Neutral Citation Number: [2014] EWCA Civ 1395

Case No: A3/2013/0818

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT, CHANCERY DIVISION
SIR ANDREW MORRITT, CHANCELLOR OF THE HIGH COURT
[2012] EWHC 3650 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 31/10/2014

Before:

MASTER OF THE ROLLS
CHANCELLOR OF THE HIGH COURT
and
LORD JUSTICE KITCHIN

- -

Between:

FRANCIS & ANR	**Appellants**
- and –	
PHILLIPS & ANR (SUING ON BEHALF OF THEMSELVES AND OTHER OWNERS OF 97 HOLIDAY CHALETS AT ATLANTIC BAYS HOLIDAY PARK, FORMERLY POINT CURFEW, ST MERRYN, PADSTOW, CORNWALL)	**Respondents**
- and –	
SECRETARY OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT	**Intervener**

- -
- -

Jonathan Seitler QC & Jonathan Chew (instructed by **Enigma**) for the **Appellants**
Chris Stoner QC & Rawdon Crozier (instructed by **Fursdon Knapper**) for the **Respondents**
Jonathan Davey (instructed by **Treasury Solicitor**) for the **Intervener**

Hearing date: 14 October 2014

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Approved Judgment

Master of the Rolls:

1. Point Curlew is a 25 acre holiday site ("the Site") at St Merryn, Cornwall which was created in the 1970s on part of a disused WWII airbase. It comprises in excess of 150 chalets which are let on 999 year leases, 11 lodges and a number of other buildings including an amenity centre ("the Amenity Centre"). On 22 April 2008, the freehold of the Site was conveyed by the former owner, St Mervyn Holiday Estate Management Co Ltd, to the defendants ("the lessors"). The last service charge before the sale of the Site to the lessors was £1478 for each chalet. The first after the sale to the lessors was a demand dated 29 December 2008 for £3117.47 for each chalet on account of the year 2009.

2. On 5 February 2009, the claimants issued these proceedings on behalf of themselves and the lessees of 97 other chalets on the Site ("the lessees"). They sought various declarations as to their liability to pay the service charges claimed by the lessors.

3. On 22 January 2010, accountants CV Ross & Co Ltd certified the amount recoverable from the lessees by way of service charge for the period 22 April to 31 December 2008 and the 12 months ended 31 December 2009 as £269,933.49 and £583,542.87 respectively. The latter certificate included £95,000 in respect of wages purportedly paid to the lessors by Francis Leisure Limited ("the company") which was the management company wholly owned and controlled by them, and £27,787.76 as a 5% management charge.

4. The claim came before HH Judge Cotter QC sitting in the Truro County Court. He handed down a very substantial judgment in October 2011 in which he dealt with a number of issues relating to the service charges demanded by the lessors for the years 2008 and 2009. The lessees appealed to the High Court on two main points. The first concerned the true construction of clauses 6 and 8 of schedule 3 of the leases and whether the lessors were entitled to include in the service charges for 2008 and 2009 £95,000 wages for themselves for managing the Site in addition to a management charge of 5%. The second was whether the judge had correctly construed the phrase "qualifying works" in the Landlord and Tenant Act 1985 ("the 1985 Act"). Section 20 of the 1985 Act limits the recovery of the cost of qualifying works by a landlord from residential tenants by means of a service charge unless he complies with a prescribed consultation process or obtains a dispensation from doing so from the appropriate tribunal. The second point is one of considerable general importance.

5. In a judgment handed down on 21 December 2012, Sir Andrew Morritt C allowed the appeal on both points. There has been considerable adverse criticism of his decision on the second point. Permission to appeal was given by Gloster and Christopher Clarke LJJ. The Secretary of State has intervened in the appeal because the point raises a question of statutory construction of public importance with the potential to affect a large number of residential landlords and tenants throughout the country. The Chancellor has construed the legislation in a way which is at odds with what, it seems, had previously been the general understanding of the position.

The leases

6. The lessees' covenants are set out in clause 2. So far as relevant sub-clause (q) is in the following terms:

> "Pay to the Lessor by way of additional rent the service rent hereinafter defined in Clause 4 within fourteen days of written demand after the accounting date as hereinafter defined in each and every year of the term PROVIDED ALWAYS that the tenant shall pay to the Lessor on each of the accounting dates in every year during the term such sum or sums as the Lessor may reasonably require on account of the said service charge and any such payment to be credited to the tenant against payment of the services as certified to be due from it (as hereinafter provided) by the certificate issued next after the making of such demand and in default of such payment by the Lessee…"

7. Clause 3 contains the lessors' covenants. By paragraph (b) the lessors covenant:

> "To carry out and provide the services as set out and numbered 1-7 in Schedule 3 hereto unless prevented from so doing by…."

8. Clause 4 contains the obligation to pay the service charge. So far as material it provides:

> "The service rent hereinbefore covenanted to be paid by the Lessee shall be a fair and equitable proportion determined from time to time by the Lessor and such sum shall be ascertained by a certificate given by the Lessor or its managing agents and certified by them to be the aggregate of the sums actually expended on the liabilities incurred by the Lessor in any period ending on the thirty first day of December or such other date as the Lessor may in its discretion determine (hereinafter called "the accounting date") during the term hereby created in connection with the management and maintenance of the Estate and the provisions of such services as herein described and in particular without limiting the generality of the foregoing shall include the cost of the matters referred to in the Schedule 3 hereto."

9. There follows in clause 4 a provision dealing with the binding nature of such a certificate to which are appended three provisos. The third is as follows:

> "(iii) As soon as practicable after the accounting date in each year throughout the term the Lessor will submit to the Lessee a statement certified by the Lessor's agent to show the computation of the said sums expended and the liabilities incurred (hereinafter called "the annual service cost") for the preceding year and the Lessee shall be entitled within fourteen days of receipt of such statement to inspect the vouchers and receipts of all items included in such statement."

10. Schedule 3 not only specifies the subject matter of the lessors' covenant in clause 3(b) but also the costs making up the service charge provided for in clause 4. That schedule provides:

"SCHEDULE 3

"1. To pay all rates and other charges upon the Estate or any part thereof other than those properties specifically demised to third parties.

2. The erection and maintenance of suitable notice boards on the Estate.

3. The maintenance operation and cleaning of soil and drainage pipes and other conducting media conduits and channels and pumps in relation thereto.

4. The provision and maintenance of fire fighting equipment.

5. The cutting and mowing of grass lopping pruning and felling of trees on the Estate.

6. Management of the Estate and its appurtenances including where applicable the charges wages pensions contributions insurance and provision of uniforms and working clothes of any staff employed by the Lessee and the provision of telephones (if any) and also the cost of providing tools appliances cleaning and other materials bins receptacles together with any amounts of fees paid to architects agents surveyors and solicitors employed by the Lessor in regard to the management of the Estate.

7. Repairing renewing rebuilding decorating cleaning and maintaining those parts of the Estate (which include an amenity centre if any) used in common with other lessees including without prejudice to the generality of the foregoing the footpaths roadways and car park on the Estate.

8. A management charge of five per centum (5%) of the total cost of the items referred to in this Schedule."

The 1985 Act

11. Sections 18 to 30 of the 1985 Act introduced limits on the recovery of service charges from tenants. It was amended by a number of subsequent statutes, particularly the Commonhold and Leasehold Reform Act 2002.

12. As amended, section 18 of the 1985 Act provides:

"**Meaning of 'service charge' and 'relevant costs'**

(1) In the following provisions of this Act, 'service charge' means an amount payable by a tenant of a dwelling as part of or in addition to the rent—

(a) Which is payable, directly or indirectly, for services, repairs, maintenance, improvements or insurance or the landlord's costs of management, and

(b) …..

(2) The relevant costs are the costs or estimated costs incurred or to be incurred by or on behalf of the landlord, or a superior landlord, in connection with the matters for which the service charge is payable."

13. Section 19(1) provides:

"**Limitation of service charges: reasonableness**

Relevant costs shall be taken into account in determining the amount of a service charge payable for a period—

(a) only to the extent that they are reasonably incurred, and

(b) where they are incurred on the provision of services or the carrying out of works, only if the services or works are of a reasonable standard;

and the amount payable shall be limited accordingly."

14. Section 20 provides:

"**Limitation of service charges: consultation requirements**

(1) Where this section applies to any qualifying works…, the relevant contributions of tenants are limited in accordance with subsection (6) or (7) (or both) unless the consultation requirements have been either —

(a) complied with in relation to the works…, or

(b) dispensed with in relation to the works … by (or on appeal from) a leasehold valuation tribunal.

(2) In this section "relevant contribution", in relation to a tenant and any works…, is the amount which he may be required under the terms of his lease to contribute (by the payment of service charges) to relevant costs incurred on carrying out the works….

(3) This section applies to qualifying works if relevant costs incurred on carrying out the works exceed an appropriate amount.

[(4)…]

> (5) An appropriate amount is an amount set by regulations made by the Secretary of State; and the regulations may make provision for either or both of the following to be an appropriate amount —
>
> (a) an amount prescribed by, or determined in accordance with, the regulations, and
>
> (b) an amount which results in the relevant contribution of any one or more tenants being an amount prescribed by, or determined in accordance with, the regulations.
>
> (6) Where an appropriate amount is set by virtue of paragraph (a) of subsection (5), the amount of the relevant costs incurred on carrying out the works…which may be taken into account in determining the relevant contributions of tenants is limited to the appropriate amount.
>
> (7) Where an appropriate amount is set by virtue of paragraph (b) of that subsection, the amount of the relevant contribution of the tenant, or each of the tenants, whose relevant contribution would otherwise exceed the amount prescribed by, or determined in accordance with, the regulations is limited to the amount so prescribed or determined."

15. Section 20ZA(2) provides: "In section 20 and in this section—"qualifying works" means works on a building or any other premises". Section 20ZA(4) provides: "In section 20 and in this section 'the consultation requirements' means the requirements prescribed by regulations made by the Secretary of State".

16. The relevant regulations are The Service Charges (Consultation Requirements)(England) Regulations 2003 SI 1987/2003 ("the Regulations"). They came into force on 31 October 2003. By regulation 1(3) they apply "where a landlord… (b) intends to carry out qualifying works to which [section 20] applies on or after [31 October 2003]". Regulation 6 provides that:

> "For the purposes of subsection (3) of section 20 the appropriate amount is an amount which results in the relevant contribution of any tenant being more than £250."

Regulation 7(4) provides that the consultation requirements which are relevant for present purposes are those specified in Part 2 of Schedule 4. Schedule 4 part 2 paragraph 1 provides:

> "1. - (1) The landlord shall give notice in writing of his intention to carry out qualifying works -
>
> (a) to each tenant; and
>
> (b) where a recognised tenants' association represents some or all of the tenants, to the association.

> (2) The notice shall -
>
> (a) describe, in general terms, the works proposed to be carried out or specify the place and hours at which a description of the proposed works may be inspected;
>
> (b) state the landlord's reasons for considering it necessary to carry out the proposed works;
>
> (c) invite the making, in writing, of observations in relation to the proposed works; and
>
> (d) specify -
>
> (i) the address to which such observations may be sent;
>
> (ii) that they must be delivered within the relevant period; and
>
> (iii) the date on which the relevant period ends.
>
> (3) The notice shall also invite each tenant and the association (if any) to propose, within the relevant period, the name of a person from whom the landlord should try to obtain an estimate for the carrying out of the proposed works."

THE QUALIFYING WORKS ISSUE

17. The 1985 Act provides that the service charge contributions recoverable from tenants (the "relevant contributions") in respect of "qualifying works" are limited to the "appropriate amount" (now set by the Regulations at £250 per tenant) unless the consultation requirements have either been complied with in relation to the works or have been dispensed with. There was no consultation by the lessors in relation to the service charges demanded for 2008 or 2009 and the consultation requirements were not dispensed with. It is common ground that the contribution sought from each lessee in respect of both years exceeded £250. The question whether the "appropriate amount" was exceeded therefore depends on the meaning of "qualifying works".

18. Judge Cotter stated his approach in the following terms:

> "341. In my judgment a commonsense approach to construction needs to be taken and in view of the fact that it acts as a trigger for the protection afforded by consultation. If the threshold were too low and all minor or non permanent works covered, the result would be commercially unmanageable to the detriment of both lessor and lessee. The phrase building works use to describe significant works with a permanent effect by way of modification of what was there before. Whether works are indeed qualifying works, is a question of fact having regard to the nature and extent of the works in question."

19. He seems to have adopted the approach set out by Robert Walker LJ in *Martin v Maryland Estates* [1999] 2 EGLR 53. That case concerned the 1985 Act in its unamended form. Section 20(1) of the version of the act then in force provided that, where relevant costs incurred on the carrying out of any qualifying works exceeded the limit specified in subsection (3) (i.e. £1000), the excess should not be taken into account in determining the amount of the service charge, unless the landlord had complied with the consultation requirements or they had been dispensed with. The landlord had consulted on some proposed works of repair and maintenance (the original works), but not on additional works, the need for which became apparent during the course of carrying out of the original works. The first instance judge held that the £1000 limit applied to all of the works and only allowed the landlord's counterclaim for service charges in relation to the costs of the original works. The landlord appealed. Having noted that Mr Lewison QC (counsel for the landlord) urged that a commonsense approach would lead to the conclusion that there were "two distinct batches of qualifying works", Robert Walker LJ said:

> "I readily agree that a common-sense approach is appropriate and necessary upon this point. I would also agree, if such were Mr Lewison's submission, that parliament has not made it entirely clear how one batch of qualifying works is to be divided from another. The definition of "qualifying works" indicates what their quality is but not how one batch is to be divided from another.
>
> It seems to me, on what is I hope a common-sense approach, that it is significant that the surveyor and the builder evidently regarded the additional work as a variation of the original contract. The judge himself found that some of the "Variation Order No 1" works were in fact covered by the original section 20 notice.
>
> Mr Lewison submitted that the judge's approach on this point was inconsistent. He suggested that if the further works were seen as part of the original batch of works, then the case was truly one of non-compliance with section 20 as regards the entirety of the works, which was not how the judge had seen it. If, on the other hand, the further works were regarded as a new batch, then there was complete non-compliance with section 20 as regards that new batch, but a further £1,000 limit should be available. That is a subtle argument, but I am not persuaded by it.
>
> It seems to me that since parliament has not attempted to spell out any precise test, a common-sense approach is necessary. The judge was influenced by the fact that all the works were covered by one contract. That would not, to my mind, always be a decisive factor, but, on the particular facts of this case, that was the right approach. The legislative purpose of the limit is to provide a triviality threshold rather than to build into every contract a margin of error, which may in some cases, including

> this case, simply duplicate a contingency sum that has already been provided for."

The Chancellor's approach

20. The Chancellor distinguished this authority on the grounds that the 1985 Act had subsequently been amended. He said:

> "35. The distinction between that case and this is the change in the legislation. The limit then was by reference to the cost of the works; the limit now is by reference to the amount of the contribution. The consultation requirements then were the provision to the tenants of at least two estimates of the cost of the works; now it is a notice by the landlord to the tenants of his intention to carry out qualifying works and to describe them in general terms. Thus the emphasis has shifted from identifying and costing the works before they start to notifying an intention to carry out the works and limiting the amount of the individual contributions sought to pay for them after their completion. Accordingly, I see nothing in the present legislation which requires the identification of one or more sets of qualifying works. If the works are qualifying works it will be for the landlord to assess whether they will be on such a scale as to necessitate complying with the consultation requirements or face the consequence that he may not recoup the cost from the tenants' contributions. As the contributions are payable on an annual basis then the limit is applied to the proportion of the qualifying works carried out in that year. Under this legislation there is no 'triviality threshold' in relation to qualifying works; all the qualifying works must be entered into the calculation unless the landlord is prepared to carry any excess cost himself."

21. He continued:

> "36. In my view the legislation in point on this appeal entitles me to construe it in the foregoing manner unconstrained by the conclusion of the Court of Appeal in **Martin v Maryland Estates**, save in its reference to the need to use common sense. In addition such a construction conforms more closely to the ongoing works of repair and maintenance likely to be necessary on an estate in multiple occupation. They are unlikely to be identified as parts of a complete set of works which can be costed at the outset. In the normal way they will be carried out as and when required. The need for some limitation on an obligation to contribute is at least as necessary with sporadic works of that nature as with a redevelopment plan conceived and carried out as a whole.
>
> 37. Accordingly, in my judgment the judge applied the wrong tests when seeking to apply the 1985 Act. It is not disputed that

> all the works he considered in paragraphs 361 to 367 were qualifying works within the statutory definition. Accordingly, all of them should be brought into the account for computing the contribution and then applying the limit. It may be that they should be spread over more than one year thereby introducing another limit. With that exception, the provisions relating to this service charge do not require any identification of 'sets of qualifying works' or the avoidance of 'excessive fragmentation'."

22. The two amendments relied on by the Chancellor were (i) the change in the "appropriate amount" above which consultation was required from a sum per works to a sum per tenant; and (ii) the change in the content of the consultation required at the first stage. I accept the submission of Mr Seitler QC that neither of these changes affected the definition of "qualifying works". As regards (i), the change in the method of calculation of the appropriate amount does not affect the underlying policy of why there is a limit. The policy of the limit (protecting tenants from unexpected costs from major works) is unaffected by the amendment. As for (ii), a change in the substance of the consultation requirements is a change in the detail of the protective process. It does not affect its scope. Like the change to the calculation of the appropriate amount, it too is a refinement of the process which does not affect the definition of qualifying works. Accordingly, I respectfully disagree with the Chancellor that *Martin's case* can be distinguished on the grounds of the amendments to the 1985 Act. Nevertheless, the question remains whether *Martin's case* is authority binding on this court for the proposition that the sets approach is correct, since there is an argument as to whether the question of the correct approach was in issue in that case. For reasons that will become clear, I do not find it necessary to resolve this argument.

Discussion

23. In a nutshell, therefore, the Chancellor decided that qualifying works are *all* the "works on a building or any other premises" (section 20ZA(2)) in respect of which the landlord incurs costs "in connection with the matters for which the service charge is payable" (section 18(2)). I shall call this "the aggregating approach". He added that, as the contributions are payable in this case on an annual basis, the limit is applied to the proportion of the qualifying works carried out in the relevant year. In other words, the correct approach to whether section 20 requires a landlord to consult (or seek a dispensation) is to aggregate *all* works in any given year without division into separate sets of qualifying works. This was not a construction of section 20 for which Mr Stoner QC (for the lessees) contended. On this appeal, however, his primary case is that the Chancellor's construction is correct.

24. The rival construction, for which Mr Seitler contends (supported by Mr Davey for the Secretary of State), is that Robert Walker LJ and Judge Cotter were right. What is required is what Mr Seitler calls "a sets approach" and Mr Davey calls "an individuated approach": section 20 should be applied by reference to individual sets of works. I shall use the phrase "the sets approach".

25. The language of the statute does not expressly provide an answer to the question of construction. Section 20ZA(2) unhelpfully defines "qualifying works" as "works on a

building or any other premises". But I am satisfied that the aggregating approach is wrong.

26. For reasons I shall explain, it is not a sensible approach and gives rise to serious practical problems. It cannot therefore have been intended by Parliament. It requires that, at the very latest, once the limit for contributions has been reached (£250 per tenant), the landlord must consult the tenants on any service charge items, however small they may be (presumably subject only to the *de minimis* exception). Mr Seitler illustrates the problem with the following example. Imagine a residential block of flats with 4 tenants: the annual regulatory limit is 4 x £250: £1000. Three lots of minor works on a building each costing £75 are carried out in the first half of the year. The landlord has spent £225 on service charge items. There has been no consultation. Unexpectedly, in September the outer door of the block breaks and a new door frame is required which would cost £800. A storm in November causes window damage that would cost £400 to repair. On the sets approach, the landlord would not need to consult on any of these items. They are all distinct sets of qualifying works none of which costs more than £1000. The landlord could respond immediately and repair the damage to the door and the window. The tenants are still protected because they have the after-the-event protection afforded by section 19 of the 1985 Act that the costs are only relevant costs to the extent that they are reasonably incurred and of a reasonable standard.

27. On the aggregating approach, the annual limit is exceeded by the broken door. The landlord is obliged to consult on it. This process takes time and costs money. If instead he replaces the door immediately, he has no right to recover the full amount without dispensation. Seeking dispensation has attendant legal and administrative costs as well as the risk of non-recovery and delay. But if he does not replace the door, the flats are unsafe and he is likely to have irate tenants.

28. Paragraph 3 of Part 2 of the Regulations obliges the landlord to have regard to the observations of the tenants in each consultation. To apply this obligation to every item of maintenance and repair (some of which may be of an emergency nature) is not sensible and in many cases would be unworkable. The added administrative burden must increase costs for landlords. These are likely to be recoverable under the terms of the lease. If they are recoverable, the tenants will have to pay for the protection of consultation even on minor matters. I do not consider that this can have been intended by Parliament. The consultation requirements under the Regulations place significant administrative burdens on the landlord. He has to describe the works that he wishes to carry out (or provide notice of the place where a description may be inspected). If this were required for every piece of minor repair work that a landlord wishes to carry out over a year, it is likely that there would have to be perpetual consultation. The landlord would have to consult on emergency matters or to consult in respect of works that are below the limit in case works are required later in the year that take the annual total over the £250 per tenant limit. There is the further difficulty that, as Mr Seitler points out, it is questionable whether a protective consultation in respect of potential works would be valid. As Mr Seitler further points out, the landlord is caught between two unworkable alternatives: consultation on every minor piece of work one at a time which would clog up the system and make running a site very difficult; or consult prospectively which may not be valid consultation at all.

29. The real protection afforded by the 1985 Act to residential tenants is that all service charges must be reasonable and reasonably incurred under section 19. This is the sensible way to control routine works of repair and maintenance which are unlikely to be the subject of a detailed plan in advance.

30. Finally, the Chancellor's annual limit is inconsistent with the service charge regime of sections 18 to 30 of the 1985 Act. Section 20(1) caps relevant contributions, which are defined in section 20(2) as "the amount….required under the terms of his lease to contribute….to relevant costs incurred in carrying out the works…". There is no mention of an annual cap. Section 18(2) defines "relevant costs" as "the costs or estimated costs incurred or to be incurred…in connection with the matters for which the service charge is payable". Section 18(3) states that "costs are relevant costs in relation to a service charge whether they are *incurred, or to be incurred, in the period for which the service charge is payable or in an earlier or later period"* (emphasis added). The statute, therefore, expressly provides that the contributions are not limited by reference to the period to which the demand relates. The Chancellor's decision imports such a limit in his annual limit. This is contrary to the express language of the statute.

31. Mr Stoner seeks to uphold the reasoning of the Chancellor. He submits that the practical difficulties suggested with the aggregating approach fall away if qualifying works are interpreted to mean significant works or works which modify what was there before. He adopts what Judge Cotter said at para 341 of his judgment (see para 18 above). He points to the fact that section 20ZA(2) refers to "qualifying works" not "qualifying work" and submits that the use of the plural suggests that minor work is not included in the definition. He says that the word "works" is suggestive of the landlord undertaking a task "different from the usual reactive maintenance of the building/premises" (para 20 of his skeleton argument).

32. In my view, there is nothing in the reasoning of para 35 of the Chancellor's judgment to indicate that he construed "qualifying works" in the manner for which Mr Stoner contends. Indeed, quite the contrary. The Chancellor said at para 35 of his judgment that there is no triviality threshold and that "*all* the qualifying works must be entered into the calculation unless the landlord is prepared to carry any excess cost himself" (emphasis added). Nor do I consider that the use of the plural is of much significance. It is not a contradiction in terms to speak of "minor works". In fact, the phrase "minor works" is commonly used. I agree that it is a strained use of language to speak of the repair of a single small window pane on its own as "works". But that does not carry the debate very far. Nor do I see how one can spell out of the statute the idea that qualifying works must be significant or that they must change what is already there. A major programme of repair or redecoration does not in any meaningful sense change what is there and yet it would be most surprising if such works were not in principle caught by the statutory provisions.

33. In my judgment, these are compelling reasons for concluding that the aggregating approach is wrong and that the incorporation of an annual limit is also wrong. I reach this conclusion without having to decide (i) whether the decision in *Martin's case* is binding on this court or (ii) whether it is permissible to have regard to certain parliamentary materials on which Mr Davey relies on the basis of the principles enunciated in *Pepper v Hart* [1993] AC 593. I discuss at para 36 below what factors

are likely to be relevant in determining the factual question of what constitutes a single set of works.

Respondents' notice in relation to the qualifying works issue: the judge misapplied the sets approach

34. Mr Stoner submits that, if the aggregating approach is wrong, the Chancellor's judgment should be upheld (with the exception of the declarations in paragraphs II(3)(b) and (c) of the order which gave effect to the decision that the correct approach was the aggregating approach). He criticises Judge Cotter's application of the sets approach. Having set out the facts in great detail, Judge Cotter set out his conclusions in a passage starting at para 357. He said:

> "357. It was the Defendant's vision that the site should be the subject of an extensive upgrading exercise. As progression of this there have been certain specific defined and separate programmes of work, such as to the banks and, as proposed, to the amenity centre and also range of very different tranches/pieces of work to different parts of the site undertaken at different times and as the need or idea arose. I cannot accept, as a matter of fact that they were ever one scheme, or could properly ever be viewed objectively using a commonsense test as such. It is to be remembered that the aim is protection through consultation. That requires a clearly identified set of works which can be set out and considered. Apart from certain aspects of the work, which were in fact mentioned in advance, I find as fact that Mr and Mrs Francis did not themselves ever plan or in any way tie all the disparate pieces of work together. It was not until the beginning of 2009 that there was any structure to the planning of the revision of the site, that being to the extent referred to at paragraph 237 above.
>
> 358. Having heard Mr Francis and considered the nature of the works I was never at any stage attracted to Mr Stoners' primary submission. It was simply not the way that Mr Francis operated. Although Mr Stoner Q.C. said that he relied upon what they said in evidence, neither Mr or Mrs Francis gave evidence that it was a single set of works. The only acceptance of any coordinated approach was in 2009. Before that and contrary to Mr Stoner's submission it was Mr Francis' evidence that, in effect, "one job creates another". Examples of his general approach to the planning of works can be seen from my notes of the following exchanges
>
> *A; I knew the site had been neglected; I knew it had been run down.. in the all office there was just a paperclip; so we had to find the evidence of what the neglect was.*

…

A; Immediate work; Drainage

Q; What paper was needed to see what needed to be done on the amenity centre?

A; None it was just visual

Q; Banks

A; I didn't know about banks until I had to build my own chalets

And

Q: In 2008 the works undertaken were works to the drains, works removing the banks, some fencing and new shop and office construction started and amenity stripping out began. In 2009; tarmac speed humps and parking and trees removed, lighting and play areas and Sept 209 started the laundry and staff room. Was it one programme of works?

A; If I worked another 20 years I would not stop doing works; so with a site that big you will always be maintaining something … the only priority was the chalets then the other works then came up as we went along; one job leads to another

and

Q; But you must have had a plan?

A; No was there a priority to the chalets; main concern was to bring my family down

Q; First thing?

A; was to remove a bank. I started the chalets, I did not work in April 2009 I started then stopped and the priority shifted to the banks which I completed by Oct/Nov 2008 perhaps before

Q; By the 3rd May 2008 you were able to tell lessees that started banks and works on amenity centre etc; so in your mind you had formulated a plan of works?

A; it was obvious to anyone that works needed to be done, but there was no plan; such as when banks removed I found man hole covers; no definite programme within the first two/three weeks

Q; B1/380; a design and access statement; date issued 10th January 2009; so by beginning of 2009 the programme is clear

A; yes

Q; Programme of "improvement"

A; Cannot replace or repair without improvement

and

Q; Did you take out any feasibility study before you made hole/took window of amenity centre?

A; No. Quicker I got damp out the better. I stripped out so I could see the route of the problem once the problem.

359. As Mr Paton rightly argued care should be taken in comparing works done by e.g. a landlord of a block of flats, consisting of a single "building", to the situation in the present case of a 25 acre holiday park containing a number of different structures. However in this case I believe that Mr Stoner Q.C.'s submission that all the works were part of a single programme never really got off the ground.

360. I do find that by 2009 there was a degree of co-ordinated planning principally in respect of the amenity centre, as set out within the Design and access statement. However, even that of itself does not mean that all works being considered can or should then fall to be assessed as one set of qualifying works.

361. I did consider if the tarmac works including creation of 22 parking spaces, turning space and disabled access; plus some resurfacing of roadways undertaken in March-July 2009 at a cost of £28,695.97 was properly part of one set or works with the road and tarmac maintenance works including speed humps, footpaths and lay-by undertaken in January to August 2009 in the sum of £26,553. Mr Paton accepted that they were "near cousins". However, on balance, and considering the all the limited evidence on the point, I accept that they were, as he argued in his closing submission "*still separate and distinct sets of work*".

362. Having considered the nature, extent and timing of the works as undertaken and proposed to be undertaken I identified the following qualifying works;

> 363. First and perhaps most importantly the proposed works on the Amenity centre. However I do not tie the stripping out of the amenity centre to the future as yet not finally determined works as being one set of works. I accept what Mr Francis told me about that work as set out above. He undertook that work to assess the problem; and the work out what to do from there.
>
> 364. Secondly the work upon the banks and the associated work of dispersal of the resulting materials. Although in light of my findings as to recoverability this is of academic importance.
>
> 365. Thirdly the works upon the (matching) two buildings that house the office/shop and launderette/rest room. I do not accept Mr Paton's submission that these should be seen as two sets of works simply be reason of a gap in construction. They were all one planned re-location from the amenity centre. Again in light of my findings as to recoverability this is of academic importance.
>
> 366. Further, and subject to costs; future lighting, drainage and paths work amongst the chalets.
>
> 367. Other items of work properly separate from the above and each other such as lighting, the children's play area, the sewage pump house, works to the roads (re-surfacing, parking spaces, turning spaces and disabled access); speed humps (together with associated work on laybys and footpaths) and fencing work all fall under the costs threshold."

35. In summary, therefore, Judge Cotter found that until the beginning of 2009 there was no clearly identified set of works. Apart from certain aspects of the work (which were mentioned in advance) the lessors did not plan the work as a single scheme. To use the judge's words, they did not "plan or in any way tie all the disparate pieces of work together". But by 2009, there was a degree of co-ordinated planning and it was possible to identify certain discrete sets of works, namely those described in paras 361 and 363 to 367 of his judgment.

36. It is not in issue that the question of what a single set of qualifying works comprises is one of fact. It is a multi-factorial question the answer to which should be determined in a commonsense way taking into account all relevant circumstances. Relevant factors are likely to include (i) where the items of work are to be carried out (whether they are contiguous to or physically far removed from each other); (ii) whether they are the subject of the same contract; (iii) whether they are to be done at more or less the same time or at different times; and (iv) whether the items of work are different in character from, or have no connection with, each other. I emphasise that this is not intended to be an exhaustive list of factors which are likely to be relevant. Ultimately, it will be a question of fact and degree. Robert Walker LJ said that, on the facts in *Martin's case,* the fact that all the works were the subject of one contract was a factor

which decisively pointed to the conclusion that there was a single set of works in that case. It seems to me that the judge must have had in mind such an approach when he said at para 362 that he had considered "the nature, extent and timing of the works as undertaken and proposed to be undertaken".

37. Mr Stoner submits that the judge should have found that what Mr Stoner described as the "haphazard" moving from one job to another until the beginning of 2009 was all part of one scheme for upgrading the Site and therefore a single set of works. He submits that there was a duty on the lessors to identify clearly the works that they planned to carry out before they embarked on them. This duty is implicit in the fact that the Regulations required them (i) to provide a notice describing in general terms the works they proposed to carry out, stating why they were necessary; and (ii) to obtain estimates for the proposed works (see para 16 above). The judge should have considered what ought to have happened with regard to the programme of works which he identified *before* the work was started, rather than ask after the work had been done whether there was only one set of works. Taking account of that duty, Mr Stoner submits that the judge ought to have found that there was a single set of qualifying works. He also submits that the judge applied a subjective test and judged the matter from the lessors' perspective. That, he says, was wrong. Having regard to the statutory purpose of protection through consultation, an objective test should have been applied. Applying an objective test, the judge should have regarded the lessors' lack of planning as indicating that the works undertaken until the beginning of 2009 were a single set of qualifying works.

38. I cannot accept these submissions. Adopting the sets approach, the judge was entitled to find that the work planned and carried out until 2009 was not all part of a single set of works. It was a question of fact and degree whether the work carried out during that period was all part of one planned single set of works or a series of disparate pieces of work. Save in one respect, he did not misdirect himself and he reached a conclusion on the facts with which it is impossible for this court to interfere. The misdirection was the statement in para 341 that qualifying works are "significant works with a permanent effect by way of modification of what was there before". I see no warrant for limiting the definition in this way. I agree that qualifying works will often be significant or substantial as opposed to minor and insignificant. But I do not see why they must also have a permanent effect modifying what was there before. For example, it is difficult to say of a substantial programme of redecoration or repair that it has a permanent effect modifying what was there before. In most cases it should be obvious whether works comprise one or more sets. But I do not consider that this misdirection was material. It did not have any bearing on the judge's conclusion on the facts of this case. In my view, the evidence of Mr Francis amply justified the conclusion in relation to the work done until 2009. I accept that the lessors were under a duty to identify any qualifying works before they were started. But this simply begs the question of what the qualifying works were. It sheds no light on the answer to that question.

39. The criticism that the judge adopted a subjective approach is misplaced. The lessors were entitled to carry out the work that they were obliged to carry out in such sequence and such manner as they chose (provided that they complied with their contractual obligations). That was a decision for them. It can be described as subjective in the sense that it reflected their state of mind and their intentions. But the

critical question for the judge was whether the work planned by the lessors constituted a single or multiple set of qualifying works. That was an objective question. He did not apply a subjective test to that question.

40. Mr Stoner raises a particular point in relation to the Amenity Centre. The judge found that the lessors had stripped out the Amenity Centre entirely in 2008 such that "it presently remains as a shell unused saved (sic) for storage" (para 8). The lessors' evidence was that they had to do the stripping out in order to reveal the full extent of the problems with the building and the refurbishment work that was needed to it (para 363). The judge decided that the stripping out works comprised one set of qualifying works and the refurbishment works another. The cost of stripping out was said to be £12,327.50. The total sum claimed by the lessors in December 2008 on account of the refurbishment work to be done to the Amenity Centre was £225,000. At para 222, the judge said:

> "Even if I were of the view that the analysis of what costs should be borne by the leaseholders was indeed fair and equitable, I would not consider the initial request for such a significant sum as £225,000, in advance, without detailed analysis being available to the leaseholders of what works were to be undertaken and a full breakdown of costs to have been reasonable".

41. Mt Stoner submits that there is no objective rationale that can justify the separation of the stripping out works from the works of refurbishment. To split the two is analogous to treating the stripping of plaster from a wall as a separate set of works from the re-plastering that follows. He also relies on the fact that the lessors requested a substantial sum on account of the cost of the works of refurbishment as evidence that those works were part of a single set of qualifying works comprising both the stripping out and the refurbishment.

42. In my view, the judge was entitled to find as a fact that the stripping out of the Amenity Centre and the subsequent refurbishment did not comprise one set of works. The lessors had taken no decision as to the nature of the refurbishment works or (I believe) as to when they would be carried out. If the lessors had decided to carry out the stripping out and refurbishment works as an entire project, and especially if they had decided to carry out the combined works pursuant to a single contract, they would almost certainly have been regarded as a single set of works. But in the circumstances that occurred, the judge was entitled to make the finding that he did. Even if there was no objective rationale for separating the stripping out from the works of refurbishment, that would only be relevant in so far as it cast doubt on whether the lessors intended to deal with them separately. But, as Mr Francis said in evidence, there was in any event an objective rationale for the separation: the work of stripping out was undertaken in order to facilitate the assessment of what needed to be done. Until that assessment was made, the lessors would not be willing to commit themselves to a refurbishment scheme. I should add that I do not find Mr Stoner's analogy of the stripping of plaster and re-plastering a wall to be of any assistance: the facts of such a case are far removed from the facts relating to the stripping out of the Amenity Centre.

43. As for the significance of the fact that the lessors demanded £225,000 on account of the costs of the (as yet undetermined) future refurbishment works, it is true that the judge did not expressly say whether he considered that the plan for these works was sufficiently formulated to amount to a separate set of qualifying works on which there should have been consultation. If he had been of the opinion that the plan for the refurbishment works was sufficiently formulated, I consider that he would have been likely to hold, adopting his approach to the meaning of "qualifying works", that they constituted a separate set of works on which the lessors were obliged to consult. The judge did not deal with the point probably because he rejected the claim for £225,000 as a payment on account since, as he explained at paras 222 and 268, "this was a large sum, unaccompanied by any or any adequate detail as to the nature and extent of the proposed works within a programme of works". Since he rejected the claim for £225,000, I see no point in remitting any question to him in relation to the refurbishment works.

MANAGEMENT CHARGES

44. The issue that arises relates to the inclusion in the service charge of £95,000 as wages for the lessors as a well as a management charge of 5%. The lessors say that the £95,000 was properly included as wages paid to them by the company for management services falling within paragraph 6 of schedule 3 to the lease and that they are additionally entitled to recover a management charge under paragraph 8 of 5% of the cost of all the services described in paragraphs 1 to 7 of the schedule. The lessees say that the lessors are not entitled to the wages paid to them by the company in respect of management charges and that remuneration for their management services is limited to 5% of the cost of the services.

45. Judge Cotter decided at para 154 of his judgment that paragraph 6 authorises the employment of a wide range of professionals and "agents" for the "management of the estate" and that "costs can be incurred and recovered under this provision whether someone is an employed member of staff, or a self-employed or external professional or agent; of the specific types stated or the general category of 'agent'". He declared that there was recoverable via the service charge "such proportion of the First Defendant (Mr Francis's) working time as invoiced via the said company as the Court shall subsequently determine to be a fair and equitable proportion of such cost".

46. The Chancellor allowed the lessees' appeal on this point. He said:

> "18. Paragraph 6 of Schedule 3 entitles the Lessor to reimbursement by the service charge of both the pay and expenses of "staff employed" and "fees paid" to "architects agents surveyors and solicitors" employed in regard to the management of the Estate. The context in which the word "agent" is used is by reference to the provision of some professional service required in connection with the management of the Estate. That is to be distinguished from the general management of the Estate. No doubt the professional agent may be a company in which the Lessor is interested, see **Skilleter v Charles** [1992] 1 EGLR 73, but the power to recover charges contained in paragraph 6 does not extend to

> non-professional management services provided by the Lessors either personally or through their management company.
>
> 19. Accordingly, in my judgment, the appropriate limitation to prevent the double recovery which both parties agree cannot have been intended is to recognise that the "fees paid" referred to in paragraph 6 are limited to those charged to the Lessors by professional agents. As such they do not include the wages of £95,000 paid to Mr and Mrs Francis in the year ended 31st December 2009 specified in the accountants' certificate referred to in paragraph 4 above because they could not employ themselves. Nor do they include payment for work of a non-professional nature charged by any agent, particularly one in which Mr and Mrs Francis are interested. Accordingly, in my judgment, the judge was wrong when in paragraph 154, quoted in paragraph 12 above, he concluded that the "fees paid" included those paid to one in "the general category of "agent"". The extension to the general category appears to me to ignore the context. I also disagree with his conclusion in paragraph 155 that the Lessors may employ an agent generally in the management of the Estate and recover his fees under paragraph 6. In my view the words "in regard to the management of the Estate" in the context of paragraph 6 as a whole are more limited than a power to appoint an 'agent to manage' the Estate, that is recognised by paragraph 8 as the function of the owners. Accordingly, I would give permission to appeal on this issue and allow the appeal. I would invite counsel to agree a form of order to give effect to these conclusions."

47. Mr Seitler submits that this analysis of paragraphs 6 and 8 of schedule 3 is wrong. The following is a summary of his submissions. He says that the two paragraphs should be construed literally. Paragraph 6 is in wide terms and covers employees and a range of third party contractors and agents. There is no support for the distinction made by the Chancellor between the work done in regard to the management of the estate by professional agents (the "agents" in paragraph 6) and the non-professional work done by the lessors in managing the estate (which is the subject of remuneration under paragraph 8). There is no difference between "management of the estate" and the subject of a "management charge". The real difference between the two paragraphs is that payments for the subject-matter of paragraph 6 (which are day to day executive acts of management) are made to third parties whereas payments for the subject-matter of paragraph 8 (which are non-delegable non-executive functions performed by the lessors) are made to the lessors. The purpose of paragraph 8 is to compensate the lessors for the non-delegable tasks that it has to perform even when they employ a managing agent. These tasks include selecting and supervising the agent and macro-management strategic decision-making that is unsuitable for an agent to undertake.

48. The lessors appointed the company to be their managing agent. As I have already said, this company is wholly owned and controlled by them. They are employed by the company and their wages were claimed as part of the service charge under

paragraph 6. Mr Seitler submits that, since it is not alleged that this was a sham arrangement, it does not matter that the lessors have an interest in the company. The wages paid to them by the company are a cost of management of the estate falling squarely within paragraph 6. In short, therefore, he contends that paragraphs 6 and 8 should be given their plain and natural meaning. There is no basis for lifting the veil of incorporation of the company and treating it and the lessors as the same entity. It follows that the lessors are entitled to include in the service charge (subject to the limitations imposed by section 18 of the 1985 Act) both the sums paid to the company for management and the 5% management charge.

49. Mr Stoner's primary submission is that the Chancellor reached the right result for the right reasons. He submits that Judge Cotter's decision was wrong because he construed paragraph 6 in the widest possible terms and without regard to paragraph 8. The meaning of the word "agents" in paragraph 6 was correctly held by the Chancellor to be restricted to agents providing a professional service in connection with the management of the estate. This construction fits with the words immediately surrounding the word "agents", namely "architects…surveyors and solicitors" (all professional persons) as well as the broader intent of schedule 3.

50. In the alternative, Mr Stoner submits that the lessors cannot recover a management charge, whether by employing managing agents or by "self-employment", other than the 5% provided for by paragraph 8; alternatively, the lessors can only recover a management charge pursuant to paragraph 6 or paragraph 8, but not both.

51. I would dismiss the appeal against this part of the Chancellor's decision, although I would uphold it for reasons which differ from the ones which he gave. Mr Seitler (rightly) accepts that the lessors are not entitled to recover under paragraph 6 what is covered by the 5% payment under paragraph 8. That is because he accepts that the parties to the lease cannot have intended double recovery and schedule 3 should be construed accordingly. He therefore accepts that, if the lessors had not incorporated themselves, they would not be able to pay themselves for managing the estate and claim the payments for doing so under paragraph 6. It is only because they incorporated themselves that (on his case) they can recover monies under paragraph 6 in addition to 5% under paragraph 8. Mr Seitler relies on the separate corporate personality of the company and says that the veil of incorporation cannot be lifted.

52. But in my view, it is not a question of whether the veil of incorporation can be lifted. The relevant question concerns the true construction of paragraphs 6 and 8. I consider that the parties cannot have intended that the lessors would be able to obtain the double recovery which it is common ground is precluded by paragraphs 6 and 8 (when read together) by the simple expedient of incorporating themselves or using their wholly owned corporate vehicle to carry out the management for them. I reach this conclusion for the simple reason that the parties could not have intended that the lessors would be entitled to payment for the same management service both under paragraph 6 and paragraph 8. On this approach, it is not necessary to give any particular meaning to the word "agents" in paragraph 6 as the Chancellor sought to do.

53. In order to avoid double recovery, Mr Seitler is driven to say that the management which is the subject of paragraph 6 is the day to day running of the estate (or micro-management) and the management which is the subject of paragraph 8 is the macro-

management. I can see no warrant for making this distinction. First, there is nothing in the language of the lease which supports it. Secondly, the dividing line between the two suggested classes of management is far from clear. If it existed, it would be likely to give rise to difficult issues of classification and real problems of record-keeping for the lessors. For both of these reasons, I do not consider that it can have been intended by the parties to the lease.

54. Since drafting this part of my judgment, I have read in draft the judgment of Sir Terence Etherton C on this issue. I believe that it is entirely consistent with what I have said and I agree with it.

CONCLUSION

55. For the reasons that I have set out above, I would allow the lessors' appeal against the decision of the Chancellor on the Qualifying Works Issue, but dismiss their appeal on the Management Issue.

The Chancellor

56. I agree with the Master of the Rolls that the appeal succeeds on the Qualifying Works issue and fails on the Management Charge issue. I add some comments of my own since we are overturning the Chancellor, Sir Andrew Morritt, on the former issue and because, as to the latter issue, even though I agree with the Chancellor's conclusion I (like the Master of the Rolls) do so for different reasons which have a material bearing on the application of the service charge provisions of the various leases (together "the Lease") for the future.

The Qualifying Works issue

57. It is common ground that, until the Chancellor's decision in the present case, the generally accepted view was that the correct approach to the meaning of "qualifying works" in section 20 of the 1985 Act was a "sets" approach, that is to say identifying separate sets of works or projects for the purpose of identifying whether "the relevant costs" exceed "the appropriate amount" specified in the section and so triggering the statutory consultation process. That approach was assumed to be the correct one by the parties and the court in *Martin v Maryland Estates Limited* [1999] L&TR 541 in relation to section 20 before the amendments made to the 1985 Act by the Commonhold and Leasehold Reform Act 2002 ("the 2002 Act").

58. The Chancellor considered that the assumption made in *Martin*, even if had previously been correct, was no longer appropriate in view of the 2002 Act amendments to the 1985 Act. He considered that under the 1985 Act as amended the qualifying works for any service charge period are to be determined on a "global works" basis (or what the Master of the Rolls has called "the aggregating approach"), that is to say they comprise all the qualifying works carried out within the applicable service charge period without distinguishing between different sets of works or projects.

59. I respectfully do not agree that the 2002 Act made any difference to the identification of qualifying works under the 1985 Act. The change the Chancellor relied upon (in para. [35] of his judgment) was a shift "from identifying and costing the works before

they start to notifying an intention to carry out the works and limiting the amount of the individual contributions sought to pay for them after their completion." There was, however, no material change to the definition of, or criteria for identifying, "qualifying works", and the provisions of the Service Charges (Consultation Requirements) (England) Regulations 2003 SI 2003/1987 ("the Regulations") (setting out the various stages of consultation and "the appropriate amount" of £250 per tenant) simply do not bear on the proper meaning of the expression "qualifying works" in the 1985 Act itself. If Parliament had intended to make any such critically important change, it would undoubtedly have made that intention clear by express provision.

60. There can be no doubt that that before the 2002 Act amendments the relevant provisions of the 1985 Act were more consistent with a "sets" based approach than the Chancellor's "global" approach since, if the section 20 limit was exceeded, those unamended provisions required the lessor to obtain actual estimates. That requirement, and the specified fixed monetary limit under the unamended section 20, are more consistent with a focus on precise sets of works than, as the respondents ("the Tenants") contend, an obligation of the lessor to forecast in advance all the works to be undertaken during the service charge period.

61. I also consider that it is highly telling that the 1985 Act does not specify any fixed period by reference to which the relevant costs involved in the qualifying works are to be ascertained for the purpose of seeing whether they exceed "the appropriate amount" for the purposes of section 20 (or the specified limit under the unamended section 20). The effect of section 18 of the 1985 Act is that the amount of the relevant costs in any service charge period is dependent on the landlord's unfettered choice as to the service charge period or (where that is specified in any particular lease) on the period that happens to be specified in the lease. The service charge provisions of the 1985Act are for the protection of tenants. If Parliament had intended qualifying works to be calculated on a global basis, that is to say all the qualifying works in any given period, for the purpose of ascertaining whether they exceed "the appropriate amount" and so triggering the statutory consultation with the tenants, then Parliament would have specified a fixed period for that calculation. That point is reinforced by section 18(3) of the 1985 Act which states that costs are relevant costs in relation to a service charge whether they are incurred, or to be incurred, in the period for which the service charge is payable or in any earlier or later period. It is also supported by the contrast with the treatment of a "qualifying long term agreement" under section 20(3) of the 1985 Act and the Regulations, which provide for the statutory consultation to apply to such an agreement if the relevant costs incurred under it in a twelve month period exceed an amount which results in the relevant contribution of any tenant in respect of that period being more than £100.

62. Furthermore, the global approach gives rise to severe practical problems for lessors and tenants. Sections 19 to 20ZA of the 1985 Act are, as I have said, intended to provide protection for tenants. They are directed towards ensuring that tenants of flats are not required (1) to pay for unnecessary services or services which are provided to a defective standard, and (2) to pay more than they should for services which are necessary and are provided to an acceptable standard: *Daejan Investments Ltd v Benson* [2013] UKSC 14, 1 WLR 854, at [42] (Lord Neuberger). The practical effect of the global approach is that a cautious lessor will have to consult on qualifying

works involving relevant costs below the appropriate amount if there is any possibility that subsequent works might take the aggregate relevant costs above that amount. It would also mean that the lessor should consult on successive occasions to carry out unanticipated or emergency work even though of relatively low value. The processes involved in the statutory consultation are potentially time-consuming, expensive and slow. The cost will inevitably be passed on to the tenants through the service charge. It is highly improbable that Parliament intended both lessors and tenants to be encumbered in this way.

63. All the above considerations point clearly in favour of (1) the interpretation of the 1985 Act being as assumed by both parties and the court in *Martin*, namely a "sets" approach to qualifying works, and (2) the consultation trigger amount specified in section 20 being, as Robert Walker LJ said in that case, to provide a "triviality threshold". Even where there is no requirement for consultation, the tenants will be protected by the requirement of section 19 of the 1985 Act that residential service charges must be reasonable and reasonably incurred.

64. I agree with the Master of the Rolls that it is not necessary to resort to the legislative material relied upon by the appellants and the Secretary of State pursuant to the principles in *Pepper v Hart* [1993] AC 593].

65. The Tenants by way of a respondents' notice challenge Judge Cotter's decision on what were the relevant qualifying works in the present case. The Tenants' criticism falls into two parts. Firstly, it is said that the Judge wrongly rejected the Tenants' submission that there was just one set of qualifying works, that is to say one scheme of redevelopment, because he approached the matter by giving weight or undue weight to the subjective views of the appellants. The Tenants rely upon the Judge's finding (at para. [357]) that the appellants did not themselves "ever plan or in any way tie all the disparate pieces of work together" and his finding (at para. [358]) that the Tenants' proposition was "simply not the way that Mr Francis operated" and his reliance on Mr Francis' evidence that, in effect, "one job creates another".

66. What constitute qualifying works for the purposes of the relevant provisions of the 1985 Act is a question of fact to be determined objectively. The Judge expressly stated (in para. [357]) that the decision was one of fact to be determined objectively on all the evidence. I do not accept that it was inconsistent with such a test to have regard to the way that the appellants actually conducted their affairs and planned their work to the Estate (as defined in the Lease). I agree with the Master of the Rolls' description (in paragraph [36] above) of factors relevant to determining which works are comprised in any particular set of qualifying works. The way in which the works were planned and the lessor's reasons for the way they were implemented are also of relevance, even if not decisive. The Judge considered all the relevant factors and had the benefit of a site visit and oral and other evidence. There is no basis for saying that his findings of fact on this issue were flawed by an error of principle or were so wayward that they could not properly be reached by any judge having regard to the admissible evidence.

67. The second criticism relates solely to the Judge's conclusion (in para. [363]) that the stripping out works at the amenity centre were separate qualifying works from the (as yet unexecuted) refurbishment work to the centre. The Judge disallowed the "on account" service charge in respect of the future work to amenity centre and it is a

reasonable to infer that he reached the conclusion that the intention to refurbish the centre was in all the circumstances insufficiently perfected to make such refurbishment and the stripping out one set of qualifying works. That was a finding of fact he was entitled to make.

The management charge issue

68. Unsurprisingly, given the general importance of the "qualifying works" issue, much less attention was devoted by the parties on the appeal to the management charge issue, which turns on the interpretation of the Lease. This point relates to the inclusion in the service charge for two periods in 2008 and 2009 of £95,000 as wages for the appellants and a 5 per cent management charge. The appellants claim that the item of £95,000 was properly included in the service charge as wages paid to them by Francis Leisure Limited ("the Company"), which was a management company wholly owned and controlled by them, in respect of management services falling within paragraph 6 of schedule 3 to the Lease ("schedule 3"). The 5 per cent management charge, which the appellants claim to be entitled to include in the service charge pursuant to paragraph 8 of schedule 3, was calculated as a percentage of the costs of all the services specified in paragraphs 1 to 7 of schedule 3, including the management services provided by the Company.

69. I have found it difficult to identify precisely the arguments deployed by the parties before the trial judge and whether or not they were identical to those deployed by them before the Chancellor and before us. This is no doubt also because of the somewhat baffling array of alternative arguments put forward by the Tenants. It is sufficient to say that the trial judge rejected the Tenants' argument that (1) the £95,000 should be excluded from the service charge because the only management fee recoverable by the appellants for any personal management services provided by them is the 5 per cent management charge under paragraph 8 of schedule 3, and (2) in any event, the 5 per cent management charge under paragraph 8 is to be calculated on the cost of providing the services under paragraphs 1 to 7 of schedule 3 other than any management services. The trial judge's reasoning was quite simply that paragraph 6 plainly authorises the employment by the lessor of an agent to manage the estate and to recover the cost of such employment, and paragraph 8 equally plainly provides for 5 per cent to be recoverable on all of the items of expenditure themselves properly recoverable in paragraphs 1 to 7 of schedule 3. In an earlier part of his judgment the trial judge had recorded the Tenants' concession that a lessor can employ as a managing agent a company owned by the lessor, provided the arrangement is not a sham.

70. The Chancellor reversed that decision of the trial judge. His reasoning can be simply summarised as: (1) both parties accept that some gloss must be put on the words in the Lease in order to prevent double recovery for the same services; (2) the context in which the word "agent" is used in paragraph 6 of schedule 3 is the provision of some professional service required in connection with the management of the Estate as distinguished from the general management of the Estate and also from non-professional management services provided by the appellants either personally or through the Company; and, accordingly, (3) the appropriate limitation to prevent double recovery is to recognise that the "fees paid" mentioned in paragraph 6 of schedule 3 are limited to those charged to the lessor by professional agents. The Chancellor concluded for those reasons that the wages of £95,000 paid to the

appellants by the Company did not fall within paragraph 6. The Chancellor also concluded that the lessor cannot recover under paragraph 6 the fees of an agent employed generally in the management of the Estate. He considered that the words "in regard to the management of the Estate" in the context of paragraph 6 as a whole are more limited than a power to appoint an "agent to manage" the Estate, which, he said, is recognised by paragraph 8 as the function of the owners.

71. I agree with the Chancellor's conclusion that the £95,000 wages paid to the appellants by the Company do not fall within paragraph 6 of schedule 3 and are not properly recoverable under the service charge provisions of the Lease. My reasoning is not, however, entirely similar.

72. The starting point is that ordinary principles of contractual interpretation apply to the relevant provisions of the Lease. The meaning of a contract is that which a reasonable person who has all the background knowledge which would reasonably have been available to the parties to the contract in the situation in which they were at the time of the contract would have understood the parties to have meant. In deciding that meaning, the court must have regard to all the relevant circumstances: *Investors Compensation Scheme v West Bromwich Building Society* [1988] 1 WLR 896, 912-913 (Lord Hoffmann). The more unreasonable a particular interpretation the less likely the parties can have intended it, and if they do intend it the more necessary it is that they shall make that intention abundantly clear: *L Schuler AG v Wickman Machine Tool Sales Ltd [1974] AC 235*, 251 (Lord Reid). If there are two possible interpretations, that is to say a real ambiguity, the court is entitled to prefer that one which is consistent with business common sense and to reject the other: *Kookmin Bank v Rainy Sky SA* [2011] UKSC 50, [2011] 1 WLR 2900 at [22] (Lord Clarke).

73. As is apparent from those basic principles, even slight variations in the language of similar categories of lease provisions may result in a different meaning. There have been many cases on the interpretation of service charge provisions and some of them raise similar issues to the present case in terms of recovery of management charges. Some of them are usefully collected and analysed in Service Charges and Management, Tanfield Chambers (3rd ed) paras. 5-005 and 5-006. It has not been suggested by counsel before us that the material provisions of the leases in those cases are absolutely identical to those in the present case and so there is no advantage in referring to them for a detailed comparison.

74. On the other hand, the reported cases are generally consistent with a broad principle that it is reasonable to expect that, if the parties to a lease intend that the lessor shall be entitled to receive payment from the tenant in addition to the rent, that obligation and its extent will be clearly spelled out in the lease: see, for example, *Gilje v Charlogrove Securities Ltd* [2002] 1 EGLR 41 at [31] (Mummery LJ). It is to be expected that the tenant will wish to be fully aware of any such additional obligation on which his or her continuing right to possess the land and to occupy it may depend. It is to be expected that the lessor will wish to make such a continuing additional obligation clear because it arises under a lease which will subsist through successive ownerships of the reversion and the tenancy and because the lessor will not wish to be out of pocket in respect of services provided for the benefit of the tenant. In the present case, for example, the Lease is for a term of 999 years. In a case, such as the present, where the service charge is reserved as rent, non-payment gives rise to a particular range of remedies in addition to an ordinary action for payment of arrears

and so the precise extent of the tenant's obligation has a particular significance for both the lessor and the tenant.

75. The starting point for resolving the interpretation issue in the present case is clause 3 of the Lease, which requires the lessor to carry out and provide the services set out in paragraph 1 to 7 of schedule 3, since the service charge is by virtue of clause 4 of the Lease calculated by reference to those services. By virtue of paragraph 6 of schedule 3 those services which the lessor is obliged to provide include "management of the Estate".

76. Paragraph 8 of schedule 3 contains an express provision for the recovery of "a management charge". The Lease does not contain any express provision distinguishing "management" under paragraph 6 of schedule 3 from "management" under paragraph 8. As the parties recognise, however, it would be commercially absurd for the lessor to be able to make a double recovery for the same management service both under paragraph 6 and paragraph 8. It is rightly conceded by the appellants that they cannot do so.

77. This has led the Chancellor and both sides in the litigation to distinguish between different types of management activity. The Chancellor distinguished between the provision of a "professional service required in connection with the management of the Estate" under paragraph 6 of schedule 3, on the one hand, and "the general management of the Estate" under paragraph 8, on the other hand. The appellants distinguish between, on the one hand, what Mr Jonathan Seitler QC, for the appellants, described as non-delegable "non-executive" management functions of the lessor (and in the appellants' skeleton argument as "macro-management strategic decision making") under paragraph 8, and, on the other hand, all other "executive" management functions under paragraph 6. The Tenants (in their skeleton argument) allot exclusively to paragraph 8 "the time taken by [the lessor] in planning strategy for his proprietary interest as well as supervising/managing himself and others to ensure that the services he has covenanted to provide have indeed been provided". They allot exclusively to paragraph 6 "the costs incurred in actually fulfilling the services covenanted to be provided, such as cutting the grass, ensuring there is lighting at all times, having the rubbish collected etc." It is not clear whether both sides accept that those distinctions respectively made by them are identical or differ in some material respect.

78. The appellants rely upon the distinction made by them as to different types of management activities to support the argument that there is no double recovery in the present case. Paragraph 6 of schedule 3 refers to the cost of staff employed by "the Lessee". There was no suggestion before us or (it would appear) before the Chancellor or the trial judge that the reference to "the Lessee" was a mistaken reference to "the Lessor". Nor did the parties refer us to any background material relevant to the point. If the reference to "Lessee" is correct, that would be a strong indication that any charge for management activity by a corporate lessor personally, through its employees, including the original lessor through its employees, was intended to be recoverable only under paragraph 8.

79. Whatever may have been the position while the reversion was vested in the original lessor, or while it may be vested in another corporate lessor, I do not consider that on

the facts of the present case the distinction between different management activities can assist the appellant, who are individuals, essentially for three reasons.

80. Firstly, the distinction made by the appellants between different types of management activities carried out by them is a distinction which would be extremely difficult, if not impossible, to apply to the management charge. The appellants seek to recover the wages paid to them by the Company which they wholly own and control and through which they direct all the management of the Estate. Through the Company they direct what work should be carried out and by whom and at what times for the purpose of the overall maintenance and strategic development of the Estate. It has not been suggested how they can practically separate out in terms of time and cost to the company the "executive" and "non-executive functions" they are thereby discharging, let alone how that could ever be reliably verified by the various tenants.

81. Second, the parties to the Lease expressly stipulated both that the lessor should provide the management services in paragraph 6 and should be entitled to a management charge under paragraph 8. It seems entirely reasonable to conclude that, in the case of a non-corporate lessor, the parties to the Lease intended that the management charge under paragraph 8 should compensate the lessor for all management services actually provided by him or her personally as distinct from the cost of services actually provided by a third party employed by the lessor pursuant to paragraph 6. Mr Seitler sought to undermine that point with the observation that it is not contended by the Tenants that the Company is (in a legal sense) a sham and the further point of general principle that a company has a legal personality distinct from its shareholders. His argument, in other words, is that the £95,000 for the appellants' wages in dispute in the present case was payable to a genuine third party, namely the Company, for services provided by the Company through its employees, the appellants. That, however, misses the point that the present issue does not turn on the separate legal personality of a company but on the proper meaning of the Lease. For the purposes of paragraph 6 of the Lease, on its proper meaning, the services are to be treated as actually carried out (as indeed they were) by the lessors themselves, namely the appellants.

82. Third, as is plain from the other two points and the history of this litigation, the Lease is on any footing very far from clear that the parties to it intended the lessor, if an individual, to be entitled to recover through the service charge both wages paid to him or her by a company wholly owned and controlled by the lessor as well as the express management charge in paragraph 8. If it had been intended that an individual lessor should be entitled to do so, that would have required clear words.

83. It follows that, in a case where the lessor is an individual, the parties to the Lease did not make a distinction between the management services under paragraph 6 of schedule 3 provided by the lessor personally (whether directly or as agent or employee of the lessor's wholly owned company) and management services for which a charge is payable under paragraph 8. The only charge recoverable by such a lessor is under paragraph 8. I do not regard this as a case where there is an ambiguity in the provisions of the Lease but rather of a straightforward interpretation of the Lease having regard to its purpose and context.

84. That leaves some further questions, which do not directly arise on this appeal, but which have been debated in the course of the litigation. The first is whether the lessor

can ever recover under paragraph 6 of schedule 3 the cost of employing an agent generally to manage the Estate and, if so, whether such an agent would have to be a "professional" agent. As I have said, the Chancellor's view was that the word "agent" in paragraph 6 is restricted to a an agent providing some specific professional service in connection with the management of the Estate as distinguished from the general management of the Estate.

85. I respectfully do not agree with that reasoning of the Chancellor. Bearing in mind the context, namely a Lease where the original lessor was a tenants' management company and the nature of the Estate, it seems to me to be an unreasonable interpretation of the Lease to prevent such a lessor from employing an agent from advising on all aspects of the management of the Estate, including issues of strategic development. It goes without saying, however, that the lessor can only include the cost of such an agent in the service charge insofar as such cost is attributable to services provided for the benefit of the various tenants as distinct from the wholly separate commercial or property interest of the lessor.

86. Further, I do not agree that it would be reasonable to limit "agents" in paragraph 6 of schedule to "professional" agents. A corporate lessor, such as the original lessor in the present case, can only act through others. It seems highly unlikely, therefore, that the parties to the Lease would have wished to exclude recovery of charges for all non-professional agents as an entire class in respect of all and every management activity.

87. Then there is the question whether, if the lessor does appoint an agent to advise and act on behalf of the lessor in relation to strategic issues of management, the lessor can recover such cost under paragraph 6 of schedule 3 in addition to the management charge under paragraph 8. I do not consider that even this issue gives rise to a true ambiguity. Once it is accepted, as I would hold, that an agent appointed to advise on all and any aspect of management of the Estate (for the benefit of the tenants) falls within paragraph 6, then I see no difficulty in there being separate recovery under the service charge for the cost of the agent under paragraph 6 and of the lessor under paragraph 8. Both provisions are perfectly clear on this aspect. Nor is it obviously unreasonable for the lessor to be compensated for the time and trouble of selecting, supervising and otherwise interacting with such an agent.

88. Finally, it must be said that this litigation and so many of the cases show how predictable it is that there will be disagreement and often litigation when service charge provisions in a lease fail to make absolutely clear (1) whether the lessor can recover by way of service charge, and if so how much, for (a) specific activities carried out personally by the lessor bearing in mind that during the currency of the lease the reversion may be or become vested in either an individual or a company, (b) general management by the lessor, including estate strategy, and (c) management advice and activities by an agent appointed by the lessor, and if so whether limited to specific activities or including general management oversight and strategy; and (2) whether there is any restriction on the lessor recovering the entirety of the cost of all of (1)(a)(b) and (c). Lack of clarity on these common issues is capable of affecting huge numbers of lessors and tenants across the country and involving them in expense and disharmony. The reported cases show that many of the disputes turn on similar or nearly similar provisions. Those who draw up or approve residential leases for their clients are plainly under a duty to take care that there is clarity and certainty in relation to those matters.

Lord Justice Kitchin

89. I agree with both judgments.