UPPER TRIBUNAL (LANDS CHAMBER)

Neutral Citation Number: [2017] UKUT 58 (LC)
Case No: LRX/127/2016

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT – service charges – condition precedent to the tenant's liability which required the service charges to be approved at an AGM by a majority of the Members– no such resolution passed – whether tenant estopped by convention from relying upon the condition precedent – no estoppel. Appeal allowed.

IN THE MATTER OF AN APPEAL AGAINST THE DECISION OF THE FIRST TIER TRIBUNAL PROPERTY CHAMBER (RESIDENTIAL PROPERTY) MADE ON 5 JULY 2016

BETWEEN:

(1) ZULFIKAR REMTULLA JETHA
(2) SHELINA ZULFIKAR JETHA **Appellants**

and

BASILDON COURT RESIDENTS COMPANY LIMITED **Respondent**

Re: Flats 8, 17, 23, 35, 38, 40, 46, 50, 51, 53 and 54 Basildon Court, 28 Devonshire Street, London W1G 6PP

Before: **His Honour Judge John Behrens**

Sitting at: Royal Courts of Justice, Strand, London WC2A 2LL
on
6 February 2017

Alastair Redpath-Stevens (instructed by Withers LLP) for the Appellants
Robert Brown (instructed by Guillaumes) LLP for the Respondent.

The following cases are referred to in this decision:

Republic of India v India Steam Ship Co Limited ("the Indian Endurance and The Indian Grace") [1998] AC 878
Christopher Charles Dixon EFI (Loughton) Ltd v Blindley Heath Investments Ltd [2015] EWCA 1023
Clacy v Sanchez [2015] UKUT 387 (LC)
Admiralty Park Management Co Ltd v Ojo [2016] UKUT 421
Bucklitsch v Merchant Exchange Management Co Ltd [2016] UKUT 527

DECISION

Introduction

1. This is an appeal against the decision of the First Tier Tribunal ("the FTT") dated 5 July 2016. The claim related to unpaid service charges in relation to 11 flats in Basildon Court, 28 Devonshire Street, London W1G 6PP. Basildon Court is a prestigious mansion block built in 1934, which comprises 56 flats in total.

2. Mr and Mrs Jetha ("the Tenants") are the tenants under the leases of the 11 flats for terms varying between 57 and 106 years. Basildon Court Residents Company Limited ("BCRC") is a service company of which the tenants are members and which was granted a lease of the common parts of Basildon Court on 2 April 1968.

3. Pursuant to the leases, the Tenants covenanted to

1. Enter into Deeds of Covenant with BCRC
2. Comply with rules and regulations formulated by BCRC
3. Pay a percentage of the total service charge to BCRC in respect of the obligations under the Common Parts Lease.

4. On various dates between 24 September 2003 and 23 August 2011 the Tenants duly entered into Deeds of Covenant with BCRC in respect of each of the 11 flats. It is not in dispute that those Deeds contained obligations on the part of the Tenants to pay a service charge.

5. The Tenants have failed to pay the service charge since June 2014. As a result, in April 2015 BCRC issued County Court proceedings to recover the sum of £41,098 plus interest. There were 3 elements to the claim – a claim for arrears of the advance service charge, a claim for arrears of the Reserve Fund[1], and a modest claim (£396 in total) for Administration Fees in respect of each of the 11 flats.

6. On 26 May 2015 the Tenants filed a Defence. As a result, on 28 July 2015 HHJ Freeland QC transferred the claim to the FTT for the determination of all issues. There followed detailed pleadings comprising a Statement of Case by each party and a Reply. The points taken by the Tenants included:

1. The relevant Deeds of Covenant did not provide for the collection of an interim service charge on account.

[1] The Reserve Fund is described in the lease as "the Sinking Fund" but it is common ground that nothing turns on this. The two phrases are used interchangeably in the documents before me and in this decision.

2. The level of the sinking fund had not been agreed at the AGM in respect of the accounting years ending December 2014 and 2015 as required by the Deeds of Covenant.

3. There was no provision in the Deeds of Covenant for an Administration Charge.

7. In its Reply BCRC contended that it had complied with the relevant provisions in the Deeds of Covenant. It also contended that the principle of estoppel by convention applied to the service charges claimed by BCRC. Reliance was placed on the fact that BCRC had been demanding an advance service charge since 1996 following the AGM in that year; BCRC had been demanding a contribution to the sinking fund at a level of £100,000 per annum since 2005 following the AGMs of 2004 and 2005; the Tenants had paid all the demands without objection until 2012.

8. On 4 February 2016 BCRC issued a without prejudice application against the Tenants under s 27A Landlord and Tenant Act 1985. That application relied on the same pleadings as the 2015 claim and has been consolidated with it.

9. The matter came before the FTT on 5 May 2016. In its decision dated 5 July 2016 the FTT held (amongst other findings):

1. The Deeds of Covenant did provide for the collection of an interim service charge on account. There is no appeal by the Tenants against this finding.

2. The Deeds of Covenant did not provide for the collection of an "Administration Fee". There is no appeal by BCRC against this finding.

3. The obligation on the Tenants to pay an interim service charge and a contribution to the sinking fund was subject to a condition precedent that there was prior approval by a majority at an AGM. There is no appeal by BCRC against this construction of the Deeds of Covenant.

4. There had been no prior approval at an AGM of the interim service charge or the contribution to the sinking fund for 2014 or 2015. BCRC seeks to challenge this finding. It relies principally on the documents surrounding the AGM's of 1996, 2004 and 2005 which it submits justify the inference that the necessary prior approval was given.

5. That the principle of estoppel by convention did apply to the case. As a result the Tenants were obliged to pay the interim service charges and contributions to the sinking fund sought by BCRC. The Tenants seek to challenge this finding on a number of grounds.

10. Permission to appeal was granted to the Tenants by Judge Carr on 21st August 2016. No formal permission to appeal has been granted to BCRC in relation to its challenge to the decision of the FTT which is contained in its Respondent's Notice. As I indicated in the course of argument I do not find it necessary to rule on whether permission to appeal is needed. If it is, I grant it. I propose to deal with BCRC's challenge on its merits.

11. Following the grant of permission to appeal BCRC has issued fresh demands and/or invoices for the 2014 and 2015 years. They were not in evidence (and plainly were not before the FTT). However, I was told that claim for the service charges was based on the actual moneys expended rather than being a claim for an interim service charge.

12. Thus there are 2 matters to be determined in this appeal:

1. Whether the FTT's finding that there was no prior approval at an AGM of the interim service charge and contribution to the sinking fund can be successfully challenged on appeal to the Tribunal.

2. If not, whether the finding that estoppel by convention applies can be successfully challenged on appeal. If so, whether, as both parties have submitted, the matter should be remitted to the FTT for further consideration, or whether I should deal with it myself.

The Deeds of Covenant.

13. The relevant clause in the Deeds of Covenant is clause 3.1.2 which provides:

> To refund to the Service Company [specified percentage](or such other proportion reasonably determined by the Service Company and previously notified to the Lessee in writing) of all costs and expenses including without prejudice to the generality of the foregoing any Value Added Tax payable or chargeable to the Service Company or for which the Service Company is obliged to account in connection therewith incurred by the Service Company carrying out its obligations to the Superior Landlord pursuant to the provisions of the Lease and of the sinking fund referred to in Clause 4.1 hereof such sums and such times and in advance or arrear as the Service Company shall at its annual general meeting by majority agree.

14. In the light of the limited scope of the appeal it is not necessary to comment on the clause in any detail. To my mind, however, the last two lines of the clause make it clear that the service charge and contribution to the sinking fund can be "in advance" and that only "such sums … as [BCRC] shall at its annual general meeting by majority agree" are payable. I accordingly have no hesitation in agreeing with the FTT's construction of the lease.

Prior Approval

15. It is convenient to deal with this issue before considering the question of estoppel by convention. If the FTT's finding that there was no relevant approval can be successfully challenged the question of estoppel by convention will not arise.

Evidence before the FTT

16. The evidence before the FTT on this issue was almost entirely documentary. Live evidence was given by Mrs Farquhar-Oliver, a director of BCRC and Mr Jetha. However neither

of them were able to give any helpful evidence as to what occurred at the AGMs. Mr Jetha acquired his first property in Basildon Court in 2003. Thus he was in no position to say what happened in 1996. He did not attend any of the AGMs of BCRC. It was his evidence (accepted by the FTT) that he did not receive any notices relating to the AGM's. Whether he would have attended if he had received the notices is a matter of speculation. Mrs Farquhar-Oliver did attend some of the AGMs. She is recorded as being present at the AGM on 15 December 2004.

17. The documentary evidence before the FTT is contained in Appendices 10 - 12 attached to BCRC's reply. In summary it comprises:

1. The Chairman's statement for the year ending 31/12/1990. According to the statement the sinking fund was at that stage £20,307. There was said to be a need to rebuild the reserve fund to deal with two major items of expenditure.

2. The Notice convening the Annual General Meeting for the year ending 31/12/1990. The Agenda included the election of Directors, the re-appointment of the auditors and proposed a resolution that the amount of the Reserve Contribution Fund be fixed at £20,000 for the year ending 31/12/1990.

3. The Notice convening the Annual General Meeting for the year ending 31/12/1995. The Agenda included the election of Directors, the re-appointment of the auditors and proposed resolutions

    1) that the amount of the Reserve Contribution Fund be fixed at £33,000 for the year ending 31/12/1995.

    2) That from the first quarter 1997 service charge and reserve fund contributions be fixed quarterly in advance.

4. The Chairman's statement for the year ending 31/12/1995. The statement contained an explanation as to why the service charge and contribution to the sinking fund had to be collected in advance and why it was necessary to fix the reserve budget at £33,000 for that year.

5. The Chairman's statement for the year ending 31/12/1997. The statement contained an explanation as to why it was necessary for the reserve budget to be increased to £85,000 for the year 1998 and commented that a similar amount would be needed for 1999.

6. Minutes of the AGM held on 15/12/2004. The Minutes contained a Chairman's report which referred to work to be carried out in 2005 and referred to the possibility of increasing the Reserve Fund Budget from £70,000 to £100,000. The Minutes referred to resolutions relating to the re-appointment of Directors and the re-appointment of the auditors but there are no resolutions relating to the sinking fund or the service charge.

7. The Chairman's statement for the year ending 31/12/2004. The statement contained an explanation as to why it was necessary to increase the reserve budget to £100,000 for the year and to increase the level of the service charge.

8. Minutes of the AGM held on 1/11/2005. The Minutes contained a Chairman's report which contained no express reference to the service charge or the sinking fund. The Minutes referred to resolutions relating to the re-appointment of

Directors and the re-appointment of the auditors but there are no resolutions relating to the sinking fund or the service charge.

The findings of the FTT

18. The FTT dealt with this issue quite briefly in its decision. In paragraph 42 it determined that there had been no prior approval for an interim service charge. The basis for the determination is contained in the second sentence of paragraph 44:

> "The Applicant is unable to provide evidence of relevant resolutions at the AGMs and is therefore procedurally prevented from making demands."

The FTT gave similar reasons for determining that there had been no prior approval for the sinking fund.

Discussion

19. I agree with Mr Brown that the absence of minutes is not conclusive of the question of whether there was a resolution at the AGM. The Minutes are evidence of what occurred at the Meeting. The existence of Minutes is not a condition precedent to the existence of a resolution.

20. It was for that reason I have set out the documentary evidence in a little detail. In my view, however, the evidence points strongly to the conclusion that there were in fact no relevant resolutions. The following factors seem to me to be of importance:

1. No documents or other evidence were produced in respect of 2014 and 2015. There is accordingly no basis to contend that there was a resolution in either of those years. BCRC can only succeed if it can point to some earlier resolution which had continuing effect.

2. I am prepared to assume without deciding that it is possible as a matter of law for BCRC to pass a resolution with continuing effect. However, I am not satisfied that they have in fact done so.

3. Mr Brown asked me to infer that the 1995 AGM passed the two resolutions referred to in the Notice. To my mind they do not assist BCRC. The first resolution (if passed) was limited to the year ending 31/12/1995 and thus provides no basis to infer a continuing resolution. The second resolution may be effective to authorise advance payments but does not assist as to the amount of service charge and or contribution to the sinking fund to be collected. It will be recalled that clause 3.1.2 requires the actual sums to be levied to be approved. The second resolution (if passed) did not purport to authorise any sum in respect of the service charge.

4. It is also to be noted the Chairman's statements at each AGM are in general dealing with the sinking fund for a particular year. They do not purport (save in very general terms) to deal with the sinking fund for future years.

5. The sinking fund also appears to have fluctuated. In 1998 it appears to have increased to £85,000. Yet by 2005 it had reduced to £75,000. Thus there is no support for the view that it could only increase.

6. It is to my mind highly pertinent that the Minutes for 2004 and 2005 do not record any resolutions relating to the fixing of the service charge or of the sinking fund and do record resolutions relating to the appointment of directors and auditors.

21. For these reasons I have come to the clear view that the FTT were entitled to determine that there were no relevant resolutions authorising either the service charge or the contribution to the sinking fund for 2014 and 2015. It follows that I would dismiss BCRC's cross appeal.

Estoppel by convention

The Facts

22. The facts as found by the FTT which are said to give rise to the estoppel can be stated quite shortly. Mr Jetha acquired his first flat in Basildon Court in 2003. He has received service charge accounts and budgets on a regular basis since then. There are examples of the invoices that were sent exhibited as an Appendix to BCRC's Statement of Case. There is a statement of the amount claimed for the Advance Service Charge and for the Reserve Fund but there is no more detail than that. There is nothing in the invoice to indicate one way or the other that the sums had been approved by a resolution of the Members at an AGM.

23. Mr Jetha did not attend any of the AGMs of BCRC. He said (and the FTT accepted) that he had not received any correspondence in relation to the AGMs. There was no evidence before the FTT and accordingly no finding by the FTT as to whether appropriate Notice was given in accordance with BCRC's Articles of Association.

24. Mr Jetha accepted that he paid the service charge and the contribution to the sinking fund until 2014. He said that he stopped paying in 2014 when there were management problems. He cited rat infestation and low water pressure. After taking it up with the management he consulted solicitors. It was following their scrutiny that he became aware of the irregularities and stopped paying. Mr Brown pointed out that there is no express finding by the FTT that it accepted this last piece of evidence. However, it is plain from paragraph 77 of the Decision that the FTT accepted that Mr Jetha stopped paying after he experienced management problems. There is no indication in their Decision that they rejected any part of his evidence. I think that the proper inference is that the FTT accepted that Mr Jetha only realised that there were irregularities when he received the advice from his solicitors in 2014.

The Law

25. I was referred to a number of authorities on estoppel by convention. I do not intend to lengthen this decision by referring to them all. However it is necessary to refer to some of them.

26. Estoppel by convention is described by Lord Steyn in *Republic of India v India Steam Ship Co Limited ("the Indian Endurance and The Indian Grace")* [1998] AC 878 at 913–914:

> "[A]n 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 and acquiesced in by the other. The effect of an 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 the assumption. It is not enough that each of the two parties acts on an assumption not communicated to the other. But … a concluded agreement is not a requirement."

27. There is further assistance in *Christopher Charles Dixon EFI (Loughton) Ltd v Blindley Heath Investments Ltd* [2015] EWCA 1023 at paragraphs 90 – 92.

> 90 Again, Dixon J's judgment in *Grundt* explains the position (and the evidential burden) clearly (see page 675):
>
> "The justice of an estoppel is not established by the fact in itself that a state of affairs has been assumed as the basis of action or inaction and that a departure from the assumption would turn the action or inaction into a detrimental change of position. It depends also on the manner in which the assumption has been occasioned or induced. Before anyone can be estopped, he must have played such a part in the adoption of the assumption that it would be unfair or unjust if he were left free to ignore it."
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> 91. Briggs J (as he then was) elaborated on this in *HMRC v Benchdollar Limited and Others* [2009] EWHC 1310 (Ch) when summarising the principles he considered to be applicable to the assertion of an estoppel by convention arising out of non-contractual dealings, which he derived largely from another decision of this Court, namely *Keen v Holland* [1984] 1 WLR 251. His summary was as follows:
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> "It is not enough that the common assumption upon which the estoppel is based is merely understood by the parties in the same way. It must be expressly shared between them.
>
> The expression of the common assumption by the party alleged to be estopped must be such that he may properly be said to have assumed some element of responsibility for it, in the sense of conveying to the other party an understanding that he expected the other party to rely on it.
>
> The person alleging the estoppel must in fact have relied upon the common assumption, to a sufficient extent, rather than merely upon his own independent view of the matter.
>
> That reliance must have occurred in connection with some subsequent mutual dealing between the parties.
>
> Some detriment must thereby have been suffered by the person alleging the estoppel, or benefit thereby have been conferred upon the person alleged to be estopped, sufficient to make it unjust or unconscionable for the latter to assert the true legal (or factual) position."
>
> 92. As to (i) above, we do not think there must be expression of accord: agreement to the assumption (rather than merely a coincidence of view, with both proceeding independently on the same false assumption) may be inferred from conduct, or even silence (see *per* Staughton LJ in *"The Indian Grace"* [1996] 2 Lloyds Rep 12 at 20). However, something must be shown to have "crossed the line" sufficient to manifest an assent to the assumption.

28. I was referred to three comparatively recent decisions where this Tribunal has had to consider the doctrine in relation to the payment of service charges where the landlord had failed to follow the procedure laid down in the lease. In two of the three cases it was held that there was estoppel by convention. In the third there was not.

29. The first case was *Clacy v Sanchez* [2015] UKUT 0387 (LC). It concerned a dispute in relation to a service charge in relation to a property in Croydon which was the subject of 4 leases. The FTT held that certification by a qualified accountant was a condition precedent to liability under the service charge provisions. As there was no such certification there was no liability to pay the service charge. An important feature of the case was that the FTT accepted the evidence that some 19 years earlier at a meeting between the landlords and the previous tenants it had been agreed that certification was not required. The FTT held that this made no difference to the result. On appeal to this Tribunal Judge Cousins allowed the appeal on both grounds. He held that the certification provisions were not a condition precedent to the payment of the service charge. He went on to consider the estoppel/waiver point.

30. In paragraphs 33 and 34 he recorded the submission that the agreement had given rise to a common understanding or assumption that certification was not required. The landlords had acted on that assumption for 19 years and the tenants would be unjustly enriched if they did not have to pay for the benefits they had accepted. In paragraph 35 he recorded an alternative submission that there had been a waiver by the tenant of their right to insist on certification.

31. Judge Cousins did not find it necessary to distinguish between the submissions. He held that there was either an equitable estoppel or a waiver.

32. The second case was *Admiralty Park Management Co Ltd v Ojo* [2016] UKUT 0421. The tenancy concerned a two bedroom flat on the first floor of a purpose built block of 16 flats in Erith. The block was part of an estate of 12 self-contained blocks comprising 104 flats in total. Proceedings were issued in the county court to recover approximately £5,000 in respect service charges for the year 2010 to 2014. The tenant made an application under s 27A Landlord and Tenant Act 1985 and thus the matter came before the FTT. At the hearing before the FTT, the FTT itself raised a point not raised by the parties that the service charge had not been calculated in accordance with the provisions in the lease. It became common ground that the landlord's managing agents had charged the tenant a proportion of the costs of maintaining all 9 buildings rather than a different proportion of the costs of his own building. It was not clear whether the true amount payable by the tenant was more or less than that claimed.

33. In any event the FTT allowed the landlord a very limited time to deal with the point it had raised and would not allow an argument of estoppel by convention to be raised. It held that as the service charge had not been calculated in accordance with the terms of the lease no sum was payable for any of the 4 years.

34. On appeal to this Tribunal the Deputy President allowed the appeal. First he held that the FTT's failure to allow the landlord to answer the point that it had raised was a breach of natural justice and a significant procedural irregularity.

35. He went on to consider estoppel by convention. He made the point that at least since 2009 the liability has been calculated on the wrong basis – i.e by apportioning the expenses of all nine buildings amongst all the tenants rather than apportioning expenditure on individual buildings amongst the tenants of those buildings alone. The method employed was obvious to the tenants because it appeared on the face of the annual statements. He pointed out that the tenant had been involved in litigation in 2011 when he did not raise any objection to the method of calculation. The Deputy President expressed his conclusion in paragraph 45 of the decision:

> It would be unfair for Mr Ojo now to be allowed to dispute his liability in those circumstances on grounds which he had chosen not to raise for many years. For him to be permitted to do so would require the appellant to recalculate the service charges back at least to 2009 in order to ascertain Mr Ojo's correct contribution, which may be more or less than the sums he has actually been charged. If Mr Ojo has been overcharged (and there is no basis for the conclusion that he has) it would mean that other leaseholders in the estate have been under charged, but it would be difficult for the appellant to recoup the shortfall after so prolonged a lapse of time. In all of those circumstances I accept the appellant's case that Mr Ojo's liability should be ascertained on the assumption that the lease allowed the appellant to apportion liability for costs incurred in relation to the estate as a whole amongst all of its leaseholders, rather than requiring it to apportion liability for work to an individual building only amongst the leaseholders of that building.

36. The third case was *Bucklitsch v Merchant Exchange Management Co Ltd* [2016] UKUT 0527. The case concerned the recoverability of service charges for 2 years in respect of a flat in York. The FTT held that the service charge had not been charged in accordance with the manner provided for in the lease (in particular regarding the requirement of the preparation of audited accounts) and that this requirement was a condition precedent to liability. However, this failure to comply with the condition precedent did not prevent the respondent from recovering the relevant service charges for the two years in issue. This is because, there had arisen an estoppel or waiver which prevented the appellants from insisting upon the condition precedent.

37. The findings of fact relied on by the FTT were contained in paragraph 37 and 38 of its decision:

> "37. In this case there was not clear "meeting with previous lessees where it had been agreed that certification was not required" as there was in *Clacy*. But the decision in *Clacy* demonstrates no representation or promise is required, The respondents have been tenants for 11 years. They have never, until now, complained about the ways the accounts have been put together. They are shareholders in the applicant company. Thus Mr Bucklitsch was at the AGM of the Company on 11 December 2014. He raised issues including the water rates. The final accounts for 31 December 2013 were adopted unanimously. (See the Minutes included in our bundle at tag 4(b)). Furthermore, when he did seek to question the service charge in the 2014 decision no issue about the amounts was raised.
>
> 38. To use the words of H H Judge Cousins in *Clacy*, the respondents "have waived any right to resile from the position that has been adopted" for the last 11 years."

38. Judge Huskinson allowed the appeal. After rejecting an argument based on procedural unfairness he considered the question of estoppel by convention. After citing the passages from

Lord Steyn's speech in the *Republic of India* and from Briggs J's summary of the relevant principles he expressed his conclusion in paragraph 26:

> 26. With respect to the F-tT I do not consider that these facts, without more, can give rise to an estoppel (whether by convention or otherwise) and/or waiver such as to disentitle the appellants from relying upon the condition precedent point. The facts as found are not sufficient to show that the various matters needing to be established, as recognised in the citation in paragraph 21 above, are established. The present case can be contrasted with that of *Clacy v Sanchez* where, as recorded in paragraph 32 of the Upper Tribunal decision, the F-tT had made findings of fact in relation to a significant meeting which had been held regarding how that property was to be managed. Also in the present case it is unclear to me what documents in what form were received when by the appellants in relation to any allegedly relevant service charge.

39. Judge Huskinson decided to remit the case to the FTT for further consideration. He did not have enough evidence upon which to remake the decision and there was an argument on abuse of process which could not be determined by this Tribunal.

The Findings of the FTT

40. The FTT's reasons are contained in paragraphs 73 – 79 of the Decision. In paragraphs 73 and 74 the FTT referred to *Clacy* and to paragraphs 34 to 36 of that decision. The matters relied on by the FTT in summary were:

1. the Tenants had been tenants within the block since 2003. No complaints had been made until the current dispute.

2. the Tenants were members of BCRC and entitled to attend the AGM. Even though they did not receive notice of the AGMs they were business people and must have been aware of the requirements for an AGM. They could have made enquiries about it. They could have challenged the service charge and the sinking fund at such meeting. If they had done that BCRC could have put the matter right at the meeting.
3. Mr Jetha was content to accept the system of service charge and sinking fund demands until he was suffering the consequences of management problems.
4. In the absence of estoppel by convention BCRC would suffer detriment and the Tenants would be unjustly enriched by not paying for benefits which they have willingly accepted.

Discussion

41. It is to be noted that the FTT has not addressed the requirements as identified in the passage from Briggs J's judgment cited above. It has not identified what common assumption was shared between the Tenants (or their predecessors in title) and BCRC. There are in fact two possible assumptions that may have been made. One is that BCRC had complied with the

obligations in the Deeds of Covenant and the necessary resolutions had been passed. The second is that there was no necessity for any resolutions.

42. To my mind this is an important point because it may be that the parties made different assumptions. BCRC may well have assumed that no resolutions were necessary whilst the Tenants may have assumed that the provisions of the lease had been carried out. That, after all, was Mr Jetha's evidence.

43. This case is thus distinguishable from *Clacy* and *Ojo*. In *Clacy* the common assumption was that no certificate was required. In *Ojo* the common assumption was that Mr Ojo's liability could be calculated by apportioning the expenses of all nine buildings amongst all the tenants rather than apportioning expenditure on individual buildings amongst the tenants of those buildings alone.

44. The next question is whether it can be said that the Tenants (or their predecessors in title) "crossed the line" and assumed some element of the responsibility for the common assumption. Again this case is distinguishable from *Clacy* and *Ojo*. In *Clacy* there was a meeting at which it was expressly agreed by the tenants' predecessors in title that no certificate was necessary. In *Ojo* the management accounts sent out each year made it clear that Mr Ojo's liability had been calculated on the wrong basis.

45. In this case the documents sent out and received by the Tenants made no reference to any resolution at the AGM. Mr Jetha did not attend any of the AGMs. The highest the matter can be put is that the predecessors of some of the flats subsequently let to the Tenants attended the meetings in 2004 and 2005 and that the Tenants paid the invoices up until 2014 without objection. To my mind those facts are insufficient to have crossed the line although I can see there is scope for a different view.

46. Finally, there is the question of whether the detriment suffered by BCRC or the benefit conferred on the Tenants is sufficient to make it unjust or unconscionable for the Tenants to assert the true legal position. In paragraph 79 of the decision the FTT make reference to the detriment suffered by BCRC and the Tenants not paying for "benefits they have willingly accepted". This suggests that the FTT believed that without the estoppel the Tenants would not have to pay for the services they received in 2014 and 2015. If that is what the FTT believed they were, with respect, wrong in law.

47. There is nothing in clause 3.1.2 of the Deeds of Covenant which provides any time limit for the passing of the resolutions or makes time of the essence in respect of such resolutions. In those circumstances there is nothing to prevent BCRC from proposing and (if sufficient members agree) passing appropriate resolutions in respect of the 2014 and 2015 service charges and contributions to the sinking fund. If the resolutions are passed the Tenants would (subject to any rights under the 1985 Act) be liable for the sums claimed. Indeed, this may well have happened in the light of the fresh demands that have been served.

48. Thus the only real detriment to BCRC is the necessity to comply with the terms of the lease in relation to the passing of the resolution. This has to be contrasted with the important safeguard provided by clause 3.1.2 that the sums claimed have the approval of a majority of the Members at an AGM. To my mind it is neither unfair nor unjust for the Tenants to insist that such a meeting take place in respect of the 2014 and 2015 charges.

49. Again this case is distinguishable from *Ojo* where for the reasons set out in paragraph 45 of the Deputy President's decision there was a very clear detriment to the landlord if there was no estoppel by convention.

50. In my view therefore the FTT did err in law in reaching its decision on estoppel by convention and the decision must be set aside. The question accordingly arises as to whether I should remit the case to the FTT for reconsideration under s 12(2)(b)(i) of the Tribunals Courts and Enforcement Act 2007 or re-make the decision under s 12(2)(b)(ii).

51. I am conscious that both Counsel invited me to remit the application to the FTT. I am also conscious that in *Bucklitsch* Judge Huskinson remitted the application to the FTT. However, for the detailed reasons set out above I have come to the clear conclusion that there is no estoppel by convention. In those circumstances I can see little point in remitting the application to the FTT so as, in effect, to give BCRC a second bite at the cherry.

52. Such a course will only serve to increase the costs. Furthermore, as fresh demands have in fact been served there is no reason to believe that the Tenants will not, in the end, have to pay appropriate sums for the services they have received and as contributions to the sinking fund.

53. I would accordingly allow this appeal and declare that there is no estoppel by convention which prevents the Tenants from relying on the absence of any resolutions in compliance with clause 3.1.2 of the Deeds of Covenant.

54. I would also dismiss the cross-appeal.

Dated 16 February 2017

John Behrens

Judge Behrens