In the Truro County Court Claim No. 9TR90003

Before:

HIS HONOUR JUDGE COTTER QC

Between:

DENNIS PHILLIPS and ROYNA GODDARD
(suing on behalf of themselves and other owners of 97 Holiday Chalets at Point Curlew, St Merryn, Padstow, Cornwall)

Claimants

and

(1) MARTIN FRANCIS
(2) REBEKAH KATHERINE FRANCIS

Defendants

Christopher Stoner QC and Rawdon Crozier (instructed by Wolferstans) for the Claimants
Ewan Paton (instructed by Meade King) for the Defendants

Hearing dates: 14th , 15th and 16th February and 26th , 27th , 28th April (written submissions received on 12th May and 19th May 2011)

JUDGMENT

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His Honour Judge Cotter Q.C. :

1. Introduction

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1. This case concerns a 25 acre holiday site, in St Merryn, Cornwall, known as Point Curlew. It is situated on a former airbase close to the Coast. The freehold was acquired by the Defendants on 22nd April 2008 when the site consisted of 153 Chalets, let on 999 year leases, 11 lodges and a number of other buildings including an amenity centre. The freehold was purchased from the previous landlord St Merryn Holiday Estate Management Company Limited ("the Old Company") which had found itself in financial difficulties by reason of its borrowing to finance redevelopment work at the site.

2. The Claimants are 88 individuals and couples who together own 96 of the chalets on the site. By this action they seek various declarations as regards their liabilities under the leases, principally in relation to service charges payments.

3. Very shortly after the acquisition of the site the Defendants embarked on an extensive and expensive programme of works across the site. It is the Claimants' case that the apparent purpose was the turning of the site into a luxury holiday complex, with the aim of selling additional new chalets, marketing the caravan park on the site to visitors and encouraging the use of the facilities by temporary and permanent residents and visitors. As a result the site would be a much more valuable entity. The Claimants, who hold chalets on long leases, believe that they have no direct or indirect financial interest in the balance of the site being the subject of what they consider a radical upgrading. It is their case that the majority of the works were unnecessary, did not constitute repair or maintenance, rather redevelopment of the site, and that the Defendants have sought to recoup through the service charges items that cannot properly be charged to the leaseholders. Hence, the essence of the dispute is whether the Defendants can recover the costs of this still only part completed programme of works (which the Claimants believed to be likely to cost in the region of £2 million) through the service charge provisions of the leases of the chalets, or whether the Defendants (as landlords) should bear all or the majority of the cost of the works undertaken .

4. The expenditure so far certified as annual service costs to be claimed back by the Defendants by way of contribution under the service charge provisions, for the years 2008 and 2009, is ;

a) 2008 ; £ 269,953 (see Bundle 6 p 1380; certified by CV Ross & Co Limited on 22nd January 2010) ; a notable item of expenditure being £132,368.40 said to be in respect of "site maintenance/construction".

b) 2009 ;£583,542 (see Bundle 7 p 1911 certified by CV Ross & Co Limited on 22nd January 2010) ; notable items of expenditure being £279,716.15 also " site maintenance/construction" and £95,000 for the wages of Mr and Mrs Francis

The total for the two years of £853,476.36.

5. As I understand matters the expenditure anticipated to be certified for 2010, as set out within the 5th witness statement of Mrs Francis is either £224,000 or £274,000 This will bring expenditure for the three years 2008, 2009 and 2010 to well over a million pounds. However, payment on account has or will be sought in respect of substantial proposed works to the amenity centre, roads, drainage and lighting.

6. In order to understand the nature and extent of the works it is necessary to set out the layout of the site. I should add that I had the benefit of a short film of the site and also a site visit. At Annexe A to this judgment are two Google Map images, which were submitted with the Claimants' skeleton argument

7. Picture 1, at the top of the page, shows the Point Curlew site in approximately 2001 i.e. at a time well before the Defendants purchase.

8. Picture 2, at the bottom of the page, is a more recent image , I was not given a date , which shows:

(a) The Chalet Area in red marked as "A". It is in this area that the Claimants and all those they represent have holiday chalets on 999 year leases. Photographs of the chalets are at Bundle 5 pages 1343 – 1345. They are not very substantial structures.

(b) An area in pink marked "B New Lodge Construction". In this area the Old Company commenced the building of new bases for new holiday chalets to be constructed and sold. These bases can be seen at Bundle 5 pages 1245 – 1248.

(c) An area in blue marked "C Caravan Park". This is an area on which touring caravans can come and rent pitches, no doubt principally in the holiday season.

(d) An area marked "D – Former Amenity Centre". This is a building which previously comprised a reception area, amusement arcade, children's play area, restaurant, bar facilities, two shops, laundry, kitchens, WC, office and a

manager's two bedroom flat prior to the Defendants stripping the entire building out in 2008. It presently remains as a shell unused saved for storage .

(e) Below the yellow former Amenity Centre, there is an island site, so created because of the roadways (shown also at Bundle 4 p 851). On this island site the Defendants have built an entirely new structures consisting of shop and office and laundry/staff rest room . A photo of the shop/office can be seen at Bundle 5p1325 – top].

9. Also of use in terms of general information and orientation ; the plan at Bundle 3 page 813 is a useful as it sets out the position of the Banks prior to removal and there are photographs in Bundle 5 that show the amenity centre after it has been stripped out

10. Although such plans and photographs give valuable assistance I still found the site visit to be of very considerable benefit .

(a) History of these proceedings

11. These proceedings had a long, eventful and from the view of case management far from satisfactory, route to the commencement of the hearing before me.

12. The issues to be determined by the Court have mutated if not wholly changed during the course of the proceedings, as a result of i) the passage of time ; ii) Changes in the case advanced on behalf of the Claimants iii) The Claimant's success on a preliminary issue iv) the particularisation of the Claimants' case on specific service charge items.

13. The proceedings began in February 2009, as a Part 8 claim brought by the Claimants accompanied by an application for an interim injunction to restrain threatened forfeitures for non-payment of service charges. At that time, the Defendants had been owners of the site for less than a year. They had informed lessees of a considerable shortfall between recovered service charge and expenditure for the year just ending (2008), and had also issued an '*on account'* demand for 2009 in the sum of £2710.84 plus VAT each (£1250 payable within 21 days, and the rest by monthly instalments of £169.77. That was based on estimate for 2009 expenditure of £450,000, then divided 166 ways, including a large amount of anticipated expenditure on the recently closed amenity centre.

14. The Part 8 claim form sought declaratory relief upon issues including "*improvements*", expenditure on "*the Defendants' own commercial*

activities", and on "*parts of the Estate which the Claimants do not 'use in common with other lessees'* ". The only specific item mentioned was the amenity centre, as regards which a declaration was sought that expenditure *"..on the building on the site of the former amenity centre..is not recoverable*" as an "*improvement"* or because it was not now an amenity centre "*used in common with other lessees".* The claim form also sought determination of the charges payable for 2008, and what should be paid on account for 2009.

15. An application for an interim injunction was unsuccessful. Directions were given during further Case Management Conferences which were intended to achieve the completion of a Scott Schedule for what was then anticipated 2009 expenditure. As 2009 passed, it became obvious that the matter would not be tried before the end of that year. HHJ Griggs therefore made a further direction requiring the Defendants to provide their certification of actual expenditure (for 2009 and 2008) by 22nd January 2010.

16. As I have set out the certified figure for 2008 was £269,953.49. The certified figure produced for 2009 was £583,542.87. In each case the certificates were accompanied by the relevant invoices making up those figures.

17. Having begun the court proceedings on the express basis that the Landlord and Tenant Act 1985 ss.18-30 (provisions on service charges payable by lessees of "dwellings") did *not* apply to these lease, by virtue of the Lands Tribunal decision in **King v. Udlaw** [2008] 20 EG 138, the Claimants had a change of stance after a review of the case law, some of it recently reported. In February 2010 they raised the issue/argument that the chalets were dwellings, that the Act did apply, and that **King v. Udlaw** was wrongly decided.

18. That issue was directed to be tried as a preliminary issue by HHJ Griggs, sitting in the High Court, who then found in the Claimants' favour in a reserved judgment handed down on 24th March 2010: see Bundle 1p 116.

19. The judgment of HHJ Griggs had very important consequences; specifically ;

    i) By Virtue of section 19 Landlord and Tenant Act 1985 service charges were subject to the qualification that the *"relevant costs*" on which they were based were recoverable only so far as they were "*reasonably incurred*"

    ii) Sections 20 and 20ZA of the 1985 Act containing the obligation to consult on "*qualifying works*" applied. This meant that if there were any "qualifying works" within the meaning of section 20 included in the service charge for which there had not been the statutory consultation (under the relevant statutory

regulations: the Service Charges (Consultation etc.) Regulations 2003), the recovery of service charge for those works would be limited to "the appropriate amount" of £250 per tenant, unless the consultation requirement was dispensed with under s20ZA

20. At a case management conference on 14th June 2010 the extant directions were amended and revised through to a final trial. In particular, the Claimants were required to comply with existing orders as to disclosure, identification of Claimants, and identification of items in dispute. On the last point, they were required to specify whether particular items were disputed as being outside the lease provisions, unreasonable, or both: see e.g. order of 14th June 2010.

21. The Defendants making applications for strike out or unless orders in July and August 2010, due to what was said to be delay by the Claimants in complying with the order . They also applied to expedite the trial.

22. By the time those applications came before HHJ Tyzack QC on 18th November 2010, some further disclosure had been provided, and the Claimants had provided some responses to the Defendants' 2008 and 2009 actual expenditure. The 2008 Schedule goes through each item ; see Bundle 1 p228, whereas the 2009 response (replacing a previous, and now abandoned version which sought to use the original form of the 'anticipated expenditure' schedule rather than responding to what the Defendants had actually spent is in more general terms.

23. As I understand matters, and as Mr Paton sets out within his skeleton argument, HHJ Tyzack QC "*made his views very clear on the delays in the matter and the need to have it tried*". The learned Judge awarded the Defendants the costs of their applications and refused the Claimants any more time in which to comply with the previous directions as to expert evidence.

24. The Claimants appealed that order, but the oral hearing for permission had not been listed before the commencement of the trial before me. This unfortunate state of affairs had obvious repercussions as to my conduct of the hearing. Eventually, at a hearing before Mr Justice Burnett which took place after the first three days of the hearing it was ordered that issues of expert evidence should be considered by me as the trial judge at the conclusion of the first stage of the hearing.

25. However the problems that I faced as the trial judge went beyond the fact that there was an outstanding appeal against an interlocutory order which covered the evidence to be adduced at the trial. It was clear that inadequate consideration had been given by the parties to the conduct of the trial and the resources of the court. I shall return to these issues at the conclusion of this judgment

(b) Ancillary Issues ; conduct

26. As is sadly so often the case in property or neighbour disputes the witness statements served on behalf of the parties contain a number of ancillary issues of alleged misconduct by the other party. I indicated at the outset of the hearing, that given nature and extent of the matters at the heart of the hearing, the available time and proportionality I would not hear any evidence upon such matters.

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(c) Issues for determination

27. The Claimants issued a Part 8 claim seeking a number of Declarations. The Declarations now sought are as set out in the Amended-Details of Claim ; see Bundle 1 p 3-10. .

28. Mr Paton, Counsel on behalf of the Defendants stated at the outset of the trial that ;

> *"It is now February 2011, but this trial concerns the actual expenditure in, and recoverable service charge for, the years 2008 and 2009. The totality of invoices, and certified expenditure for both of those years, have been known and disclosed for over a year (and in the case of the 2008 invoices, over two years). They can be found in bundles 6, 6A (2008), 7 and 7A (2009). The Claimants' specific points on the 2008 expenditure are at [B1 Tab 8] incorporating the Defendants' responses. The Claimants' shorter form responses to the 2009 expenditure, and the Defendants' response to those, is at [B1 Tab 9]. In the course of considering and declaring the sums for those years, the Court will also have cause (and will be asked) to rule on some general issues of principle and interpretation."*

29. Any court should extremely wary of hiving off issues to be determined on a preliminary basis; or of the sequential determination of issues. However, given the peculiar circumstances as faced by the court at the commencement of the hearing, and in line with the submissions of Mr Stoner Q.C. leading Counsel on behalf of the Claimants, it was my judgment at the outset of the hearing that that the appropriate way to proceed to use the limited court time available was to first attempt to determine the general issues of principle and interpretation. Further, and at the same time to determine some specific issues of fact that will

allow the future determination of a number of sub-issues. It is to be remembered that this will be a subsisting relationship and the Claimants have refused to pay any further service charge since March 2010. If necessary there would then be a separate hearing (" Part 2") to consider the quantum of individual charges.

30. As a result I indicated that within the first part of the hearing I would consider

    (a) The issues of law and construction relating to the proper interpretation of the leases (which form the basis of the declarations sought by the Claimants)

    (a) Principal issues of fact

    before any individual and discrete issues relating to the service charges actually payable for 2008 and 2009. As such this is in effect, and despite reservations as to this method of progressing, a judgment upon a number of preliminary and also discreet issues.

31. As for Part 2 and consideration of the specific invoices, the Part 1 findings should allow, to quote Mr Stoner Q.C. leading Counsel for the claimants, "*a proportionate and focused exercised shorn of various permutations as to when a particular invoice may or may not be wholly or partly relevant*."

2. Background to the charges

32. I shall now set out the relevant background to the charges in dispute and in so doing some factual findings.

33. It is sensible to start with the trading of, and works undertaken and proposed to be undertaken by, the old company.

34. There are few pictures of Point Curlew under the tenure of the Old Company. However a picture of the amenity centre (as it was) is at Bundle2 page 418 and an old brochure with various photographs (including of the interior of the amenity centre) is at Bundle 2 pages 552 – 557.

35. The Old Company had borrowed money (from Banks), this as opposed to attempting to claim it through the service charge, with a view to a radical overhaul and improvement of the site. The plan annexed to the leases of lodges (see e.g. the lease dated 25th August 2006 to Michael and Hazel Bale shows the ambitious plans of the old company for the site which included a new swimming pool and changing facilities as

an extension to the existing clubhouse, tennis courts and changes to the entry roads and landscaping

36. The old company also undertook significant works of maintenance. There is a report which is said to date from 2006 and which was produced by Edward Symmons for the bank that had lent money to the Old Company ; see Bundle 4 p 1179. This sets out that the Old Company had spent £88,777 on soil and surface water drainage, a combined total of £150,817 on new roads (said to be phase 1) and £102,797 on landscaping and planting.

37. The report also set out views to be used the formulation of the comprehensive marketing approach. This included addressing what was stated to be the initial poor impression upon arriving at the amenity block " *as little money has been spent in this area*". It is stated that the management company should reconsider, inter alia actions to "*improve amenity block frontage. Refurbish amenity block entrance and possibly utilise shop as display area*"

38. The residual method of valuation is also set out, relying on the assumption that a developer would make his bid for the site based on projected growth development value of the scheme on completion less costs of the works including fees, interest in profit with the residue reflecting the amount he could afford to bid up for the site allowing for a minimum profit margin .The amenity centre is given a value based on turnover of £200,000.

39. The service charge for the year 2007 was £1478.75 ;Bundle 1page 205

40. As I have set out the Defendants purchased the site on the 22nd April 2008. Within about ten days of their acquisition, at a meeting with chalet leaseholders on 3rd May 2008 the Defendants identified plans already formed to undertake extensive works.

41. As Mrs Goddard recollected, and I accept her recollection as accurate , that those chalets owners present "*left the meeting feeling very positive about everything*.". Importantly Mr Francis stated to those present that the chalet owners had been paying too much maintenance and that his intention was to bring the site to a first-class standard. He talked about the caravan park as resembling a gypsy site. Mrs Goddard distinctly remembers Mr Francis" *banging his fingertips on the table*" and saying that the works to the caravan park, clubhouse and new Lodge Park would not cost the chalet owners anything.

42. The meeting was followed by a letter sent by the Defendants to all chalet owners on 15th May 2008.

> *" We are both very excited about the future and look forward to making point Curlew holiday Park the site to be proud of, and one we should all benefit from"*

And under the title renovation/upgrading of the site it is stated;

> *" it is our intention to improve the park and facilities at point Curlew over the coming months*."

It continued

> *" the touring Park has been closed for the 2008 season, and works have already started to remove the banks around the touring Park, the site will then be levelled and had standing to put in place for caravans/motorhomes and the shower block/dishwashing facility will be rebuilt to a higher standard*"

And

> *" The main renovation/upgrading of the clubhouse will take place during the winter months, and more consideration is needed by ourselves to ensure that we make the right decisions some cosmetic upgrading/minor alterations will be undertaken for this season's trading period"*

At the conclusion of the letter it is stated;

> *" it is our intention to make point Curlew a better place for both the chalet owners and their guests, our aim is to provide an attractive family friendly site for us all to be proud of.."*

The letter also stated

> *" Please find attached an invoice for payment on account in respect of the anticipated service charge 2008 and for the years ground rent.*

43. The detailed letter, sent within a month or purchase of the site also covers issues of maintenance, leases and administration of bookings with relevant prices, the cleaning of chalets and general administration. It is clear from this letter that some thought had been given, and planning undertaken, by the Defendants as to the nature and extent of works required to bring the site up to what they consider to be the standard to be achieved. I find as a fact that much remained to be considered on a detailed basis. However, as I shall set out in more detail in due course it is in my opinion important to note that the work upon the removal of the banks had already started with the intention that the site be levelled. The tenor and content of the letter in no way supports the explanation later given by Mr Francis that this step was in effect an emergency one undertaken by reason of the rat infestation.

44. More importantly the content of the letter made it clear that Mr and Mrs Francis wish to engage not upon a programme of repair and maintenance of the site i.e. to bring the existing facilities and layout up

to relevant intended standards at the time of construction or installation, rather the intention was to improve the park and facilities, produce higher standards and provide an attractive family friendly site that they could be proud of. In my judgment, it was a clear mission statement.

45. Having heard the evidence of Mr and Mrs Francis and considered all other documentation, it is my finding that it was a mission planned in outline, but only in broad outline, before purchase and built on an understanding on their part that the vast majority of the costs of the improvements throughout the site could be charged back to the chalet leaseholders. I am therefore puzzled by his comments at the first meeting that the works to the Club house would not cost a penny.

46. A further meeting took place on 25 October 2008. Mrs Goddard stated

> *" At the next meeting we were invited to attend was held on Saturday, 25 October. We were rather surprised to find heavy's (sic)/bouncers on the door and assume that Mr Mrs Francis were expecting trouble by what they were about to tell us. It was at this meeting Mr Francis dropped his bombshell ; he announced that our maintenance was to increase the £2710 plus VAT per chalet. Several owners reminded him what he had said at the April meeting, that we had been paying too much in the past and that the refurbishment to the caravan park, amenities centre and Lodge Park wouldn't cost us a penny, to which he replied that that was a mistake, we had misunderstood. He said that the site was enough far worst (sic) State land he thought…… I do not remember much else about that meeting I was too shellshocked by his reaction to my husband and also knowing that this maintenance increase would be an impossible amount to have to find. As we left the meeting, me and my husband discuss the situation with other owners, we were all very, very concerned, and came to the conclusion that Mr Mrs Francis were asking for this amount not to maintain our chalet site but to refurbish everything not owned by us, which was totally unfair. We no longer owned the site, they did, therefore it was their property and they should finance any refurbishments therefore necessary themselves. My husband and I, and a few other owners decided that somehow between us we had to challenge these charges and bring them back to a more realistic figure.*

47. It was the evidence of Mrs Francis that what took place at the meeting was accurately reflected in a letter dated 5 November 2008 which was placed on a website. It stated

> "*we explained the need for the removal of the banks due to terrible problems that we had on site with regards to rats. The banks were constructed of rubble which was dug out originally*

to build chalets on site. Over the years the rubble was dumped and topsoil was thrown on top. The banks were being used to dump rubbish. Nothing would grow in the concrete. The banks were infested with rats. Therefore we made a decision that immediate removal of the banks was essential to address all of these problems"

" we also explained that when we originally advised all owners as we were to commence work renewing the touring Park, we did not at that time know how bad the drainage problems on site as a whole were. Since May we have been trying to sort out all of these problems, many very serious problems concerning the poor way the drains had been originally constructed by the previous owners of the site. We found many problems that were leading down from the top of the park all the way to the pump house. We are now only just resolving these issues so hopefully in the future much of the drainage system will be working more efficiently and hopefully we'll have fewer problems on this side of the estate."

and

" We discussed that speeding has been a problem on site this year. We will be putting up a barrier and speed humps next year, but we do expect everyone who uses this site to abide by the site speed limits of 5 MPH . Please ensure all of your guests are fully informed on this issue as if anyone continue to speed on site we will be asking them to leave."

and

" We discussed our plans for the site in the future. The amenity building is diabolical. It has many major problems that have not been done in the past and the time has come where we cannot allow this building to remain open to the public as we have serious health and safety issues with regards to this building. We feel from speaking to.. Chalet/lodge owners that the amenity centre has been embarrassment and disappointment to the site for a long time. The previous owners SMHEMC had intended to address this building out its problems before, but.. never got round to it (planning permission was obtained). Therefore the refurbishment of this building now is essential as is long overdue. This amenity centre has affected the whole of the estate is dire appearance and lack of facilities. Since we have been working so hard to improve the site and bring it up to a respectable standard the next step must be this building. We discussed with all who attended this meeting that we intended to renovate.. refurbish this building immediately. We discussed the alternative of knocking this building down and rebuilding a new one. We

asked for views on this and the majority of people who attended the meeting appeared to feel the same. It was best to go ahead with refurbishment immediately rather than the far greater cost and delay involved in a demolition of the current building."

48. As matters then progressed the following service charge demands have been made by the Defendants:

    (1) For period 1 January – 31 January 2009 demand dated 29 December 2008 in the sum of **£3117.47** [B1/212]

    (2) On account demand dated 1/1/10 for period 1 January – 31 December 2010 in the sum of **£3290.00** [B1/216]

    (3) On account demand dated 14/5/10 for period 14 May – 31 December 2010 in the sum of **£9599.27** [B1/220]

    (4) On account demand dated 31/12/10 for period 1 January – 31 December 2011 in the sum of **£9803.51** [B1/223]

49. In addition the expenditure for the period 22 April – 31 December 2008 has been certified as a total sum of **£269,933.49** Bundle 6 p1380 and the expenditure for the period 1 January – 31 December 2009 has been certified in the sum of **£583,542.87** Bunde7 p1911. No demands, however, have actually been served post certification.

50. Anticipated expenditure for 2010 sought from the leaseholders was **£1,397,000** Bundle 1 p220.

51. Those service charge demands were in respect of expenditure and anticipated expenditure on the following items which are subject to dispute :

    (1) Stripping out and rebuilding/refurbishing the amenity centre (including anticipated expenditure of £900,000 less 30% landlord's contribution);

    (2) The construction of the new office/shop/laundry block.

    (3) The removal of banks surrounding the park to control an established rat infestation.

    (4) Works relating to drainage

    (5) New street lighting;

    (6) The installation and subsequent remodeling of speed humps;

    (7) The replacement of old paths and creation of new paths;

(8) A management fee

Issues of Construction

52. In advance of the hearing the Claimant's produced a document entitled " 22 key issues and findings".

53. In relation to the construction of the lease the issues it was stated that the issues falling for determination in Part 1 of this hearing were

    a. Meaning of estate

    b. Demands for payment/Anticipated expenditure

    c. Construction of clause 4

        i. Management and maintenance in the Claimant's leases

        ii. Provision of such services

        iii. Fair and equitable proportion

    d. Construction of Schedule 3 clause 7

        1. Clause 7 ; An Amenity centre

        2. Clause 8 ; The management charge

    e. Qualifying works ;(sec 20 L & T Act 1985 & service charge consultation regulations) 2003 ;Contribution limited if not subject of consultation; More than one set of works (i.e. more than one set of charges and not covered by the same cap).

54. Before turning to issues of construction I should observe that there can some times be real difficulties arising from a court considering issues of interpretation of either legislation or as here, a contract, in a factual vacuum. However, it appeared to me that there were in fact only two significant issues of pure construction ; the ability to seek advance payment as against the future costs of matters covered by the service charge and the ability to levy a free standing management charge.

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55. An example chalet lease ("the Standard Lease") is at Bundle 1p14. There are various forms of leases over the years, but only with minor relevant variations, up to 2007. The 2007 lease does have a significant variation.

56. There are also leases for the lodges ; and I shall deal with any variations as they become relevant.

57. The following are the essential elements of the Standard Lease ;

    (1) The Estate is defined in the 1st recital Bundle 1p14; as Wardles Leisure Estate (a former name of Point Curlew) and reference is made to Plan B Bundle 1p32.

    (2) By clause 2q the lessee covenants with the lessor to actually pay the service charge, referred to as "service rent" in the following terms:

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

    (3) The definitions of "service rent" and "accounting date" are contained in clause 4 Bundle 1p22 which provides:

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

(4) The mechanics of certification are contained in the following sub-clauses of clause 4 ;

"*(a) Such certificate as to the amounts or sums actually expended or liabilities incurred as aforesaid shall be final and binding on the accounting date of each year as may be practical PROVIDED ALWAYS that any omission by the Lessor of any sum expended or liability incurred in any year shall not preclude the Lessor from including such sum or the amount of such liability in the certificate of any subsequent year or years as the Lessor shall deem fit PROVIDED FURTHER that there shall not be included any sum which is:*

(i) Properly recoverable by the Lessor from the Lessee under the terms and provisions hereof or by general law; or

(ii) Actually recovered by the Lessor from the Lessee of any other part of the Estate under the terms and provisions of the Leaser under which such Lessee holds or by general law;

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

(5) Schedule 3 then provides the only expressed services within the Lease. The following sub-paragraphs are of some significance ;

"*[3] The maintenance operation and clearing of soil and drainage pipes and other conducting media conduits and channels and pumps in relation thereto."*

"[6] Management of the Estate and its appurtenances including where applicable the charges wages pensions contributions insurance and provision of uniforms and working clothes of any staff employed by the Lessee and the provision of telephones (if any) and also the cost of providing tools appliances cleaning and other materials bins receptacles together with any amounts of fees paid to

architects agents surveyors and solicitors employed by the Lessor in regard to the management of the Estate."

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

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

58. Another significant provision is paragraph (d) of Schedule 1 [1/26], namely the easements by which the lessees benefit, which provides:

"*The right to use such areas as the Lessor shall from time to time designate and not otherwise demised to the Lessees on the Estate for purposes in connection with the use and enjoyment of the demised premises."*

59. The 2007 Lease Bundle 1 page 44 varied from the above provisions, in two significant respects;

(1) The definition of "the Estate" contained in the recital is by reference to two title numbers at H M Land Registry as well as identification by through a plan. The two title numbers cover the whole of the site.

(2) Clause 2q does include any payment on account provisions ; see Bundle 1p52.

60. I now turn to the specific issues as identified

(a) The Meaning of "Estate"

61. There is a declaration sought by the Claimants as to the meaning of "estate". The Estate is defined in the 1st recital Bundle 1p14 as "Wardles Leisure Estate" (a former name of Point Curlew) and reference is made to Plan B ; Bundle 1p 32. The plan clearly shows that the estate excludes the area described as " New lodge construction" as shown in pink on the Google maps annexed to this judgment , the field area to the North and (for no reason that is apparent to me) the end of the nose of land formed between the main road and the old entry road. As a result no charge can be made under the standard lease for any works on the lodges and the field. I was

puzzled as to why this particular declaration had been sought in relation to the leases of the chalets. The position seemed to me quite clear and I could not see the material dispute.

62. However as set out above the 2007 chalet lease and lodge leases have a different definition of estate and incorporates the whole of Mr and Mrs Francis freehold estate; see 2007 draft lodge lease at Bundle 1 p44 and the lease at Bp 64 with "*the Estate*" defined as comprising both of the titles CL132618 and CL140205. The latter is the title to the lodge area, recreation field and the strip of land between the amenity centre and the road.

63. The aspect described as an "*oddity*" by Mr Paton is that on the lodge leases "the Estate" was then described as "for the purpose of identification in part edged red on plan B annexed hereto", which plan B was then the title plan of CL140205 alone. However, to the extent that there is any uncertainty, the clear words of description should prevail over the plan, and the plan should be regarded in those leases as identifying the Estate only "in part".

64. In his reply Mr Stoner Q.C. referred to the fact that the Defendants seemed, through the answers of Mr Francis, to be accepting that charges had been levied on the basis that for the standard the lease the lodge area was part of the estate. To the extent that this has taken place it is clearly wrong and a reconciliation within the figures are required. This can be addressed, if necessary, during Part 2.

(b) Demands for payment for anticipated expenditure

65. This is of course a pure point of construction of the words used in a contract.

66. It is an important issue as the ability to seek payment for anticipated expenditure underpins a very substantial amount of the on account demands. It the Claimants' case that upon a proper construction of the standard lease it does not enable the Defendant to finance expenditure by taking advance payment from the lessees.

67. The Claimants' interpretation of the provisions of the lease (see skeleton paragraph 42 et seq) is as follows ;

    (a) The lessee covenants in clause 2q to pay within 14 days of a written demand. That written demand falls to be served after the accounting date.

    (b) To find what the accounting date is one has to look to clause 4. Clause 2q expressly directs the reader to clause 4 by reference to the words "*as hereinafter defined*". The definition of

"*accounting date*" is the 31st December or such other date as the landlord may determine.

(c) As a result the additional rent is payable within 14 days of the written demand, which itself cannot be served until after the end of the year (being the accounting date).

(d) The landlord is required to certify the expenditure in the relevant year (to 31st December), that certification being in respect of "*the aggregate of sums actually expended on the liabilities incurred by the lessor*" in the period ending on the accounting date. The service rent is payment in respect of such actually expended.

(e) Returning to clause 2q; Bundle1p21, there is a proviso which includes the only payment on account provision in the lease. It reads:

"PROVIDED ALWAYS that the tenant shall pay to the Lessor on each of the accounting dates in every year during the term such sum or sums as the Lessor may reasonably require on account of the said service charge and any such payment to be credited to the tenant against payment of the services as certified to be due from it (as hereinafter provided) by the certificate issued next after the making of such demand…"

(f) The proviso therefore allows the landlord to seek a payment on the accounting date, being the 31st December (or such other date as the landlord determines). This, Mr Stoner Q.C. submits, makes perfect sense as it enables the landlord to seek payment on account pending completion of the certification process. It is also reinforced by the fact that the payment on account is of "*the said service charge*" which is the service rent defined in clause 4, that unequivocally being the fair and equitable proportion of "sums actually expended on the liabilities incurred by the lessor" ending on the 31st December in any given year.

68. Attractive though Mr Stoner's submission were I do not accept them.

69. My findings as that there is a rather more straightforward meaning.

70. The service charge is ascertained by a certificate that sets out the sums actually spent in the year up to the accounting date ; here 31st December As soon as practicable thereafter (this being a tighter and more onerous requirement that reasonable practicable) the lessor will submit to the Lessee a statement certified by the lessor's agent to show the computation of the said sums expended and the liabilities incurred (hereinafter called "the annual service cost") for the proceeding year

and the Lessee shall be entitled within fourteen days of receipt of such statement to inspect the vouchers and receipts of all items included in such statement.

71. After 31st December and when a certificate is available to the landlord a written demand can be served and the amount must be paid within 14 days

72. However the lease further provides that on the accounting date 31st December the tenant shall pay to the Lessor "*such sum or sums as the Lessor may reasonably require on account of the said service charge*".

73. The ambiguity said to be present is whether this means

> (a) the service charge in respect of the previous year; shortly to be certified and paid within 14 days (Claimants' interpretation)
>
> or
>
> (b) The service charge for the forthcoming year (Defendant's interpretation)

74. Before considering the relevant provision I should state that the usual principles of construction of a contract apply as a lease is no more than the contract governing the terms on which the land is let. Whilst accepting this broad guiding proposition Mr Stoner Q.C. also relied upon the helpful analysis set out in **Earl Cadogan-v- 27/29 Sloane Gardens Ltd and another** [2006] 2 EGLR 89 by HH Michael Rich QC . He stated

> *17] When my decision in* Gilje *was considered by the Court of Appeal [2001] EWCA Civ 1777 (reported at [2002] 1 EGLR 41), it likewise referred to the decision in* Agavil. *Its approach to the construction of lease provisions such as the present was stated by Laws LJ, in para 27, as follows:*
>
> > *The landlord seeks to recover money from the tenant. On ordinary principles, there must be clear terms in the contractual provisions said to entitle him to do so. The lease,* moreover *was drafted, or proffered, by the landlord. It falls to be construed* contra proferentem.
>
> (Emphasis added.)

He then said, in para 28*:*

> *At the end of the day, I do not consider that a reasonable tenant or prospective tenant, reading the underlease that was proffered to him, would perceive that para 4(2)(1) obliged him to contribute to the*

> *notional cost to the landlord of providing the caretaker's flat. Such construction has to emerge clearly and plainly from the words that are used. It does not do so. On that short ground, I would… dismiss the appeal.*

[18] I think that in these passages, unless read carefully, Laws LJ may appear to be conflating two separate principles of construction. That is why I have underlined his use of the word "moreover", which indicates that he was not treating the requirement of clear terms as the same as the contra proferentem *rule that, as Mr Denyer-Green reminded me, by reference to the short judgment of Cairns LJ in* Killick v Second Covent Garden Property Co Ltd *[1973] 1 WLR 658*, at p663, requires an ambiguity before it can be called in aid. Cairns LJ referred to the rule properly so-called in* Agavil *as follows:*

it is a rule which only applies where, apart from it, considerations on one side or the other are evenly balanced, and I do not find that to be the position here.

[19] Although Mummery LJ, in his judgment in Gilje*, also used the expression "*contra proferentem*", he did so in supporting an approach to the construction of these clauses that, in effect, raises a presumption against recovery of charges unless the provision is in clear terms. He referred to a statement in the* Encyclopaedia of Forms and Precedents *relating to the drafting of provisions in leases for service charges as follows:*

It is stated as follows:

The draftsman should bear in mind that the courts tend to construe service charge provisions restrictively and are unlikely to allow recovery for items which are not clearly included.

Cited as authority are three cases, all decided in the 1980s. They include decisions of this court. … The proposition is obvious… the proposition reflects a particular application of the general principle of construction in the contra proferentem *rule.*

[20] I would therefore regard my use in McHale *of the word "unavoidable" as merely a shorthand for the approach that we adopted in that case, which was not criticised in the present case and that, on review of authority, appears to me to have been correct. I would however, for the purposes of this decision, spell out the considerations more fully. The approach has, I believe, to be as follows:*

> *(i) It is for the landlord to show that a reasonable tenant would perceive that the underlease obliged it to make the payment sought.*
>
> *(ii) Such conclusion must emerge clearly and plainly from the words used.*
>
> *(iii) Thus, if the words used could reasonably be read as providing for some other circumstance, the landlord will fail to discharge the onus upon it. This does not, however, permit the rejection of the natural meaning of the words in their context on the basis of some other fanciful meaning or purpose, and the context may justify a "liberal" meaning.*
>
> *(v) If consideration of the clause leaves an ambiguity, the ambiguity will be resolved against the landlord as "proferror".*

75. When I read first the lease, having noted that it was said that there were differing interpretations as to the payment on account provision, but no more, I struggled to see how it could be interpreted it in any way other than (b). It appeared to me to be the clear and plain meaning. I did not perceive any ambiguity and I did not believe that a reasonable tenant would read it in any other way.

76. Subsequently I have now had the benefit of lengthy submissions by both Counsel and both oral and written as to the rival interpretations, however that first impression had remained strong and held good.

77. In my view if, as the Claimants contend, my initial reading is incorrect and (a) is the proper reading then it is a provision of little real economic benefit to the lessor ; possibly to an efficient landlord a matter of just a few weeks ; indeed theoretically only over 14 days and also bears the burden of the lessor funding the necessary works over the preceding 12 months.

78. Hence, on the Claimants' interpretation it would seem, in practical terms for the lessor being the party offering the terms of the lease, a potentially financially very onerous and important provision inserted through unclear and indirect wording. I think that Mr Paton overstated the position when he suggested that if the Claimants' interpretation were correct that this would be "*the world's shortest and least useful payment on account provision"*; but the underlying point of a lack of business common sense has clear force.

79. If (a) is indeed the correct interpretation the obvious question arises as to why the draughtsman inserted the caveat, protective of the lessee's position of reasonable requirement given such a short timescale i.e. it

was potentially a requirement to pay on account of an amount potentially fully due in a period of a few weeks.

80. Further, the payment is specifically said to be credited against payment of the service rent as certified to be due from it by the certificate next issued. Again this would be a very strange insertion into the agreement if the payment is solely on account of a period now just expired with figures available for calculation. Whereas if the intention was (b) it would provide very sensible protection in the event that the landlord did not expend the sums i.e. would prevent the money being used for another purpose .

81. After comprehensive submissions I have not been moved from my first interpretation made upon careful reading ; which is after all perhaps the best guide that a judge can have as to the ordinary interpretation. As a result I do not believe that the wording supports the narrow construction put forward by Mr Stoner Q.C. It is my judgment on reading the lease , and without any extraneous consideration, that what he suggests is neither the natural or ordinary reading of the provisions. Rather it requires strained semantics and is reliant on a process of rigid cross referencing. Indeed it requires the reasonable reader to ignore the straightforward meaning of the phrase itself and after a journey to another clause arrive back with a very different meaning and one which has a very significant and adverse financial implications for the party who drafted the clause.

82. In my judgment an ordinary and reasonable prospective lessee would have read the provisions as I did on first reading. As Lord Hoffman stated in ***Investors Compensation Scheme Ltd v West Bromwich Building Society*** [1998] 1 WLR 896 at 912-3.

> *The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean*

83. It is also my view that this interpretation and my finding of no real ambiguity is supported by the importance of establishing clear and straightforward provisions concerning the payment of the service charge which would have been well known to the parties when the lease was signed. This was a lease with the hall marks of professional drafting, if not the full execution, and was repeatedly used. I take the view that had Mr Stoner Q.C.'s interpretation been intended it would have been clearly expressed in terms and not as is the result of his submissions hidden behind a phrase that when read as a reasonable person would ordinarily read it, would mean something radically different. I do not believe that parties can be readily taken to have

obscured very important practical element a fortiori in the present circumstances when the effect would be contrary to the interests of a lessor who repeatedly chose to offer the lease in these terms.

84. For the contra proferentem rule to assist the Claimants, Mr Stoner Q.C, first needed to establish real ambiguity within the provisions. This needs to be readily apparent. In my view it is not.

85. Mr Paton submitted that it was significant over the twenty years no person had ever argued or suggested such a meaning /reading. The suggested interpretation was first mooted shortly before the commencement of this action and was the creation of over-analysis after considerable scrutiny of the provisions of the lease. He submitted that this is for the very good reason that what was suggested by Mr Stoner Q.C. was an unreasonable, narrow and "semantic" analysis of the words in those clauses.

86. However, in accordance with clear and binding principle it is not legitimate to use as an aid in the construction of the contract anything which the parties said or did after it was made. Accordingly in so far as Mr Paton in submissions or Mr Francis during his evidence sought to rely upon previous practice in relation to the service charge and what the Old Company may or may not have intended and what leaseholders may or may not have said to the Old Company it is n my opinion irrelevant to the determination of this issue. I should add that I have had no evidence as to why the provision in question was removed from the 2007 lease.

87. Finally on this issue it is to be noted that upon what I consider to be the correct interpretation there is the enshrined protection within the lease that, firstly, the request is subject to a reasonableness requirement and, secondly, that specific credit must be made against the future service charge costs . Interestingly these provisions it seems to me, are wholly consistent with the subsequent effect of sections 19 of the 1985 Act and 42 of the Landlord and Tenant Act 1987.

(c) Construction of clause 4

88. Issues have raised as to the meaning to be given to the following expressions in the context of the service charge/rent

    a) Management and maintenance in the Claimant's leases
    b) Provision of such services
    c) Fair and equitable proportion

89. Mr Stoner Q.C. submitted within his skeleton that

> *"The proper construction of clause 4 and in particular the meaning of the phrases identified below permeates a number of*

the declarations sought, including those at 5(1) [1/6], 5(2) [1/6], & 5(5) [1/8]"

Orally he added declaration 5(A)(4)

90. I will deal with each in turn

(i) Management and maintenance

91. Firstly, Mr Stoner Q.C. raises the meaning to be given to the words in the lease ; " *in connection with management and maintenance of the estate"*. .He submits that the word maintenance should be given a restricted meaning. He refers to the analysis in the Court of Appeal in **ACT Construction –v- Customs & Excise** [1981] 1WLR 49 ; specifically at 58 C onwards where Ackner LJ stated as follows

> *I have no hesitation in concluding, having regard to the nature, scale and effect of this work, that it was not work of maintenance in the ordinary accepted sense of that word. On the agreed facts it is easy to imagine the substance of the expert advice which ACT would have given to the building owners. They would have said in effect, 'It is useless to try and carry out any work on the existing foundations of these houses. You would only be throwing good money after bad. You need to put in an entirely new foundation.'*
>
> *Counsel for the Crown submits that if you carry out work which is designed to safeguard the building from future deterioration, that is maintenance. I cannot accept that such a test could be conclusive. I respectfully agree with the example referred to by Brandon LJ in relation to the pitch roof which takes the place of a flat roof. Equally, the first-time provision of a damp proof course, which the commissioners in their own booklet accept is not maintenance. I think there is force in Counsel's submissions for the Crown that, without entering into the realms of definition, maintenance* generally *involves the following characteristics: firstly, an element of repetition, because the object is to keep the building in the condition in which it started; secondly, that the work is generally speaking foreseeable, whereas this was dramatically unforeseeable; thirdly, again generally speaking, that the work is of a minor character and habitual, although naturally there are exceptions as in the case of roof works; fourthly, that generally speaking in maintenance one does not add something substantial which is new; and, lastly, that you do not in ordinary maintenance make a substantial improvement to that which you maintain. Significantly here it is not the omission of any one of those characteristics which is of*

particular importance; it is the omission of all those characteristics

92. In his skeleton argument Mr Stoner Q.C. set out (paragraphs 55 -59) that

> *Often the word is closely allied to "repair", but in the present case the meaning of the word is plainly far more restricted. This is because of the provisions of paragraph 7 of Schedule 3 which includes separately to the word "maintaining" the words repairing, renewing, rebuilding, decorating and cleaning.*
>
> *Returning to clause 4 "management and maintenance" are plainly different from the services in Schedule 3, clause 4 referring to "management and maintenance of the Estate* ***and*** *the provision**s** of such services and herein described …" [1/23].*
>
> *It is suggested that "maintenance" in paragraph 7 is restricted to those repetitive, foreseeable, minor (but necessary) chores such as ensuring the bins are emptied and all relevant light bulbs work. This is emphasized by the juxtaposition of the words "management and maintenance".*
>
> *The use of the word "Management" in clause 4 is, in reality, overtaken by the use of exactly the same term albeit with expansion of its meaning in paragraph 6 of Schedule 3 [1/29].*
>
> *Accordingly, either the use of the word "management" in clause 4 is tautologous or the meaning in clause 4 is very restrictive given the provisions of paragraph 6 of the 3rd Schedule.*

93. It appears to me that Mr Stoner's submission, when looked at in the round, is that the words management and maintenance in clause 4 should be interpreted in so restrictive a manner as to add little or nothing to the specific aspects of management and maintenance set out within schedule 3.

94. However in my judgment the meaning and purpose is clear when the words are taken in their full context.

> *" in connection with management and maintenance of the estate and the provisions of such services herein described and in particular <u>without limiting the generality of the foregoing</u> shall include the cost of the matters referred to in the Schedule 3 hereto" (emphasis added)*

95. The draughtsman clearly wanted to provide and in effect expressed that he was providing a saving provision in case an item of management and maintenance was not specifically set out within schedule 3. These are, as Mr Paton submits "*extensive and wide words, going considerably beyond a bare covenant to "maintain*"."

96. When considering scope it is also important to note Schedule3 is not a recitation of what the landlord can recover via service charge, but is setting out the content of the covenant by the landlord in clause 3(b) "*to carry out and provide the Services as set out and numbered 1-7 in Schedule 3 hereto*".

97. As a result I do not believe that an unduly restrictive approach is called for by reason of the existence of schedule 3. Rather the focus is on the general meaning of the words. Whether an item or aspect of work falls is covered by either of these words is a mixed question of fact and degree to be individually determined.

(ii) Fair and equitable proportion

98. The next phrase raised for interpretation within clause 4 is " *fair and equitable proportion*"

99. Mr Stoner Q.C. submitted that it is important to note that the term requires not only that it is fair but also that it is equitable. He submitted that as a principle of construction the court should not assume the parties have used two words in the same phrase to have the same meaning. Rather the use of the word "*equitable"* must add something to the use of the word "fair". Further he argued that the "something" relevant to the current circumstances, enables the prevention of the recovery of any expenditure on matters which relate to the commercial activities of the landlord.

100. He submitted that it would not be equitable (or indeed fair) for the leaseholder to contribute to the separate business interests of the landlord, in respect of which that landlord is seeking to make a profit. He argued that it matters not, for example, that the leaseholder may benefit from the provision of a café on the site which the landlord may be seeking to run. It would not be equitable for the leaseholder to pay twice for the benefit of the café, namely via the commercial price of a cup of tea and jacket potato (the price paid being fixed by the operator by reference to the overheads) as well as via the service charge in the capital costs of the landlord establishing its commercial venture

101. Mr Stoner Q.C. also submitted that there were two important points of the factual matrix

a) Firstly the lease involves the grant of a lease for 999 years of a small footprint of land ; just the chalet without garden on an estate that encompasses many acres of land. The only other rights as to the rest of the estate are those limited easements conferred in schedule 1

b) Secondly, and concerning the estate generally there is little restriction on what the landlord can do.

102. Mr Paton's submission in response was that there are two alternative submissions on the meaning to be ascribed to these words in clause 4 of the leases.

103. Firstly, and as the Defendant's primary submission, the phrase simply reflects an arithmetical provision governing apportionment as between lessees of the total amount of service charge already otherwise recoverable in principle for the performance of the landlord's covenant and under clause 4 ("*maintenance and management of the Estate*") and Schedule 3.

104. So the first questions are whether an item of expenditure, or all of it, or some part only of it, is recoverable via service charge under those primary clauses. If it is not – e.g. because it (or some part of it) is a 'pure' improvement, does not relate to "the Estate", or relates to the landlord's personal expenditure or benefit – it (or that part of it) is not recoverable at all.

105. On that view, one therefore considers any questions of mixed "Estate" and personal expenditure, or irrecoverable elements of improvement within works carried out, at that initial stage, before going on to consider how the recoverable element is divided and therefore what "fair and equitable" proportion the individual lessees should bear. Further, Mr Paton submitted that the starting point for apportionment will then generally be equality as between lessees, save in a case where there are very different categories of lessees with greater or lesser premises. That is generally a "fair and equitable" proportion in most landlord and tenant cases.

106. Secondly, and in the event that the primary submission does not fine favour he submitted that if these words provide an additional discretionary tool to a Tribunal or Court, to say in respect of any expenditure on "the Estate" ,which falls within clause 4 and Schedule and is prima facie recoverable, that the landlord may nevertheless not recover all of it from lessees, but only some "fair and equitable proportion" of it, in a percentage to be determined, then the relevant features cannot be solely those set out by Mr Stoner Q.C. Indeed he submitted that the Claimants have generally set up an inaccurate and misconceived antithesis between spending 'which benefits the chalet lessees' and that which is said to be for the Defendants' benefit.

107. In his argument he stated that the fundamental point to grasp, in relation to the Defendants' performance of their covenanted services in relation to "the Estate", is that all work to it is ultimately for everyone's benefit. It is in everyone's interests to have good quality and adequate lighting, roads, parking, drainage, a shop, launderette, a reception facility, and (when it is done) an Amenity Centre. All of these aspects of the Estate are matters from which chalet lessees benefit, not just in their own enjoyment and experience of a properly maintained site, but when they sub-let their chalets to holidaymakers for their own gain. He stated that a telling item of evidence was the selection of print outs of certain Claimant chalet owners' internet advertisements for the sub-letting of their chalets which he handed up at close of trial. He relied upon the facilities and aspects of the site to which these adverts make reference in an attempt to attract lettings e.g.

> *"The site has a family friendly atmosphere, with ample space for children to play, a large play park and a well stocked licensed shop. There are brand new laundry facilities on site....*
> *The clubhouse facilities are undergoing refurbishment and is currently closed but a temporary bar AREA IN THE CONSERVATORY is open for the main holidays."*

108. Mr Paton submitted that the "apportionments" which have been applied by the Defendants in this case, in relation to the future works to the Amenity Centre, the existing works to the office/reception/shop building, and the office running costs could be analysed under either of his interpretations of the scope of the phrase. Either they reflect a recognition that an element of the works falls outside the covenant, or they reflect a fair and equitable apportionment, in relation to just those items, in this latter sense.

109. The submissions of both Counsel highlight the difficulty of looking at scope or meaning of a terms of lease such as this in a factual vaccum

110. In my opinion the terms of the lease do not support the interpretation urged upon me by Mr Paton's primary submission, unless that submission in making reference to part recoverability, concedes true flexibility of analysis.

111. Indeed in my judgment the term imports flexibility to cover exactly the scenario presented in this case by some of the works. It is intended that only a fair and equitable proportion of the sums actually expended "*on the liabilities incurred by the lessor*" shall be sought from the leaseholders. This requires an assessment that cannot be determined solely on the basis of whether a particular item of works falls as a matter of rigid construction as wholly recoverable or wholly irrecoverable and then as a matter of pure division amongst all lessees. It requires an analysis in the round of cost and benefit.

112. Therefore I believe that the scope and effect of the term should be determined upon individual facts and is not capable of being further helpfully informed by prior generic guidance. I do not think that was properly included in a list of issues of construction.

113. For the avoidance of doubt it is my judgment that the factors raised by both Counsel in argument are capable of playing a part in the analysis of what is fair and equitable and indeed in some respects can be seen as opposite sides of the same coin. On the one side the provision from the chalet occupiers perspective of potentially beneficial but unnecessary facilities that provide a direct profit to the lessor. From the lessor's perspective provision of facilities that are not a necessary feature but provide a benefit to both the lessees and lessor. In my judgment the extreme examples as cited in argument do not help the analysis beyond making it clear that the analysis of the effect to be given to the term is necessarily a flexible and fact specific one.

(iii) Issues of Construction in respect of Schedule 3 clause 7

114. As one of the "services" referred to in clause 4 of the main body of the lease, clause 7 of Schedule 3 provides:

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

115. Before any detailed analysis it is important to remember when considering the term that it is subject to the "*fair and equitable proportion*" analysis to which I have just referred.

116. As for the general approach to construction it is not appropriate in my judgment to approach matters as solely turning upon fine semantics and requiring the analysis of each word in splendid isolation. A lease such as this is intended to regulate affairs over very many lifetimes and cover many eventualities. It is first necessary to stand back and look at the broad and ordinary meaning of the words as a whole before then considering the meaning to be given to any word.

117. As Lord Hoffman set out in **Investors Compensation Scheme Ltd v West Bromwich Building Society** the meaning of words is a matter of dictionaries whereas the meaning of a document is what the parties using those words against the relevant background would reasonably have been understood to mean.

118. With this in mind I turn to the points raised.

119. The first issue raised by Mr Stoner Q,.C was in respect of the clause is the reference to "*an amenity centre if any*".

120. It was Mr Stoner Q.C.'s submission that the starting point must be the fact that the reference is not to "the" amenity centre, but to "an amenity" centre and that wording has remained consistent from the outset of the grant of leases. Hence the fact there is a building which was called the "amenity centre" does not equate to that being "an amenity centre" as referred to in the lease. Indeed the reference to "if any" destroys that suggestion by its inclusion even in those leases granted more recently when there plainly was a building known as "the amenity centre".

121. I should state that I have no evidence as to what was present in terms of any amenity centre of group of amenities as at 1982. So it is possible that the all the material leases in this claim were signed when there was an existing building . I simply do not know on the evidence before me.

122. It appeared to me that the aim behind this submission was not to be forced to accept that all the facilities or features in what was, on any view of the facts, an amenity centre building present for some years, were necessarily caught within the definition of amenities. This has relevance in terms of the hiving off of facilities previously in the centre building and also in how any restaurant or bar in an amenity centre as constructed is to be viewed.

123. So what did the draughtsman mean by the phrase " *an amenity centre if any*". Did he mean any specific building so called or any collection of amenities ?

124. It seems to me to be implicit within Mr Stoner's submission that he did not necessarily accept a very wide definition should be given so as to capture any facilities or features, regardless of nature or extent, that make a place such as the site in question attractive or more attractive to temporary or permanent residents. However, assuming this to be a proper stating point the issues is then how to determine if certain features or facilities are indeed caught.

125. In my judgment words "if any" are important as they signify that any such facilities or features as may be caught within the term were not necessities such as to be expressly covered within schedule 3 and paragraph 3(b). Beyond that it appears to me that it is a question of fact and degree. Although an amenity can be defined as something that contributes to physical or material comfort, the phrase has come to have different common meanings in specific contexts . By way of example with regard to the standard amenities in a dwelling house ; such as a hot and cold water supply, sink and bath/shower and as regards a civic amenity centre the handling of waste.

126. Yet again I turn to the touchstone of Lord Hoffman's statement in **Investors Compensation Scheme Ltd v West Bromwich Building Society** that the meaning of words is a matter of dictionaries whereas the meaning of a document is what the parties using those words against the relevant background would reasonably have been understood to mean.

127. As a result it is my view that scope of the amenity centre reference must be seen within the context of what was being covered with the lease as a whole.

128. In my judgment what the draughtsman intended to cover by the phrase an amenity centre was any group of facilities or features that provides comfort, convenience, or pleasure and also aspects of practical assistance in ordinary life for the residents of holiday chalets

129. Mr Stoner Q.C.'s next submission was that there is a clear and crucial qualification and limitation in the body of the clause 7 of Schedule 3, namely that it only relates to repairing etc those parts of the estate "*used in common with other lessees"*. Therefore as a matter of construction, the reference to an amenity centre, if any, is simply a reference to any "centre" which may be provided for the landlord for the use of the lessees on the Estate as opposed to use by any person irrespective of whether they are or are not a lessee on the Estate.

130. Thus Mr Stoner QC argued a building which features an obvious " amenity" such as a games or play room solely available to all leaseholders would be an amenity centre of the sort contemplated by the parties in clause 7.However a restaurant and bar run as a business and which is open to all persons including the public is not the provision of an amenity centre "used in common with other lessees", even if it named as such.

131. He argued that this reflected the fact that it is within the landlord's gift to make parts of the Estate open to the public or a particular category of persons, which would then not be "used in common with other lessees" but instead are "*areas where the landlord has chosen to put its freehold interest to use in a manner which permits free access to all, whether that be for commercial gain or otherwise*".

132. Mr Paton's submissions in response to the Claimants' interpretation had two main elements

133. First, the words "used in common with other lessees" in Schedule 3 paragraph 7 is simply a common form of shorthand for what are sometimes called the "common parts" of a leased estate, such as roads, paths, drains, lighting and other communal or integral parts of the whole estate. It is not intended to invite an inquiry into whether

individual lessees actually "use" a specific patch of the Estate on which works have been carried out, or (worse still) give lessees a right somehow to 'elect' not to use and therefore not to pay for certain items. If that were a permissible construction of this or any other lease, the system of service charges would quickly unravel.

134. Secondly, and in any event, even if such words in Schedule 3 paragraph 7 were capable of such an extraordinary interpretation, so that works under that paragraphs were somehow limited to parts of the Estate identifiable as "used in common with other lessees" as opposed to some other category which was somehow not so "used", it would give way to the generality of clause 4 of the leases, expressed in the words set out above and the words *"...and in particular without limiting the generality of the foregoing shall include the cost of the matters referred to in the Schedule 3 hereto*."

135. In my judgment the draughtsman did indeed only have an intention to cover what are often known as "*common parts*" by the insertion of the words " *in common with other lessees*".

136. That this is so is clearly supported by the phrase " *..including without prejudice to the generality of the foregoing the footpaths , roadways and car park*". What Mr Stoner Q.C. seeks is that the word "*solely*" be inserted by interpretation so that the phrase reads "…… *those parts of the estate (which include an amenity centre if any) solely used in common with other lessees* ...." . However I do not believe that the term can be properly interpreted so as to produce such a significant restriction, which would catch all parts of the estate, including the road ways and car park, such that if they were available for use for whatever purpose by a non lessees there would be no liability at all for the leaseholders. Accordingly I reject Mr Stoner Q.C.'s submission on this phrase.

137. The next aspect of clause 7 said to require interpretation is the the phrase "*repairing renewing rebuilding decorating cleaning and maintaining"* Bundle 1p29.

138. The Claimants' contention is that despite the multitude of words used no element of improvement falls within the terms of clause 7, save, of course, for necessary and inevitable betterment which results from undertaking a repair or renewal.

139. Again I return to the problems of seeking to define meanings of such terms in the absence of the relevant facts. Ultimately what may be done as a matter of repair, renewal or rebuilding is a question of fact and degree; see the useful analysis in ***Dowding & Reynolds: Dilapidations – The Modern Law and Practice*** (4th Ed, 2008) at paragraphs 4-18 to 4-31 and particular 4-22 and 10-04 to 10.09. In my judgment this means that the wording of this part of the lease must be

fully and finally construed in the context of the lease a as whole and the relevant surrounding circumstances of the precise matter in issue.

140. However there are two matters with regard to these words that can be addressed by way of construction.

141. Firstly, as for the method of any repair a landlord is not obliged to adopt the cheapest method, however his choice of work is not unfettered.

142. Secondly, I do think that it is possible to set out an opinion as to the scope of the most significant word in the context of the present case; " re-build". In my judgment the clearly imposes a liability beyond the ordinary meaning of repair ; see **Norwich Union Life Assurance Co. Limited-v-Bristih Rialways board** [1987] 2 E.G.L.R. 137 per Hoffman J (as he then was)

143. However an obligation to rebuild should be construed narrowly because it is a potentially very onerous obligation . I accept Mr Stoner Q.C.'s submission that proper construction means in not in effect replacing the word with wider words. Rebuild does not mean simply "build" or "construct". Mr Stoner Q.C. referred to passages in **Dowding & Reynolds: Dilapidations – The Modern Law & Practice**. It is set out at paragraph 18-34:

"Difficulties may arise in practice as to what constitutes performance of the obligation to rebuild and reinstate. The difficulty most commonly encountered is the extent to which the reinstated building must conform to what was there before. It will often be the case, for example, that building methods or materials will have changed since the original building was put up … The courts have tended to adopt a relatively strict approach to the construction of obligations to reinstate. It appears that whilst exact reproduction of the original will not always be required, nonetheless only immaterial changes are permissible."

At paragraph 18-37

"*Immaterial changes in design are permissible, but only where the change is such that, having regard to all relevant factors, the new building can properly be said to be a reinstatement of the original."*

.

144. The capital cost of first construction of amenity centre or indeed or any other building is not included in the terms of the standard lease. As regards an amenity centre, a building existed with facilities within it. Clearly if some reason the fabric became so damaged or degraded that it could not be properly left to house those facilities ; then on the terms of this lease the rebuilding of the structure

on the same footprint is clearly caught, and then subject to the fair and equitable caveat referred to above.

145. However if a building is present housing a number of facilities; and that building is to be the subject of major works without demolition, as is the case here ; I do not see how the covenant can be stretched so as to cover the works upon the rebuilding, renewal and repair of that structure i.e. so as to provide the same footprint or structure and the construction of new additional buildings. Patently the result is not one building as there was before but three separate buildings. That they then house the same but expanded and improved facilities cannot in my judgment assist the Defendants.

(iv) Construction of Schedule 3 clause 8

146. Finally as regards matters of general construction, submissions were made as to the meaning of Schedule 3, clause 8 which provides for

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

147. It was Mr Stoner Q.C.'s submission that the term enabled the landlord to employ managing agents as without express provision such charges are not recoverable: see **Embassy Court Residents' Association Ltd v Lipman** [1984] 2 EGLR 60 per Cumming Bruce LJ.

148. He conceded that a landlord can employ as a managing agent a company owned by that landlord, provided the arrangement is not a sham: see **Skilleter v Charles** [1992] 1 EGLR 73.

149. Importantly in the factual context of this claim he submitted that as a matter of construction clause 8 does not entitle the landlord to charge wages for management, especially if the landlord's wages are then inflated by 5% by the application of the management charge pursuant to clause 8. He said that , the provisions of clause 6 of Schedule 3, refer to staff:

(1) Employed by the landlord; and

(2) When considered in the context of the separate provision contained within clause 8 plainly do not extend to the cost of the landlord's in house management.

150. However, Mr Paton submitted that

> *" In broad terms, paragraph 6 contemplates and includes the employment and engagement of potentially a wide range of staff, professionals and other agents in connection with the*

"management of the Estate", along with payment of their wages and benefits, and provision of all tools and materials.

151. He argued that there is nothing improper in the Defendants effectively employing and paying for themselves in that role, so long as they do the work and provide good value at a reasonable cost. The payments made had been in lieu of the Defendants employing, as they would clearly have been entitled to do under the lease under paragraph 6, full time site supervisors and managers on the Estate and paying such persons' wages and NI contributions. Mr Paton also submitted that what had been charged compared favourably to similar costs previously incurred by the old company, when a "manager's salary" and at one time also a "manager's flat" in the amenity centre were provided to the managing director from company funds .

152. Further, Mr Paton submitted that the Claimants' submission that the recovery of any such costs is wholly limited and confined to the paragraph 8 " *management charge of..5% of the total cost of the items referred to in this Schedule*":

"is simply an untenable reading of Schedule 3. Paragraph 6 could not be clearer. Paragraph 8 is a "management charge of 5% of the total cost of the items referred to in this Schedule", and so is on top of the items referred to in e.g. paragraph 6".

153. I accept Mr Paton's argument as correct and in my judgment Mr Stoner Q.C.'s submission cannot be correct given the clear and extensive wording of paragraph 6, one of the very paragraphs of services expenditure in Schedule 3 to which the 5% in clause 8 is expressed to be applied.

154. This paragraph authorises not just the employment of "staff", but also a wide range of professionals and "agents" for the "management of the Estate". So costs and charges can be incurred and recovered under this provision whether someone is an employed member of staff, or a self-employed or external professional or agent; of the specific types stated or the general category of "agent".

155. On the plain wording, the Defendants can instruct an "agent" for "the management of the estate", and recover the cost under that provision.

156. As I have set out Mr Paton relied in part on the fact that the old company paid the managing director Mr. Drummond a substantial salary and provided him with a flat. However, I do not take into account past conduct; the terms of the lease are plain and simple. The 5% recoverable in clause 8 does not in someway negate the clear content of paragraph 6. In my judgment 5% is recoverable on all of

the items of expenditure of themselves properly recoverable, in Schedule 3 paragraphs 1 to 7.

157. Finally and regards VAT if it is recoverable then it is not a cost within the meaning of the phrase " total cost" as I read this to mean actual eventual net liability.

4. Parts 1 & 2

158. Having dealt with matters of construction and to the extent I feel that it is properly possible without a detailed factual context I now turn to the individual items in dispute.

159. Again it is important to state that faced with the unsatisfactory state of affairs I was presented with at the outset of this hearing , specifically having regard to an outstanding appeal in respect of the expert evidence and court time I was forced to adopt a two stage approach.

160. The precise dividing line between Parts 1 and 2 has been largely left to me i.e. it has been anticipated that I should proceed as far as I feel able on Part 1 to determine the outstanding issues. However there has been no expert evidence and limited consideration of the detail of sums expended or to be expended. Therefore it is necessarily the case that on some issues I can only make preliminary findings.

5. Evidence

161. On behalf of the Claimants I heard from Mr Phillips, Ms Goddard, Mr Stephens, Mr Sandoz and Mr Afshar Radd

162. On behalf of the Defendants from Mr Francis and Mrs Francis.

163. I should make some general observations as to the evidence of the Defendants. Both were combative in the witness box. I formed the clear view Mr Francis is a very shrewd and quick minded businessman capable of and a well used to decisive but not impulsive action. I formed the view that Mr Francis had an outline vision for the site from the outset i.e. from before the date of acquisition. He saw the site as tired generally and its facilities inadequate for modern holiday visitor. That such a vision existed so early can be seen from the matters indicated to the Chalet owners at the meeting on 3rd May and subsequently confirmed in the letter of 5th May. However he did not approach it as a developer may by preparing detailed and phased plans.

164. At the outset Mr Francis had at the forefront of his mind the ability to recover the costs of much of the work that he thought

necessary from the leaseholders. Such was clear from his evidence concerning the negotiations and advice before purchase.

165. As I shall set out in detail in due course his justification for the removal of the banks was that there was a serious rat infestation. However the works he proposed to undertake were to be a very considerable cost, with estimate of £300,000 and eventual cost of £180,000. Such large-scale expenditure would not ordinarily be countenanced by an experienced business such as Mr Francis without very careful thought. The suggestion that he panicked is one I simply do not accept . Indeed I do not accept that the rats played any significant part in the decision to remove the banks. I find that he initially pressed on with works without a detailed overview of how all matters would progress, but, importantly, in the belief that costs were recoverable

166. The finding that Mr Francis was not truthful at points during his extended evidence as to the reasons for the removal of the banks does not have the limited impact of Mr Francis sought in effect to offer during his evidence he said *" if I'm wrong I'll take the consequences*". As I explained to him it was not just a question of him being wrong it was and is also a question as to whether he has been truthful. Put shortly if I find, as I do, that his explanation for the work upon the banks is unreliable, then what is justification for other acts or omissions.

167. Although the issue of the banks provided a key to unlocking credibility of Mr Francis this of course does not mean that I should not accept his evidence as to fact on all other contentious issues. Such a blanket response would be wholly wrong in principle. However it did mean that I had to treat the balance of his evidence with considerable caution and consider all surrounding factors on every issue

6. Findings of fact

168. Firstly I should record that having heard the witnesses, considered the documents and visited the site there is an obvious clear difference in philosophy between many, if not all of the Claimants and the Defendants as to what is needed for a safe and acceptable site.

169. Mr Francis considered various aspects of the site to be unacceptable for a modern facility. However, many of the Claimants were to greater or lesser degrees happy with more modest and to a degree somewhat tired facilities.

170. Whilst Mr Francis genuinely believed that more speed humps and better lighting were necessary for a modern and safe site, many residents were and are strongly opposed to the introduction of what

they honestly consider to be wholly unwarranted intrusions into a longstanding sate of affairs regardless of costs. Such polarity can never be reconciled by a court. All that I can rule upon is what the Defendants are properly able to do and (it being a separate issue) what they can properly charge back under the service charge provisions

171. At the outset of the hearing the Principal issues of fact were stated to be as follows

(a) Reasonableness of expenditure ; these are obvious issues of fact (two questions ; are the costs reasonable and secondly was it reasonable for the landlord to incur them including at speed)

(b) Principal facts prior to determination of invoices

a. Former amenity centre

b. Removal of earth banks

c. New street lighting

d. Works on Caravan park

e. Construction of a shower block

f. Work on drains

g. Installation of speed humps

h. Replacement of old paths

i. Relationship between the Defendants and Francis Leisure Limited .

(a) Recoverability and reasonableness ; an overview as to an appropriate level of charge

172. All service charges otherwise properly due and owing are subject to the requirement of s.19(1) of the 1985 that:

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

(a) Only to the extent that they are reasonably incurred …"

173. The "reasonableness" of the expenditure should be read in a common sense manner adopting the two stage test identified in **Forcelux-v-Sweetman** [2001] 2EGLR 173 and **Veena v Cheong** [2003] 1 EGLR 175, specifically

(a) Are the costs reasonable in themselves; and

(b) Was it reasonable for the landlord to incur the costs

174. As part of that common – sense approach, and in respect of the second limb of the test, it is the Claimants case that the timing of expenditure is relevant on the issue of reasonableness. Thus, in the present instant, it is the Claimants' case that it is simply not reasonable for the Defendants to have embarked on such a rapid programme of works resulting in significant increases in any service charge properly recoverable for a few years, as opposed to a programme of works which spreads the cost of properly recoverable work over a sensible period of time. These, it was submitted "*are after all leaseholders of chalets worth in the regions of £35,000"*

175. The case on behalf of the Defendants is that every single invoice has is in respect of work incurred "*in connection with the maintenance and management of the estate"*. However, in so far as the proposition is advanced, whilst on an individual and isolated basis this may be so, I do not believe that the cumulative effect of costs can be ignored in the assessment of the reasonableness exercise.

176. In my judgment and absent other considerations such as reduced costs and/or urgency, it is not possible for a landlord to embark on a rapid and extensive programme of works on the basis that each individually may be reasonable without considering the overall effect a fortiori upon a leaseholder with a modest value property. Implicit within the overall assessment of reasonableness must be the financial impact as objectively assessed.

177. As an overview it is in my judgment important to bear in mind what was said at the meeting at 3rd May 2008 and the content of the letter of 5tH May 2008 and the clear vision then set out of improvement and upgrading to a first rate site. As well as such an eventual goal I had an overriding impression that the Defendants were "in a hurry" to achieve it.

178. As I have indicated the site was clearly tired and in need of maintenance although polarised views existed as to the extent of works required. It may well have been to the eyes of someone such as Mr Phillips, a very largely adequate site requiring only very limited works. However, I am far from sure that this was correct. Indeed in respect of the evidence of Mr Phillips, his views albeit I have no doubt shared by some others of the Claimants revealed that his was a perspective of spending as little as possible on the site. He was unhappy with the level of charges under the old company and had relatively modest requirements. Such views were at the extreme end of those held by residents. Other Claimants saw the need for expenditure and wished some works ; but not the scale and scope subsequently undertaken and certainly, and most probably for the vast majority of leaseholders , not at the pace of works the Defendants sought to achieve. .

179. In my judgment with regard to specific items of expenditure following questions arise

180. Firstly to what extent are the individual items recoverable under the service charge provisions?

181. Secondly to the extent that they are recoverable have they been " reasonably incurred" the purposes of section 19 of the Landlord and Tenant Act 1985. In my judgment this exercise allows the wider consideration of the context and pace of the programme of works, whether or not such works constituted one or a more sets of qualifying works

(b) The removal of the Earth Banks

182. The banks existed throughout the site. Mr Francis told me that he thought the origin lay in the destructions of buildings that had formerly been part of the airbase, when the park was first set out. In any event they were of longstanding

183. The banks were close to lodges or places regularly used and accessed by visitors to residents at a busy site with no, no meaningful or regular complaint about any aspect of their condition or construction (say that those at the entrance when not tended were liable to become overgrown). They had a purpose as a windbreak, natural barrier so the children did not roam too far and encouraged and gave a habitat to wildlife including rabbits and butterflies (see e.g. evidence of Ms Stephens Bundle 2 p 544 paragraph 10)

184. I accept that in a very limited and discreet stretch, by the bins store, the wildlife also included some rats.

185. In my judgement is clear that the rats were not a large-scale problem. This can be seen from the report of the company following a visit on 14th February 2008; see Bundle 4 p969. This report is as instructive and illuminating for what it does not say as much as what it does.

> *"Evidence of Pests ; Waste Area ; Rats noted during service. Burrows/holes/runs located and treated. Middle bin compound has large colony of rats along bank behind compound. The cause of this is mainly due to drainage bungs being missing , these need replacing urgently & bin hire company will do this if requested"*

186. It is in my view inconceivable that a large-scale infestation that extended beyond the area immediately adjacent to the bins store as identified in the February report would have been missed . There is no evidence of complaint or problems experienced by the occupiers (which would have included paying guests on rental) over many years.

187. It was the Claimant's case that there was no rat problem as confirmed with the oral evidence given ; "*never ever seen a rat*" ; Mr Phillips, " *never seen a rat*" Mrs Goddard, " *I am terrified of them and would not walk around at night if I knew rats*" ; Mr Stephens and " *it's a fiction I have never seen a rat*" ; Mr Sandoz . I unhesitatingly believed these witnesses on this issue.

188. Mr Francis in a stark challenge stated that these witnesses were lying. It is not surprising that he felt driven to this assertion in light of the fact that his evidence was wholly incompatible with what these witnesses had told me. Mr Francis stated that when the bucket of a mechanical digger hit the bank as it instructed the first chalet, a number of rats row to the bank .He stated that he instructed the driver to drop the bucket 50 yards away and more rats ran out. He stated that he could see that there was a serious infestation extending throughout the banks. His witness statement (Bundle 2 p 763) states as follows

> *" it was clear to us that the banks represented a real problem. Because they were very steep and contained miscellaneous items of refuse it was very difficult to keep the grass short on more than in the conventional manner. More importantly they had a substantial rat population which had been caused in part by the fact that the old company had no systematic arrangements for the proper collection of waste. The vermin used the rubble as rat runs…. I decided we need to deal with this issue urgently. The rats I presented a significant health hazard -all more serious for the presence of a substantial number of children amongst holidaymakers. We instructed Hooper civil engineering and land surveying and to prepare a survey drawing and calculate the volume is involved in the removal of the banks. They calculated that some 17,350m3 thereabouts needed to be removed so instructed to contractors to quote"*

and

" Our member very vividly that when one of my machine drivers used his bucket to remove the first part of the banks hundreds of rats scattered all over the roads. We had this problem with all the banks around the estate"

and

"the quantities removed were substantial and we needed a significant space to crush the stone that had been dumped to form the banks. I thought it was sensible to use the caravan park is a compound for this purpose since we would say the chalet owners money by doing it this way"

189. As a result Mr Francis stated that he decided the only option was to remove the banks completely reconsider there was no other viable option. By the 5th May he well knew the potential costs involved. As the letter at Bundle 4/976 confirms he had confirmation of an earlier site visit when total costs for all proposed groundworks, including the work to the banks was estimated by Simpson Plant Hire to be in the sum of £465,884. the removal of the existing banks was said to have been "*priced….based on the survey produced by Chris Hooper*".

190. Mr Francis took no expert advice about the rat problem (even though there was a report available from the company which he subsequently retained for inspection and control of vermin) and he did not tell the Chalet owners of the problem that he states was present when explaining that he was to remove the banks. Given the potential costs involved, which I have no doubt he always intended to reclaim through the charges to the Leaseholders, the lack of advice or consultation is remarkable.

191. Further, I find as a fact that Mr Francis told residents at the time of informing them of his plans in May 2008 that mowing was a major difficulty.

192. Mr Francis stated during his evidence in February that there were obvious other benefits, extra car parking and prevention of flooding being the most obvious. However when I pressed him on the true reason he stated, I have no doubt conscious of the credibility problem that would result if he were not believed, that it was the rat infestation.

193. Of course Mr Francis well knew and knows that if it were necessary to remove rat infested banks, the lessees would have considerable difficulty in objecting to a charge of the reflected the consequential costs. Whereas if the true reason was redevelopment then he faced obvious difficulty in recovery.

194. I find as a fact, indeed I do not hesitate to find, not just on balance, but for me beyond any doubt, that Mr Francis when first considering the site quickly arrived at the view that the banks should be removed. As a resourceful man well used to dealing with property and building works I believe he realised that the soil and rubble that would result could be used to level the caravan park. Further that the extra space created by the removal of the banks could be used in part for extra car parking, parking he thought was needed. So at a stroke he would remove a maintenance problem (because in his eyes the banks were indeed difficult to mow), create a site that was more pleasing as a development, creating additional parking and level the caravan site without having to pay for infill.

195. I have no doubt that when he started the works, specifically when the banks by the bins store were hit by the mechanical bucket that some rats did emerge. However there were few in number, located in a small area and in no way precipitated or underpinned his decision. I have little doubt that had Mr Francis wish to control what he believed to be a rat problem he would have immediately telephoned the same people who have compiled a report and had been engaged in the past (see Bundle 4 p 969) and indeed he later retained ; see e.g. Bundle 7A p 2410).

196. Mr Francis correctly identified that his evidence was so directly contrary to that of the three witnesses giving evidence on behalf of the claimants that either he was lying or they were lying as to the presence and problem of rat infestation. I have little hesitation in preferring the witnesses called on behalf of the Claimants.

197. Mr Francis appeared to change his evidence between the first and second sections of the hearing of his evidence. In April during his resumed evidence, he placed much more emphasis on other reasons than the rat infestation. Further, Mr Francis stated that " *if it was a mistake*…" he would take the consequences. However I do not see that there really was any mistake in terms of his continued view as to all round utility of the works, including the benefit of levelling. Indeed when I asked him would he still have done it even it the rat problem could be sorted he said " possibly"; but in my judgment the answer was that he would definitely have carried the works out.

198. In line with the general matters set out my detailed findings of fact in relation to the banks are as follows;

a) From the outset of his ownership of the park and probably before, Mr Francis intended to remove the banks. The motivation was multifactorial ; primarily it would provide earth and rubble to level out the caravan park, but with the associated benefits of providing extra space some of which could be utilised for extra parking,

and in the process make mowing easier. I reject the evidence that the alleviation of flooding played any part. I have little doubt that viewing the site Mr Francis considered the banks to have no utility and that therefore their removal as part of the changes to the layout to the site made obvious business sense.

b) That Mr Francis started the works, and consideration of the costs, so early in his ownership and without any expert advice as to the rat problem that he says existed, and strongly supports this finding. I have little doubt that the problem of the discreet colony, if the amount of rats did amount to a calling, could have been readily and easily dealt with by pest control expert. The elevation of the rat problem to the primary cause of these works has not been an honest process. The problem has been deliberately exaggerated so as to avoid perceived problems with recoverability of costs.

199. It is the Defendans' case that the removal of the banks was a perfectly reasonable decision taken as a matter of urgency in "*the management and maintenance of the Estate*", with removal of the hazardous feature the sensible and economic option. However, In light of my findings I do not see how the associated costs of bank removal are recoverable from the lessees as falling under either management or maintenance of the site in any ordinary senses of those words i.e. even beyond the items as set out within Schedule 3. Put simply the banks were removed as part of Mr Francis' plans for the remodelling of aspects the site as a whole and specifically the caravan park.

200. Even if they were recoverable costs on the basis of the Defendant's case they were not in my judgment reasonably incurred in any event .Very significant sums were incurred without considering the costs of alternative measures e.g. pest control and at a an unjustifiable speed .There was no urgency and mature consideration should have been given to the nature and extent of alternative and lesser works.

201. Finally on this issue it is accepted by the Defendants that both the removal of the banks(£90,000) and the surfacing, using the recovered spoil from the banks, of the touring park in 2009 (£91,875) fall into the "qualifying works" category . If my determination had been that these works were recoverable under the service charge provisions, the Defendants would then have had to make an application under section 20ZA to the Leasehold Valuation Tribunal for retrospective dispensation from the requirements in any event.

202. These findings also have a potential impact on other sums claimed. As Mr Stoner Q.C. submitted consideration must be given to other associated costs as in effect part of the same scheme specifically

the fencing along the front and right around the touring park ; as this was a previous barrier.

203. Further there was the creation go the car parking area on the land previous occupied by the banks . He the described the main element of such costs as

> *" Expenditure on tarmac for extra car parking for existing chalet park/resurfacing of the exiting roadways /patching maintenance works around the lodge area for the water connection area Health and safety problem*" ; in the total sum of £28,695 .97.

204. Mr Paton described such works as follows

> *"Tarmac works including creation of 22 parking spaces, turning space and disabled access; plus some resurfacing of roadways (March-July 2009): £28,695.97"*

205. Mr Stoner submits that if the removal of the banks is not recoverable then these sums should also not be recoverable as they are part of the same development scheme.

206. In my judgment he may well be right in whole or, as seems to me more likely, in part. However precisely what sums are so attributable is an issue that will require more evidence and to be addressed in Part 2.

207. Finally, and as I shall indicate in due course such works should not in any event be aggregated with other works for the purpose of identifying sets of qualifying works.

(c) Amenity Centre

208. The Amenity centre is a large building. I had the benefit of a walk around it. It comprised at the time of the Defendants purchase of

a) Entrance hall
b) reception area
c) office (with a portacabin outside)
d) manager's two bedroom flat
e) two shops
f) launderette
g) amusement arcade and children's play area (the "rainbow room")
h) two bars

i) a restaurant (part being within a conservatory together as was the end of the main bar)
j) kitchen
k) beer cellar
l) store
m) bar service areas
n) toilets

209. Mr Sandoz who had owned a chalets since 1991 stated, and I accept as correct, that some time approximately 10 years prior to the defendants purchase "*the bars in the amenity centre became full to overflowing and a as result the centre underwent extensive refurbishment and a conservatory was added, to the end of the main bar. This increased capacity led to increased profits*" .

210. He annexed to his statement at Bundle 2 p 618 a page from the North Cornwall Advertiser of June 1997 stating that the site had " *undergone a total refurbishment of the bar and entertainment area.. this means that the excellent new facilities can now been enjoyed all year round by non –residents as well as residents*" . Indeed the point that it was open all year around to non residents was repeated. I believe that this is significant as it to be viewed in light of the fact that the chalet owners, by the terms of their leases, are not entitled to reside at the site within a set two month period of the winter. Hence the amenity Centre was clearly operated as a business for those two months, one sixth of the year, with the primary if not the sole trade being " non – chalet" trade.

211. Part of the premises appear to have been leased and run as a business by Mr and Mrs Tuffin. I heard no evidence from them as to the condition of the premises or the nature and extent of trading.

212. The major issue between the parties is future expenditure. As for the costs claimed so far Mr Paton submitted the initial works carried out to the centre in 2008 and 2009 following its temporary closure were relatively minor, (Oct-Dec. 2008, Jan-May 2009): £12,327.50 and fall to be regarded as part of the maintenance and making safe of what was already there. He sought to separate them form the proposed future works for the purposes of the identification of relevant qualifying works. As I shall set out in due course I accept this submission.

213. The Centre was clearly in need of a substantial overhaul necessitating significant works . Indeed there were those amongst the residents who viewed its condition as wholly unacceptable. It is impossible for me to now accurately ascertain the true extent of structural as opposed to cosmetic problems that existed prior to the stripping down of the centre to the current shell.

214. As set out above the report of Edward Symmons (Bundle 4 p1179) the initial impression of the amenity centre was poor as little money had been spent in the area. It recommended improvement of the block frontage and refurbishment of the block entrance together with a possible use of the shop was a display area. It gave an approximate turnover of the amenity centre of £200,000.The report does not indicate that the amenity centre was in any way unusable or in a diabolical state. The valuation is based upon the continuing stable turnover.

215. I also note the minutes of the directors meeting on 24 September 2005 (Bundle 4 p 1187) which states at paragraph 4.4

> *" BE reported that during remedial work related to the insurance claim, in some roof timbers had been exposed and revealed signs of rot. Although immediately and was considered unnecessary, the issue needed to be addressed in the not too distant future"*

216. Doing the best I can on available documentation and witness evidence I find that the Amenity centre did require structural works to the roof and was generally tired and in need of an overhaul. So works of repair were needed.

217. However the descriptions and analysis set out by Mr and Mrs Francis are in my view exaggerated. In my judgment with the use of very significantly less funds that are now estimated the Amenity Centre could have been substantially improved with the result that it would have been perfectly adequate for the ordinary and reasonable user. I see no reason why such works, which would have necessitated significant internal structural works would have allowed the continued housing of the facilities set out at paragraph … (a) –(n) above. However, even after such works were carried out the new centre would not have been "first-rate" and therefore as a result not to the satisfaction of Mr and Mrs Francis who wanted a far more impressive facility.

218. As it is the estimates for the proposed works have very radically changed from the initial written estimate provided to the leaseholders as set out in the letter of 29th December 2008 (Bundle 1 p 212) of £350,000 . To put this figure in context at the October meeting as recorded by the Defendants in the letter of 5 November 2008 it was set out by the Defendants that ;

> *" we have advised that we will be issuing an invoice for the period 1st January 2009 -31st December 2009 to the sum of £2760.74 per chalet/lodge owner. This represents the expenses we expect to incur. There is a lot of essential work that is needed to fully refurbish and renovate the amenity centre..... we are estimating this figure as with other areas on site we seem to*

keep finding unforeseen problems as the site has been so poorly maintained in previous years. This is an estimate of what expenses we expect to incur. We must be honest and advise it is quite possible that amount will not cover all of these works and maintain the site to a good standard, but will try our best to save monies were possible and deal with all expenses incurred.. December 2009, when we will certificate all expenses incurred on managing and maintaining the site and all expenses incurred on these essential areas above. This site desperately needs to be improved and once we have achieved this then it will benefit us all.

and

" our intention is to have a site we can be proud of and an amenity centre that reflects that"

219. As I have already indicated I do not accept what was said at the meeting (to the extent that it is correctly reflected in his letter), with regard to the reason for the removal of the banks. I also do not accept that the amenity centre was in as poor a condition as the letter indicates. Specifically, I do not accept that there were serious health and safety issues preventing its use. I do find that in the eyes of Mr and Mrs Francis refurbishment of the building was long overdue and that they considered that it had a dire appearance and a lack of facilities. They wished to have a modern amenity centre that, as the letter states that they could be proud of.

220. Returning to the initial estimated expenditure to refurbish the Amenity Centre this was in the sum of £350,000 with a total proportion payable by leaseholders in the sum of £225,000. As I have already indicated Mr Francis is an experienced man as regards building works and the associated costs. I have no doubt that this estimate was relatively carefully considered by him albeit that a caveat was expressed at the meeting. The figure was repeated in the on account demand the 2010 (bundle page 216).

221. However by an account for the period of 14 May to 31 December 2010 the sum leapt to an estimated cost of refurbishing the amenity centre of £900,000 i.e. an increase of over 150% with the leaseholders contribution (70%) rising to £630,000 i.e. approaching three times the original figure. The explanation given for this was not that there had been an underestimation of the costs, rather that the original figure was on the basis that the costs would be spread out over a number of years. However having considered the contents of the letter and heard the evidence I do not accept that that is correct. There was no adequate explanation before me as to why the estimate for works yet to be completed has increased so radically.

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

223. Further and in any event I do not consider the request for *increased* sums, without any real rationale being provided, on account of the service charge to have been a reasonable request on account in any event i.e. regardless of recoverability and/or the reasonableness of the initial demand

224. The proposed works to be carried out on the on the former Amenity Centre are substantial see statement of Mr Francis Bundle 2 p 774 at paragraph 68 et seq and Bundle 2p 83. He stated

> " *The Amenity Centre is a major problem it was a poor, conversion of an old officers' mess left over from the Second World War. It has an old tin roof containing asbestos which had been noted……. it was in a major state of decay at the time of our acquisition. It had no installation and no heating. As a result the toilets were very cold. They were so bad that the old company had apparently hired portaloos for use by staff. The office was in a dreadful mess. It was damp, smelly and dangerous and quite inappropriate for people to work in - a fact which the old company recognised because it had at a continuing expense hired a Portakabin on a weekly basis for the use of Mr Drummond the managing Director as a recognised that the office in the old amenity centre could not be used…. in fact the entire building was damp. When we pull the furniture away to expose the outside walls they were found to be completely black with damp. The bar area had continuously to water as the roof was full of holes. The carpet in the bar area even had holes in it where the water had been dripping on the same spot, apparently for many years. When we removed the carpet the extent of the damp problem was clearly evident. The kitchen has no outside door to it. The walls and roof covered in mildew. The Electric's both in the kitchen and the children's games room were very poor. The plugs from some of the games machines and even melted into the sockets they were getting so hot. We felt we had to close the amenity centre as it had fallen into such substantial disrepair*"

225. As I have already stated whilst I am in no doubt that works were indeed required upon the Amenity Centre it is my judgement that Mr Francis has in this passage exaggerated the extent of the problems. I believe that the outset of his consideration of the site that Mr Francis believed that in effect a new amenity centre was required with all that could usefully be retained the existing facility being the shell.

226. Whilst it has been accepted on behalf of the Defendants that appropriate renewal and rebuilding may involve an element of improvement it is stated (Bundle 2 p 82/83)

> " *as a result Defendants are not precluded from claiming for works undertaken simply because they involve an element of improvement provided the works are strictly necessary as matters of good estate management of the fence to comply with their covenants in the lease*"

227. However, he is also set out within the reply to the request for further information(Bundle 2 p 839b) that with regard to the figure of £903,804.05

> *" This estimate relates only to the cost necessary to bring the building up to the basic standard of the existing amenity centre as it would have been had it been kept in repair and reasonable condition. It does not include the changes to the restructure, over and above the replacement of the existing roof, which would create the external roof terrace ….the figure of £903,804.05 does however include for the provision of the dining/games room, as the existing amenity centre included those facilities, and the replacement of the existing roof"*

228. As Mr Francis stated

> "*Having closed the amenity centre we took out the rotten timbers and the ceilings. Mr Holland has anticipated that the demolition and refurbishment would cost £903,804.05. In fact apart from removal of the asbestos which is a specialist operation and which would require specialist contractors we intended to do as much of the work as possible ourselves so as to reduce the cost of the operation as much as possible and so to benefit the chalet owners . This would reduce the cost significantly but the issue these proceedings and the very aggressive approach which Mr Knapper has adopted to us may mean that we feel we have to employ contractors to do this work. We would not propose to charge the leaseholders for the entire cost of the necessary works since we appreciate the cost will be substantial. I wish I absorb some of the costs ourselves but we would wish to recover an appropriate contribution from the chalet owners*."

229. The report of Mr Pesznski, is at Bundle 2 page 650. He has not yet given evidence and I do not know if the Defendants will wish to call him in the second part of his hearing. As a result Mr Stoner Q.C. submitted in his submission by reply that no or very little weight should be attached to his untested evidence. However a significant limitation upon his expert evidence in any event will be that when he

visited the building it had already been stripped out in preparation for a complete refurbishment. He states, in part seeking to taking over my function,

> *"I note that with the exception of the reception, office shop and launderette, these works simply seek to reinstate the previous accommodation within the confines of the existing building shell. There are no proposed additions or extensions to this existing structure, with the exception of some modification of the roof, in order to create the dining/games room with a roof terrace over the proposal does however reconfigure the internal layout. The extent of works I will consider to be additional are limited to the altered roof structure and finish in order to create the dining/games room and external roof terrace. Apart from these items, I do not consider that the proposed works would constitute an improvement. There will be an element of betterment but this is an inevitable result of the fact that long overdue repairs will be undertaken, and not because the works present an improvement on what would be expected if the building had been properly maintained .There may be a case regarding improvements to some of the proposed works which would offer an element of discount from the repairs cost . These costs would relate to the altered elements of roof structure and finish and any extra over costs associated with the internal layout reconfiguration. However, within the overall scope of these works, I'm of the opinion that such costs would have a minimal impact upon the overall cost of this refurbishment"*

230. As I have set out the previous Amenity Centre was previously open to members of the public, indeed positively sought to attract them and when reading into the case it was my understanding that the proposed structure would also seek to attract ordinary members of the public not residents of the site and the majority of the building will not be subject to any exclusivity as to entry/use. Indeed I could see no business rationale for proceeding otherwise. The Defendant's witness statement were silent on the subject

231. However in his closing submissions Mr Paton stated

> *. The provision of an Amenity Centre – which this would most certainly still be, even if it just provided bars, a restaurant, toilets and a games room – is expressly envisaged by Sch. 3 clause 7. It does not cease, and has not ceased to be an Amenity Centre because the office and launderette have been moved out of it. Notably, the Claimants made no response in submissions to Martin Francis's evidence that if refurbished and re-opened, it would in fact be kept for use by chalet lessees and holidaymakers (their sub-lessees) only, and not opened*

to the general public. However, even when it was open to the public in previous years, there appears to have been no suggestion that the costs of its maintenance, renewal or rebuilding fell wholly outside the service charge provisions. The raising of funds for the old company's far more ambitious project (involving a swimming pool etc.) was a different issue.

232. When I read this it was not my recollection of the evidence. I remembered no firm binding statement. My note of his evidence (as with any Judge's notes they are not a complete verbatim transcript) on this point is as follows

Q ; p388 is your planning application ; this is what you put in?
A ; This drawing is wrong as the footprint is the same.

Q; p389 ; there will be major structural changes ; such as to the toilets ?

A; What are you getting at ; it is correct ; it's a better place.

They wanted a games room ; so I think that its intended to be a play area.

Q ; Your idea once built it rent it out ?

A ; The people outside were renting it previously. It was a 12 month contract and they left in August; they were new. Lisa and Carl Tuffin. They complained no heating general smell and wiring tripping. The electrician plug was melted in and covered up.

A ; it has beautiful view and the roof terrace gives the visitors and chalet owners and attracts business.

A ; I am not a charity. I intend to run the amenity centre to make money as I believe that it encourages people to come to the site and also that it will encourage new owners to the site . ***I do not know if I will exclude the public as yet****. The families do not intend the builder in the village coming in for a late drink and that is not for the advantage of me or others.*

Q ; The prices will be the same for public and chalets owners ?.
A ; yes

Q ; Your are going to spend £ 900,000 and get a new bar and restaurant
A ; I will have 10 weeks as a season.

Q; So need to get as many people in as possible ?

A ; yes

Q ; So will , the lessees , they be charged for the capital expenditure and will get charged the ordinary costs ?
A; yes

A; But you don't always make a profit out of one part ; it may make a loss ; its rental and caravan park ; it's a question of the whole. I paid £1.35 m for the site.

233. Mr Stoner Q.C. submitted

It is astonishing that a throw away remark by Mr Francis has been both misstated and then adopted in the misstated way. If the Defendants' case is that it intends to spend £900,000 refurbishing the empty building on site and will then restrict that to park residents the entire scheme unambiguously falls foul of the reasonableness requirements imposed by s19 of the Landlord & Tenant Act 1985.

It is submitted on behalf of the Defendants that Mr Francis said the former amenity centre building will be kept for use by chalet lessees and any holidaymakers they let to and no one else. This is startling and in any event simply incorrect:

(a) Mr Francis' evidence (on the morning of day 3 of the trial) was that he had not decided whether to open it to the public or not. Accordingly not only was his evidence that no decision had been made, he simply referred to the public potentially being excluded.

(b) Farcically the submission actually puts the case on behalf of the Defendants that those on holiday in the touring park would be excluded from the facilities on offer in the refurbished building for they are nether chalet lessees or sub-lessees of the chalet lessees.

234. I am here concerned with evidence as to a future intention in relation to works which have not been undertaken ; indeed which may not take place as the intention has been stated to be now dependent upon my findings. Mr Paton submitted

In response to his Honour's question when these matters were referred to in the Claimants' submissions ("where am I in this case?" on these items), all that can be ruled upon is whether qualifying works on these matters are in principle recoverable under the leases, subject to all future questions of consultation and reasonableness of sums. ***If the Court rules that they are not recoverable at all, either because of the provisions of the***

leases or because it would not be reasonable even to embark on works to these matters at all, then the Defendants are unlikely to carry them out; *but it is submitted that this would be a wrong finding in principle on the clear wording of the lease (especially Schedule 3 clauses 3 and 7). The reality is that differences on these items are likely to be questions of amount and degree, to be resolved by the consultation process and a future LVT challenge if necessary; but as a matter of principle such works are within the scope of the lease provisions.*

235. I am not prepared to rely upon the submission set out within Mr Paton's closing submissions. My overall view of Mr Francis' evidence is that he was and is, at the least, prepared to change his plans according to his own best commercial interests and that he has not as a matter of fact formed the settled view that Mr Paton now suggests. Such an intention has never having been previously expressed and, as Mr Francis stated in relation to the shortness of the high season, there is the need to get as many people to use the facilities as possible to maximise income. Further, if he changed his mind in the future what recourse would the leaseholders have ? It appears to me that the answer is none.

236. I can only proceed on the plans placed before me . The Defendants reply to a request further information (Bundle 2 p81) states as follows

" as is clear…. it is not intended to demolish the Amenity Centre in its entirety nor to construct it simply to undertake necessary works of repair, renewal and rebuilding (which involves an element of demolition but not the demolition of the entire building). Stripping out works have been completed and are claimed as a service charge it is not possible to identify specifically the precise cost of the stripping out works because personnel wearing gate carry out a number of tasks necessary to ensure the defendants complied with their contractual responsibilities and their invoices are not broken down to show each item of work undertaken……. as is shown in the on account demand for 2010 the defendants propose to apportion the cost so that only 70% of the total cost of the planned works is claimed from the chalet/lodge owners. In determining the appropriate apportionment the defendants have taken the total of 241 caravan pitches/chalets/lodges and assumed that the use of the amenity centre will be shared between those occupying the 70 caravan pitches (29% of the total) rounding the 71% charged to chalet/lodge owners down to 70%. The net effect is that as the defendants own 9 chalets and seven lodges of the 171 chalets/lodges as they will absorb in excess of 30% of the total expenditure. It is considered the apportionment of the cost (whereby 30% is absorbed by the defendants to reflect usage by

those occupying the caravan pitches) is generous to chalet owners because it assumes (optimistically) 100% occupancy of the caravan pitches"

237. As for the plans for the future works there is a "Design and Access Statement" at Bundle 1 p 380 (dated 10th January 2009).Under description it is stated ;

" the proposed application consists of five sections , all relate to the overall improvement of the application site with the sole aim of enhancing the holiday experience through improved layout , design and the siting of essential facilities for all visitors . The overall aim of this application is to address the negative issues of the existing facilities available in the camp . The existing layout and facilities available at this time are limited , the existing washroom has been demolished due to its poor condition , there is no provision for visitors to wash dry clothing , the existing clubhouse was poorly arranged and lack sufficient teaching and the wealth of facilities , safe storage for food and drink all of which were detrimental (to the) holiday experience .

The application consists of the following

- *new shower block*
- *wash and dry room/staffroom*
- *alteration to the clubhouse comprising :-new sun deck/roof garden (hidden within roof space) and external alterations to the Windows*
- *boundary fence*
- *storeroom*
- *Erection of purpose-built holiday units (as per application 2009/00158)*

238. It is significant to note that there is no mention of the existing clubhouse being dangerous, dire or diabolical.

239. Further, and a matter relevant to qualifying works, it appears to tie together five sections of planned work.

240. It is now accepted that the planned works to the Amenity Centre will constitute qualifying works (Bundle 2 p82 para(iii)), and as a result consultation is required

241. Having made these general observation and after consideration of all evidence my findings in relation to the Amenity centre are as follows;

242. The amenity centre was clearly in need of works of repair and maintenance. However, it was not in the dire diabolical condition described by Mr Francis. I find that he has exaggerated the problems as to condition and construction. To the extent that it is necessary it is extremely difficult to now give a certain and accurate assessment as to the extent of work required to bring the existing community centre up to an objectively reasonably acceptable standard and keeping an office, shop and launderette within the building. This is because it is now been stripped out.

243. On balance I think that it would have been possible to maintain and indeed in some respects improve on all facilities in a significantly revamped building. In my judgment this a potential relevant feature within what is considered a fair and equitable proportion of the costs of any new amenity centre.

244. It was the intention of the Defendants from the outset, and by that I mean before or immediately after purchase to

(a) substantially improve the amenity centre so as to make its central focus as an attraction of the site and improve its profitability.

(b) Build a separate office, shop, launderette and staff facilities.

245. The works undertaken and proposed be undertaken were not and were not intended to be limited in scope or cost to simply repair or maintenance of the existing centre but are in fact a substantial building programme, including but not limited to rebuilding, to provide wholesale improvement in the layout and facilities on the site as a whole .This involved the creation of separate new buildings. By way of example of operative motivation, as Mr Francis indicated during the site visit, it was, in his opinion, far more convenient and suitable for all users of the site as a whole to have the launderette where it is now, rather than within the former amenity centre. Likewise, I have little doubt the office.

246. As I have already set out in some detail the lease does not restrict the recoverable charges to repair and maintenance alone but allows the costs of works of renewing and rebuilding, which will often necessarily carry with them an element of improvement or betterment over the existing structure and accompanying facilities.

247. In my judgment had there been consultation in relation to the works and, more importantly such works limited to those reasonably required to the Amenity Centre, then much of the current force in Claimant's objections as to the scope of the works would have been removed. However this is not what took place

248. In my judgment that the plans of the Defendants do include improvement and betterment does not of itself deny recoverability. However the objection of the leaseholders is that the works go well beyond the terms of the covenant and that

a) new buildings have been created ; office/ shop and launderette/staffroom.

b) the proposed betterment or improvement of the remaining amenity centre building is substantially for the benefit of the Landlords commercial activities.

249. In respect of the creation of the new buildings it is my view that the building costs are not recoverable. They were not a rebuild but part of a "new build" as part of an obvious improvement programme.

250. As to (b) above given the limit to the findings that I can make during Part 1 of this hearing it is not possible for the court in any assessment process at this stage to make

(i) the necessary distinctions as to the extent to which features of the proposed works fall wholly or partly to be considered as improvements primarily for the benefit of the Landlords that could have been avoided by pure repair and maintenance works to the existing structure (a fortiori allowing some element betterment or improvement).

(ii) An assessment of the nature and extent of the likely commercial activities of the landlord and the extent of benefit to the leaseholders

251. Such detailed assessment can and indeed should be made given the fact that lease specifically incorporates a limit to the leaseholders liability for works of repairing , renewing rebuilding decorating cleaning and maintaining parts of the estate , including an amenity centre, to a fair and equitable proportion.

252. In my judgment this limitation imports flexibility that can and should reflect the symbiotic use of an amenity centre in which truly commercial enterprises of the landlord and facilities for the use and benefit of the leaseholders co-exist. As I have stated it is an analysis of coin with two sides.

253. What I have been able to determine is that assuming the whole of the proposed costs of the work to the building is prima facie recoverable under the covenants within the leases it would not, in my

judgment, be fair and equitable to apportion the overall cost of the works in the manner suggested by the Defendants.

254. Such an apportionment wholly ignores the lack of what is, at the very least, a potentially non- exclusive facility attracting non residents and those visiting the caravan park and the consequential profit to be derived by the Defendants (and solely the Defendants) from the commercial enterprises the centre will contain. As I have set out the previous centre was wholly operated for a sixth of the year primarily if not solely for non –residents.

255. In this regard I believe that the words *" used in common with other lessees*" have some resonance and to a degree informs as to the appropriate considerations to weigh into the balance when considering what is fair and equitable.

256. Although exclusivity is not enshrined it seems to me that very significant common use and as a result benefit must have been in contemplation of the parties by the imposition of the liability.

257. Indeed, despite the fact that both facilities may be used in common with other lessees, there is a very great deal of difference between a games room access to which is expressly limited or usually limited by the fact that no non resident knows of its existence on the one hand and a restaurant advertised, in newspapers as open to all members of the public indeed operated to attract non-residents, possibly throughout the year and providing no discount of subsidy to a resident or the unfettered ability to sit at a table and not incur any costs.

258. The report compiled by Edward Symons shows that the amenity centre had a clear value in terms of net income to a potential purchaser. If a major driver for the undertaking of the works, including as they do, at the very least, a significant betterment, is to substantially increase that value based on annual income, I do not see how it can be fair and equitable that the lessees in effect face the whole of the cost, save for some reflection of use by other temporary or permanent site residents.

259. I accept Mr Paton's submission that the restaurants or bars in the building on this holiday site are amenities within the definition I have outlined. However that cannot, in my judgment, be an end to the matter. That is why the draughtsman inserted the caveat of fair and equitable

260. So what is a fair and equitable proportion and how is the necessary assessment to be undertaken ?

261. Firstly , as I have stated , I reject the analysis put forward by the Defendants. It ignores the obvious potential increase in commercial benefit as a primary driver behind the works.

262. In my judgment the obvious starting point must be the contemplation of the parties. This means careful consideration of the specific wording of the lease.

263. I find that the lease contemplated the ordinary generic description of such facility on a holiday leisure site such as this estate. People on holiday look for certain facilities to be available to make their stay more enjoyable. There then has to be detailed consideration of what is to be constructed and how i.e. in what proportion the floor space will be used and for what.

264. At this stage the extent to which the former centre could have been the subject of works at very considerably lesser costs may be relevant.

265. Then there is the question of the extent to which facilities will provide income for the lessor. Any analysis should take into account whether the usage is indeed solely or mainly in common with other lessees (such as a games room) producing no income, or a commercial operation solely or mainly for the residents, being leaseholders and visitors to the lodges or caravan park (such division being important as landlord gains profit through the visitors using the estate) such as launderette or a solely or largely free standing commercial use such as a restaurant in which regard the leaseholders are in no different position to a passing member of the public.

266. The proposed plan for the works set out at page 383 that

> *" the proposed scheme has increased the kitchen areas, provide a dedicated route for staff serving food within the existing restaurant, a small takeaway servery has been included adjacent to the kitchen. The existing WC provisions had been demolished and relocated to provide clean modern facilities, all of which ensure the layout complies with Part M (disabled access). It is proposed to raise the height of the roof as there is adequate height between the rich and the proposed deck level… to provide a more open approach and ease the flow of visitors it is proposed to replace the existing windows on the front elevation to the French doors, thus improving the amount of natural light within the bar area."*

I found it difficult to easily interpret the plan at bundle page 389.

267. Having made these preliminary findings I do not believe that I can properly go further in terms of findings at this stage. In my judgment it would be necessary for there to be further evidence and

submissions on what should constitute a fair and equitable proportion of the works actually to be carried out and given the intended and potential uses of the facilities.

268. As for the reasonableness of the request for money in advance of the works, I have already set out that I do not believe the initial request in advance was a reasonable requirement as a payment on account. This was a large sum, unaccompanied by any or any adequate detail as to the nature and extent of the proposed works within a programme of works i.e. accompanied by other significant demands for funds.

269. Further and given the initial estimate, the greatly increased request as subsequently made, without any adequate explanation or detailed costings, cannot be viewed as reasonably made in any event.

270. The leaseholders must have an ability to plan finances and the reasonableness of the requirement is not simply limited to the amount sought but the full circumstances of the demand.

271. Further, I am now uncertain, given the content of the submissions made by Mr Paton, and the requirement of consultation as to how these findings will impact on the proposed works to be undertaken and as a result the costs to be incurred and then to be subject of analysis of the fair and equitable proportion capable of recovery from the lessees. Without knowledge of such matters it is not possible to set a reasonable sum that may be sought on account.

272. After time for the consideration of this judgment I will require submissions as to the way forward, through Part 2 hearing or otherwise on the question of the ability of the court to further determine the nature , extent and future costs of works upon the amenity centre.

(d) New office/shop and new launderette/rest room buildings

273. As I have set out the construction of these buildings was bound up with the proposed works on the amenity Centre as, the office, reception, launderette and shop were previously located in the amenity centre building.

274. The new office/shop building was commenced in 2008 and completed 2009. Mr Paton submitted that estimated cost allocated between invoices: £23,724.17, £15,127.38, and £8596.79).

275. The New launderette (‘wash/dry’ room) and staff room was completed in 2009 at a cost of £14,451.45.

276. Mr Paton submitted that in relation to both these items that the starting point was the condition of the Amenity centre following the Defendants' purchase , as described by Mr. Francis. As I have set out is was his evidence that the building was unsafe, unheated and poorly wired, with asbestos in the roof. The office was unusable, and old company had hired Portakabins and Portaloos for staff. He argued that in light of these conditions the Defendants took the reasonable and economic decision to relocate these essential facilities in two modest new buildings. Further they were entitled to do in the reasonable "management and maintenance of the Estate", but these items could also be seen as economic renewal and/or rebuilding of the inadequate and deteriorated facilities housed in the amenity centre.

277. He relied upon the report of Mr Peszynski at Bundle 3 p657:

> *"I consider these facilities to be essential for the proper running of the park, and their isolated refurbishment within the existing amenity block would not constitute a commercial or economic solution and would I believe result in a valueless repair."*

278. Mr Paton further submitted that the cost has been very modest compared to the estimates [see Bundle 3 p826], and neither building amounts to an item of "qualifying works" under s20.

279. It was said that only 50% of associated costs for the construction have been passed on .Certainly within the schedule entitled "*expenditure on the reception Offfice/shop*" certain items are marked as half charged or part charged. It was also stated that no charge has been made for the cladding of office/shop as the Defendants had materials to clad which they had originally purchased at a cost of approximately £2000. The total costs on this "maintenance task" are said to be £23,724.17.

280. However for the reasons set out above I do not find that any of the construction costs of these new buildings on a separate part of the site from the amenity centre are recoverable under the terms of the lease. They are clearly "new build" as opposed to "re-build", not moved to new buildings by reason of any reasonable necessity and as such clear improvements.

281. If they had been recoverable I would not have disallowed them on a freestanding test of reasonableness, given the timing and extent of the request by way of charge .

(e) Lighting

282. The past expenditure was incurred between June and August 2009 in the sum of £32,225.13. There are also lighting works which are yet to be done (which will be qualifying works).

283. As for the Claimant's perspective, Mr Phillips was "non-plussed" by the lighting replacements works so soon after the installation of low level lighting by the old company. He could see a need for lighting on the paths to the chalets, but was strongly of the view that the balance of the lighting on the site was quite adequate.

284. The Defendants were of the view, that the level of lighting and also the construction of the electrical lighting units themselves were both inadequate and unsafe. I accept that this was their honest belief. However no expert assistance was obtained as to an adequate or proper level of lighting for the site beyond that of an electrician.

285. I visited the site during the day .The level of lighting did not strike me as a first-time visitor as obviously excessive. I suspect that much of the objection lies in the change from the previous position which appear to have been a long-standing relatively low level.

286. Mr Paton submitted that the provision of adequate street lighting is an essential aspect of the safe management and maintenance of a large holiday park, particularly with regard to the elderly. What existing lighting there was at the park was inadequate and (in some cases) vandalised. The Defendants took a reasonable decision to install proper lighting for the management and maintenance of the Estate and the maintenance and renewal of the common parts of that Estate. he submitted that the amounts involved are modest and reasonable:

287. Mr Stoner Q.C. submitted that it was a management decision to put up the lights, and the work cannot be considered repair or maintenance ; it was an attempt at improvement. Further he stated that it was a question of reasonableness in that there was inadequate justification for£32,222 of 40 odd street lights.

288. As I indicated during the course of submissions I was and am not in a position to compare and contrast the position before and after installation of the lights ; and I simply do not have the evidence currently before me when to allow this. The adequacy of lighting on a leisure site is also in no small part a subjective matter and even within the Claimant cohort I expect that there is a very large measure of disagreement on the detail of this issue.

289. As a starting point for an analysis that there can be no doubt that some work to some of the areas and previously installed lighting was reasonably required within the terms of the lease. Thereafter, I accept that it is possible that within the full extent of the works actually carried out elements go beyond such works and into redesign and (although not universally accepted as such) improvement. Further I

bear in mind the lack of expert assistance, this not being the fault of the Claimants. However, I am not a position to make a detailed assessment and on balance it is my view that whilst there may be an element of betterment, and having regard to the fair and equitable proviso, the whole costs of the lighting works so far undertaken are properly recoverable.

290. I also see no ground for disallowing the recovery on the freestanding test of reasonableness.

(f) Drainage works

291. As for the Drainage works this has been described as

> *" **Initial drainage works** (including draining chalet park): £15,769.20 + £7502.50 of Francis Leisure invoice (2008) £6680.72 (2009)*

292. Mr Francis stated that there was a substantial drainage problem on the site with neither the foul all the storm water drainage anything like adequate. He stated that he believed that the old company had been conscious for a long time of the problem the drainage and had not adequately dealt with it. He also stated, as set out within his witness statement at paragraph 56 (Bundle page 767) that he was told that the car and park could be a nightmare during bad weather, and that there were open manholes. As result he believed urgent work was necessary.

293. It is necessary to separate out the relevant elements of the work undertaken and proposed to be undertaken in the future

294. As for foul water it was the evidence of Mr Francis that the problem was to do with the drainage system which ran from the chalet park through the Caravan Park to the play area and onto the pumping station. He told me that the system simply could not cope and the pipe was constantly backing up. Work was undertaken including upon the structures in the Caravan Park.

295. As for the storm water drainage in the chalet park this was a separate problem with a wholly separate cause or causes, including the fact that the main storm pipe the ram through the touring park to the old chalet park had collapsed causing water to back up into the old chalet park. The old company had apparently put in a new pipeline to the side of the park near the lodges and only six chalets were ever connected to this pipe. Mr Francis stated

"as a first step we drain the Caravan Park replacing the stormwater drain and installing a herringbone system of drains which now ensures that surface water which runs down the slight incline from the chalet park can drain away satisfactorily."

296. He also added

" additionally we have decided that it is necessary in the near future to renew the drainage throughout this area, provide a proper system of removing stormwater from the chalet roofs so that they are collected and run properly into drains and install proper paths so the chalet owners have access to common parts without having to go over grass to do so." He stated this was an expensive but very necessary operation

297. Hence it is the only "first step" which has been taken ; see Bundle 3 700 para. 61. Future major works will be the subject of consultation.

298. Mr Paton submits that the works undertaken were clearly an essential aspect of the management and maintenance of the Estate in general, while also falling within both Schedule 3 paragraph 3, not limited by the common use caveat and paragraph 7 (maintenance and operation of drainage pipes and conduits; repair, renewal or rebuilding of common part of Estate).He also added that the cost was modest and reasonable and below the s20 threshold.

299. I listened carefully to what Mr Francis stated about the drains and followed the relevant evidence as best I could including cross-examination. In the round and put simply I accept what he told me about the drainage works so far undertaken.

300. Mr Stoner Q.C. submitted

The suggestion a disproportionate amount of time was spend on the limited drainage works is refuted. Some time was spent on it because reliance was placed on the report dating from 2003, incorporating a report from 1997 [4/1004 – 1119] as justifying the drainage works which have taken place and which are intended, when that report quite clearly relates to the need to upgrade drains as a consequence of the installation of the lodges, which is outside the Estate for the purposes of all bar one of the chalet leases: see, for example, the first paragraph of the executive summary at [4/1014].

The point was also used to illustrate what the Claimants contend is the incorrect reliance on incomplete and aged documentation from the old company to justify works in 2008 and 2009.

301. I note the content of the "Executive Summary" at Bundle page 14 stating that the report dated 31st January 2003 was commissioned to clarify the extent of works required to improve the system with a view to construction of additional accommodation and leisure facilities. However I do not accept Mr Stoner's fundamental premise that the work so far undertaken was wholly or partially motivated or caused by reasons other than those stated by Mr Francis. I accept the evidence as to the inadequacy of the system in situ for the current usage and also of a collapse. Mr Francis was adamant during cross-examination that the works were not for the benefit of the caravan park.

302. I also see the work as in issue as primarily intended by the draughtsman to be recoverable under schedule 3 paragraph 3. This is not limited by a common use caveat. The work undertaken was on the estate and as a result prima facie covered.

303. As a result it is my view that these costs of works as undertaken on the estate are properly recoverable.

304. I also see no reason on the arguments and evidence before me in Part 1 to impeach the recovery as unreasonable in any way.

305. However, this is on the basis that all works actually carried out were on the estate and there is not some further point to be taken as regards the actual amount of costs incurred. Certainly to the extent that any of the works were not undertaken on the estate but off it i.e. within the lodge area itself I would probably hold a very different view.

306. To the extent that any of the works so far undertaken were not carried out on the estate and/or if there is some further point as regards the actual amount of costs I will allow further evidence and submissions in Part 2.

307. As for any arguments as regards future works I would also need further submissions in Part 2

(g) Road works and the Installation of speed humps

308. This issue relates to road and tarmac maintenance works including speed humps, footpaths and lay-by works, undertaken in January to August 2009 at a cost of £26,553

309. There was an issue of fact as to whether there were already some speed bumps in existence at the time of the purchase of the site by the Defendants. Mr Philips indicated the general position at the time of the site visit. Mr Francis denied the existence of such humps. It may be that humps did exist in the past but were removed as part of the more recent roadworks undertaken by the old company. However I am

unable to reach any concluded finding as to whether they existed not. However, the implicit acceptance that some speed humps were previously present and presumably considered acceptable and appropriate, is some importance.

310. Of course safety must be a very high consideration if not paramount within any site layout. It is therefore primarily a question degree as to what calming measures are required.

311. Mr Francis stated

" we also constructed speed humps within the estate as speeding within the park revs into the real health and safety hazard. There was some opposition to the installation of the speed comes in reality is the owners of the site responsible for the safety chalet owners we had no choice but to take the necessary steps to stop speeding. By light of feedback which we have received subsequent to the construction has been very positive with most people understanding that they have made the site much safer the young and old alike. In particular I have noticed the poets now allow their children to cycle from the shallowest play area and use the shop on the island were as previously most things it too dangerous to do so .We have also installed number of disabled dropped kerbs to assist the disabled and marked the series appropriately"

312. I listened to Mr Francis on this point and accept what he said at an honest appraisal of the issue as he saw it. I further accept his rationale is entirely reasonable from the perspective of the owner of the park.

313. However, the issue of whether speed humps were reasonably and properly installed does not fully answer the question the recoverable to the cost. It seems clear that they were initially constructed so that they were too high they were then lowered.

314. It seems to me that this was mistake and that there was an inadequate analysis before construction. The question then , as one of reasonableness if not initial recoverability is ; why should the leaseholders pay for mistakes in the construction of the speed humps ? I can see no reason why. To the, I assume relatively minor extent that remedial works were required I do not believe that such works are recoverable. The extent of the reduction is a matter of Part 2

(h) Relationship between the Defendants and Francis Leisure Limited

315. The invoiced payments to Francis Leisure Limited for services of Martin and Rebekah Francis in 2009 were £55,000 and £35,000 respectively.

316. I have already set out my finding as to the correct interpretation of clause 3 paragraph 8; but other arguments were raised in respect of the sums sought in respect of services rendered by the Defendants.

317. By way of overview Mr Francis stated at paragraph 97(Bundle 3 p 785)

" additionally I wife has been working full-time for 50 weeks a year since we acquired the estate. She not charge for time prior to 31 December 2008 per time for the administrative support she has provided since then has been invoiced by our company Francis leisure Limited. We have charged her work at £15 per hour which I consider to be reasonable to the work is done the charges seems that she has worked 50 hours per week in doing their job. That does not include any time on our own commercial activities in fact she spent more than 50 hours in doing her job- more like 70 hours-but we have limited the invoiced to keep the charges as low as possible"

318. By way of main challenge to the detail of the sums claimed it is the Claimants' submission that the Defendants cannot properly claim for 100% of Mrs Francis' time in the office as she clearly spent a significant amount of time upon commercial activities solely for the benefit of the defendants and that the sum sought is in excess of that properly recoverable..

319. The relevant invoice is at Bundle 7A p 2678 for the period 1st January 2009 -31st December 2009. It claims for 50 weeks administrative support at £750 per week equating to 50 hours at £15 per hour (an average of over seven hours a day for seven days a week) . There is a general description of duties all of which on the detail given what a recoverable. On the basis of what Mr Francis stated the hours worked were an average of 10 hours per day for seven days a week with under a third of the time spent on commercial activities i.e. time spent on other duties specifically the ancillary businesses run by the defendants such as the rental of leaseholders chalets, lodges and also occupation of the caravan park.

320. It is also of significance to note that there are also invoices for office wages reflecting work of office administration and reception duties by Lisa Tuffin , Sally James and P.Smith throughout 2009 in the total sum of £9,955.39

321. Although I accepting that the business of the estate generally is one that requires attention seven days a week I cannot accept Mr Francis' starting point of seven hours for each day for all but two weeks a year. It is simply untenable as an accurate position.

322. Within the Defendant's replies to Claimant's requests for further information at bundle p 84 it is stated in the context of the charge for 50% of the construction of the office that

> *" ... That apportionment assumes that over 50% of the office use relates to functions specific to the proper management of the estate with the remainder being related to the commercial activities of the Defendants such as their commercial letting of chalets/lodges"*

323. There is also the statement within the Defendants replies to the Claimants' response to the schedules that

> *" the Defendants have included in service charge half of the entire office wages. They have absorbed 50% of the costs of the site office. They consider this to e an appropriate apportionment"*

324. Further on my notes Mrs Francis answered in cross-examination that

> *Q ; B7A/ 2678 ; Francis leisure invoice ; your wages ?*
> *A; yes ; I work 7 days a week ; 7 hours a day for 50 weeks*
>
> And also
> *Q You charge 50% of the running of the office as you think that is fair*
> *A; yes*

325. Perhaps unsurprisingly in light of the above Mr Stoner Q.C. also asked in cross-examination

> *Q; So they pay 50% of the building, 50% of staff, why not 50% of you*
> *A ; Mine is a full time job to do this work*

326. However, it is not solely Mrs Francis who is working upon site management issues but also her husband. Mr Francis stated at paragraph 98 (Bundle p 713)

" I am responsible for organising and co-ordinating the office operations and procedures and manage the staff, check with all suppliers (e.g. waste collection, electricity and gas) to ensure we save money wherever possible and make sure that all materials that we purchase at the best possible value and arrange appointments of new staff, make decisions regarding the proper operation of the office,

establish standards and procedures, take responsibility for the maintenance of the office equipment and supplies, recruit and monitor staff and evaluate staff performance. I am also responsible for dealing with or orders, planning and implementing office systems, anticipating necessary supplies and verifying their receipt. Make sure that the needs of all leaseholders are met and check their properties if we have any concerns on their behalf e.g. because of bad weather damage. I make sure that all governments within the leases adhered to, ensure payments the estate are received and is not arrangement to be chased. I deal with all health and safety issues, working injunction with the local authority and ensure that all licences and certificates are complied with. I think the overall cost compares very well when there is borne in mind the cost paid by the old company(whose directors include some of the claimants in this case) to Mr Drummond (its managing director) for a similar (or in fact I suspect rather less demanding job."..... 2006 budget for the old company anticipated £46,000 for managers wages"

327. Clearly it is necessary to look at the combined time of Mr and Mrs Francis when considering this issue. However although Mr Francis makes reference to the previous level of charges I simply do not have the available evidence to make a proper comparison.

328. Standing back and making the best assessment that I can on the evidence before me I do not accept that all the hours claimed by Mr Francis fall within the entitlement to claim back against the leaseholders. This does not mean that I do not believe that Mrs Francis has worked long hours, I am sure that she does, though probably not to the full and consistently sustained extent suggested, rather I do not believe that the total hours claimed as properly referable to work recoverable under the lease is correct. I think that the amount of time spent upon the work properly referable to work directly upon the Defendant's commercial interests has been underplayed.

329. Assuming a 50 hour week I believe that in line with the other office charges 50 % of Mrs Francis' time is properly recoverable.

330. I also understood from the oral evidence of Mrs Francis that a check would be made that the 50% rule applied to the other charges had indeed been followed for all relevant invoices. No doubt this can be clarified in Part 2.

331. Further, and in line with my judgment upon the issues above such as (but not limited to) the banks there may need to be a further reduction in the hours properly payable i.e. Mr Francis' time on this work. Again submissions can be made in Part 2.

7. Sham/Dormant Company

332. An issue was raised in cross-examination and thereafter developed in argument (not having been pleaded) that the company that raised the charges in respect of the Defendant's time and indeed was itself charged was dormant. There was also a suggestion that the company was somehow a "sham"

333. In oral evidence Mrs Francis did not accept that it was a sham or dormant. She gave evidence in respect of 2008 charges, and that an invoice for £45,000 related to the payment of third party contractors Bundle 6 p1753. She plainly rejected that it was a sham company

334. Further and in response to the developing argument Mr Paton handed up certain information at the hearing on 28th April 2011 which included a print off from Companies House and correspondence from the company accountant.

335. Mr Stoner Q.C. argued

It is submitted the company is plainly not properly dormant. However, in so far as it is dormant, the sums claimed for 2008 and 2009 cannot, on the face of the company documentation, be established as having been "actually incurred" within the meaning of clause 4 of the leases. Accordingly they have to be dismissed from the service charge accounts. There is simply no evidence the Defendants can adduce that the sums have been "actually incurred".

336. The issue of dormant status or indeed the company being a "sham" have not been the subject of detailed and full argument from both sides, and were still being developed through Mr Stoner Q.C.s' reply to the written closing submissions on behalf of the Defendant. I have not been cited any section /statute (save for what the meaning of dormant is under the companies law) or authority as to how and with the effect of a company is declared dormant or had any properly focussed relevant evidence.

337. I am not prepared to give a concluded view on either issue on the basis of what I have received so far in terms of documentation and submissions. I am prepared to hear further and full submissions in Part 2 if the point if these matters are to be pursued. However this would require the Defendant to be properly put on notice of the full extent of the facts and legal arguments used against them and have a full ability to respond.

8. Qualifying works

338. By virtue of section 20 and section ZA of the Landlord & Tenant Act 1985 and The Service Charges (Consultation Requirements)(England) Regulations) 2003 SI 2003 N0 1987, the relevant contributions of tenants in respect of *"qualifying works*" are limited to £250 per tenant in respect of such works *unless* consultation requirements have either been complied with, have been the subject of agreement or have been dispensed with by a Leasehold Valuation Tribunal.

339. No adequate consultation for the purposes of the statutory requirements has in fact taken place in respect of any element of the works completed, and the Claimants have sought to argue that the majority of the work so far undertaken, being qualifying works, is caught by the cap

(a) <u>The tests to be applied</u>

340. So what are qualifying works ? Section 20ZA(2) of the 1985 defines qualifying works as.

"*means works on a building or any other premises"*

This phrase provides little help or guidance. Mr Stoner Q.C. stated that qualifying works have been defined as works which would normally be regarded as "building works", such, by way of example, that cleaning windows is not "Qualifying Works" and he referred to **<u>Paddington Walk Management Limited v Peabody Trust</u>** [2010] L & TR 89 [Central London County Court] per HHJ Hazel Marshall QC at page 109 paragraphs 88 – 93. It is clear that the learned judge in that case had relatively short submissions including what I would respectfully suggest was a bold submission that anything that could be caught by the word "work", regardless of type, nature and extent, if under taken on a building qualifies under the definition. The leaned Judge stated that it was a short point and a matter of impression before stating

" Works on a building comprise matters that one would naturally regard as being "building works" and it does not seem to me that window cleaning naturally falls within that concept"

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

342. Mr Stoner Q.C. submitted that if works are on their face qualifying works the next issue is whether they represents one set of Qualifying Works for the application of what is sometimes called the "triviality threshold". He submitted that landlords often seek to "double dip" by arguing that various individual elements of work are each separate "Qualifying Works" so the triviality threshold above which consultation is required is not triggered, which obviously erodes the consultation requirements. He referred to **Martin v Maryland Estates** [1999] 2 EGLR 53 in which Robert Walker LJ concluded:

(a) A commonsense approach was necessary as Parliament has not made it clear how to make a division, if at all, between works being undertaken.

(b) Extreme fragmentation of works in a major scheme of development "plainly would be absurd".

(c) The fact all the works were covered by one contract is not a decisive factor.

(d) The legislative purpose of the limit on recovery in the absence of consultation is to provide a triviality threshold rather than to build into every contract a margin of error.

343. In response Mr Paton's starting point, which he described as a basic point, was that the definition of qualifying works was intended to catch and solely to catch actual and significant physical works done to a building or to "premises" i.e. land other than a "building", and not just any item of expenditure later sought to be recovered via a service charge as that term is defined in section 18 of the Act. It is a point which, to the extent that it is dispute, I accept as correct.

344. As for Mr Stoner's second issue, Mr Paton referred to Section 20(3) of the Act which provides that the section "*..applies to qualifying works if relevant costs incurred on carrying out the works exceed an appropriate amount*". The "appropriate amount" is an amount which results in the "*relevant contribution*" of any tenant being more than £250. This is set out within the Regulations at regulation 6:-

"Application of section 20 to qualifying works

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

345. Mr Paton submitted that this results in the relevant question in respect any potentially qualifying set of works being "*do they cost*

such an amount that each tenant's relevant contribution to them will be over £250?". Therefore where there are 166 lessees as there were in 2009 with equal contributions, the threshold figure for one set of "qualifying works" is therefore £41,500.

346. As to how the question as to how the court is to properly identify a single set of "qualifying works", and to what extent different items of work should be aggregated together, or "disaggregated" and considered as separate, Mr Paton referred to **Mihovilovic v. Leicester City Council** [2010] UKUT 22 (LC), 28/1/10 as to guidance upon some factors suggested by the Upper Tribunal (Lands Chamber)(president ; George Bartlett Q.C. . This case concerned work replacing doors and windows in flats/maisonettes and communal parts within a block of flats. However, it was limited work of a similar nature carried out within a few days and the issue was the way that the parties had treated the work . I gained no assistance from the case.

347. In my judgment as, with the issue referred to Mr Stoner it appears to me that the question of aggregation is a question of fact on the circumstances of each individual case.

348. Taking the steps together the task in the present case is to identify whether there are any particular items or tasks within the overall year's expenditure which constitute "qualifying works", and if so what they are. Secondly, it is necessary to consider whether such works constitute one or more sets of qualifying works. Thirdly, the triviality threshold must be applied to any relevant set of qualifying works. In the present case the sum of £250 per tenant produces figures of £41,000 (2008) or £41,500 (2009) as a limit to the cost of *those* works, before they become subject to any consultation requirement.

349. I turning to the respective cases.

(b) Claimant's analysis

350. In closing Mr Stoner Q.C. submitted there was just one set of qualifying works and stated that he placed considerable reliance on evidence of Mr and Mrs Francis that in reality it was one scheme of redevelopment. He stated that the Defendants acquired this site in April 2008 and embarked on a major redevelopment and refurbishment programme which, adopting the necessary common sense approach can only be taken to be one set of Qualifying Works.

351. Accordingly, in the present instant, any works which would ordinarily be considered to be building works are qualifying works for the purposes of the 1985 Act. As a result Mr Stoner Q.C. submitted that the following works , at least, were a single set of qualifying works;

(a) All the works associated with the amenity centre;
(b) All the works associated with the construction of the new office/shop/laundry;
(c) All the works associated with the removal of the earth banks
(d) All the works associated with the drainage on site;
(e) All the works associated with the new street lighting;
(f) All the works associated with the pathways;
(g) All the works associated with the roads, including the installation of speed humps.
(h) All the works associated with the caravan park (in so far as the same are recoverable as service charge).

352. It is also the Claimants' case that the statutory cap on recovery is a once and for all cap in respect of the Qualifying Works in question, not a cap on recovery in any one accounting year:

353. In the alternative he separated out the following as separate sets of qualifying works

- The works on amenity centre (this not being in dispute)
- Office /shop ; launderette and rest room ; all being one set of works
- The Banks (this not being in dispute)
- The Drains paths and lights (work to yet be undertaken)
- The Speed humps, roads, fencing and lighting
- Sewer pump house
- Storage building

(c) Defendants' Analysis

354. Mr Paton submitted that there were two such sets of works (the banks removal and the levelling of the caravan park) but no others. All of the other significant items of work listed above are and were distinct tasks and projects relating to different areas and aspects of a 25 acre site and carried out at different times over the course of the 2008 and 2009 period.

355. He pointed out that three of the items of work as identified related to "*three separate "building[s]" being the office/reception building; the launderette/staff room*" and the initial works to the amenity centre. Others are clearly distinct and stand-alone projects, such as street lighting, fencing and the new car parking areas.

356. He argued that carrying out a range of such disparate jobs on a large holiday park is a very different case from a landlord carrying out works to a single block of residential flats.

(e) Judgment and Conclusions

357. It was the Defendant's vision that the site should be the subject of an extensive upgrading exercise. As progression of this there have been certain specific defined and separate programmes of work, such as to the banks and, as proposed, to the amenity centre and also range of very different tranches/pieces of work to different parts of the site undertaken at different times and as the need or idea arose. I cannot accept, as a matter of fact that they were ever one scheme, or could properly ever be viewed objectively using a commonsense test as such. It is to be remembered that the aim is protection through consultation. That requires a clearly identified set out works which can be set out and considered. Apart from certain aspects of the work, which were in fact mentioned in advance, I find as fact that Mr and Mrs Francis did not themselves ever plan or in any way tie all the disparate pieces of work together. It was not until the beginning of 2009 that there was any structure to the planning of the revision of the site, that being to the extent referred to at paragraph 237 above .

358. Having heard Mr Francis and considered the nature of the works I was never at any stage attracted to Mr Stoners' primary submission. It was simply not the way that Mr Francis operated Although Mr Stoner Q.C. said that he relied upon what they said in evidence, neither Mr or Mrs Francis gave evidence that it was a single set of works. The only acceptance of any coordinated approach was in 2009. Before that and contrary to Mr Stoner's submission it was Mr Francis' evidence that, in effect, "one job creates another". Examples of his general approach to the planning of works can be seen form my notes of the following exchanges

A ; I knew the site had been neglected ; I knew it had been run down.. in the all office there was just a paperclip ; so we had to find the evidence of what the neglect was.

...

A; Immediate work ; Drainage

Q; What paper was needed to see what needed to be done on the amenity centre ?
A ; None it was just visual

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

And

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

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

and

Q ; But you must have had a plan ?
A ; No was there a priority to the chalets ; main concern was to bring my family down

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

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

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

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

Q; Programme of " improvement"
A ; Cannot replace or repair without improvement

and

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

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

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

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

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

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

363. First and perhaps most importantly the proposed works on the Amenity centre. However I do not tie the stripping out of the amenity centre to the future as yet not finally determined works as being one set of works. I accept what Mr Francis told me about that work as set out above. He undertook that work to assess the problem; and the work out what to do from there.

364. Secondly the work upon the banks and the associated work of dispersal of the resulting materials. Although in light of my findings as to recoverability this is of academic importance.

365. Thirdly the works upon the (matching) two buildings that house the office/ shop and launderette /rest room. I do not accept Mr Paton's submission that these should be seen as two sets of works simply be reason of a gap in construction. They were all one planned re-location from the amenity centre Again in light of my findings as to recoverability this is of academic importance.

366. Further, and subject to costs ; future lighting , drainage and paths work amongst the chalets.

367. Other items of work properly separate from the above and each other such as lighting , the children's play area, the sewage pump house, works to the roads (re-surfacing, parking spaces, turning spaces and disabled access) ; speed humps (together with associated work on laybys and footpaths) and fencing work all fall under the costs threshold.

9. Conclusion on Past Expenditure

368. In relation to the charges already levied for the certified years , 2008 and 2009 and exercise of adjustment will now have to be undertaken in line with my findings as set out above, to the extent possible before Part 2.

369. Most obviously in relation to 2008 and the total of £132,368.40 for site maintenance and materials, this largely consisted of one item; the removal of the banks, which as I have set out in my judgment, was not properly recoverable.

370. A number of items for 2009 will be affected by this judgment and recalculation needed.

10. Future Charges

371. Turning to the sums to be the subject of charges

372. The most important single item of expenditure is the work upon the amenity centre. As I have set out the centre building is currently largely derelict or used for storage, following the fairly basic stripping out works in 2009. Obviously the Defendants will wish to reflect upon my findings before steeling on future plans.

373. The replacement of paths, lighting and drainage renewal (estimated cost in 2010 demand: £250,000) will require consultation..

11. Directions for Part 2

374. I will hear submissions after delivery of this judgment as to the directions necessary before, and detailed issues still to be addressed Part 2.

12. Case Management Issues

375. I stated that I would return to issues of case management at the conclusion of this judgment.

376. The directions made by HHJ Tyzack Q.C., which included that the trial, with a three day estimate, could be by a recorder, were surely made upon an understanding of the scope of the trial that could not possibly have envisaged

a) Firstly, that the trial judge would receive ;

- a Trial Bundle of 16 lever arch files together with two further lever arch files of authorities,
- (less than three clear days before the trial) a 31 page skeleton prepared by leading Counsel referring to required reading time of a day and thereafter;
- (Even later) a Defendants' skeleton of 42 pages
- A Claimant's List of Issues 10 pages and Defendant's list of issues 17 pages

to a total of 100 pages of skeletons and issues.

As there had be no pre-warning of the requirement for reading-in time, the first time that I was able to devote any real time to the consideration of the papers was after the conclusion of my Friday list at 6.00 pm. As I indicated via e-mail on receipt of the papers and although I usually spend many hours each weekend working I was only able to spend a few hours over that weekend. The regrettable result was that I was not able to commence this complex trial as familiar with the detailed arguments and voluminous papers as I ordinarily expect to be and as proper trial directions should enable me to be.

b) Secondly, that a realistic time estimate for the trial was not less than 10 days. The hearing that has in fact taken place, constituting only part of the final hearing, eventually took six days with the necessity for written submissions received afterwards.

c) Thirdly, that the court administration would be faced on the morning of the trial, without any warning, with the vast majority of the Claimants attending. Taken together with legal teams and others there were well in excess of 100 people seeking to fit in an ordinary courtroom. It was necessary for claimants to the action to have to stand in the corridor outside court with the doors open and very available piece of floorspace within the court to be occupied. Indeed even by the fourth day (and with a change of courtroom to a less unsatisfactory courtroom having been secured) there were still 75 people present in court. It may well be that the number of those attending also took those representing the Claimants somewhat by surprise. However given the number of Claimants to the action i.e. parties to the action, I would have expected prior liaison on the issue

377. In my judgment it is blindingly obvious that the parties should have each thought through the conduct of the trial and consequential requirements and thereafter liaised and to the extent that it was not possible to air these matters with HHJ Tyzack Q.C., to return to the court, preferably before me as not only the Designated Civil Judge but also the trial judge.

378. Parties must understand and proceed upon the basis that the courts resources, including the amount of sitting days are not only finite but reducing with concomitant and increasing pressure upon judges to use them efficiently and with fair allocation to all users.

379. Judges will not ordinarily have any reading time set aside and inadequate time for judicial preparation and even more importantly inadequate time estimates will inevitably lead to significant delay, with adjourned hearings, written submissions and, of course, extra expense. It is a problem that is all too common. Indeed in **Ecological Sciences Limited-v-Plymouth City Council** [Plymouth County Court Claim No: 0PL00708; October 2010] , a complex and high profile case concerning the lease and associated agreement concerning the collection and disposal of all biodegradable waste for the City of Plymouth I specifically set out very similar concerns. Indeed as the following passages indicate I had faced very similar conduct to the present case .

> *On the morning of this complicated case , and shortly before the hearing was due to commence I was handed a bundle of authorities and the skeleton argument on behalf of the Claimant , which apparently only been e-mailed to central listing based at another court earlier that morning. No explanation has ever been given for the eleventh hour presentation. The failure to comply with the order materially*

hampered my preparation of the case. One only has to have a glance at the content of the Claimant's skeleton and the number of authorities cited to appreciate that a significant amount of time was required to read it and take on board its content . Before evidence is to be heard in a case it is very important that the judge fully understands the nature and extent of the competing arguments including as to the appropriate guidance from authority. Bearing in mind the need to at least complete the evidence within two days I had little option but to start the case without adequate opportunity to digest the skeleton let alone read the authorities.

It should also have been clear to both parties that given the nature and extent of the legal argument that two days had become obviously and significantly insufficient. A least one further day was needed. Had notice of this been given it may well have been possible to find an alternative longer hearing date without very significant additional delay and every attempt would have been made to do so. As it has transpired I have had to hear the evidence and then subsequently some significant time later receive written submissions, which have run to a combined total of 67 pages ignoring appendices and authorities, and consider the same without the assistance of counsel. This exercise is necessarily more costly and time consuming than submissions at the end of the evidence and places an additional strain upon the judge who by virtue of intervening time, has to take yet further time, a valuable and limited resource, to re-read a substantial amount before consideration of the written submissions.

It should be understood that a time estimate must include time for submissions and ordinarily time for delivery of a judgment. A time estimate must mot be based on managing to complete the evidence and thereafter the possibility of written submissions. It is the duty of the parties to notify the court if a time estimate is obviously inadequate. Overall these matters have made my task considerably harder and also served to lengthen the time before have been able to deliver a judgment.

380. It may be that this statement needed wider communication. Certainly it was not heeded in this case.

381. I did consider, faced with what I was faced with on the morning of the trial, the extent to which I could manage the hearing through the imposition of a timetable so as to ensure that it was completed in three days. However, given the number of parties involved and the sums at stake, indicated to be in the global sum of £2 million, it was my judgment that this would not be appropriate. Indeed I felt all that I could properly do was indicate that I would not consider issues of conduct. As it was the case was presented in a very expert fashion by

Counsel and having regard to the wide range of maters to be addressed six days was barley adequate, and inadequate if all submissions were to be delivered orally.

382. It appears to me that the tap root of problem was the wholly unrealistic time estimate given to HHJ Tyzack Q.C. , being one that failed to provide for adequate reading in time, submissions or judgment. Extra cost and delay has undoubtedly resulted. In my judgment the parties have not been well served and an improper burden placed upon the resources of the court.