UPPER TRIBUNAL (LANDS CHAMBER)

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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT – service charges – right-to-buy leases – interpretation – whether "common parts" limited to common parts of individual building or of entire estate – replacement of district heating system under PFI contract – whether lessees liable to contribute to maintenance of replacement system – appeal allowed

IN THE MATTER OF AN APPEAL AGAINST A DECISION OF THE LEASEHOLD VALUATION TRIBUNAL FOR THE LONDON RENT ASSESSMENT PANEL

BETWEEN:

ONE HOUSING GROUP LIMITED	**Appellant**
and	
(1) MR IAN AND MRS JANE KINGHAM **(2) MS JANE BERRYMAN**	**Respondents**

Re: Spinnaker House,
Byng Street,
London E14 8LQ

Before Martin Rodger QC, Deputy President
Sitting at: 45 Bedford Square, London WC1B 3AS
on
20 May 2014

Ranjit Bhose QC instructed by Judge & Priestley, solicitors for the Appellant
Mr Ian Kingham, in person, for the Respondents

The following cases are referred to in this decision:

Holding & Management v Property Holding and Investment Trust [1989] 1WLR 1313 (CA)
Liverpool City Council v *Irwin* [1977] AC 239

DECISION

Introduction

1. In the decision under appeal the Leasehold Valuation Tribunal for the London Rent Assessment Panel ("the LVT") considered an application under section 27A of the Landlord and Tenant Act 1985 regarding the service charges payable by the long leaseholders of two maisonettes in a former local authority block of flats and maisonettes known as Spinnaker House at Byng Street, London E14. Those leaseholders are now respondents to this appeal against the LVT's decision by their landlord, One Housing Group.

2. In the course of its decision the LVT was required to interpret the standard form of lease used since the 1980s by the appellant's predecessor as landlord of Spinnaker House, the London Borough of Tower Hamlets ("LBTH"), when granting long leases to its secure tenants under the statutory right-to-buy regime of the Housing Acts 1980 and 1985. Spinnaker House is one of a large number of residential buildings comprising the Barkantine Estate, which is itself one of four former LBTH housing estates on the Isle of Dogs now owned by the appellant. A large number of the flats and maisonettes on these estates are occupied under the terms of the same standard lease.

3. The appeal is limited to two aspects of the LVT's decision, both of which it had decided against the appellant, namely:

(1) whether the leaseholders are liable to contribute to "estate costs" incurred by the landlord in maintaining communal areas of the Barkantine Estate as a whole, rather than in maintaining the curtilage and immediate environs of Spinnaker House; and

(2) whether the leaseholders are liable to contribute to costs incurred by the landlord in connection with a district heating system known as the Barkantine Heat and Power Scheme, which delivers heat and hot water to 495 homes on the Barkantine Estate.

4. The appellant was granted permission to appeal on these issues (and was refused permission on other issues) by a decision of the Tribunal on 7 June 2013. The appeal was directed to be heard by way of a review with a view to re-hearing.

5. At the hearing of the appeal Mr Bhose QC, who appeared on behalf of the appellant, first explained why, in his submission, the decision of the LVT was wrong and ought to be set aside. Mr Kingham argued that no errors had been identified and that the decision should therefore stand without the Tribunal embarking on a re-hearing. After hearing both parties on the interpretation of the lease I indicated that I would take time to consider whether the LVT's conclusions were correct. In order to avoid the need for the parties to return for a further hearing, I nonetheless undertook a re-hearing immediately and before coming to a final conclusion on the outcome of the review. I then heard further submissions as well as brief evidence from Mr Matthew Saye, a senior employee of the appellant, and from Mr David Wright, who had been familiar with the Barkantine Estate for more than 30 years and who was able to provide some relevant factual evidence.

The Barkantine Estate

6. From the LVT's decision and other documents included in the appeal papers the following uncontroversial facts about the Barkantine Estate emerge. The Estate comprises 25 blocks of flats in various styles. The Estate was formerly owned by LBTH which also owned three further housing estates on the Isle of Dogs. Although built for letting to the local authority's own tenants, the advent of the right to buy scheme in 1980 saw many of the flats, maisonettes and houses on the Estate passing into the hands of private leaseholders.

7. In December 2005 the Estate was transferred, together with LBTH's other Isle of Dogs estates, to Toynbee Island Homes, a housing association which subsequently became part of the appellant One Housing Group. It appears from the evidence that a small number (perhaps 40) of the homes on the Estate were not part of the block stock transfer by LBTH to Toynbee and do not form part of the Estate in the ownership of the appellant.

8. Spinnaker House was constructed in about 1977. At that time it is though to have shared a communal central heating and hot water facility with an adjoining building. The facility relied on a boiler which was thought by Mr Wright (who had known the estate since the early 1980s) to have been housed in a separate building adjoining Spinnaker House.

9. Spinnaker House is at the north western corner of the Estate and is separated from the adjoining public roads by a perimeter wall perhaps 2m tall. On the north side Spinnaker House and its immediate curtilage within the perimeter wall are bounded by Byng Street and on its south side by Strafford Street. The remainder of the Estate lies to the south of Strafford Street.

10. The Estate is crossed by a number of estate roads and footways, shown respectively green and brown on the plan attached to the lease. There are also blocks of garages and parking areas which are let to individual residents.

11. Amongst the communal areas on the Estate there are a number of children's playgrounds. One of these, adjoining Spinnaker House, is now branded as "Spinnaker House Playground" but Mr Saye explained that that designation is employed for ease of identification, and is not intended to limit those who may use the playground to residents of Spinnaker House. Some other playgrounds on the Estate are also designated by the names of adjoining buildings, but others are not and, as far as the appellant is concerned all of the communal areas are provided for the amenity of all of the Estate's residents.

12. In the recent past there have been a number of disputes between the appellant and leaseholders on the Estate concerning service charges for major works and the allocation of costs for certain specific services, in particular those relating to the Common Parts and to the supply of heat and hot water through the Barkantine Heat and Power System.

13. The Barkantine Heat and Power System ("BHP") commenced operation in about 2000 and replaced a former district heating system or systems which provided heat and hot water to the Estate. Not all of the buildings on the Estate benefit from the system, but those which do have been charged an additional sum by the appellant as part of their service charge. The first year in which the additional charge was levied was 2010/11 and the sum claimed from each of the respondents was £343.75 (including VAT).

14. The BHP plant was constructed under the terms of a private finance initiative ("PFI") agreement between LBTH and the London Electricity Board (now EDF Energy) and it is operated by an EDF subsidiary, the Barkantine Heat and Power Company ("BHPCo"). The system is powered by a generating plant located in a separate building at Tiller Road, just outside the boundaries of the Estate. The building and the equipment it houses are owned by BHPCo and energy is supplied through the system to 495 homes on the Estate, as well as to public buildings on the Estate including a school, nursery, leisure centre and community hall. Hot water is pumped around the estate at pressure through a series of pipes which lead to individual buildings including Spinnaker House.

15. The charge which the appellant seeks to include within the service charge is not for the cost of the energy supplied to individual homes but is said to be for the maintenance of the BHP infrastructure (although this description is disputed by Mr Kingham). Each flat which opted to join the system when it was created has its own separate meter into which the resident inserts a pre-payment card to pay for the heat and hot water provided.

The Tower Hamlets standard form of right to buy Lease

16. The Lease of 29 Spinnaker House, which was granted on 20 June 1988 by LBTH to the predecessors of the first respondents, Mr and Mrs Kingham, is in the standard form used by LBTH for right to buy lettings and is for a term of 125 years at a rent of £10 a year. It was common ground that the Lease was not a bespoke document drafted with the flats and maisonettes at Spinnaker House specifically in mind.

17. The Lease begins with a page of particulars which include a recital of the Lessor's registered title No. LN232017. Throughout the document LBTH and its successors (which now include the appellant) are referred to as "the Lessor", the leaseholders or tenants (now the respondents) are referred to as the "Lessee" and the respondents' maisonette is referred to as "the Demised Premises". The whole of the block comprising 1-42 Spinnaker House is referred to as "the Building".

18. Clause 1(10) of the Lease defines the expression "the Common Parts" as comprising:

> "All main entrances passages landings staircases (internal and external) gardens gates access yards roads footpaths parking areas and garage spaces (if any) passenger lifts (if any) means of refuse disposal (if any) and other areas included in the Title above referred to or comprising part of the Lessor's Housing Estate and of which the Building forms part provided by the

> Lessors for the common use of residents in the Building and their visitors and not subject to any lease or tenancy to which the Lessors are entitled to the reversion"

Although the expression "the Lessor's Housing Estate" is employed in the definition of the Common Parts, the Lease contains no separate definition of that expression.

19. Clause 2 records that in granting the Lease the Lessor was acting pursuant to its powers in Part V (the right to buy provisions) of the Housing Act 1985.

20. The Lease includes a covenant or agreement by the lessee to pay the "Service Charge" which is defined in paragraph 1(2) of the fifth schedule as meaning "such reasonable proportion of Total Expenditure as is attributable to the Demised Premises". The expression Total Expenditure was itself defined in paragraph 1(1) of the fifth schedule to mean "the total expenditure incurred by the Lessors in any Accounting Period in carrying out their obligations under clause 5(5) of this Lease …".

21. At clause 5(5) of the Lease the Lessor took on a series of obligations which include, at 5(5)(a)(iii), an obligation to maintain the Common Parts and to keep them in good and substantial repair and condition. The Lessor's other obligations in relation to repair referred only to the Building and no further reference was made to the expression "the Lessor's Housing Estate" which had been employed to in the definition of the Common Parts.

22. The Lease includes two specific covenants by the Lessor relating to heating and hot water. By clause 5(5)(g) the Lessor agreed:

> "To maintain and renew when required any existing central heating and hot water apparatus in the Building and all ancillary equipment thereto other than that contained in and solely serving the Demised Premises."

By clause 5(5)(h) the Lessor also covenanted:

> "To maintain at all reasonable hours through any system existing at the date hereof for the supply of hot water from a central heating system but not otherwise an adequate supply of hot water to the Building and during the period from the first day of October in each year to the last day of April in each succeeding year to provide sufficient and adequate heat to the radiators (if any) for the time being fixed in the Demised Premises or in any other part of the Building unless the Lessors shall be unable to perform this covenant by reason of the act neglect or default of the Lessee… or by reason of any breakdown or interruption of the supply of fuel or current or other cause whatsoever over which the Lessors have no control…"

23. Finally by clause 5(5)(o) the Lessor covenanted:

> "Without prejudice to the foregoing to do or cause to be done all such works installations acts matters and things as in the absolute discretion of the Lessors may be considered necessary or advisable for the proper management maintenance safety amenity or administration of the Building"

24. A further proviso at clause 7(2) provided that:

> "Nothing in this Lease shall impose any obligations on the Lessors to provide or install any system or service not in existence at the date hereof."

25. The Lease granted certain rights to the Lessees which were listed in the second schedule. These were largely conventional rights of access, support, passage of utilities etc. They included at paragraph 1(a) a right of passage on foot over "the Common Parts including the main entrances and the passages landings and staircases leading to the Demised Premises". In addition to this general right of way on foot over the Common Parts a further specific right of passage on foot was granted by paragraph 1(b) "over any footpath serving the Building and the Demised Premises shown coloured brown on the plan annexed hereto or otherwise serving the Lessor's Housing Estate and of which the Building forms part." A right of way with vehicles was granted by paragraph 1(c) over any roadway serving the Building or the demised premises shown coloured green on the plan annexed to the Lease "or otherwise serving the Lessor's Housing Estate and of which the Building forms part." Finally a specific right was granted by paragraph 1(d) "to use the gardens and pleasure ground (if any) with the curtilage of the Building…"

26. The Lease also reserved certain specific rights to the Lessor. These are listed in the third schedule, paragraph 5 of which gives the Lessor the following entitlement:

> "Full right and liberty for the Lessors upon giving one year's Notice to the lessee to discontinue the supply of heat and hot water from the Lessor's District Heating Scheme subject to the Lessors bearing the cost of adaptations to alternative methods of supply of heat and hot water."

Although it the expression "the Lessor's District Heating Scheme" appears in paragraph 5 with capital letters, suggesting that it is a defined term, no other reference to that expression appears in the Lease, nor is the use of the expression qualified by the words "(if any)" or similar as had been done, for example, in clause 5(5)(h).

Issue 1: Estate charges and the extent of the Common Parts

27. The appellant's service charge accounts for the year ending 31 March 2011 divide expenditure into two categories, namely, Block costs and Estate costs. Both categories include sums for cleaning and ground maintenance, rubbish collection and day to day maintenance. The Block costs additionally include building insurance, lift maintenance and a number of other specific items.

28. The sum claimed from the respondents as their contribution towards the Estate costs in 2010/11 was £138.21. In the interim service charge claimed on account for 2011/12 a sum of £1,166.04 was claimed in respect of unparticularised "environmental works" (to which a 15% management fee was added). This figure was treated as being in respect of "Estate costs" and was in addition to other items recoverable as Block costs.

29. The respondents argued before the LVT that the Lease did not impose any liability on them to contribute towards the cost of services provided to the Estate as a whole. Rather, they submitted, their obligation was to contribute to costs incurred by the appellant in connection with the maintenance and repair of the Common Parts (clause 5(5)(a)(iii)) and the Building, but neither of those expressions was defined so as to include areas outside the immediate curtilage of Spinnaker House itself.

30. Both parties agreed that the extent of the leaseholders' liability to contribute towards costs associated with the maintenance of the Barkantine Estate as a whole depended on the proper construction of the expression "the Common Parts". The LVT found this issue a difficult one and after the hearing it gave further directions on 5 July 2012 for the production of further evidence which it was hoped would elucidate the issue. In particular the Tribunal directed the appellant to provide copies of the registered freehold title (LN232017) referred to in the Lease together with a copy of the Land Registry filed plan for that title. The appellant was also directed to produce a plan showing what it considered to be the Barkantine Estate.

31. In response to the LVT's directions the appellant provided further information on 27 July 2012. In a letter from its solicitor the appellant explained that the original title under which Spinnaker House had been held (LN232017) had been closed and the appellant had not yet been able to procure a copy of the filed plan for that title from the Land Registry. A copy of the Land Certificate for the closed title was provided and attention was drawn to the schedule of registered leases which referred to flats in a total of 12 blocks on the Barkantine Estate. The appellants also explained that they considered the Barkantine Estate to comprise all of the property registered under two new title numbers (EGL 500533 and EGL 500532) and it provided copies of the filed plans for each.

32. In paragraph 60 of its decision the LVT was critical of what it described as the appellant's failure to produce the evidence which it had requested. This caused the LVT "great difficulty in reaching a decision as to the extent of "the Common Parts" as defined in the Lease." It went on to explain this difficulty in paragraph 67, as follows:

> "Since the property included in Title Number LN232017 is described by reference to a filed plan and [the appellant] has not produced a copy of the filed plan the Tribunal was not able to ascertain the extent of the property comprised within that title and consequently the Tribunal was not able to determine the full extent of the area falling within the "Common Parts" as defined in the Lease. Therefore for the purpose of this determination the Tribunal construed the "Common Parts" narrowly as being the children's play area and gardens within the walled area surrounding Spinnaker House, the access road, paths and the grassed square to the west of the building but not to the more distant recreational areas, roads and pathways across the Isle of Dogs which the Tribunal finds seem to be provided for the general public and it cannot have been intended that the appellants contribute towards the costs of such remote areas."

33. In paragraph 68 of its decision the LVT addressed the appellant's contention that the Barkantine Estate was all that property comprised in the two registered titles it had produced. The LVT noted, correctly, that the property comprised in one of those registered titles (LN500532) had

not been included in the title referred to in the Lease which had subsequently been closed (LN 232017). This caused the LVT to reach the following conclusion:

> "On the evidence produced the Tribunal was not persuaded by the Respondent's approach and was not certain that the Barkantine Estate comprises all the property registered under title numbers EGL500533 and EGL500532. The Tribunal is of the view that the respondent cannot recover from the applicants the costs incurred in respect of those areas that fall within title no: EGL500532 as an Estate Cost. Due to the paucity of evidence produced the Tribunal was unable to apportion the costs between those costs that fall within the Estate Costs as defined in the Lease and those that do not."

The expression "Estate Costs" is not defined in the lease and I suspect that the reference to that expression in the final sentence of paragraph 68 was either intended to refer to the Total Expenditure to be included in the service charge or to the expression "Common Parts" which is defined in the Lease. In any event it is clear what the LVT was deciding. It had two separate reasons for its conclusion that the leaseholders were not obliged to pay the Estate costs. The first was that the evidence was insufficient to enable the full extent of the Common Parts to be identified; and secondly, part of the Estate to which the costs related was not within the title out of which the Lease had been granted and, to that extent could not in any event form part of the liability of the leaseholders.

34. In his submissions to the Tribunal Mr Bhose QC criticised the LVT's restrictive approach to the task of identifying the extent of the Common Parts. It was clear from the office copy of the Land Certificate for Title LN232017 out of which the Lease had originally been granted, that that title had included at least 12 buildings on the Estate. Even without sight of the filed plan (which the appellants had not been able to produce despite its efforts to obtain it from the Land Registry within the short period requested by the LVT) it was clear that the Common Parts were greater than the area allowed by the LVT. The definition of the Common Parts referred to areas included in title LN232017 and it was abundantly clear that these were not limited to the immediate environs and curtilage of Spinnaker House which the LVT had described in paragraph 67 of its decision.

35. Mr Kingham submitted that the LVT's approach was justified. On the limited evidence available to it, it could not possibly identify the full extent of the Estate. He submitted that in any case the definition of the Common Parts pointed towards a limited area. To come within the definition of the Common Parts in clause 1(10) of the Lease Mr Kingham suggested that an area had to satisfy two conditions, namely:

(a) they must either be within title LN323107 or "within the Lessor's Housing Estate of which the Building forms a part"; and

(b) additionally it must have been "provided by the Lessors for the common use of residents in the Building and their visitors."

36. Mr Kingham submitted that, whatever the true extent of the property comprised within the original title, or encompassed within the expression "the Lessor's Housing Estate", the second of the two conditions limited the scope and extent of the Common Parts. The only areas provided for the use of the residents of Spinnaker House and their visitors were those either within the building itself

or within its immediate curtilage as described by the LVT. Other areas of the Estate were provided for the residents of other buildings, or for the public as a whole. They could not therefore fall within the description of the Common Parts.

37. In interpreting the expression "Common Parts" the following general points seem to me to provide important context.

38. First, as both parties agreed, the Lease was a standard document capable of being used for the letting of residential property of different styles and in different locations, the only common feature of which was that they belonged to LBTH. Although Spinnaker House is no doubt typical of many buildings on former LBTH estates, with the exception of the Particulars page and plans the Lease was not drafted with Spinnaker House specifically in mind.

39. Secondly, Spinnaker House was part of the larger Barkantine Estate, the boundaries of which were capable of ascertainment at the time the Lease was granted. Those boundaries would have been common knowledge at that time. The Lease was granted to someone who had been the secure tenant of the demised premises residing there for at least two years before becoming entitled to exercise the right to buy. The lessee to whom the Lease was granted would therefore already have been very familiar with the Estate. Although, as Mr Kingham pointed out, the lease was intended to be assignable, an assignee is in a position to make enquiries at the point of purchasing the lease to establish the extent of the Estate referred to in the definition of the Common Parts. There was no suggestion that the boundaries of the Estate had changed following the 2006 block transfer to the appellant (although part of the Estate had not been transferred), and the evidence of Mr Wright, who had known the Estate from the early 1980s, corroborated the appellant's own understanding that those boundaries remained as they had been at the date of grant of the Lease.

40. Thirdly, both in their former capacity as secure tenants, and as Lessees under the new Lease, the Lessees would have enjoyed the same use of the Common Parts as the secure tenants of other flats or maisonettes in the building and indeed in the Estate as a whole. As Mr Bhose pointed out, it is not usual for the letting of local authority accommodation to include formal grants of rights over communal areas, but rather a council's secure tenants generally enjoy the use of common areas by virtue of implied rights. An example of this type of tenancy was considered by the House of Lords in *Liverpool City Council* v *Irwin* [1977] AC 239. The tenancy agreement of a flat in a tower block contained no formal grant of rights by the Council to its tenant, and imposed no express obligations on the Council in its capacity as landlord. The only obligations contained in the tenancy agreement were those to be assumed by the tenant. Nonetheless the House of Lords was in no doubt that, for example the lifts and staircases were obviously provided by the council as being necessary amenities for their tenants over which they impliedly gave the tenants and their families and visitors a licence to use.

41. The definition of "the Common Parts" begins with a list of specific areas, some of which are within the Building and some outside it; the list includes entrances, passages and landings as well as gardens, roads and parking areas. These specific areas are then supplemented by two additional and possibly much larger areas which are identified as "other areas included in the Title above referred to

or comprising part of the Lessor's Housing Estate and of which the Building forms part." This recognises the possibility that the area to be described may be comprised in more than one registered title. In such a case, where the Lessor's Housing Estate is a larger area than the area included in the title referred to in the particulars to the lease, the Common Parts will comprise not only the specific entrances, landings, roads, parking areas etc referred to at the beginning of the definition, but may be as large as the housing estate as a whole.

42. At the hearing the parties agreed, correctly in my view, that "the Lessor's Housing Estate" did not refer to the whole of the LBTH residential estate in the most general sense, which would include not only the Barkantine Estate but at least three other housing estates throughout the Borough. It was common ground that the Lessor's Housing Estate was a specific estate, namely the estate "of which the Building forms part", which in this case was the Barkantine Estate. The words "of which the Building forms part" indicate that the draftsman's intention was to identify a specific estate.

43. That large area is then subject to further qualification by the words "provided by the Lessors for the common use of residents in the Building and their visitors and not subject to any lease or tenancy to which the Lessors are entitled to the reversion." In interpreting this limitation I first bear in mind that it focuses on the intention or purpose of the Lessors, LBTH. The areas referred to are described as being "provided by the Lessors for the common use etc." Although the expression is defined in a Lease which grants the lessee specific rights over defined areas, the definition does not refer to those areas or to the grant or exercise of rights at all.

44. The fact that the Common Parts are not defined by reference to areas over which the lessee has been granted rights accords with the description of the Common Parts as areas provided for the use "of residents in the Building and their visitors". It will be remembered that the standard form of lease was intended for use when secure tenants took advantage of the right to buy. The "residents" in the Building referred to in the definition must therefore have been expected to include many who would remain secure tenants and whose use of the Common Parts would not have depended on the grant of rights at all, but simply on their status as secure tenants with the implied licence to use the areas intended for common use.

45. For these reasons I do not think any reliable guide to the extent of the Common Parts is to be found by considering the included rights listed in the second schedule to the Lease. In particular I do not think that paragraph 1(d) of the second schedule, which confers a specific right on the lessee "to use the gardens and pleasure ground (if any) within the curtilage of the Building" provides any assistance in understand the extent of the Common Parts.

46. On the other hand I do not consider that the second schedule to the Lease is irrelevant to this question. Paragraphs 1(b) and (c) of the second schedule grant the Lessee specific rights over footpaths and roads "serving the Building and the Demised Premises shown coloured [brown/green] on the plan annexed hereto or otherwise serving the Lessor's Housing Estate of which the Building forms part". That grant of rights would lead one to expect that the Lessee would assume a corresponding obligation to contribute through the service charge to the upkeep of the same roads and footpaths. If the LVT's narrow approach to the extent of the Common Parts is correct the

Lessee would have no liability to contribute to estate roads other than the road leading from the Building immediately on to Byng Street.

47. There is no evidence that particular areas of the Barkantine Estate were provided by LBTH for the use of residents of Spinnaker House to the exclusion of other residents of the Estate. Particular areas or facilities (for example the staircases, passenger lifts and means of refuse disposal within the Building itself) were no doubt provided with use by the residents of Spinnaker House specifically in mind. Other areas of the Estate could have only have been intended to be provided for the common use of the residents of the Estate as a whole. The Estate roads and footpaths, not being public highway, were for use by all of those who lived on the Estate going to and fro to their own homes. Recreational areas, open spaces and communal gardens cannot sensibly be described as having been provided for the common use of residents in one part of the Estate alone, but simply by virtue of the layout of the Estate and its function of providing accommodation for a long number of people, must have been intended for their collective use, enjoyment and amenity.

48. I do not consider that areas clearly intended for use by residents of the Estate as a whole are, for that reason, any less intended for use by the residents of Spinnaker House and their visitors or that the wider constituency of their users should be a reason for excluding those areas from the scope of the Common Parts. The extensive character of the Estate and the absence of any coherent delineation of areas intended for use by one group of residents as opposed to another, seem to me to make it unlikely that any such distinction was intended. Nor do I consider that the possibility that members of the public who are neither residents of one of the buildings on the Estate or their visitors might make use of Estate roads, footpaths or other facilities detracts from the purpose for which those facilities were provided. I agree with Mr Kingham that the key to identifying the scope of the Common Parts is by reference to those areas provided for the use of residents of Spinnaker House (whether leaseholders or secure tenants) but I do not accept his restrictive interpretation of the areas which fall within that description.

49. Nor do I accept the LVT's reference to "more distant recreational areas, roads and pathways across the Isle of Dogs" as an accurate description of the wider interpretation of the Common Parts which I consider should be adopted in preference to their narrow approach. As both parties agree, "the Lessor's Housing Estate of which the Building forms part" clearly does not means the whole of the LBTH housing stock situated throughout the Isle of Dogs. The alternative to the LVT's construction is not so defuse an area that it "cannot have been intended that the [leaseholders] contribute towards the cost of such remote areas". Rather, the wider construction which I am satisfied is the correct one extends the Common Parts no further than the limits of the Barkantine Estate itself, the unlet and unreserved parts of which, intended for amenity use, were provided by LBTH for common use by the residents of Spinnaker House together with the residents of the other buildings on the Estate.

50. I am therefore satisfied that the LVT defined the Common Parts too narrowly. The LVT was undoubtedly hampered by the absence of the title plan, but it was clear from the office copies of the land certificate even without the plan that the title referred to in the lease contained a much greater area than the LVT allowed. As for the extent of the Barkantine Estate, the plan attached to the title referred to in the lease has been obtained from the Land Registry and, as the LVT anticipated, it

forms part only of the two titles under which the appellant's interest in the Barkantine Estate as a whole is registered. I accept the evidence of Mr Saye, confirmed by Mr Wright, that the appellant's understanding of the limits of the Barkantine Estate accords with the Estate as it existed when the lease was granted in 1988.

51. The LVT excluded the sum of £5,866.10 from the 2010/11 service charge on the grounds that it was related to Estate costs. The respondent's proportion of that total was £138.21 plus the 15% management fee which the LVT found to be reasonable. The cost of environmental works intended to be undertaken in 2011/12 was not separately addressed by the LVT in its decision (although it recorded the respondent's submission that this was an Estate cost item which should be excluded for that reason). I assume the LVT accepted that submission. No other submission of the respondents was recorded by the LVT as exempting them from a liability to contribute to the proposed environmental work. Having found that the LVT defined the scope of the Estate too narrowly, and no further evidence having been adduced on this issue, I am satisfied that the environmental works were properly the subject of the interim service charge. That conclusion does not preclude the respondent or any other leaseholder from challenging the inclusion of the environmental works in the final service charge account on other grounds.

Issue 2: The leaseholders' liability to contribute to costs in connection with the Barkantine Heat and Power Plant

Review of the decision of the LVT

52. The case presented to the LVT by the landlord on the issue of its entitlement to add the cost of running the communal Barkantine Heat and Power Plant ("the BHP Plant") to the service charge was recorded at paragraphs 46-53 of the decision. At paragraph 51 the LVT recorded that the landlord relied on the provisions of the lease, specifically clause 5(5)(a),(g), (h) and (o). In submitting that the LVT's decision was flawed Mr Bhose suggested that this case had simply not been considered by the LVT.

53. In paragraph 65 of its decision the LVT reviewed the evidence and drew attention to some specific features, namely: that it was common ground that the BHP Plant was not within the area of the landlord's registered title; that the BHP charge had not been claimed by LBTH and had been introduced by the appellant for the first time in 2010/11; that the charge was apportioned at a cost per unit which had not been explained; that there was a dispute over whether the leaseholders had been informed in advance that the charge would be included in the service charge; and that the appellant had not complied with the LVT's further directions to provide an explanation of the basis on which the BHP charge was calculated and apportioned. After this review the LVT concluded:

> "Given the lack of evidence as to the basis on which the charges calculated and charged to the leaseholders, and in view of the comments under paragraph 67 below, the Tribunal determined the charge of £14,437.50 in respect of the Barkantine Heat & Power to be unreasonable and so does not allow this charge."

The reference to the LVT's comments under paragraph 67 were to a part of its decision concerning the Common Parts in which it had explained that it was unable to determine the full extent of the Common Parts as defined in the lease and concluded that it should therefore construe the expression narrowly as being limited to the immediate environs of Spinnaker House.

54. As Mr Bhose submitted, the LVT did not address the appellant's case that the BHP costs were recoverable under clause 5(5)(g) or (o). When refusing permission to appeal the LVT confirmed that it had not decided this part of the case on the basis that the BHP charge were not within the sub-clauses of the leases relied on, but solely for the reasons explained in paragraph 65 and 67 of its decision i.e. because of the lack of evidence concerning the basis on which the charges had been calculated, which led the LVT to conclude that the charge was unreasonable, and because the BHP Plant was not part of the Common Parts.

55. As to the first of these reasons, it does not appear to have been part of the leaseholders' case that the BHP costs were unreasonable. As the LVT recorded in paragraphs 23 to 28 of its decision, the leaseholders did indeed rely on the absence of evidence to show what the charge was for, but they did not suggest that it was unreasonable. Rather it was said that charges could not be included in the service charge as the BHP Plant was not within the landlord's title, nor within the estate, nor provided for the use of residents of Spinnaker House or their visitors; in other words, the leaseholders' case was primarily that the BHP Plant was not included in the Common Parts.

56. I am satisfied that it was not open to the LVT to find that the BHP charge was unreasonable, because that was not the basis of the argument presented to it. Moreover the LVT's conclusion that the charge was unreasonable was not explained, nor was it supported by any evidence. In its directions of 26 March 2012 the LVT had required the appellant to provide a greater explanation of the BHP charge, which the appellant attempted to do by its solicitor's letter of 27 July 2012. All that was established by that evidence was that the BHP charges were calculated on the basis of invoices received from LBTH arising out of a contract which it had entered into, and for which the landlord had assumed liability when the block transfer of the Barkantine Estate took place. Two invoices were produced showing the total "annual facilities charge" claimed by LBTH for 2010/11 and it was explained that the total charge was divided equally between all 495 properties which had opted into the BHP service by agreement with LBTH prior to the block transfer. No evidence was presented by any party to suggest that the charge was unreasonable in amount, nor could the material before the LVT have supported a conclusion that the charge had not been reasonably incurred or that the service provided was not of a reasonable standard. The reasonableness of the charge was simply not an issue.

57. The alternative basis on which the LVT reached its conclusion that the charge was not recoverable was that the BHP Plant was not part of the Common Parts. This was an acceptance of the leaseholders' primary argument, but that argument missed the point. It was no part of the appellant's case that the BHP charge was recoverable as expenditure in relation to the Common Parts. The clauses on which the appellant relied dealt specifically with "any existing central heating and hot water apparatus in the Building and all ancillary equipment thereto" (5(5)(g)) and permitted the landlord to undertake other works and installations which it considered necessary or advisable for the proper management maintenance and amenity of the Building (5(5)(o)). Whether the BHP Plant

was located within the boundaries of the Barkantine Estate, or was part of the Common Parts, was simply not relevant to the question whether the maintenance of the BHP Plant fell within either of the provisions relied upon by the Landlord.

58. I am therefore satisfied that the LVT's reasons were not sufficient to support its decision that the charge for the BHP Plant was irrecoverable and did not deal with the justification for the charge relied on by the appellant. The decision was therefore flawed and must be set aside.

The interpretation of clause 5(5)(g)

59. The liability of the leaseholders to contribute to the cost of the BHP Plant depends on whether the "annual facilities charge" which the appellant pays to LBTH is within the scope of the "Total Expenditure" described in paragraph 1(1) of the fifth schedule to the lease.

60. For an item of expenditure to be part of the Total Expenditure it must be incurred by the landlord in carrying out its obligations under clause 5(5) of the lease. The obligations relied on are those in clauses 5(5)(g) and (o).

61. Sub-clause (g) deals solely with maintenance and renewal of "any existing central heating and hot water apparatus in the Building and all ancillary equipment thereto other than that contained in and solely serving the Demised Premises". The covenant therefore imposed an obligation on the landlord to maintain and renew the central heating and hot water apparatus which was present in the Building when the lease was granted in 1988. It also imposed a continuing obligation for the repair of any alternative central heating and hot water system falling within the scope of the covenant. The continuing application of the obligation to different generations of central heating and hot water apparatus is clear for two reasons. First the obligation is to maintain and "renew when required" any existing apparatus, and so it is not limited to the original equipment but includes any renewal of it; and, secondly, the deliberate contrast between "existing" in sub-clause (g) and "existing at the date hereof" in sub-clause (h) indicates that the obligation in (g) was not limited to apparatus existing when the lease was granted.

62. The landlord is therefore under an obligation throughout the 125 years of the term of the lease to maintain and renew when required "the central heating and hot water apparatus in the Building and all ancillary equipment thereto". The issue is whether the maintenance of the BHP Plant is within the scope of that obligation.

63. When considering the extent of the landlord's obligations in relation to the BHP Plant, and the leaseholders' corresponding liability to contribute towards the cost of performing those obligations, one particular feature which creates difficulty is that, for the most part, the apparatus which has been supplied by the landlord in substitution for the original central system is not "in the Building". Although no doubt there are hot water distribution pipes within Spinnaker House, the BHP Plant itself is some distance from the building and, indeed, falls outside the territorial limits of the Barkantine Estate altogether. The question which therefore arises is whether the parties intended that

any replacement of the central heating and hot water system which existed at the date of the lease was to be repaired and maintained by the landlord under sub-clause (g) or whether they intended that obligation to extend only to systems within the Building. If the system was provided outside the Building, as was the BHP Plant, how did the parties intend its continuing maintenance to be dealt with?

64. Before addressing that question it is relevant to consider the statutory context in which the lease was entered into, i.e. in pursuance of the statutory right to buy under the Housing Act 1985. Section 139 of the 1985 Act requires that any lease executed in pursuance of the right to buy shall conform with Parts I and III of Schedule 6 to the Act. By paragraph 14(2)(c) of Part III, where the dwelling house is a flat there is to be implied into the lease a covenant by the landlord to:

> "Ensure, so far as practicable, that services which are to be provided by the landlord and to which the tenant is entitled (whether by himself or in common with others) are maintained at a reasonable level and to keep in repair any installation connected with the provision of those services."

65. The statutory implied covenant is a relevant part of the context or background against which sub-clause (g) of the LBTH standard form of lease should to be construed. The parties entering into the lease are to be taken to have had in mind the statutory right to buy scheme, and LBTH's standard lease would have been drafted in the knowledge that it was required to "conform" with the relevant parts of Schedule 6 of the 1985 Act, including the implied obligations to maintain services at a reasonable level and to keep associated service installations in repair. The draftsman would have been aware that any gaps between his drafting and the statutory terms would be filled by the implication of the statutory term. One would therefore not expect to find any divergence between the statutory implied terms and the express terms of the lease; on the contrary, one would expect clause 5(5)(g) to impose the same obligation as that imposed by paragraph 14(2)(c) of Part III of Schedule 6 to the 1985 Act. The statutory implied covenants may therefore be a helpful reference point when trying to resolve any ambiguity in the meaning of the express covenants in the lease, including in particular clause 5(5)(g).

66. Under the terms of the statutory covenant the landlord is required to repair "any installation connected with the provision of those services" which are to be provided by the landlord. That language seems to me to be wide enough to impose on the landlord an obligation to repair any installation, including a district heating system, through which the landlord performs its obligation to ensure that the services which it provides are maintained at a reasonable level. The statutory implied covenant is not circumscribed by reference to the location of the installation, so the fact that a replacement heating system is not situated in the Building is of no consequence. I have no doubt that the effect of the statutory covenant is that the landlord is under an obligation to keep the BHP system maintained and in repair (an obligation which it may obviously discharge by contracting with a third party for it to repair and maintain the system).

67. It is then necessary to consider whether clause 5(5)(g) is narrower in its effect than the statutory covenant, or simply covers the same ground. I have already explained that the existence of an implied statutory obligation in all right to buy leases would lead me to expect that the express

terms of the agreement would have the same effect. Nonetheless, sub-clause (g) does not appear to have been widely drafted. It refers to "apparatus in the Building" as its primary subject matter. It extends also to "all ancillary equipment thereto". Mr Kingham submitted that "ancillary" equipment in this context might simply mean thermostats or controls on individual units and was not apt to refer to the power generating plant itself. If anything, the apparatus within the Building might be said to be ancillary to the BHP system, rather than the other way round. Although I acknowledged the cogency of that submission I have ultimately been unpersuaded by it, for four related reasons.

68. First, I am satisfied that the renewal of the original district heating system and the repair of the BHP system which replaced it are within the landlord's obligation under the implied statutory covenant. For that reason I would expect the same work to fall within the express obligation imposed by sub-clause 5(5)(g).

69. Secondly, the leases are for a term of 125 years and the parties must have contemplated the likelihood of several different renewals of the central heating and hot water apparatus during the term. They are more likely to have intended that similar obligations would apply to each successive system irrespective of its particular design characteristics. There would be no logic in an agreement that the landlord should be obliged to maintain and renew to the fullest extent the existing apparatus in the Building but not a replacement for that apparatus just because it happened to include components located outside the Building.

70. Thirdly, while one might not most naturally describe the BHP system as "ancillary" (in the sense of subservient, less important or secondary) to the apparatus for heating and hot water in the Building, I do not think such a description is an impossible one.

71. Finally, because of the duration of the Lease and the expectation of successive renewals of the existing system and its replacement with equipment the specific characteristics of which could not be foreseen when the lease was entered into, it is inappropriate to focus too closely on the precise language adopted by the parties to describe the landlord's obligations and better to give greater weight to the more general objective which they demonstrate. I take that general objective to be that the apparatus through which central heating and hot water are made available to the demised premises should be maintained and renewed by the landlord at the tenant's expense. The adoption of too literal a construction of the covenant might create a disincentive to the installation of the most efficient or suitable system available in the future, which is unlikely to have been the parties' intention.

72. For these reasons I have concluded that the cost of maintaining the BHP system is properly to be regarded as part of the appellant's obligation under sub-clause (g), with the result that the costs incurred are properly part of the Total Expenditure describes in paragraph 1(1) of the fifth schedule which is to form part of the Service Charge.

The landlord's alternative case: clause 5(5)(o)

73. If I am wrong in that conclusion, and if, as Mr Kingham submitted, it is impossible to regard the BHP system as ancillary to the central heating and hot water apparatus in the Building, it is necessary to consider whether the same cost may nonetheless properly be regarded as falling within the Total Expenditure, even if it goes beyond the landlord's obligation in sub-clause (g). In my judgement it would, for the second of the reasons advanced by Mr Bhose, namely because it would fall within the scope of the landlord's obligation in sub-clause (o). I will deal briefly with that argument, as it forms only a secondary support for my principal conclusion.

74. Sub-clause (o) obliges the landlord to do works if it considers them necessary or advisable for the proper management, maintenance, safety, amenity or administration of the Building. The clause is drafted in wide terms, referring to "works installations acts matters and things" and so as to be contrasted with the specific subject matter of sub-clauses (g) and (h) which deal with central heating and hot water systems.

75. Ordinarily one would be slow to treat a provision such as sub-clause (o) as intended to cover the same subject matter as has already specifically been dealt with in another covenant (see, for example, *Holding & Management v Property Holding and Investment Trust* [1989] 1WLR 1313 (CA); other examples are discussed in the leading text books (Rosenthal: *Commercial and Residential Service Charges* (2013) at paragraphs 2-55 to 2-72, and Tanfield: *Service Charges and Management* (3rd Edition) (2013) at paragraph 2-005). In this case, however, I have already concluded that the maintenance of the BHP system is part of the landlord's obligation under the lease by virtue at the very least of the implied covenant introduced by paragraph 14(2)(c) of Schedule 6, Housing Act 1985. In those circumstances, even if the same work does not fall within sub-clause (g), there does not seem to me to be any good reason to exclude it from sub-clause (o) if it appears to fall naturally within the scope of that covenant.

76. The BHP system is an installation for the amenity of the Building, by the provision of heat and hot water. The only consequence of excluding it from the scope of sub-clause (o), in circumstances where the same work is required to be done as part of the statutory safety net of covenants implied into every right to buy lease, would be to cast doubt on whether the cost of the work would be recoverable through the service charge. The statutory scheme contemplates only that the cost of complying with the implied covenant "may be" part of a service charge (see paragraph 16A(1)(b) of Schedule 6 to the 1985 Act). Although this provision is permissive ("the lease may require the tenant to bear a reasonable part of the costs incurred") it is clear from the express terms of this lease that the parties intended the costs of compliance with the landlord's covenants to fall generally on the service charge. If the consequence of taking a narrow view of the landlord's obligation under sub-clause (g) is to put at risk the landlord's entitlement to recover the cost of carrying out work which it is its obligation to carry out, the case for including that work within the scope of sub-clause (o) is a strong one.

77. For these reasons I am satisfied that the cost of repairing and maintaining the BHP system should be included within the service charge and that the LVT reached the wrong conclusion on this issue. Unfortunately that conclusion does not enable me yet to make a determination of the extent to which the leaseholders are oblige to contribute towards the annual facilities charge for the BHP

system incurred in 2010-11 which totalled £14,437.50. A number of additional legal and factual issues emerged in the course of the hearing which must first be considered.

Emerging issues

78. In this part of my decision I will comment on two related issues which came into focus only during the hearing of the appeal. They are:

(1) the extent of the leaseholders' liability to contribute towards the capital cost of providing the BHP Plant; and

(2) the relationship between clauses 5(5)(g) and (h) and the landlord's right of discontinuance of the supply of heat and hot water under paragraph 5 of the third schedule to the lease.

(1) The leaseholders' liability to contribute towards the capital cost of providing the BHP Plant

79. In his submissions Mr Kingham questioned whether the full amount of the annual facilities charge could properly be regarded as having been incurred by the appellant in the maintenance of the BHP system, or whether some proportion of it might represent the capital cost of installing the BHP system in replacement for the previous central heating and hot water system. Any such capital cost, he suggested, could not properly be included in the service charge because of a term of the lease which it has not yet been necessary for me to refer to.

80. The term Mr Kingham had in mind is paragraph 5 of the third schedule to the lease. The third schedule lists certain specific rights excepted and reserved to the landlord out of the grant of the demised premises to the tenant. Paragraph 5 of the schedule gives the landlord the right to discontinue the supply of heating and hot water "from the Lessor's District Heating Scheme" subject to giving twelve months notice and subject also to the lessor "bearing the cost of adaptations to alternative methods of supply of heat and hot water."

81. In order properly to explain Mr Kingham's submission it is necessary to refer to the evidence of Mr Saye given on behalf of the appellant, which was not before the LVT but was received by the Tribunal in the course of the re-hearing of the application. Mr Saye explained that the BHP system was installed under the terms of a PFI agreement between LBTH and EDF Energy Group. The system commenced operation in 2000 and was in the eleventh year of the 25 year term of the PFI agreement when the appellant first decided to include a charge for the system in the service charge.

82. When the appellant acquired the housing stock of LBTH by block transfer in December 2005 it agreed to reimburse LBTH for the sums it was liable to pay to EDF under the PFI agreement. The appellant receives invoices from LBTH referring to "Barkantine annual facilities charge ... as per

Transfer Agreement". The PFI contract itself is not in evidence, but the annual facilities charge seems to have been agreed in advance for the full 25 year term of the PFI contract. The only evidence about how the charge was calculated, and what it was intended to cover, is contained in an extract from the Transfer Agreement between the appellant and LBTH which Mr Saye produced. The Transfer Agreement incorporates a schedule of "Barkantine PFI payments" which shows the annual payments for each year from 2000 to 2025. The figure for each year includes a sum described as being for the "maintenance repair and capital replacement" of the system. That figure increases annually by a predetermined amount so it cannot have been intended to be related to actual expenditure in any particular year. That annual sum is supplemented in each year by a further smaller sum referred to in the schedule as "operator", which also increases annually to a predetermined amount. A 15% profit margin is then added to the aggregate of these figures before the "housing share" is calculated. It should be explained that the BHP system serves not only the residential parts of the Barkantine Estate but also other buildings including council offices and community facilities. The "housing share" is 57%. The resulting total is expressed in the schedule (taking the first year as an example) as 109.8 but it seems likely that this represents £109,800 since that amount is then divided amongst the 534 properties referred to in the penultimate line of the schedule to produce a "cost per property" of £205.62.

83. It is unclear from this limited material whether the annual facilities charge is intended not only to meet the cost of running the BHP system (other than the utilities charges paid by the individual subscribers to the system) and replacing it after 25 years, but also to reimburse the capital cost of providing the BHP infrastructure in 2000. Mr Kingham submitted that although any repair and maintenance element of the BHP annual facilities charge may be recoverable through the service charge it was not clear that any part of the charge was for repair and maintenance; his expectation was that maintenance costs were covered by the metered charge payable by individual lessees and that the facilities charge was purely to enable EDF to recoup the capital cost of installing the system. In Mr Kingham's submission any part of the sum due under the PFI agreement which was for the provision of the BHP system itself ought not to be passed on to the leaseholders because it represented the cost of the "adaptations" referred to in paragraph 5 of the third schedule which should be provided by the landlord at its own expense following the discontinuance of the original central system.

84. Mr Kingham's submission assumed that the reference in paragraph 5 of the third schedule to the Lessor's District Heating Scheme was to the original system for the supply of heating and hot water to Spinnaker House which had been discontinued and replaced by the BHP Plant in 2000. That system was also referred to in clause 5(5)(h) by which the landlord agreed to supply hot water and heat "through any system existing at the date hereof for the supply of hot water from a central system but not otherwise." The issue raised by Mr Kingham draws attention to the relationship between these provisions of the lease.

(2) The relationship between clauses 5(5)(g) and (h) and the landlord's right of discontinuance of the supply of heat and hot water under paragraph 5 of the third schedule to the lease

85. It is perhaps unorthodox that the right to give notice to discontinue a supply of heating and hot water which the landlord covenanted to maintain should be contained in a reservation rather than in

sub-clause (h) itself. The relationship between clauses 5(5)(g) and (h) and paragraph 5 of the third schedule is complex and was not fully investigated in the evidence and argument presented to the Tribunal. I draw attention to some specific features of that relationship at this stage.

86. The obligation imposed on the landlord by clause 5(5)(h) is to supply hot water and heat "through any system existing at the date hereof for the supply of hot water from a central system but not otherwise." It therefore differs from the obligation in sub-clause (g) which is limited to maintaining and where necessary renewing the apparatus through which heat and hot water are supplied, but does not extend to the supply of the heat and hot water themselves.

87. The obligation in sub-clause (h) is qualified in a number of significant respects.

88. First, the obligation is conditional on there having been a "central system" for the supply of those services in existence at the date of the lease; absent such a system there would have been no obligation on the landlord to supply hot water and heat at all. It is common ground that there was such a system at Spinnaker House.

89. Secondly, the landlord's obligation to supply hot water and heat was limited to the life of the system which existed at the date of grant of the lease. When that system ceased to be capable of delivering heat and hot water, the landlord did not come under an obligation to supply hot water and heat through any different system. That is clear from the obligation being to deliver the services through "any system existing at the date hereof … *but not otherwise*".

90. Thirdly, the covenant to supply heat and hot water operated only "unless the Lessors shall be unable to perform this covenant by reason of … any breakdown or interruption of the supply of fuel or current or other cause whatsoever over which the Lessors have no control". The effect of that limitation has to be assessed in light of the landlord's obligation under sub-clause (g) to maintain and renew when required "any existing central heating and hot water apparatus in the Building and all ancillary equipment thereto other than that contained in and solely serving the Demised Premises".

91. The lease was granted for a term of 125 years and no central system for the supply of hot water and heat could have been expected by the parties to last for the full length of the term. The parties must therefore have appreciated that, even if the landlord complied with its obligation under clause 5(5)(g) to maintain the original central heating and hot water apparatus, there would come a point when the original system would require to be replaced. That expectation is reflected in the obligation to "renew when required" which would require the landlord to provide new apparatus for the supply of heat and hot water. However, when the original central hot water and heating system reached the point where it could not longer be maintained and had to be replaced, the obligation to maintain a supply of hot water and heating lapsed, because it exists only for so long as the system existing at the date of lease remained available "but not otherwise". The landlord would then remain obliged to maintain the central heating and hot water apparatus in the building and all its ancillary equipment, but not to deliver a supply of hot water and heating through it. The cost of maintaining and renewing the a new system (including, as I have already found, the BHP system) would continue to fall on the service charge by virtue of sub-clause (g).

92. How does the landlord's right under paragraph 5 of the third schedule of the lease to give notice discontinuing the supply of heat and hot water "from the Lessor's District Heating Scheme" relate to its covenants in clauses 5(5)(g) and (h)?

93. If the landlord is permanently unable to supply hot water and heating through the original system for reasons over which it has no control (for example, if despite its best efforts the apparatus is no longer capable of being kept in repair) its obligation under sub-clause (h) must be taken to lapse altogether because it depends on the continuation of the original system. The giving of a notice under paragraph 5 of Schedule 3 to discontinue the supply was also clearly intended to have permanent effect. There may however be a number of important differences between these alternative routes to discontinuance of the heating and hot water supply. I received no submissions on this aspect of the lease, so I make these tentative suggestions without reaching any conclusion and with a view to the parties considering how the remaining issues may best be resolved.

94. The first difference between the alternative means by which the obligation to supply heat and hot water may come to an end is that one (the giving of notice under paragraph 5) is voluntary or elective on the part of the landlord while the other (the impossibility of continuation contemplated by clause 5(5)(g)) is effectively involuntary. If the landlord is no longer able to maintain the supply through the system which existed at the date of grant of the lease for reasons beyond its control its obligation under sub-clause (g) lapses, without the need to give notice of discontinuance; conversely, there would appear to be no need for the continuation of the supply of heating and hot water through the original district heating system to be impossible before the landlord may give notice under paragraph 5 discontinuing it. Discontinuance by notice seems therefore to have been intended to be an unrestricted right of the landlord.

95. The second difference between the two methods by which the landlord's obligation to supply heat and hot water may be discontinued may be in the consequences of discontinuance.

96. The price of discontinuance by notice under paragraph 5 of the third schedule is clearly spelled out and is that the landlord has to bear the cost of "adaptations to alternative methods of supply of hot water and heating". This requires the landlord to pay for the cost of providing such adaptations if it chooses to discontinue the supply through the original central system.

97. Where discontinuance occurs because the landlord is unable to continue to supply heat and hot water through the original system for reasons beyond its control the lease does not impose any express obligation on the landlord to pay for the provision of an alternative system. Nor, provisionally at least, do I think such an obligation could be implied. The obligation to supply heat and hot water is clearly limited by sub-clause (h) to the lifetime of the original central system. In the event of the original system having to be replaced or "renewed" for reasons beyond the control of the landlord, the source of the landlord's obligation to renew can only be sub-clause (g). Costs incurred in performing the landlord's obligations under sub-clause (g) are part of the Total Expenditure which may be included within the service charge.

98. If this analysis of the relationship between the alternative routes by which the supply heat and hot water may be discontinued is correct, it becomes important to identify the basis on which the system present in the building at the commencement of the lease came to be replaced by the BHP system.

99. The suggestion that only part of the BHP payment may be capable of being passed on to the leaseholders through the service charge emerged only in the course of argument and neither party has had the opportunity to consider it fully or to adduce relevant evidence. There are a number of potential issues and arguments: as to the effect of paragraph 5 of the third schedule and its relationship to sub-clause (g) and paragraph 1(1) of the fifth schedule; as to the circumstances in which the previous system was discontinued (in particular whether it had reached the end of its life and could no longer be repaired, or whether it was discontinued pursuant to a notice given under paragraph 5 of the third schedule); as to the terms and effect of the PFI agreement; and, depending on those terms, as to the quantification of the contribution to be made by the leaseholders if paragraph 5 of the third schedule applies so as to make the appellant liable to meet part of the annual facilities charge.

100. These issues of fact and law were not investigated at the hearing before me. Before considering how they may best be resolved I will give the parties the opportunity to take stock and to express their own preferences. The better course may be for these unresolved issues to be referred back to the First-tier Tribunal for it to investigate the relevant facts and consider such arguments as the parties wish to present to it with the benefit of a proper opportunity to consider the issues; alternatively there may be merit in the re-hearing of the original application, of which the Upper Tribunal is now seized, to continue in this Tribunal. I therefore encourage the parties to consider these alternative courses, to seek to reach a consensus, and to submit their further proposals for the resolution of this matter within six weeks of the date of this decision.

101. My decision on this aspect of the appeal is, therefore, limited to determining that costs incurred by the appellant in the maintenance and repair of the BHP system (and in its renewal when required) are properly part of the Total Expenditure which may be taken into account in determining the annual service charge.

Martin Rodger QC

Deputy President

25 June 2014