UPPER TRIBUNAL (LANDS CHAMBER)

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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT – service charges – construction of lease – whether term to be implied that the management company must calculate the relevant adjustment to the on account payments within a reasonable time – whether breach of such an implied term resulted in nothing being recoverable as service charges for the relevant year.

IN THE MATTER OF AN APPEAL AGAINST A DECISION OF THE LEASEHOLD VALUATION TRIBUNAL OF THE MIDLAND RENT ASSESSMENT PANEL.

BETWEEN (1) REDROW HOMES (MIDLANDS) LIMITED Appellants
(2) DICKENS HEATH (PHASE 5) MANAGEMENT COMPANY LIMITED
(3) GALA UNITY LIMITED

and

(1) DAVINDER HOTHI Respondents
(2) ROMANDA HOTHI
(3) DAVID RAMSDEN
(4) KAREN MARTIN
(5) GURDEV JHEETA
(6) HAYLEY THOMPSON
(7) S. ARUNKUMARAN
(8) R. MOLY KURIAN

Re: Flats and Town Houses at
Ascote Lane,
Dickins Heath,
Solihull,
West Midlands,
B90 1TP

Before: His Honour Judge Nicholas Huskinson
Sitting at: Birmingham Civil Justice Centre, Priory Courts, 33 Bull Street, Birmingham. B4 6DS
on 29 June 2011

Andrew Vinson, instructed by I.H.R. Mason Solicitor for Redrow Homes Limited Midlands Division, on behalf of the First Appellant.
Douglas Readings, instructed by Hadgkiss Hughes & Beale, on behalf of the Second Appellant and Third Appellant.
Mr Davinder Hothi appeared in person on behalf of himself and the Second Respondent.
The other Respondents were not present or represented.

The following cases are referred to in this decision:

Gilje v Charlegove Security's Limited [2003] EWHC 1284 (Ch)
Leonora Investment Company's Limited v Mott MacDonald Limited [2008] EWCA Civ 857
Holding & Management (Solitaire) Limited v Sherwin [2010] UKUT 412 (LC)
Halsbury's Laws of England 4th Edition Re-issue Volume 9(1) paras. 929 and 931.

DECISION

Introduction

1. The Appellants appeal, with permission, from the decision of the Leasehold Valuation Tribunal of the Midland Rent Assessment Panel ("the LVT") dated 13 June 2009 whereby the LVT decided certain matters relating to the recoverability of service charge payable by the Respondents as lessees of property at Ascote Lane. The Phase 5 Dickins Heath Development comprises 85 properties of various types. The case before the LVT concerned 6 of those properties namely Nos.50, 54, 56 and 62 all of which were in Block C Ascote Lane, No.44 in Block B Ascote Lane and No.121 in Block A Ascote Lane.

2. An application was made by the First Respondent to the LVT in November 2008 for a determination of the amount payable for service charges in respect of No.56 for 2007 and 2008. Thereafter, pursuant to directions from the LVT, the other Respondents were also joined as parties to the proceedings and the proceedings were widened to include consideration of the interim service charge demands for 2009. The First Appellant was the freeholder of all of the properties when the leases were executed, but thereafter the freehold has been transferred to the Third Respondent. The Second Respondent is the manager of the estate and is a party to the leases as described below.

3. In its decision the LVT determined certain matters regarding the recoverability of the interim service charges demanded for the calendar year 2009. There is no challenge to this aspect of the decision. However so far as concerns the years 2007 and 2008 the LVT, rather than considering the merits of the matter and examining the amount of the service charges properly payable for those years, decided instead that nothing whatever was payable by way of service charge for either of those two years. The terms of the leases are referred to in detail below but, putting the matter shortly for the moment, the leases envisaged there would be payments on account of service charge made in advance during the relevant calendar year and that after the calendar year the final calculations would be prepared and a figure, referred to as "the Maintenance Adjustment", should be determined being the amount (if any) by which the estimated figure (on the basis of which the on account demands had been made) exceeded or fell short of the actual figure. There was then provision for payment by the lessees of any shortfall or for the repayment (or giving of credit) to the lessees in respect of any over payment.

4. The totality of the LVT's reasoning which led it to conclude that, in the circumstances which had arisen, nothing was payable for service charges for 2007 and 2008 is given in paragraphs 18, 19 and 20 of its decision as follows:

> "18. In our view there is an implied term in the Leases that the Second Respondent will determine the Maintenance Adjustment within a reasonable time after the end of the year.
>
> 19. We are also of the opinion that a breach of this implied term invalidates any interim (service charge) demand.

> 20. In our view, a reasonable time has now elapsed since the end of 2007 and 2008. It follows that the interim demands for 2007 and 2008 are now invalid."

In conclusion the LVT also decided in paragraphs (C) and (D) of its decision that:

> "C). All of the costs incurred or to be incurred by the Respondents in connection with these proceedings are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenants.
> (Section 20C of the Landlord and Tenant Act 1985).
>
> D). The Second Respondent to reimburse to the First Applicant, forthwith, the whole of the fees paid by the First Appellant in respect of these proceedings.
> (Regulation 9 of the Leasehold Valuation Tribunals (Fees) (England) Regulations 2003)."

5. The issue for the Upper Tribunal on this appeal is whether the LVT was correct in its conclusion that nothing was payable for service charges for 2007 and 2008. If the LVT was correct then the appeal must be dismissed, but if incorrect then the matter will have to be remitted to the LVT for the determination on the merits as to what is the quantum of the service charges properly recoverable for those two years having regard to the evidence and to the terms of leases and the provisions of the Landlord and Tenant Act 1985 as amended, especially section 19. The appeal has been ordered to proceed by way of review. At the hearing the First Respondent appeared, representing himself and the Second Respondent, but the other Respondents had not given notice of intention to respond to the Appellant's appeal and were not parties to the appeal and were neither present nor represented. Mr Vinson and Mr Readings and Mr Hothi had all prepared helpful skeleton arguments and they developed those arguments in oral submissions. No evidence was heard.

The Leases

6. Certain of the leases on the estate are of houses for a term of 999 years and certain leases are of flats for a term of 125 years. However so far as concerns the issue before the Tribunal on this appeal nothing turns upon any difference in the wording of the leases. In particular it was accepted by all parties that the wording of the relevant service charge provisions are the same in the various leases. I take the terms of the lease from the lease dated 21 December 2006 which was granted in respect of 56 Ascote Lane to the First and Second Respondent.

7. There were three parties to the relevant leases, namely the Lessor (i.e. the First Appellant), the Company (i.e. the Second Appellant) and the Tenant. After the grant of the relevant leases the First Appellant has transferred the freehold to the Third Appellant.

8. The lease defines the expression "the Material Charges" as being the aggregate of the charges computed in accordance with the Sixth Schedule and payable under clause 3(4). The lease defines the expression "the Material Charges Percentage" as being specified percentages of various elements of the Material Charges. Clause 3 of the lease contains covenants by the

Tenant with the Lessor and as separate covenants with the Company. By clause 3(4) the Tenant covenanted as follows:

> "(4)(a). Pay to the Company the Material Charges Percentage in respect of each year ending on 31 December (hereinafter called "the Maintenance Year") the first of such payment being that payable for the year ending 31st day of December 2005 (or to such other half yearly instalment date as determined by the Lessor) and not to exercise or seek to exercise any right or claim to withhold payment thereof or any right or claim to legal or equitable set off.
>
> (b). The Material Charges Percentage shall be paid in half yearly instalments in advance on the 1st day of January and the 1st day of July in each year on account of the Material Charges Percentage payable by the Tenant such amount to be the Company's reasonable estimate of the Material Charges Percentage attributable to the Demised Premises for such Maintenance Year (such certificate to be final and binding on the Lessee until the accounts are audited and adjusted as provided below).
>
> (c). Within twenty-eight days after the accounts of the Company for the Maintenance Year have been audited and a certificate signed by the auditors stating the amount of the Material Charges Percentage attributable to the Demised Premises for that year (or a certified copy thereof) has been served on a Tenant (such certificate to be binding on the Tenant) to pay to the Company the amount (if any) by which the Material Charges Percentage payable in respect of the Demised Premises for such year exceed the amount paid on account in respect of such year PROVIDED that if the amount of such Material Charge Percentage payable for the year in respect of the Demised Premises is less than the amount paid in advance on account thereof the excess shall at the discretion of the Company either be repaid to the Tenant or retained by the Company on account of payments due from the Tenant in future years."

9. The Sixth Schedule to the lease makes provision regarding the computation of Material Charges in the following terms:

> "1. The Material Charges in respect of each calendar year shall be computed not later than the beginning of March immediately preceding the commencement of the calendar year following (other than the Material Charges for the current calendar year expiring 31st March 2006 which has already been computed) and shall be computed in accordance with paragraph 2.
>
> 2. The Material Charges shall consist of:-
>
> A sum comprising:-
>
> (i) The expenditure estimated as likely to be incurred in the year commencing 1st January by the Company for the purposes mentioned in the Seventh Schedule together with
>
> (ii) An appropriate amount as a reserve for or towards those of the matters mentioned in the Seventh Schedule as are likely to give rise to expenditure after such calendar year being matters which are likely to arise either only once during the then unexpired term of this Lease or at intervals of more than one

year during such unexpired term including (without prejudice of the generally of the foregoing) and the repair and/or renewal of the Service Installations.

(iii) a reasonable sum to enable the Company to employ managing agents for its administrative and management obligations in respect of the Development.

3. (i) After the 31 December of each year the Company shall determine the "Maintenance Adjustment" calculated as set out in the next following sub-paragraph.

(ii) The Maintenance Adjustment shall be the amount (if any) by which the estimate under paragraph 2(i) above shall have exceeded or fallen short of the actual expenditure in the relevant preceding year.

(iii) The Tenant shall be allowed or shall on demand pay as the case may be the proportion of the Maintenance Adjustment appropriate to his/her demised premises.

4……

5……

6……"

Appellants' Submissions

10. On behalf of the First Appellant Mr Vinson recorded that the First Appellant did not accept that any term should be implied into the lease to the effect that the Company should determine the Maintenance Adjustment (i.e. as provided for in the Sixth Schedule paragraph 3) within a reasonable time, nor did he accept that there had been any breach of such implied term supposing that such a term was to be implied. However he concentrated his argument upon the question of what was the proper consequence supposing that such a term was to be implied and had been breached. Before turning to this point I should record that in his skeleton argument he had contended, for various reasons, that no term should be implied that the Maintenance Adjustment should be calculated within a reasonable time, including that the lease is a lengthy document which had been professionally drafted and that implication of terms should be a last resort and only if necessary to give business efficacy. However in argument before the Tribunal Mr Vinson accepted that it would not be unusual to imply a term requiring that a step which had to be taken (but for which no time was specified in the contract) should be performed within a reasonable time.

11. Mr Vinson argued that, supposing there is an implied term that the Maintenance Adjustment is to be calculated by the Company within a reasonable time and supposing further that the Company i.e. the Second Appellant was in breach of that implied term, then the consequences of such breach are as follows:

(1) There could be a claim for damages, if any could be proved, arising from any unreasonable delay in calculating the Maintenance Adjustment. For instance if a Tenant

could show that the delay meant that he received a repayment (i.e. arising from an overpayment of the interim service charges) later than he should have done then he might be able to claim lost interest.

(2) The Tenant could seek to enforce the Company's obligation by applying to the Court for the taking of an account and, if the Company's delay is unreasonable, the Company would have to pay the costs. This was the form of remedy contemplated by Etherton J in *Gilje v Charlegove Security's Limited* [2003] EWHC 1284(Ch) at paragraph 27. That was a case concerned with the proper application of section 20B of the 1985 Act, but the learned judge at the end of his judgment contemplated what the appropriate remedy would be if there had been a failure by the lessor to prepare a final account. There was no suggestion in that case that such a failure would give rise to nothing being payable – instead the Court contemplated the possibility of an application for an account.

(3) There is also a statutory remedy, in that the Tenant, if he considers the Maintenance Adjustment calculation has been unreasonably delayed, can apply to the LVT under section 27A for a decision as to how much service charge is payable. The absence of the calculation of the Maintenance Adjustment is not something which prevents the Tenant being able to go to the LVT – indeed this is what actually happened in the present case and there was no suggestion made by the Appellants or by the LVT itself that the absence of a calculation by the Second Appellant of the Maintenance Adjustment meant that it was premature for the LVT to consider the amount of the service charges payable.

12. Accordingly Mr Vinson submitted that if there was an implied term and if it had been broken, then the remedy was either damages at common law or an account (or specific performance) in equity, or an application to the LVT under statute. There was no justification for concluding that the consequences of a breach of an implied term to calculate the Maintenance Adjustment within a reasonable time was that nothing was payable for the relevant calendar year by way of service charges and in consequence that anything already paid on account for that calendar year would have to be repaid. Mr Vinson pointed out that clause 3(4) (a) and (b) required the payment of service charge on account by half-yearly instalments in advance on 1st January and 1 July in each calendar year and contained a covenant by the Tenant "not to exercise or seek to exercise any right or claim to withhold payment thereof or any right or claim to legal or equitable setoff". Mr Vinson pointed out that there was thus this positive obligation to make these payments on these days and that the Tenant, if he failed to do so, would be in breach of covenant and theoretically (albeit subject to certain statutory limitations) susceptible to being proceeded against for forfeiture of the lease. The demands for on account payment were valid when issued and were not conditional on anything, nor was there anything in the lease indicating that these demands on account might subsequently become invalid. The scheme of the lease is pre-estimate; payment; adjustment. There is nothing in the lease to provide or even indicate that the validity of the demand for on account payment on 1st January and 1st July in each year will lapse on the basis of some subsequent event and will have to be repaid.

13. The LVT in refusing permission to appeal had sought to support its conclusion on two separate grounds, not raised in its decision:

"Further, if there was an error of the law as alleged, the Tribunal would nevertheless have made the same decisions on the grounds:-

(i) That this case is analogous to the case of *Leonora Investment Company Limited v Mott MacDonald Limited* [2008] EWCA Civ 857; or in the alternative:

(ii) That the Unfair Terms in Consumer Contracts Regulations 1999 rendered the service charge demands unenforceable."

14. As regards these two additional points Mr Vinson advanced the following arguments:

(1) The *Leonora* case shows that leases must be construed in accordance with their own terms and the question to ask is: what does the lease say has to happen before the Tenant is obliged to pay service charge? There is nothing in the present lease to indicate that nothing by way of service charge is payable if the Maintenance Adjustment has not been calculated within a reasonable time. Also in paragraph 24 of the *Leonora* decision, where the Court contemplated that the landlord could issue a revised statement and could ultimately recover service charge payments, the Court observed that provisions of this kind should not be seen as procedural obstacle courses.

(2) As regards the Unfair Terms in Consumer Contracts Regulations 1999 Mr Vinson submitted that these apply to contractual terms and there is no term in the Lease which can properly be said to be unfair. What is provided in the present case is a scheme in fairly standard form of pre-estimate, payment and final adjustment.

15. On behalf of the Second and Third Appellants Mr Readings adopted the submissions made by Mr Vinson and added certain further points. He relied upon the *Gilje* case and submitted that the LVT was wrong in treating these demands as merely "interim" demands which could subsequently metamorphose from valid demands to invalid demands depending upon when the Management Adjustment was calculated. Mr Readings also submitted that the *Leonora* case strongly suggested that the Appellants' argument in the present case was correct, see paragraph 24 of the *Leonora* case. Mr Readings submitted that the Court of Appeal would not have expressed itself in the manner it did in paragraph 24 if a failure to issue a statement within a reasonable time or an error made in a statement was an error which was incapable of being cured and had the result that the entire right to recover service charge for the relevant year was lost for ever. As regards the 1999 Regulations Mr Readings submitted that for Regulation 5 to apply it was necessary there was a significant imbalance in the parties' rights and obligations and it was necessary that this was to the detriment of the consumer. Neither of these qualifications were satisfied and these further reasons, together with the reason already given by Mr Vinson (i.e. that there has been no specific contractual term identified which is allegedly unfair) mean that the Regulations are of no relevance in the present case. Mr Readings submitted that, if the Tribunal concluded that the Appellants' appeal should be allowed, then the question of how much was payable by way of service charge for the years 2007 and 2008 would have to be remitted to the LVT for reconsideration and he further submitted that, for the reasons next mentioned, this remittal should be to a differently constituted LVT. The reasons why the remittal should be to a differently constituted LVT

were, he said, because of (i) the nature of the mistake made by the LVT in its present decision (supposing that the appeal succeeds), (ii) the vigorous way in which the LVT has sought to defend its decision by the volunteering of two further grounds (see paragraph 13 above) to support its decision, and (iii) the approach taken to the *Gilje* case by this LVT (presided over by the same chairman as presided in the present case) in an earlier case which was decided on appeal by this Tribunal in *Holding & Management (Solitaire) Limited v Sherwin* [2010] UKUT 412(LC).

16. Mr Readings also advanced arguments regarding paragraphs (C) and (D) of the LVT's decision, being their findings dealing with costs. He submitted that this Tribunal should reverse those findings. I enquired of Mr Readings as to whether in their application to this Tribunal for permission to appeal the Second and Third Appellants had sought and been given permission to challenge these decisions by the LVT upon costs. Mr Readings accepted that the grounds of appeal advanced to this Tribunal by the Second and Third Respondents did not seek to challenge this point – indeed the grounds of appeal state:

> "The Appellant wishes to appeal by way of Review with a view to re-hearing against that part of the decision of the [LVT] by which the LVT decided: "*Nothing is payable for service charges (including parking spaces) for 2007 and 2008).*"

Mr Readings submitted that these Appellants should nonetheless be allowed to challenge these findings. On the merits he submitted that there is no finding by the LVT that the Second and Third Appellants acted unreasonably, except for the finding which is challenged in this appeal (namely the alleged breach of an implied term). Also the LVT's decision in paragraphs (C) and (D) may well have been made on the basis that the LVT had decided the question of service charges for years 2007 and 2008 in favour of the Tenants on the basis of the implied term point. If the LVT's decision on this point is reversed then the costs finding should fall with it. He submitted that if the Appellants succeed in this appeal then the matter will have to be remitted for a further hearing and it is wrong for the Second and Third Appellants to have to pick up the bill for what was an abortive hearing before the LVT. Similarly as regards the costs before this Tribunal Mr Readings submitted it would be wrong to require the Second and Third Appellants to pay their own costs because of an unfortunate mistake by the LVT rather than for them to be allowed to enjoy such contractual rights as they may have to pass these costs on to the Tenants through the service charge.

Respondent's Submissions

17. Mr Hothi stated that the Respondents had applied to the LVT for a decision upon the service charges as a matter of last resort. The Respondents were concerned regarding the quantum of the service charges which had been demanded. He told me that he considered that the Second Appellant had got in, by way of on account payments, more money than was shown as being expended in such unaudited accounts as he had been able to see. He drew attention to paragraph 10 of the Second and Third Appellant's statement of case where it is stated that the Second Appellant has (since the LVT's decision) determined that the Maintenance Adjustment in respect of 2007 and 2008 is nil. He submitted that it is insulting to the intelligence to suggest that the amount of the monies demanded on account was so precisely calculated that there was

nothing whatever to be adjusted either way pursuant to be provisions of the Lease. He raised various matters concerning the quantum of the service charges for 2007 and 2008 including for instance the inclusion of what he submitted could not be appropriate charges for gardening in respect of immature landscaping during the winter months when snow was on the ground.

18. Mr Hothi submitted that in order for the service charge mechanism in the lease to function there is a requirement for the Second Appellant to determine the Maintenance Adjustment within a reasonable time after the year end. While the situation may be different for the first or perhaps the first two years of the lease, thereafter the Maintenance Adjustment is the key. Consider for example the calendar year 2010. For this year it is necessary that no later than 1 March 2009 a proper estimate is made as to what the Material Charges would be (see Sixth Schedule paragraphs 1 and 2). In order for this proper estimate to be made by 1 March 2009 in respect of the calendar year 2010 the Second Appellant must properly examine the ongoing level of expenses and must have done the calculation of the Maintenance Adjustment for the calendar year which has just terminated on 31 December 2008. In effect Mr Hothi submitted that there is a linkage between certain steps which need to be taken by the Second Appellant in the first two months of each year, namely the calculation of the Maintenance Adjustment for the year just finished and the calculation, in the light of knowledge gleaned from that operation, of an appropriate amount to be paid on account for the year which will commence on the following 1st January. Mr Hothi's argument appeared to involve a contention that unless (in the example given) the Maintenance Adjustment was promptly calculated for the calendar year 2008, the demand for estimated on account payments for the calendar year 2010 would be invalid. However in response to questioning from me, Mr Hothi appeared to accept that this argument, although in theory it might be capable of being raised in the future, was not relevant to the question with which the Tribunal is concerned in the present case. This is because the basis of the LVT's decision, against which the present appeal is brought, is not that the original demands for on account payments for 2007 and 2008 were invalid because of some previous failure to have worked out the Management Adjustment for some earlier year, but instead the basis of the LVT's decision is that the subsequent failure by the Second Appellant to work out the Management Adjustment for 2007 and 2008 had the retrospective effect of resulting in nothing being payable for either of those years with the consequent retrospective invalidating of the on account demands for those years.

19. It is convenient to deal with this point now. Both Mr Vinson and Mr Readings submitted that this point raised by Mr Hothi did not arise. They drew attention to the LVT's decision at paragraph 17 under the heading "Facts" where it is recorded that "The Second [Appellant] has served interim demands on the [Respondents] in respect of 2007, 2008." It is not suggested that there was anything wrong with these interim demands when they were served. Also and in any event the requirement under clause 3(4)(a) and (b) is that the Tenant must pay a sum on account in an amount which is "the Company's reasonable estimate of the Material Charges Percentage" which is to be final and binding until the accounts are audited and adjusted. It was submitted that the mere fact that (in the example given) the Second Appellant may not by 1 March 2009 have worked out the Maintenance Adjustment for 2008 does not of itself prevent a proper and bona fide reasonable estimate being made by the Second Appellant of the Material Charges Percentage for 2010. It is sufficient for present purposes for me to note Mr Hothi's argument but to conclude that it does not arise in the present case. This appeal is proceeding by way of review. The LVT proceeded upon the basis (and appears to have found) that proper

demands for on account payments were made for 2007 and 2008. The question I am concerned with is not some argument as to whether these demands were invalid when made, but is instead the question of whether the subsequent failure by the Second Appellant to calculate the Maintenance Adjustment within a reasonable time results in nothing being payable for 2007 and 2008.

20. As regards the basis upon which the LVT did decide the case, Mr Hothi submitted the LVT was correct to find that a term should be implied into the lease that the Maintenance Adjustment must be determined within a reasonable time after the end of the relevant year and was also correct to find that there had been a breach of this implied term for both the year 2007 and the year 2008. He submitted the LVT was correct in concluding that a breach of this implied term meant that nothing was payable by way of service charge for these years. He submitted that a re-hearing would be pointless as on the material available it would not be possible to work out the appropriate figures. He also adopted the support which the LVT perceived it could draw from The Unfair Terms in Consumer Contracts Regulations 1999.

21. On the question of costs Mr Hothi submitted that the Second and Third Appellants should not be allowed to challenge paragraphs (C) and (D) of the LVT's decision as these were not raised in the application for permission to appeal to the Upper Tribunal. He informed me that the Respondents instituted the proceedings as a matter of last resort. He made an application to me that I should make an order under section 20C in respect of the costs before Upper Tribunal.

Conclusions

22. For the reasons already stated in paragraph 19 above I proceed on the basis that there was nothing wrong with the demands for payments on account of service charge in respect of the years 2007 and 2008. There is nothing in the LVT's decision to indicate that such sums as were demanded on account were not properly demanded in accordance with clause 3(4) and the Sixth Schedule. The substance of the LVT's decision is not that there was anything wrong with these demands for payment on account when they were originally demanded – instead the substance of the decision is that subsequently, by reason of breach of the alleged implied term, nothing became payable by way of service charges for these years and accordingly the obligation to make payment on account pursuant to these demands for payment on account disappeared.

23. Paragraph 3 of the Sixth Schedule provides that after the 31 December of each year the Company (i.e. the Second Appellant) shall determine the Maintenance Adjustment. It is only once this has been done that the further demand to or allowance to the Tenant can be made. However the lease does not lay down any express time period within which the Second Appellant is to determine the Maintenance Adjustment. While I was not referred to this during argument, in my judgment the law on this point is helpfully summarised in *Halsbury's Laws of England* 4th Edition Re-issue Volume 9(1) paragraph 929:

> "Where no time for performance is fixed by the contract the law implies an undertaking by each party to perform his part of the contract within a time which is reasonable having regard to the circumstances of the case…"

Neither Mr Vinson or Mr Readings advanced any substantial argument against the proposition that there should be implied into the lease a term that the Company (the Second Appellant) should determine the Maintenance Adjustment within a reasonable time after 31 December in each year. If there was no such implication at all and the Second Appellant was allowed to wait as long as it wished then this could plainly give rise to potential difficulties, especially for Tenants, as pointed out by Hothi. Accordingly I agree with the LVT's decision that such a term is to be implied into the lease.

24. The LVT found that for each of the two years 2007 and 2008 the Second Appellant was in breach of this implied term by failing to calculate the Maintenance Adjustment within a reasonable time. The Company would have been unable to calculate the Maintenance Adjustment until the accounts of the Company had been audited and the relevant certificate had been signed, see clause 3(4)(c). I was not referred to any evidence as to the date by when this occurred in relation to the 2007 or 2008 accounts. However the Maintenance Adjustments had not been calculated by the date of the hearing before the LVT in June 2009. On this appeal by way of review there is no basis on which I could interfere with the LVT's decision that for each of these two years there was a breach of the implied term.

25. The crucial question which therefore arises is what is the effect of breach of this implied term. It may be noted that *Halsbury* at paragraph 931 states:

> "The modern law, in the case of contracts of all types, may be summarised as follows. Time will not be considered to be of the essence, except in one of the following cases: (1) the parties expressly stipulate that conditions as to time must be strictly compiled with; or (2) the nature of the subject matter of the contract or the surrounding circumstances show that time should be considered of the essence; or (3) a party that has been subjected to unreasonable delay gives notice to the party in default making time of the essence."

In my judgment time was not of the essence as regards the obligation under the implied term that the Second Appellant should calculate the Maintenance Adjustment within a reasonable time after the end of the relevant service charge year. Breach of this implied term did not automatically mean that all of the Tenant's obligations to make payments of service charge in respect of that year disappeared. The remedies potentially open to the Tenants (i.e. the Respondents) were as described by Mr Vinson, namely either (i) an action for damages or (ii) an action for specific performance or for an account or (iii) an application to the LVT under the Landlord and Tenant Act 1985 for the determination of the service charges payable.

26. There is no basis upon which the LVT could properly decide that the consequence of a breach of the implied term to calculate the Maintenance Adjustment within a reasonable time was the total loss of the right to charge any service charge for the year in question. It may be noted that the LVT reached this conclusion without looking at the merits of the claim for service charge so far as concerns quantum. The effect of the LVT's decision is that, even if a landlord under a lease such as the present dutifully and competently provides excellent and

valuable services throughput the service charge year, that landlord becomes disentitled to charge anything at all for the relevant year (and in consequence will become obliged to repay or make an allowance to the tenants for anything paid on account) if the landlord does not within a reasonable time after the end of the relevant year calculate the Maintenance Adjustment. For such a remarkable result to ensue there would need to be some provision to that effect in the lease. Plainly there is no such express provision in the present lease. It follows that the only basis on which the LVT's decision could be upheld is if it were proper to imply not merely a term that the Maintenance Adjustment would be calculated within a reasonable time but also to imply a term that failure to do so would result in the Company being disentitled to charge any service charge at all for the relevant year irrespective of the services which had in fact been provided and their quality and value. Merely to state such a possible implied term indicates how obvious it is that such a term cannot properly be implied either on the basis of business efficacy or on the basis of the officious bystander test or on any other basis.

27. It follows that in my judgment the LVT was wrong in its conclusion that the failure by the Second Appellant to calculate the Maintenance Adjustment within a reasonable time resulted in no service charges being payable for the years 2007 and 2008.

28. I turn next to the proposition advanced by the LVT in its refusal of permission to appeal that even if it did make some error of law as alleged (i.e. regarding the question of an implied term) the LVT would nevertheless have made the same decisions for the reasons mentioned in paragraph 13 above. I question the appropriateness of an LVT seeking to uphold its decision (and seeking to justify a refusal of permission to appeal) by reference to new points which were never raised in the original decision. It may perhaps be that such a new point could properly be mentioned in a refusal of permission to appeal if there was some obvious and unanswerable point which had unfortunately been overlooked in argument before the LVT and in the LVT's decision, being a point which was necessarily determinative of the case. However here the two points raised by the LVT, without any development or reasoning, are not within such a category as last mentioned. In fact in my judgment both points are plainly wrong.

29. The *Leonora* case is authority for the proposition that, where a landlord claims a service charge, it is necessary to ask what the lease says has to happen before the tenant is obliged to pay the service charge. In the present case what had to happen was that the Company had to make a valid demand for payments on account in accordance with the provisions of clause 3(4)(a) and (b) and the Sixth Schedule. In relation to the years 2007 and 2008 valid demands for on account payments were made, see paragraphs 19 and 22 above. The Company would have been unable to claim an additional payment for, for instance, 2007 unless and until it had calculated the Maintenance Adjustment and had served the appropriate documents. However the Company has not attempted to claim an additional payment. What this case concerns is whether the LVT was correct in concluding that nothing is payable for service charges for 2007 and 2008. I accept the arguments advanced by Mr Vinson and Mr Readings that the *Leonora* case lends no support to the LVT's decision and that the Court of Appeal's analysis in paragraph 24 of that case points away from rather than towards the LVT's decision in the present case being correct. As regards the LVT's reference to the Unfair Terms in Consumer Contracts Regulations 1999 it is noted that all the LVT has done in its refusal document is to

refer to these Regulations, but without any explanation as to how they might even arguably be relevant. The LVT has not identified any term regarding service charges in the leases which it considers to be unfair and which in consequence is not to be binding on the consumer. In my judgment no such term can be identified in the service charge provisions in this lease.

30. Unfortunately the LVT has not given any consideration to the questions under section 27A for the years 2007 and 2008 beyond its ruling that nothing is payable. Accordingly the question of how much is payable for these two years remains at large to be determined upon the merits of the case. This question will have to be remitted to the LVT. I agree with Mr Readings' submission that it would be inappropriate for the matter to come back before an LVT which contained any of the members who were a party to the present decision. However having expressed this view, it is not for this Tribunal to give formal directions as to the future progress of this case before the LVT.

Decision

31. I allow the Appellants' appeal against the LVT's decision so far as it concerned the service charges for 2007 and 2008. I direct that the questions arising under section 27A of the Landlord and Tenant Act 1985 as amended in relation to 2007 and 2008 are remitted to the LVT for a rehearing before an LVT.

32. So far as concerns the Second and Third Appellants' request that I should reverse the LVT's decisions in paragraph (C) and (D) I conclude as follows:

(1) These Appellants are not entitled to raise this argument. They did not ask for permission to appeal these points and have not been granted any such permission.

(2) In any event I would have declined to interfere with the LVT's decision on these points bearing in mind (a) it was the LVT's discretion as to what order to make regarding costs and (in particular) (b) the reason given in the next paragraph regarding the section 20C order I am asked to make in respect of the costs before this Tribunal.

30. Mr Hothi invited me to make an order under section 20C regarding the costs before the Upper Tribunal. It is true, as pointed out by Mr Readings, that it is unfortunate there has been an abortive hearing (so far as concerns 2007 and 2008) before the LVT and that there has been the necessity of the present appeal to this Tribunal. Mr Readings asks why should the Second and Third Appellants have to bear these costs rather than passing them on to the Tenants through the service charge. I have not been asked to construe the lease as to whether there is power to pass on such costs through the service charge and I make no findings one way or another upon that point. However I consider the application under section 20C on its merits supposing that such a power does exist to pass on the costs through the service charge. It is indeed unfortunate that these wasted costs have arisen because of the manner in which the LVT dealt with the service charge for 2007 and 2008. However a reason why this has happened is

because the Second Respondent failed, in breach of an implied term, to prepare the Maintenance Adjustment within a reasonable time. If the Second Appellant had not been at fault in this manner I conclude that there would not have been an abortive hearing before the LVT or this appeal to the Upper Tribunal. Accordingly I order under section 20C that all of the costs incurred by the Appellants in connection with the proceedings before the Upper Tribunal are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenants of the development.

Dated 7 July 2011

His Honour Judge Nicholas Huskinson