Neutral Citation Number: [2021] EWHC 3786 (Ch)

Case No: PT-2020-MAN-000168

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN MANCHESTER
PROPERTY TRUSTS AND PROBATE LIST (Ch)

1 Bridge Street West,
Manchester, M60 9DJ

Date: Wednesday 25th August 2021 at 2.30pm

Before:

HIS HONOUR JUDGE CAWSON QC
SITTING AS A JUDGE OF THE HIGH COURT

- -

Between:

MOSTYN HOUSE ESTATE MANAGEMENT COMPANY LIMITED	**Claimant**
- and -	
(1) BARRY YOUDE + 39 OTHERS **(2) MOSTYN HOUSE FREEHOLD MANAGEMENT COMPANY LIMITED** **(3) MOSTYN HOUSE LEASEHOLD MANAGEMENT COMPANY**	**Defendants**

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DAVID UFF (instructed by **Ozon Solicitors**) for the **Claimant**
LINA MATTSSON (instructed by **Kleyman and Co.**) for the **Represented First Defendants** and **Second Defendant**
The Third Defendant was not present or represented

Hearing dates: 23rd and 24th August 2021

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APPROVED JUDGMENT

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HIS HONOUR JUDGE CAWSON QC:

Introduction

1. By this Part 8 Claim the Claimant, Mostyn House Estate Management Limited ("**the Company**"), seeks a declaration as to its entitlement to maintain the structure and exterior of two listed buildings ("**the School Buildings**"), comprising part of the former Mostyn House School ("**the School**"), now developed into apartments demised under long leases ("**the Leases**") to 45 Leasehold Owners ("**the Leasehold Owners**"), and to require 40 Freehold Owners ("**the Freehold Owners**") who have acquired freehold properties forming part of the same development ("**the Development**"), to rateably contribute to the costs thereof, through the payment of a rent charge, pursuant to the provisions contained in the Transfers ("**the Transfers**") of the freehold properties to the Freehold Owners or their predecessors in title.

2. The Company was incorporated on 14th January 2014, the same day as the Second Defendant, Mostyn House Freehold Management Company Limited, ("**FMC**"), and the Third Defendant, Mostyn House Leasehold Management Company ("**LMC**").

3. The Company is represented by Mr David Uff of Counsel. Ms Lina Mattsson of Counsel appears for the First Defendants, being 38 of the 40 Freehold Owners, and also FMC, the Management Company controlled by the Freehold Owners. I am grateful to Mr Uff and Ms Mattsson for their helpful written and oral submissions, although it is to be noted that the relevant Defendants' Skeleton Argument was prepared by Ms Katrina Mather of Counsel, who at the last minute was unable to appear before me. The Third Defendant, LMC, the Management Company controlled by the Leasehold Owners has been joined as a party, but is not represented. The Leasehold Owners themselves have not been joined as parties to the claim but it is maintained that they unanimously support the Company in bringing the present claim and that they agree to be bound by the decision of the Court.

4. It is to be noted that the shareholders of the Company comprise, or should comprise, the 45 Leasehold Owners and the 40 Freehold Owners. In 2017 those of the directors who were Freehold Owners were removed as directors, leaving the Company in the control of the Leasehold Owners and thus able to cause it to bring the present proceedings, for which they as Leasehold Owners stand to benefit if the costs of maintaining the School Buildings can be shared with the Freehold Owners.

5. The title to the freehold reversion to the Leases is registered at HM Land Registry under Title No CH659630. The registered proprietor of the freehold reversion, Grey GR Limited Partnership, is not a party or represented before me.

6. Paragraph 6 of the Details of Claim accompanying the Part 8 Claim Form pleads that:

> *"The Directors have caused the Company to seek the direction of the court. The questions which the Company invites the court to decide is whether, on the proper interpretation of the instruments transferring the freehold interests of residential properties on the Development to Freehold Owners:*
>
> *(1) The Company is entitled to maintain the structure and exterior of Mostyn House School to a good state of repair;*
>
> *(2) The Company is entitled to require the Freehold Owners 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 properties on the Development."*

7. As it stands, paragraph 7 of the Details of Claim then continues:

> *"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 diving the total of such expenditure by the total number of residential properties on the Development.*

8. However, in reply submissions, Mr Uff indicated that the Company no longer sought a declaration that extended to the Leasehold Owners, so that the declaration now sought does not include the words *"each leasehold owner and"* as had been included in paragraph 7 of the Details of Claim.

9. The entitlement of the Company to the declaration sought is said by the Company to arise under the terms of paragraph 6 of Part 12 and paragraph 1.3 of Part II of Part 15 of the Transfers.

10. The Company maintains that the natural and ordinary meaning of the words used in these provisions is clear, particularly when read together with a relevant Section 106 Agreement, that there is no ambiguity and that the provisions plainly give rise to the claimed entitlement.

11. This is disputed by the Freehold Owners who, in short, maintain that under the provisions of the Transfers, and under the provisions of the Leases, the terms of each of which are mirrored in one another, the primary maintenance obligations fell on the Freehold and Leasehold Owners and FMC and LMC, with FMC and LMC having a right to recoup as against the Freehold Owners and the Leasehold Owners respectively in respect of their maintenance obligations, and that whilst the Company might possibly have some residuary entitlement to carry out maintenance works in certain instances and recover rateably from both Freehold Owners and Leasehold Owners, it was not an absolute entitlement of the kind reflected in the declaration sought, and that, consequently, I should not grant the declaration sought.

12. In addition, it was argued by the Freehold Owners that this is not in any event an appropriate case to grant declaratory relief, given that, so Ms Mattsson submits, all proper parties are not before the Court, and the Court cannot be satisfied that all sides of the argument that on proper analysis arise will be fully and fairly put. In these circumstances and given further that the Court is not concerned with a particular factual scenario relating to repairs under which the Company seeks to establish its entitlement, it is submitted that I should decline to exercise my discretion in granting any form of declaratory relief in any event.

Background

13. It is necessary to examine the background to the matter in some detail.

14. The School fronted onto the Dee Estuary at Parkgate, Cheshire, CH64 6SG, and comprised the listed School Buildings, a Grade II listed Chapel and playing fields, including thereon a listed cricket pavilion known as Jarrah House.

15. By 2013 the School Building were, so the evidence would suggest, in something of a state of disrepair, the school having ceased to operate as an independent preparatory school some years prior thereto.

16. On 11th July 2013, PJ Livesey Heritage Homes North West Limited ("**the Developer**") obtained planning permission to develop the school, for a development involving the creation of 45 leasehold apartments within the listed School Buildings, the development of the listed Jarrah House into a

freehold house for sale and the construction of 39 further freehold houses on the playing fields, with antecedent services and service roads, etc.

17. The planning permission was granted subject to the relevant parties entering into a Section 106 Agreement with the Local Authority, Cheshire West and Cheshire Borough Council ("**the Council**"). The Developer had agreed to purchase the School comprising the whole of the Development, subject to the obtaining of planning permission and the Developer acquired the freehold thereto prior to the sale of the leasehold and freehold units that were subsequently developed, to the Leasehold Owners and Freehold Owners. A Section 106 Agreement was entered into on 4th October 2013 between the Council (1), the original owners of the school (2), the Developer (3) and the then mortgagee (4) ("**the 2013 Section 106 Agreement**").

18. The relevant provisions of the 2013 Section 106 Agreement provided as follows:

    i) It contains the following definitions:

        a) *"Chapel"* meaning *"the building shown on Plan 1 as Phase 4"*;

        b) *"Chapel Maintenance Fund"* meaning *"the sum of £100,000 which was to be used solely for the maintenance of the Chapel"*;

        c) *"Development Site"* meaning *"the site the subject of the Planning Application which is shown edged blue on Plan 3"* - in fact the whole of the Development Site;

        d) *"Listed Building"* meaning *"the buildings known as Mostyn House School, the Chapel and Jarrah House, which is situated on the Development Site and which is shown coloured red on Plan 2"*;

        e) *"Management Company"* meaning *"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"*;

        f) *"New Build"* meaning *"any part of the Development Site shown coloured blue on Plan 2"* – Plan 2 showed the playing fields and the part of the Development Site developed as freehold properties but excluding Jarrah House.

g) *"Owner"* as including successors in title, subject to a proviso that is not relevant for present purposes.

ii) Clause 5.4 of the 2013 Section 106 Agreement provided as follows:

"5.4 Prior to the construction of the last dwelling on the Development Site or upon the cessation of the construction of dwellings on the Development Site for a period greater than 6 months (whichever is the earlier) the Owner/developer shall pay the Chapel Maintenance Fund to the Management Company

5.4.1 The Owner/Developer will serve written notice on the Council within 7 (seven) days of the Chapel Maintenance Fund having been paid to advise the Council that the same has been paid to the Management Company."

iii) Clause 5.5, which provided 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."*

19. There were two subsequent Section 106 Agreements entered into on 23rd February 2015 and 19th February 2016 respectively following variations in the planning consent. As the original owners had by then disposed of their interest, these were simply between the Council (1), the Developer (2) and Santander UK Limited as mortgagee (3). It is common ground that these were, so far as relevant, in like terms as the 2013 Section 106 Agreement, and I shall refer to them collectively as *"the Section 106 Agreement"*.

20. As mentioned, the Company, FMC and LMC were all incorporated on 14th January 2014, that is after the entry by the relevant parties into the 2013 Section 106 Agreement. On incorporation the Articles of Association of each of them were in like terms. I would note that their objects all included at Article 4.1(a), (d) and (f) objects in the following terms:

"4.1 The Company's objects are:

(a) to acquire, hold, manage and administer the freehold or leasehold property or properties known as Mostyn House School and Land Adjoining, Parkgate, Neston including without limitation to the generality of the foregoing any common areas roads, acessways, footpaths, parking areas, drains, sewers, lighting, security and associated facilities ('the Management Property') either on its own account or as a trustee, nominee or agent of any other company or person;

...

(d) to collect rents, charges and other income and to pay any rates, taxes, charges, duties, levies, assessments or other outgoings of whatsoever nature charged, assessed, or imposed on or in respect of the Managed Property or any part of it;

...

(f) to insure the Managed Property or any other property of the Company or in which it has an interest against damage or destruction and such other risks as may be considered necessary, appropriate or desirable and to insure the Company against public liability and any other risks which it may consider prudent or desirable to insure against."

21. As I have said, the members of the Company comprise the Freehold Owners and Leasehold Owners, but the latter outnumber the former, hence the ability to remove the directors who were not Leasehold Owners. The LMC and the FMC only have Leasehold Owner members and directors and Freehold Owner members and directors respectively.

22. The Articles of Association of the Company purport to have been amended on 20th October 2016 to add as an additional object the following:

"to continue the future management and maintenance of the Listed Buildings to a good state of repair"

23. The amended Articles of Association defined *"Listed Building"* in the same terms as in the 2013 Section 106 Agreement.

24. However, the validity of the relevant resolution to amend the Articles of association of the Company is challenged, and it is accepted by the Company that as any such amendments were made after the relevant sales off to the Freehold Owners and the Leasehold Owners, it cannot affect the proper construction of the relevant Transfers or Leases.

25. One can see from the registered title to the freehold reversion that the relevant leases granted to Leasehold Owners were granted by the Developer between 16th October 2014 and 22nd January 2016, for 240 year terms of apartments within the two School Buildings, granted at a premium. Sales of the freehold properties took place contemporaneously therewith. No list of freehold sales is available, but the transfer to Jane Milligan, who has provided a witness statement on the First and Second Defendants' behalf, is dated May 2014 and other transfers have been produced dated 30th October 2014 (Jarrah House), and 29th May 2015 (6 Elgin Close). Notwithstanding that it was a listed building, the transfer of Jarrah House was in the same terms as the other transfers.

26. It is necessary to set out the relevant terms of the Transfers and the Leases in some detail.

The Transfers

27. The Transfers are expressed to have been made by the Developer with the concurrence of FMC and the Company, and those parties formally executed the Transfers and entered into covenants contained therein. The counterparty transferee was in each case the relevant purchaser of the freehold estate in the particular unit. FMC is referred to in the Transfers as *"the Management Company"*, and the Company is referred to therein as *"the Company"*.

28. Part 1 of the Transfers contains a number of definitions relevant for present purposes, namely:

    i) *"The Chapel"* meaning *"the private chapel shown coloured yellow on the Estate Plan"*;

    ii) *"The Chapel Contribution"* meaning *"the sum of £100,000 as defined in the Section 106 Agreement"*;

    iii) *"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"*;

    iv) *"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"*;

    v) *"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"*;

    vi) *"Development"* meaning *"the Livesey development at the former Mostyn House The Parade Parkgate, Neston CH64 6SG for the purposes of identification only <u>edged blue</u> on the Plan"* – being the whole of the Development Site that I have referred to;

    vii) *"Estate"* meaning *"That part of the Development known as Mostyn House The Parade Parkgate Neston CH64 6SG for the purposes of identification only <u>edged green</u> on the Plan"* – where the Plan showed the whole of the site or old playing fields on which the freehold properties were being constructed with Jarrah House included in the middle of it;

viii) *"The Fixed Rent Charge"* meaning *"a perpetual fixed yearly rent charge of £1.00 … charged upon and issuing out of the propert";*

ix) *"Maintenance Contribution Variable"* meaning *"the contribution equal to the Transferee's Proportion of the expenditure described in Part II of Part 15"*;

x) *"Rent Charges"* meaning *"the Fixed Rent Charge and the Variable Rent Charges"*;

xi) *"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"*;

xii) *"Section 106 Agreement"* meaning *"[the 2013 Section 106 Agreement] and, as varied amended repealed or replaced from time to time";*

xiii) *"The Service Charge Variable"* 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"*;

xiv) *"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."

xv) "The V*ariable* Rent Charges" meaning *"the Service Charge Variable Rent Charge and the Maintenance Contribution Variable Rent Charge."*

29. Part 2 of the Transfers deals with interpretation. It provides, amongst other things, that words importing the singular include the plural and vice versa,

that the expressions *"the Transferor"* and *"the Transferee"* include their respective successors in title and that the expressions *"the Management Company"* and *"the Company"* includes any other company to which the rights and duties of the Management Company and the Company are respectively assigned or transferred.

30. Part 3 of the Transfers contains a number of recitals, including the following:

> *"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."*

31. Part 5 of the Transfers deals with the grant of rent charges. Paragraphs 1and 3 thereof provided that:

> *"1. In consideration of the covenants on the part of the Management Company contained in this Transfer the Transferee hereby grants to the Management Company the Service Charge Variable Rent Charge and the Fixed Rent Charge."*
>
> ...
>
> *"3. In consideration of the covenants on the Part of the Company contained in this Transfer the Transferee hereby grants to the Company the Maintenance Contribution Variable Rent Charge."*

32. Part 9 of the Transfer set out a number of restrictive covenants on the part of the transferee Freehold Owners, and began:

> *"The Transferee with the intent to bind the Property and any person who may be for the time being the owner of an estate or interest in or occupier of the Property or any part COVENANTS with the Transferor and as a separate covenant with the Management Company and the Company and further as a separate covenant with each of the owners for the time being of the other properties on the Development (all of whom the Transferor the Management Company the Company and the owners of the other properties on the Development are in this Transfer collectively called "the Covenantees") for the benefit of the property respectively vested in the Covenantees and each and every part:"*

A number of restrictive covenants are then set out, and I refer to this provision because the effect of section 56 of the Law of Property Act 1925 is that those covenants could be enforced by, amongst others, Leasehold Owners for the benefit of the demises of leasehold properties within the Development.

33. Part 10 of the Transfer sets out a number of positive covenants on behalf of the Transferee Freehold Owners.

34. Part I of Part 10 of the Transfers contains a number of covenants on the part of the Transferee with the Transferor, and as a separate covenant with the Management Company but not, it is to be noted, the Company. The provisions of paragraphs 3, 5 and 9 of Part 1 are of particular relevance and provide as follows:

> *"3. To keep the Property and all additions in good and tenantable repair and decorative condition and forthwith to replace all broken glass.*
>
> *...*
>
> *5. To protect and maintain in a manner befitting the feature any original feature of the Property 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.*
>
> *...*
>
> *9. If the Transferee makes default in the performance of the covenants relating to works of repair decoration reinstatement*

replacement or renewal to permit the Transferor or the Management Company and persons authorised by the Transferor or the Management Company (but without prejudice to the right of re-entry contained in this transfer) to enter the Property and carry out the works at the expense of the Transferee in accordance with those covenants and to repay the expense of the works to the Transferor or the Management Company (as the case may be) on demand."

35. Part II of Part 10 of the Transfers then contains covenants on the part of the Transferee with the Management Company. Paragraph 1 thereof provided for the payment of the Fixed Rent Charge. Paragraph 2 thereof provided as follows:

> *"2. 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."*

36. Part III of Part 10 of the transfers then contains a covenant on the part of the Transferee with the Company, being a covenant:

> *"...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."*

It then went on to make further provision in respect of the mechanics thereof.

37. Part 11 of the Transfers contains covenants on the part of the Management Company. Pursuant to these covenants the Management Company covenanted with the Transferee and further covenanted with the Transferor

as set out therein. Paragraphs 2, 4, 5, 7, 8 and 11 are of particular relevance for present purposes:

> *"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."

38. Part 12 of the Transfers contains a number of covenants on the Company's part. Pursuant to Part 12 the Company covenanted with the Transferee and further covenanted with the Transferor as therein set out. Paragraphs 2, 3, 4, 5 and 6 are of particular importance for present purposes and provided 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."*

39. I pause there to say that paragraph 6 is of particular importance for present purposes, as the Company relies upon it and paragraph 1.3 of Part II of Part 15 of the Transfers as the basis for the declaration that it seeks.

40. Part 13 of the Transfers contain covenants on the part of the Transferor, which it is not necessary for me to refer to further.

41. Part 15 of the Transfers then deals with Service Charge Expenditure and Maintenance Contribution Expenditure.

42. Part I of Part 15, which is headed *"The Service Charge Expenditure"*, provides at paragraphs 1(1) and 3 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."

43. Turning to Part II of Part 15 headed: *"The Maintenance Contribution Expenditure"* this provided at paragraphs 1.1 to 1.6 as follows, paragraph 1.3 being of crucial importance as indicated:

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."

The Leases

44. The parties to the Leases were the Developer, described therein as *"the Landlord"*, LMC, described therein as *"the Management Company"*, the Company described therein as *"the Company"* and the relevant leasehold owner, described therein as *"the Tenant"*.

45. The Leases included the following definitions in clause 1:

i) *"The Estate"* is defined in the Leases as *"Mostyn House School for the purpose of identification only edged light blue as the cost centre on the Plan."* It is apparent from being shown copies of two leases granted to Leasehold Owners that there are two sets of leases, one set of leases relating to one of the two School Buildings and one set of leases relating to the other of the School Buildings with the light blue edging relating to the particular building on the plan.

ii) *"The Property"* is defined in the Leases by reference to Part 1 of the First Schedule to the Leases. A description is then provided in Part 1 of the First Schedule of the relevant apartment, but it is therein expressed to exclude … *"all parts of the structure and the roof and foundations of the Estate and the walls, other than interior linings and surface finish which are load bearing or enclose the property and the window frames."*

iii) *"Service Charge"* is defined as meaning: *"the contributions equal to the Tenant's Proportion of the expenditure described in Clause 7.1 and in Part I of the Second Schedule."*

iv) *"The Maintenance Contribution"* is defined as meaning *"the contribution equal to the Tenant's Proportion of the expenditure described in Part II of the Second Schedule"*. I note the identity between these definitions and the definitions of *"Service Charge Variable Rent Charge"* and *"Maintenance Charge Variable Rent Charge"* in the Transfers.

v) A definition of *"Tenant's Proportion"* in very similar terms to the definition of the *"Transferee's Proportion"* in the Transfers. I do not

need to set it out in full given that it is in such similar terms to the equivalent provision in the Transfers, although it does include an additional matter falling within the definition of *"Tenant's Proportion"* relating to internal common parts which is not relevant for present purposes.

46. There are then further definitions set out in clause 2 of the Leases:

i) *"Chapel"* and *"Chapel Contribution"*, *"Communal Area"*, "*Communal Facilities"*, *"Communal Services", "Development", and "the Section 106 Agreement"* are given like definitions to those in the Transfers;

ii) The definition of *"Retained Parts"* is in slightly different terms from the definition in the Transfers in that it defines *"the Retained Parts"* as meaning:

> *"... those parts of the Development including the Estate and the Services Installations apparatus plant machinery and equipment and roads drives paths and forecourts serving the Retained Parts not included nor intended to be included in this demise or a demise of any other part of the Development by a lease in a form similar to this lease nor included or intended to be included in a transfer of a residential unit on the Development."*

It would therefore include those parts of the School Buildings expressed by Part 1 of Schedule 1 to be excluded from the demises.

47. Clause 4 of the Leases contains a number of recitals in similar terms to those in the Transfers, but given that there are some differences I set them out as follows:

> *"4.4 The Management Company has agreed to join in this Lease with responsibility for the services repair maintenance insurance and management of the Estate.*
>
> *4.5 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."*

48. Clause 6 of the Leases contained the Tenant's covenants with the Landlord. I merely note those.

49. Clause 7 of the Leases contains covenants on the part of the Tenant, again in similar terms to those in the Transfers on the part of the Transferees, and begins as follow:

> *"7. The Tenant with the intent to bind the Property and any person who may be for the time being the owner of an estate or interest in or the occupier of the Property or any part* ***COVENANTS*** *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 (all of whom the Landlord the Management Company the Company and the tenant/owners are in this clause collectively called 'the Covenantees') for the benefit of the property respectively vested in the covenantees and each and every part:"*

50. Clause 7.1 thereunder relates to the payment of contributions by way of Service Charge to the Management Company and contributions to the Company equal to the Tenant's Proportion and contains covenants that provide, so far as relevant, as follows:

> *"(a) To pay contributions by way of Service Charge to the Management Company equal to the Tenant'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 the Second Schedule.*
>
> *(b) To pay contributions to the Company equal to the Tenant'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 the Second Schedule."*

51. Of further relevance within Clause 7 are clauses 7.4, 7.6 and 7.7 which contained the following covenants on the part of the Tenant:

> *"7.4 (a) To keep the property and all additions in good and tenantable repair and decorative condition (but not to decorate any part of the exterior of the Property including the exterior of external doors and windows of the Property) and forthwith to replace all broken glass and to replace and renew the Landlord's fixtures and fittings which materially reach the end of their useful*

life the replacement or renewal to be suitable and at least of equal and similar utility.

(b) To protect and maintain in a manner befitting the feature any original feature of the Property 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 Landlord and the local planning authority.

(c) To keep clean the interior of the windows of the Property and where the Property has roof light windows and or glass in the doors windows and screens to any roof terrace or balcony to clean the exterior of the glass in those windows doors and screens as often as shall reasonably be necessary and to keep the Property swept the chimneys (if any) serving the Property.

7.6 If the Tenant makes default in the performance of the covenants relating to works of repair decoration reinstatement replacement or renewal to permit the Landlord or the Management Company and persons authorised by the Landlord or the Management Company (but without prejudice to the right of re-entry contained in this Lease) to enter the Property and carry out the works at the expense of the tenant in accordance with those covenants and to repay the expense of the works to the Landlord or the Management Company (as the case may be) on demand.

7.7 To permit the Covenantees and persons authorised by the Covenantees at reasonable times except in the case of emergency and wherever possible on giving reasonable notice to enter the Property for the purpose of executing works of repair decoration reinstatement replacement renewal alteration addition or improvement to or upon the Development the work being done with reasonable despatch causing as little disturbance as possible and making good all damage caused."

52. Clause 8 contained covenants on the part of the Management Company, i.e., LMC, and pursuant to those covenants, which were made with the Tenants and by way of further covenant with the Landlord, the Management Company covenanted in the terms then set out in clause 8. Of particular relevance for present purposes are the covenants contained in clauses 8.2, 8.5, 8.8, 8.9 and 8.11 which provided as follows:

"8.2 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 covenants of the tenants/owners of other properties.

…

8.5 To keep the Retained Parts cleaned and lighted to a standard which the Management Company may consider from time to time to be adequate.

…

8.8 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 Landlord and the local planning authority.

8.9 To insure and keep insured the Landlord the Management Company each of the tenants/owners of the properties and the employees of the Landlord and the Management Company to the extent that those employees are concerned with the Development in a sum with an insurance office or underwriters and through any agency including the Landlord's as decided from time to time by the Landlord or in default by the Management Company against all third party claims for damage to property or injury to any person (whether or not the tenant/owner of a property on the Development) arising out of the Development or its use or the act or omission on the Development by the Landlord the Management Company or any tenant/owner and their respective servants licensees and employees and any other person whatsoever subject to excesses exclusions or limitations as the insurers may require PROVIDED ALWAYS THAT the Landlord and the Management Company shall not be liable to the Tenant for a defect or want of repair decoration reinstatement replacement or renewal either:

(a) to the extent that the works required to remedy it are carried out at the expense of the insurers or otherwise out of money arising under a policy or policies of insurance effected pursuant to this lease, or

(b) if the cost of remedying the defect or want of repair decoration reinstatement replacement or renewal would have been recoverable under a policy or policies of insurance but for the policy or policies having been vitiated or voided in whole or in part by the act or default of the Tenant or any person in occupation of the Property or for or over whom the Tenant is responsible or has control.

8.11 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 they relate to the Retained Parts."

53. Clause 9 of the Leases contains covenants on the Company's part, being covenants by the Company with the Tenant, and further by way of covenant with the Landlord. These covenants are in very similar terms to the covenants contained in Part 10 of the Transfers in respect of the freehold properties. For this reason I do not need to set them out in full, but it is to be noted that clause 9.4(c) is in like terms to the key paragraph 6 of Part 10 of the Transfers.

54. So far as the Schedules to the Leases are concerned containing provisions relating to *"Service Charge Expenditure"* and *"Maintenance Contribution Expenditure"*, Part I of the Second Schedule is headed *"Service Charge Expenditure"*, and provides so far as relevant as follows:

"1. The expenditure described as the 'Service Charge Expenditure' means expenditure:

(1) in the performance and observance of the covenant's obligations and powers on the part of the Management Company and contained in this Lease 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 tenants of the Estate in accordance with the Tenant's Proportions in relation to the Estate."

55. Part II of the Second Schedule is concerned with the *"Maintenance Contribution Expenditure"*. It is in a slightly different format to the equivalent provisions in Part II of Schedule 15 of the Transfers. Paragraph 1 thereof provides as follows:

"1. The maintenance described as the 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;

1.5 in the performance and observance of the covenants obligations and powers on the part of the Company and contained in this Lease or with obligations relating to the Common Areas and the Common Facilities or their occupation or use and imposed by operation of law;

1.6 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 Landlord 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 tenants/owners of the properties on the Development not being the payment of rent to the Landlord.

1.7 in the provision of services facilities amenities improvements and other works where the Company in its or the Landlord in the Landlord's absolute discretion from time to time considers the provision to be for the general benefit of the Development and the tenants/owners of the properties on the Development and the tenants/owners of the properties on the same and whether or not the Company has covenanted to make the provision;

1.8 in the payment of bank charges and of interest on and the cost of procuring any loan or loans raised to meet expenditure."

56. It is against this background and the Leasehold Owners having control of the Company that the present proceedings have been brought.

57. It is not suggested that any particular repairs are required to the structure or exterior of the School Buildings or that any party has been in default in effecting repairs to the structure and exterior of the School Buildings or that there is any ongoing breach of the Section 106 Agreement.

Issues that arise for consideration

58. The principal issue that arises for consideration is plainly as to whether paragraph 6 of Part 12 and paragraph 1.3 of Part II of Part 15 of the Transfers entitle the Company to carry out maintenance works to the structure and exterior of Mostyn House School and to recover payment of part of the costs, in fact 1/87th of the costs per Freehold Owner, from the Freehold Owners, and to do so in the absolute and unconditional terms predicated by the terms of the declaration sought. This necessarily raises a question of construction as to the true meaning and effect of those provisions.

59. It is common ground that the Section 106 Agreement, and specifically the 2013 Section 106 Agreement, forms part of the admissible background for the purposes of this construction exercise, but there is an issue between the parties as to whether the common form Leases granted to Leasehold Owners can properly be regarded as part of the admissible background and, if they can, as to how much weight ought to be placed thereupon.

Correct principles to apply in interpreting or construing the Transfers

60. The parties were agreed as to the relevant principles of law to be applied in interpreting or construing the Transfers. The court is concerned with identifying the intention of the parties by reference to what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the relevant document to mean, and is required to perform such exercise by focusing on the meaning of the relevant words of the provision being construed in their documentary, factual and commercial context – see *Arnold v Britton* [2015] UKSC 36, [2015] AC 1619, at [15] per Lord Neuberger.

61. As Lord Neuberger went on to say at [15] *Ibid*, that meaning has to be assessed in the light of:

> *"(i) the natural and ordinary meaning of the clause; (ii) any further relevant provisions of the lease in that case; (iii) the overall purpose of the clause and the lease; (iv) the facts and circumstances known or assumed by the parties at the time the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of the parties' intentions."*

62. Although I was not taken to this case, I note that in *Wood v Capita Insurance Services* [2017] AC 1173, [2017] UKSC 24, Lord Hodge at [10], in dismissing suggested inconsistencies between *Arnold v Britton* and *Rainy Sky v Kookmin Bank* [2011] 1WLR 2900, observed that:

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

63. Lord Hodge went on at [12] to refer to a unitary exercise involving an iterative process by which each suggested interpretation is checked against the provisions of the document, and the commercial consequences are investigated. At [13], Lord Hodge explained that textualism and contextualism are not conflicting paradigms and he set out how those respective tools might be applied to the particular context of the particular case.

64. I bear firmly in mind that the interpretation or construction exercise is fundamentally about resolving ambiguities in a document rather than finding them, at least unless something has obviously gone wrong.

The admissibility of the terms of the Leases to the Leasehold Owners as part of the background for the purposes of construing the transfers.

65. Mr Uff relies on the decision of the majority of the Court of Appeal in *Cherry Tree Investments v Landmain* [2013] Ch 305, [2012] EWCA Civ 736, as authority for the proposition that in the case of a public document that would be placed on a public register, such as a transfer of registered land and its registration at HM Land Registry, there is limited, if any, scope for using as an aid to construction other contemporaneous documents not made public in the same way.

66. The issue that arose in the latter case was as to whether a registered charge and the power of sale thereunder could be construed by reference to the necessarily private facility letter pursuant to which the registered charge had

been granted in order to correct the registered charge as a matter of construction. The majority of the Court of Appeal held that this was impermissible.

67. At [129] and [130], Lewison LJ, one of the majority, said this:

> *"129. In Attorney General of Belize v Belize Telecom Ltd, Lord Hoffmann himself said of an earlier decision of the Court of Appeal discussing a company's articles of association:*
>
> > *'Because the articles are required to be registered, addressed to anyone who wishes to inspect them, the admissible background for the purposes of construction must be limited to what any reader would reasonably be supposed to know. It cannot include extrinsic facts which were known only to some of the people involved in the formation of the Company.'*
>
> *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. There is, in my judgment, a real difference between allowing the physical features of the land in question to influence the interpretation of a transfer or conveyance (which we do) and allowing the terms of collateral documents to do the same (which we should not). Land is (almost) invariably registered with general boundaries only, so the register is not conclusive about the precise boundaries of what is transferred. Moreover, physical features are, after all, capable of being seen by anyone contemplating dealing with the land and who takes the trouble to inspect. But a third party contemplating dealing with the land has no access to collateral documents."*

68. Further, Mr Uff would no doubt rely upon the principle that matters known only to, or at least reasonably ascertainable by only one or more, but not all of the parties, cannot be an admissible aid to construction – see in particular *Arnold v Britton* (supra) at [21].

69. However, when it comes to a consideration of whether the Leases might provide part of the admissible background against which the transfers are to be construed one is, in my judgment, concerned with a rather different scenario than that in *Cherry Tree Investments v Landmain Ltd* and the circumstances envisaged by Lewison LJ at [130]. Further, I do not consider that knowledge of the relevant provisions of the Leases can properly be said only to have been reasonably available to the Developer and/or the Company and/or FMC and not to the Freehold Owners.

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 <u>the Transfers</u> 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, <u>including</u> 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.

71. In short, therefore, I am satisfied that it is appropriate to have regard to the Leases and the terms thereof in construing the relevant provisions of the Transfers. But I do not consider that the case turns thereupon.

<u>The true meaning and effect of paragraph 6 of Part 12 and paragraph 1.3 of Part II of Part 15 of the transfers</u>

The Company's case.

72. The Company's case is quite straightforward, and can be summarised as follows:

i) The 2013 Section 106 Agreement makes it clear at clause 5.5.2 thereof that each Transfer and Lease should contain a provision

whereby *"the Management Company"* covenanted with the Owner/Developer and the purchaser to continue the future management and maintenance of the Listed Buildings, which of course included the School Buildings, to a good state of repair.

ii) It is said by the Company that clause 5.5.1.1 of the 2013 Section 106 Agreement specifically required the provisions of the transfers/leases to contain a covenant by the purchasers with the Owner/Developer and the Management Company to pay a rent charge/service charge to cover the cost incurred in performing the Management Company's obligations.

iii) The Management Company envisaged by the 2013 Section 106 Agreement is one in which the shares are held by Freehold and Leasehold Owners, the Company placing reliance on clause 5.5.3 of the 2013 Section 106 Agreement.

iv) It can, so the Company argues, thus be seen that paragraph 6 of Part 12 and paragraph 1.3 of Part II of Part 15 of the Transfers are the provisions that were intended to give effect to these provisions of the 2013 Section 106 Agreement.

v) The wording of these provisions is, it is said by the Company, quite clear, that the Company has covenanted by paragraph 6 of Part 12 to *"comply generally with the obligations detailed in the Section 106 Agreement"* which would include, so it is said, the obligation expressed therein to continue the future management and maintenance of *"the Listed Building"*, including each of the School Buildings. On this basis the Company must, so it is said, be entitled to maintain the structure and exterior of Mostyn House School to a good state of repair.

vi) Further, it is maintained by the Company that paragraph 1.3 of Part II of Part 15 is equally clear, that the Company is entitled thereby to recover through the Maintenance Contribution Variable Rent Charge, from each Freeholder Owner, the *"Transferee's Proportion"*, that is 1/87th of the expenditure incurred in relation to the maintenance of the structure and exterior of Mostyn House School to a good state of repair because it is *"expenditure incurred by the Company in connection with compliance with the requirements of the Section 106 Agreement"*.

vii) The Lease it is said is not an admissible aid to construction, but even if it is admissible for this purpose as I have found that it is, a provision therein relating to who is responsible as between the

Tenants and LMC for the maintenance of the School Buildings is simply a matter between the Tenants and LMC, and perhaps also between them and the Landlord, but does not concern the Company and the latter's own obligations in consequence of the covenants on its part entered into to give effect to the requirements of the Section 106 Agreement.

viii) A like argument is advanced by the Company in so far as the Freehold Owners place reliance upon the fact that the Transfers, for example by paragraph 8 of Part 11, place an obligation on the FMC to comply with the conditions of the Section 106 Agreement *"in respect of the Development so far as they relate to the Retained Parts."* This is said not to bear on the Company's obligations and entitlements consequential thereupon.

Is the Company's construction the correct one?

73. Despite the cogent and attractive way that the Company's case as to the true construction of the relevant provisions was advanced by Mr Uff, I am not persuaded that it is the correct construction essentially for the reasons advanced by Ms Mattsson.

74. The difficulty with the Company's approach is, in my judgment, that it focuses too narrowly on the language of paragraph 6 of Part 12 and paragraph 1.3 of Part II of Schedule 15 without setting them in their wider context, including in particular the other provisions of the Transfers, but also the admissible background matters and circumstances, knowledge of which would have been available to the parties, and commercial common sense.

75. Having regard to the terms of the Transfers as a whole, paragraph 6 of Part 12 of the transfers does, as I see it, raise a question of construction as to what *"complying generally with the obligations in the Section 106 Agreement"* means in the context of this particular a covenant in the Transfers with the Freehold Owners and the Developer.

76. Given, in particular, 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.

77. The 2013 Section 106 Agreement is clearly an aid to construction of the Transfers but cannot be determinative of the obligations under the Transfers. It is part of the admissible background that rather than one Management Company, as envisaged by a reading of the Section 106 Agreement itself, three Management Companies were established all with exactly the same objects. It can be ascertained from the terms of the Transfers themselves that the mechanism in fact deployed for ensuring performance of the Owner's/Developer's obligations thereunder so far as the management and maintenance of *"the Listed Building"* to a good state of repair is concerned is much more nuanced than simply imposing that obligation on the Company. The parties to the Transfer included not only the Company, but also FMC, the very name of which identifies it as concerned with management of the freehold properties. Under Part 11 of the Transfers, FMC assumes the obligation to keep in good and substantial repair, etc. the Retained Parts – see paragraph 2. FMC's obligations extend to protecting and maintaining in a manner befitting the feature any original feature of the Development which is within the Retained Parts, whether or not listed – paragraph 4. FMC assumes further obligations by paragraphs 3, 5 and 8. The latter paragraph 8 expressly obliges FMC to comply with the conditions of the Section 106 Agreement so far as they relate to the Retained Parts. On any breach the Developer (Transferor), but not the Company, has the right under paragraph 11 to step in and remedy the breach at FMC's cost.

78. So far as the freehold properties sold as part of the Development are concerned, which included the listed Jarrah House, the Freehold Owners are obliged to repair, see paragraphs 3 and 5 of Part 1 of Part 10. On default the Developer (Transferor) and FMC have the right to step in and do the works at the cost of the Freehold Owner. This right to step in is not a right, certainly under the express terms of the Transfers, that is extended to the Company.

79. Even if the Leases do not form part of the admissible background for the purposes of the relevant construction exercise, the parties to the Transfers would know, not least from reading the Section 106 Agreement, that the Leases were being granted on terms that broadly mirrored the Transfers, and that demises of the apartments within the School Buildings were likely, in accordance with leasehold conveyancing practice, to have excluded the structure and exterior of the listed School Buildings, which would thus fall within the definition of *"Retained Part"* for which an equivalent (to FMC) leasehold management company (in fact LMC) would be responsible for repair. 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.

80. To the extent that the Leases do form part of the admissible background, it would have been confirmed thereby that LMC had thereunder assumed responsibility for the repair of the structure and exterior of the School Buildings, being part of the Retained Part, and for Section 106 Agreement obligations in respect thereof – see e.g. clauses 8.2. 8.8 and 8.11 of the Leases with a right for the Developer (Landlord) to step in in the event of breach pursuant to clause 8.14, provisions broadly replicating those in the Transfers.

81. Examination of the Leases also reveals, as I have mentioned, that there were two *"Estates"*, being each of the old School Buildings. This is, as I see it, significant, in that although any expenditure by LMC on the structure and exterior of the School Buildings would be recoverable as *"Service Charge Expenditure"* pursuant to Clause 7(a) and Part I of the Second Schedule to the Leases, paragraph 3 of the latter schedule provides, as we have seen, that where expenditure is incurred only in respect of *"the Estate"*, i.e. in respect of a particular School Building, then the expenditure is to be divided between the tenants of *"the Estate"*, i.e. of that School Building. It follows that if repairs were required to one School Building it would only be the Leasehold Owners of that building who would be liable to contribute under these provisions.

82. Clause 9.4(c) of the Leases is in like terms to paragraph 6 of Part 12 of the Transfers. As I see it, it would be odd to say the least, and incongruous, 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.

83. It would also be odd and incongruous, given the link that I have identified between the Leases and Transfers, if clause 9.4(c) of the Leases fell to be construed differently from the equivalent paragraph 6 of Part 12 of the transfers. This 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.

84. There are other factors which point, in my judgment, against the construction contended for by the Company:

    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.

85. I note that the recitals to the Transfer do, at paragraph 5 of Part 3, refer to the reasons for the Company agreeing to join in the Transfers, apart from assuming responsibility for *"services repair maintenance insurance management of the Communal Areas the Communal Facilities and the provision of Communal Services"* as being to *"ensure that the obligations contained in the Section 106 Agreement are performed"*. I also note that Recital 4 sets out that FMC agreed to join in the transfers with responsibility for the repair, maintenance, etc. of *"the Development"*. I would 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.

86. However, subject thereto, I am not persuaded that, properly construed, 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. I do not consider the answer to be that the obligations of FMC and LMC are to be regarded as simply personal to the Freehold Owners and the Leasehold Owners (and/or the Developer (as Transferor or Landlord)) respectively as contended for, not least because looking at the matter objectively it does not seem to me that it can have been intended that the liability to contribute to maintenance works should turn effectively upon who got in first to carry them out.

87. In short, therefore, I am not satisfied that the Company is entitled to the unqualified declaration that it seeks so far as an entitlement to maintain the structure and exterior of the School Buildings and to recover the expenditure involved is concerned. In those circumstances I consider that the Company's Part 8 claim falls to be dismissed.

Discretion

88. Ms Mattsson placed reliance on *Radia v Jhaveri* [2021] EWHC 2089 (Ch). This recent case emphasises that the grant of declaratory relief is discretionary and a matter for the discretion of the judge. In this case the Deputy Judge applied what Aikens LJ had said in *Rolls-Royce v Unite the Union* [2009] EWCA Civ 378, at [120], to the effect that before granting a declaration the court must be satisfied that all sides of the argument have been fully and properly put and that the court must therefore ensure that all those affected are either before it or will have their arguments put before the court. She submits that, absent at least the freeholder reversioner, and possibly also individual tenants, as parties before the court, I could not be so satisfied and so in my discretion should in any event refuse relief.

89. However, given my finding on the construction issue, it is not necessary for me to consider whether I should decline to grant a declaration as a matter of discretion on this basis. I would therefore merely say that I would have had reservations about making a declaration that affected the Development as a whole without having before the court the freeholder reversion and the tenants themselves, not least given the potential conflicts between the tenants in respect of the two respective School Buildings. Nevertheless, if I had been in favour of the Company this probably would not have prevented me from granting the declaration sought, given that the result would appear to be to the benefit of the absent parties and not to their detriment. However, as I have said, that is not a matter that I need to decide.