**UPPER TRIBUNAL (LANDS CHAMBER)**

**UT Neutral citation number: [2015] UKUT 0387(LC)**
**UTLC Case Number: LRX/79/2014**

**TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007**

***LANDLORD AND TENANT – service charges –certification process - true construction of the Standard Lease Provisions as to the certification process – whether certification is a condition precedent to recovery of services charges, or machinery for their recovery – alternatively a course of conduct giving rise to an equitable estoppel or waiver of the strict requirements.***

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

**BETWEEN**

**(1) STEPHEN CLACY**
**(2) WENDY NUNN**

**Appellants**

**and**

**MRS ALEXANDER SANCHEZ & OTHERS**

**Respondents**

**Re: 40 St Peters Road,**
**Croydon**
**Surrey**
**CRO 1HG**

**Before: Judge Edward Cousins**
**Sitting at: Royal Courts of Justice, Strand, London WC2A 2LL**
**On**
**3rd March 2015**

For the Appellants: Mr Stephen Fletcher, of Counsel
For the Respondents: Mr Graeme Kirk, of Counsel

The following is a list of authorities relevant to the issues in the case, a number of which are cited in this decision:

*Finchbourne Ltd v Rodigues* [1976] 3All ER 581

*Rexhaven Ltd v Nurse and Alliance and Leicester Building Society* (1996) 28 HLR 241

*Wagon Finance Ltd v Demelt Holdings Ltd* (Unreported) 19 June 1997, Court of Appeal

*The Republic of India v India Steamship Co Ltd* [1998] AC 878 per Lord Steyn

*Scottish Mutual Insurance Plc v Jardine Public Relations Ltd* [1999] EWHC 276 (TCC)

*Jacey Property Ltd v De Sousa* [2003] EWCA Civ 5110

*Rigby v Wheatley* LRX/84/2004 (Lands Tribunal)

*Warrior Quay Management Co Ltd v Joachim* LRX/42/2006 (Lands Tribunal)

*Wembley National Stadium Limited v Wembley (London) Ltd* [2007] EWHC 756 (Ch)

*Bhambhani v Willowcourt Management Co Limited* (1985) LRX/22/2007 (Lands Tribunal)

*Leonora Investment Co Ltd v Mott MacDonald Limited* [2008] EWCA Civ 587; [2008] 2 P&CR DG15

*London Borough of Brent v Shulem B Association Ltd* [2011] 1WLR 3014

*Akorita v Marina Heights (St Leonards) Ltd* [2011] UKUT 255 (LC)

## DECISION

### The background to the appeal

1. This is an appeal by Mr Stephen Clacy and Ms Wendy Nunn ("the Appellants") to the Upper Tribunal, Lands Chamber, from the decision ("the Tribunal Decision") of the First-tier Tribunal (Residential Property Division) ("the Tribunal") handed down on 11th May 2014. Permission to appeal was granted by the Deputy President on 9th September 2014 on the first two grounds of appeal, but refused on the third ground ("the Decision of the Deputy President").

2. The Tribunal Decision followed a hearing which took place on 6th May 2014 at which Mr Clacy represented both himself and Ms Nunn. The Respondents were represented by Mr Kelleher, of Counsel. The subject matter of the dispute between the parties concerned the non-payment of service charges alleged to have been due and owing by the Respondents. The Tribunal came to the conclusion that there were a number of "legal bars" (as it was put by the Tribunal) to the Appellants recovering all or part of the service charges, and the efficacy of the service charge demands made by the Appellants seeking the recovery of the sums. Essentially it was found that on a true construction of the terms of the relevant leases it was a condition precedent to a valid demand that costs had to be certified by an accountant.

3. The property the subject matter of the appeal is 40 St Peters Road, Croydon which comprises a block of 4 flats let on long leases ("the Building"). The Appellants are the joint freeholders of the Building, and the Respondents are, respectively, the lessees of the following flats:-

(1) The first Respondent is the lessee of Flat 4;

(2) The second Respondent is the lessee of Flat 1;

(3) The third Respondent is the lessee of Flat 2;

(4) The fourth Respondent is the company formed for the purpose of enfranchisement;

(5) The fifth Respondent is the lessee of Flat 3.

4. The four leases are in similar form ("the Standard Lease Provisions"), and contain the usual provisions for payment of estimated service charges in advance, and a balance to be paid or credited after the end of each service charge year. The relevant clauses relating to certification contained in the Standard Lease Provisions are set out below. It is common ground that no certificates had been obtained or issued as at 6th May 2014, being the date of the Tribunal hearing. In such circumstances it was submitted by Counsel for the Respondents that nothing was payable by way of service charges as at that date and that the process of certification was a condition precedent to liability to pay any amount after the end of a service charge year in the case where there had been no demand for estimated payments on account in advance. Indeed, as the Tribunal stated, although the Appellants were entitled to make a demand for estimated payments in advance, no such demand had occurred. The demands for payment that were made were issued after the end of the service charge year to which the demand related.

5. In short the Tribunal accepted Counsel's argument that certification was a condition precedent to liability for payment of any sum in respect of service charges. Consequently nothing was payable in respect of service charges as at 6th May 2014. However, the Tribunal accepted that the actions and inactions of the first Appellant were carried out in a spirit of benevolence towards the Respondents.

6. A second feature also arose for consideration. This related as to an alleged agreement having been reached at a meeting between the first Appellant and previous lessees where it apparently had been agreed that certification was not required. It is said that an arrangement had been reached whereby where a lessee had a query he/she would refer it to the first Appellant who then would send to the lessee a copy of the relevant invoice. The Tribunal accepted this evidence, but came to the conclusion that such an arrangement did not effect the "legal entitlements" of the Respondents, as so described by the Tribunal.

7. On 29th May 2014 an application for permission to appeal was made to the Tribunal by the Appellants, and on 23rd June 2014 the Tribunal refused to review the Tribunal Decision, and also refused permission to appeal, for the reasons given ("the Permission to Appeal Decision"). The Appellants then in July 2014 renewed their application for permission to appeal to the Upper Tribunal. Paragraph 9 of the Grounds of Appeal sets out three substantive grounds. In the Decision of the Deputy President permission to appeal was granted on the question of certification, and to the possibility that certain actions on the part of the tenants and their predecessors in title constituted a waiver or estoppel as to the requirement to certify. This was on the basis that an agreement had been reached between the first Appellant and the Respondents which in effect "waived" the strict requirements of the leases.

**The Tribunal Decision**

8. A number of points are noted in the Tribunal Decision to which reference should be made. No service charges were being claimed by the Appellants for the years 2009/2010 and 2010/2011 as the first Appellant was apparently ill during that period, and no service charge accounts had been drawn up. Thus the Appellants were not and are not, seeking to recover any of the costs of the services from the Respondents for those periods (see paragraph 21 of the Tribunal Decision). There was apparently also a dispute about the number of demands for payment which were made. However, it was agreed that the demands for payment which were in fact made were issued after the end of the service charge year which the demand related (see paragraph 28). It is also noted that it was common ground that no certificates had been obtained as at 6th May 2014. Thus it was submitted by Counsel that in the circumstances nothing was therefore payable as at 6th May 2014 by way of service charges as certification was a condition precedent to liability to pay any amount after the end of a service charge year. Also there had been no demand by the Appellants for estimated payments in advance as they were entitled so to do (see paragraph 30).

9. It is noted that the first Appellant did not advance a contrary legal argument after reference had been made by Counsel for the Respondents to the case of *Akorita v Marina Heights (St*

*Leonards) Ltd.* [1] However, reference was made by the first Appellant to a meeting with previous lessees where it had been agreed that certification was not required and that (as the Tribunal put it) "… a lessee who had a query would refer it to [the first Appellant] who would then send the lessee a copy of the relevant invoice. We accept this evidence but such arrangement does not effect the legal entitlements of the [Appellants]." (See paragraph 32).

10. In the circumstances, and after having heard the evidence in the case, it is to be noted that the Tribunal accepted Counsel's legal submissions, and held that certification was a condition precedent to liability for payment of any sum for service charges in the circumstances of the case. As no certificates existed as at 6th May 2014 nothing was therefore payable as at that date (see paragraph 33). It is to be further noted that the Tribunal accepted the explanation provided by the first Appellant that he had not obtained the certificates, and to do so would have entailed costs which then would have been added to the Respondent's service charges. The Tribunal went on to state that "…. whilst it became clear as the hearing progressed that any of [the first Appellants] actions and in actions were carried out in the spirit of benevolence towards these [Respondents], we must apply the law".

11. The Tribunal then went on to consider "Other Issues" as they considered it desirable to do so "…. in case the factual position changes after 6th May 2014 and having regard to the possibility that our decision on the certification issue might be wrong – particularly as the [the Appellants] were not legally represented before the Tribunal (see paragraph 35). The Tribunal noted that it was "a sad ironery" that as the Appellants did not enforce their rights to advance payments of estimated service charges they could not benefit from cited precedent.

**The Permission to Appeal Decision**

12. Although other points were made in the Application for Permission to Appeal to the Tribunal, the two substantive grounds related to the alleged agreement between the Appellants and the predecessors in title to the current lessees, and the obligation for certification being a condition precedent to the liability to pay. These submissions were rejected by the Tribunal, and the Tribunal held that it would not review the Tribunal Decision and permission to appeal was refused ("the Reasons"). In paragraph 2 of the Reasons it was stated that the Appellants were not legally represented before the Tribunal, but they had obtained legal advice for the purposes of the application for permission to appeal and that "… they seek to advance argument on the construction of the lease (and other matters) which were not advanced before the …. Tribunal." In paragraph 8 of the Reasons the Tribunal stated that "we recognise that our conclusion on the certification issue may have been wrong (paragraph 35) and we are unable to state that the legal arguments now advanced by the Respondents are misconceived. However, we are unable to conclude that the appeal has a "realistic prospect of success" without hearing representations from the [Respondents] legal team." The Tribunal then made further observations including a reference to the Overriding Objective as set out in Rule 3 of 2013 Rules, and also to the fact that the Respondents would incur significant legal costs were permission to appeal be granted. Accordingly, despite the repetition of the statement that the Tribunal may have been wrong in its conclusion it still found it necessary to refuse permission to appeal.

[1] [2011] UKUT 255 (LC).

**The Decision of the Deputy President**

13. The relevant reasons given by the Deputy President are as follows:-

> "As to ground 2, in paragraph 32 of its decision the First-tier Tribunal accepted Mr Clacy's evidence that he had agreed at a meeting with previous leaseholders that certification of the annual service charge was not required. The First-tier Tribunal considered that such agreements had no effect on the liability of the current leaseholders to pay the service charges. It is arguable that such an agreement may affect the liability of a successor in title to leaseholders who were party to it and to put the onus on new leaseholders to inform the landlord that they required the certification provisions of the lease to be observed once more.
>
> The issue of interpretation of the lease raised by ground 1 seems less promising but the point is a short one and it is not obvious from the material before the Tribunal at this stage that it has no merit so permission to appeal is granted to enable it to be considered further."

14. In paragraph 4 the Deputy President stated that the appeal would be dealt with by the Upper Tribunal by way of review with a view to a re-hearing. Directions were given as to the filing of a further statement of case by the Appellants, and following this a Respondent's notice. He also made it a requirement that a statement of case be provided by the Appellants dealing with the facts referred to in paragraph 32 of the Tribunal's Decision relating to the possible waiver/estoppel point raised by the Appellants.

15. Duly the Appellants provided two further documents, both apparently being dated 9th October 2014. The first of these is a Further Statement of Case provided by the Appellants, and the second is a Reply to the Respondents' Statement of Case. This was produced in response to a claim made by the Respondents in their opposition to the appeal filed on 21st October 2014 (point 2) in which they claimed to have made requests for certified accounts.

16. In support of their respective submissions the Appellants filed a skeleton argument dated 26th February 2015, and the Respondents filed written submissions dated 2nd March 2015, both drafted by Counsel.

**Discussion**

17. There are two essential issues to be resolved on this appeal, namely the estoppel/waiver point and the certification point. I shall deal with these in reverse order.

***The Certification Point***

18. There are three questions to be answered in this regard, all of which relate to the true construction of the relevant Standard Lease Provisions. First, do the lease provisions contain a primary obligation to pay rent and service charges without any deduction upon written demand made by the Appellants, and to keep them indemnified? Secondly, is the requirement for prior certification of the service charges purely machinery for achieving payment, and to use as expressed Tuckey LJ in the case of *Leonora Investment Co Ltd v Mott MacDonald Limited,*[2] is it one of the "… contractual routes down which the landlord must travel", Or, thirdly, whether the proper exercise of the service charge machinery is a condition precedent to the lessees' liability to pay the charges? It is necessary to analyse the Standard Lease Provisions in this regard.

***The Standard Lease Provisions***

19. Clause 2 of the Standard Lease Provisions provides as follows:

> "The Lessee HEREBY CONVENANT with the Lessor and as a separate covenant with the Management Company and separately with and for the benefit of the tenants or occupiers of the flats in the Building as follows:-
>
> (1) To pay to the Lessor the rent at the times and in the manner aforesaid without reductions or abatement;
>
> (2) (i) In these presents:
>
> (a) The percentage is the percentage specified in Part 4 of the 5th Schedule;
>
> (b) "The general expense shall mean the cost of the expense and outgoings and other heads of expenditure as the same are set out in the 3rd Schedule.
>
> (ii) To pay to the Management Company without any deduction upon written demand (and in advance if required) an amount equal to the sum of the percentage of the general expense (such sum being here and after called "the service charge") or any of the general expense and at all times keep the Lessor and the Management Company indemnified in respect of the same.
>
> (iii)Without prejudice to the covenant contained in clause 2(2)(ii) the following terms and conditions shall apply to the payment of the service charge by the Lessee.
>
> "(a) The amount of the service charge shall be ascertained and certified annually by a Certificate …. signed by a qualified accountant as soon as practicable after the end of each of the Management Company's financial year {as hereinafter defined} and shall relate to such year in manner hereinafter mentioned.

[2] 2. [2008] EWCA Civ 587; [2008] 2 P & CR DG15.

(b) The expression "Management Company's financial year" shall mean the period from the first day of January to the thirty first day of December in every year or such other annual period as the Management Company may in its discretion from time to time determine that as being that in which the accounts relating to the Building shall be made up.

(c) A copy of the Certificate for each such Management Company's financial year shall be supplied by the Management Company to the Lessee on written request and without charge to the Lessee.

(d) The Certificate shall contain a first summary of the said expenses and outgoings and other heads of expenditure in the Management Company's financial year to which it relates.

(e) The expression "the expenses and outgoings and other heads of expenditure" as hereinbefore used shall be deemed to include not only those expenses and outgoings and other heads of expenditure hereinbefore described which have been actually disbursed incurred or made by the Management Company during the year in question but also such reasonable whole or part of all such expenses outgoings and other expenditure hereinbefore described which are of a periodically recurring nature (whether or not recurring by regular periods) whenever disbursed incurred or made including a sum or sums of money by way of reasonable advance provision for anticipated expenditure in respect thereof as the Management Company or its agents may in its discretion allocate to the year in question as being fair and reasonable in the circumstances.

(f) Both on the twenty-fifth day of March and the twenty-ninth day of September of every year during the term the Lessee shall pay to the Management Company one half of such a sum (hereinafter referred to as "the advance payment") in advance and on account of the service charge as the Management Company or its agents shall from time to time specify at their reasonable discretion to be fair and reasonable PROVIDED THAT subject and without prejudice to the foregoing provisions the amount of the advance payment for the Management Company's financial year current at the date hereof shall be deemed to be the sum referred to in Part 5 of the Fifth Schedule of which sum the Lessee shall pay on the signing hereof the due proportion calculated on a day to day basis for the period from the date hereof to the date upon which the next payment falls due.

(g) As soon as practical after the end of the Management Company's financial year the Management Company shall furnish to the Lessee on account of the service charge payable by the Lessee for that year due credit being given therein for the advance payment made by the Lessee in respect of the said year and upon the furnishing of such account there shall be paid immediately by the Lessee to the Management Company the service charge or any balance found payable or there shall be allowed by the Management Company to the Lessee any amount which may have been overpaid by the Lessee by way of advance payment as the case may

require PROVIDED ALWAYS that the provisions of this sub-clause shall continue to apply notwithstanding the expiration or sooner determination of the term but only in respect of the period down to such expiration or sooner determination.

(h) It is hereby agreed and declared that the Lessor shall not be entitled to re-enter under the provision in that behalf hereinafter contained by reason only of non-payment by the Lessee of any advance payment as aforesaid prior to the signature of the Certificate relating to the Lessor's preceding financial year but nothing in this Lease shall disable the Lessor or the Management Company from maintaining an action against the Lessee in respect of non-payment of any such advance payment notwithstanding that the Certificate in respect of the period covered by such advance payment has not been signed at the time of the proceedings subject nevertheless to proof in such proceedings by the Lessor or the Management Company that the advance payment demanded and unpaid is of a fair and reasonable amount having regard to the prospective service charge ultimately payable by the Lessee.

20. In seeking to answer the three questions posed above, it is necessary to have regard to the Standard Lease Provisions, to which I have made reference above, and some detailed reference the relevant case law.

21. In the earlier case of *Finchbourne Ltd v Rodigues*[3] it was held by the Trial Judge in answer to the question of whether the ascertainment and certification by the landlord's managing agents of the landlords of the amount to which a fixed percentage of expenditure incurred was to be applied was a condition precedent to liability to pay the service charge, the Judge found in the affirmative. Otherwise, as he stated, the tenant could not know what sums were to be paid. The finding was not challenged.

22. Similarly in the case of *Rexhaven Ltd v Nurse and Alliance and Leicester Building Society*[4]. The management company was required to provide a certificated estimate of expenditure in respect of each quarter specifying the tenant's proportion. The certificate was stated to be binding and conclusive. Again, it was held by the Learned Deputy Judge of the Chancery Division that on a true construction of the terms of the lease two letters sent by the management company constituted a condition precedent to liability and the requirement had been satisfied. A similar position arose in the case of *Wagon Finance Ltd v Demelt Holdings Ltd*[5] .

23. In the case of *Rigby v Wheatley*[6] the Tribunal rejected the argument on behalf of the landlord that the right to demand insurance rent was independent of the requirement for a determination to be made by the surveyor, and the word "determination" was a pre-condition to a valid demand. It was noted by the Tribunal that without such determination there was no basis upon which a tenant

[3] [1976] 3 ALL ER 581.
[4] (1996) 28 HLR 241.
[5] (Unreported) 19 June 1997, Court of Appeal.
[6] [2005] LRX/84/2004 (Lands Tribunal).

would be able to know the amount of his liability. It is also to be noted that the Tribunal did not accept the LVT's distinguishment between certification and determination, or that for a determination to be conditional more informative language would be required.

24. In the case of *Akorita v Marina Heights (St Leonards) Ltd*[7] certification was found to be a condition precedent to liability, the Tribunal concluding that the lease provisions did make the certificate for interim and final charges a condition precedent to liability.

25. However, more recently in the case of *Warrior Quay Management Co Ltd v Joachim*[8] the leases in question included an obligation on the part of the landlord that at least once a year a certificate should be served on the tenants setting out the various items of service charge expenditure. Following this certification process the tenants then became liable to pay any balance due to the management company. As there had been no service of certificates at the end of the year the LVT determined that there was no balancing payment due at all, and further as there had been no proof of expenditure, all of the interim payments already made had to be returned to the tenants. This decision was reversed by the Tribunal Judge (HH Judge Huskinson) who found that the failure by the management company to obtain the required auditor's certificates did not have the effect of rendering nothing payable for services charges for the years in question. He held as follows:-

> "However, I am unable to read the lease as meaning that if [the Management Company] has failed to comply with this provision [i.e. the failure to comply with its obligations under the Seventh Schedule Part III paragraph 2] then this automatically thereby proclaims that in respect of the service charge year to which the failure relates [The Management Company] had lost the right to be paid any service charge whatever, such that the entirety of any sum paid on account must be dealt with on the basis that the leaseholder is either entitled to credit for this sum or to be repaid…. the whole of the amount paid on account….. The absence of any proper certificate is a matter that may weigh against [the Management Company] and may result in the LVT deciding that a lesser sum that hoped for by [the Management Company] may be decided to be the amount payable. Also the absence of the certificate should result in the position being that the amount which is decided by the LVT to be payable by way of shortfall will not be payable until the proper certificate (certifying that at least this amount is payable) is provided by [the Management Company's] auditors or accountants. However, if the LVT's decision is that the service charge payable for the relevant year is less than the sum paid on account, then the leaseholder is entitled to the benefit of that decision immediately (and without waiting for a certificate from the relevant auditor or accountant)…..
>
> In the result therefore I conclude, with respect to the LVT, that the absence of the required certificates from [the Management Company's] accountants or

[7] *Ibid.*
[8] [2008] LRX/42/2006 (Lands Tribunal).

auditors did not have the effect of making nothing at all payable by way of service charge for the relevant years."[9]

26. In the case of *Scottish Mutual Insurance Plc v Jardine Public Relations Ltd*[10] the service charge under the lease in question was payable annually on demand, being a fair proportion of expenditure determined by the landlord's surveyor. It was further specified that a certificate should be provided by the landlord showing the amount of the service charge. For the purposes of this covenant the certificate stated it was to be conclusive evidence of the amount so to be paid. It was found by the Deputy Judge that on a true construction of the terms of the relevant clauses the requirement for a certificate was purely machinery, and that the absence of the certificate would not prevent the landlord from recovering service charges, at least in the circumstances where the clause in question contained a primary obligation to pay.

27. Finally, I refer to another Decision of HH Judge Huskinson of *Bhambhani v Willowcourt Management Co. (1985) Ltd.*[11] In this case the LVT reached the conclusion that, in the absence of any certificates from the landlord's surveyor regarding the actual amount of the relevant cost and expenses incurred in any relevant year ending on 24th June, it was unable to claim by way of service charge any additional sum such as a balancing payment over and above such payment as it was entitled to recover as the payment on account of management charges provided for by the lease. Similar to the present case, no certificate has been forthcoming from the lessor's surveyor in respect of any of the service charge years with which the case was concerned, and indeed no such certificate had ever been issued at any stage. Accordingly, there had not been in respect of any of the service charge years any final reckoning by the surveyor's certificate as to how much should actually be paid by the lessees for that year. The Learned Judge held that no time limit was placed on the lease for the obtaining of the relevant surveyor's certificate in respect of any particular service charge year, i.e. the end of year certificate which certifies how much was actually payable by way of service charge for that relevant year. He found that there was no basis upon which to apply such a time limit.

> "It may be noted that a delay can work to the disadvantage of [the lessor] rather than of the [lessee] (or any other tenant) because there is no provision for payment of interest on the shortfall once it is eventually certified. It would be artificial (not justified by the terms of the lease) to conclude that the respondent had 364 days (but not a single day more) in which to obtain the relevant Surveyor's Certificate. According I agree with the LVT's conclusion in paragraph 47 that the absence of a Surveyor's Certificate can still be rectified, anyhow so far as concerns the calculating of the final amount payable for the relevant year pursuant to a certificate under the first proviso to clause 3(g)."[12]

28. Having regard to the case law referred to above, and on a true construction of the express terms of the standard leases in question, I reach the following conclusions:-

[9] See paragraphs 25 and 27 of the decision.
[10] [1999] EWHC 276 (TCC), per David Blunt QC.
[11] LRX/22/2007 (Lands Tribunal).
[12] At paragraph 20.

(1) The Standard Lease Provisions contain a primary obligation on the part of the lessees to pay to the management company upon written demand the service charge (as defined), or any of the general expense, without any deduction, and at all times to keep the lessor and the management company indemnified in respect of the same (clause 2(2)(ii)). However, without prejudice to such liability the terms and conditions set out in (a)-(h) shall apply to the payment of the service charge by the lessee. In particular reference should be made to (a) where the amount of the service charge shall be ascertained and certified annually by a certificate as "soon as practicable" after the end of the financial year (being the period from 1st January to 31st December in every year), and that in (c) a copy of the certificate for each such financial year shall be supplied by the management company to the lessee, but only on written request so to do.

(2) In my judgment the words "without prejudice" indicate the machinery for the payment of the service charge by the lessees, and the method by which the amount of such charges shall be ascertained and certified annually. Thus I find that there is no requirement that the ascertainment and certification of the service charge is a necessary or essential pre-condition to the ability of the management company to seek payment of the general expense. I am fortified in this interpretation by the use of the words "without prejudice", and also the fact that a copy of the certificate should be supplied, but only when the written request of the lessees is forthcoming.

(3) Thus, in answer to the second question, in my judgment it is clear that the requirement for certification is therefore not an essential pre-requisite to the payment of the service charge by the lessees. There is no contractual requirement or stipulation for certification, and thus no condition precedent. The phraseology set out in clause 2(2)(iii) provides the machinery relating to the primary obligation to pay. It is, in effect, a confirmatory procedure.

(4) In answer to the third question, I therefore find that the absence of the certificate does not prevent the Appellants from claiming the service charges due and owing subsequent to the end of the financial year. There is no limitation upon the certificate being produced subsequently, although it is to be noted that the certificate should be signed by a qualified account as soon as practicable after the end of the financial year. This can still be done.

(5) I should also state that although I have made some detailed reference to the authorities, it is clear that each case is dependent upon the strict construction of the lease in question. Thus, although the *dicta,* to which I have referred is of importance as to judicial interpretation, it must be remembered that such interpretation is based upon the true construction of the relevant lease in question. In the present case I have come to the conclusion that on a true construction of the standard form leases, it is clear that clause 2(iii) provides a mere machinery for the ascertainment of the service charge for the purposes of its payment in accordance with clause 2(ii).

***The estoppel/waiver point***

29. Turning to the second ground of appeal and paragraph 1 of the reasons in the Decision of the Deputy President, I have already made reference to the fact that the evidence adduced by the

Appellants, and accepted by the Tribunal, that there had been a meeting between them and the previous leaseholders at which it had been agreed that certification of the annual service charge was not required. In paragraph 9 above, I refer to paragraph 32 of the Tribunal Decision where it was stated in terms that such evidence was accepted. However, the Tribunal considered that such agreements had no effect on the liability of the current leaseholders to pay the service charges. Indeed, Counsel for the Respondents has not sought to challenge this finding based upon the evidence adduced during the hearing.

30. In the Appellants' Further Statement of Case dated 9th October 2014 the circumstances relating to second ground of the Grounds of Appeal are set out in some detail as to what transpired after 1993 when the Appellants had purchased the freehold of the Building and the dissolution of the management company Primoasset Ltd. On 10th October 1993 the Appellants wrote to the Lessees and canvassed their opinions as to how they would like the property to be managed. Subsequently there was a meeting between the Appellants and at least two of the Lessees, and in paragraphs 12 to 14, and 16, of this document the first Appellant set out the arrangements that had been agreed as is stated in this paragraph:-

> " ….. they asked that I would manage the Building and set out demands each year. If any lessee wanted to see the expenditure receipts copies would be supplied. I agreed to this before it was far simpler, cheaper and less onus for all concerned including myself….
>
> In the following 19 years I have managed the property pursuant to the tenant's request and agreement and I never at any time received a request for receipts until around 2012 when the current lessees wrote to me asking for copies which were duly supplied. Never throughout that time was a request made to have the accounts certified as a requirement of the Housing Acts and neither was a request made to have the accounts certified under the terms of the lease. We maintain there is no requirement for us to have them certified as a requirement of the lease…..
>
> During the 19 years flats regularly changed hands in replying to the leasehold inquiries it was clear that the accounts had not been certified. I am sure that on each occasion the purchasers would have been aware that the preceding years' maintenance payments had been made on the basis that their sellers (or their predecessors) had requested and agreed for me to do the maintenance and passed their share of the bill onto them for payment without any sophisticated process including certification. The reasons I am so sure about that, is that there was never any occasion when a new or recent buyer has raised with me (or anyone else so far as I am aware) why the request for payment were not being made through the procedure set out in clause 2(2) or alternatively trying to arrange the issue as a reason not to pay." ….
>
> Over the years the lessee has saved many thousands of pounds in not having the accounts certified. For 19 years no request was either made for copy expenditure receipts or any account to be certified."

31. In the Appellants' Reply to the Respondents' Statement of Case, reference is made to the claim in point 2 of the Grounds of the Respondent Opposition to the appeal, filed on 21st October 2014, that the Respondents made requests for certified accounts. In paragraph 1 of the Appellants' Reply the first Appellant states that this is untrue, and what they did request were copies of the supporting expenditure receipts (see the First Appellant's letter dated 2nd July 2012). In paragraph 10 of this submission the point is reiterated that the Building has been managed in accordance with the Appellants' interpretation of clause 3(8) of the Third Schedule to the Standard Lease Provisions. It is contended that the first Appellant has never received any complaints whatsoever concerning the management of services throughout the 18 years of owning the freehold.

32. Two points arise from the analysis of these events. First, as Counsel for the Appellants submits, the Tribunal, having heard evidence from both sides, accepted the Appellants' evidence relating to the meeting, to which reference has been made above. An example of the relevant invoice appears at page 50 of the appeal bundle ("the Bundle"). Details of that meeting are set out at page 85 of the Bundle. The Respondents have not sought to appeal the finding made by the Tribunal and accepted the evidence adduced before it. Unless or until an appeal is mounted against this finding, that finding must stand, as *res judicata*.

33. The second point to be made is that it is submitted that this agreement has given rise to a common understanding, or assumption, between the parties that certification would not be required. It is therefore submitted by Counsel for the Appellants that an equitable estoppel has arisen in the nature of an estoppel by convention. In the case of *The Republic of India v India Steamship Co Ltd:*[13]

> "…It is settled that an estoppel by convention may arise where parties to a transaction act on an assumed state of facts or law, the assumption being either shared by them both or made by one or acquiesced in by the other. The effect of the estoppel by convention is to preclude a party from denying the assumed facts or law if it would be unjust to allow him to go back on an assumption….It is not enough that each of the two parties acts on an assumption not communicated to the other. But it was rightly accepted by counsel for both parties that a concluded agreement is not a requirement for an estoppel by convention."

34. The doctrine may therefore apply where the party against whom the estoppel by convention has been raised made no representation or promise. In the present case it is said that the assumption made by the Appellants for some 19 years was that there was no requirement to obtain certification before making demand either because the Lessor was acting under the first of the options in the relevant clause of the Standard Lease Provisions, or the lessees did not require them to do so. It would therefore, so it is submitted, be unjust to allow the lessees to resile from the course of conduct that certification would not be required, and they ought to be precluded from doing so. The Appellants have suffered detriment, and the Respondents would be unjustly enriched if they did not have to pay for the benefits which they had willingly accepted.

[13] [1997] UKHL 40; [1998] AC 878 per Lord Steyn.

35. An alternative basis for the Appellants' submissions is that by the conduct of the Respondents, and their predecessors in title, in not requiring certification but accepting demands and paying demands, the lessees have waived any rights to resile from that position and to insist that certification was a pre-condition of their liability.

36. Having regard to these various submissions made in relation to the second issue, in my judgment, either there has been a course of conduct which constitutes an equitable estoppel by precluding the Respondents from seeking to assert that there should now be a certification process in accordance with the terms of the Standard Lease Provisions, or the Respondents have waived any right to resile from the position that has been adopted throughout the period of 19 years or so both by themselves and their predecessors in title.

37. In such circumstances I allow the appeal on both grounds for the reasons stated. As the appeal has been successful, and having regard to paragraph 6 of the Decision of the Deputy President, I remit the case to the First-tier Tribunal for further consideration as to the determination of the amount of the service charges to be paid by the Respondents to the Appellants. I also reiterate the point made by the Deputy President that in these circumstances the parties are encouraged to consider mediation as an alternative means of resolving their disputes.

Dated: 13August 2015

Judge Edward Cousins