UPPER TRIBUNAL (LANDS CHAMBER)

UT Neutral citation number: [2015] UKUT 0427(LC)
UTLC Case Number: LRX/131 and 132/2014

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT – service charges - estimated charges – management company failing to prepare audited accounts – whether failure to prepare annual accounts was condition precedent to liability for estimated charges – whether Tribunal had jurisdiction to consider construction of the lease in the light of the question referred by the County Court. – appeal allowed.

IN THE MATTER OF AN APPEAL FROM TWO DECISIONS OF THE FIRST TIER TRIBUNAL (PROPERTY CHAMBER).

BETWEEN

ELYSIAN FIELDS MANAGEMENT COMPANY LIMITED	**Appellant**
- and -	
(1) JOHN NIXON	
(2) PATRICIA NIXON	**Respondents**

AND BETWEEN:

IMPERIAL BUILDINGS MANAGEMENT COMPANY LIMITED	**Appellant**
- and -	
JOHN NIXON	**Respondent**

Re: Re Apartments 52, 53 and 97
Elysian Fields, Colquitt Street,
Liverpool L1 4DL
and
Apartments 6, 10, 20 and 25, Imperial Buildings,
High Street, Rotherham S60 1FF

Before: Judge Behrens sitting as a Judge of the Upper Tribunal
at the Royal Courts of Justice, Strand, London WC2A 2LL
on 20th July 2015.

Andrew Dymond (instructed by Brown Turner Ross) for the Appellants
Mr Nixon, in person for the Respondents

The following cases are referred to in this decision:

Regent Management v Jones [2010] UKUT 369 LC.

Redrow Homes v Hothi [2011] UKUT 268 (LC)

Pendra Loweth Management v North [2015] UKUT 0091 (LC)

Lennon v Ground Rents [2011] UKUT 330 (LC)

Staunton v Kaye [2010] UKUT 270 (LC)

Cain v London Borough of Islington [2015] UKUT 0117 (LC)

DECISION

Introduction

1. This is an appeal from two decisions of the First-tier Tribunal (Property Chamber) ("FTT") made on 13th August 2014. Both decisions related to the service charge payable in cases that had been referred to the FTT by the County Court.

2. The FTT decided that no service charge was payable because the Management Company had failed at the relevant time to comply with clauses 5 and 6 of the 7th Schedule of the relevant leases. It will be necessary to set out the relevant provisions later in this judgment. For present purposes it is sufficient to note that there was an obligation on the Management Company under clause 5 to keep proper books of account in relation to its obligations under the Schedule. Under clause 5(b) the accounts needed to be prepared and audited by a competent chartered accountant who was required to certify the total costs and the proportion payable by the Tenant. Under clause 6 the Management Company was required to serve on the Tenant within one month of the date of the certificate a notice stating the total and proportionate amount specified. The FTT held that as at the date when proceedings were issued in the County Court there was no compliance with these provisions and that accordingly no sum was due. In those circumstances it was not necessary for the FTT to consider the individual items of the service charge.

3. The FTT went on to make two further observations in respect of the Elysian Fields Apartments and one further observation in respect of the Imperial Buildings Apartments.

4. In relation to the Elysian Fields Apartments it commented

1. that as one of the properties on the ground floor was a Chinese restaurant, the insurance risk attributable to such a property is greater than for a residential flat. This was a matter which the Landlord ought to take into account when apportioning the premium between the various properties.

2. that the Tenant had not produced sufficient evidence to demonstrate that the question of the reasonableness of the service charge was arguable (save for the issue of insurance) within the meaning of the decision of HH Judge Mole QC in *Regent Management v Jones* [2010] UKUT 369 LC.

5. In relation to the Imperial Buildings Apartments it commented that the Tenant had not produced sufficient evidence to demonstrate that the question of the reasonableness of the service charge was arguable within the meaning of *Regent*.

6. Permission to appeal was granted by Martin Rodger QC, Deputy President on 12th December 2014. In essence there are three grounds of appeal raised by the Management Companies:

1. the FTT was wrong to hold that compliance with clauses 5 and 6 was a condition precedent to payment of the service charge.

2. the FTT had no jurisdiction to determine that the demands were invalid. It was not a matter raised in the County Court; it was not an issue that was referred to them.

3. it was not within the jurisdiction of the FTT to recommend that the Landlord take into account the risk attributable to the restaurant when fixing the apportionment for the buildings insurance. It was not a point raised by the Tenant; there was unsupported by evidence and the reasons given were inadequate.

7. Mr Nixon has filed a statement of case and a skeleton argument in opposition to the appeal. It is convenient to deal with his arguments later in the judgment.

The Properties

8. The Elysian Fields property comprises a single block of luxury self-contained apartments constructed at the turn of the century in Liverpool. All facilities are close to hand. The ground floor consists of a restaurant, the entrance to the apartments and the entrance to underground car parking part of which is available to the general public. The development comprises 105 apartments on 7 floors. Each apartment is of different size, ranging from single bedroomed to penthouses. The entrance lobby is marble faced and the hallways carpeted. There are two lifts.

9. The Imperial Buildings property is a listed building comprising 17 commercial and 19 residential units in the centre of Rotherham. It was formerly Rotherham Market Hall built in the Victorian era. The upper floors have been recently converted into 19 residential flats having a separate entrance and a door entry system. The flats comprise six two bedroomed flats, eight one bedroomed flats and five studio flats. The entrance hall gives access to a stone staircase with wrought iron balustrades leading to two upper floors with a mezzanine floor. There is also a lift. The windows to the common parts are of timber frame single glazed construction. Some show signs of wear.

The Leases

The parties

10. All of the leases are similar in form[1]. In each case there are three parties. Iliad Group Limited and Iliad (Rotherham) Limited are the landlords of the Elysian Fields and the Imperial Buildings Apartments respectively; Elysian Fields Management Company Ltd and Imperial Buildings Management Company Ltd are the respective Management Companies. Mr Nixon is the Tenant of all four of the Imperial Buildings Apartments and two of the three Elysian Fields Apartments. Mr and Mrs Nixon are the joint tenants of the third Elysian Fields Apartment – (no 97).

The relevant clauses

11. The leases contain a definition clause. It is not necessary to refer to them in detail save to note cl 1.25 and cl 1.27. Cl 1.25 defines the Service Charge:

> A reasonable proportion attributable to the Property of the total costs charges and expenses incurred by the Management Company (including the reimbursement of the premium for buildings insurance) in performing its obligations set out in the Seventh Schedule.

12. Cl 1.27 defines the Services as

> "the services to be provided pursuant to the Management Company's obligations set out in the Seventh Schedule"

13. By cl 4 of the lease

> "The Lessee hereby covenants with the Management Company to observe and perform the covenants stipulations and obligations set out in the Fifth Schedule hereto"

14. Clause 1 of the Fifth Schedule contains a covenant by the Lessee

> "To pay (by standing order if required) to the Management Company on the 1st October in every year (or on such other appropriate date or dates to be determined by the Management Company acting reasonably) the amount of the Service Charge estimated by the Management Company as being required to enable the provision of the Services during that year and forthwith upon demand to pay to the Management Company any underpayment in respect of the provision of the

[1] The only lease in the Appeal Bundle is in respect of 52 Elysian Fields. There was some suggestion at the hearing before me that there were some differences between the Elysian Fields leases and the Imperial Buildings leases. I am not in a position to comment on that suggestion. This appeal is determined on the basis that the material provisions are identical

Services for any previous calendar year and if such Service Charge shall not be paid the Lessee hereby acknowledges that it shall be recoverable as rent in arrears"

15. By cl 6 of the lease:

"The Management Company hereby covenants with the Lessee subject to the payment by the Lessee of the Service Charge to observe and perform the obligations contained in the Seventh Schedule"

16. Clauses 1 to 3 of the Seventh Schedule contain the obligations on the Management Company. They include repairing obligations in relation to the reserved property, maintenance of the boundary walls, security systems and keeping the halls staircase and landings properly cleaned. In addition the Management Company was required to paint the outside wood and ironwork once every 5 years.

17. Clauses 5 and 6 of the Seventh Schedule provide:

"5. To keep proper books of account of all costs charges and expenses incurred by it in carrying out its obligations under this Schedule and an account shall be taken as at the 30th day of September (or an appropriate date to be determined by the Management Company) in every year during the continuance of the Term Provided That

(a) the Management Company shall be entitled to appoint managing agents and/or accountants to carry out all or any of its obligations contained in this Lease and the fees of such managing agents and/or accountants for acting in accordance with and pursuant to such appointment shall be deemed an expense properly incurred under this Lease

(b) the accounts prepared in pursuance of this Schedule shall be prepared and audited by a competent chartered accountant who shall certify firstly the total amount of such costs and expenses (including the fees for such preparation and audit of the said accounts and the fees of the managing agents referred to in the last preceding sub paragraph) for the period to which the account relates and secondly the proportionate part due from the Lessee to the Management Company pursuant to clause 1 of the Fifth Schedule and such certificates shall be final and binding upon the parties thereto

6. Within one month of the dates of such certificates as are provided for in clause 5(b) of this Schedule to serve on the Lessee a notice in writing stating the said total and proportionate amounts specified and if payment of any sum thereby certified as due and payable by the Lessee to the Management Company shall not be paid within 14 days after service of the said certificate interest shall be payable upon the said sum from the dated of the service of the said certificate until payment at a rate 4% above the base lending rate of Barclays Bank PLC prevailing at the date of the service of the said certificate"

Invoices/Statements

18. From time to time the Management Companies submitted invoices to Mr Nixon. Examples of those invoices were before the FTT and some of these are included in the appeal bundle.

19. A typical invoice (p 95 of the bundle) is dated 19 March 2012 in respect of Apartment 25 Imperial Buildings in the sum of £287.01. The only information on the invoice is that it is the service charge for the period 1/4/2012 until 30/6/2012.

20. It is thus plain that it is an estimate of the service charge for a future period. Whilst clause 1 of Schedule 5 refers to 1st October as the date of payment it gives the Management Company discretion to nominate other dates.

21. More importantly it contains no information as to how the service charge has been calculated, no information as to the individual costs or of the proportion of the individual costs allocated to Apartment 25.

22. In addition to the invoices the Management Companies submitted statements to Mr Nixon. Examples of those statements were before the FTT and some of these are included in the appeal bundle. A typical statement is dated 10 September 2013 (p 52 of the bundle) in respect of Apartment 97 Elysian Fields. However that statement contains even less information that the invoices.

23. Mr Nixon complains that he has requested audited accounts in respect of the service charge to which he is entitled under clause 5 and 6 of the Seventh Schedule. None have been produced.

24. Mr Nixon also complains that there were substantial breaches of the Management Company's obligations under Clauses 1 to 3 of the Seventh Schedule. This was particularly true of the Apartments in Imperial Buildings.

25. In his skeleton argument he put the matter in this way:

> With regards to Elysian Fields, the disputes are in relation to the reasonableness of charges levied. The Service Charge costs were increased continuously by the previous Management Company Andrew Louis (as mentioned above to have a conflict of interest). This company was removed from management of the Service Charges and we were informed by their Solicitors to

pay no further Service Charges due to the formation of a new Management Company Danos, which again was another in-house company (conflict of interest)

The brought forward figures were strongly disputed, but again to no avail.

12. We would like the Tribunal to note that payments over time have been made, amounts which include Ground Rents.

13. Service Charge amounts were withheld when the Appellant profusely refused to supply any information we requested i.e. accounts (which so happened to be produced just in time for the hearing with the First-Tier), insurance certificates etc.... Service Charge amounts were withheld when defects began to show which the Management Company and Landlord/developer profusely refused to address.

14. We are being intimated, harassed and bullied by the conduct of this large group of inter-related companies.

26. When he made oral submissions he repeated the above points. He made the point that if the Management Company is not compelled to comply with its contractual obligations – in particular to supply audited accounts in a reasonable time it leads to an abuse of power against the Tenant. He also submitted that charges were being made for work that was not carried out.

27. It is to be noted that in paragraph 13 Mr Nixon refers to accounts being submitted just in time for the hearing before the FTT. Examples of those accounts which are dated 18th April 2014 appear at pages 99 – 100 of the bundle. These accounts do give a breakdown of the costs and do contain a certificate from a chartered certified accountant. However, as the certificate makes clear, the accountant has not carried out an audit. Thus, the accounts supplied to the FTT did not comply with paragraph 5 of the Seventh Schedule.

Claims in the County Court

28. In October 2013 the Management Companies instituted 7 sets of proceedings in the County Court for the recovery of the unpaid service charges. The claim was in standard form and exhibited the statement and an interest calculation. Mr (and Mrs) Nixon filed the same defence in each case. In summary it was asserted:

(a) "the charges levied against the service charge account are unreasonable and are therefore irrecoverable".

(b) interest was not payable because "it is attached to charges which are unrecoverable due to unreasonableness".

(c) the Appellants had failed to provide audited accounts for the years 2009/10, 2010/11 and 2011/12.

(d) the Respondents also counterclaimed for breach of repairing covenant.

(e) that the matter be transferred to the [FTT] for a determination of the service charge under paragraph 3 of Schedule 12 to the Commonhold and Leasehold Reform Act 2002.

29. On 10 January 2014, DJ Johnson ordered that two claims in relation to Elysian Fields[2] and one claim in relation to Imperial Buildings[3] be transferred to the FTT the following basis:

"The matter be transferred to First Tier Tribunal Property Chamber in order for a decision to be reached as to the reasonableness of the service charges claimed by the Claimant".

30. On 13 March 2014, DJ Johnson ordered that one claim in relation to Elysian Fields[4] and three claims in relation to Imperial Buildings[5] be transferred to the FTT the following basis:

"This matter be transferred to the Leasehold Valuation Tribunal".

31. Mr Dymond pointed to the difference in the wording of the two County Court orders. He submitted that the jurisdiction of the FTT was more limited in the case of the January 2014 orders than the 13 March 2014 order. I shall consider the point later in the judgment but for the moment merely comment that I cannot believe for one moment that the parties or the District Judge intended that the FTT should have a different jurisdiction in 4 of the claims. It would seem to be wholly contrary to the overriding objective to deal with cases justly and at a proportionate cost.

The Decisions of the FTT

32. The FTT delivered two linked decisions on 13th August 2014. The main ground of the decision in the Elysian Fields Apartments is at paragraphs 24 to 26

"24. It is the Tribunal's view that if a management company takes the drastic step of issuing proceedings in the County Court for non payment of service charge against a flat owner, it is only fair that the flat owner knows precisely what is owing and how the sum is calculated. That can and should be provided by the landlord BEFORE proceedings are issued, thus giving the flat owner the opportunity of considering whether he has a defence to the claim, and more

[2] Claim nos. 3QZ32803 and 3QZ32807.
[3] Claim no.3QZ32783.
[4] Claim no. 3QZ32817.
[5] Claim nos.3QZ32753, 3QZ32768 and 3QZ32795.

importantly whether such expenditure attributable to his property is reasonable. It is only by this means that the Overriding Objective is achieved.

"25. On behalf of the Applicant it was argued that clause 1 of the Fifth Schedule entitles the Applicant to collect service charge 'on account', by quarterly payments. From the documents supplied in the Applicant's bundle, it does not appear that the Applicant has supplied a budget or a statement of the amount estimated to be required in order for the Applicant to discharge its obligations. In any event the Tribunal do not accept this contention, since to do so would allow the Applicant to avoid its responsibilities under the lease, and under the Act, to provide audited accounts.

"26. Accordingly, the Tribunal determines that as at the date of issue of the proceedings against the Respondents, no service charges were payable to the Applicant under the respective leases of the Property. Having decided this the Tribunal did not need to proceed to consider whether the actual amounts demanded for service charge were reasonable."

33. In the Imperial Buildings case the FTT adopted the reasons in the other decision.

34. As noted in the Introduction the FTT made further observations in relation to the Chinese restaurant and the insurance and in respect of the evidence supplied by Mr Nixon. It is not necessary for me to repeat what is set out in the Introduction.

Discussion on the main ground.

35. I agree with Mr Dymond that the effect of the FTT's decision is that the service of a certificate complying with clause 5 and 6 of Schedule 7 is a condition precedent to any liability to make payment for the service charge.

36. I also agree with Mr Dymond that such an interpretation is not in accordance with clause 1 of Schedule 5. Clause 1 clearly provides for payment based on a determination of the amount estimated to due by the Management Company. There is nothing in clause 1 which requires the provision of the audited accounts and there is no reason to imply such a term.

37. This view is supported by paragraphs 16-14, 16-15 and 16-17 of Rosenthal (and others) on Commercial and Residential Service Charges and by the two cases cited by Mr Dymond – *Redrow Homes v Hothi* [2011] UKUT 268 (LC) and *Pendra Loweth Management v North* [2015] UKUT 0091 (LC)

38. In Redrow Judge Huskinson found that it was an implied term that the accounts would be prepared within a reasonable time. He considered the effect of the breach in paragraphs 24 – 27 of his judgment:

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.

39. Similar observations appear in paragraph 50 of the judgment of Martin Rodger QC in Pendra:

50. Nonetheless, a failure on the part of the Management Company to provide annual certified accounts does not seem to me to suspend the lessee's obligation under clause 10 to pay the Estimated Service Charge on demand. There is simply no connection between the performance by each of the parties of their respective obligations. The obligation to pay the Estimated Charge is not expressed as being subject to the production of the audited accounts, and the Management Company is in a position to make an estimate each year whether or not the accounts are available. There is therefore no practical reason to treat the production of the accounts as a condition of payment.

40. To my mind these cases are indistinguishable from the facts of this case. It follows that the FTT were wrong to assess the service charges at nil.

41. I have to confess that I have considerable sympathy for the views expressed by the FTT in paragraph 24 of the judgment especially as this is a case where Mr Nixon has repeatedly requested audited accounts without success. As already noted the accounts provided in April 2014 do not comply with the provisions of the lease because they have not been audited.

42. However as Judge Huskinson pointed out in paragraph 25 of his judgment Mr Nixon is not without a remedy.

> 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.

43. It would, of course be open to Mr Nixon to apply to the County Court to amend the Counterclaim to include a claim along these lines in addition to the claim for breaches of the repairing covenants in the lease. However in the light of the directions that I propose to make he may think that an action for specific performance is unnecessary.

Jurisdiction

44. In the light of my views on the construction of the lease it is strictly unnecessary for me to deal with the jurisdiction point. However, as it was argued and raises a point of some importance, I propose to deal with it.

45. Mr Dymond's submitted that the question of whether the service charges were recoverable at all was not in issue in the County Court proceedings and that accordingly the FTT had no jurisdiction to determine it.

46. This, to my mind, is a point based on the pleadings in the County Court. It is, however to be noted that Mr Nixon did plead (in paragraph 5 of the Defence) that the Management Company was in breach of the terms of the lease by failing to provide audited accounts for the years from 2009 – 2012. It is true that he did not plead that as a consequence of that no service charge was payable; but to my mind bearing in mind that these were proceedings in the County Court and that Mr Nixon was a litigant in person this pleading was wide enough to enable Mr Nixon to submit, as a matter of law that no service charge was payable. Thus I reject the pleading point.

47. There is more substance in Mr Dymond's other point which is based on the terms of DJ Johnson's order of 10 January 2014. He submits that in relation to those 3 claims the jurisdiction of the FTT was limited to considering the reasonableness of the service charge. He referred me to two decisions of the Upper Tribunal – *Lennon v Ground Rents* [2011] UKUT 330 (LC) at paragraphs 23 – 24; and *Staunton v Kaye* [2010] UKUT 270 (LC), at paragraphs 19 – 21.

48. Both of these decisions have very recently been considered by Martin Rodger QC in *Cain v London Borough of Islington* [2015] UKUT 0117 (LC) who said at paragraphs 17 – 18:

> 17. The order transferring the proceedings referred only to a determination of the reasonableness of the service charge demanded. As the Tribunal has explained in *Lennon v Ground Rent (Regisport) Ltd* [2011] UKUT 330 (LC) and in *Staunton v Taylor* LRX/87/2009, the jurisdiction of the F-tT in a case transferred to it from the County Court is confined to the question transferred and all issues comprehended within that question. I would suggest, however, that that principle ought to be applied in a practical manner, with proper recognition of the expertise of the F-tT in relation to residential service charges. When trying to identify which subsidiary issues ought properly to be treated as being included within the scope of the questions transferred it is not appropriate to be too pedantic, especially where an order transferring proceedings is couched in general terms and where there is no suggestion that the court intended to reserve for itself any particular question. It is not uncommon for orders for transfer to be expressed rather generally, and in practice the tribunals of the Property Chamber sensibly recognise that it would be a disservice to the parties (and to the transferring court) for them to adopt an over-scrupulous approach to their jurisdiction.

18. This case provides a good example. Although the issue transferred was "the reasonableness of the service charges demanded", Mr Bhose did not suggest that, at the beginning of the F-tT hearing at least, those issues did not include the subsidiary question of apportionment. Before determining the statutory question under section 19 of the Landlord and Tenant Act 1985 concerning, in short hand, the reasonableness of the service charge, it was necessary for the F-tT to consider the prior contractual question of how much Mr Cain was obliged to pay under the terms of his lease. Until that sum was quantified, it would not be possible to determine whether it was reasonable, except in rather abstract terms. Construing the order for transfer with appropriate generosity, it can therefore be seen that subsumed within the jurisdiction which it conferred was the power to rule on any question of interpretation of the lease on which the quantification of the service charge depended. At the commencement of the proceedings before it, the F-tT therefore had jurisdiction to determine the question whether the Council was entitled to apportion service charges by reference to the number of bed-spaces in the Building. It was necessary for it to do so in order to determine the sum payable by Mr Cain, which itself was a precondition of determining the reasonableness of that sum.

49. In my view the approach of the Deputy President can be applied to the order of 10 January 2014. It is to my mind inconceivable that the parties or the District Judge intended there to be a different jurisdiction for the 3 properties included in that order from the 4 properties included in the 13 March 2014 order.

50. If, as a matter of law, no service charge is payable I find it difficult to understand how any figure can be said to be reasonable. Thus, adopting the generous interpretation advocated by the Deputy President the order of 10 January 2014 can be said to encompass the question of whether any service charge is payable at all.

Other grounds

51. I can deal with the other grounds quite shortly. I agree with Mr Dymond that the FTT's comments with regard to the Chinese restaurant. It was a point raised by the FTT of its own motion. There was no evidence as to the insurance ratings. Furthermore the recommendation made by the FTT was not a determination of the service charge within the jurisdiction under s 27A of the Act. It follows that it cannot stand.

52. Even though there is no cross appeal I do not think that the comments as to whether Mr Nixon had produced sufficient evidence to demonstrate that the question of whether the service charges were reasonable was arguable can stand either. It has to be borne in mind that this is a case where the only documents produced prior to April 2014 contained no details of the basis of the claim and the certificates dated 14th April 2014 were not audited. Mr Nixon cannot in my view be criticised for not formulating his claim in detail in these circumstances.

Result

53. In the result the appeal will be allowed. The matter will be referred back to a differently constituted FTT to determine the amount payable under the service charges.

54. In the light of the fact that the Management Companies are plainly in breach of their obligations under clauses 5 and 6 of the Seventh Schedule and in order to ensure that the new hearing before the FTT is meaningful I propose to direct that:

1. in respect of any year for which a claim for service charge is included in the County Court proceedings the Management Company shall within 28 days of the date of service of this order file with the FTT and serve on Mr Nixon (and in the case of Apartment 97 Elysian Fields Mrs Nixon) fully audited accounts in accordance with clauses 5 and 6 of the Seventh Schedule.

2. within 28 days of the service of the audited accounts Mr Nixon (and if appropriate Mrs Nixon) must file with the FTT and serve on the Management Companies a document setting out which parts of the service charge are challenged and setting out the grounds of the challenge.

3. within a further 28 days the Management Companies shall serve a reply to the grounds of challenge.

4. Any further directions shall be a matter for the FTT.

Dated: 6 August 2015

John Behrens

His Honour Judge Behrens