FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**BIR/00CS/LIS/2018/0028**
Court Reference	**:**	**C8DT576A (County Court at Birmingham)**
Property	**:**	**31 View Point, Tividale, West Midlands B69 1UU**
Applicant/Claimant	**:**	**Greenbelt Group Limited Represented by Mr John Aldis of Counsel instructed by Optima Legal Services**
Respondents/ Defendants	**:**	**(1) Mr Andrew Thomas Lane (2) Ms Joanne Sarah Lane (previously Bourne) In person but speaking through Mr Andrew Thomas Lane**
Type of Application	**:**	**Monies due under Freehold Covenants on Transfer from the County Court at Birmingham by Order of District Judge Kelly**
Tribunal Judge sitting As a Judge of the County Court	**:**	**Judge Anthony Verduyn**
Tribunal Valuer Member as an Assessor Under CPR Part 35.15	**:**	**Mr David Satchwell FRICS**
Date of Hearing	**:**	**7th November 2018**
Date of Decision	**:**	**10th January 2019**

DECISION

BACKGROUND

1. These proceedings were issued in the County Court Business Centre as long ago as 4th February 2016, and have had an interesting procedural journey. The claim for £854.60 was amended pursuant to an Order of District Judge Loyns dated 28th February 2016 to £1,172.68. The claim was initially transferred to the County Court at Dudley and directions were given on 27th November 2017. Then by Order of District Judge Riley dated 5th March 2018, the proceedings were transferred as Business and Property Work to the County Court at Birmingham. On 21st May 2018, District Judge Kelly ordered, pursuant to the Civil Justice Council pilot scheme for flexible deployment and of her own initiative, that it be transferred to the First-tier Tribunal, Property Chamber, Residential Property division to be decided by a Tribunal Judge sitting as a Judge of the County Court (under Section 5(2)(t) and (u) of the County Court Act 1984 as amended by Schedule 9 to the Crime and Courts Act 2013), sitting with a valuer member of the Tribunal as assessor. Directions were given by Regional Judge Jackson on 24th May 2018 regarding statements of case and witness evidence. Times were subsequently extended for compliance with those directions. A final hearing was listed before me, with site view, on 7th and 8th November 2018, but the hearing was concluded on the first day. This is my reserved decision and judgment.

2. At the outset of the hearing, and for the avoidance of doubt, I confirmed that I was hearing this case in my capacity as a Judge of the County Court, meaning as a District Judge in this instance. Furthermore, the case appearing not to have been allocated, was now allocated by my order to the Small Claims Track, with the flexibility of procedure consequent upon that allocation under CPR Part 27.8. Consistent also with Tribunal procedure and CPR Part 27.8(4), evidence was not taken on oath. I also reminded those attending that Mr Satchwell FRICS, was sitting with me only in his capacity as an assessor under CPR Part 35.15. He has had no part in this decision, which is purely my own, and he has assisted me as an assessor through his attendance at trial and only where identified below. Even then, his assistance has been purely in relation to matters within his expertise and I have decided to what extent (if any) to accept his assessment.

3. The Applicant was represented at the hearing by Mr John Aldis of Counsel and the Respondents, Mr and Mrs Lane, by Mr Lane as a lay representative and litigant in person. No objection was made by either party to the procedure I outlined and, therefore, adopted.

4. The claim relates to sums due under freehold covenants for maintenance of amenity areas. It is similar to a service charge dispute in long leases that regularly are determined by the Tribunal and, hence, the Order made to transfer it to the Tribunal for case management and hearing. Whilst there is necessarily a similar focus to service charge cases on the precise provisions being relied upon, there is no over-arching statutory framework for resolving these disputes in the Tribunal akin to the Landlord and Tenant Act 1985 in respect of leasehold properties. Furthermore, the Court does not have a free-ranging jurisdiction merely to act as it thinks fit, but must apply established legal principles. The

effect of this is that some of the complaints of the Respondents simply cannot be determined before me in the manner they would wish.

5. The issues between the parties are set out in their Statements of Case.

6. On 7th September 2001 the Respondents had transferred to them from Bellway Homes Limited 31 View Point at a price of £111,500 (this is the "Transfer" referred to below). As part of the transfer Deed they entered into covenants set out therein in the Fourth Schedule. Clause 2 is the key provision and termed the "Covenant" below:

   "The Transferee [i.e. the Respondents] hereby covenants with the Transferor and its successors in title to the Amenity Area to pay the Annual Sum (plus value added tax applicable thereto) annually in advance on the <blank> (or on such other date or dates as may be selected by the Transferor or its successors in title and whether annually or for any lesser period) in each year … and PROVIDED ALWAYS that: -
   (a) for the first five Years calculated from the Initial Date [i.e. date of completion of the sale of the first dwelling on the Site] the Annual Sum shall be the Initial Sum [i.e. £60] together with in addition an increase (the "Inflationary Increase") to reflect the effect (if any) of inflation from the Initial Date …
   (b) in the sixth year calculated from the Initial Date and in any Year thereafter the Transferor may (in its absolute discretion) require the Transferee pay in lieu of the Initial Sum together with the inflationary increase the Actual Share subject always to the provisions of paragraph 2(c)
   (c) in Any Year in respect of which the Transferee is required to make payment by reference to the Actual Share (instead of the Initial Sum with in addition the Inflationary Increase) then the Actual Share shall be limited to 150% of the Annual Sum payable in respect of the fifth Year prior thereto so that (by way of example only) the Actual Share payable by the sixth Year calculated from the Initial Date will be limited to 150% of the Initial Sum payable in the first Year after the Initial Date and the Actual Share payable for the eleventh Year calculated from the Initial Date shall be limited to 150% of the Annual Sum payable in respect of the sixth year calculated from the Initial Date
   (d) The Transferor and/or its successors in title may at any time select a new or different Due Date in relation to the Property and may also in their discretion demand payment of a proportion of the Annual Sum for a lesser period than one year"

   Clause 1 included the following definitions:
   "AMENITY AREAS means those parts of the Transferors development from time to time (and whether owned by the Transferor or its successors in title or not) set out or intended to be set out as woodland play or landscaping areas (those currently intended as such being shown edged blue and cross hatched green on the plan marked B annexed hereto)"
   "ANNUAL MANAGEMENT AND MAINTENANCE COST means the total of the costs and expenses incurred in any Year in connection with the management and maintenance of the Amenity Areas in accordance with the obligations to the Transferee hereafter set out and/or the cost and expense incurred in connection with the enforcement of the performance or observance by all owners and occupiers of the Site of their obligations and liabilities in respect of these amenity

Area Covenants and such costs and expenses shall include without limitation all reasonable fees charges and expenses incurred (including fees of professional advisers, agents or bodies instructed or employed in connection therewith and the costs and expenses of employing staff) whether directly or indirectly and reasonable estate management remuneration and charges incurred"
"ACTUAL SHARE means the pro-rate share applicable from time to time to the Property of the Annual Management and Maintenance Costs …, calculated by reference to the Annual Management and Maintenance Costs of all dwellings constructed or permitted to be constructed on the Site …"

7. The Applicant asserts that it is the successor in title to Bellway Homes Limited in respect of the Amenity Areas, registered with HM Land Registry as "Land at Darby's Hill, Tividale" under title number WM819619. The transfer to the Applicant was registered on 16th January 2004. The Respondents cannot gainsay the registered title and accept that it encompasses the Amenity Areas, so no issues arise in respect of title.

8. The Applicant asserts that, having had transferred to it the Amenity Areas, it has the benefit of the Covenant and can make demand for sums payable under it. The Respondents disputed this in the Court proceedings, because the Applicant was not the original Transferor or beneficiary of the Covenant. In their Statement of Case as directed in the Tribunal, the objection was more that the Respondents were not informed that the Applicant had moved from being the contractor or agent of Bellway Homes Limited and become the registered proprietor of the Amenity Areas.

9. There is nothing in these points for the Respondents. Bellway Homes Limited were legally allowed to dispose of its freehold interest in the Amenity Areas, whether to the Applicant or any third party, and that they did so is demonstrated by the indisputable registered title. The Covenant clearly anticipates that the benefit may be transferred to successors in title, like the Applicant. As a matter of law, there is no doubt that this is effective to transfer to the Applicant the rights formerly held by Bellway Homes Limited: the benefit of the Covenant was intended to run with and be annexed to the Amenity Areas. The point of the Covenant was to fund the maintenance of the land, hence "touched and concerned" the land. That is sufficient as a matter of law.

10. The Respondents nevertheless insist that the covenant is defective because of blank spaces in the transfer. The initial payment date is blank in Clause 2. The definition of "DUE DATE" is similarly defective, as it is stated to mean: "the <blank> day of <blank> in each year or such other date or dates as may from time to time be selected by the Transferor or its successors in title pursuant to clause (2)(d)".

11. Again, this objection must fail. Although dates should have been entered in the blank spaces, for each date there is the alternative for Bellway Homes Limited or now the Applicant to specify a date, and by their demands for payment that is exactly what they have done. The covenant therefore works in its own terms and should not be avoided.

12. The Respondents advance another objection, and that is that the Transfer included no map, and subsequently supplied maps of the Amenity Area differ in their boundaries. This was a point not well-developed in any Statement of Case in the County Court or before the Tribunal. As is evident from the trial bundle (page 207), HM Land Registry had a copy of Plan B with the Transfer. At the hearing, the objection appeared to relate to inclusion in a plan dated 10th January 2007 (page 130) of a very narrow piece of land in its north-western section and not appearing on the earlier versions of Plan B. Whilst this additional land could potentially be included within the definition of Amenity Areas (to which land expressly could be added at a later date i.e. "from time to time") and I note it appears in the relevant registered title plan for WM819619, it would not be within the definition "woodland play or landscaping areas". It appears, accordingly, that nothing was charged to the Respondents in relation to it. It is certain insufficient as an issue, therefore, to void the Covenant.

13. The Respondents raised issues concerning their entry into the Covenant in September 2001. In summary, they felt misled from the outset: the Amenity Area (part of a landscaped former quarry) was to be an asset for the use of two development sites with locked gate for which £60 per year was payable, and they paid a holding deposit for their house and laid out money on carpets and curtains; but their solicitor (notwithstanding he was recommended by Bellway Homes Limited) discovered a public right of way over the Amenity Area and warned that the Covenant could be an expensive obligation. After a delay whilst he raised the issue with the transferor, the Respondents were told they had to exchange contracts or lose their deposit and, it seems, money laid out on carpets and curtains. The Respondents were advised by their solicitor to either pull out or set up a residents' association to monitor future costs under the Covenant. It seems he may also have advised that additional charges and late payment fees could not be levied and that non-payment would probably lead to the sum being recovered at sale of the house in due course. In the current circumstances, the Respondents feel exploited and misled. It is hard to see, however, that there is any meaningful complaint in law at this remove: the Respondents had the services of an independent solicitor who plainly drew their attention to the Covenant and tried to renegotiate this. This attempt failed, but the Respondents then accepted the Transfer. Some of their account is difficult to follow, but as discussed below, late payment charges and the like are legitimately in issue. As to whether arrears of sums due under the Covenant can be charged to the property, this will be an issue (if any) at enforcement of a claim and is by no means unheard of as a tactic by a creditor. None of this goes to the validity of the Covenant itself.

14. In the Statement of Case for the Respondents directed by the Tribunal, two other "avenues that could be explored" are mentioned, but (perhaps unsurprisingly) not particularised. They are the Unfair Terms in Consumer Contract Regulations 1999 ("the Regulations"), applicable at the date of purchase, and "Abuse of Dominant Position". No argument was developed relating to either of these; and the latter is plainly insupportable on any material before the Tribunal, since it relates to competition law and distortions in the market place. It has no bearing upon the issues before me, because there is no evidence that Bellway Homes Limited had anything like that level of economic power that would engage such considerations.

15. In respect of the Regulations, the Respondents state: "For a contract to be fair, it must be evenly balanced, both parties must have had the opportunity to negotiate said contract, and there must be clauses for exit/withdrawal from the contract." The Covenant plainly does arise in a contract (specifically for the sale and purchase of land). Fairness does not require that a contract must be open to negotiation, since the point of the Regulations is to address fairness where there is no negotiation (merely "take it or leave it"). If the contract were individually negotiated then the Regulations would not apply. The objection taken by the Respondents is that there is no provision for "exit/withdrawal", but that applies to both sides of the Covenant. Paragraph 8 of the Fourth Schedule obliges the Transferor:

    "to carry out or procure the carrying out of the management and maintenance obligations in respect of the Amenity Areas contained in agreements under Section 106 of the Town and Country Planning Act 1990 or in any planning consent".

    It goes on to provide for how successors in title would also be bound by this paragraph and those agreements whilst the Amenity Areas were public open space. It is because the Applicant is bound and is expending money on the Amenity Areas that it is making the charges it now pursues. Furthermore, there is no explanation on the part of the Respondents of why they should be allowed unilaterally to exit obligations under a Covenant which is shared by (I am told) 299 properties. To allow them to exit the Covenant, will pro-rata increase the burden on others. I do not consider, therefore, that there is any basis on the Respondents' Statement of Case for invoking the Regulations in this manner some 17 years after the Covenant was entered into. The Regulations do, however, assist the Respondents in a different way as set out below.

16. The general grievance of the Respondents, not articulated in respect of the Regulations, is that they contend that the effect of the Covenant is to make them responsible for the maintenance of the land of a third party for which they receive no benefit. It seems to me that this line of complaint is essentially groundless: at the time of entry into the Covenant, the Respondents had been warned that the Amenity Area could not be exclusively available for the use of the two adjacent developments, as it had public access to it and was designated as public open space. The treatment of the Amenity Area was a condition of the development as a whole (from which the Respondents plainly do benefit) and was promoted as an attraction to purchasers, even though one that went sour. The Applicant can contend with considerable force that it gets no benefit from the land comprised in the Amenity Areas because it has no value, save for the use of householders in the locality. The scheme as introduced was intended merely to ensure that those who benefitted most (albeit not exclusively) were the ones bearing the cost of maintenance. Put another way, were the Amenity Areas to fall completely into ruin through neglect (becoming overgrown waste land) then the disbenefit would be experienced by people like the Respondents, whose properties are adjacent to it. The scheme for Amenity Areas may not have worked out as the Respondents would have wished, in that values to houses in the locality may not be enhanced, but it is hard to see what is unfair in the general scheme as originally envisaged. The burdened householders may not be

able to choose or replace the Applicant, but neither can the Applicant avoid its responsibilities to the purchasers (and their successors) of the properties burdened with the Covenant.

17. Whilst the Respondents have raised the issues above, the core of their complaint is that the charges being made under the Covenant are unwarranted.

18. The starting point for consideration of the issue of the scale of charges is the claim advanced in the Applicant's Statement of Case. This asserts that early years of the charge were paid (a point not admitted by the Respondents, but not for me to determine as not an issue in the claim). Annual claims are made from September 2007 (£79.36) and September 2008 (£81.68); a change in year-end led to a claim from September 2009 to end of February 2010 (£40.81); then annual claims from March 2010 (£85.57), March 2011 (£100.11), March 2012 (£79.80), March 2013 (£90.74), March 2014 (£92.15) and March 2015 (£82.31). In anticipation of potential objections, the Applicant asserts that these sums represent recoverable management and maintenance expenditure within the 12-year limitation period for a claim under a deed (an assertion rightly not challenged by the Respondents). The Applicant produces a schedule of visits by their representative to the contractor retained to carry out the work. Insofar as the expenditure related to remedying specific issues, like vandalism and fly-tipping, the Applicant asserts that this is within the Covenant as recoverable expenditure. This assertion is not new, as the Applicant made it by way of letter dated 9th October 2007 to the Respondents (trial bundle page 219).

19. The Respondents' Statement of Case pre-supposes that the Covenant does not represent a contractual obligation. Once it is recognised that the Covenant is, in law, part of a contract then the assertions on the part of the Respondents would seem to fall into the following categories:

20. Firstly, they dispute that the transfer includes liability for fly-tipping and remedial works, pointing to there being reference to "management and maintenance" only.

21. Secondly, the Respondents have asserted that the Applicant appears unregulated and in breach of contract for want of explaining the conditions upon which they intend to operate. No written statement of the services to be provided or schedule of works was given before 2017. Site notes were only disclosed in these proceedings. The current programme is for grass cuts every three weeks, and much else is inspection. Although the Respondents then point out that they are charged for wear and tear to footpaths used by the public, dog fouling collection, damage to fencing, fly-tipping etc. The Respondents complain that £799 was spent on signage warning not to start fires when they complained to the Applicant that the grass had been scorched by portable BBQs, but payment to the contractor was withheld as one sign was in the wrong place. The Respondents are aware of wide-spread disaffection amongst people required to pay the Applicant for similar services in similar developments.

22. Thirdly, the Respondents contend that the services charged for by the Applicant were in some way sub-standard. The Respondents assert that initial payment was in the "mistaken belief" that maintenance would be to a high standard, but

standards fell off dramatically after 2004. Payment was accordingly withheld in protest, but pursued by the Applicant using various agencies to press for payment. Nevertheless, the Applicant is said to be in breach of contract for failing to provide adequate site maintenance. It is stated that the opinion of residents is that standard of maintenance is very poor, with grass cut every 3 to 4 weeks and growing quite long in between; it is full of moss and weeds, with poor drainage (and consequent water running over paths and freezing in winter). Some trees are dead and others diseased. Dog-fouling, rubbish and litter present significant problems. One path has been closed and allowed to be overgrown, the Applicant says to stop access for fly-tipping (concerning which no documents could be found in the possession of Sandwell MBC as local authority). Some dumped asbestos sheeting has been unmoved since 2002. Old tarmac from paths has also been dumped among the trees, whilst a new section cracked in a matter of weeks, notwithstanding charged expenditure of £6,000. These problems with inspection persist, notwithstanding that the Applicant charges for inspection of its land.

23. Fourthly, the Respondents contend that, since they cannot control access to the Amenity Area, they should not be burdened with the consequences. The Applicant should have acceded to the request for a lockable gate. Indeed, the Amenity Area has become a magnet for undesirable visitors and is spoilt by anti-social behaviour that the police are unable to control. The combination of this and the charges makes the Respondents' home difficult to sell.

24. Finally, the Respondents have challenged the entitlement of the Applicant to make charges for late payment and for a 7-day letter sated 13th March 2015. The sums claimed under these heads were pursued before me on the basis that they represent enforcement costs or at least a reasonable charge, and I will consider these separately below.

25. I visited the site with the assessor on the morning of the hearing and in torrential rain. The Amenity Areas are essentially on a hillside overlooking the urban environment beyond, which explains why the Respondents are troubled by noisy visitors on nights like New Year's Eve. The centre of the open space is not the Amenity Area, but circled by grassy areas and paths edged with woodland. The Respondents disclosed photographs taken shortly before our visit, which shows that tidying up by the Applicant's contractors had preceded us. Even so, within the denser thickets of trees and shrubs, there was evidence of fly-tipping just beyond garden fences and in more out of the way areas. The location of dumped tarmac was identified to me. Paths were tarmacked, with some tarmac cracked, but generally of a condition comparable to municipal parks and recreation grounds. Similarly, some fence and gates showed signed of damage, but were not generally dilapidated. Visually the Amenity Area appeared unexceptional.

26. At the hearing the Applicant called Mr Dennis Marshall to give evidence. He had been the senior contracts manager for the Applicant since January 2006 and was called as a witness of fact (hence, in answer to the Respondents' objection to him being called at all, he was not there to express an independent opinion and so his employment by the Applicant did not disqualify him from giving evidence). He confirmed the truth of his witness statements detailing the

arrears and stated that the Respondents are the only long-term non-payers of charges. In respect of work carried out, he provided copies of site attendance notes. He stated that the Applicant did correspond with the local authority on matters like fly-tipping and a barrier across a public right of way. He states that responsibility for paths is shared three-ways (without detailing the other parties) and that the Applicant is responsible for the top tarmac. Problems have been created by settlement in the former quarry and one path re-routed. Others have to await repair until after settlement has resolved. Reasonable repairs are carried out as and when appropriate. One route was closed to the public to put off anti-social behaviour and following liaison with police and the local authority: this is the over-grown path complained about. The Applicant has offered to increase the height of fencing to reduce anti-social behaviour, but the expenditure has been resisted and so not been incurred.

27. Mr Marshall specifically addressed the reasonableness of charges. He asserts that the Applicant monitors contractors' work and if they underperform, or charge too much, then new contractors are instructed. For this reason, in 2013 "Stoulton" were replaced by "Ingritas" (although the charge remained the same). In 2016 "Ingritas" were replaced by "Hosta", although the charge then went up somewhat to £10,790. A comparable quotation from "Q Landscapes" came in at £14,650. Nine other comparable developments operated by the Applicant have annual charges ranging from £8,185 to £13,250. To such charges are added inspections, removal of fly-tipping, removal of vandalised fences, repair to surface tarmac and the like.

28. In his second statement Mr Marshall addresses Standard of Work in addition to the matters already set out, which the Applicant says is to be judged in terms of achieving a "reasonable standard for the sums charged", hence the level of inspection. He confirmed orally that inspection was one a month, and contractors were currently visited every two weeks. He now personally inspected only once a year.

29. Mr Lane challenged Mr Marshall on the frequency of inspection, given Mr Lane said he did not always see an inspector. Mr Marshall referred to the notes from each attendance exhibited to his statement, now phoned in each visit and formerly typed up after each visit. Mr Marshall pointed out that it may be that the inspector was there but simply not observed. The notes are commonly either Mr Marshall's or Mr Keith Barnfield, his former (and now retired) colleague. Mr Lane suggested Mr Barnfield may not even get out of his car to inspect, but Mr Marshall did not consider this likely. Mr Marshall was challenged also on asbestos being left in situ, to which he responded that undisturbed it presented no risk and that the local authority had not been in touch with him about it. Fly-tipping was reported, he conceded, but it was dealt with in response. When pressed on rubbish being left on the Amenity Areas, he says he was not aware that this was taking a long time to clear. Mr Marshall defended the path closure, decided upon with consultation with police and the local authority, but accepted the closure was crudely done. He accepted that anti-social behaviour was unpleasant, but asserted it was beyond the Applicant's control: this was public open space, after all. He had not attended the only public meeting he was aware of to discuss the issues. He stated this was on advice, but why was unclear. The recent clearing up before my visit was explained in terms of a recognised need

to remove the rubbish strewn on fireworks night. He said that information sheets or packs were sent out at the start of the Applicant's involvement, but otherwise the only detail was in the bills sent. More information was now provided, following a case heard in Scotland. Overall his evidence was that the Amenity Areas were maintained as public open space with woodland and not as a park, so he defended the charges raised. Fly-tippers, if detected, were reported to the local authority, but there had been no success detecting those responsible (in contrast to some of the Applicant's sites, where addresses had been found in the rubbish). He denied knowledge of any refusal of the Applicant to speak to Mr Lane until he had started paying his bills.

30. Mr Lane gave evidence, confirming his Statement of Case. He was pressed on letters from the Applicant detailing what the annual charge was for, notably the letter of 20th September 2004 referring to insurance, routine seasonal work, liaison and administration costs, and repair costs to the play area (since removed). A letter dated 9th October 2007 provided further detail, including referring to "amenity grassed areas, rough grassed areas, long grassed areas, shrub beds, a young woodland, mature trees …" and, less positively perhaps, non-routine work like removal of fly-tipping, remedial planting and the like. Mr Lane pointed out that such letters were provided after the Covenant was entered into. He also disputed prior consultation on some charges. He complained that standards did not match up to the sales pitch and he did not get benefit from what was spent. When challenged that higher levels of service would incur extra cost, Mr Lane merely observed that it was not fair to pass cost on to residents when not properly explained at the outset. The attendance notes were put to him as evidence of inspection, but he insisted that Mr Barnfield was seen on many occasions not to get out of his car. He appeared unwilling to accept that the Applicant engaged with the local authority and police, and expressed the view that the Amenity Areas were abused as people thought it belonged to the Council. Positive views at the state of the Amenity Areas reported in 2011 would not be repeated now, he insisted. He specifically complained that grass cutting was about half the frequency contended for, and was more like rolling because the cutters were so blunt. Mr Lane did not dispute that there had been 4 contractors in total or that they were changed when standards fell. He accepted that the total bill has not changed markedly in 13 years and he accepted that he did not know what the market rate was for the work. He was not saying that the cost of the contractors was unreasonable, but the total charge was. He queried attendance to inspect once a month and the scale of the current bill in the order of £100 per year. When he was again challenged that the more he wants the Applicant to do, the more it would charge, he complained that the Applicant was involved at all: they were paying for a service that they could not change. The Applicant could appear to charge what it liked, and even for works to tarmac that quickly failed. Residents were rightly angry.

31. Mr Lane made closing comments after he gave his evidence, ruing having bought the property, and complaining at the extent of anti-social behaviour. He invited me to reject the Applicant's version of its own conduct: it was unregulated and unresponsive. Non-payment was in protest at an Applicant who did not even have its representative attend a public meeting.

32. The Respondents also adduced letters from residents and former residents Mrs M.J. Williams and Ms S.R. Mumford. Both were unhappy with how the development was initially marketed. Mrs Williams was unhappy at the enforcement of the charging regime, and repairs which she considers to be part of the charges appearing as extras on the bills. Mr Malcolm Pierce states he had a similar purchasing experience to the Respondents. Both he and Ms Mumford mention the removal of a children's play area that had been subject to vandalism and the charges that resulted, but I note that this predates the period in issue in the current case. Mr Pierce then leaps forward to 2011 and complaint at charges for fly-tipping and other anti-social matters (including, latterly, the removal of a car that had rolled down a bank) which he considers that the Applicant should not be charging for. He had also suffered an assault when trying to move on people behaving anti-socially on the road at the top of the Amenity Areas. None of these people attended to give evidence and their letters must be treated with circumspection as untested. Much of it, however, did not go to the issues properly before me.

33. In respect of the charges, Mr Aldis asserted that these were reasonable having regard to what was supposed to be done, what was done and the level of fee charged for it. Antisocial behaviour imposed material additional costs, by way of removal of fly-tipping, rubbish and dog fouling. There is clear evidence for a suitable regime of inspection and a sensible approach to engaging with the local authority and police. The overall costs had risen from the introductory £60 p.a. to about £100 in a 17-year period. The obligation was to choose a reasonable contractor at a reasonable price: not necessarily the cheapest contractor so long as a sensible choice was made.

34. Turning briefly to the applicable law, the transfer required to be considered as a whole and the provisions applied in the context of the factual background at the time of its execution; in other words, the laying out of large estates, where the burden of the Amenity Areas was to be shared between the home owners, but managed by an independent third party. Although clause 2 refers to "the costs and expenses incurred in a Year", rather than "the costs and expenses *reasonably* incurred in a Year", I consider that the test of reasonableness must be implied for the following reasons: firstly, it seems to me inherently improbable that anyone intended home owners to be burdened with unreasonable costs and expenses; secondly, if that had been the intention then the word "indemnity" or some cognate provision ought to have been spelled out; thirdly, although the word "reasonable" is only used in two places in the definition of "Annual Management and Maintenance Cost", this is to qualify specific elements of costs incurred and seems to me to reinforce that all unspecified elements should be reasonable in scale; fourthly, such an implication ensures that the provision does not fall foul of paragraph 5(1) of the Regulations, which states that "A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer." This imbalance can be avoided by the implication of reasonableness and, therefore, the scheme for management of the Amenity Areas preserved, where otherwise those areas would be in danger of falling into dereliction to the harm of the developments as a whole for want of any scheme for reimbursing

reasonable investment in maintenance; fifthly, such an implication gives effect to paragraph 7(2) of the Regulations which states that "If there is doubt about the meaning of a written term, the interpretation which is most favourable to the consumer shall prevail …"; sixthly, the implication of reasonableness is consistent with a well-established line of authorities, predating the Landlord and Tenant Act 1985, where the implication was used to avoid landlords (in that case) being in a position where they could be "as extravagant as they chose in the standards of repair" (Finchbourne v Rodrigues [1976] 3 All ER 581; also see Holding & Management Ltd v Property Holding & Investment Trust [1989] 1 WLR 1313; Fluor Daniel Properties Ltd v Shortlands Properties Ltd [2001] 2 EGLR 103); seventhly, and I consider rightly, Mr Aldis had regard to reasonableness in his closing submissions, submitting that in this context the Applicant is not required to choose the cheapest contractor (as confirmed by Plough Investments v Manchester CC [1989] 1 EGLR 244), so long as a reasonable mode of conducting the repair is chosen.

35. Returning to the issues raised by the Respondents set out above, applying the implied term as to reasonableness, and considering all the evidence I have heard and read, I make the following findings.

36. In respect of the first matter, I find that the "Annual Management and Maintenance Costs" does allow for the recovery of costs reasonably incurred in removal of fly-tipping and similar remediation for anti-social damage, like damage from vandalism. The obligations of the Applicant imposed by the planning authority related to the permanent retention of the Amenity Areas as public open space (see letter of 8th December 2004 at page 100; extract from Section 106 Agreement at pages 114-115). This, necessarily, must include remediation of damage of this sort: left unmanaged and unremoved, the area would quickly decline and cease to be public open space in any practical or useful sense. The choice is really whether to include these costs in the annual contract or to deal with removal on an *ad hoc* basis. Undoubtedly the annual contract would be more expensive if the contractor were to take the risk on the number of incidents likely to need remediation, and I do not consider it unreasonable, therefore, for the Applicant to deal with fly-tipping and the like as an extra item charged only when it arises and the money is spent on remediation.

37. In respect of the second matter, whilst there is no statutory regulatory framework in respect of freehold covenants of this type, that is a matter for parliament to legislate upon. The implication of the concept of reasonableness does not allow the Applicant to do as it will at any cost, and whilst the provision of greater detail of what is being undertaken, and at what cost, is to be encouraged on the part of the Applicant, I am not in a position to make any direction to that end. It has been a feature of this case that the Respondents repeatedly set out criticisms of the maintenance of the Amenity Areas, but cannot accept that more would need to be spent if many of their objectives were to be achieved. If signage would discourage the public treating this land as though it belonged to the Council, then such signage can and should be paid for. If barriers are needed to stop vehicles attempting to park on the precipitous slopes, then barriers have to be paid for. Ultimately, a balance has to be struck between expenditure and results. As matters stand, I do not find that the Applicant has failed to strike a reasonable balance. I bear in mind that there

may be more than one reasonable choice in any circumstances; indeed, some or all of the complainants would appear to want specific additional expenditure (for example, re-opening an exit path or repairing the relocated pathway that subsided in part), but this may be incompatible with other reasonable objectives (limiting access in certain areas to reduce anti-social behaviour or keeping costs down). On the evidence before me, the choices so far made by the Applicant appear generally to be within the band of reasonable responses. Monthly inspection I consider to be entirely appropriate. The only exception to that would appear to be the failure to remove asbestos now largely overgrown in one area. Whilst there may be an argument in some contexts for asbestos to be left undisturbed, the photographic evidence does not suggest that this is one of those circumstances (it appears to be in an overgrown crude pile, see page 144). Of course, no cost has been incurred in respect of this. In general, I would encourage consultation on expenditure on significant items, not least because if it were unreasonable the expenditure would be unrecoverable, but I cannot impose such a regime.

38. In respect of the third matter, the general standard of work in management and maintenance of the Amenity Areas, this presents the most difficult problem for determination. There have undoubtedly been many issues. Prior to the period that I am to consider, there was the removal of the playground area that formed a significant part of the Section 106 Agreement, but this appears to have been justified as the area was a magnet for anti-social elements and subject to a lot of vandalism. It follows that removal, if arguably a little crudely executed, was to general benefit. The woodland parts of the Amenity Areas are largely left with minimal tending: branches cut are left where they fall, and there is little general clearance or tending. Similarly, not all grass areas appear to be cut with the same frequency. There is photographic evidence for problems with litter and dog fouling, though the area was generally tidied before my inspection. Mr Lane gave evidence that there were occasions when the Applicant's inspector did not leave his car. Whilst I find that that does not mean that no inspection took place (the Amenity Areas are large with several entry points and the inspector may have got out at some of these, unseen by Mr Lane), I accept his evidence that there have been some deficiencies in the service provided. I do, however, note that contractors have been changed when standards fell, and I do not accept the criticism that failures have been frequent and general. The overall impression from the evidence, including the records disclosed by the Applicant, is that there has been reasonable efforts on the part of the Applicant to keep the Amenity Areas at a standard compatible with the standards of housing and public spaces in the locality and at a reasonable cost. The deficiencies that have arisen are not sufficiently serious to reduce the sums claimed.

39. In considering cost in this context, I sought the opinion of the assessor, Mr Satchwell. He has considerable experience on the costing of maintenance contracts for sites like this one, albeit more usually in the context of management of long lease residential property. In his opinion, the contract prices obtained annually by the Applicant for regular maintenance (so, excluding remediation of fly-tipping and the like) were reasonable. I accept his opinion not only because of his independent expertise, but also because (a) I accept the Applicant's evidence that the costs incurred were lower than alternative prices in the market for a contract of that nature, (b) prices do not

seem to have increased at any exceptional level from year to year, and (c) there was no contrary evidence adduced before me. Mr Satchwell was of the same opinion in respect to the cost of inspection and extra items, like clearance of fly-tipping, and I accept his opinion for the same reasons (although market evidence was not adduced by the Applicant on these points, so I was more dependent on the assessor).

40. In respect of the issue of public access and antisocial behaviour, I do not consider that this can be taken into account against the Applicant. The Amenity Areas are public open space and have to be maintained as such. It is unfortunate that the area attracts so many visitors late at night, but that is a consequence of the development of Darby's Hill and not the fault of the Applicant. Indeed, the Applicant has offered some potential mitigation in terms of higher fences and barriers, but the cost makes these unattractive. Ultimately, anti-social behaviour needs to be address by the local community, the local authority and the police. The Applicant has no choice but to manage and maintain the public open space in this context. It seems to me that matters would be much worse, if maintenance was not carried out and the area left unmanaged.

41. The Applicant has added a "Late Payment Charge" for each year in its claim, starting at £18.22 in October 2007 and rising to £21 on 13th March 205 (plus £24 for a 7-Day Letter). The Applicant seeks to justify this as "costs and expenses incurred in connection with the enforcement of the performance and observance by all owners and occupiers of the Site of their obligations and liabilities in respect of these Amenity Area Covenants…" I find, though, that they are not so recoverable. With the exception of the specific 7-Day Letter, there is no explanation for these charges at all. The sums appear arbitrary and are not connected with any activity on the part of the Applicant. There is no express basis in the Covenant for charges of this sort and I find that they should not have been levied. In respect of the 7-Day Letter much the same applies. This may be a cost of enforcement, were it a letter of claim, but it is not clear that it fulfils any such role. Absent any evidence justifying the sums claimed within the terms of the Covenant, there is no liability for them.

42. Finally, I note that the position in relation to the costs of these proceedings was not squarely addressed before me, presumably on the part of the Respondents because they did not know the outcome, and on the part of the Applicant because it can rely on contractual recovery of costs and expenses in connection with enforcement under the terms of the Covenant itself. Such contractual recovery would be subject to the costs incurred being reasonable either because the Covenant refers to "all reasonable fees charges and expenses incurred" or by implication (following Finchbourne above). Whilst the Applicant has been largely successful and were this not in the Small Claims Track, would recover its reasonable costs accordingly, I would observe that the Applicant's Particulars of Claim and Statement of Case, and the witness statements of Mr Marshall, should and largely did duplicate each other, and reasonable costs would not simply double the sums involved because this case moved from Court to Tribunal case management. The attendance of Counsel at the hearing was, for the avoidance of doubt, entirely reasonable.

43. It follows that the claim made out in respect of the annual charges only and give judgment for the Applicant (Claimant) in the sum of £732.53 on this case and as allocated to the Small Claims track.

44. I make no order as to costs in this small claims matter.

45. If either of the parties is dissatisfied with this decision, they may apply to the County Court Circuit Judge for permission to appeal, but such application by way of notice to appeal (Form N164) must be made within 21 days of the date of this decision (CPR Part 52,.12(2)(b)).

Tribunal Judge Dr Anthony Verduyn sitting as a District Judge of the County Court
Dated 10th January 2019