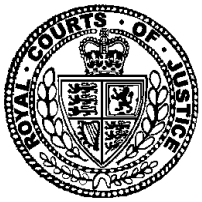

Neutral Citation Number: [2022] EWCA Civ 929

Case No: CA-2021-001917

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE BUSINESS AND PROPERTY COURTS IN MANCHESTER
PROPERTY TRUSTS AND PROBATE LIST (Ch)
His Honour Judge Cawson QC
[2021] EWHC 3786 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 06/07/2022

Before :

SIR ANDREW McFARLANE, PRESIDENT OF THE FAMILY DIVISION
LADY JUSTICE ASPLIN
and
LADY JUSTICE NICOLA DAVIES

- -

Between :

MOSTYN HOUSE ESTATE MANAGEMENT COMPANY LIMITED	**Claimant/ Appellant**
- and -	
1) BARRY YOUDE AND 39 OTHERS **2) MOSTYN HOUSE FREEHOLD MANAGEMENT COMPANY LIMITED** **3) MOSTYN HOUSE LEASEHOLD MANAGEMENT COMPANY**	**Defendants/ Respondents**

- -
- -

Simon Allison and **Rebecca Sage** (instructed by **Ozon Solicitors**) for the **Appellant**
Lina Mattsson (instructed by **Kleyman and Co.**) for the **First Respondents**
The **Second and Third Respondents** did not appear and were not represented

Hearing date: 15 June 2022

- -

Approved Judgment

This judgment was handed down remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 10:30 on 6 July 2022.

Lady Justice Asplin :

1. This is an appeal from an order dated 21 August 2021, made by His Honour Judge Cawson QC, sitting as a judge in the High Court, by which he dismissed the Appellant, Mostyn House Estate Management Company Limited's Part 8 Claim. Mostyn House Estate Management Company Limited (the "Company") sought a declaration that it is entitled to maintain the structure and exterior of two listed buildings which form part of the former Mostyn House School which has been developed into apartments demised on long leases to 45 leasehold owners and to require 40 freehold owners who have acquired properties forming part of the same development to contribute rateably to the cost of that maintenance, by means of a rent charge contained in the transfers to the freehold owners or their predecessors in title.

Overview

2. The background to this matter is set out in detail in the judgment ([2021] EWHC 3786 (Ch)) and reference should be made to it there. For these purposes, it is necessary to note that the former school comprised two listed school buildings, a Grade II listed chapel, and a listed cricket pavilion, known as Jarrah House (together referred to as the "Listed Building"). On 11 July 2013, PJ Livesey Heritage Homes North West Limited (the "Developer") obtained planning permission to develop the former school involving the creation of 45 leasehold apartments within the listed school buildings, the development of Jarrah House into a freehold house and the construction of 39 further freehold houses on the playing fields (the "Development").

3. The planning permission was granted subject to the execution of a section 106 Agreement with the local authority. On 4 October 2013, such an agreement was entered into between the Cheshire West and Cheshire Borough Council, the original owners of the school, the Developer and the then mortgagee (the "2013 Section 106 Agreement"). It provided, amongst other things, that certain repair works be carried out to the Listed Building in tandem with the housing development, the Listed Building being in a serious state of disrepair.

4. The Company was incorporated on 14 January 2014, the same day as the Second Respondent, Mostyn House Freehold Management Company ("FMC") which is controlled by the freeholder owners at the Development and the Third Respondent, Mostyn House Leasehold Management Company ("LMC") which is controlled by the leaseholders. The Articles of Association of each of the Company, FMC and LMC, were in like terms.

5. The relevant leases in relation to the apartments in the two school buildings were granted by the Developer for terms of 240 years, at a premium, between 16 October 2014 and 22 January 2016 (the "Leases"). There was no list of freehold sales before the judge but the transfers available to him were dated May 2014, 30 October 2014 and 29 May 2015 (judgment below at [25]).

6. The First Respondent is, in fact, 40 named individuals, of whom Mr Barry Youde is the first. They are the owners of the freehold properties at the Development. The first to twenty-seventh and thirtieth to fortieth individuals and the Second Respondent, FMC, are represented by Ms Mattsson. The individual leaseholders were not parties to the Part 8 Claim and have not been joined in the appeal. Although the Third Respondent,

LMC, which is controlled by the leaseholders, is a party to the proceedings, it was not represented before the judge, nor was it represented before us. The registered proprietor to the freehold reversion to the leases is Grey GR Limited Partnership. It was not a party to the Part 8 Claim nor has it been joined on appeal.

7. The Company's shareholders were intended to be the 40 owners of the freehold properties at the development and the 45 leaseholders. In 2017, those of the directors who were freehold owners were removed, placing the Company in the control of the leaseholders and leaving it free to bring the Part 8 Claim from which the leaseholders will benefit if the cost of maintaining the school buildings must be borne rateably by the freeholder owners. The Company is represented by Mr Allison and Ms Sage.

8. The form of the declaration which was sought in the Details of Claim to the Part 8 Claim was as follows:

"The claim is for declaratory relief in terms:

> (1) The Company is entitled to maintain the structure and exterior of Mostyn House to a good state of repair;
>
> (2) The Company is entitled to require each leasehold owner and each freehold owner to pay to the Company a rent charge/service charge, including an equal proportion of the cost of maintaining the structure and exterior of Mostyn House School to a good state of repair and calculated by dividing the total of such expenditure by the total number of residential properties on the Development."

Before the judge, however, Mr Uff, who appeared on behalf of the Company, made clear that the declaration sought did not extend to the leasehold owners. To be clear, therefore, it does not include the words "each leasehold owner and" in the first line of the second paragraph. It refers solely, therefore, to the alleged obligation of freeholders to pay a proportion of the cost of maintaining the structure and exterior of Mostyn House School. I will refer to the amended version as the "Declaration".

9. It is alleged that the Company is entitled to the Declaration under the terms of paragraph 6 of Part 12 and paragraph 1.3 of Part II of Part 15 of the transfers of the 40 freehold titles which were all in identical form (the "Transfers"). It was said that the natural and ordinary meaning of the words used, particularly when read together with the 2013 Section 106 Agreement and the provisions of the Transfers as a whole, gave rise to the entitlement set out in the Declaration.

10. In short, the freeholders argued that under the provisions of the Transfers and those of the Leases, the terms of which mirrored one another, the primary maintenance obligations fell upon FMC, LMC and the freehold and leasehold owners themselves, with FMC and LMC having a right to recoup the cost of such maintenance against the freehold and leasehold owners respectively in respect of their maintenance obligations under the appropriate recoupment provisions. It was said that whilst the Company might have a residuary entitlement to carry out maintenance work in some circumstances and recover the costs from both freehold owners and leaseholders, it was not an absolute entitlement of the kind contained in the Declaration.

11. It was also argued that it would not be appropriate to grant the Declaration for a number of reasons. First, it was in general form and did not relate to particular repairs and secondly, not all proper parties were before the court and the court could not be satisfied that all sides of the argument had been fairly and fully put. Further, at trial there was no suggestion that any particular repairs were in fact required to the structure and exterior of the former school buildings; or that any party had acted in default in effecting repairs to their structure or exterior; or that there was any ongoing breach of the 2013 Section 106 Agreement or the two subsequent section 106 agreements dated 23 February 2015 and 19 February 2016 respectively. It was common ground that the subsequent agreements were, as far as they were relevant, in like terms to the 2013 Section 106 Agreement. I shall refer to them together, where necessary, as the "Section 106 Agreement", as did the judge.

Structure of the Documentation

12. In order to understand the judge's decision and the issues on appeal, it is necessary to have an overview of the central provisions relating to the Development. The relationship between the different parts of the Development was the subject of finely calibrated documents. The judge sets out these central provisions in his judgment and reference should be made to them there. For ease of reference and understanding, I will set out the essential provisions again here.

- *2013 Section 106 Agreement*

13. The relevant provisions of the 2013 Section 106 Agreement are set out at [18] of the judgment. The relevant definitions are as follows: the "Chapel" was defined by reference to a plan and was the original chapel at the former school; the "Chapel Maintenance Fund" means "the sum of £100,000 which was to be used solely for the maintenance of the Chapel"; "Development Site" means "the site the subject of the Planning Application" which was also defined by reference to a plan; "Listed Building" means "the buildings known as Mostyn House School, the Chapel and Jarrah House, which is situated on the Development Site"; "Management Company" means "the company set up in accordance with Clause 5.5 of this Agreement to manage the dwellings in the Listed Building and the New Build dwellings" (the Company); "New Build" means "any part of the Development Site shown coloured blue on Plan 2" which showed the playing fields and the part of the Development Site developed as freehold properties but excluding Jarrah House; and "Owner" includes successors in title, subject to a proviso that is not relevant for present purposes.

14. For these purposes, the most important provisions in the 2013 Section 106 Agreement is clause 5.5. Where relevant, it provides as follows:

> "5.5
>
> Subject to clause 2.2 above, the Owner/Developer covenants to continue the future maintenance and management of the Listed Building to a good state of repair and to use the Chapel Maintenance Fund for its sole purpose and to ensure such future maintenance and management of the Listed Building the Owner/Developer covenants with the Council:

5.5.1 Not to dispose of any dwelling on the Development Site until the Management Company has been established in accordance with the following provisions:

5.5.1.1 The first directors and shareholders of the Management Company shall be representatives of the Owner/Developer;

5.5.1.2 The Owner/Developer shall ensure that the principal objects of the Management Company will include provisions that the Management Company shall continue the future management and maintenance of the Listed Building to a good state of repair;

5.5.2 To ensure that the contracts for the sale of all dwellings on the Development Site contain agreements by the purchasers thereof to subscribe for or acquire shares in or become members of the Management Company;

5.5.3 To ensure that control of the Management Company shall be transferred to the owners of the dwellings upon completion of the sale of the last dwelling on the Development Site;

5.5.4 To dispose of each dwelling by either a freehold transfer or the creation of a lease for 250 years or longer which will be sold to a purchaser. A standard form of transfer/lease will be used in the sale of each dwelling so that all transfers/leases contain identical provisions in all material respects;

5.5.5 To ensure that every transfer/lease of each dwelling shall inter alia contain provisions to ensure the following:

5.5.5.1 The purchaser will covenant with the Owner/Developer and the Management Company:

5.5.5.1.1 to perform obligations including an obligation to pay annually in advance to the Management Company an estate rent charge/service charge including in particular that part arising from the continued future management and maintenance of the Listed Building by the Management Company in accordance with the provisions hereof;

5.5.5.1.2 to pay any supplementary estate/rent charge service charge in accordance with the provisions that will be contained in the transfer/lease;

5.5.5.1.3 upon any transfer/assignment of a transfer/lease to transfer its share in the Management Company to the relevant transferee/assignee or otherwise procure that the relevant transferee/assignee becomes a member of the Management Company;

5.5.5.2 The Management Company will covenant with the Owner/Developer and the purchaser to continue the future management and maintenance of the Listed Building to a good state of repair and to use the Chapel Maintenance Fund for its sole purpose."

- *The Transfers*

15. As the judge explained at [27] of his judgment, the Transfers are expressed to have been made by the Developer with the concurrence of FMC and the Company and those parties executed the Transfers and entered into the covenants contained in them. The counterparty in each case was the relevant purchaser of the freehold estate of the particular premises. In the Transfers, FMC is referred to as the "Management Company" and the Company is referred to as the "Company". The Transfers were all in identical form.

16. The judge set out the definitions contained in the Transfers which are relevant to these proceedings and his comments upon them at [28] of his judgment and reference should be made to that paragraph. Suffice it to say for these purposes, that:

i) The "Chapel" and the "Chapel Contribution" were defined by reference to the 2013 Section 106 Agreement, which was referred to as the "Section 106 Agreement" as varied, amended, repealed or replaced from time to time;

ii) The "Development" was defined by reference to a plan and comprised the whole of the Mostyn House School site – the entirety of the Listed Building and grounds and playing fields of the old school; and the "Estate", also defined by reference to a plan, comprised the old playing fields on which the freehold properties have been built, with Jarrah House included in the middle of it.

iii) The relevant definitions in relation to areas not forming part of any demise are these:

"Communal Areas" meaning "any land on the Development which serves the dwelling units on the Development not included nor intended to be included in the sale of any such dwelling units, including (but without prejudice to the generality of the foregoing) the Communal Facilities";

"Communal Facilities" meaning "the Estate Roads the Service installation street lighting and furniture and other facilities within the Communal Areas which serve the properties on the Development";

"Communal Services" meaning "those services, if any, provided at and for the benefit of the Development from time to time for the joint benefit of all residents and occupiers of the Development";

"Retained Parts" meaning "those parts of the Development, including the Estate the Service Installations apparatus plant machinery and equipment and roads drives paths and forecourt serving the Retained Parts not

> included nor intended to be included in this transfer or the transfer of any other part of the Development by a transfer in similar form to this transfer and or not included nor intended to be included in any demise by a lease of a residential unit on the Development".

17. By paragraph 1 of Part 5 of the Transfers, the Transferee grants the Management Company (FMC) the Service Charge Variable Rent Charge and the Fixed Rent Charge and by paragraph 3 the Transferee grants to the Company the Maintenance Contribution Variable Rent Charge. The definitions of those Rent Charges are as follows:

> "Maintenance Contribution Variable Rent Charge" meaning "the contribution equal to the Transferee's Proportion of the expenditure described in Part II of Part 15";
>
> "The Service Charge Variable Rent Charge" meaning "the contributions equal to the Transferee's Proportion of the expenditure described in clause 2 of Part II of Part 10 and in Part I of Part 15";
>
> "Transferee's Proportion" meaning
>
> "Firstly that proportion of the expenditure described in clause 2 of Part II of Part 10 and in Part I of Part 15 so far as such expenditure relates to the Estate which the square footage of the Property bears to the total square footage of all the properties in the Phase(s) from time to time and so far as such expenditure relates to the Development which the square footage of the Property bears to the total square footage of all the properties in the Development from time to time.
>
> "Secondly, an equal proportion of the Maintenance Contribution Variable Rent Charge calculated by dividing the total of such expenditure by the total number of properties on the Development."
>
> "The Variable Rent Charges" meaning "the Service Charge Variable Rent Charge and the Maintenance Contribution Variable Rent Charge."

18. Part 3 of the Transfers contains recitals, the most important of which for these purposes are:

> "2. The Transferor wishes to dispose of each of the properties on the Estate by means of a form of a transfer in substantially the form of this transfer or as near as circumstances admit and require to the intent that the owner for the time being of any property forming part of the Estate may be able to enforce (so far as possible) the performance and observance of covenants and provisions contained in the Transfer of any other property so far as they affect the owner or the property to which the owner is entitled.
>
> ...

> 4. The Management Company has agreed to join in this Transfer with responsibility for the services repair maintenance and insurance and management of the Development.
>
> 5. The Company has agreed to join in this Transfer with responsibility for services repair maintenance insurance and management of the Communal Areas the Communal Facilities and the provision of the Communal Services and to ensure that the obligations contained in the Section 106 Agreement are performed."

19. Part 1 of Part 10 of the Transfers contains a number of positive covenants on the part of the Transferee (freehold purchaser/owner) which are made as separate covenants with the Management Company (FMC) but not with the Company. They include a covenant to keep the "Property" in good and tenantable repair (para 3); to protect and maintain in a manner befitting the feature, any original feature of the Property (para 5); and permitting the Transferor or the Management Company to enter and carry out works at the expense of the Transferee if the Transferee defaults in the performance of the covenants (para 9). Part II of Part 10 of the Transfers contains further covenants by the Transferee with the Management Company. Paragraph 2 is as follows:

> "To pay contributions by way of Service Charge Variable Rent Charge to the Management Company equal to the Transferee's Proportion of the amount which the Management Company may from time to time expend and as may reasonably be required on account of anticipated expenditure on rates services repairs maintenance and insurance being and including expenditure described in Part I of Part 15 **AND** to pay the Service Charge Variable Rent Charge not later than 21 days of being demanded the contributions being due on demand **AND** if so requested in writing by the Management Company or the Transferor to pay the Service Charge Variable Rent Charge in advance and by banker's order or other means of automatic transmission of funds to a bank or other financial institution and account nominated by the Management Company or the Transferor as the case may be."

20. On the other hand, Part III of Part 10 of the Transfers contains a covenant by the Transferee with the Company in the following form:

> "...to pay contributions by way of Maintenance Contribution Variable Rent Charge to the Company equal to the Transferee's Proportion of the amount which the Company may from time to time expend and as may reasonably be required on account of anticipated expenditure on rates services repairs maintenance and insurance and other matters described in Part II of Part 15."

21. Part 11 contains covenants on the part of the Management Company. The judge set out paragraphs 2, 4, 5, 7, 8, and 11 at [37] of his judgment, as follows:

> "2. To keep in good and substantial repair reinstate replace renew maintain and decorate the Retained Parts **PROVIDED THAT** the Management Company shall not be liable for a defect or want of repair

decoration reinstatement replacement or renewal unless the Management Company has first had notice thereof and sufficient opportunity to remedy it nor for defects or wants of repair decoration reinstatement replacement or renewal which are the subject of obligation under the Transferee's covenants or under the covenants of the owners of other properties.

...

4. To protect and maintain in a manner befitting the feature any original feature of the Development which is within the Retained Parts whether or not such feature is listed by the local planning authority and not to damage or remove or permit or suffer to be damaged or removed any such feature without first obtaining the written consent of the Transferor and the local planning authority.

...

5. To keep in good order as the Management Company may think fit the grounds of the Retained Parts in accordance with the requirements of the local planning authority and any planning agreement including but not limited to the Section 106 Agreement insofar as applicable thereto and to maintain features of the landscaping tree and shrub planting schemes relating to the Estate so far as those features are within the boundaries of the Property in accordance with the requirements of the local planning and other competent or statutory or public authorities and undertakers or pursuant to any scheme of the Transferor.

. . .

7.(a) To keep the Retained Parts and the Chapel insured with an insurance office or underwriters and through any agency including the Transferor's as decided from time to time by the Transferor or in default by the Management Company (unless the insurance is rendered void by any act or omission of the Transferee or persons claiming under the Transferee) in the sole names of the Transferor and of the Management Company against loss or damage by fire storm tempest explosion and other risks (subject to excesses exclusions or limitations as the insurers may require) as the Transferor or the Management Company may think fit for amounts which the Transferor or failing the Transferor the Management Company thinks expedient ....

8. To comply with the conditions of the Section 106 Agreement, any other planning agreement and any planning consent in respect of the Development so far as the relate to the Retained Parts.

...

11. On service by the Transferor of a notice in writing on the Management Company specifying a breach of the obligations on the part

> of the Management Company forthwith to take all necessary steps to remedy the breach to the satisfaction of the Transferor and in the event of the Management Company failing to perform any of its obligations to permit the Transferor as its agent for which authority is by this transfer given to perform those obligations at the cost of the Management Company which shall be a debt due immediately to the Transferor (but without placing any obligation on the Transferor to do so) and to make payment or permit the Transferor to obtain from the owners of the properties on the Development payment in advance and on demand of an amount equal to the Variable Rent Charge which has been or would have been paid to the Management Company on account of the performance of those obligations whether or not payment has previously been made to the Management Company."

22. The Transfers also contain covenants by the Company at Part 12. In particular, the Company covenanted with the Transferee and further covenanted with the Transferor as follows:

> "2. To keep in good and substantial repair reinstate replace (where beyond repair) renew and maintain the Communal Facilities and the Communal Areas PROVIDED THAT the Company shall not be liable for a defect or want or repair reinstatement replacement or renewal unless the Company has first had notice thereof and sufficient opportunity to remedy it nor for defects or wants of repair reinstatement replacement or renewal which are the subject of obligations under the Transferee's covenants or under covenants of the owners of other properties whether on the Development.
>
> 3. To protect and maintain in a manner befitting the feature any original feature of the Development which is within the Communal Areas and the Communal Facilities whether or not such feature is listed by the local planning authority.
>
> 4. To protect and maintain the Chapel in a manner befitting a listed building by the local planning authority.
>
> 5. To maintain and keep in good order as the Company may think fit the grounds of the Communal Areas.
>
> 6. To maintain and manage the Communal Areas and Communal Facilities in accordance with the requirements of the Section 106 Agreement and to comply generally with the obligations detailed in the Section 106 Agreement and in particular to use the Chapel Contribution towards the Chapel only as defined in the S106 Agreement. For the avoidance of doubt the Chapel Contribution shall be firstly used by the Company to comply with the provisions of clause 4 above in relation to the Chapel and thereafter the maintenance of the Chapel shall be part of the Maintenance Contribution Variable Rent Charge under clause 4 above."

As the judge pointed out, paragraph 6 is of particular importance because the Company relies upon the wording in relation to the Section 106 Agreement contained in it, together with Paragraph 1.3 of Part II of Part 15 of the Transfers as the basis for the Declaration.

23. Part 15 is concerned with the Service Charge Expenditure and Maintenance Contribution Expenditure. Although these provisions are detailed and lengthy, it is important to understand them as part of the structure of provisions relating to the Development. In relation to the Service Charge Expenditure, paragraphs 1(1) and 3 of Part 1 of Part 15 provide as follows:

> "1. The expenditure described as 'the Service Charge Expenditure' means expenditure:
>
> (1) in the performance and observance of the covenants obligations and powers on the part of the Management Company and contained in this Transfer or with obligations relating to the Development or its occupation and imposed by operation of law."
>
> …
>
> "3. Where any part of the Service Charge Expenditure is incurred by the Management Company only in relation to the Estate and not to any other part of the Development then such part of the Service Charge Expenditure shall be divided between the owners of the Estate in accordance with the Transferee's Proportions in relation to the Estate."

Part II of Part 15 is concerned with the "Maintenance Contribution Expenditure". Paragraphs 1.1 – 1.6 are in the following form:

> "1. The expenditure described as 'Maintenance Contribution Expenditure' means expenditure incurred by the Company in connection with:
>
> "1.1 The maintenance repair replacement and upkeep of the Communal Areas and the Communal Facilities including the costs incurred where applicable in respect of the supply and consumption of electricity water gas and other services other than to individual properties;
>
> 1.2 The provision of the Communal Services including the costs incurred where applicable in respect of the supply and consumption of electricity water gas and other services other than to individual properties;
>
> 1.3 Compliance with the requirements of the Section 106 Agreement and in particular in relation to the Chapel;
>
> 1.4 In the performance and observance of the covenants obligations and powers on the part of the Company and contained in this Transfer or with obligations relating to the Common Areas and the Common Facilities or their occupation or use and imposed by operation of law.

> 1.5 In the payment of the expenses of management of the Common Areas and the Common Facilities of the expenses of the administration of the Company of the proper fees of surveyors or agents appointed by the Company or in default by the Transferor in connection with the performance of the Company's obligations and powers and with the apportionment and collection of those expenses and fees between and from the several parties liable to reimburse the Company for them and of the expenses and fees for the collection of all other payments due from the owners of the properties on the Development not being the payment of rent to the Transferor.
>
> 1.6. In the provision of services facilities amenities improvements and other works where the Company in its or the Transferor in the Transferor's absolute discretion from time to time considers the provision to be for the general benefit of the Development and the owners of the properties on the same and whether or not the Company has covenanted to make the provision."

As I have already mentioned, the Company places reliance upon paragraph 1.3.

- *The Leases*

24. The parties to the Leases were the Developer, described as "the Landlord", LMC, described as the "Management Company", the Company which was described as the "Company" and the relevant leasehold owner, described as the "Tenant". The relevant parts of the Leases are set out at [44] – [57] of the judgment and reference should be made to those paragraphs. In summary:

    i) The Leases define the "Estate" by reference to the particular school building in which the apartment is situated and therefore, there are two different definitions of "Estate" depending upon the location of the apartment. (judgment at [45 i)]);

    ii) Where service charge expenditure is incurred by LMC in relation to one of the school buildings (and not any other part of the Development), only the leaseholders in that building are liable to contribute towards that expenditure. ([54]);

    iii) The definition of "Retained Parts" includes the exterior and the structural parts of the School buildings ([45 ii)] and [46 ii)]);

    iv) By clause 8, subject to the payment of the Service Charge, amongst other things, LMC covenants: to keep in good and substantial repair, reinstate, replace, renew, maintain and decorate the Retained Parts (clause 8.2); to protect and maintain in a manner befitting the feature, any original feature of the Development which is within the Retained Parts . . . (clause 8.8); to keep insured the Landlord, LMC, each of the tenants and relevant employees against all third party claims for damage to property or injury to any person arising out of the Development or its use (clause 8.9); and to comply with the conditions of the Section 106 Agreement and any planning consent so far as they relate the Retained Parts (clause 8.11).

v) The Service Charge Expenditure set out in the Second Schedule is defined as LMC's expenses in the performance of its obligations under the Lease;

vi) Each Tenant covenants to pay the Service Charge and other sums due under the Leases, including the Maintenance Contribution, "with the Landlord the Management Company the Company and as a separate covenant with each of the tenants/owners for the time being of the other properties on the Development";

vii) Clause 7.6 (*Jervis v Harris* clause), Clause 7.9 (any notice of defects) and Clause 7.15 (indemnity for the Tenant's failure to comply with planning obligation and the Section 106 Agreement) are for the benefit of the Landlord and FMC and not the Company;

viii) Clause 4, Recital 4.5 provides that: "The Company has agreed to join in this Lease with responsibility for the services repair maintenance insurance and management of the Development Communal Areas the Communal Facilities and the provision of the Communal Services and with regard to the performance of the obligations contained in the Section 106 Agreement";

ix) Clause 9 provides that subject to payment of the "Maintenance Contribution" the Company covenants, amongst other things, "to keep in good and substantial repair reinstate replace (where beyond repair) renew and maintain the Communal Facilities and the Communal Areas";

x) Clause 9.4 (c) of the Leases replicates paragraph 6 of Part 12 of the Transfers. It provides that the Company covenants "To maintain and manage the Communal Areas and the Communal Facilities in accordance with the requirements of the Section 106 Agreement and to comply generally with the obligations detailed in the Section 106 Agreement and in particular to use the Chapel Contribution towards the Chapel only as defined in the S106 Agreement";

xi) The right reserved in Part III of the First Schedule to enter the demised properties for the purpose of executing works to the Retained Parts is exclusively reserved to the Landlord and LMC; and

xii) If LMC or the Company default on their obligations, it is the Landlord which has a right to perform their obligations and recover the costs.

The judge's reasoning

– Admissible background

25. It was accepted before the judge that the 2013 Section 106 Agreement forms part of the admissible background for the purposes of the exercise of construing the Transfers. However, whether the terms of the Leases were also part of that background was in contention. The judge concluded that he was satisfied that it was appropriate to have regard to the Leases and their terms when construing the Transfers but stated that he did not consider that the case turned upon it ([71]). His conclusion was based upon a number of key considerations which he set out as follows:

"70. The following are, in my judgment, key considerations:

i) Firstly, the leasehold properties and the freehold properties were being developed as part of the same development and were sold off contemporaneously one with the other.

ii) Secondly, the provisions of the Transfers specifically relate to the Leases and the property demised thereby, in that, for example:

a) Various provisions refer to "the Development" and the definition thereof extends to the whole development, including the leasehold element of the development;

b) The definition of "Retained Parts" in the Transfers is not limited to "the Estate", as defined, but extends to other parts of the Development, but specifically to the Development "not included or intended to be included in any demise by the lease of a residential unit on the Development". To understand the full effect of this clause one would need to look at the Leases albeit, given the leasehold conveyancing practice, it is perhaps reasonable to assume that the structure and exterior of the School buildings were likely to have been excluded from the relevant demises in considering the definition of "Retained Parts";

c) The definition of "Transferee's Proportion" touches upon matters concerning not just "the Estate" but "the Development" as a whole;

d) Reference is made in the Transfers to the 2013 Section 106 Agreement, which concerned the Development as a whole and envisaged sales of leasehold properties and freehold properties by leases/transfers with "a standard form transfer/lease" being used "in the sale of each dwelling so that all transfers/leases contain identical provisions in all material respects";

e) The restrictive covenants entered into by the Transferees were expressed as being given to, amongst others, "the owners for the time being of the other properties on the Development" for the benefit of the property respectively vested in them and each and every part, which, as we have seen, would have extended to the Leasehold Owners and the property the subject matter of the Leases.

iii) Thirdly, it can be seen that there is a clear link between the Leases and the Transfers given the above considerations, and it is a principle of construction that where contracts or other documents are linked, the law will try and construe them consistently with each other – see e.g. *Durham v BAI* [2012] 1 WLR 867, at [69] per Lord Mance.

> iv) Fourthly, I consider that the Leases and the terms thereof are properly to be regarded as part of the background knowledge which would have been available to the parties, including the Transferees. There is no evidence that the same were actually made available to freehold purchasers, but there is no reason to suppose that they would not have been available for the assistance of the diligent conveyancer concerned to understand how the provisions relating to the Development as a whole worked, including for example, an understanding of the extent of the definition of "Retained Parts".
>
> v) Fifthly, the position is, in my judgment, very different from that in *Cherry Tree Investments v Landmain* in that the Leases in the present case, in contrast to the facility letter in the latter case, would not, as I see it, for the purposes of Lewison LJ's analysis, have been regarded as private documents not available to those subsequently dealing with the freehold titles, but would be just as public on the register maintained by HM Land Registry as the Transfers."

- *Proper construction of the Transfers*

26. The judge went on to decide that the construction put forward on behalf of the Company was not the correct one for numerous reasons, some of which turned upon the terms of the Leases and others not. In summary, the judge's reasoning was as follows:

    i) The Company's approach focussed too narrowly upon paragraph 6 of part 12 and paragraph 1.3 of Part II of Schedule 15 of the Transfers without setting them in their wider context, including the other provisions of the Transfers, the admissible background matters and circumstances, knowledge of which would have been available to the parties, and commercial common sense ([74]);

    ii) The Company only has an obligation to comply with the 2013 Section 106 Agreement to the extent that the Transfers and/or Leases imposed an obligation on it to do so. In this regard, the judge expressed himself in the following way:

> "76. Given the other provisions of the Transfer and what can be gleaned from the Transfers themselves with regard to the terms of the Leases and what might be expected to appear therein, let alone a consideration of the terms of the Leases themselves, I ask myself: can it really be said that it was objectively intended that if the Company does not as a matter of course maintain the structure and exterior of the School buildings that it would be a breach of clause 6 of Part 11 of the transfers? I find that difficult to accept, bearing in mind that the Company has no obligations of its own under the 2013 Section 106 Agreement not being a party thereto, or to any of the subsequent reiterations thereof, and can only be obliged to comply with it to the extent that the Transfers and/or the Leases themselves imposed an obligation upon the Company."

iii) The 2013 Section 106 Agreement is an aid to construction but not determinative of the obligations under the transfer ([17]);

iv) It is part of the admissible background that rather than one management company envisaged in the 2013 Section 106 Agreement, three management companies were established with exactly the same objects ([77]);

v) Under Part 11 paragraphs 2, 3, 4, 5 and 8 of the Transfers, amongst other things, FMC assumed the obligation to keep in good and substantial repair the "Retained Parts" (Para 2) and those obligations extended to protecting and maintaining any original feature of the Development which is within the Retained Parts, in the manner befitting that feature (paragraph 4). Paragraph 8 expressly obliges FMC to comply with the provisions of the Section 106 Agreement so far as it relates to the Retained Parts. On any breach, the Developer and not the Company has the right to step in and remedy the breach at FMC's cost (paragraph 11) ([77]);

vi) Paragraphs 3 and 5 of Part I of Part 10 of the Transfers contain obligations on the freehold owners to repair their freehold properties (including Jarrah House) and in default it is FMC and the Developer who have the right to step in and do the work at the cost of the freehold owners ([78]);

vii) The freehold owners would know from the Section 106 Agreement that the Leases were being granted on terms that broadly mirrored the Transfers and that the demises of the apartments within the school buildings were likely to have excluded the structure and exterior of the listed school buildings which would fall within the definition of "Retained Parts" for which a leasehold management company (in fact, LMC) would be responsible for repair ([79]). The judge went on:

> ". . . Further, to the extent that it might have been anticipated that the Leases would replicate the Transfers, it might reasonably have been anticipated that there would be a leasehold management company, LMC, with obligations so far as compliance with the Section 106 Agreement was concerned, replicating those of FMC under the Transfers."

viii) To the extent that the Leases do form part of the admissible background:

a) They confirm that LMC assumed responsibility for the repair of the structure and exterior of the school buildings, being part of the Retained Parts and for the Section 106 Agreement obligations in that regard ([80]);

b) The Leases reveal that there were two "Estates" being each of the old school buildings which is significant because paragraph 3 of Part 1 of the Second Schedule to the Leases provides that where expenditure is incurred only in respect of "the Estate" being a particular school building, the expenditure is to be divided between the tenants of <u>that</u> school building ([81]);

c) Clause 9.4(c) of the Leases is in like terms to paragraph 6 of Part 12 of the Transfers. It would be odd if ". . . despite the carefully calibrated provisions under which LMC was obliged to maintain the structure and exterior of the old School Building and recover the cost from the Leasehold Owners of that building, the effect of clause 9.4(c) was that the Company was also obliged by the covenant in clause 9.4 to carry out the same maintenance works but with the ability to claim the costs rateably from all Leasehold Owners and Freehold Owners. That cannot, as I see it, looking at matters objectively, have been intended." ([82]); and

d) It would also be odd, given the link between the Leases and Transfers, if clause 9.4(c) of the Leases were construed differently from the equivalent paragraph 6 of Part 12 of the Transfers, which could lead to the absurd result of the Company incurring expenditure on relevant repairs but being unable to recover the full cost, which would be a consequence of the provisions in the respective documents being construed differently ([83]).

27. The judge also relied upon other facts which he considered pointed away from the construction contended for by the Company. He described them in the following way:

> " 84. . . .
>
> i) Firstly, if the Company is right, this would mean that if Jarrah House or the interior parts of the demised apartments fell into disrepair the Company would be obliged, without more, to repair them with an ability to recover the cost thereof against all Leasehold Owners and Freehold Owners, despite the fact that the owner of Jarrah House and the relevant Leasehold Owners had assumed the responsibility to repair and the right to step in on breach was reserved to the Developer and FMC or LMC, as appropriate, and specifically not the Company. This would make little sense.
>
> ii) Secondly, the focus of paragraph 6 of Part 12 of the Transfers and clause 9 of the Leases containing the Company's covenants is very much more upon, as one might have expected, on *"Communal Facilities"*, *"Communal Areas"* and *"the Chapel"*, which are specifically referred to therein. If it really had been intended to subject the Company to an unqualified responsibility for the maintenance of the Listed Buildings, then one would have expected these provisions to have expressly said so, rather than, only identifying the communal aspects and the Chapel."

28. The judge went on to note that as a result of the recitals to the Transfer at paragraph 5 of Part 3, and recital 4, he did not rule out "the possibility that in certain circumstances of default on the part of those who have expressly assumed responsibility for the repair and maintenance of *"Listed Buildings"*, and the various components thereof, under the Transfers and Leases, the Company might have some role to play, if not obliged under

paragraph 6 of Part 12 of the Transfers, in ensuring that the obligations under the Section 106 Agreement were performed, but that would, as I see it, be a matter to be determined upon the particular facts of a particular situation or scenario" ([85]).

29. However, the judge was not persuaded that: "the transfers, or indeed the Leases, allow for two parallel repair regimes obliging FMC or LMC in the case of the Leases and the Company to comply with the same repair obligations but with fundamentally different consequences as to who is liable to contribute thereto. I consider this particularly so, given the carefully calibrated terms upon which FMC and LMC are entitled to recover contributions from the Freehold Owners and Leasehold Owners respectively" ([86]).

Grounds of Appeal and Respondent's Notice

30. The grounds of appeal are that: the judge was wrong in law to allow the Leases to influence the interpretation of the freehold Transfers; and that he was wrong in law to conclude that insofar as the Transfers are to be interpreted without reference to extraneous material (the Leases), they do not give rise to the rights claimed.

31. The Respondents contend that the judge's order should be upheld and by a Respondent's Notice state that even if the appeal in relation to the true construction of the Transfers were allowed, this court should not exercise its discretion to grant the declaration sought because: (i) not all parties affected by such a declaration were parties to the claim; (ii) in the absence of those parties and Grey GR Limited Partnership, in particular, the court could not be satisfied that all sides of the argument have been fully and properly put; and (iii) the declaration is inappropriate without all rights, obligations and, liability affected the various owners and management companies of the Estate being determined by the court at the same time.

Relevant principles of construction

32. The relevant principles to be applied when construing the Transfers were not in dispute before the judge. Neither are they in dispute before us. Those central principles can be found in *Arnold v Britton* [2015] UKSC 36, [2015] AC 1619, *Wood v Capita Insurance Services* [2017] UKSC 24, [2017] AC 1173 and *Rainy Sky v Kookmin Bank* [2011] UKSC 90, [2011] 1 WLR 2900 to the extent that it is approved in those cases. The principles are now very well known. A convenient summary of those grounding principles can be found at [18] and [19] of *ABC Electrification Ltd v Network Rail Infrastructure Ltd* [2020] EWCA Civ 1645 per Carr LJ.

33. Despite the fact that the principles are not in dispute, as this appeal turns solely upon the proper construction of the Transfers, it is important to have the correct approach in mind. In *Wood v Capita*, Lord Hodge made clear that the court's task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement [10]. As Lord Hodge went on:

> "It has long been accepted that this is not a literalist exercise focused solely on a parsing of the wording of the particular clause but that the court must consider the contract as a whole and, depending on the nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to that objective meaning. In

> *Prenn v Simmonds* [1971] 1 WLR 1381 (1383H-1385D) and in *Reardon Smith Line Ltd v Yngvar Hansen-Tangen* [1976] 1 WLR 989 (997), Lord Wilberforce affirmed the potential relevance to the task of interpreting the parties' contract of the factual background known to the parties at or before the date of the contract, excluding evidence of the prior negotiations. . . .
>
> 11. Lord Clarke elegantly summarised the approach to construction in *Rainy Sky* at para 21f. In *Arnold* all of the judgments confirmed the approach in *Rainy Sky* (Lord Neuberger paras 13-14; Lord Hodge para 76; and Lord Carnwath para 108). Interpretation is, as Lord Clarke stated in *Rainy Sky* (para 21), a unitary exercise; where there are rival meanings, the court can give weight to the implications of rival constructions by reaching a view as to which construction is more consistent with business common sense. But, in striking a balance between the indications given by the language and the implications of the competing constructions the court must consider the quality of drafting of the clause (*Rainy Sky* para 26, citing Mance LJ in *Gan Insurance Co Ltd v Tai Ping Insurance Co Ltd (No 2)* [2001] 2 All ER (Comm) 299 paras 13 and 16); and it must also be alive to the possibility that one side may have agreed to something which with hindsight did not serve his interest: *Arnold* (paras 20 and 77). Similarly, the court must not lose sight of the possibility that a provision may be a negotiated compromise or that the negotiators were not able to agree more precise terms.
>
> 12. This unitary exercise involves an iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences are investigated: *Arnold* para 77 citing *In re Sigma Finance Corpn* [2010] 1 All ER 571, para 10 per Lord Mance.. . . "

34. In particular: the exercise of interpreting a provision involves identifying what the parties meant by the words used through the eyes of a reasonable reader; commercial common sense is only relevant to the extent of how matters would or could have been perceived by the parties, or by reasonable people in the position of the parties, as at the date that the contract was made; one can only take into account facts or circumstances which existed at the time that the contract was made, and which were known or reasonably available to both parties; and the purpose of interpretation is to identify what the parties have agreed and not what the court thinks that they should have agreed.

Was the judge wrong to take account of the terms of the Leases?

35. In summary, on behalf of the Company, Mr Allison argues that the Leases were not part of the admissible contextual background when construing the Transfers because: none of them had been entered into when the earliest Transfers were executed; it could not be presumed that a reasonable conveyancer would have had knowledge of their contents or access to them; and the Transfers were registered at the Land Registry and as public documents a restrictive approach should be adopted to the use of background information in their interpretation: *Cherry Tree Investments Ltd v Landmain Ltd* [2012] EWCA Civ 736, [2013] Ch 305.

36. In particular, Mr Allison submits therefore, that: a reasonable person would not have had regard to the Leases as relevant because they had not been registered at the time of the first Transfer; the meaning of the Transfers could not change and therefore, a Transfer registered before the first Lease could not have a different meaning from one registered afterwards; it was wrong of the judge to speculate about the availability of the Leases to prospective purchasers of the freeholds as part of the conveyancing process as there was no evidence that this occurred or that a package of model documents was available; in any event, the language of the Leases would not have affected the way in which a reasonable person would have understood the language of the Transfers because none of the provisions of the Transfers "specifically relate" to the Leases as the judge suggests, nor is there a "clear link"; and the Transfers may be understood as clearly with as without recourse to the Leases.

Discussion and Conclusion

37. It seems to me that this ground of appeal can be dealt with quite shortly. It is clear from the judge's findings about the order of events at [25] of his judgment that the execution of the first Transfer preceded the grant of any of the Leases. The first Transfer of which he was aware was executed in May 2014 and the Leases were granted in the period between October 2014 and January 2016. There is a finding of fact, therefore, that the first Transfer was executed before any of the Leases were granted.

38. On that basis alone, it is difficult to see that the detailed terms of the Leases could form part of the admissible background for the purposes of construing the Transfers. To do so would be contrary to the clear principles set out by Lord Neuberger in *Arnold v Britton* and reiterated and approved by Lord Hodge in *Wood v Capita*. It is necessary to interpret the Transfers in the light of the factual background known to the parties at or before the date of their execution. One can only take into account facts or circumstances which existed at the time that the contract was made, and which were known or reasonably available to both parties. Only the factual background which existed before the first Transfer was executed can be of any relevance to the construction exercise, therefore. The Transfers were in model form and as Mr Allison put it, their meaning cannot differ depending upon whether any particular Transfer was executed before any of the Leases or afterwards.

39. Were there evidence that a standard form model lease was reasonably available before the first Transfer was executed, the position might be different. There was no evidence of that. Although it does seem likely that a reasonable conveyancer would have requested sight of a draft Lease, it was not for the judge to speculate whether the terms of draft leases were known or reasonably available at the time. I consider, therefore, that he was wrong to conclude as he did at [70iv)].

40. At [25] of the judgment, the judge refers to the sale of the freehold properties having taken place "contemporaneously" with the grant of the Leases. He also relied upon the fact that the freehold and leasehold properties were being developed as part of the same development and as he puts it "were sold off contemporaneously" as one of his "key considerations" when determining that the terms of the Leases should be taken into consideration in the interpretation of the Transfers ([70i)]). It seems to me that the judge relied upon this perceived contemporaneity in order to make good the lack of evidence as to whether draft model leases were reasonably available before the first Transfer was executed.

41. As Mr Allison pointed out, however, the judge's conclusion in relation to contemporaneity (if it is taken to mean that a Lease was executed before or at the same time as the first Transfer) is contrary to his findings about the dates of execution of the Transfers and the first grants of the Leases. It seems to me that the judge did not intend to make a separate finding of fact that the Transfers and the Leases were contemporaneous and in doing so, to make a finding contrary to his findings in relation to the timing of the execution of those documents. If and to the extent that he did, I consider that the permission to appeal against such a finding which Mr Allison sought orally and an appeal on that point should be granted.

42. I should add that if by the reference to contemporaneity, the judge meant that the terms of the Leases were reasonably available at the time that the first Transfer was executed, there was no evidence to support such a finding or inference. If it was meant to mean that the Transfers and the Leases should be treated as a suite of documents which were executed as part of the same transaction, by the same parties and, therefore, should be read and interpreted together (see *Smith v Chadwick* (1882) 20 Ch D 27; *Cherry Tree Investments Ltd v Landmain* at [81] per Arden LJ and *Kason Kek-Gardner Ltd v Process Components Ltd* [2017] EWCA Civ 2132, per Lewison LJ at [12] – [13]), he was equally incorrect. The Transfers and the Leases were not executed as part of a transaction by the same parties.

43. It seems to me to be more likely that the judge intended his reference to contemporaneity to be a more general, common sense comment about the fact that the leasehold and freehold properties were sold off over a similar period as part of the same development. As I have already stated, however, that general comment does not support the judge's conclusion that the terms of the Leases form part of the admissible background to the Transfers whether because the first Lease was executed before the first Transfer or because a model draft Lease was available before the first Transfer was executed.

44. It also seems that the judge's approach to contemporaneity may have affected his view of whether the approach in *Cherry Tree Investments Ltd v Landmain* was relevant in this case. At [70v)] the judge stated that the position was very different in this case from that in *Cherry Tree* because the Leases, in contrast to the facility letter in *Cherry Tree*, would not have been regarded as "private documents" which would not have been available to those subsequently dealing with the freehold titles, but would have been just as public on the register at HM Land Registry as the Transfers. Although that may have been true after the first Lease was granted in October 2014 and subsequently registered at HM Land Registry, it was not true before the execution of the first Transfer in May of that year. As I have already noted, the meaning of the Transfers which were all in the same form, cannot differ depending upon whether they were executed before after the first Lease.

45. *Cherry Tree* was a case in which a property had been sold purportedly in exercise of a power of sale granted in a registered charge, read with a facility agreement of the same date and executed by the same parties. The charge, but not the facility agreement, was registered at HM Land Registry. The charge made no reference to the facility agreement and did not include the details of the sums to be paid in respect of which the property was charged. It was critical to the validity of the sale that the provisions of the facility agreement varied or extended the statutory power of sale. One of the questions before this court was whether the charge and the facility agreement could be interpreted

together, despite the fact that only the charge was registered pursuant to the Land Registration Act 2002.

46. It is of note that at [99] Lewison LJ, who was in the majority stated:

> "99. The question, then, is what does the registered charge mean? Whatever it means, it has always meant what it means. A contract cannot mean one thing when it is made and another thing following court proceedings. Nor, in my judgment, can it mean one thing to some people (e g the parties to it) and another thing to others who might be affected by it. As Arden LJ herself has said a contract has only one meaning: *Static Control Components (Europe) Ltd v Egan* [2004] 2 Lloyd's Rep 429. Thus I do not consider that the question is as posed by Arden LJ at para 63. We are not, in my judgment, seeking to ascertain "what the parties intended to agree" but what the instrument means."

This supports Mr Allison's submission and the conclusion that I have already reached that the Transfers cannot have the potential to mean one thing before a Lease is executed and registered and another afterwards.

47. Lewison LJ also went on to address the issue of the admissibility of the facility agreement and the influence it had over the interpretation of the charge. Having accepted that it was admissible and, accordingly, that the court need not shut its eyes to the existence and terms of the facility letter, ([104]), he addressed what should be done with the evidence. He concluded as follows:

> "124. Our courts have already drawn distinctions between the use of background material in the interpretation of what I might call "ordinary" commercial contracts on the one hand, and the interpretation of negotiable and registrable contracts or public documents on the other. . . .
>
> . . .
>
> 126. The High Court of Australia has applied the same approach to the interpretation of conveyancing documents intended to be registered under the Australian Torrens system: *Westfield Management Ltd v Perpetual Trustee Co Ltd* (2007) 81 ALJR 1887. As the joint judgment in that case put it (para 39):
>
> > "The third party who inspects the register cannot be expected, consistently with the scheme of the Torrens system, to look further for extrinsic material which might establish facts or circumstances existing at the time of the creation of the registered dealing and placing the third party (or any court later seized of a dispute) in the situation of the grantee."
>
> 127. It is true that even after the passing of the Land Registration Act 2002 ours is not a fully edged Torrens system, where the

registered title is indefeasible with very limited exceptions. We have more overriding interests, and greater opportunities to alter or rectify the register than would be acceptable under a true Torrens system. Despite these differences in my judgment the general approach of the High Court ought to apply to our system of land registration. It is also true that the High Court expressed itself in terms of admissibility. But as I have said admissibility is not the sole criterion. Even if the evidence is admitted, the question remains: what influence should it have?

128. There is, in fact, no conflict between this approach and the principles established in the *ICS* case. For the question is: what weight would the reasonable person with all the background knowledge of the parties attribute to background material which did not appear on the face of the charge itself? All this was elegantly explained by Campbell JA in *Phoenix Commercial Enterprises Pty Ltd v City of Canada Bay Council* [2010] NSWCA 64, para 151:

> "However, the way those principles come to be applied to a particular contract can be affected by aspects of the contract such as whether it is assignable, whether it will endure for a longer time rather than a shorter time, and whether the provision that is in question is one to which indefeasibility attaches by virtue of the contract being embodied in an instrument that is registered on a Torrens title register. All these are matters that would be taken into account by the reasonable person seeking to understand what the words of the document conveyed. That is because the reasonable person seeking to understand what the words convey would understand that the meaning of the words of the document does not change with time or with the identity of the person who happens to be seeking to understand the document. That reasonable person would therefore understand that the sort of background knowledge that is able to be used as an aid to construction, has to be background knowledge that is accessible to all the people who it is reasonably foreseeable might, in the future, need to construe the document."

. . .

130. In my judgment this is the key to the present case. The reasonable reader's background knowledge would, of course, include the knowledge that the charge would be registered in a publicly accessible register upon which third parties might be expected to rely. In other words a publicly registered document is addressed to anyone who wishes to inspect it. His knowledge would include the knowledge that in so far as documents or copy documents were retained by the registrar they were to be taken as containing all material terms, and that a person inspecting the register could not call for originals. The reasonable reader would

> also understand that the parties had a choice about what they put into the public domain and what they kept private. He would conclude that matters which the parties chose to keep private should not influence the parts of the bargain that they chose to make public. . . . a third party contemplating dealing with the land has no access to collateral documents."

48. Accordingly, in the case of a public document, such as the Transfers, it is necessary to adopt a restricted approach. A third party might have had need to rely upon the terms of the first Transfer to be registered and would not have had access to the Leases. Accordingly, it seems to me that the situation here was similar to that in *Cherry Tree* and that the judge's conclusion at [70v)] was wrong. For this additional reason, therefore, it seems to me that it was not open to the judge to take account of the terms of the Leases when construing the Transfers.

49. As Ms Mattsson points out, however, this is not the end of the matter. The judge did not rely exclusively upon the terms of the Leases as a means of interpreting the Transfers. His conclusions were based upon wider considerations. Furthermore, if this appeal is to be allowed, it is necessary for the Company also to succeed in relation to its construction of the Transfers.

Was the judge wrong to decide that the terms of the Transfers did not give rise to the rights claimed?

50. Mr Allison, on behalf of the Company, submits that if the Transfers are read as a whole in the light of the 2013 Section 106 Agreement which forms part of the admissible background, the Transfers impose a clear entitlement for the Company to repair and maintain the Listed Buildings (which include the former school buildings) and to recover the costs from the freehold owners. In summary, he says that:

    i) It is clear from Part 3, paragraph 5 that the Company is a party to the Transfers in order to ensure the performance of the obligations contained in the Section 106 Agreement;

    ii) By Part 12, paragraph 6 of the Transfers, the Company covenants to comply generally with the obligations detailed in the Section 106 Agreement, including by maintaining and managing the Communal Areas and the Communal Facilities in accordance with the Section 106 Agreement and by using the "Chapel Contribution" for the specified purpose;

    iii) The Company has the benefit of the Maintenance Contribution Variable Rent Charge, under which it can recover expenditure incurred in connection with compliance with the requirements of the Section 106 Agreement (Part 15, Part II, paragraph 1.3); and

    iv) The proportion of the Maintenance Contribution Variable Rent Charge paid by each Transferee is calculated by dividing the expenditure by the total number of properties on the Development so that all leaseholders and freeholders contribute.

51. Further, he says that it is clear from the Section 106 Agreement that the Company covenants to ensure the future maintenance and management of the Listed Building which includes the school buildings. In particular, this can be seen, he says, from the following:

    i) Clause 5.5.1.2 provides that the Management Company established in accordance with the Section 106 Agreement will have principal objects which include provisions that the Management Company shall continue the future management and maintenance of the Listed Building to a good state of repair;

    ii) By clause 5.5.2, purchasers of all dwellings forming part of the Development are to acquire shares in or become members of the Management Company;

    iii) By clause 5.5.1.1 each transfer or lease was to include a requirement to pay an estate rent charge or service charge to the Management Company including that part arising from management and maintenance of the Listed Building in accordance with the Section 106 Agreement;

    and

    iv) Clause 5.5.5.2 provides that the Management Company will covenant in each transfer or lease to continue the future management and maintenance of the listed buildings at the Development to a good state of repair.

52. Although Mr Allison accepts that the obligations of the three management companies which were, in fact, established (the Company, FMC and LMC) overlap in a number of respects, he says that only the Company: was incorporated to ensure the requirements of the Section 106 Agreement were met; covenants to undertake to comply with the Section 106 Agreement obligations in both the Leases and the Transfers; and is able to recover expenditure from both freehold and leasehold owners. Furthermore, the obligations of the three companies should not be interpreted to create an immutable division.

53. Accordingly, Mr Allison submits that there is no ambiguity in the requirement in clause 5.5.5.2 of the Section 106 Agreement that the Company covenant with the Owner/Developer and the purchaser to "continue the future maintenance and management of the Listed Building to a good state of repair. . ." and there is nothing in the terms of the Transfers which would prevent the Company from repairing and/or maintaining the school buildings or either of them, as one of the Listed Buildings.

54. He also submits that the definitions of "Retained Parts" and "Communal Areas" both include the structure and exterior of the school buildings but do not refer to one another. He says, therefore, that the definitions give rise to an unavoidable overlap between the repair and maintenance obligations of FMC and the Company with respect to the non-demised parts of the school buildings. He says, however, that there is nothing surprising in this and the Transfer should not be interpreted in order to avoid such overlaps which, in reality, are unavoidable.

55. Lastly, in relation to Jarrah House, which is a Listed Building, Mr Allison points out that responsibility for maintenance falls upon the relevant freehold owner under the terms of the Transfer with express inspection rights for the Company and a "step in"

right for FMC in the event of default. He says, nevertheless, that for the same reasons as relate to the school buildings, the Company is entitled to maintain Jarrah House and does not need "step in" rights therefore. Only FMC needs such rights because Jarrah House is not part of the Retained Parts.

56. Mr Allison also submits that the judge was wrong to conclude that there could not be parallel or overlapping repair regimes with different consequences as to who is liable to contribute. He says that the outcome in relation to contribution is an inevitable corollary of the correct construction of the Transfers. The Company recovers its cost of complying with its obligations from the owners of the leasehold apartments and the freehold properties in equal shares pursuant to the Transfers (and the Lease).

57. Ms Mattsson, on the other hand, submits that although there may be circumstances in which the Company would be obliged to step in in order to ensure compliance with the Section 106 Agreement, as a "belt and braces" measure, the Transfers create a hierarchy of responsibilities. It is only if the primary responsibilities have not been met that the Company would have any duties or responsibilities and accordingly, it cannot be entitled to the Declaration. She says that this is all the more so where there is no evidence of any disrepair or breach of the Section 106 Agreement which might trigger any of its broad obligations.

58. I should say, at this stage, that I agree with Ms Mattsson and the judge. If one considers the terms of the Transfers as a whole as a reasonable reader, in the light of the admissible background of the 2013 Section 106 Agreement and the fact that by the time the Transfers were executed there were three management companies with identical articles of association and the knowledge which would have been available to the parties before the first Transfer was executed, it seems to me that the Transfers cannot be construed in the way in which Mr Allison suggests.

59. Before turning to the detail, when seeking to construe the Transfers, it must also be borne in mind that they are sophisticated documents, drawn up by lawyers and for the most part, appear to have been well drawn.

60. It is true that Part 3 paragraph 5 of the Transfers provides that the Company agreed to be a party to the Transfer to "ensure that the obligations contained in the Section 106 Agreement are performed" amongst other things, that at paragraph 6 of Part 12 the Company covenants, amongst other things to "comply generally with the obligations detailed in the Section 106 Agreement . . ." and that "Maintenance Contribution Expenditure" is described at paragraph 1.3 of Part II of Part 15 of the Transfer as expenditure incurred by the Company in connection with "compliance with the requirements of the Section 106 Agreement and in particular, in relation to the Chapel". It seems to me, however, that without more these are very slender branches on which to hang the obligations and contributions which Mr Allison says arise. I agree with the judge that the Company focusses too narrowly upon these phrases without setting them in the context of the respective clauses and the wider context of the Transfer as a whole, interpreted in the light of the 2013 Section 106 Agreement.

61. First, even if one focusses on these paragraphs alone, it seems to me that:

    i) Paragraph 5 of Part 3 is a recital rather than an operative clause and as a result, should be given less weight; it is in general terms and refers to the Company

ensuring that the obligations under the Section 106 Agreement are performed rather than being primarily responsible for performing them; and it provides little assistance because the Company which is not a party to the 2013 Section 106 Agreement only has an obligation to comply with that agreement to the extent that such an obligation is expressly imposed by an operative provision in the Transfer itself;

ii) Although the obligation in paragraph 6 of Part 12 of the Transfer appears in an operative clause, the clause should be read as a whole. If one adopts that approach, the natural and ordinary meaning of the paragraph does not create the express obligation Mr Allison seeks to derive from it. The paragraph provides for the management and maintenance of "Communal Areas" and "Communal Facilities" "in accordance with the requirements of the Section 106 Agreement". There is nothing surprising in that. It goes on: "and to comply generally with the obligations detailed in the Section 106 Agreement and in particular to use the Chapel Contribution towards the Chapel . . . " It seems to me that the reference to the requirements of the Section 106 Agreement is general and cannot be elevated in the way in which Mr Allison suggests. Furthermore, as Ms Mattsson submitted and as the judge pointed out, the reasonable reader would conclude that it would have been natural also to make express reference to the exterior and structure of the school buildings had it been intended that the Company have a primary obligation to maintain that structure, particularly given the express reference to the Chapel, the Communal Areas and Communal Facilities; and

iii) The same is true in relation to paragraph 1.3 of Part II of Part 15. It contains express reference to the Chapel.

62. Secondly, this is all the more so when those paragraphs are interpreted in the context of the whole of the finely calibrated scheme of responsibility and contributions contained in the Transfer. It is clear from paragraphs 2, 4 and 5 of Part 11 of the Transfers that it is FMC which has covenanted to keep the "Retained Parts" in good and substantial repair (etc) (para 2); to protect and maintain any original feature of the Development which is within the Retained Parts (para 4); and to keep in good order the grounds of the Retained Parts (para 5). FMC also covenants to comply with the conditions of the Section 106 Agreement in so far as it relates to the Retained Parts (para 8) and to keep the Retained Parts insured (para 7(a)). On any breach, it is the Developer and not the Company which has the right to step in and remedy the breach at FMC's cost (paragraph 11).

63. As I have already mentioned, the Company is, conversely, responsible for maintaining and managing "Communal Areas", "Communal Facilities" and the provision of "Communal Services" in accordance with the requirements of the Section 106 Agreement and to comply generally with the obligations detailed in the Section 106 Agreement and, in particular, to use the Chapel Contribution towards the Chapel only as defined in the Section 106 Agreement (Part 12 paragraph 6) .

64. The parties agree that the definition of "Retained Parts" in the Transfers includes the structure and exterior of the school buildings and that therefore, FMC is under an express obligation to maintain that structure. In my judgment, that militates against Mr Allison's reading of the general words in Part 12 paragraph 6. It is clear that it is FMC which has the primary responsibility.

65. Mr Allison also submits, however, that "Communal Areas" as well as "Retained Parts" should be construed to include the structure and exterior of the school buildings and that, accordingly, the Company is expressly obliged to maintain the structure and can recoup its expenditure. I disagree.

66. In my judgment, the natural and ordinary meaning of the definitions of "Communal Areas", "Communal Facilities" and "Communal Services" when read as a whole and in context, should be construed to mean areas which are truly communal in the sense that they are used by all of the owners at the Development, being both the freeholders and the leaseholders. The definition of "Communal Areas" includes reference to "serve the dwelling units" without differentiation between freeholders and leaseholders; the definition of "Communal Facilities" refers to "properties on the Development" in the same general way and "Communal Services" includes a reference to "joint benefit". It is not natural, therefore, that the structure and exterior of the school buildings should be included within any of those definitions. Furthermore, if the definition of Communal Areas did include the structure and exterior of the School Building, these would be an overlap with "Retained Parts". Although the existence of an overlap (if there is one) is not definitive, given the words used and the fact that the Transfers are carefully drafted, it seems to me that the possibility of such an overlap weighs against Mr Allison's construction.

67. Furthermore, as the judge points out at [84i)] of his judgment, if Mr Allison's preferred construction were correct the Company would be obliged to maintain Jarrah House, with an ability to recover the costs of doing so from all leaseholders and freeholders, despite the fact that the freehold owner of that property is liable to do so and on default, the Developer and FMC have the right to step in and do the works at the freeholder's cost (Paragraphs 3 and 5 of Part 1 of Part 10 of the Transfer). As the judge stated, that would make little sense, if the intention was that all the Listed Buildings on the Development would be managed by the Company and the cost split equally between the Freehold and Leasehold Owners.

68. Another indicator is the existence of the different charging regimes by way of separate Rent Charges for the Estate and the Development, with different "Transferee's Proportions" and therefore allocation of the cost depending on which company undertakes the works to which part of the Development. As Ms Mattsson submits, therefore, the obligations are not "interchangeable" between the different companies. I agree that the clear intention of the different "Transferee's Proportions" is that the Leasehold and Freehold Owners pay for "their respective parts" of the Development. Furthermore, on any breach by FMC, it is the Transferor, not the Company, that has the right to step in and remedy the breach and recover "expenses and fees". This right is not extended to the Company.

69. For all of these reasons, I consider that the judge was right to reject the Company's construction of the Transfers.

Should a declaration have been granted?

70. It will be apparent from what I have already decided that the question of whether the Declaration ought to have been granted in the circumstances does not arise. Nevertheless, I would sound a note of caution about the exercise of the discretion to grant declarations which are general in nature. The Declaration was widely worded and

did not relate to any particular repairs or circumstances in which expenditure upon repairs might arise.

71. For all of the reasons set out above, I would dismiss the appeal.

Lady Justice Nicola Davies:

72. I agree.

Sir Andrew McFarlane, President of the Family Division:

3. I also agree.