was the important obligation and it did not require the provision of evidence of consumption.

62. It also considered that the definitions of AC Energy and Residential Energy Charge, each of which required that consumption be "evidenced by meters", did not import a similar requirement into the calculation of the Apartment Energy Charge.

63. Finally, the FTT did not consider that the meter readings referred to needed be contemporaneous with the period covered by the payment. At paragraph 88 of its decision the FTT explained that:

> "Evidence from meters could mean evidence of past consumption where no actual readings could (reasonably) be obtained."

The appellant's case

64. The appellant's case is that clause 3.2.2 does not permit estimated bills based on past consumption. The leaseholder's obligation under the first limb of clause 3.2.2 is to pay for utility supplies "consumed" within the apartment; such consumption must be proved by reference to the individual apartment meters. Estimates unrelated to consumption recorded by the meters during the period to which the bill relates cannot form the basis of a valid demand. The various layers of the definition of the Apartment Energy Charge also showed that the

contribution towards the cost of operating the air-conditioning system must also be based on meter readings. Moreover, the appellant says, if the FTT's decision to the contrary is correct, it will be liable to pay utilities charges based on estimated consumption for the remaining 987 years of the underlease terms, which is clearly contrary to the intention of the parties when the underleases were entered into.

65. In the course of oral argument I asked Ms Mattson whether the parties must be taken to have assumed that the meters in the building would never malfunction or, if not, what they must be taken to have intended in the event of one or more meters giving false readings. Since the meter readings are the basis of an apportionment, an inaccurate reading given by even a single meter could potentially falsify the calculation for every apartment. Ms Mattsson's answer was that the parties must be taken to have anticipated the possibility of breakdown, for example if the Building was struck by lightning or if there was a software malfunction. The experts had agreed a more accurate method of estimating consumption based on occupancy information, external temperature readings and other data. It would therefore be permissible, in the event of a malfunction, for the respondent to substitute a reasonable estimate of consumption for such period as was reasonable in all the circumstances.

66. The possibility that there might be limited circumstances in which demands based on estimates of consumption would be contractually compliant was not put to the FTT although it did refer in paragraph 88 to circumstances in which "no actual readings could (reasonably) be obtained." It was not asked to determine whether the period for which the respondent relied on estimated consumption was a reasonable period in all of the circumstances. It may be that the factual evidence which the respondent persuaded the FTT not to hear (on the grounds that it was unnecessary) would have included evidence relevant to that question. The experts had not investigated the cause of the problems with the meters which remained unknown, although they noted that Switch2 had recommended for some considerable time that it be properly investigated. On behalf of the respondent Mr Bates emphasised that the meters were not under its control, but belonged to the freeholder, and Switch2 was the freeholder's agent, not the respondents. Since the respondent and the freeholder are companies within the same group and since Switch2 certainly acted for the respondent in preparing statements for the leaseholders those may not be points of significance, but the fact remains that FTT was not asked to consider whether there might be a general rule prohibiting estimation but subject to an exception in the event of a meter malfunction.

The respondent's case

67. Mr Bates submitted first that the availability of accurate meter readings was not a condition precedent to the appellant's liability to make payment for energy or other services consumed under clause 3.2.2. The experts had agreed on a method of assessment of energy consumed which compensated for the occurrence of faulty meter readings (which in any event were less prevalent than had previously been understood). The revised invoices had now been sent out, but the appellant had not yet expressed any view on them. Once the appellant accepted that the use of estimated readings was permissible for a reasonable period if the meters were known to be unreliable there was no real challenge to the decision of the FTT in paragraph 88 of its decision. The Tribunal should therefore confirm that the demands were compliant with clause 3.2.2 and then it should be left to the experts to agree how much of the sums demanded were due (applying their previously agreed methodology in the light of the Tribunal's decision on the remaining issues). If agreement was not reached the parties should

restore the application for further consideration by the FTT as it had indicated in paragraph 92 of its decision.

Discussion and conclusion

68. As already explained above, clause 3.2.2 imposes two different obligations, the first being to pay the whole cost of direct energy and services consumed within the apartment, and the second to pay a share or proportion of the cost of gas and electricity consumed by the central Plant to generate hot and chilled water for the air conditioning systems serving the upper floors.

69. The obligation to pay for direct energy is expressed in entirely general terms, with no indication of how the sum payable for energy consumed is to be ascertained. The appellant is clearly correct that that sum payable must be referable to consumption, but there is no express requirement that consumption must be measured using any particular method. No doubt it was contemplated that, initially at least, the meters installed in the apartments would be the basis of assessment, but I agree with Ms Mattsson that the parties cannot be taken to have assumed that the meters would always provide a reliable measure of consumption. For one thing, the possibility of a temporary malfunction was readily foreseeable, and for another, each underlease is for a term of 999 years and the use during that exceptionally long term of some different approach to measuring consumption cannot have been excluded. As far as direct energy is concerned, therefore, I do not accept Ms Mattsson's submission that an accurate measurement using the four meters in the apartment is a condition of the leaseholder's liability to pay for energy consumed.

70. In practice clause 3.2.2 anticipates a demand for payment by the supplier of the electricity, gas or water, so the onus is on the supplier to state how much energy has been consumed. The supplier is likely to base its demand on meter readings, but if the meters are believed to be faulty there is nothing in the language of the clause which prohibits consumption from being ascertained in some other way, including by a genuine estimate.

71. If, on receiving a demand for payment, the leaseholder considers that the sum demanded was not a proper reflection of the amount of energy consumed in the apartment it might refuse to pay and challenge the supplier to establish the level of consumption during the period to which the demand related. If agreement could not be reached it would be for the supplier to prove to the satisfaction of a court or tribunal, if necessary, how much energy had been consumed. Like any other question of fact to be determined in a civil court or tribunal, that question would fall to be proved on the balance of probability.

72. An energy supplier who was put to proof of consumption, but who could not rely on meter readings, might seek to prove that there was an earlier period for which reliable meter readings were available and to base an assessment of consumption on that period. It might be a reasonable inference that, all other things being equal, the amount of energy consumed in one year would be much the same as the amount consumed in a previous year.

73. If such a supplier was able to provide proof of consumption in that way, the onus would pass to the consumer to show that there was some reason why consumption measured accurately in a previous period could not be relied on as a reliable means of assessing consumption in the period in question. The consumer might do so by showing that the meters had always been faulty, or that the apartment had been empty or occupied less intensively in

one of the periods, or that weather conditions had been very different. If the consumer was unable to rebut the inference that proven usage in an earlier period was a reliable guide to consumption in the period under consideration, the appropriate finding of fact for the court or tribunal would be that, on balance, the sum claimed fairly represented the cost of energy consumed during that period.

74. In their joint statement the parties' experts agreed that it would be reasonable to use a previous period of consumption, making adjustments for seasonal and occupancy issues, as the best method of estimating consumption for flats with unreliable meter readings.

75. For these reasons I do not agree that the only method of determining consumption is by using accurate meter readings for the period of assessment, although that is obviously the best method. Consumption is a question of fact which can be proved on the balance of probability by any method capable of arriving at a figure which is more likely to be correct (or at least more likely to be conservative) than to be excessive. In principle, therefore, a demand for payment based on an estimate of direct electricity or water consumed in an apartment is capable of being a valid demand.

76. Is the leaseholder's obligation to pay the Apartment Energy Charge any different?

77. As a matter of construction of the underlease, the ascertainment of the Apartment Energy Charge requires the use of meters. It is a charge payable for a proportion of the Residential Energy Charge which is itself a charge for a proportion of the electricity and gas consumed by the central air-conditioning Plant serving the whole Building; in each case the relevant proportion is to be "evidenced by meters installed for the purpose of measuring such consumption".

78. The FTT considered that evidence of consumption from meters could include "evidence of past consumption where no actual readings could (reasonably) be obtained." I initially found that a difficult proposition to accept, because the evidence which the meters were intended to provide was clearly evidence of consumption during the period to which the demand for payment related and, moreover, a process of *measurement* of that consumption (rather than estimation) was contemplated. It did not seem to me to be easy to regard consumption proved only by inference from a measurement taken in a different period, and subject to adjustments to reflect changes in circumstances, as falling within the various expressions which define the Apartment Energy Charge.

79. Despite these misgivings I have come to the conclusion that the FTT was correct to allow the possibility that, exceptionally, where reliable readings were not available, the evidence of consumption on which an apportionment could be based would include evidence of consumption in a previous period. The meters installed in the Building are a tool which should not be allowed to assume a disproportionate significance. It would be wrong to make performance of the leaseholder's substantive obligation to pay for energy referable to the heating and cooling of its own apartment dependent on the reliability of the meters. I note, as did the FTT, that in its guidance on the resale of gas and electricity, OFGEM, the independent energy regulator, stipulates that where electricity is supplied by a reseller through a meter which does not accurately record the number of units used, the reseller must use reasonable endeavours to estimate what proportion of the total bill each tenant should pay. While that guidance has no contractual force, it reflects a common sense approach such as reasonable

parties are likely to have intended should be adopted in the event of inaccurate meter readings.

80. In any event, even if the obligation to pay the Apartment Energy Charge were to be interpreted as dependent on the availability of accurate metering, the consequence of a malfunction would not be that the leaseholder would be entitled to free energy. To the extent that it made use of the heating and cooling services it would be obliged to make payment on a *quantum meruit* basis. In assessing a *quantum meruit* (i.e. a reasonable sum for a service willingly received in circumstances where it cannot have been intended that no payment would be required) it would be necessary to estimate the amount of energy consumed. That requirement seems to me to point towards a limited process of estimation being permissible in ascertaining the Apartment Energy Charge.

81. I therefore dismiss the appellant's appeal on the first issue. I am satisfied that a demand for payment under clause 3.2.2, whether for direct electricity, or for the Apartment Energy Charge, is not rendered invalid by being based in part on an estimate of consumption.

Issue 2: Is the fixed charge element of the utilities charges payable by the leaseholders?

82. The fixed charges in issue are the availability charge and the reactive charges which were included in the electricity bills paid by the freeholder, which passed it on to the respondent, and which the respondent seeks to pass on to the leaseholders. The charges for gas also included a standing charge. It is common ground that the other charges concealed within the leaseholders' bills (the climate change levy and commercial rate VAT) are not payable.

83. The availability charge was found by the FTT to be a charge to secure the availability of electricity to the Building" levied by the energy supplier. The reactive charge was found to be a charge made by the electricity supplier based on the efficiency of the equipment in a building. The standing charge for gas was a charge covering the supplier's cost of maintaining its installations in the Building and managing the supply. All three charges were included by Switch2 in its calculation of the Apartment Energy Charge which appeared on the statements as separate charges for heating and cooling.

84. The appellant's case was that these charges were not charges for electricity or gas consumed or metered and so could not fall within clause 3.2.2. Moreover, they were charges which were not incurred for the benefit of the residential parts of the Building, but only because part of the Building was in commercial occupation by the Marriott hotel.

85. The FTT rejected the appellant's case on this issue, and I am satisfied that it was correct to do so for the reasons it gave. Those reasons were essentially that the availability charge was incurred because electricity was supplied in bulk to the Building as a whole, as it had been when the underleases were granted, not through any choice of the freeholder but simply because that was how the Building had been designed. Having taken a lease in a building designed in that way, the leaseholders could not avoid part of the necessary cost of procuring a supply of electricity. There was no evidence to support the assertion by the leaseholders that the availability charge was required only because of the energy consumed by the hotel.

86. The same reasoning applied to the reactive charge, which was a levy for the supply of electricity to this Building in which the appellant had chosen to take leases of apartments. It was not suggested that the reactive charge was incurred as a result of any breach by the freeholder or the respondent of any obligation.

87. In the case of gas, a building in exclusively residential occupation might have incurred a standing charge at a lower rate, but this was not such a building. The OFGEM guidance recommended that standing charges be divided amongst all occupiers in proportion to usage, which appeared to the FTT to be the approach adopted by Switch2.

88. I find that reasoning convincing and I am satisfied that the cost of electricity and gas recoverable under clause 3.2.2 properly includes an apportioned part of the availability charge, the reactive charge and the gas standing charge. On the evidence electricity and gas were supplied inclusive of these charges because of the characteristics of the Building, and they were simply part of the cost of receiving the supply. There was no evidence that the charges could have been avoided.

89. I also note the approach taken to charges of this type by OFGEM, the independent energy regulator, in its current (October 2005) guidance on the resale of gas and electricity. The maximum resale price for electricity for domestic use is the same price as that paid by the reseller, including any standing charges. The guidance gives a number of examples of how this price should be calculated and in one of these (8a) it is assumed that electricity is purchased in kVA units thus attracting an availability charges and maximum demand charges. OFGEM treats these charges as part of the permitted resale price. That approach is supportive of the view that the charges are simply part of the cost of electricity supplied.

90. I note in passing that it is said by the appellant that the unit rate agreed by the experts as payable for direct electricity exceeds the maximum resale price permitted by the OFGEM guidance (which has statutory force by reason of section 44, Electricity Act 1989). That was not a point put to the experts when they gave evidence, and the FTT made no finding in the light of their apparent agreement. Although there is no evidence that the OFGEM rate was exceeded, I nevertheless agree with Ms Mattsson's submission that an agreement between experts cannot sanction a breach of the general law (section 44). When they apply their agreed approach, the experts should therefore limit the unit rate payable by the leaseholders to the rate paid by the reseller (including in that rate the availability and reactive charges. As the OFGEM guidance acknowledges, however, arriving at a single unit rate for supplies of gas and energy can be complex because different tariffs apply to different parts of the supply and seasonal or retrospective adjustments may be required. The duty of the re-seller is said by OFGEM to be to "use reasonable endeavours to make an estimate of the applicable unit price" and to explain its calculation to the consumer. If, with the benefit of the FTT's decision on issues of principle and the assistance of the experts, the parties are still unable to agree the appropriate unit rate, it will be necessary for the application to be restored for further consideration by the FTT.

Issue 3: Is the Switch2 standing charge payable by the leaseholders?

91. The third issue argued on the appeal concerned a "standing charge" which appeared on Switch2's statements for each apartment. It is not clear how this 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. It was demanded by the respondent as part of the charges payable under clause 3.2.2 of the underlease.

92. The FTT found that this charge was not payable under clause 3.2.2. 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. It followed that it was not open to the respondent to treat the Switch2 standing charge as part of the utility charge payable within 7 days of demand under clause 3.2.2.

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.

94. In paragraphs 76 and 77 of its decision the FTT considered the consequences of the standing charge never having been included as part of the service charge. It said this:

> "76. … we do not see that Switch2's charges have been properly demanded or set out under the terms of the lease. If this were the end of the matter, then it would appear therefore that section 20(B) Landlord and Tenant Act 1985 would apply to some previous charges meaning that they are not payable by [the appellant].
>
> 77. However, it appears to us that this is all circumvented by clause 2.4 of the lease. Under the terms of that clause the leaseholders covenant to pay, *on demand*, any other sums due to the Lessor. Switch2's charges have been demanded. Even therefore if not correctly demanded under clause 3.2.2, the sums are payable pursuant to clause 2.4."

95. The term on which the FTT relied, clause 2.4, is part of the reddendum (the part of the lease reserving payments of rent). So far as is relevant clause 2 grants the term of 999 years and continues:

> "PAYING THEREFOR during the Term the following rents:-
>
> 2.1 [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 3.2.2
>
> 2.4 on demand any other sum due under the terms hereof
>
> 2.5 [VAT]"

96. For the appellant Ms Mattsson submitted that once it was accepted that the Switch2 charge could be recovered as part of the service charge, reliance on clause 2.4 was obviously impermissible. It related to "any other sum" and so could not be used as an alternative route for demanding payment of something which was not "other" but ought to have been included in the service charge.

97. I agree with Ms Mattsson's submission and I do not think the FTT was entitled to find that sums recoverable as service charges could additionally be demanded and become immediately payable by virtue of clause 2.4. If that interpretation of clause 2.4 was correct it would be hard to see what would prevent the respondent from demanding reimbursement of all service charge expenditure under the same clause, thereby circumventing the accounting and collection provisions in Part B of Schedules 4 and 5.

98. On his oral argument on behalf of the respondent Mr Bates did not seek to support the FTT's route to recovery of the Switch2 charges. He argued instead that the charges were either payable on demand under clause 3.2.2 or were payable as a service charge; in the latter case he submitted that the respondent's omission to take account of the charge when estimating its total expenditure service charge payable by quarterly instalments on account, did not prevent it from including the charge in its end of year accounting.

99. In support of his argument that the Switch2 standing charge was within clause 3.2.2 Mr Bates referred to the Tribunal's decision in *Waverley Borough Council v Arya* [2013] UKUT 0501 (LC) in which, after reviewing a series of authorities it was said that in principle the cost incurred by a landlord in arranging for the provision of services and in managing their delivery could properly be regarded as part of the cost of providing the service, but that it was necessary in every case to have regard to any limitations which the particular lease imposed on the categories of expenditure to which the service charge was intended to relate. There was no reason in principle, Mr Bates submitted, why the cost of reading the meters could not be regarded as part of the cost of electricity and gas consumed.

100. I do not accept Mr Bates submission. In agreement with the FTT I consider that the elaborate definition of the Apartment Energy Charge (which is essentially the cost of a quantity of electricity and gas) does not include the cost of employing a consultant to read the meters and calculate the energy bills. The cost of the energy itself would be the same whatever it cost to administer the system. Given that one of the components of the sum payable under clause 3.2.2 does not include administration costs, it would be cumbersome and impractical to treat the other component (direct energy) as including such costs. That is particularly so because, as the FTT pointed out, there are a number of different categories of service charge expenditure within which this cost can readily be accommodated. In Part D of Schedule 4 the cost of entering into contracts for the carrying out of any of the services or other estate management functions is within paragraph 4 and the cost of the supply of fuel for the provision of services is within paragraph 6.

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.

Consequential issues

102. Ms Mattsson invited me to rule on a number of other issues which the FTT had not found it necessary (or in some cases possible) to consider.

103. In her written submissions Ms Mattsson was critical of what she described as the FTT's refusal or failure to decide six of the issues referred to it. That criticism is unjustified. There was no requirement for the FTT to reach conclusions on issues which did not arise because of

its decisions on other issues, and the suggestion that it was wrong not to decide all issues is unsustainable. Nevertheless, some of the issues which the FTT did not feel it necessary to address may now arise because this Tribunal has taken a different view on the Switch2 standing charge, but that does not mean that the FTT was wrong not to decide them. In many cases it will be helpful for a tribunal briefly to express its conclusions on contingent or subsidiary issues (especially issues of primary fact) which would only have arisen if it had reached a different conclusion on some over-arching issue, but a tribunal can rarely be criticised for not doing so. It can certainly not be criticised where the evidence on contingent issues has not been fully investigated at the conclusion of a lengthy hearing, and where it is unclear what the tribunal is being asked to decide, as the FTT recorded was the case on a number of the issues it is now said it should have tackled.

104. If the respondent wishes to recover the Switch2 standing charge it will be necessary for it to include them in an end of year service charge reconciliation, as Mr Bates said it was able to do. It has not yet done so but if it does there are a variety of points which the appellant may wish to take including by relying on section 20B(1) of the 1985 Act to argue that the charges were incurred more than 18 months before they were demanded or by challenging the reasonableness of the service provided. In his statement of case for the appeal Mr Bates informed the Tribunal that any attempt by the leaseholders to rely on section 20B(1) would be met by evidence of notices satisfying section 20B(2). Ms Mattsson asserted that only one such notice had ever been served (not the six pleaded in the respondent's statement of case) and that there was a period from 1 March 2012 to 7 August 2012 to which no section 20B(2) notice related. She invited me to make a determination to that effect and to rule that no charge was recoverable for that period.

105. I am not prepared to determine any issue concerning section 20B in this appeal, which is a review of the decision of the FTT, not a rehearing of the section 27A application. The relevant facts have not been found by the FTT and (in the case of Switch2 charges at least) proper demands have not yet been made. Additionally, detailed issues of quantification may yet arise in these proceedings if the parties cannot now agree the appropriate unit rate, and even after the cost of the utilities supplied has been ascertained the appellant may then ask the FTT to rule that some part of the cost (including the fixed and standing charges) was not reasonably incurred so that its liability should be limited under section 19(1) of the1985 Act. Just as the FTT anticipated in its directions and decision, the resolution of issues of principle does not necessarily mean that all issues of detail have fallen away.

106. I therefore propose to remit the application to the FTT for further consideration in the light of this decision.

The other issues

107. The remaining issues are largely procedural and can be dealt with relatively shortly.

108. The appellant complains that the FTT should have recorded concessions which it says the respondent made during the hearing and issues on which the parties had agreed. Those criticisms are, once again, unjustified and fail to take into account both that the task of the FTT under section 27A of the 1985 Act is to determine what sums are payable, and that it has no jurisdiction to make declarations. If professionally represented parties have reached agreement and wish that to be recorded it is for them to provide a clear statement of what has

been agreed (as the parties in this appeal have subsequently succeeded in doing at the invitation of the FTT).

109. The complaint about unrecorded "concessions" is also misconceived. The FTT is not required to record the evidence or submissions it has heard in minute detail, but only to the extent necessary to enable the reader of its decision to understand how it has resolved the issues in dispute, and why. What appears to one side to be a significant concession may appear to be nothing of the sort to the tribunal, especially in a case where the material presented to it lacks clarity.

110. The last procedural issue arises out of the appellant's submission that it should be entitled to an order that the respondent pay its costs of the proceedings before the FTT under rule 13(1) of the Property Chamber's 2013 Rules. It is not yet clear whether the claim is intended to be pursued against the respondent's representatives for allegedly wasted costs or against the respondent itself for unreasonable conduct of the proceedings. It is submitted by Ms Mattsson in her written argument that the Upper Tribunal has jurisdiction under its own rules (rule 10 of the Tribunal Procedure (Upper Tribunal)(Lands Chamber) Rules 2010 (as amended)) to make an order in relation to the whole of the proceedings, including the proceedings before the FTT. I doubt that very much, especially in a case where the FTT itself has not been asked to consider such an application. It should surely be obvious that the appropriate tribunal to deal first with an application concerning the costs of proceedings, where complaint is made about the manner in which those proceedings have been conducted, is the tribunal before which the hearing took place.

111. Happily, it was agreed that it is not necessary for me to consider the issue of costs further, as the appellant has now made a proper application for costs to the FTT. That application is currently stayed, by the agreement of the parties, to await the outcome of this appeal. I therefore decline to entertain an application in relation to the costs of proceedings before the FTT even if I have jurisdiction to do so. If the appellant considers that there are grounds for an application in relation to the costs incurred in connection with the appeal it may make an appropriate application after it has considered this decision.

Disposal

112. For the reasons which I have given I dismiss the appeal on issue 1 (estimated charges) and issue 2 (fixed charges) but allow it on issue 3 (Switch2 standing charge). I remit the application to the FTT for further consideration and I direct that within six weeks the appellant must apply to the FTT for further directions. The parties should seek to agree draft directions which might usefully include a stay of proceedings to enable their experts further time to quantify the sums payable (subject to the various defences open to the appellant).

Martin Rodger QC
Deputy Chamber President

19 December 2016

UPPER TRIBUNAL (LANDS CHAMBER)

Neutral Citation Number: [2016] UKUT 0553 (LC)
Case No: LRX/127/2015

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT – SERVICE CHARGES – liability of underlessees to pay for utilities "consumed" – meters believed to be unreliable – whether underlessees liable to pay bills based on estimated consumption – determination of unit rate – whether standing charges and other fixed charges properly included – whether recoverable charges limited by OFGEM guidance – appeal allowed in part

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

BETWEEN:

EAST TOWER APARTMENTS LIMITED

Appellant

- and -

NO.1 WEST INDIA QUAY (RESIDENTIAL) LIMITED

Respondent

Re: East Tower Apartments,
No.1 West India Quay,
London E14

Before: Martin Rodger QC, Deputy Chamber President

Royal Courts of Justice

London WC2A

On 1 September and 29 November 2016

Ms Lina Mattsson, instructed by Penningtons Manches LLP, for the appellant
Mr Justin Bates, instructed by King & Wood Mallesons, for the respondent

The following case is referred to in this decision:

Waverley Borough Council v Arya [2013] UKUT 0501 (LC)

Introduction

1. This is a dispute about payments for gas, electricity and water supplied to apartments in a building now known as No 1 West India Quay, London E14 ("the Building") pursuant to the long leases of 42 apartments granted by the respondent to the appellant in 2004. The installations for the supply and metering of energy within the Building are sophisticated but have proved to be unreliable, at least as far as the metering of energy is concerned. The terms of the leases under which the appellant is required to pay for the utilities provided for its benefit are also sophisticated, but they have proved to be difficult to implement. The result has been a dispute which has spawned numerous issues and sub-issues, conducted at very considerable expense, which has now been grinding on since 2009.

2. On 18 June 2014 the appellant made an application to the First-tier Tribunal (Property Chamber) (the FTT) seeking a determination under section 27A, Landlord and Tenant Act 1985, of its liability to pay invoices for heat, cooling, electricity, domestic hot water, standing charges and VAT for the period from 31 May 2008 to 31 December 2013 supplied in respect of the apartments which it owned in the Building. The period under consideration was subsequently extended by agreement to 31 October 2014. A recognised tenants association was subsequently added as a party to the application, but it did not participate actively either before the FTT or on the appeal.

3. After a hearing lasting 3 days during which the FTT conducted a site visit, heard expert evidence and was addressed at length by experienced counsel, it delivered a decision (in its final form) on 1 September 2015 in which it determined 6 out of a list of 15 issues which had been prepared by counsel for the appellant. The FTT explained that the remaining issues had either been agreed by the parties' experts or had ceased to be contentious by the conclusion of the hearing.

4. Permission to appeal was given by this Tribunal on 12 January 2016. At the hearing of the appeal the appellants were represented (as they had been before the FTT) by Ms Lina Mattsson and the respondents by Mr Justin Bates, both of counsel. I am grateful to counsel and their instructing solicitors for the considerable assistance they have provided the Tribunal.

The Building

5. The Building comprises 32 floors and was completed in 2004 for West India Quay Development Company (Eastern) Limited, which is still the freeholder. On 5 August 2004 the freeholder granted a headlease of part of the Building for a term of 999 years to the respondent, a company which I was told is part of the same group as, or otherwise connected to, the freeholder. The head lease is of the 158 residential apartments and common parts on the 13th to 32nd floors of the Building; I will refer to these floors as the upper floors. Shortly after taking the headlease the respondent granted individual underleases of 42 of the 158 apartments in the Building to the appellant.

6. The appellant's underleases (and the underleases of the other apartments on the upper floors) are in a standard form which obliges the lessee to pay for utilities consumed in the apartment itself, and for utilities consumed in the provision of heating and cooling to the apartment and the common parts of the upper floors through central service installations. The

underleases also oblige the lessees to pay a service charge as a contribution towards the cost of other services.

7. The lower floors of the Building, from the ground to the 12th floor, are occupied by the Marriott Hotel group; on these floors Marriott operates a hotel and occupies a further 47 apartments. I will refer to these as the lower floors, without distinction between the hotel and the apartments. I was not told the terms on which Marriott occupies the lower floors, but I was informed that the freeholder and the respondent are both part of, or connected to, the Marriott group. In the basement of the Building there is a car park, the use of which is shared between the leaseholders and Marriott, with the leaseholder of each apartment having a separate lease of a parking space in the car park.

The respondent's headlease of the upper floors

8. By clause 2.2 of the headlease of the upper floors the respondent is obliged to pay the freeholder a service charge calculated in accordance with Schedule 4. The service charge comprises 53% of the freeholder's expenditure on a conventional range of services provided to the Building. These are listed in Part D of Schedule 4 and include maintaining the structure, decorating the exterior, services relating to good estate management and professional fees in relation to the provision of services or calculation of service charges, outgoings and electricity and gas.

9. The respondent is also required by clause 3.2.2 to contribute towards the cost of energy. This obligation is in two parts. The first requires the respondent "to pay for all electricity gas water telephone and other data supplies and facilities consumed within the Demised Premises". The clause does not specify to whom these payments are to be made, but it is obvious that they must be made to the supplier of the particular service, whether that be the freeholder or a third party.

10. The second limb of clause 3.2.2 of the headlease requires the respondent to pay for energy consumed in the generation of heating and cooling for the upper floors of the Building by the central service installations (referred to as "Plant" in the headlease). This sum is referred to as the "Residential Energy Charge", an expression defined in clause 1.6 as:

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

The expression "AC Energy" used in the definition of the Residential Energy Charge is itself defined in clause 1.6 as:

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

11. By clause 3.2.2 the Residential Energy Charge is to be paid to the freeholder (or as it directs) and the payment is to be made:

"within 15 working days of written demand thereof (supported by reasonably sufficient evidence of the amount of AC Energy consumed in the Demised Premises for the relevant period)."

The appellant's underleases of individual apartments on the upper floors

12. The underleases of the apartments on the upper floors of the Building are for terms of 999 years less three days from June 24, 2004. The form of the underleases closely follows the form of the respondent's headlease and each obliges the underlessee to pay, amongst other sums: a service charge in respect of the residential common parts and the car park ascertained and payable in accordance with Part B of Schedules 4 and 5 respectively (clause 2.2); a sum referred to as the Apartment Energy Charge in accordance with clause 3.2.2 (clause 2.2); and, on demand, "any other sum due under the terms hereof" (clause 2.4).

13. The services are described in Parts C and D of Schedule 4 and include costs relating to good management, fees payable to third parties in connection with management, the provision of services, the calculation of service charges, the costs of the supply of electricity, gas, oil or other fuel for all purposes in connection with the residential parts of the Building and any incidental costs. They are payable under Part B by a simple scheme of quarterly provisional payments on account based on estimates by the respondent's surveyor with a balancing sum payable once the total annual expenditure has been ascertained.

14. Clause 3.2.2 of the underlease is structured in the same way as the same clause in the headlease. It first requires the lessee to pay for "all electricity gas water telephone and other data supplies and facilities consumed within the Demised Premises" [i.e. the individual apartment]. It also requires the lessee to pay the Apartment Energy Charge to the Lessor (or as it might direct). This charge relates to the cost of supplying hot and chilled water to the air conditioning systems in the Demised Premises, and is payable within 7 days of written demand but, unlike the corresponding provision of the headlease, there is no requirement that the demand be supported by evidence of the amount of energy consumed in the Demised Premises for the relevant period.

Metering the supply of utilities to the Building

15. The arrangements for the supply of utilities and the metering of consumption are at the heart of this appeal.

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").

21. The FTT (whose decision was seen in draft by the parties before it was finalised) recorded that Switch2 was employed by the freeholder, and that was the position adopted by Mr Bates at the hearing before me, although the respondent's statement of case for the appeal stated that Switch2 carried out its functions on its behalf. This confusion is symptomatic of a general lack of clear boundaries between the roles and responsibilities of the freeholder, Marriott, and the respondent, which in turn may be a reflection of their common ownership; for example, I was shown invoices for the supply of electricity to the whole Building by the utility supplier which were addressed to Marriott Hotels Ltd.

Bulk supply invoicing

22. Invoices for the supply of electricity to the whole Building show that the charge by the utility suppliers to the freeholder comprised three elements: energy charges, a levy charge and VAT.

23. The invoiced energy charges were based on metered consumption, for which different unit rates were applied to day units and night units. The energy charges also included sums which were not directly related to consumption: an availability charge (a sum charged by the utility provider to guarantee the availability of a certain level of supply) which seems to have fluctuated in different periods from zero to sums of several thousand pounds; a standing charge of a few pounds per day; and a reactive charge, which represents about 1% of the bill and is connected to the efficiency of the energy supply and metering systems in the Building.

24. The levy charge included in the supplier's invoices referred to the climate change levy (CCL), which was charged at a flat rate per unit of electricity consumed. In one quarterly invoice delivered in 2008, for example, the CCL of almost £4,000 represented about 4.3% of the total bill.

25. CCL and VAT were charged on the energy charges. VAT was charged at the prevailing standard commercial rate which has variously been 15%, 17.5% and 20% during the period in question.

Invoicing individual leaseholders

26. The role of Switch2 was to read the meters, calculate the sums payable by each occupier and prepare a statement itemising the charges. These statements were then delivered by the respondent's managing agents accompanied by an application for payment of the total sum containing additional information required by statute.

27. The content of the statements and applications for payment can be illustrated by one example. On 8 October 2008 Wood Management delivered a request for immediate payment of £635.53 for utilities to the appellant as leaseholder of apartment 2202 and its car parking space for the period from 31 May to 31 August 2008. The request was accompanied by a statement provided by Switch2 which purported to show the current and previous meter readings for heating, cooling, (direct) electricity and domestic hot water. The number of units consumed was shown to which a unit rate was applied to provide charges for each service. By far the greatest charge was in respect of electricity (meaning "direct" electricity consumed within the apartment) which accounted for £512.31, with heating and cooling (charges for the air conditioning plant) representing less than £75. A standing charge to cover Switch2's costs of reading the meters and calculating the sums due (which in this example was £18.59) was added to the utility charges producing a total of £605.27. VAT was stated in the Switch2 calculation to be 0.0%, but the managing agents invoice added VAT at 5% to arrive at the final charge of £635.53.

28. Any approach to apportioning the bulk charges for utilities supplied to the Building amongst its various occupiers had to be formulated in the light of at least three problems.

29. The first problem was that, by 2008, some of the meters recording consumption in certain parts of the Building were known to be defective; it was therefore necessary for to make estimates of the usage for certain areas and, eventually, for the whole of the upper floors. Up to March 2012 Switch2 estimated the consumption of energy for those apartments where it had reason to believe the meters were faulty, but used actual meter readings for the remainder. From March 2012 to October 2014 the respondent considered that so many of the meters were unreliable that it was preferable to base the charges for all of the apartments on estimated consumption (which may have been made by its own managing agents, Marathon Estates, rather than by Switch2). In arriving at estimates historic consumption data was used so that the charges for one year were based not on consumption in that year but in an earlier year which was assumed to provide a reasonably accurate guide.

30. The second problem was that the sub-meters do not record all of the energy consumed in the Building. For reasons which are not fully understood a proportion of the energy supplied through the bulk meters is "lost" within the Building (i.e. it is consumed or dissipated without being recorded by any sub-meter). In deciding what unit rate to charge individual leaseholders for the energy consumed in their apartments Switch2 sought to recoup the cost of this lost energy although there was no reason to believe that it had been consumed in those apartments.

31. 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 CCL and VAT at the standard rate) but which are not payable by domestic consumers (who are exempt from the CCL and who pay VAT on energy at a reduced rate of 5%).

32. The process by which Switch2 calculated the utilities charges for each apartment was not clear from the statements delivered to the leaseholders. It now seems that the dominant consideration in calculating the unit rate shown in the invoices was to ensure that the respondent and the freeholder recouped from the apartment leaseholders the full cost of providing energy to the Building, except to the extent that the energy was confirmed to have been consumed by the hotel or otherwise accounted for by usage on the lower floors. The unit rate therefore took account not only of the cost of the energy consumed in an apartment but also a contribution towards the additional charges levied by the utility companies (in the case of electricity the availability charge, the reactive charge, the supplier's standing charge and the CCL), a contribution towards the "lost" energy, and a contribution towards the standard rate VAT charged by the utility company. None of this was apparent from the bills received by the leaseholders.

33. One consequence of the way in which the unit rate was determined was that during some periods VAT was effectively being charged to the leaseholders at an aggregate rate of 26%. This was because concealed within the unit rate calculated by Switch2 was VAT at the commercial rate of 20% which was paid by the freeholder to the utility suppliers; a further 5% VAT charge at the domestic rate was then added by the managing agent to the sum shown in Switch2's statements when they delivered their requests for payment.

34. These anomalies only became clear with the benefit of disclosure of the suppliers' invoices by the respondent and investigation by the experts witnesses instructed by both parties.

The revised invoices

35. At the hearing before the FTT in July 2015 evidence was given by a representative of Switch2 who suggested that, contrary to the previous understanding of the parties' experts, reliable information may still be capable of being retrieved from the meters for the period from March 2012. In the light of that evidence the respondent subsequently undertook further investigations with the assistance of its expert, Mr Hamilton. Two weeks before the hearing of the appeal in September 2016 the respondent issued new invoices for the whole of the period from May 2008 to October 2014 which are said to be based on the methodology agreed between the experts for determining appropriate unit rates. These revised invoices are said to rely on actual meter readings for the period after March 2012, where only estimates had previously been used. The recalculated invoices for some apartments suggest that the respondents have been overcharged in the past for energy consumed, while those for other apartments suggest that they have been undercharged.

36. The appellant stopped paying for utilities some years ago because of the dispute over the accuracy of the bills (although it has paid for a number of apartments, under protest, as a condition of the respondent's cooperation in connection with their proposed sale). There has, so far, been no consideration by the appellant of the revised invoices and (given that years of overpayment have been followed by years of refusal to pay) it is not apparent which of the parties is likely now to be owed money by the other.

The FTT proceedings

37. The appellant's application to the FTT sought a determination of the amount payable for heat, cooling, electricity, domestic hot water, standing charges and VAT for the period from 31 May 2008 to 31 December 2013. In advance of the hearing experts instructed by the parties, Mr Hamilton for the respondent and Mr Lowndes for the appellant, were able to reach agreement on a number of issues.

38. The matters which were agreed and recorded between the experts included that approximately 10% of the meters in the apartments were unreliable, and that the domestic hot water meter had not registered consumption at all during the period under consideration (and no charge had been raised by Switch2). They agreed that where the meter readings were known to be faulty it was reasonable to base bills on estimated consumption. They agreed that VAT and CCL costs had been wrongly charged to the leaseholders and should not be included as part of their bills.

39. The experts also arrived at an agreed method of calculating an appropriate unit rate for electricity using the metering system available in the Building which stripped out the inappropriate charges. They did not agree what the appropriate unit rate should be since that depended, amongst other things, on the FTT's determination of whether the fixed charges could be recouped. They were nevertheless able to quantify the effect of the agreed errors and the respondent's expert, Mr Hamilton, calculated that for the period 31 May 2008 to 1 March 2012 the appellant had been overcharged by £61,016.56.

40. Mr Hamilton and Mr Lowndes were called to give evidence before the FTT and both parties were given the opportunity to cross-examine them. No attempt was made by the appellant in cross-examination to undermine the matters on which the experts had reached agreement. In particular it was not suggested to either expert that the methodology they had agreed upon for ascertaining the appropriate unit rate for electricity was based on some misconception or error of law.

41. No witnesses of fact gave evidence to the FTT. The respondent's counsel, Mr Bates, had successfully submitted to the tribunal that factual evidence would not be of assistance in determining the issues of principle which were all that prevented the experts from reaching agreement on the appropriate charges.

The FTT's decision

42. The FTT determined 6 issues. It was unable to specify the sums payable by the appellant for utilities between 2008 and 2014, despite that being the question posed by the application. Neither party had approached the hearing with evidence of specific figures but instead each invited the FTT to determine issues of principle. This approach had been sanctioned by the FTT at the last of a series of case management hearings, on 19 March 2015, at which it directed meetings of expert witnesses "to thrash out the core issue" with a view "if necessary, [to] having a determination from the Tribunal on areas which the experts cannot agree".

43. The "core issue" to which it had previously referred, and which the FTT did determine, was whether as a matter of contract demands for utility charges based on estimated

consumption (as opposed to properly metered consumption) were valid. The appellant had submitted that it was obliged to pay only for consumption which was evidenced by current meter readings. For reasons which I will explain later the FTT rejected the appellant's case and held that estimates based on historic meter readings were permissible.

44. The FTT also decided that there was a contractual obligation on the leaseholders to pay fixed charges for all fuels so that that the respondent was entitled to include the fixed charges for electricity and gas in the unit rates charged to leaseholders. The standing charge representing a contribution towards Switch2's services was also payable. Finally the FTT decided that there was nothing in the guidance issued by OFGEM on maximum resale prices for electricity which prevented the respondent from relying on estimated readings.

45. The FTT stated in paragraph 39 that it would not address all 15 of the issues which the appellant's counsel had listed in her skeleton argument, but only those which appeared to it to be in dispute by the conclusion of the hearing. Some of the issues had been overtaken by agreements reached by the experts or by the parties, some did not arise because of the FTT's decisions on other points, or could not be determined because no cross examination had been directed to them when the experts gave evidence. The final issue, a proposed claim by the appellants for an award of costs under rule 13 of the Property Chamber Rules 2013, was not yet the subject of an application and (correctly in my view) was not determined by the FTT for that reason.

46. In its decision at the conclusion of the final hearing the FTT noted the progress made by the experts in agreeing a method of apportionment between the upper and lower floors of the Building and of estimating figures for consumption by individual apartments where meters were faulty. It was now for the experts to implement their agreement in light of the tribunal's conclusions on the issues of principle and to agree the appropriate figures. If agreement could not be reached the FTT suggested that a further application could be made to it.

Issues

47. Permission to appeal was sought by the appellant on 6 grounds, three of which concerned the non-determination of issues which had appeared to the FTT not to arise for one or other of the reasons given in paragraph 45 above. The first ground concerned the FTT's refusal to hear oral evidence to enable it to determine the appellant's application for costs under rule 13. Permission to appeal was refused on that issue, since no costs application had been made to the FTT. Permission was given on the remaining grounds. The three substantive issues arising out of the matters which the FTT did decide were the following:

1. Are the leaseholders required by clause 3.2.2 of the underleases (or otherwise) to pay utility charges based on estimated rather than metered consumption?

2. Is the fixed charge element of the utilities charges payable by the leaseholders?

3. Is the Switch2 standing charge payable by the leaseholders?

48. Whether any of the other issues left underdetermined by the FTT will arise for consideration in this appeal will depend on the answer to those three substantive questions.

Issue 1: Are the appellants required by clause 3.2.2 of the underleases (or otherwise) to pay utility charges based on estimated rather than metered consumption?

49. The background to this issue is that for a period of 20 months from March 2012 to October 2014 the respondent's agents delivered only two requests for payment for utilities charges and in each case the requests were based on estimates of consumption. On 7 February 2014 a request for payment was made for each apartment for charges for the period from 1 March 2012 to 31 December 2013, and on 27 November 2014 a further request for the period from 1 January to 31 October 2014 was made. The estimated consumption on which both requests were based was derived from actual consumption as shown by the apartment meters in a 15 month period from December 2010 to March 2012.

50. The respondent claims to be entitled to payment of the sums requested under clause 3.2.2 of the underlease, which it is therefore necessary to consider in some detail.

Clause 3.2.2

51. Clause 3.2.2 of the underlease is a covenant by the leaseholder:

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

52. It can be seen that clause 3.2.2 is in two parts.

53. The first part is an obligation to pay for electricity etc "consumed within the Demised Premises". It therefore relates to what has been termed "direct" electricity and other direct utilities (although there is no supply of gas to the individual apartments). Electricity consumed to provide electric lighting and to operate domestic appliances is within the first limb. The obligation is, implicitly, to pay the supplier of the commodity which in the case of water and electricity would appear to be the respondent. The clause does not say when payment is to be made but this omission is supplied by clause 2.4 which provides that sums payable to the Lessor other than ground rent, service charges and the Apartment Energy Charge are payable on demand.

54. The second part of clause 3.2.2 is the obligation to pay the Apartment Energy Charge within seven days of demand. To understand this obligation it is necessary to consider four defined expressions.

55. The "Apartment Energy Charge" is defined in clause 1.6 of the underlease. It means:

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

56. The expression "AC Energy" used in that definition (which I assume is shorthand for "air conditioning energy") is itself defined in the same clause as meaning:

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

57. The "Residential Premises" are the apartments and other areas for residential use (roof terraces, corridors etc) on the upper floors of the Building (the thirteenth to thirty-second floors).

58. Finally, the "Residential Energy Charge" is an expression defined in the headlease which I have referred to in **paragraph 10 above.** It is the cost of that proportion of AC Energy attributable to the heating and chilling water for use in the air conditioning systems serving the upper floors of the Building "as evidenced by meters installed for the purpose of measuring such proportions".

59. With the assistance of these various definitions it can be seen that the Apartment Energy Charge is intended to represent the cost of that proportion of the total AC Energy i.e. the gas and electricity consumed by the central plant in the Building to generate hot and chilled water to operate the air conditioning systems serving the upper floors, as is referable to the operation of the air conditioning systems in the individual apartments. The second limb of clause 3.2.2 requires the leaseholder to meet that cost.

The FTT's conclusion

60. At paragraph 80 of its decision the FTT recorded that the appellant's submission was that no payment was due for consumption not evidenced by meter readings.

61. The FTT disagreed. It said that the relevant terms of the underlease were plain and workable. Clause 3.2.2 was the important obligation and it did not require the provision of evidence of consumption.

62. It also considered that the definitions of AC Energy and Residential Energy Charge, each of which required that consumption be "evidenced by meters", did not import a similar requirement into the calculation of the Apartment Energy Charge.

63. Finally, the FTT did not consider that the meter readings referred to needed be contemporaneous with the period covered by the payment. At paragraph 88 of its decision the FTT explained that:

> "Evidence from meters could mean evidence of past consumption where no actual readings could (reasonably) be obtained."

The appellant's case

64. The appellant's case is that clause 3.2.2 does not permit estimated bills based on past consumption. The leaseholder's obligation under the first limb of clause 3.2.2 is to pay for utility supplies "consumed" within the apartment; such consumption must be proved by reference to the individual apartment meters. Estimates unrelated to consumption recorded by the meters during the period to which the bill relates cannot form the basis of a valid demand. The various layers of the definition of the Apartment Energy Charge also showed that the

contribution towards the cost of operating the air-conditioning system must also be based on meter readings. Moreover, the appellant says, if the FTT's decision to the contrary is correct, it will be liable to pay utilities charges based on estimated consumption for the remaining 987 years of the underlease terms, which is clearly contrary to the intention of the parties when the underleases were entered into.

65. In the course of oral argument I asked Ms Mattson whether the parties must be taken to have assumed that the meters in the building would never malfunction or, if not, what they must be taken to have intended in the event of one or more meters giving false readings. Since the meter readings are the basis of an apportionment, an inaccurate reading given by even a single meter could potentially falsify the calculation for every apartment. Ms Mattsson's answer was that the parties must be taken to have anticipated the possibility of breakdown, for example if the Building was struck by lightning or if there was a software malfunction. The experts had agreed a more accurate method of estimating consumption based on occupancy information, external temperature readings and other data. It would therefore be permissible, in the event of a malfunction, for the respondent to substitute a reasonable estimate of consumption for such period as was reasonable in all the circumstances.

66. The possibility that there might be limited circumstances in which demands based on estimates of consumption would be contractually compliant was not put to the FTT although it did refer in paragraph 88 to circumstances in which "no actual readings could (reasonably) be obtained." It was not asked to determine whether the period for which the respondent relied on estimated consumption was a reasonable period in all of the circumstances. It may be that the factual evidence which the respondent persuaded the FTT not to hear (on the grounds that it was unnecessary) would have included evidence relevant to that question. The experts had not investigated the cause of the problems with the meters which remained unknown, although they noted that Switch2 had recommended for some considerable time that it be properly investigated. On behalf of the respondent Mr Bates emphasised that the meters were not under its control, but belonged to the freeholder, and Switch2 was the freeholder's agent, not the respondents. Since the respondent and the freeholder are companies within the same group and since Switch2 certainly acted for the respondent in preparing statements for the leaseholders those may not be points of significance, but the fact remains that FTT was not asked to consider whether there might be a general rule prohibiting estimation but subject to an exception in the event of a meter malfunction.

The respondent's case

67. Mr Bates submitted first that the availability of accurate meter readings was not a condition precedent to the appellant's liability to make payment for energy or other services consumed under clause 3.2.2. The experts had agreed on a method of assessment of energy consumed which compensated for the occurrence of faulty meter readings (which in any event were less prevalent than had previously been understood). The revised invoices had now been sent out, but the appellant had not yet expressed any view on them. Once the appellant accepted that the use of estimated readings was permissible for a reasonable period if the meters were known to be unreliable there was no real challenge to the decision of the FTT in paragraph 88 of its decision. The Tribunal should therefore confirm that the demands were compliant with clause 3.2.2 and then it should be left to the experts to agree how much of the sums demanded were due (applying their previously agreed methodology in the light of the Tribunal's decision on the remaining issues). If agreement was not reached the parties should

restore the application for further consideration by the FTT as it had indicated in paragraph 92 of its decision.

Discussion and conclusion

68. As already explained above, clause 3.2.2 imposes two different obligations, the first being to pay the whole cost of direct energy and services consumed within the apartment, and the second to pay a share or proportion of the cost of gas and electricity consumed by the central Plant to generate hot and chilled water for the air conditioning systems serving the upper floors.

69. The obligation to pay for direct energy is expressed in entirely general terms, with no indication of how the sum payable for energy consumed is to be ascertained. The appellant is clearly correct that that sum payable must be referable to consumption, but there is no express requirement that consumption must be measured using any particular method. No doubt it was contemplated that, initially at least, the meters installed in the apartments would be the basis of assessment, but I agree with Ms Mattsson that the parties cannot be taken to have assumed that the meters would always provide a reliable measure of consumption. For one thing, the possibility of a temporary malfunction was readily foreseeable, and for another, each underlease is for a term of 999 years and the use during that exceptionally long term of some different approach to measuring consumption cannot have been excluded. As far as direct energy is concerned, therefore, I do not accept Ms Mattsson's submission that an accurate measurement using the four meters in the apartment is a condition of the leaseholder's liability to pay for energy consumed.

70. In practice clause 3.2.2 anticipates a demand for payment by the supplier of the electricity, gas or water, so the onus is on the supplier to state how much energy has been consumed. The supplier is likely to base its demand on meter readings, but if the meters are believed to be faulty there is nothing in the language of the clause which prohibits consumption from being ascertained in some other way, including by a genuine estimate.

71. If, on receiving a demand for payment, the leaseholder considers that the sum demanded was not a proper reflection of the amount of energy consumed in the apartment it might refuse to pay and challenge the supplier to establish the level of consumption during the period to which the demand related. If agreement could not be reached it would be for the supplier to prove to the satisfaction of a court or tribunal, if necessary, how much energy had been consumed. Like any other question of fact to be determined in a civil court or tribunal, that question would fall to be proved on the balance of probability.

72. An energy supplier who was put to proof of consumption, but who could not rely on meter readings, might seek to prove that there was an earlier period for which reliable meter readings were available and to base an assessment of consumption on that period. It might be a reasonable inference that, all other things being equal, the amount of energy consumed in one year would be much the same as the amount consumed in a previous year.

73. If such a supplier was able to provide proof of consumption in that way, the onus would pass to the consumer to show that there was some reason why consumption measured accurately in a previous period could not be relied on as a reliable means of assessing consumption in the period in question. The consumer might do so by showing that the meters had always been faulty, or that the apartment had been empty or occupied less intensively in

one of the periods, or that weather conditions had been very different. If the consumer was unable to rebut the inference that proven usage in an earlier period was a reliable guide to consumption in the period under consideration, the appropriate finding of fact for the court or tribunal would be that, on balance, the sum claimed fairly represented the cost of energy consumed during that period.

74. In their joint statement the parties' experts agreed that it would be reasonable to use a previous period of consumption, making adjustments for seasonal and occupancy issues, as the best method of estimating consumption for flats with unreliable meter readings.

75. For these reasons I do not agree that the only method of determining consumption is by using accurate meter readings for the period of assessment, although that is obviously the best method. Consumption is a question of fact which can be proved on the balance of probability by any method capable of arriving at a figure which is more likely to be correct (or at least more likely to be conservative) than to be excessive. In principle, therefore, a demand for payment based on an estimate of direct electricity or water consumed in an apartment is capable of being a valid demand.

76. Is the leaseholder's obligation to pay the Apartment Energy Charge any different?

77. As a matter of construction of the underlease, the ascertainment of the Apartment Energy Charge requires the use of meters. It is a charge payable for a proportion of the Residential Energy Charge which is itself a charge for a proportion of the electricity and gas consumed by the central air-conditioning Plant serving the whole Building; in each case the relevant proportion is to be "evidenced by meters installed for the purpose of measuring such consumption".

78. The FTT considered that evidence of consumption from meters could include "evidence of past consumption where no actual readings could (reasonably) be obtained." I initially found that a difficult proposition to accept, because the evidence which the meters were intended to provide was clearly evidence of consumption during the period to which the demand for payment related and, moreover, a process of *measurement* of that consumption (rather than estimation) was contemplated. It did not seem to me to be easy to regard consumption proved only by inference from a measurement taken in a different period, and subject to adjustments to reflect changes in circumstances, as falling within the various expressions which define the Apartment Energy Charge.

79. Despite these misgivings I have come to the conclusion that the FTT was correct to allow the possibility that, exceptionally, where reliable readings were not available, the evidence of consumption on which an apportionment could be based would include evidence of consumption in a previous period. The meters installed in the Building are a tool which should not be allowed to assume a disproportionate significance. It would be wrong to make performance of the leaseholder's substantive obligation to pay for energy referable to the heating and cooling of its own apartment dependent on the reliability of the meters. I note, as did the FTT, that in its guidance on the resale of gas and electricity, OFGEM, the independent energy regulator, stipulates that where electricity is supplied by a reseller through a meter which does not accurately record the number of units used, the reseller must use reasonable endeavours to estimate what proportion of the total bill each tenant should pay. While that guidance has no contractual force, it reflects a common sense approach such as reasonable

parties are likely to have intended should be adopted in the event of inaccurate meter readings.

80. In any event, even if the obligation to pay the Apartment Energy Charge were to be interpreted as dependent on the availability of accurate metering, the consequence of a malfunction would not be that the leaseholder would be entitled to free energy. To the extent that it made use of the heating and cooling services it would be obliged to make payment on a *quantum meruit* basis. In assessing a *quantum meruit* (i.e. a reasonable sum for a service willingly received in circumstances where it cannot have been intended that no payment would be required) it would be necessary to estimate the amount of energy consumed. That requirement seems to me to point towards a limited process of estimation being permissible in ascertaining the Apartment Energy Charge.

81. I therefore dismiss the appellant's appeal on the first issue. I am satisfied that a demand for payment under clause 3.2.2, whether for direct electricity, or for the Apartment Energy Charge, is not rendered invalid by being based in part on an estimate of consumption.

Issue 2: Is the fixed charge element of the utilities charges payable by the leaseholders?

82. The fixed charges in issue are the availability charge and the reactive charges which were included in the electricity bills paid by the freeholder, which passed it on to the respondent, and which the respondent seeks to pass on to the leaseholders. The charges for gas also included a standing charge. It is common ground that the other charges concealed within the leaseholders' bills (the climate change levy and commercial rate VAT) are not payable.

83. The availability charge was found by the FTT to be a charge to secure the availability of electricity to the Building" levied by the energy supplier. The reactive charge was found to be a charge made by the electricity supplier based on the efficiency of the equipment in a building. The standing charge for gas was a charge covering the supplier's cost of maintaining its installations in the Building and managing the supply. All three charges were included by Switch2 in its calculation of the Apartment Energy Charge which appeared on the statements as separate charges for heating and cooling.

84. The appellant's case was that these charges were not charges for electricity or gas consumed or metered and so could not fall within clause 3.2.2. Moreover, they were charges which were not incurred for the benefit of the residential parts of the Building, but only because part of the Building was in commercial occupation by the Marriott hotel.

85. The FTT rejected the appellant's case on this issue, and I am satisfied that it was correct to do so for the reasons it gave. Those reasons were essentially that the availability charge was incurred because electricity was supplied in bulk to the Building as a whole, as it had been when the underleases were granted, not through any choice of the freeholder but simply because that was how the Building had been designed. Having taken a lease in a building designed in that way, the leaseholders could not avoid part of the necessary cost of procuring a supply of electricity. There was no evidence to support the assertion by the leaseholders that the availability charge was required only because of the energy consumed by the hotel.

86. The same reasoning applied to the reactive charge, which was a levy for the supply of electricity to this Building in which the appellant had chosen to take leases of apartments. It was not suggested that the reactive charge was incurred as a result of any breach by the freeholder or the respondent of any obligation.

87. In the case of gas, a building in exclusively residential occupation might have incurred a standing charge at a lower rate, but this was not such a building. The OFGEM guidance recommended that standing charges be divided amongst all occupiers in proportion to usage, which appeared to the FTT to be the approach adopted by Switch2.

88. I find that reasoning convincing and I am satisfied that the cost of electricity and gas recoverable under clause 3.2.2 properly includes an apportioned part of the availability charge, the reactive charge and the gas standing charge. On the evidence electricity and gas were supplied inclusive of these charges because of the characteristics of the Building, and they were simply part of the cost of receiving the supply. There was no evidence that the charges could have been avoided.

89. I also note the approach taken to charges of this type by OFGEM, the independent energy regulator, in its current (October 2005) guidance on the resale of gas and electricity. The maximum resale price for electricity for domestic use is the same price as that paid by the reseller, including any standing charges. The guidance gives a number of examples of how this price should be calculated and in one of these (8a) it is assumed that electricity is purchased in kVA units thus attracting an availability charges and maximum demand charges. OFGEM treats these charges as part of the permitted resale price. That approach is supportive of the view that the charges are simply part of the cost of electricity supplied.

90. I note in passing that it is said by the appellant that the unit rate agreed by the experts as payable for direct electricity exceeds the maximum resale price permitted by the OFGEM guidance (which has statutory force by reason of section 44, Electricity Act 1989). That was not a point put to the experts when they gave evidence, and the FTT made no finding in the light of their apparent agreement. Although there is no evidence that the OFGEM rate was exceeded, I nevertheless agree with Ms Mattsson's submission that an agreement between experts cannot sanction a breach of the general law (section 44). When they apply their agreed approach, the experts should therefore limit the unit rate payable by the leaseholders to the rate paid by the reseller (including in that rate the availability and reactive charges. As the OFGEM guidance acknowledges, however, arriving at a single unit rate for supplies of gas and energy can be complex because different tariffs apply to different parts of the supply and seasonal or retrospective adjustments may be required. The duty of the re-seller is said by OFGEM to be to "use reasonable endeavours to make an estimate of the applicable unit price" and to explain its calculation to the consumer. If, with the benefit of the FTT's decision on issues of principle and the assistance of the experts, the parties are still unable to agree the appropriate unit rate, it will be necessary for the application to be restored for further consideration by the FTT.

Issue 3: Is the Switch2 standing charge payable by the leaseholders?

91. The third issue argued on the appeal concerned a "standing charge" which appeared on Switch2's statements for each apartment. It is not clear how this 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. It was demanded by the respondent as part of the charges payable under clause 3.2.2 of the underlease.

92. The FTT found that this charge was not payable under clause 3.2.2. 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. It followed that it was not open to the respondent to treat the Switch2 standing charge as part of the utility charge payable within 7 days of demand under clause 3.2.2.

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.

94. In paragraphs 76 and 77 of its decision the FTT considered the consequences of the standing charge never having been included as part of the service charge. It said this:

> "76. … we do not see that Switch2's charges have been properly demanded or set out under the terms of the lease. If this were the end of the matter, then it would appear therefore that section 20(B) Landlord and Tenant Act 1985 would apply to some previous charges meaning that they are not payable by [the appellant].
>
> 77. However, it appears to us that this is all circumvented by clause 2.4 of the lease. Under the terms of that clause the leaseholders covenant to pay, *on demand*, any other sums due to the Lessor. Switch2's charges have been demanded. Even therefore if not correctly demanded under clause 3.2.2, the sums are payable pursuant to clause 2.4."

95. The term on which the FTT relied, clause 2.4, is part of the reddendum (the part of the lease reserving payments of rent). So far as is relevant clause 2 grants the term of 999 years and continues:

> "PAYING THEREFOR during the Term the following rents:-
>
> 2.1 [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 3.2.2
>
> 2.4 on demand any other sum due under the terms hereof
>
> 2.5 [VAT]"

96. For the appellant Ms Mattsson submitted that once it was accepted that the Switch2 charge could be recovered as part of the service charge, reliance on clause 2.4 was obviously impermissible. It related to "any other sum" and so could not be used as an alternative route for demanding payment of something which was not "other" but ought to have been included in the service charge.

97. I agree with Ms Mattsson's submission and I do not think the FTT was entitled to find that sums recoverable as service charges could additionally be demanded and become immediately payable by virtue of clause 2.4. If that interpretation of clause 2.4 was correct it would be hard to see what would prevent the respondent from demanding reimbursement of all service charge expenditure under the same clause, thereby circumventing the accounting and collection provisions in Part B of Schedules 4 and 5.

98. On his oral argument on behalf of the respondent Mr Bates did not seek to support the FTT's route to recovery of the Switch2 charges. He argued instead that the charges were either payable on demand under clause 3.2.2 or were payable as a service charge; in the latter case he submitted that the respondent's omission to take account of the charge when estimating its total expenditure service charge payable by quarterly instalments on account, did not prevent it from including the charge in its end of year accounting.

99. In support of his argument that the Switch2 standing charge was within clause 3.2.2 Mr Bates referred to the Tribunal's decision in *Waverley Borough Council v Arya* [2013] UKUT 0501 (LC) in which, after reviewing a series of authorities it was said that in principle the cost incurred by a landlord in arranging for the provision of services and in managing their delivery could properly be regarded as part of the cost of providing the service, but that it was necessary in every case to have regard to any limitations which the particular lease imposed on the categories of expenditure to which the service charge was intended to relate. There was no reason in principle, Mr Bates submitted, why the cost of reading the meters could not be regarded as part of the cost of electricity and gas consumed.

100. I do not accept Mr Bates submission. In agreement with the FTT I consider that the elaborate definition of the Apartment Energy Charge (which is essentially the cost of a quantity of electricity and gas) does not include the cost of employing a consultant to read the meters and calculate the energy bills. The cost of the energy itself would be the same whatever it cost to administer the system. Given that one of the components of the sum payable under clause 3.2.2 does not include administration costs, it would be cumbersome and impractical to treat the other component (direct energy) as including such costs. That is particularly so because, as the FTT pointed out, there are a number of different categories of service charge expenditure within which this cost can readily be accommodated. In Part D of Schedule 4 the cost of entering into contracts for the carrying out of any of the services or other estate management functions is within paragraph 4 and the cost of the supply of fuel for the provision of services is within paragraph 6.

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.

Consequential issues

102. Ms Mattsson invited me to rule on a number of other issues which the FTT had not found it necessary (or in some cases possible) to consider.

103. In her written submissions Ms Mattsson was critical of what she described as the FTT's refusal or failure to decide six of the issues referred to it. That criticism is unjustified. There was no requirement for the FTT to reach conclusions on issues which did not arise because of

its decisions on other issues, and the suggestion that it was wrong not to decide all issues is unsustainable. Nevertheless, some of the issues which the FTT did not feel it necessary to address may now arise because this Tribunal has taken a different view on the Switch2 standing charge, but that does not mean that the FTT was wrong not to decide them. In many cases it will be helpful for a tribunal briefly to express its conclusions on contingent or subsidiary issues (especially issues of primary fact) which would only have arisen if it had reached a different conclusion on some over-arching issue, but a tribunal can rarely be criticised for not doing so. It can certainly not be criticised where the evidence on contingent issues has not been fully investigated at the conclusion of a lengthy hearing, and where it is unclear what the tribunal is being asked to decide, as the FTT recorded was the case on a number of the issues it is now said it should have tackled.

104. If the respondent wishes to recover the Switch2 standing charge it will be necessary for it to include them in an end of year service charge reconciliation, as Mr Bates said it was able to do. It has not yet done so but if it does there are a variety of points which the appellant may wish to take including by relying on section 20B(1) of the 1985 Act to argue that the charges were incurred more than 18 months before they were demanded or by challenging the reasonableness of the service provided. In his statement of case for the appeal Mr Bates informed the Tribunal that any attempt by the leaseholders to rely on section 20B(1) would be met by evidence of notices satisfying section 20B(2). Ms Mattsson asserted that only one such notice had ever been served (not the six pleaded in the respondent's statement of case) and that there was a period from 1 March 2012 to 7 August 2012 to which no section 20B(2) notice related. She invited me to make a determination to that effect and to rule that no charge was recoverable for that period.

105. I am not prepared to determine any issue concerning section 20B in this appeal, which is a review of the decision of the FTT, not a rehearing of the section 27A application. The relevant facts have not been found by the FTT and (in the case of Switch2 charges at least) proper demands have not yet been made. Additionally, detailed issues of quantification may yet arise in these proceedings if the parties cannot now agree the appropriate unit rate, and even after the cost of the utilities supplied has been ascertained the appellant may then ask the FTT to rule that some part of the cost (including the fixed and standing charges) was not reasonably incurred so that its liability should be limited under section 19(1) of the1985 Act. Just as the FTT anticipated in its directions and decision, the resolution of issues of principle does not necessarily mean that all issues of detail have fallen away.

106. I therefore propose to remit the application to the FTT for further consideration in the light of this decision.

The other issues

107. The remaining issues are largely procedural and can be dealt with relatively shortly.

108. The appellant complains that the FTT should have recorded concessions which it says the respondent made during the hearing and issues on which the parties had agreed. Those criticisms are, once again, unjustified and fail to take into account both that the task of the FTT under section 27A of the 1985 Act is to determine what sums are payable, and that it has no jurisdiction to make declarations. If professionally represented parties have reached agreement and wish that to be recorded it is for them to provide a clear statement of what has

been agreed (as the parties in this appeal have subsequently succeeded in doing at the invitation of the FTT).

109. The complaint about unrecorded "concessions" is also misconceived. The FTT is not required to record the evidence or submissions it has heard in minute detail, but only to the extent necessary to enable the reader of its decision to understand how it has resolved the issues in dispute, and why. What appears to one side to be a significant concession may appear to be nothing of the sort to the tribunal, especially in a case where the material presented to it lacks clarity.

110. The last procedural issue arises out of the appellant's submission that it should be entitled to an order that the respondent pay its costs of the proceedings before the FTT under rule 13(1) of the Property Chamber's 2013 Rules. It is not yet clear whether the claim is intended to be pursued against the respondent's representatives for allegedly wasted costs or against the respondent itself for unreasonable conduct of the proceedings. It is submitted by Ms Mattsson in her written argument that the Upper Tribunal has jurisdiction under its own rules (rule 10 of the Tribunal Procedure (Upper Tribunal)(Lands Chamber) Rules 2010 (as amended)) to make an order in relation to the whole of the proceedings, including the proceedings before the FTT. I doubt that very much, especially in a case where the FTT itself has not been asked to consider such an application. It should surely be obvious that the appropriate tribunal to deal first with an application concerning the costs of proceedings, where complaint is made about the manner in which those proceedings have been conducted, is the tribunal before which the hearing took place.

111. Happily, it was agreed that it is not necessary for me to consider the issue of costs further, as the appellant has now made a proper application for costs to the FTT. That application is currently stayed, by the agreement of the parties, to await the outcome of this appeal. I therefore decline to entertain an application in relation to the costs of proceedings before the FTT even if I have jurisdiction to do so. If the appellant considers that there are grounds for an application in relation to the costs incurred in connection with the appeal it may make an appropriate application after it has considered this decision.

Disposal

112. For the reasons which I have given I dismiss the appeal on issue 1 (estimated charges) and issue 2 (fixed charges) but allow it on issue 3 (Switch2 standing charge). I remit the application to the FTT for further consideration and I direct that within six weeks the appellant must apply to the FTT for further directions. The parties should seek to agree draft directions which might usefully include a stay of proceedings to enable their experts further time to quantify the sums payable (subject to the various defences open to the appellant).

Martin Rodger QC
Deputy Chamber President

19 December 2016