UPPER TRIBUNAL (LANDS CHAMBER)

UT Neutral citation number: [2012] UKUT 2 (LC)
Case Number: LRX/64/2011

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT – service charge – Landlord and Tenant Act 1985 s.20B – 'costs' are 'incurred' when 'expended' or 'become payable' – gas used from 2001 to 2007 not billed by correct supplier until November 2007 – included in service charge April 2008 – tenant liable

IN THE MATTER OF AN APPEAL AGAINST A DECISION OF A LEASEHOLD VALUATION TRIBUNAL

BETWEEN **OM PROPERTY MANAGEMENT LIMITED** **Appellant**

and

THOMAS BURR **Respondent**

Re: 9 Cambridge Square,
Royal Eastwood Park,
Redhill, RH1 6TG

Before: His Honour Judge Mole QC

Sitting at 43-45 Bedford Square, London, WC1B 3AS
on 12 December 2011

Justin Bates instructed by Ms McQueen-Prince, solicitor for Peverel Property Management Limited
The respondent in person

The following cases are referred to in this decision:
Gilje v Charlgrove Securities [2004] 1All ER 91
Hyams v Wilfred East Housing Co-op Ltd (LRX/102/2005)
Mrs Marie Jean-Paul and another v the London Borough of Southwark [2011] UKUT 178 (LC), *London Borough of Brent v Shulem B Association Ltd* [2011] EWHC1663, and *v Charlgrove Securities* [2004]1 All ER91.
Capital and Counties Freehold Equity Trust Ltd v BL PLC [1987] 2 EGLR 49

DECISION

Introduction

1. Mr Burr, the respondent, owns the leasehold interest in 9 Cambridge Square, Royal Eastwood Park, Redhill and has done since September 2006. This flat is part of a substantial estate known as Royal Eastwood Park, completed by Barratt Homes Ltd in 2000.

2. The appellant, OM Property Management Ltd, is the management company for the estate and a party to Mr Burr's lease. The appellant is responsible for maintaining the communal facilities, which include a leisure centre and swimming pool. The pool is heated by gas. The appellant's duties involve (amongst other things) paying the gas bills. It recovers its costs through a service charge to the leaseholders.

3. At the start of the appellant's management of the estate in April 2001, the developer told the appellant that the gas for heating the pool was supplied by EDF Energy. Gas bills were duly received from EDF and paid by the appellant from 2001 until late 2007. In November 2007 Total Gas and Power informed the appellant that it, not EDF, had been supplying the gas to the development. Worse, a gas meter had been misread and EDF had been undercharging. Total demanded a payment of £135,337.28. A dispute ensued that led to the gas being cut off for some months. Eventually EDF returned the money wrongly paid to it, the appellant paid Total the full amount demanded and Total agreed to reduce by 20% the sums it was claiming. This left £100,289.28, which sum the appellant demanded from the leaseholders in the service charge accounts for 30th of April 2008. Mr Burr's share was £313. 90. He made a part payment of £194.49 under protest and then, on 10 June 2010 issued a claim against the appellant (then known as Peverel O M Ltd) in the Reigate County Court claiming the sum of £200.57 as damages for negligence. He claimed that the appellant was responsible for the mistake with the gas meter and if the proper amount had been included in a service charge at the proper time the previous leaseholder would have shouldered the cost. The Appellant denied the claim and negligence and said that Mr Burr was liable according to the terms of the lease and that the charges due to Total were only incurred when they were invoiced in November 2007. The County Court transferred the proceedings to the Leasehold Valuation Tribunal for determination.

4. With the agreement of the parties the LVT dealt with the application on the basis of their written representations.

5. The chairman of the LVT decided the application on 27th April 2011. After setting out on the submissions of the parties and the law and the LVT said that it had no power to determine allegations of negligence. It was not for it to decide whether it might have been possible for the appellant to discover the correct identity of the gas supplier or whether the bills were too low. The LVT concluded that that under the terms of the lease Mr Burr was liable to take on any outstanding liability that might otherwise have fallen on his predecessor. The LVT also concluded that the charges for the costs of supply of gas to the swimming pool were properly included within the service charge and that the charges for the gas supplied by Total were reasonable.

6. At paragraph 30 the LVT turned to the issue in this case.

> "30. The cost of the gas supply is a relevant cost within the meaning of Section 18 of the Act. The question is when that cost was incurred. Was it incurred when the gas was supplied or was it incurred when Total issued invoices? If it was incurred more than 18 months before a demand for payment of aid service charge was served on the tenant then Section 20B provides that the tenant is not liable to pay those costs unless subsection 2 applies.
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> 31. Section 20B was intended to deal with the problem of stale or historic claims for service charges. In *Gilje v Charlgrove Securities* [2004] 1All ER 91 at paragraph 27 Etherton J said "the policy behind section 20B of the Act is that the tenant should not be faced with a bill for expenditure, of which he or she was not sufficiently warmed to set aside provision."
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> 32. The (appellant) submits that the cost of gas was incurred when Total submitted invoices in November 2007. If that is correct, the policy of the section as set out by Etherton J would be defeated. In a case such as this, whether the fault lies at the door of the supplier or the (appellant), the lessees would face a bill for unanticipated and unbudgeted expenditure unless they are protected by Section 20B.
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> 33. In the normal course of events, there will not be significant delay between gas is being supplied and an invoice being issued and so the question of when the cost is incurred is unlikely to arise. It is only where there has been some sort of unusual occurrence such as here that the issue will arise.
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> 34. The Oxford English Dictionary gives a long entry for "incur" but it includes: "to run, flow, fall or come to or into; to fall (within a period of time, the scope of an argument, etc.)... To devolve or accrue; to supervene... to become through one's own action liable or subject to; to bring upon oneself..."
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> 35. Section 20B refers to the "relevant costs... were incurred". V (appellant) became liable to pay for the gas when the gas was supplied even though it may not have been invoiced until a later date. The cost had been accrued at that time. The Tribunal considers that if the policy of 20B is not to be defeated, then that is the meaning which must be given to the word "incurred". The consequence is that the lessees are not liable to pay for the cost of gas supplied more than 18 months before notification was given to the lessees.
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> 36. The letter dated 23 October 2008 which enclosed a copy of the accounts clearly amounted to a demand for payment of the service charge. The tribunal has considered whether any of the letters from 17th of April 2008 up to that date amounted to sufficient notification so as to satisfy section 20B (2). It concludes that they did not. The letters appear to be a genuine attempt to keep the residents informed of the problem and the attempts to resolve them. The letter dated 24th of June 2008 informed lessees that the total sum of £135, 337.25 had been paid to Total. However, there is no suggestion in any of those letters that the lessees would be required to contribute towards the payment which was being made.
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> 37. In conclusion, the cut off date is 18 months before 23 October 2008, namely 23 April 2007.

7. The LVT then considered the schedule of amounts and sought to apply the cut-off date to it. It's further dealt with a point arising out of the alleged use of the reserve fund to offset gas charges. Neither of those points arise in this case.

Submissions

8. Mr Bates submitted that the case law establishes that costs are "incurred" by the landlord within the meaning of section 20B either when the landlord actually pays the bill or when he becomes contractually obliged to pay it by receiving an invoice. Costs are not "incurred" until at least an invoice is presented; a liability may arise on the provision of goods or services but the landlord is not obliged to pay until a quantified demand is presented. Until then no cost is "incurred." He took me to the authorities of *Hyams v Wilfred East Housing Co-op Ltd* (LRX/102/2005) , *Mrs Marie Jean-Paul and another v the London Borough of Southwark* [2011] UKUT 178 (LC), *London Borough of Brent v Shulem B Association Ltd* [2011] EWHC1663, and *v Charlgrove Securities* [2004]1 All ER91. On either analysis, he submitted, the LVT is wrong because the service charge demand was presented well within 18 months from the first invoice from Total.

9. Mr Burr supported the LVT's decision for the reasons it gave, which were correct, although he was not in a position to offer a detailed analysis of them. He submitted that the policy of the section was to protect tenants from old and unanticipated demands. It was for the landlord or management company to know what the costs were and to make sure that what they paid was the right amount. If they did not do that, they should take the knock.

Law

10. The Landlord and Tenant act 1985, section 20B reads as follows:

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

11. The crucial issue is the proper interpretation of the words "costs…incurred" in those subsections.

12. *Hyams v Wilfred East Housing Co-op Ltd* (LRX/102/2005) was a decision of the President on the 9th of October 2006. This case turned, so far as one point is concerned, upon the interpretation of the phrase "improvement contributions to be payable in respect of costs incurred" in two leases. These were leases granted under the right to buy legislation and the issue arose as to whether or not particular costs had been incurred during the reference period beginning before the start of the lease. Both tenants were arguing that certain costs due under a contract were incurred before the start of the reference period on the dates when invoices had been "received and paid". No distinction in that case appears to have been made between receipt and payment of the invoices as a matter of fact. The

lessor argued that the works were a single project, the amount due was a single sum, and the costs were not finally incurred until the end of the contractual period.

13. The President said:

> "Both Ms Anderson and Mr Baker relied on *Capital and Counties Freehold Equity Trust Ltd v BL PLC* [1987] 2 EGLR 49, in which His Honour Judge Paul Baker QC, sitting as a judge of the High Court, construed "incurred" in a lease to be synonymous with "expended" or "become payable". In my judgment, the appellant's submissions on this issue are correct. The amount in each invoice became payable on the date stated in that invoice, and I cannot see on the evidence before me how it could fail to constitute costs incurred at that date. The invoices are acknowledged to be for work done and certified under the contract. The contract itself was not produced, so that there is nothing to indicate that the liability for the amounts in the invoices were qualified in any way."

14. The President again considered the words "costs... incurred" in the case of *Mrs Marie Jean-Paul and another v the London Borough of Southwark* [2011] UKUT 178 (LC). This time it concerned the interpretation of section 20B. The appellants argued that the demands that had been made had never satisfied the requirements of section 20B because they had not specified the costs which had been incurred, as opposed to an estimated contribution towards those costs. The Council argued firstly that the letters were requests for payments for costs that had been occurred but suggested in the alternative that the costs were only actually incurred for the purposes of section 20B when the final account was rendered by the contractor. This was well within the 18 months time limit. The President referred to Etherton J's statement of the policy behind section 20B in Gilje.

15. The President said:

> "17. The question for decision is whether, if the council were to serve a demand that complied with the provisions of the lease for the amount, £39,049.33, that the LVT has determined to be payable section 20B would operate so as to prevent its recovery. Mr Butler's primary argument was that by the time the letters of 18 October 2005 and 17 February 2006 were sent the council had incurred the totality of the costs, since completion was on 27 August 2005, and the council's liability to pay the total contract amount arose on that date. In my judgment, however, costs are only "incurred" by the landlord within the meaning of section 20B when payment is made. There is clearly a distinction between incurring liability (i.e. an obligation to pay) and incurring costs, and it is the latter formulation that is used in the provision."

16. The President went on to note that some payments under the contract had been made at the time that each letter was sent and the greater part of the payments had been made at the time of the letters sent after completion of the works. It was unclear how much of this the tenants were potentially liable for.

> "The final two payments were made by the council in March 2006 and March 2007, but no demand or other notification was sent to the tenants between the letter of 17 of February 2006 and the demand of 1 October 2008. If any part of these final payments related to works for the cost of which the tenants were potentially liable none of this would be recoverable

because the demand of 1 October 2008 was more than 18 months after the costs were incurred".

17. The case of *London Borough of Brent v Shulem B Association Ltd* [2011] EWHC1663 (Ch) was decided on the 29th of June 2011(that is to say after the case of *Marie Jean-Paul v London Borough of Southwark*.) In this case Morgan J. had to consider an appeal concerning the construction of 20B from the Central London County Court. It is not necessary to consider the facts in any detail. It is sufficient to note that this was not a case in which the precise date when a lessor should be taken to have incurred costs for the purposes of section 20B actually mattered. (See paragraph 24) However several dates were suggested: (1) the date of the certificate; (2) the date of service of the certificate of the lessor; (3) the date of payment of the sum identified in the certificate (if paid within 28 days after the certificate); or (4) the date of expiry of the period of 28 days after the certificate. Morgan J. observed:

> "As it happens, nothing turns on the answer to this question as to precisely when the lessor incurred costs in relation to the subject matter of a particular certificate. The lessor accepts that whichever of the suggested dates is taken as the date on which costs were incurred, those costs were incurred in respect of each of these certificates numbered one to seven more than 18 months before the demand of 15th December 2006."

18. Having said that, I accept that it is possible to read some of the comments made by Morgan J. in paragraph 58 of his judgment as indicating that he thought the costs might be incurred at a date earlier than actual payment. However, this was the passage where he was considering a practical point that was not essential to his decision and, even if it was clear, which it is not, that this was his view, it would be obiter dicta.

19. The LVT particularly relied upon the policy of the act as it understood it from the judgement of Etherton J in the case of *Gilje v Charlgrove Securities* [2004]1 All ER91. However, as the appellant submitted, it is important to read what Etherton J said in context. Firstly, that case arose where tenants had paid a service charge in advance on the basis of the landlord's estimated annual expenditure but the final account was not issued to the tenants until 18 months after the costs had been incurred. The main issue was whether section 20B applied to payments made on account. It was decided that it did not where the actual expenditure did not exceed the payments on account so that no request was made for any additional payment. The final account was not a "demand for payment" within the meaning of section 20B(1). Against that background the Judge said:

> "27. Finally, I agree with Ms Eilledge that, so far as discernible, the policy behind s.20B of the Act is that the tenant should not be faced with a bill for expenditure, of which he or she was not sufficiently warned to set aside provision. It is not directed at preventing the lessor from recovering any expenditure on matters, and to the extent, of which there was adequate prior notice. This does not leave the tenant without a remedy for the failure of the lessor to prepare a final account. In the event of wrongful delay by the lessor, the tenant can apply to the court for the taking of an account and, if the lessor's delay is culpable, the lessor will have to pay the costs."

Consideration and Conclusion

20. In the current case I do not think that it is necessary or desirable to try and determine whether costs are incurred when an invoice or certificate is served or when payment is made. (I am not necessarily equating an invoice and a certificate; different considerations may well apply to them.) I do not get much help from dictionary definitions of 'incurred'. It is of greater assistance to recall that the statute declares that it is 'costs' that are 'incurred' which are relevant. In the present case it is sufficient to say that the costs were not incurred when the gas was used. I appreciate that the liability to pay somebody something may have been incurred at that point, but the use of the word 'costs' is significant. As the President pointed out, it is the cost that must be incurred. A liability does not become a cost until it is made concrete, either by being met or paid or possibly by being set down in an invoice or certificate under a building contract.

21. I do not see that there is any tension between the decisions of the President in *Hyams v Wilfred* and *Jean-Paul v LB Southwark*. Each was decided on its own facts. In neither case was it necessary to distinguish between the issue of a certificate or invoice under a works contract and payment of it, nor was it suggested there was any gap between demand and payment that was of significance. The crucial and helpful point was the drawing by the President of the distinction between incurring a liability and incurring a cost. I am happy to adopt the formulation of HHJ Baker QC in *Capital & Counties Trust* that costs will be incurred when they are 'expended 'or 'become payable.' The submissions recorded in *LB Brent v Shulem*, which seem to have earned at least the tacit approval of Morgan J, are consistent with that.

22. I have not been shown any authority that suggests that the 'cost' is incurred when the 'liability' is incurred. A cost and a liability are separate things and Parliament chose to use the word 'cost' in section 20B. If the intention of Parliament is clear from the words it used, considerations of the policy Parliament may have had in mind must take a back seat. But in any event the judge's comments in *Gilje* were not made about a situation where the landlord (or management company) could not warn the tenant to set aside provision because the landlord did not appreciate that the costs were likely to be incurred. The landlord can only give "sufficient warning" or "adequate prior notice" of something of which he is aware. I cannot read Etherton J's words as giving any support for the proposition that the 18 months limit is an absolute cut-off point that operates regardless of any fault on the landlord's behalf.

23. In my judgement the true answer is that as a matter of the interpretation of section 20B 'costs' are 'incurred' on the presentation of an invoice or on payment; but whether a particular cost is incurred on the presentation of an invoice or on payment may depend upon the facts of the particular case. It is possible to foresee that where, for example, payment on an invoice has been long delayed, the decision as to when the cost was actually occurred might be different depending on the circumstances; it might be relevant to decide whether the payment was delayed because there was a justified dispute over the amount of the invoice or whether the delay was a mere evasion or device of some sort. In the former case the tribunal of fact might find that the costs were not incurred until a genuine dispute was settled and the bill paid. In the latter case the tribunal might be very reluctant to allow deliberate prevarication to postpone the running of the time limit imposed by section 20B. That is the sort of factual matter that the LVT is well placed to decide.

24. In this case, however, such a point did not arise. The LVT erred in law. The cost of the gas was not 'incurred' at least until Total presented the bill in November 2007. It was included in the service charge demanded in April 2008, well within the time limit set by section 20B. The appeal is allowed.

Dated 26 January 2012

His Honour Judge Mole QC