[2020] EWHC 2623 (Ch)

Case No: CH-2019-00342

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
HIGH COURT APPEALS (CH)

7 Rolls Building
Fetter Lane
London EC4 1NL

Date: 06/10/2020

Before :

MR JUSTICE MILES

- -

Between :

Terracorp Limited	**Claimant and Appellant**
- and -	
Rajesh Mistry and others	**Defendants and Respondents**

- -
- -

Andrew Spink QC, Andrew Maguire and Stephen Butler (instructed by **Griffin Law**) for the **Claimant/Appellant**
Nicholas Bacon QC, Helen Swaffield and Martin Langston (of or instructed by **Contract Law Chambers**) for the **Defendants/Respondents**

Hearing dates: 23-24 July 2020

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APPROVED JUDGMENT

Mr Justice Miles

Introduction

1. This is an appeal by the Claimants from the order of HHJ Johns QC dated 3 December 2019 following his judgment of 9 September 2019, given after a six day trial. It is convenient to call the parties "the Claimant" and "the Defendants" as in the court below.

2. The dispute is about covenants in contracts under which land-owning companies ("the sellers") sold small parcels of green field sites to numerous buyers ("the plot purchasers"), including the Defendants. The business of buying farms or other green field land (without planning permission), parcelling it into small plots, and selling these to multiple buyers is sometimes known as land banking.

3. The plot purchasers each acquired a freehold title to their parcel of land which, after payment in full of the purchase price, was registered in their name at the Land Registry. They generally paid the purchase price in instalments. They also entered covenants ("the Covenants") to pay additional sums ("the Covenant Charges") in connection with the cleaning, maintenance and repair of roads, paths and other access ways ("roads etc.") on land described as retained by the sellers.

4. None of the sites (which are still green fields) had or have planning permission for development, and there are as yet no roads etc. on any of the land retained by the sellers capable of being cleaned, maintained, or repaired.

5. The Claimant sought payment of the amounts set out in the Covenants. The Defendants argued that, on the true interpretation of the sales contracts, they were not liable to pay anything as there were no roads etc. capable of being cleaned, maintained, or repaired and there was no present prospect of any such services being carried out.

6. The judge declared that on the true interpretation of the Covenants no liability for payment of the Covenant Charges had yet arisen.

7. The Defendants also ran a series of other defences, including fraudulent misrepresentation, conspiracy, estoppel, title to sue, and allegations that the original sales had been part of an unauthorised collective investment scheme. These other defences failed. The judge held that the Defendants were overall winners and ordered the Claimant to pay 50% of the Defendants' costs of the proceedings.

8. The Claimant now appeals (with the permission of Fancourt J) against the judge's declaration and the costs order.

Factual background

9. I can largely take the material facts from the judge's principal judgment. The Claimant is controlled by Mr Baron Deschauer, its 95% shareholder. He arrived in the UK from Canada in 1998 and from 2001 was involved in promoting the selling companies, which bought green field sites and then on-sold small plots to purchasers. The business model involved buying a farm or other large area of agricultural land (through a land-owning company) and dividing the land into small plots (ranging from a quarter-acre to several acres) for sale to purchasers. The plots were typically sold for between £10,000 and £30,000, usually payable in instalments over several years.

10. The first area of land acquired in this way was near Tewin, Hertfordshire. It was bought by a company formed for the purpose, Warrengate (Herts) Limited, which was owned as to 50% by Commonwealth Properties Ltd ("CPL"), Mr Deschauer's corporate vehicle. The other 50% was owned by the son of Mr Deschauer's partner. The Tewin site covered about 170 acres. It was divided into plots of 1 to 5 acres. Phase 1, comprising 54 plots, and phase 2, a further 92 plots, was sold to purchasers during 2002. The purchasers were mostly individuals and, as very few had the means to buy the plots outright, instalment sales were agreed. The sales were promoted and agreed by agents acting on a percentage commission.

11. The documents given to purchasers were a brochure and a contract for sale (which contained the relevant Covenant). The brochure showed the locations of the various plots and the areas where roads were to run to give access to the plots. The brochure indicated that the areas marked on the plan for the roads were going to be retained by the selling company. There was no other documentation. The terms of the sale agreements were presented by the agents for the selling company and there were not negotiations of their terms with the purchasers.

12. After the Tewin site had sold well, Mr Deschauer promoted other developments of land purchased by landholding companies and essentially the same process occurred. In January 2003 a 500 acre farm at Bluebell Hill, Kent, was acquired by another company associated with Mr Deschauer, Bluebell Land. Phase 1 of this site, representing 68 two acre plots, sold quickly. A second phase was sold out by the end of 2003. A third phase was later released and also did well. Another site, acquired in Autumn 2003 at Groombridge, Sussex, comprising 40 acres, was divided into half-acre plots, and sold for around £30,000 each. Other sites were acquired by landholding companies associated with Mr Deschauer from 2003 to 2005.

13. In 2007 Mr Deschauer's company, CPL, acquired another group of companies called the Glenridge group, which had operated using the same business model as Mr Deschauer and his companies.

14. A further site was acquired in 2009 at Broomfield Essex. It was again divided up and sold to plot purchasers, following the same business model as before.

15. The sales process for each of these developments was much the same as for Tewin. Purchasers were given sales brochures showing the layout of the plots and the proposed access roads etc. on "retained land". They entered contracts for sale of the plots containing a relevant version of the Covenants (there were some differences in the wording: see below). There were no other documents. The contracts were in the terms presented by the sellers and there was no negotiation of the wording.

16. Each of the brochures described the current status of the relevant land, variously, as being agricultural, within a metropolitan green belt, or within an area of Outstanding Natural Beauty. None of the land had planning permission and, had any checks been carried out, it would have been apparent to the purchasers that there was no prospect of planning permission being obtained for a development of the plots in the foreseeable future, at least without a major shift in local planning policies.

17. The Defendants alleged at the trial that they had been induced to buy the land by fraudulent statements about the prospects of development. They claimed that the sellers through their agents or Mr Deschauer had stated that planning permission for residential development could and would be obtained by or on behalf of the sellers within a short time (a few years). The judge rejected this allegation. The judge accepted that the Defendants had, over the years, come genuinely to believe that they had been told something along these lines. He held that the agents had probably put a positive spin on the gains to be obtained if planning permission were to be given. They had used hard sale talk to the effect that the plots were selling like hot cakes and that the purchasers needed to act quickly. The purchasers often contracted quickly and without instructing solicitors. But the agents and Mr Deschauer had not told the purchasers that the companies would or could obtain planning permission. He had

indeed instructed the agents not to make promises about planning permission. There is no appeal by the Defendants against these findings.

18. The sales were made between 2001 and 2008. The sites containing the plots were and remain green fields. None has been given planning permission for residential development. No application for such permission has even been made. The fields are farmed, mostly for grass, by third-party farmers under arrangements made with Mr Deschauer's companies. No roads etc. have been constructed and there is no foreseeable prospect, given the planning position, of any being constructed.

19. In 2012 Mr Deschauer's business was restructured following advice from accountants. All the areas shown on the plans for roads etc. (then owned by the various selling companies) were transferred to the Claimant and the sellers also assigned their rights under the Covenants to the Claimant.

The proceedings

20. The Claimant made demands for the Covenant Charges and issued small claims against those who did not pay. A number of these came before the judge in the Central London County Court ("CLCC") for directions on 8 March 2018. It became apparent to the judge that there were many more such claims in that court and in various other hearing centres. With a view to saving judicial resources, avoiding the risk of inconsistent results, and bringing the benefit of a more detailed examination of the claims, the judge made a case management order consolidating the claims before him and allocating the consolidated claim to the multitrack. He also directed the Claimant to transfer other claims to the CLCC. A costs sharing order was made.

21. Before the trial various representative Defendants were appointed and the parties identified seven variants of Covenant wording contained in the various sales contracts ("Categories 1 to 7"). The judge made a case management order to the effect that a decision on the construction of the Covenants would bind all of the Defendants in relation to Categories 1 to 7. Various directions were also given in relation to the other defences taken by the Defendants.

22. By the time of the trial the consolidated claim was against 174 Defendants (including some settled cases). The Claimant said that the Defendants were liable under the Covenants for sums ranging from a few hundred to several thousand pounds each.

The Covenants

23. Categories 1-7 are in the following terms (Categories 2 and 3 are identical, but I will use the same numbering as the judge):

> <u>Category 1</u>
>
> "To pay on demand a proportion of the costs incurred in cleaning, maintaining and renewing any farm road, or any other existing roads, all other roads, drives, tracks and paths constructed or to be constructed over the Transferors retained land in approximately the positions shown on the Plan annexed hereto as well as cost of mowing and cutting of the verges including any costs reasonably incurred in upgrading such roads or constructing a

varied or substituted access in place of such roads. The costs shall be £140 per annum and shall be index linked to inflation or to a 5% per annum cumulative increment, whichever is the greater, and shall be payable yearly in advance".

Categories 2 and 3

"To pay for maintaining, renewing and using the existing roads, and all other roads drives tracks and paths constructed or to be constructed over the Sellers retained Land in approximately the positions shown on the Plan and for the mowing and cutting of their verges including costs incurred in upgrading such roads or pathways, or constructing a varied or substituted access in place of such roads or pathways. This amount shall be £150 per annum, for each plot with a 5% per annum increment, and shall be calculated yearly in advance, commencing from the Date of Acceptance of this Agreement, and payable on demand to the Seller or his appointed Agent."

Category 4

"To pay on demand a proportion of the costs incurred in cleaning, maintaining and renewing the farm road, the existing roads, and all other roads drives, tracks and paths constructed or to be constructed over the Sellers retained Land in approximately the positions shown on the Plan and the mowing and cutting of their verges including any costs reasonably incurred in upgrading such roads or constructing a varied or substituted access in place of such roads. This amount shall be capped at £140 per annum linked to inflation or to a 5% per annum increment, whichever is the greater, and shall be payable yearly in advance."

Category 5

"To pay upon demand a fair proportion of the costs incurred in cleaning maintaining and renewing the farm roads, the existing roads and all other roads, drives, tracts and paths constructed or to be constructed over the Sellers retained Land in approximately the position tinted yellow on the Plan and the mowing and cutting of their verges including any cost reasonably incurred in upgrading such roads or pathways, or constructing a varied or substituted access in place of such roads. This amount shall be £120 p.a. for each plot linked to inflation or to a 5% per annum increment, whichever is the greater."

Category 6

"To pay on demand the costs incurred in cleaning maintaining and renewing any farm road, or any other existing roads and all other roads, drives tracks and paths constructed or to be constructed over the Transferors retained land in approximately the positions shown on the Plan annexed hereto as well as the cost of mowing and cutting of the verges including any costs reasonably incurred [in upgrading such roads] or constructing a varied or substituted access in place of such roads. The costs shall be £140 per annum, for a 1 acre plot and £250 per annum for a 5 acre plot (as applicable) and in each case

shall be index linked to inflation or to a 5% per annum cumulative increment, whichever is the greater, and shall be payable yearly in advance."

Category 7

"To pay for maintaining, renewing and using the existing roads, and all other roads, drives, tracks and paths constructed or to be constructed over the Sellers retained Land in approximately the positions shown on the Plan and for the mowing and cutting of their verges. This amount shall be £100 per annum, for each plot with a 5% per annum cumulative increment, and shall be calculated yearly in advance, commencing from the Date of Acceptance of this Agreement, and payable on demand to the Seller or his appointed Agent."

24. There are some obvious differences between the words used in these various versions. Category 4 stands out as the only version which says that the amount is "capped." But there are other differences which I shall consider so far as material below. The parties both submitted to the judge that (other than Category 4) their preferred reading of the Covenants should apply to all of the Categories. At the hearing of the appeal the parties made some submissions based on differences in the wording of the various Categories and said that they may be significant. The Claimant's principal contention was, however, that under all the variants the Defendants have been liable to pay Covenant Charges since the sale agreements were entered; while the Defendants contended that they have not yet become liable to pay anything.

Principles of interpretation

25. The judge took the relevant principles from Rainy Sky SA v Kookmin Bank [2011] UKSC 50, [2011] 1 WLR 2900; Arnold v Britton [2015] UKSC 36, [2015] AC 1619 ("Arnold"); and Wood v Capita Insurances Services Limited [2017] UKSC 24, [2017] AC 1173.

26. I shall not attempt yet another summary of the principles. Popplewell J gave a concise synthesis in Lukoil Asia Pacific Pte Limited v Ocean Tanker (Pte) Limited [2018] EWHC 163 (Comm) at [8] (which the present parties did not dispute):

"The court's task is to ascertain the objective meaning of the language which the parties have chosen in which to express their agreement. The court must consider the language used and ascertain what a reasonable person, that is a person who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract, would have understood the parties to have meant. The court must consider the contract as a whole and, depending on the nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to the objective meaning of the language used. If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other. Interpretation is a unitary exercise; in striking a balance between the indications given by the language and the implications of the competing constructions, the court must consider the quality of drafting of the clause and it must also be alive to the possibility that one side may have agreed to something which with hindsight did not serve his interest; similarly, the court

> must not lose sight of the possibility that a provision may be a negotiated compromise or that the negotiators were not able to agree more precise terms. This unitary exercise involves an iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences are investigated. It does not matter whether the more detailed analysis commences with the factual background and the implications of rival constructions or a close examination of the relevant language in the contract, so long as the court balances the indications given by each."

The judge's reasoning

27. The judge dealt with the application of these principles to the interpretation of the Covenants between [52] and [62] of his judgment. At the invitation of the parties he used Category 1 as a paradigm, and he concentrated his reasoning on that version. He concluded that since no roads etc. have been constructed, or even planned, and therefore no services are able to be provided, no liability to pay the charges has yet arisen. He considered that the use of the language of "costs incurred" and other language used by the parties showed the Covenants were concerned with a world that has yet to come into being. He distinguished the current situation from that in Arnold. That case was about whether the tenant's promise was to pay a fixed sum, or a proportionate part of the costs incurred by the landlord, but it was not concerned with the prior question whether any obligation to pay had arisen.

28. He observed that obligation was to pay "on demand" and thought that this had a greater role to play on the Defendants' interpretation than on the Claimant's. On the Defendants' reading, the function of the demand would be to tell the plot purchasers that the cleaning, maintenance etc. of the roads etc. was being (or was, within the forthcoming period, to be) carried out, so that the plot purchasers would know that they had to start contributing. He thought that if the Claimant was right and the charges started from the date of the relevant agreement, the requirement of a demand did not have much of a purpose.

29. The judge pointed out that the sales contracts were not well drawn agreements. In all but one of the contracts, no rights were even granted for purchasers to use the roads etc. (once made). The cases show that commercial common sense may play a greater role where the contract is not well drafted.

30. He then addressed the Claimant's reliance on the words "commencing with the date of agreement" (found in Categories 2 and 3, and 7). He thought these were of limited significance as they refer to the calculation of the annual sum rather than determine whether it is yet payable; and, second, they have some function in telling the reader that the sums could potentially be payable even before the instalments of the purchase price had all been paid.

31. Similarly, he gave little weight to the words "to be constructed" (which appear in each of the covenants). He did not think that the phrase meant or suggested that there must immediately be a payment for cleaning, maintaining, or repairing roads etc., where the roads etc. do not exist and where their existence will come about (if at all) only in the distant future. Rather, he thought these words simply spelt out that the relevant

services might be carried out in respect of roads etc. which had not yet, at the date of contract, been constructed.

32. The judge saw business common sense as pointing in the same direction as his view of the effect of the language: he thought it would be commercially surprising for the parties to have intended to agree a liability to make an annual payment for the maintenance of roads etc. which do not exist and are not expected to exist in the near future.

33. Finally, in relation to Category 4, where the annual sum is expressed as a cap, he concluded that the liability could only be to pay towards costs incurred subject to a maximum and that since the Claimant could not demonstrate any relevant expenditure (or planned expenditure), there was no liability. That was a conclusion he had anyway reached for the other Categories.

The appeal

34. The Claimant challenges this reasoning. It submits that the proper interpretation of each version of the Covenants is that the relevant purchaser is obliged to pay a fixed sum (to be increased by the relevant uplift) from the date of the contract, whether or not any roads etc. have been or are anticipated to be built at any given date and whether or not any services in respect of those roads etc. have been provided or are in contemplation within the next year. The Claimant contends that the obligation is an unconditional one to pay, from day one, the fixed sum (uplifted as appropriate).

35. As to the text, the Claimant emphasises that in each Category the purchaser agrees "to pay" and that in substance the object of that verb is the fixed sum (identified in the second sentence of each version). This is (in most cases) expressed to be an amount "*payable yearly in advance*".

36. The Claimant says next that in a number of cases (Categories 2 and 3, and 7), the obligation is described as "*commencing from the Date of Acceptance of this Agreement*". In the case of Category 1 it relies on clause 11 of the contract which states: "*Costs in accordance with Clause 10 hereof [which contains the Covenant] shall be payable as from the date of this Agreement*." The Claimant submits that these provisions naturally mean that, starting with the date of the Agreement, the Defendants would have to pay a fixed sum payable annually in advance (to be uplifted annually).

37. The Claimant observes that there is no mechanism or yardstick for determining the proportion that any particular purchaser has to pay other than the fixed sum, nor any mechanism for monitoring the amount of work carried out by the seller. It says that this tells in favour of a simple obligation to pay the annual sum stipulated in the Covenant.

38. The Claimant notes that under the sales contracts the selling company was under no obligation to apply for planning permission or to carry out any works to build, clean or maintain the roads etc. The Claimant also says that a reasonable reader with access to the factual information available at the time of the relevant contract (including by making inquiries of the local planning authorities) would have understood that planning permission was not imminent and might not be granted for generations (if at

all). The reasonable reader would therefore have no reason to read the clause as being conditional on any efforts by the selling companies to obtain planning consents or indeed doing anything else.

39. The Claimant says that its interpretation makes commercial sense as it tells the plot purchasers, with certainty, the amount they would have to pay each year; and that, commercially, the costs were simply being spread over the life of the contract. There is no commercial reason why payment should not have been spread in this way and made in advance of any roads etc. actually being constructed.

40. The Claimant also argues that the Defendants' interpretation (as accepted by the judge) is potentially difficult to apply. If the annual sum is not payable from the start of the contract, it is unclear what would trigger the right to payment. Is it for instance only once planning permission had been obtained or only after the roads etc. had actually been constructed? Or when construction was at least planned? The Claimant says that its interpretation promotes clarity and simplicity.

41. The Claimant says that the judge overstated the importance of the words "incurred in" appearing in Categories 1 and 6 and points out that in categories 2 and 3 the reference to costs being "incurred" is only part of an inclusive (and therefore not exhaustive) obligation to pay. Category 7 does not use the word "incurred" at all.

42. The Claimant also submits that the words "on demand" do have a contractual function on its interpretation, as a recalculation is needed each year and the clauses therefore require the seller to have to set out the amount in a formal demand.

43. The Claimant says that the reference to the amount being "capped" in Category 4 is a drafting infelicity and that it should be read, like the other versions, as requiring the payment of a fixed sum.

44. The Defendants invite the Court to uphold the judgment for the reasons given by the judge. They supplement this with a number of other observations about the language, purpose, context, and commercial consequences. I shall address these as relevant in my analysis below.

Analysis and decision

45. I start with a close reading of the language and syntax chosen by the parties, read in their context. I have of course to consider each different version separately. There are, however, common features of the various versions and, for ease of exposition, I shall address these together (while also noting the textual variances). As well as being a helpful way of setting out the analysis, this approach reflects the way the parties presented their arguments at the hearing.

46. The first sentence in each case commences with the verb "to pay." In Categories 1, 4, 5 and 6 the Defendants are "*to pay the costs [or a proportion of the costs] incurred in"* cleaning, maintaining etc. the roads etc. In Categories 2 and 3 and 7 they are *"to pay for"* the costs of cleaning, maintaining etc. the roads etc. In Categories 2 and 3 there is a combination of both formulations with an (inclusive) reference to *"costs incurred"*.

47. The second sentence in each Category states what the amount of the payment obligation shall be and (in most cases) when it shall be paid.

48. In each case, the wording and syntax operate to tie the obligation to pay to the provision of a service (cleaning, maintaining etc. the roads etc.) by the seller. The covenant is to pay a share of the "costs incurred" in, or to "pay for", defined services. The relevant services ("cleaning, maintaining and renewing" the roads etc., "the mowing and cutting of the verges", "upgrading such roads") are then carefully identified.

49. The text of each of these first sentences does not, to my mind, naturally read as an unconditional payment obligation, unmoored from the provision of the relevant services by the sellers. On a natural reading, the seller has to provide the (carefully specified) services in return for the right to be paid.

50. The Claimant says that the second sentence of the Covenants (and cl. 11 in the case of Category 1) shows that the amount of the costs must be paid whether or not any such service is performed or even capable of being performed. It stresses the words "payable annually in advance" and the obligation (in some of the clauses) to pay from the date of the agreements. It says that these show that the obligation is not conditional on provision of the services. But that is to make the tail wag the dog. The purchaser's obligation is "to pay" (in some versions) "for" the specified services, or (in the others) a proportionate part of the "costs incurred" by the seller in carrying out the specified services. The undertaking to pay is coupled with the provision of services. If the services cannot be provided (because the roads etc. are not under development or even contemplated) there is nothing to "pay for" and there are no "costs incurred" or to be incurred in providing those services. (I shall return to the reference to payment being "yearly in advance" in a moment.)

51. The Claimant argues that the Defendants' reading treats the sellers as if they were under an obligation to provide the cleaning, maintenance etc. services and that the contracts contain no such obligation. I do not agree. To say that the Claimant is required to do (or be able to do) the specified acts to earn the payment is not to invent an obligation to do those things. It simply reads the clause as requiring the sellers to carry out (or at least genuinely plan to carry out within the next year) the specified activities before being allowed to demand payment. Otherwise they will be getting payment for nothing and that is not the natural meaning of the words and syntax chosen by the parties to express their bargain.

52. The Claimant sought to draw an analogy with the reasoning of Morgan J in Arnold at first instance ([2012] EWHC 3451 (Ch)) where he concluded that (in the leases before him) the object of the verb "to pay" was a fixed sum (subject to uplift) and that earlier part of the clause was merely descriptive of the character of the payment (as a shared service charge). The Claimant says that the first sentence in each of the versions here is no more than a way of describing the payment, but that the essential obligation contained in the Covenants is the obligation to pay a fixed sum from day one.

53. I do not accept this submission for several reasons. First, it is wrong to seek to construe a contract by seeing what a judge in another case has said about a differently worded contract (see the red flag raised by Sir George Jessel MR in Aspden v Sedden

(1874-75) LR 10 Ch. App. 394 n.1). Not only is it fruitless and distracting, it can lead the Court down the wrong path.

54. Second, the syntax and structure of the service charge clauses considered in Arnold differ markedly from the present ones. In Arnold the judge, construing a single sentence, thought it was grammatically permissible to read the fixed sum as the object of the verb "to pay". In the present case the object of the verb "to pay" is to be found in the first sentence of the Covenants: it is to pay a share of the costs "incurred in" maintenance etc. of the roads etc. or (as the case may be) to "pay for" such costs. The second sentence then tells the parties the amount payable. But a reasonable reader would not jump from the verb "to pay" in the first sentence to the fixed amount in the second sentence and rub out all the words in between.

55. Third, the situation in Arnold was quite different from the present case. There was no suggestion in Arnold that the relevant services were not being provided by the landlord. Lord Neuberger said in the Supreme Court at [24] that natural meaning of the words used was that the *"lessee is to pay an annual charge to reimburse the lessor for the costs of providing the services which he covenants to provide, and the second half of the clause identified how that service charge is to be calculated."* The payment obligation was a quid pro quo for the landlord's services and the question was how to determine its amount. On the Claimant's reading of the present Covenants the first sentence is not to be read as a duty to reimburse the seller for doing something; it would be a free-standing duty to make a payment, de-coupled from the seller having to provide anything to earn it.

56. The Claimant says that the first sentence of the Covenants functions as a "description" or "characterisation" of the payment, but little more than that. I find this unconvincing. The first sentence, on a natural and ordinary reading, has a clear contractual function. It identifies, with some care and precision, what the seller has to do to earn the payment. It is more than a mere description of the payment.

57. On the Claimant's interpretation there would indeed be little purpose in the careful and detailed specification in the first sentence of each version of what the payment is for. The wording of the clause spells out in some detail the subject matter of the relevant costs ("cleaning, maintaining, renewing," "roads, drives, tracks or paths", or "mowing their verges" etc.) and says where the roads etc. were to be. The Claimant's reading (which labels most of the first sentence as "descriptive") gives these carefully chosen phrases little or no purpose. To use an image from Wood v Capita, it airbrushes away much of the wording. A reasonable reader would resist that conclusion and would suppose that the parties had deliberately and carefully stipulated what the seller had to do (or, at least, anticipate doing in the coming year) before it could demand payment.

58. The Claimant seeks to meet this point by saying that on its reading the first sentence has some contractual force (other than being merely descriptive). It says that if a selling company did ever come carry out maintenance etc. on roads etc. a purchaser would be able to say that the Covenant, as worded, was the full extent of its liability and that no more could be demanded. But that argument gives an unduly attenuated purpose to the clause, particularly in circumstances where (as the Claimant itself emphasised) the seller was and is under no obligation to apply for planning permission, build any roads etc., carry out any services, or even retain ownership of

the land where the roads (if ever made) were to go. To my mind it is far more natural to read the first sentence as saying that the plot purchasers will pay for (a share) of any cleaning, maintenance etc. costs to be incurred or spent by the sellers on the roads etc in any coming year; but that presupposes that the seller can do (or at least anticipates doing) those specific things within the year covered by the relevant payment.

59. The Claimant also says that (on its reading) any payments before the roads etc. are actually developed are to be regarded as advance payments: the purchasers are merely spreading their liability for maintenance charges over the entire life of the contract. It says that this is a standard way of paying a service charge and again draws an analogy with Arnold. I do not find this persuasive. As the Claimant accepts (and indeed asserts) the selling companies are under no obligation to construct any roads etc. or (even if they did) carry out any works. They are not even required to retain ownership or control of any land on which the roads etc. might be built. The Claimant also accepts (and asserts) that if sums were actually paid under the Covenants the sellers would be under no obligation to segregate or reserve them as a fund to spend on maintenance or repairs. The position may again be contrasted with that in Arnold where there was no issue about whether the landlord was providing the services for which it claimed payment. Here, until planning permission has been sought and granted and the roads etc. built, the sellers will not be able to provide any of the services specified by the Covenants. That may never happen. On the Claimants' case, the purchaser has to pay an indefinite series of sums each year for which it may never receive anything at all. Of course, if the seller did happen at some stage to provide the services it would be able to render an annual charge without giving any credit for amounts previously received. Given this context, it would be hard to regard any payments made before the seller anticipates providing services in the following year as being "advance" payments for anything. I also see little appeal in the Claimant's contention that the Defendants have simply agreed to spread the cost of the services over the life of the contract; there may well never be any services or any cost. But, of course, if such services do happen to be provided, the Claimant will then be able to charge for them annually under the Covenants.

60. Returning to the text of the Covenants, the Claimant emphasises that the amounts are expressed to be "*payable yearly in advance*" or "*calculated yearly in advance*" and says that this shows that the sums are unconditionally payable. I do not think that this assists the Claimant; indeed, if they point either way, these words tend to support the Defendants. On the Defendant's reading, the obligation to pay only arises when there is (at least) a genuine expectation that the selling company will (in the following year) incur costs or pay amounts in or for cleaning, maintenance etc. of the roads etc. This might allow the Claimant to make a demand before the costs were actually incurred but it would depend on relevant expenditure genuinely being expected to happen in the coming year. The Claimant would then be able to serve a demand for payment "in advance" for the coming year. It would accord with ordinary language to regard the payment as being due (or calculated) "yearly in advance" for the services to be provided in that year.

61. The language does not, in my view, fit as well with the Claimant's reading. Until the Claimant is able to say that it genuinely intends (and will be able) to provide the relevant services in the coming year it is hard to regard a payment as being made as in

"advance" of anything. As already explained the Claimant is not required to segregate or reserve any such payment, or to give any credit for it. The payment would not, in such events, naturally be an "advance" payment for any services, or the costs incurred in providing the services, as specified in the first sentence of the Covenants.

62. The Claimant says that on the Defendants' reading the application of the Covenants is less certain and straightforward: it may be unclear on the facts whether and when the Claimant is able to demand payment. But the quest for contractual clarity and simplicity, while desirable, cannot override the meaning a reasonable reader would otherwise give to the agreement based on the language and context. The Defendant's reading may give rise to disputes about precisely when the selling company's right to charge for maintenance etc. of the roads etc. will be triggered, but contractual issues of this kind are not uncommon, particularly where the drafting is imperfect (as here).

63. I also do not see any real force in the Claimant's argument that the Covenants do not provide a mechanism for determining the amount of the cost to the sellers of providing the services. The second sentence in each case (other than Category 4) tells the parties the amount payable once the obligation to pay is triggered. The lack of a contractual mechanism of this kind tells the reader nothing about the trigger point for the payment obligation.

64. The Claimant particularly emphasises clause 11 of the Category 1 contracts (see [36] above), and the words in some of the other Categories "*commencing from the Date of Acceptance of this Agreement*". It says that these show that the obligation to pay was free-standing and arose on day one. There is some force in this point, at least if the words are taken in isolation. But they cannot be. I agree with the Defendant's submission that, read in their contractual context, these provisions are concerned with the calculation of the appropriate sum once payable (the amount of the uplift being calculated from the date of the contract). They have to be read together with the requirement that the payment obligation in the Covenant arises "on demand," and in light of the statement (in the first sentence of each version) that the payment is in respect of "costs incurred in" or is "for" the relevant services. Reading the Covenants (and contracts) as a whole, I agree with the Defendants that the references to payments commencing from the date of the contract are concerned with calculation of the sums due rather than obligation to pay.

65. Clause 11 of Category 11 is more naturally to be read as saying that the amounts payable for the relevant services (if any) shall date from the commencement of the agreement. I do not think that this clause, read in the wider contractual context, does the work the Claimant seeks from it (creating an unconditional payment obligation, un-coupled from the provision of any services). The Claimant's reading to my mind ignores the other textual and contextual indicators I have already mentioned.

66. Taken in the round, I consider, for the reasons given above, that a contextual reading of the language and syntax of each of the Categories firmly favours the Defendants' reading.

67. The conclusion is stronger still for Category 4 where the amount was "capped" at a specified amount (with uplifts). This can only mean that the fixed amount is a maximum and that the amount the purchaser is obliged to pay might therefore be less than this. This presupposes that there must be a calculation of the seller's actual costs

(including the seller's costs genuinely anticipated for the coming year) of providing the services, and there can be no such calculation where there is not even a present expectation of the roads etc being made. The Claimant appeared to me to have no answer to this point. It says that the wording was "infelicitous". That is not an argument: it is just a plea to the reader to ignore a word that thwarts the Claimant's desired conclusion. The Claimant has given no reason for saying the wording was an error or should otherwise be ignored. The word was not said to be inconsistent or incongruent with any other part of Category 4. The word "capped" is unambiguous. The amount set in the second sentence is, as it says, only a cap.

68. I turn, as part of the iterative (or recursive) process of interpretation, to consider the commercial consequences of the competing constructions. As Lord Neuberger said in Arnold [19]-[20], commercial common sense cannot be invoked retrospectively, or to rewrite a contract in an attempt to assist an unwise party, or to penalise an astute party.

69. In my judgment the commerciality of the rival readings also firmly favours the Defendants' reading. The purchasers bought their plots in the hope that, one day, the land would be developed and the roads etc. would be built. But, as the judge held, viewed objectively, there was no realistic prospect of that happening any time soon. The land was agricultural or green field. There had to be a radical shift in planning policies before the land could be developed, and that might take generations. The sellers did not give any undertakings to apply for planning permission or carry out any development. Nonetheless there was some hope that, one day, the land would be developed and, if it that happened, there would have to be access ways for the purchasers to reach their plots. It makes commercial sense for the parties to agree that, if the roads etc. did come to be built and the sellers did come to spend money on cleaning and maintaining them, the purchasers of the plots would have to pay a share of the costs incurred by the sellers; nor is it surprising, commercially, that the amounts then payable should be fixed by the contracts (subject to annual uplift). All that makes commercial sense.

70. But there is little commercial sense in plot purchasers having to pay, from day one, for the maintenance etc. of roads etc. that not only did not exist at the dates of the sales but were not even foreseeably expected to be built. It is still stranger when one notes that the selling companies were under no obligation to apply for planning permission for the roads etc., or to build them. Yet odder that, even if the roads etc. ever came to be built, the sellers would have no contractual duty to clean or maintain them; it would be at their whim. The surprise multiplies when one notes that (on the Claimant's case) the selling companies were at liberty (immediately after the sales) to dispose of the land where the roads etc. were going to be placed but still claimed payment of the Covenant Charges. It would be commercially counter-intuitive for a purchaser to commit to paying an annual sum indefinitely for the cleaning or maintenance of roads etc. which might never exist, where the seller has no obligation to bring them into being, or maintain them, or even to keep the relevant land.

71. The Claimant argues that the Defendants' appeal to commercial sense impermissibly engages hindsight, that it is only as things have turned out that the contracts appear commercially surprising, and that the judge fell prey to the temptation of correcting what now seems a bad bargain. I do not accept this submission. Commercial common sense falls to be judged at the time of the contract. The Claimant's own case is that a

reasonable reader of the contract would have known, at that time, that any development would be unlikely for very many years, if not generations. It is to my mind commercially improbable, testing matters *as at the date of the contract*, that purchasers would intend to have to pay, from day one, a yearly sum indefinitely for the cleaning, maintenance etc of roads which were (on the Claimant's case) no more than a remote hope, and certainly not an expectation. There is no hindsight involved in this evaluation; it is how things would have appeared to the reasonable reader on the day the contract was made. It is of course possible for a party to sign up to any deal, however commercially improbable it may seem. It sometimes happens. But there is no reason to think that has happened here.

72. Commercial common sense therefore also tells firmly in favour of the Defendants' reading of the Covenants. The process of interpretation is recursive: commercial common sense in this case provides further support for the choices I believe a reasonable reader would make in interpreting the text and syntax of the clause (as explained earlier).

73. For all these reasons I consider that the judge was right to grant the declaration. This part of the appeal is dismissed.

The costs appeal

74. As I have already explained, as well as arguing about the meaning of the contracts, the Defendants ran a number of defences and counterclaims. These were (i) that there had been fraudulent misrepresentations, (ii) that the Claimant was estopped from claiming the Covenant Charges by reason of representations about planning permission and its likelihood, (iii) that the benefit of the obligation to pay the Charges had not been validly transferred or assigned to the Claimant, (iv) that some of the sales contracts had not been properly executed, (v) that monies previously paid by the Defendants under the Covenants had been converted, (vi) that the various selling companies' business activities comprised a single unregulated Collective Investment Scheme, (vii) that the sale contracts constituted or involved irrecoverable consumer credit under the Consumer Credit Act 1974, (viii) that the selling companies and Mr Deschauer had conspired against the Defendants (a claim parasitical on the alleged misrepresentations), and (ix) that the Claimant was required to establish the title of each of the selling companies. Points (iv) and (ix) were hardly pursued at trial and, on the remaining points the Defendants lost.

75. The Claimant says that these various defences and counterclaims greatly prolonged the trial and led to increased costs on both sides. The Claimant's counsel took me on a tour through the way some of these defences and counterclaims were pleaded and advanced, including in a long schedule of alleged misrepresentations and in the Defendants' witness statements. He also said (with some justification) that a number of the defences or counterclaims were barely comprehensible, were bad in law, or were effectively abandoned at trial.

76. The judge addressed each of the defences or counterclaims in his main judgment. He analysed the evidence with care and set out his reasons for dismissing them, and there is no appeal by the Defendants from this part of his decision.

77. The judge gave his main judgment on 9 September 2019. The parties served skeleton arguments on consequential matters including costs. A hearing took place on 25 September 2019. The judge then handed down a reserved judgment on these points ("the second judgment").

78. At the consequentials hearing the judge was faced (as is often the case) with parties urging starkly opposing positions about costs. The Defendants said that, as the winners, they should have all of their costs. The Claimant sought an issues-based costs order, with the Defendants to pay 90% of their own costs and the Claimant to pay 10% of the Defendants' costs.

79. The judge referred in his second judgment to the relevant provisions of CPR 44.2. He cited a helpful summary of the principles in Sycamore Bidco v Breslin [2013] EWHC 583 (Ch) where Mann J said at [11]-[12]:

> "[11] The principles on which I should determine this dispute were not themselves disputed. Many are set out in the judgment of Jackson J in Multiplex v Cleveland Bridge [2009] Costs LR 55:
>
> > "(i) In commercial litigation where each party has claims and asserts that a balance is owing in its own favour, the party which ends up receiving payment should generally be characterised as the overall winner of the entire action.
> >
> > (ii) In considering how to exercise its discretion the court should take as its starting point the general rule that the successful party is entitled to an order for costs.
> >
> > (iii) The judge must then consider what departures are required from that starting point, having regard to all the circumstances of the case.
> >
> > (iv) Where the circumstances of the case require an issue-based costs order, that is what the judge should make. However, the judge should hesitate before doing so, because of the practical difficulties which this causes and because of the steer given by Rule 44.3(7).
> >
> > (v) In many cases the judge can and should reflect the relative success of the parties on different issues by making a proportionate costs order.
> >
> > (vi) In considering the circumstances of the case the judge will have regard not only to any Part 36 offers made but also to each party's approach to negotiations (insofar as admissible) and general conduct of the litigation.
> >
> > …
> >
> > (viii) In assessing a proportionate costs order the judge should consider what costs are referable to each issue and what costs are common to several issues. It will often be reasonable for the overall winner to recover not only the costs specific to the issues which he has won but also the common costs."
>
> [12] In addition:

(i) The fact that a party has not won on every issue is not, of itself, a reason for depriving that party of part of its costs.

> "There is no automatic rule requiring reduction of a successful party's costs if he loses on one or more issues. In any litigation, especially complex litigation such as the present case, any winning party is likely to fail on one or more issues in the case. As Simon Brown LJ said in Budgen v Andrew Gardner Partnership [2002] EWCA Civ 1125 at paragraph 35: "the court can properly have regard to the fact that in almost every case even the winner is likely to fail on some issues" … (Gloster J in Kidsons v Lloyds Underwriters [2007] EWHC 2699 (Comm)).

(ii) The reasonableness of taking a failed point can be taken into account (Antonelli v Allen The Times 8th December 2000 per Neuberger J).

(iii) The extra costs associated with the failed points should be considered (Antonelli).

(iv) One still has to stand back and look at the matter globally, and consider the extent, if any, to which it is just to deprive the successful party of costs (Antonelli).

(v) The conduct of the parties, both before and during the proceedings, is capable of being relevant (CPR 44.3(5)).”

80. Neither side took issue with this statement of the principles before me. As Sycamore shows, while the Court will often undertake a quasi-mathematical assessment of the time and costs spent on particular issues, that is only the starting point and the overall decision as to the appropriate discount often involves a broad-brush judgment. In that case Mann J (at [28]) discounted the costs payable to the winning party by less than the amount he considered it had spent on the points on which it had lost.

81. The core reasoning of the judge on costs is set out in the second judgment at [17]-[21]:

> “[17] The Defendants are the winners. They have succeeded in defending the claim to the Covenant Charges in its entirety I must therefore give weight to the general rule that the winners should receive their costs.
>
> [18] It does seem to me though that the fact that the Defendants failed on the other defences requires that a different order be made. Those defences did account for a large part of the trial, both as to evidence and argument. Those circumstances take this case beyond those where a successful party loses on one or more issues but should not be deprived of any costs as a result.
>
> [19] However, while the defendants lost on the fraudulent misrepresentation defence and related arguments, the defendants were not, in my judgement, unreasonable and running that case. They honestly believed misrepresentations had been made to them about the availability of planning

permission. And I accepted that, had they been made, Baron Deschauer could not have had an honest belief in their truth.

[20] Further, I do not accept that, had the question of interpretation been the only one for trial, there would have been no evidence called at trial. The Covenants fell to be interpreted in light of the factual matrix existing when they were made. At least some live evidence is likely to have been called dealing with that matrix. Further, Terracorp called several witnesses detailing what works have been carried out at the sites, seemingly with a view to arguing that these works come week came within the scope of the Covenants.

[21] Given these last two points and the fact that the Defendants have won overall, it would, in my judgment be unjust to make an order that the Defendants play any part of Terracorp's costs. Rather, justice is done by ordering Terracorp to pay 50% of the Defendants' costs of the proceedings."

82. The Claimants initially sought permission to appeal the costs order on four grounds. The first three criticised the judge for failing to make an issues-based order. The fourth was that "the award of 50% of the Defendants costs of the trial (when the interpretation issue took up approximately 15-20% of preparation and court time) is not just, fair or proportionate as it fails to reflect the Defendants' conduct and level of success at trial".

83. Fancourt J limited permission to appeal to "the question of whether a proportionate order of 50% of the Respondents' costs was unjustifiably high and therefore wrong, given that the Appellants were not awarded any of their costs for the issues on which they succeeded at trial". He said that the judge had correctly treated the Defendants as the successful party and was entitled to conclude that the Defendants had only been partly successful and should be awarded part only of their costs; and that the Claimant should be awarded no part of its own costs.

84. It follows from the terms of the permission order that the only question on the appeal is whether the judge erred in setting the percentage that the Claimant should bear. The judge put this at 50%. The fourth ground of appeal says that the interpretation issue took up approximately 15-20% of preparation and court time. At the hearing of the appeal, the Claimant's counsel did advance some calculations during his submissions about the number of pages devoted in the pleadings, witness statements and trial bundle to the interpretation issue (which he put at around 10%). None of that was in put in evidence before the judge or before me.

85. An appellate court will only interfere with a judge's exercise of discretion in relation to costs in limited cases. The appellate judge does not simply ask whether he or she would have reached the same decision, but, in a spirit of self-restraint, recognises the advantage the trial judge enjoys from being immersed in the case, and having a better feel for the way the case has been run. It is not for an appellate court even to consider whether it would have exercised the discretion differently unless it has first concluded that the judge's exercise of discretion is flawed, i.e., that the judge has erred in principle, taken into account matters which should have been left out of account, left out of account matters which should have been taken into account, or reached a conclusion which is so plainly wrong that it can be described as perverse (see e.g.

Johnsey Estates (1990) Limited v Secretary of State for the Environment [2001] EWCA Civ 535 at [21]-[22] and Dufoo v Tolaini [2014] EWCA Civ 1536 at [40]).

86. In Straker v Tudor Rose (a firm) [2007] EWCA Civ 368 Waller LJ said this:

> "[2] The key issue is whether the judge misdirected himself. It is well known that this court will be loath to interfere with the discretion exercised by a judge in any area but so far as costs are concerned that principle has a special significance. The judge has the feel of the case after a trial which the Court of Appeal cannot hope to replicate and the judge must have gone seriously wrong if this court is to interfere".

87. The judge had the advantage of conducting a six day trial and had a feel for the case. His careful principal judgement shows that he was aware of the large number of defences and counterclaims run by the Defendants and appreciated the nature and scale of the evidential material going to those various issues. He went through the defences and counterclaims and assessed each separately. He was also aware of the way that the Defendants' defences and claims had been formulated and advanced, including in the pleadings and particulars that have been given in various schedules. He commented on some of these in his principal judgment.

88. The costs argument took place soon after the main judgment was given, and the judge had the benefit of long skeleton arguments.

89. The judge's core reasoning on the exercise of his discretion was expressed concisely and would perhaps have benefited from some expansion. But the Claimant goes further and contends that the judge erred so seriously in the exercise of his discretion that this Court should substitute its own view.

90. The Claimant says, first, that although, in [19] of the second judgment, the judge referred to the fraudulent misrepresentation defence "and related arguments" he did not refer to a number of the other defences. It submits that the defences concerning the assignment, due execution, title to the land, conversion, and the Consumer Credit Act do not "relate" to the misrepresentation defence. The Claimant says that the judge appears to have overlooked these other defences and that this is a serious flaw in his judgment.

91. I do not agree with this reading of the second judgment. The judge had recently given the full principal judgment where he had carefully and comprehensively gone through each of the defences and counterclaims. The Claimant's skeleton argument on consequential matters had also gone separately through the various defences and at [15] of his second judgement the judge recorded counsel for the Claimant saying that the Defendants had failed on all their defences save interpretation of the Covenants. The judge was clearly alive to the points on which the Defendants had lost, and I do not accept that he overlooked them when considering costs. Costs judgments are often briefly stated, and I read the phrase "and related arguments" in [19] as shorthand for the defences and counterclaims run by the Defendants which were not successful.

92. The Claimant next criticises the judge for taking account of the fact that the Defendants honestly believed that misrepresentations had been made and were not unreasonable in running the misrepresentation case. It says that he overlooked the

tortuous history of the pleading and the schedule of representations. It points out that the Defendants had alleged a wide and unfocused array of representations which, by the time of trial, had reduced to one main representation. It says that this scattergun approach served to increase the costs. I reject this challenge. The cases show that the relevant conduct of the parties includes whether it is reasonable or unreasonable to run a particular point and the judge, who heard the trial, took the view that the Defendants had not acted unreasonably in running this part of their argument. Again, I read this part of his judgment as stating (perhaps too concisely) that the Defendants' conduct of the defence had not been unreasonable. I see no basis for saying that his view was not reasonably available to him. He was well aware of the way the case had been presented and the evidence that the parties had advanced.

93. The Claimant's principal criticism is that the judge failed to undertake the exercise, at least expressly, of assessing what proportion of the Defendants' costs were properly attributable to the interpretation issue. There is some force in this submission. The judge did not spell out assessment of the amount of the costs attributable to the interpretation issues.

94. There are three comments to make before assessing this submission further. The first is that, even where a judge fails to give sufficient reasons for a decision on costs, an appellate court will only interfere if satisfied that the judge has reached a decision which is plainly wrong (in the sense of being outside the generous ambit of his discretion): see Budgen v Andrew Gardner Partnership [2003] CP Rep 8, where the Court of Appeal referred to English v Emery Reimbold [2002] EWCA Civ 605. At [28]-[30] of English the Court said this about costs decisions:

> "[28] It is, in general, in the interests of justice that a Judge should be free to dispose of applications as to costs in a speedy and uncomplicated way and even under CPR this will be possible in many cases.
>
> [29] However, the Civil Procedure Rules sometimes require a more complex approach to costs and judgments dealing with costs will more often need to identify the provisions of the rules that have been in play and why these have led to the order made. It is regrettable that this imposes a considerable burden on Judges, but we fear that it is inescapable.
>
> [30] Where no express explanation is given for a costs order, an appellate court will approach the material facts on the assumption that the Judge will have had good reason for the award made. The appellate court will seldom be as well placed as the trial Judge to exercise a discretion in relation to costs. Where it is apparent that there is a perfectly rational explanation for the order made, the Court is likely to draw the inference that this is what motivated the Judge in making the order. This has always been the practice of the Court - see the comments of Sachs LJ in Knight v Clifton [1971] Ch 700 at 721. Thus, in practice, it is only in those cases where an order for costs is made with neither reasons nor any obvious explanation for the order that it is likely to be appropriate to give permission to appeal on the ground of lack of reasons against an order that relates only to costs."

95. Hence a judge should give reasons where he makes an order out of the ordinary. But it is not enough to say that the judge has failed to give sufficient reasons. The Court will only intervene where there is no obvious (or rational) explanation for the order.

96. The second comment is that, as explained in the Multiplex case, where the court concludes a percentage order is appropriate, the successful party is likely to be entitled to the costs of common issues in the litigation, as well as the costs of discrete issues on which that party has won. Here, the judge held that some of the evidence about the process by which the plots were sold to plot purchases was relevant to the factual background against which the contracts were to be interpreted. I note in this regard that during the appeal on the interpretation issue, counsel for the Claimant took me to a number of passages in the witness statements of the Defendants and Mr Deschauer to seek to establish what the Claimant said was the relevant background. That was part of the evidence before the judge at trial.

97. The Claimant says that, without the plethora of defences run by the Defendants, the evidence about the factual matrix would have a good deal more contained and that may be right; but the judge did not say that all of the evidence was relevant to interpretation, only some of it. This was an assessment he could make in light of his knowledge of and feel for the case.

98. The third comment is that while the extra costs associated with failed points need to be considered, the court still has to stand back and look at the matter globally and consider the extent, if any, to which it is just to deprive the successful party of costs (see the guidance given in the Sycamore case). The exercise is not mechanical, and it involves an element of discretionary judgment. The ultimate question is what the just costs order is.

99. With these three points in mind, I return to the Claimant's challenges to the judge's decision. In the second judgment the judge started by concluding that the Defendants had won overall but also recognised that the Defendants had lost on a substantial number of issues and that these had led to the trial being longer and more complex. This justified a deduction from the costs payable to the Defendants. He noted that some of the costs would have been incurred in any case in relation to the factual background to the contracts and also noted that the Claimant had called evidence to attempt to argue that some works have been carried out within the scope of the covenants. He took account of the conduct of the parties and the reasonableness of the Defendants' conduct of the case. As I read [21] of his second judgment, he then stood back and asked overall what the just outcome was. This is how he came to the 50% proportion.

100. Ideally the judge might well have given fuller reasons. He should probably have set out more explicitly the proportion of time which he considered was spent on the interpretation issues and the common issues and attempted to quantify this, at least as a starting point. He should also have said more than he did in [19] about the various other defences and counterclaims that had been run by the Defendants.

101. However, I am unable to conclude that the judge's decision was not rationally open to him or that he erred in the exercise of his discretion. The judgment shows that he took into account the fact that the Defendants had lost a number of issues and he considered the conduct of the parties, as well as the fact that some of the evidence

would have been required in any case. But he also gave weight to the fact that the Defendants had won an important victory by obtaining a declaration that they were not liable to pay the Covenant Charges to the Claimant. This was the target of the proceedings. The judge was fully immersed in the details of the case and he had a far better understanding of the various strands of evidence and how much time they took at the trial than this court can possibly achieve: the appeal on this point was largely an exercise in island-hopping. As I read his judgment the Judge was well aware of the arguments that the lost defences had taken up much time and cost and had in mind the course the proceedings and trial had taken. The judge had to make an overall decision as to the justice of the costs order and that is what he did. I do not see any basis for concluding that his decision was irrational or outside the range of decisions reasonably open to him.

102. The Claimant has not established that the judge's exercise of his discretion was flawed. The costs appeal is dismissed.

Conclusion

103. The appeal is dismissed.