FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00BG/LSC/2014/0329**
Property	**:**	**East Tower Apartments, 1 West India Quay E14**
Applicant	**:**	**East Tower Apartments Limited**
Respondent	**:**	**No.1 West India Quay Residential Limited**
Representatives	**:**	**Ms Matteson (Counsel for the Applicant)** **Mr Bates (Counsel for the Respondent)**
Tribunal	**:**	**Tribunal Judge Martyński** **Mr H Geddes**
Dates of hearing	**:**	**10 & 11 December 2018 & 18 March 2019**
Date of original decision	**:**	**9 April 2018**
Date of reviewed decision	**:**	**21 June 2019**

DECISION AFTER REVIEW

This reviewed decision is issued following the parties' representations sent to the tribunal following its original decision. The parts of this decision that have changed are shown in bold italics throughout the decision.

Decision summary

The value of the Respondent's claim for outstanding utility charges in the period from 31 May 2008 to 31 January 2018, as calculated and agreed by the parties, is £204,821.66. The deductions to be made from that sum to calculate the sum payable

by the Applicant are the sums stated below in relation to each issue.

1. Issues 1 & 13: Availability and Reactive charges are recoverable on direct electricity after December 2016. ***The parties should attempt to agree the figures resulting from this decision***.

2. Issue 2: Switch 2's charges are not recoverable. ***The value of this sum is £11,389.15***.

3. ***Issue 3: The parties agreed that DHW charges to be deducted for the period from September 2009 to March 2012 are £247.77, so the credit due to the Respondent is £995.00***.

4. Issue 4: The amount of overcharge for apartment 27.10 is £8,330.52 for the Second Phase.

5. Issue 5: There is an overcharge to apartment 27.10 of £28,786.73 for Third Phase billing.

6. Issue 6: Utility charges for March to August 2012 are not recoverable. ***The value to be deducted is £19,154.58.***

7. Issue 7: The Respondent has overcharged the Applicant for direct electricity. ***The parties should seek to agree the value if possible***.

8. Issue 8: Charges of £45,013.14 for Heating, Cooling and Direct Electricity are not recoverable.

9. Issue 9: There is no overcharge to apartment 27.10 for Third Phase billing.

10. ***Issue 10: The parties agreed that the sum to be deducted for the Second Phase is £4,067.28***.

11. ***Issue 11: The parties agreed that the value in respect of the sold apartments is the sum of £176.39***.

Background

12. These proceedings have been ongoing since June 2014 when the original application to the tribunal was made.

13. The previous history of this matter is largely set out in the tribunal's revised decision dated 3 November 2015 and the decision of the Upper Tribunal ("UT") (dealing with an appeal from the tribunal's decision) dated 19 December 2016.

14. In its decision of 19 December 2016, the UT dealt with a number of issues that had been the subject of appeal. The UT rejected all but one of

the appeals on those issues. The UT remitted to this tribunal the issue in respect of which the appeal was allowed.

15. After the proceedings had been dealt with by the UT and the one issue remitted to this tribunal for further consideration, the parties compiled a list between them of 13 issues upon which they required this tribunal to make decisions.

16. Prior to the conclusion of the hearings in this tribunal in December 2018 and March 2019, the parties managed to reach agreement in respect of Issues 3, 10 & 11. A copy of the signed agreement is attached to this decision.

17. The subject building is a 33-storey block. Floors 1-12 are a hotel and the remaining floors consist of 158 flats let on long leases.

18. The Applicant in these proceedings holds the long leasehold interest in a number of residential flats in the building.

19. The Respondent holds the head lease of the building.

20. Water, gas and electricity are supplied to the building and then distributed to the common parts and plant, the various parts of the hotel and to the privately-owned flats.

21. There are a large number of meters in the building to monitor the supply and distribution of energy. There are meters (Fiscal Meters) which measure the main supply coming in. There are then bulk meters and other meters including meters for each individual flat.

The issues and our decisions

Issue 1 – agreement regarding Availability and Reactive Charges on direct electricity

22. The issue was defined between the parties as;

> Are Availability and Reactive ("A&R") charges on direct electricity recoverable for the Third Phase billing notwithstanding the parties' agreement that A&R are not recoverable

23. A discussion of A&R can be found in the previous decisions of this tribunal and the UT.

24. The parties have each relied on experts throughout these proceedings. Those experts, prior to the hearing before the tribunal in July 2015 agreed as follows:

> We agree that electricity rates for any power used for domestic consumption [direct electricity] in the apartments would have to exclude availability charges and reactive charges as these charges would not normally be included in standard domestic rates and are specific to commercial installations

25. The hearing before the tribunal in July 2015 proceeded on this basis. The parties, at the hearing, disputed A&R charges in relation to indirect electricity – the issue being, should they be included in the charges to be paid by private leaseholders.

26. In the tribunal's decision of November 2015, we dealt with the issue of A&R charges and found that these charges were properly payable by leaseholders.

27. The UT considered the same question and came to the same conclusion.

28. However, neither tribunal specifically made a distinction between direct and indirect electricity.

29. On 31 August 2016 (between this tribunal's original decision and the UT decision) the parties agreed a List of Issues Not In Dispute ("LIND") which included the following;

> Availability and Reactive charges for 'direct electricity' used for domestic consumption in the apartments are not payable by the Applicant and should be removed from any charges levied.

30. Prior to the first hearing before the tribunal in July 2015, the parties had agreed between themselves that the years covered by the application would extend from 31.05.2008 to 31.10.2014.

31. Directions given by the tribunal on 9 January 2018 recorded the agreement between the parties that the application would be further extended to cover the years 1.11.14 to 27.2.18.

32. It was only after these directions and possibly not until the Respondent filed its Statement of Case dated 13 November 2018 that the Respondent stated that it was now, for billing periods post 2014, arguing that A&R charges were recoverable from leaseholders in relation to direct electricity.

33. According to the Respondent, demands had been made for all direct electricity post 2014 including A&R so the Applicant was fully aware what approach, at least on the ground, it was taking to the issue.

34. However, the Applicant argued that this was not clear; there is no way of telling from invoices from the relevant time that A&R charges are included. Further, our attention was drawn to correspondence in the documents before us showing the confusion over A&R charges.

The Applicant's case on the agreement

35. In her skeleton argument, Counsel for the Applicant, Ms Mattsson, argued;

> It is submitted that L is plainly issue estopped from resiling from its admission. Further, there is no good reason why L should be entitled to resile

from its concession at this late stage in the proceedings and re-litigate the same.

36. In oral argument at the hearing, Ms Mattsson relied on extracts from Foskett on Compromise [8th Ed.]. Essentially, she argued that there was a contract of compromise between the parties. The consideration for the contract is, on the one hand the forbearance of litigating by one party and, on the other, an advantage to the other party not having to be pursued with the action.

37. Ms Mattsson referred to issue estoppel but beyond mentioning that there was a useful commentary in the White Book, she did not expand upon this.

The Respondent's case on the agreement

38. Mr Bates, Counsel for the Respondent, argued that;
    (a) this issue had been decided by both this and the UT. Both had found that A&R charges were payable by leaseholders – the agreement between the parties was therefore inconsistent with the findings of the tribunals
    (b) the tribunals' reason for finding that A&R charges were payable was that such charges were simply a result of the way in which the subject building was built and set up – that is with a bulk supply to the building which was then distributed within the building
    (c) the agreement between the parties was in the context of a particular dispute at a particular time and only related to billing periods up to 2014 (phase 1 & 2 billing periods) and was not an agreement that A&R charges would not be included in direct electricity charges for all time
    (d) the OFFGEM guidance on situations of this kind clearly indicated that charges such as A&R would be payable by leaseholders in situations such as these

39. Accordingly, Mr Bates argued that A&R charges were payable in respect of direct electricity either for 'phase 3' billing – that is billing after October 2014 or, as from 21 August 2016, that being the date of the agreement of Issues Not In Dispute referred to above.

Decision

40. There is no question in our minds that A&R charges are properly payable in respect of direct and indirect electricity; the principles are the same in both cases. This view is implicit in the reasoning set out in the tribunal's original decision and in the decision of the UT.

41. The experts are no longer of the same mind on the matter. Mr Hamilton has conceded that he was wrong in his original view that A&R charges should not be included in direct electricity.

42. In those circumstances, it would be seemingly unfair to the Respondent to not allow it to include these charges for later billing periods. It would

be bizarre to keep the parties bound to an agreement that was based on a premise that was plainly wrong.

43. As to the wording of the original agreement between the parties on the issue, that is plainly not sufficient to hold the Respondent to that position for all time.

44. In our view, the Respondent is bound by the agreement up until the end of December 2016 ***(that being a date by which the parties could be taken to have received and read the decision from the UT)*** by which time it was plain from the reasoning of the UT that such an agreement could no longer be sustained and that the Respondent was not keeping to this position in its billing.

Issue 2 – Are Switch 2's standing charges recoverable?

45. These charges ('the standing charges') are the charges made by the energy company, Switch 2, for reading the electricity meters and working out bills, rather than for the energy supplied. The charges only concern the period 2008-2012 (the periods of Phase 1 and Phase 2 billing).

46. The standing charges had been demanded by the Respondent pursuant to clause 3.2.2 of the residential leases.

47. The charges were dealt with in the tribunal's original decision in 2015. This tribunal concluded that the charges were not recoverable under clause 3.2.2 of the residential leases (which allows for the quicker recovery of energy use than other general Service Charge items) as this clause concerned simply the cost of electricity consumed by the flats. However, we went on to find that the standing charges could be recovered under clause 2.4 of the residential leases in the building as a general Service Charge and could be demanded and were immediately payable after demand.

48. The UT considered the same issue in its decision of December 2016. The UT agreed with this tribunal that the standing charges were not recoverable under clause 3.2.2 of the residential leases. However, the UT disagreed with this tribunal's view that the charges could be demanded under clause 2.4. The UT agreed that the charges were payable as part of the Service Charge (which, in the residential leases is claimed by way of an annual estimate of expenditure and quarterly payments on account in accordance with that estimate under Schedule 4 to the lease).

49. Following this decision, the Respondent dealt with the issue by re-apportioning and re-allocating the standing charges. The charge, which had been charged as a fixed sum in demands to leaseholders under clause 3.2.2 was replaced with a proportionate charge to leaseholders under the general Service Charge in 2016. The Respondent did not re-demand the charges. Mr Bates, for the Respondent, argued that there

was no need for the charges to be re-demanded as there is no need to re-create a liability that already exists.

50. The next issue in relation to the standing charges is whether or not they are now made irrecoverable by the provisions of s.20B Landlord and Tenant Act 1985.

51. It is accepted, as it must be, by the parties that these charges were originally demanded, incorrectly, under clause 3.2.2 of the residential leases.

52. Ms Mattsson for the Applicant argued that an invalid demand could not satisfy the provisions of s.20B and that, as more than 18 months had passed since the charges were incurred, they are not now payable. Section 20B provides 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.
> (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.

53. Ms Mattsson relied upon *Brent London Borough Council v Shulem B Association Ltd* [2011] 1 WLR 3014, a decision of the High Court, in which Morgan J held that the reference to a 'demand' in s.20B(1) is a reference to a valid demand under the relevant contractual provisions. The decision was approved by the Court of Appeal in *Skelton v DBS Homes (Kings Hill) Ltd* [2017] EWCA.

54. Mr Bates's argument was essentially that *Schulem B* is wrong if it states that a 'demand' within the meaning of s.20B(1) must be a contractually valid demand. He argued that such a proposition adds an unjustified gloss to the wording of s.20B(1). Mr Bates went on to expand upon his argument both in his skeleton argument and in oral submissions.

55. In the alternative, Mr Bates argued that, if the provisions of s.20B(1) were not met, then s.20(B)(2) was met by way of the summary of costs sent out by the Respondent to leaseholders each year. This summary lists the various heads of Service Charge and gives a figure for the cost of each head. For example, the summary for the year ended June 2011 (sent out in December 2011) states;

Electricity	£130,310

This therefore tells the leaseholders what sums were spent on electricity and standing charges would form a part of these costs.

56. There a problem here however pointed out by Ms Mattsson. There has been much controversy in this case over the issue of disclosure. We were told that the Applicant had sought disclosure as to the make-up of some of the figures in the accounts summaries sent out annually to the leaseholders – that disclosure has not been forthcoming. Therefore, argued Ms Mattsson, the Respondent is not able to show that the Switch 2 charges are included in the total figure for electricity set out in the summary.

57. In addition to this, Ms Mattsson drew our attention to some rudimentary calculations that she had done to show that that figure for electricity that we had been shown for the year ending 2011 may not be correct. She referred us in the documents to a figure of £236,656 for a 16-month period including the year ending June 2011. Averaging for that 16-month period, the 12-month figure is £177K for communal electricity alone. This casts doubt on the accuracy of the figure in the summary and, in any event this suggests that this figure is more than taken up with communal electricity charges, there would be no room for Switch 2 Charges. Therefore, if she is able to cast doubt, with reference to the documents, on the figure in the annual summary, the onus must be on the Respondent to adduce evidence that it is correct – no such evidence has been adduced.

Decision

58. We consider that we have no option but to follow the decision in *Schulem B* that in order for a demand to satisfy the provisions of s.20B(1), it must be a contractually valid demand.

59. We do not agree that the charges can simply be re-allocated into general Service Charges. Ms Mattsson demonstrated at the hearing that the figure for the electricity in the Service Charge estimate was probably not sufficient to include standing charges.

60. We find therefore that Switch 2's charges are not recoverable.

Issue 4 – is any overcharge due to the Applicant for apartment 27.10 in respect of the Second Phase billing?

61. The parties agreed that the meter for apartment 27.10 has never worked properly for the periods in question in these proceedings.

62. Both experts gave evidence on this issue at the hearing. In the course of his evidence, Mr Hamilton, for the Respondent, accepted that figures supplied by managing agents were incorrect. Accordingly, this left only one question between the parties which was whether the correct figure for a refund in respect of this apartment should be £7,384 or £8,330. Mr Bates did not make an alternative case (at the hearing) on this question.

Decision

63. We find that the figure for overcharge is £8,330. The reason for this is that this figure is calculated using the blended rate favoured by Mr Lowndes.

64. The electricity coming into the Fiscal Meters is charged at different tariffs depending on when it is used. However, there is no way of telling when that electricity is used by the flats.

65. The Applicant's preferred method of dealing with this issue is by using the 'blended method'. This is the taking of all the tariffs and averaging them and applying that unit rate to the residential leaseholders.

66. This method is criticised by Mr Hamilton, the Respondent's expert because using that method may involve over-charging or under charging the leaseholders.

67. However, in the circumstances of this case, we consider that the blended rate approach is consistent with OFGEM guidance.

Issue 5 - is any overcharge due to the Applicant for apartment 27.10 in respect of the Third Phase billing?

68. The charges to apartment 27.10 for this period are based on a percentage figure. The Respondent has split the use of energy amongst the apartments according to meter readings from an earlier period. Each flat has therefore been allocated an assumed percentage of the total use and billed accordingly.

69. Whilst there is logic in this approach, the problem, as illustrated with apartment 27.10, is that the percentage attributed to that flat is far higher than the percentage attributed to other similar one-bedroomed flats. In the case of apartment 27.10 the percentage figure is 5.206. Other similar flats have much lower percentages, for example, the percentage for apartment 22.02 is 0.288%.

70. It was put to the parties that, given that the percentages were based on meter readings in the past, at one point, in order to arrive at a percentage figure of 5.206, apartment 27.10 must have been using an unusually large amount of energy (or possibly more likely, the meter readings were wrong). The parties were unable to disagree with this and agreed that the percentage figure for 27.10 was significantly out of line with other apartments and that there was no satisfactory explanation for this.

Decision

71. Whilst there is a clear logic in the Respondent's methodology, it has produced a result that is, so far as anyone can tell, unrealistic. Accordingly the methodology can not, in the case of apartment 27.10, be reasonable and therefore the charges made to that apartment can

not be reasonable in amount. In our view, the Applicant having raised an arguable case on reasonableness, it is for the Respondent to show that the charges levied on apartment 27.10 were reasonable; it has been unable to do that.

72. The Applicant's expert, Mr Lowndes, re-calculated the charges in accordance with a revised percentage (that was in line with other similar flats) and arrived at an overcharge figure of £28,786.73 and we adopt his calculations.

Issues 6 & 12 – Are the utility charges for March to August 2012 recoverable under s.20B; the validity of the s.20B notices and in respect of the utility charges for the apartment and whether they need to relate to sums in question

73. Mr Bates accepted in his skeleton argument that there is no s.20B(2) notice in respect of gas or water.

74. ***We accordingly presumed and came to the conclusion that, in respect of gas and water, no charges were payable. As to the notices for electricity, we have not accepted that these are valid notices.***

Issue 7 – Has the Respondent overcharged the Applicant for direct electricity?

75. The starting point here is the fact that the Fiscal Meters in the building are working and measure the energy correctly. The problem is that some of the meters downstream of this measuring electricity supplied to various parts of the building are, and have been for many years, unreliable. Further, some of the 600 or so meters are missing and have never been found. The full amount of energy coming into the building is therefore not fully accounted for by the meters downstream of the Fiscal Meters resulting in the issue of 'lost energy'.

76. The Applicant argued that the amount of energy used by its residential flats could be measured by the flat meters. That measurement should therefore settle the issue of how much energy use should be applied to those flats. Any 'lost energy' therefore has nothing to do with the flats.

77. Mr Lowndes, the Applicant's expert, said on the question of 'lost energy'; the combined sum of the bulk meters is wrong and do not record the full amount of energy. We know that the apartment meters are largely correct and about four of the Applicant's flats had meters that were not functioning correctly; some meters have never been found; we do not know if all the energy being used by the landlord is being captured by their meters. It follows therefore that any energy not measured by the Applicant's flat meters is not being used by them and they should not be charged for it.

78. Mr Hamilton, the Respondent's expert said that all meters will deteriorate over time and contribute to the issue of lost energy.

79. Ms Mattsson relied on the following extracts from the OFFGEN guidance:

> If the purchaser has a meter which records the number of units used at each rate, the reseller will be expected to charge according to the consumption recorded on the meter and the appropriate unit prices on his own bill.
> If the purchaser does not have a meter, or the meter does not accurately record the number of units used within each price band, the reseller must use his reasonable endeavours to estimate what proportion of the total bill each tenant should pay.

80. Ms Mattsson referred us to the expert's joint report from 2015. Section 4.0 paragraph 1 of that report states as follows:

> We both agree that we can see no reason why we could not continue to use the individual apartment readings of unit consumption to prorate the charge based upon the apportioned totals used for establishing the estimate of hotel verses domestic consumption.

81. The Respondent's position starts with the fact that the only correct measurement of energy is from the Fiscal Meters measuring the total energy going into the building. As that is the only certainty, the allocation of that energy should be calculated from that point only and the 'lost energy' apportioned between the various users of the building. The 'lost energy' could not be identified and accordingly, a reasonable method of accounting for this was the apportionment of it throughout the various users of energy in the building.

82. Such a way of apportioning cost is, according to the Respondent, in accordance with OFFGEN guidance examples. Further, the overall import of the OFFGEN guidance is that the reseller of energy (in this case the Respondent) must use a reasonable and rational method of apportioning charges for energy use. There may be more than one such reasonable method; the choice of method is up to the reseller.

83. Mr Bates then drew our attention to various reports on the state of meterage throughout the building. These reports detail various problems with meters and meterage (including residential flat meters) from 2007 onwards.

84. This led the tribunal to question why the issue regarding meterage had been left for so long and why the necessary steps to deal with the inaccurate meters had not been taken by the Respondent. Mr Bates for the Respondent pointed out that this had not been one of the issues in the proceedings before either this hearing or the previous hearing before the tribunal. However, as Ms Mattsson for the Applicant pointed out, the issue of the 'disrepair' of the meters was raised by the Applicant in its Statement of Case dating from 2014. The reason why the issue was then not pursued was, according to Ms Mattsson, that following argument from Mr Bates, this tribunal made a ruling in the previous proceedings, that in order to deal with the issues in this case, there was

no need to hear evidence on this point. This is somewhat unsatisfactory. Mr Bates told the tribunal that there may be an issue as to the ownership of individual flat meters (and so an issue as to who was liable to repair them) in any event.

Decision

85. We agree with Mr Bates that the OFFGEN guidance may allow a landlord to estimate and charge for the allocation of use of lost energy in certain circumstances. However, the circumstances must be such to make that a reasonable approach. We do not consider that the circumstances of this case make the Respondent's approach reasonable.

86. The parties agreed for flat 27.10, where the meter has never worked, that the use of electricity for that flat could be estimated by looking at the consumption of other flats. This must also be the case for other flats.

87. We know that up until 2014, the majority of the meters in the Applicant's flats were working.

88. Whilst we note Mr Hamilton's comment that meters will become less reliable over time, these meters have only been in place for around 14 years.

89. We also know that the bulk meters are unreliable and that there are meters that have not been found. We were told that there are hundreds of meters in the building.

90. We agree with Ms Mattsson that; (a) it is more likely than not that the individual flat meters provided, in the past, a reliable guide to their use of energy and that this use, where necessary, can be reliably estimated, and; (b) there is no evidence as to where the lost energy has gone and that it is more likely than not that this energy is lost outside of the residential flats.

91. Accordingly we conclude that the Respondent is not entitled to charge the residential flats for any lost energy.

Issue 8 – Are the additional charges for the period September 2008 to March 2012 of £45,013.14 for Heating, Cooling and Direct Electricity demanded for the first time in August 2016 demands recoverable pursuant to s.20B?

92. The principle here is the same as in Issue 2 dealt with above. In dealing with this issue in the hearing, we were referred back to the same annual summaries relied upon by the Respondent. By way of example we looked at the summary for the year ended June 2009. The only relevant item there is for 'Common Part Electricity'. Ms Mattsson made the following points;
    - The Respondent had failed to show how the figures in this summary match up with the actual figures for electricity

- There is no scope to insert or infer into this figure the charges for water, gas and switch 2 charges
- On her rough calculation on the actual figures, the summary figures appear to be inaccurate

93. We therefore come to the same conclusion as we did in Issue 2 for the same reasons and find that these charges are not recoverable.

Issue 9 – Has there been an overcharge for direct electricity for the Third Phase, as a result of the "Your Apartment%" methodology?

94. This issue arises from the fixed percentage method adopted by the Respondent. The energy use, as measured by the Fiscal meters, is apportioned on a percentage basis between the hotel and the residential parts of the building (64.25% and 35.75% respectively).

95. The Applicant bases its figures for use of direct electricity on meter readings. The Respondent simply looks at the overall use of direct electricity and apportions as per the percentages. This method, argues the Applicant, means that the apartments are charged an extra amount which indicates that the apartment use of electricity has increased over time. The Applicant states that, whilst the charge for electricity can vary over time, the actual amount of electricity is likely to remain stable. There is no reason for there to be an increased use of electricity over time by the apartments.

96. The experts were asked to comment on this in the hearing. Mr Lowndes for the Applicant stated that there was no reason for actual consumption by the apartments to increase – this is likely to remain stable over time, although he had no evidence for this. As to the hotel consumption, this is not so straightforward, that consumption may vary depending on occupancy.

97. Mr Hamilton for the Respondent stated that he was not involved in this part of the case. However, he stated that the hotel, as a commercial organisation, was more likely to be using the most modern, energy saving, equipment.

98. Both parties relied upon the comments of the Upper Tribunal when dealing with the appeal from the original hearing of this case. The relevant paragraphs are as follows:

> 99. An energy supplier who was put to proof of consumption, but who could not rely on meter readings, might seek to prove that there was an earlier period for which reliable meter readings were available and to base an assessment of consumption on that period. It might be a reasonable inference that, all other things being equal the amount of energy consumed in one year would be much the same as the amount consumed in a previous year.
>
> 100. If such a supplier was able to provide proof of consumption in that way, the onus would pass to the consumer to show that there was some reason why consumption measured accurately in a previous period could not

> be relied on as a reliable means of assessing consumption in the period in question. The consumer might do so by showing that the meters had always been faulty, or that the apartment had been empty or occupied less intensively in one of the periods, or that weather conditions had been very different. If the consumer was unable to rebut the inference that proven usage in an earlier period was a reliable guide to consumption in the period under consideration, the appropriate finding of fact for the court or tribunal would be that, on balance, the sum claimed fairly represented the cost of energy consumed during that period.

Decision

95. It appears to us that the Upper Tribunal was focusing on an evidence based solution to the problem. On this issue, the Applicants are saying that there is evidence of consumption, i.e. meter readings, but no evidence of increased consumption over time. Therefore, the onus is on the Respondent to explain increased consumption. There was no such evidence from the Respondent.

96. The experts could add little to the issues – importantly, what they could not provide was evidence one way or another that apartment consumption of direct electricity was likely to rise over time.

97. Whilst we have concluded that apartment meter readings from earlier years can be relied upon, there is no real and reliable evidence as to consumption levels over time.

98. In these circumstances, we conclude that there is no good reason to depart from the accepted percentage split of the actual consumption accurately measured by the Fiscal meters and that it is more likely than not that there is increased consumption over the whole building.

Deputy Regional Tribunal Judge Martyński
~~**9 April 2019**~~
21 June 2019

ANNEX - RIGHTS OF APPEAL

1. If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber) then a written application for permission must be made to the First-tier Tribunal at the Regional office which has been dealing with the case.

2. The application for permission to appeal must arrive at the Regional office within 28 days after the Tribunal sends written reasons for the decision to the person making the application.

3. If the application is not made within the 28-day time limit, such application must include a request for an extension of time and the

reason for not complying with the 28-day time limit; the Tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed despite not being within the time limit.

4. The application for permission to appeal must identify the decision of the Tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal, and state the result the party making the application is seeking.