UPPER TRIBUNAL (LANDS CHAMBER)

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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT – service charges – lessee's obligation to pay proportion of estate costs by reference to formula – whether lessee's proportion should be calculated by reference to 13 dwellings built on land sold to another developer as well as the 218 dwellings built on the retained land, both sites together constituting a single residential estate – whether the estate costs payable by the lessee should include the costs associated solely with the land sold as well as the retained land – appeal allowed in part – appeal against section 20C order made by FTT under the landlord and Tenant Act 1985 allowed

IN THE MATTER OF AN APPEAL AGAINST A DECISION OF THE FIRST-TIER TRIBUNAL (PROPERTY CHAMBER)

BETWEEN:

FIRSTPORT PROPERTY SERVICES LIMITED

Appellant

and

MRS EMSAL AHMET

Respondent

Re: Flat 6 Anderson House,
12 St Martins Lane,
Beckenham
Kent BR3 3XS

Determination under written representations

The following case is referred to in this decision:

Arnold v Britton [2015] UKSC 36

The following cases were referred to in argument:

Ashworth Frazer v Gloucester City Council [2002] L&TR 2
Wolfe v Hogan [1949] 2 KB 194
Investors Compensation Scheme v West Bromwich Building Society [1998] 1 WLR 896
East v Pantiles Plant Hire Ltd [1982] 2 EGLR 111

DECISION

Introduction

1. On 24 December 1997 Laing Homes Limited ("Laing") entered into an agreement with the Wellcome Foundation Limited to purchase a residential development site in Beckenham, Kent known subsequently as the Langley Park Estate. On 28 April 1998, before they completed the purchase, Laing entered into an agreement with Noel and Danielle Faulkner, trading as Faulkner Associates ("Faulkner"), under which Laing agreed to hold three parcels of the land (the Coach House and the Mansion House/Dairy Cottages/Chapel site, together known as the refurbishment site, and the North Lodge) on trust for Faulkner with the intention that these would be sold to Faulkner upon completion. Laing completed the purchase on 7 September 1998 and transferred the three land parcels (collectively referred to as "the Faulkner site") to Faulkner on 30 October 1998. Laing registered their freehold interest in the site on 12 January 1999 under title number SGL605484 ("484") and Faulkner registered their freehold interest in the Faulkner site on 29 January 1999 under title number SGL605938 ("938").

2. In their agreement dated 28 April 1998, Laing and Faulkner, whilst not operating as a partnership, agreed to cooperate in the residential development of the Langley Park Estate. They proceeded to develop their respective parts of the estate; Laing by 185 freehold houses and 33 leasehold flats, making a total of 218 dwellings, and Faulkner by 13 dwellings comprising the refurbishment of existing properties.

3. The intention of Laing and Faulkner, as expressed in clauses 11.7 and 11.8 of their agreement, was that they would cooperate in the establishment of a management company to manage and administer the common areas of the estate. The agreement provided that Faulkner and/or its successors in title the owners and occupiers of the refurbishment site "shall contribute the sum of 6.8% towards the ongoing administration and/or service charge of such Management Company."

4. On 20 July 1999 Laing entered into the Langley Park Beckenham Management Agreement with OM Management Services Limited, which later changed its name to FirstPort Property Services Limited ("FirstPort"). FirstPort agreed to carry out the management functions set out in the form of transfer and lease annexed to the management agreement (but not put in evidence) and in a management scheme for the estate prepared by FirstPort and agreed by Laing. It was intended that the management agreement would remain in force until the completion of Laing's development when a management lease would be granted by Laing to FirstPort of all the external and internal common parts of the estate, known as the "Maintained Property". (Such a management lease does not appear to have been granted upon completion of the development.)

5. It appears that the management scheme was first prepared by FirstPort on 28 February 1999. There were a number of subsequent revisions. The management scheme applied to both the Laing and Faulkner sites and it stated at paragraph 2.1 that:

> "The intention is that the whole development will fall under one estate management scheme, with all properties contributing towards the overall costs of the Estate."

These estate costs are described in section 5 of the management scheme which states:

> "Faulkner Associates will pay 6.8% of the annual estates service charge and the 220 Laing properties will share equally the remaining 93.2%."

(It was originally proposed that Laing would construct 220 dwellings rather than the 218 that were eventually built.)

6. This arrangement echoed that contained in the April 1998 agreement between Laing and Faulkner, but Faulkner was not a party to either the management agreement dated 20 July 1999 or the management scheme dated 28 February 1999 which seems to have been prepared by FirstPort for Laing only.

7. On 12 December 2001 Mrs Emsal Ahmet took a long lease of Flat 6, Anderson House, St Martins Lane, one of the Laing properties on the Langley Park Estate. She was provided with a copy of the management scheme and also an information sheet as part of the sales documentation in which the "development" was said to include the Faulkner site. When Mrs Ahmet signed her lease she believed her contribution to the estate costs would have regard to the total number of dwellings on the combined Laing and Faulkner sites.

8. The stated intention that Laing and Faulkner and their successive transferees and lessees would share the estate costs was reflected in at least two of the leases granted by Faulkner of dwellings on the Faulkner site in which the lessees covenanted to pay as part of their service charge a contribution to "the cost of managing and maintaining the Estate Common Parts including (if deemed appropriate) the provision of 24 hour porterage at the site entrance." The "Estate" for the purposes of these leases appears to include both the Laing site and the Faulkner site. The transfer of the freehold interest in No. 3 The Dairy (one of the refurbished properties on the Faulkner site) also contains a covenant that the transferee will:

> "… pay a fair proportion to the Transferor or its successors in title on demand of the costs incurred by the Transferor in repairing and maintaining in good and substantial repair the gates on the Estate and any entry-phone system and the common entrances access way to the Property together with the costs of lighting all common parts of the Estate."

But the declared intention of Laing and Faulkner to share the estate costs was not put into effect between them and was not reflected in the transfer of the Faulkner site on 30 October 1998.

9. This anomaly was identified as early as 5 January 2000 and is recorded in a sequence of correspondence and meeting minutes. This correspondence culminated in a letter from FirstPort's Regional Property Manager to all owners at Langley Park dated 10 January 2009 in which he stated:

> "The other key change that has been made to the scheme is in respect of the 'Faulkner properties'. These are the refurbished units on the scheme. When the management scheme was designed it was expected that these properties would contribute 6.8% of the schedule 1 costs. However, due to a faulty transfer of land between Laing Homes and Faulkner we have no right to bill anyone for this amount. The situation has now progressed to a stage that our auditors were concerned by the lack of recovery and have asked us to ensure that we collect 100% of the service charge costs [from] the existing plots where we can recover.
>
> We have therefore had to assume this year that we will not receive the 6.8% contribution and so your service charge has increased by the extra amount. I continue to work with LPRA [Langley Park Residents Association] to ensure that everything is done to recover this amount moving forwards and also the previous year's contributions which amount to almost a six figure sum."

10. It appears that FirstPort were unsuccessful in their attempts to recover a contribution from Faulkner with the result that since 2009 the 218 Laing residents have paid all of the estate costs.

11. On 27 August 2015 Mrs Ahmet made an application under section 27A of the Landlord and Tenant Act 1985 for a determination of liability to pay and reasonableness of service charges for the six years 2009-2014, arguing that it was unreasonable for the freehold and leasehold owners of the 218 Laing dwellings to pay all of the estate costs when the owners of the 13 Faulkner dwellings, who enjoyed the same communal facilities, made no contribution. The respondent to the application was identified as FirstPort ("The Manager"), which is party to Mrs Ahmet's lease and responsible for a range of management and administration services.

12. In its decision on the application dated 5 February 2016 the First-tier Tribunal (Property Chamber) ("FTT") found in favour of Mrs Ahmet and determined that her liability to pay should be based upon 1/231st of the estate costs rather than 1/218th. They also granted Mrs Ahmet's application for an order under section 20C of the Landlord and Tenant Act 1985.

13. FirstPort sought permission to appeal which was granted by the FTT on 8 March 2016.

14. On 12 August 2016 the Registrar directed that the appeal should be heard by way of review. Both parties have adduced new evidence which I consider to be relevant to the issues in the appeal and in order to ensure that the overriding objective of dealing with the appeal fairly and justly is satisfied I have determined that the appeal should be heard as a re-hearing with the new evidence of both parties being admitted. The appeal took place under the written representations procedure.

The Lease

15. Clause 4 of Mrs Ahmet's lease contains the lessee's covenants. Under clause 4.2 the lessee covenants with FirstPort to observe and perform the obligations on the part of the lessee

set out in Parts One and Two of the Eighth Schedule. Paragraph 2 of Part One of the Eighth Schedule provides for the lessee to pay FirstPort the "Lessee's Proportion".

16. The Lessee's Proportion is defined in the Seventh Schedule and is the sum of five separate contributions to specified costs defined under Parts A to E. Only Part A is in dispute in this appeal. The lessee covenants to pay "the Part A Proportion" of the amount attributable to the "Estate Costs" in connection with the matters set out in Part A of the Sixth Schedule together with FirstPort's associated costs. The Part A Proportion is defined as:

> "The percentage figure calculated by reference to the formula:- :(1/x x y) where x = the total number of transfers and leases of Dwellings legally completed by the Transferor up to the end of the relevant Rentcharge Year and y = all the expenses reasonably and properly incurred within the relevant Rentcharge Year by the Manager in connection with the matters comprising the Variable Rentcharge Costs SAVE THAT the finally crystallized Transferee's Proportion may be subject to variation from time to time in accordance with the provisions of this Lease."

17. The lease contains no definition of the terms "Transferor", "Rentcharge Year", "Variable Rentcharge Costs", or "Transferee's Proportion". The word "Dwellings" is defined as:

> "…the Properties and the Demised Premises forming the Buildings or the Block or the Development (as the context permits) and a Dwelling means any one of them served by the Communal Areas and Facilities including where the context permits the Demised Premises and a Dwelling means any one of them."

18. In the context of this appeal it is the "Development" which is relevant. It is defined in the First Schedule of the lease as:

> "ALL THAT piece of land situate at Langley Court South Eden Park Road Beckenham and known for development purposes as Langley Park Beckenham now or formerly comprised in Title Number SGL605484 and (to be allocated) TOGETHER WITH any adjoining land which may be added thereto within the Perpetuity Period and together with any buildings or structures erected or to be erected thereon or on some part thereof."

The FTT's Decision

19. The FTT said that the starting point for the determination of the dispute was the terms of the lease. In particular they focussed on the definition of the Part A Proportion which they considered to be unclear due to the lack of defined terminology and inconsistent plans. They did not accept FirstPort's explanation that the use of the expression "Transferor" rather than "Lessor" was a conveyancing mistake as a result of which the language used in freehold transfers had been transposed into the lease. They considered that the expression "Transferor" could include both Laing and Faulkner or that it might be a term copied from the October 1998 transfer to Faulkner.

20. FirstPort submitted that it was not the role of the Tribunal to determine whether or not the definition of the Part A Proportion was fair but instead they should determine the meaning of the words in the lease according to the guidelines set out in *Arnold v Britton* [2015] UKSC 36. The FTT distinguished *Arnold* by saying that in the present case there had been no change in the factual situation between the parties and that Mrs Ahmet was not asking for the definition to be re-written, only for it to be interpreted in accordance with the intention of the parties. Having determined that there was ambiguity in the wording of the lease the FTT said that it was entitled to consider the facts and circumstances known or assumed by the parties at the time the document was executed in order to understand those intentions.

21. The FTT proceeded to consider the factual matrix and placed particular weight upon (i) the sales documentation; (ii) the management scheme; and (iii) a copy of the estimated service charges for the initial year (unidentified) of management that divided the total sector costs between Laing (93.2%) and Faulkner (6.8%). The FTT also noted that (i) FirstPort did not dispute that the intention of Laing and Faulkner had been to share the estate costs; and (ii) that until 2008 such charges appear to have been divided between 231 dwellings, i.e. the total of the Laing and Faulkner dwellings. The FTT presumed that this was the date at which "the owners of the Faulkner properties" successfully challenged their obligations in connection with the estate charges. It was for these reasons that the FTT determined that Mrs Ahmet should pay 1/231st of the estate costs.

The issue between the parties

22. There is essentially a single issue in dispute which is the interpretation of the definition under Mrs Ahmet's lease of "the Part A Proportion" of the estate costs. FirstPort contended that this fell to be calculated by reference only to the 218 Laing Properties and excluding the 13 Faulkner properties. They relied upon four grounds of appeal:

(i) That the FTT failed to take into account, or did not give sufficient weight to, the fact that at the date of the lease the Faulkner site was not part of Title No.484 and never had been;

(ii) That the FTT erred when construing the word "Transferor" in the lease;

(iii) That the FTT gave insufficient weight to the evidence of a TP1 transfer form of the freehold transfer of another Laing property on the estate when considering the factual matrix; and

(iv) The FTT had regard to irrelevant considerations or, alternatively, it gave excessive weight to the possibility that the word "Transferor" in the lease might have been intended to include Faulkner Associates. The Faulkner site was not explicitly referred to in the lease, nor was its known Title Number inserted instead of the words "(to be allocated)." FirstPort said that the most rational explanation why Faulkner's known title number was not inserted was that while the original intention may have been to manage the Laing and Faulkner sites together, by the time the lease was executed, that intention had not come to fruition.

23. Mrs Ahmet contended that the calculation of the Part A Proportion should include the 13 Faulkner properties. She reprised her submissions before the FTT and adduced further documents to support her case. In particular she commented upon the four grounds of appeal as follows:

(i) Many of the plans produced by FirstPort at the FTT were not relevant and failed to establish that at the date of the grant of the lease the Faulkner site did not form part of Title No.484. At the FTT Mrs Ahmet produced a copy of the plan for Title No.484 dated 3 April 2000 which she had been given as part of the sales documents and which she said showed that the Faulkner site was not excluded from the title at that time.

(ii) Mrs Ahmet submitted that the reference to "Transferor" in the lease should be interpreted in accordance with the clear intention of the parties, namely that Faulkner should contribute to the estate costs. The term "Transferor" should therefore include Faulkner.

(iii) FirstPort referred in their submissions to the parties' intention "to ensure uniformity across the Estate." Mrs Ahmet agreed but, unlike FirstPort, she said that such uniformity could only be achieved by the inclusion of the Faulkner site within the term "Estate".

(iv) Mrs Ahmet rejected FirstPort's explanation for the use of the words "(to be allocated)" when referring to the title number in the lease and submitted that the only other properties that could have been included were the Faulkner properties which it was always intended should be included in the management scheme for the combined estate.

24. Both parties elaborated and extended their submissions in their written representations and I have taken all of this additional material into account in determining this appeal.

Legal principles

25. The appeal involves a dispute about the construction of a service charge provision in Mrs Ahmet's lease. The interpretation of written contracts was considered recently by the Supreme Court in *Arnold* in the context of such a service charge provision. Lord Neuberger (with whom Lord Sumption and Lord Hughes agreed) stated at paragraph 15:

> "When interpreting a written contract, the court is concerned to identify 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 contract to mean', to quote Lord Hoffmann in *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38, [2009] 1 AC1101, para 14. And it does so by focussing on the meaning of the relevant words, … in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was

executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions…."

26. Lord Neuberger emphasised seven factors at paragraphs 17 to 23:

> "17. First, the reliance placed in some cases on commercial common sense and surrounding circumstances … should not be invoked to undervalue the importance of the language of the provision which is to be construed….
>
> 18. Secondly, when it comes to considering the centrally relevant words to be interpreted, I accept that the less clear they are, or, to put it another way, the worse their drafting, the more ready the court can properly be to depart from their natural meaning…
>
> 19. [Thirdly] commercial common sense is not to be invoked retrospectively. The mere fact that a contractual arrangement, if interpreted according to its natural language, has worked out badly, or even disastrously, for one of the parties is not a reason for departing from the natural language. Commercial common sense is only relevant to the extent of how matters would or could have been perceived by the parties, or by reasonable people in the position of the parties, as at the date that the contract was made…
>
> 20. Fourthly, while commercial common sense is a very important factor to take into account when interpreting a contract, a court should be very slow to reject the natural meaning of a provision as correct simply because it appears to be a very imprudent term for one of the parties to have agreed, even ignoring the benefit of wisdom of hindsight…
>
> 21. [Fifthly]…. When interpreting a contractual provision, one can only take into account facts or circumstances which existed at the time the contract was made, and which were known or reasonably available to both parties. …. It cannot be right to take account of a fact or circumstance known only to one of the parties.
>
> 22. [Sixthly], in some cases, an event subsequently occurs which was plainly not intended or contemplated by the parties, judging from the language of their contract. In such a case if it is clear what the parties would have intended the court will give effect to that intention….
>
> 23. [Seventhly], reference was made in argument to service charge clauses being construed "restrictively". I am unconvinced by the notion that service charge clauses are to be subject to any special rule of interpretation …"

Discussion

27. There is ambiguity in the wording of the definition of the "Part A Proportion" in Mrs Ahmet's lease. Several terms are undefined and some, such as "Transferor", "Rentcharge Year" and "Variable Rentcharge Costs" are associated with freehold rather than leasehold disposals.

28. Indeed these terms are all defined in a freehold transfer of part of Laing's Title No.484, identified as Plot 223, on 27 June 2002. The first part of the definition of the "Transferee's Proportion" in that transfer is similar to that of the "Part A Proportion" in Mrs Ahmet's lease. This is the transfer that FirstPort refer to in ground (iii) of their grounds of appeal and which they say formed a relevant part of the factual matrix which was not given sufficient weight by the FTT. The FTT do not refer to this transfer in terms but it should be noted that it is dated after Mrs Ahmet's lease and therefore it could not have been taken into account at the time that lease was granted.

29. It seems likely that the June 2002 transfer was in a standard form used by Laing and that similar transfers were effected at or before the date of Mrs Ahmet's lease. The management agreement between Laing and FirstPort dated 20 July 1999 refers to the "Deeds" as meaning the deeds substantially in the form of the transfer and lease annexed to the agreement (but not produced in evidence). Laing covenanted with FirstPort to dispose of the freehold and leasehold dwellings using only the Deeds in connection therewith. Although a copy of such a transfer may not have been available to Mrs Ahmet at the time she took her lease, she knew that the Laing properties were being disposed of by the grant of leases and the transfer of freeholds, as is clear from (i) the definition of the Part A Proportion which refers to transfers and leases and (ii) the sales documents in which there are several references to "Transfer/Lease".

30. There is no dispute about the known intention of Laing and Faulkner to cooperate in forming and setting up a management company and for Faulkner to be responsible for the payment of 6.8% of the establishment and administration costs of such a company: see clauses 11.7 and 11.8 of the agreement between them dated 28 April 1998. That intention is reflected in the management scheme which was provided to Mrs Ahmet at the time she took her lease and which stated in terms (paragraph 5.0) that Faulkner would pay 6.8% of the annual estate service charge. The Faulkner site was expressly said in that document (paragraph 2.1) to form part of the Langley Park Development. Mrs Ahmet submits that given this intention, which is acknowledged by FirstPort, the word "Transferor" as it appears in the definition of the Part A Proportion must refer to both Laing and Faulkner.

31. Mrs Ahmet's argument on this point rests upon what is meant by the total number of "Dwellings legally completed by the Transferor" in the definition of the Part A Proportion. Dwellings in this context means the properties forming the "Development" which is defined in the First Schedule to the lease (see paragraph 18 above) and means the land "now or formerly comprised in Title Number SGL605484 and (to be allocated)". Mrs Ahmet submits that the Faulkner site was included in Title No.484 before it was separately registered as Title No.938.

32. The extent of the land purchased by Laing on 7 September 1998 is said to be shown coloured pink and dark green on Plan 1 attached to the transfer. This plan has not been produced by either party but I am satisfied from the evidence which has been adduced (including what appears to be a copy of Plan 2 of that transfer which also shows the acquired land) that it included the Faulkner site. The question is whether the Faulkner site was ever registered as part of Title No.484.

33. FirstPort correctly point out that by the date of Mrs Ahmet's lease the Faulkner site was registered under Title No.938. But that does not mean it was never part of Title No.484 which was first registered on 12 January 1999. The earliest edition of that title put in evidence is dated 5 November 1999 and shows the entries on the register of title on 3 April 2000. The filed plan is dated March 1999 but there is only a monochrome version in evidence so it is not possible to identify with certainty the extent of the land edged in red which delineates the registered land.

34. Title No.938 (the Faulkner Site) was first registered on 29 January 1999. The earliest (only) edition put in evidence is that dated 19 January 2011 which shows the entries on the register of title on 22 October 2015. The Faulkner site comprises three separate parcels of land: the North Lodge, the Coach House and the Mansion House/Dairy Cottages/Chapel site. There is nothing on any of the plans to suggest that the North Lodge or the Coach House ever formed part of Title No.484. Indeed Mrs Ahmet annotated the North Lodge site on one of the plans in her evidence with the words "not part of the estate/development".

35. Given the respective dates of registration for the two freehold titles it seems very unlikely that the Mansion House/Dairy Cottages/Chapel site would have been registered under Title No.484 only to be removed from that title and registered under Title No.983 less than three weeks later. A later edition of Title No.484 dated 8 August 2011 which shows the entries on the register of title on 4 August 2016 is included in the evidence. There is a note against the first entry in the Property Register of this edition, repeated on the filed plan (dated July 2001), which states:

> "The land tinted green on the title plan is not included in this title."

The land tinted green is the Mansion House/Dairy Cottages/Chapel site. If this part of the Faulkner site was originally part of Title No.484 I would have expected its removal and later registration as part of Title No.938 to have been noted in the later edition of Title No.484 as land edged and renumbered in green on the title plan. The fact that it is shown tinted in green and has a specific note referring to its exclusion from Title No.484 suggests that it was not included in that title in the first place. In this connection I note that paragraph 10 of the transfer between Laing and Faulkner dated 30 October 1998 states:

> "The parties hereto HEREBY APPLY to the Chief Land Registrar to enter on the Registers *of their respective titles* such of the easements rights [etc] contained herein as are capable of registration." (Emphasis added)

That suggests that the two sites were to be separately registered.

36. Having considered the facts and the evidence I do not consider that the Mansion House/Dairy Cottages/Chapel part of the Faulkner site formed part of the "Development" for the purposes of the First Schedule to Mrs Ahmet's lease.

37. Mrs Ahmet also submitted that the words "and (to be allocated)" in the First Schedule of her lease refer to the Faulkner site. If this were so there would have been no reason not to specify Faulkner's Title No.938 which was registered nearly two years' before the grant of Mrs Ahmet's lease. Furthermore the same parenthetic expression appears at the head of her lease

against the words "Title Number". Such a title number on a lease is usually that of the landlord. At page 117 of the FTT's trial bundle there is a copy of the first page of a lease dated 28 June 2002 granted by Laing out of Title No.484 in which the words "and (to be allocated)" are absent from the equivalent description of the title number.

38. I am satisfied on the evidence and having taken account of the legal principles described above that the reference to "Transferor" in the definition of the Part A Proportion in the lease was an error and that it can only sensibly be interpreted, given the background and facts known to the parties at the time, as meaning "the Lessor", namely Laing Homes Limited and that the "Development" as defined in the First Schedule to the lease does not include the Faulkner site (Title No.938). I draw support for this conclusion from the fact that two of the other parts of the "Maintenance Expenses" described in the Sixth Schedule to the lease (parts C and D) are also calculated by reference to formulae where the value of "x" is given as "the total number of transfers and leases of Dwellings legally completed by the *Lessor*" (emphasis added).

39. This conclusion means that the value of "x" in the formula for calculating the Part A Proportion under Mrs Ahmet's Lease is 218 and not 231.

40. But that still leaves the calculation of the value of "y" in the formula which, under the definition of the Part A Proportion, means "all the expenses reasonably and properly incurred within the relevant Rentcharge Year by the Manager in connection with the matters comprising the Variable Rentcharge Costs …." The terms "Rentcharge Year" and "Variable Rentcharge Costs" are not defined in the lease, nor do they appear in any other provision within it. That is not surprising given that the definition of the Part A Proportion has apparently been taken from Laing's equivalent form of freehold transfer.

41. Just as the word "Transferor" was mistakenly used in the definition of the Part A Proportion in Mrs Ahmet's lease, so too in my opinion were the associated terms "Rentcharge Year" and "Variable Rentcharge Costs". The Rentcharge Year under the transfer is equivalent to "the Maintenance Year" under Mrs Ahmet's lease and it is the latter expression which must have been intended to be signified when "Rentcharge Year" was used in the definition of the Part A Proportion.

42. The "Variable Rentcharge Costs" are defined in the transfer as meaning "the matters to be performed by the Manager and the costs and expenses relating thereto more particularly specified in this Transfer." One category of such costs is "Estate Costs" which are defined in clause 13.1 of the transfer and are similar to those defined in Part A of the Sixth Schedule to the lease. But there are differences in the definitions. For instance, the definition of Estate Costs under the transfer includes, at paragraph 13.1.4, the following costs:

> "Inspecting maintaining renting purchasing renewing re-instating replacing repairing and insuring the electro-mechanical gates and security surveillance and access equipment and associated plant and such other ancillary equipment relating thereto by way of contract or otherwise as the Manager may from time to time consider necessary or desirable for the carrying out of the acts and things mentioned in this Schedule".

There is no corresponding provision under Mrs Ahmet's lease although the definition of the "Maintained Property" for which FirstPort are responsible includes "the Communal Areas and Facilities" which in turn includes "the electro-mechanical entrance gates and all security and access systems serving the Development".

43. Similarly there is a difference between the definitions of "the Communal Areas and Facilities" (for the management of which FirstPort is responsible) in the transfer and Mrs Ahmet's lease in that only the latter includes reference to "the refuse stores and other areas (if any) intended for use in common by the lessees of the Dwellings."

44. It seems therefore that FirstPort has (slightly) different management responsibilities under the transfers and the leases. But the definition of the variable "x" in the formula for the Part A Proportion in both the lease and the transfer is "the total number of transfers and leases of Dwellings." In my opinion, based upon the evidence and the factual context, the Laing transfers and leases require each lessee and transferee to pay 1/218th of the *total* Estate Costs as defined in the transfer at clause 13.1 and in the lease in Part A of the Sixth Schedule. If that were not the case the said formulae would presumably refer to the total number of transfers or leases (depending upon the form of disposal) but not both. I do not understand this interpretation of the calculation of the Part A Proportion to be in dispute between the parties and it reflects what actually happened in the apportionment of the only service charge year for which detailed accounts were submitted in evidence. I also draw support for this conclusion from the proviso to clause 7.12 of the lease which states:

> "PROVIDED ALWAYS that the total of the transferees and lessees proportions shall equal one hundred percent of the Maintenance Expenses in any Maintenance Year."

45. FirstPort's covenants under Mrs Ahmet's lease are contained in the Tenth Schedule and provide for them to carry out the works and do the acts and things set out in the Sixth Schedule ("the Maintenance Expenses"), conditional upon them having first received payment of the Lessee's Proportion. It is the "Estate Costs" defined in Part A of the Sixth Schedule which are in dispute. The terms which appear in Part A of the Sixth Schedule such as "Accessways" and "Maintained Property", are defined by reference to the "Development" and not to the "Estate". There is no definition of the "Estate" under Mrs Ahmet's lease. There is a definition of "Estate Regulations" but that means "any reasonable regulations made by the Manager from time to time for the proper management and use of the *Development*" (emphasis added).

46. I considered the meaning of "the Development" in detail above and determined that it did not include the Faulkner site. That being so I do not consider that FirstPort are under any obligation under Mrs Ahmet's lease to carry out the Sixth Schedule works in respect of the Faulkner land and nor is Mrs Ahmet under any obligation to pay for any such works that FirstPort may have carried out.

47. There is a definition of "The Estate" in the transfer. It means:

> "the land now or formerly comprised in the above Title number [SGL605484] together with any adjoining or neighbouring land which may be added thereto within the Perpetuity Period"

That definition is equivalent to "the Development" and for the reasons given above it does not include the Faulkner site.

48. There is a difference between work carried out by FirstPort solely on the Faulkner site and work carried out by FirstPort on the Laing site but which benefits both the Laing and Faulkner transferees and lessees, e.g. work done to the electro-mechanical entrance gates. In my opinion the cost of works which are of mutual benefit to both the Laing and Faulkner sites are properly chargeable to the Laing transferees and lessees. Mrs Ahmet's lease anticipates that Faulkner (or its transferees and/or lessees) may contribute to such shared benefit costs. Paragraph 4 of the Seventh Schedule to Mrs Ahmet's lease states:

> "The amount of Maintenance Expenses shall be adjusted to take into account any sums received by [FirstPort] as a contribution towards the cost of the work mentioned in the Sixth Schedule hereto from the owners lessees or occupiers of any adjoining or neighbouring properties to the Development."

49. The responsibility of Faulkner and its lessees for meeting the costs of maintaining the external common parts of the estate is found in copies of two leases granted by Faulkner for Flats 1 and 7, the Mansion Apartments, dated 31 August 2000 and 30 March 2001 respectively. The form of the leases is the same. FirstPort is not a party to either lease. Under the leases the lessees covenant with Faulkner "and as separate covenants severally and with each owner of each other flat and dwelling house in the Estate" to pay the service charges to Faulkner or as Faulkner may direct. The service charges are the aggregate of stated percentages of the expenses and outgoings incurred by Faulkner under the heads of expenditure defined in the Fourth Schedule as "the No.1 Service Charge" and "the No.2 Service Charge".

50. The No.1 Service Charge deals with the costs of maintaining, repairing, renewing etc the building containing the demised premises. The No.2 Service Charge relates to the maintenance, repair and renewal of Estate Roads, Estate Sewers and

> "The cost of managing and maintaining the Estate Common Parts including (if deemed appropriate) the provision of 24 hour porterage at the site entrance."

51. The "Estate" is defined in the leases as "the Property shown coloured pink on Drawing No.4". It appears from the (poor) copies of those plans which were submitted in evidence that the property coloured pink is the whole of the Langley Park Estate, including both the Laing and the Faulkner sites.

52. The No.1 Service Charge is defined by reference to all costs and expenses incurred by Faulkner in complying with its obligations contained in clauses 5.2, 5.3 and 5.4 of the leases. The No.2 Service Charge is not defined by reference to any obligations that Faulkner have regarding the "Estate Common Parts". Indeed there are no such obligations contained in Faulkner's covenants under the leases. So far as the estate costs are concerned therefore it seems as though Faulkner's lessees have covenanted to pay a defined percentage of any such costs that Faulkner may, but do not seem not obliged, to incur.

53. There appears to be no management agreement between Faulkner and FirstPort equivalent to that dated 20 July 1999 between Laing and FirstPort. The management lease of the common parts of the estate that was anticipated in that agreement does not appear to have been granted.

54. The only obligation upon Faulkner to contribute to any of the estate costs is contained in Part II (Obligations) of the Third Schedule to the transfer between Laing and Faulkner dated 30 October 1998. That contains the following positive covenant to be performed and observed by the purchaser (Faulkner):

> "(5) To pay to [Laing] or as it directs a proper proportion of the reasonable cost of repair and remedial works to the Distributor Road and other works and areas outside the Property so far as the same are required in consequence of use thereof or works thereto by the Purchaser its successors in title or servants agents contractors and others permitted or authorised by [Faulkner]"

The "Property" is defined by reference to a plan which is not produced in evidence. But from the reference to three parcels of land, it is likely to be the Faulkner site.

55. In summary it seems as though the external common parts of the Langley Park Estate are managed as a whole by FirstPort with no separate itemisation of expenditure between the Laing and the Faulkner parts of the estate. The only copy (undated) of a service charge statement (estimated) appears at page 254 of the FTT's trial bundle. It gives figures for each item of expenditure and then apportions the total 93.2% to Laing and 6.8% to Faulkner. But although those percentages are the same as those stated in the agreement between Laing and Faulkner dated 28 April 1998 and may well be a fair apportionment between the two parts of the estate, there is nothing in Mrs Ahmet's lease that requires the adoption of those figures when calculating her Part A Proportion. Mrs Ahmet's obligation under her lease is to pay 1/218th of the Estate Costs excluding any such costs which are incurred solely in respect of the Faulkner site. It would be inconsistent in my view when applying the formula for the calculation of the Part A Proportion if one was to exclude the Faulkner site when calculating the value of "x" but to include it when calculating the value of "y".

Determination

56. I allow the appeal insofar as the value of 1/x in the formula for the calculation of Mrs Ahmet's Part A Proportion should be 1/218 and not 1/231. But that fraction should not, as FirstPort submit, be applied to the total costs of managing the external common parts of the whole of the Langley Park Estate, i.e. including both the Laing and Faulkner sites. It should be applied to the total estate costs excluding any such costs which are referable only to the Faulkner site.

57. Although the effect of this decision should be to reduce the amount of the service charge payable by Mrs Ahmet, the shared benefit cost of the security gate and CCTV monitoring, which was the largest single item in the only schedule of service charges submitted in evidence, cannot necessarily be recovered in part from Faulkner. Given that FirstPort have succeeded in part of their appeal and that in practice the reduction in Mrs Ahmet's service

charge is likely to be small, I do not think it just and equitable that FirstPort should be prevented from exercising any contractual right it may have to add the costs of the proceedings to the service charge payable by Mrs Ahmet and I therefore allow its appeal against the FTT's order under section 20C of the Landlord and Tenant Act 1985.

Dated 21 February 2017

A J Trott FRICS