<u>IN THE BRISTOL COUNTY COURT</u>

Case No: 0GL00863
0GL00865, 0GL00866

<u>(Transferred from Gloucester County Court)</u>

Bristol Civil Justice Centre
2 Redcliff Street
Bristol England
BS1 6GR

Friday 21st October 2011

BEFORE:

HIS HONOUR JUDGE McCAHILL QC

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BETWEEN:

TWO RIVERS HOUSING

Claimant

- and -

HARRISON & OTHERS

Defendants

\- - - - - -

MR JOHN McCAFFERTY appeared on behalf of the Claimant.

MR EWAN PATON appeared on behalf of the Defendant.

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<u>JUDGMENT APPROVED BY THE COURT</u>

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Friday 21st October 2011

JUDGE McCAHILL QC:

1. INTRODUCTION: THE PARTIES AND THE NATURE OF THE CLAIM

1. The Claimant Housing Association seeks to recover certain service charges from the Defendants, the freehold owners of houses on the Claimant's housing estate. The Claimant acquired the housing estate in 2003, under a large-scale voluntary transfer to it ("LSVT") by the Forest of Dean District Council ("FDDC"). The Claimant bases its claim to recover those charges from these Defendants on the terms of the individual conveyances under which the Defendants bought their council house from their council landlord, FDDC, at various times in the 1990s.

2. The Defendants are, therefore, former residential tenants of FDDC. The Defendants live and lived on three different estates owned by FDDC, from which each couple, in the 1990s, purchased their council house under the 'Right to Buy' provisions in Part V of the Housing Act 1985.

3. On each of the three estates, where the first three Defendants live, there are and always have been certain grassed areas and verges which FDDC cut and maintained. It has been accepted by the Claimant, in documents and by its witnesses in evidence before me, that the general public was and is entitled to use these grassy areas. There was no evidence and there is no evidence of any prohibition restricting the use of these grassy areas and verges to tenants or occupiers on the relevant FDDC estate.

4. When all the properties on these estates were wholly tenanted, the cost of maintaining these grassy areas was factored into the calculation of the rent payable by these Defendants and others as tenants. However, the cost of these maintenance works were not disclosed separately to the tenants, but merely included within the general rent which the tenants were called upon to pay. It would, therefore, not have been readily apparent, certainly from any documentation to FDDC's tenants, that their rent included the cost of cutting and maintenance of grassy areas and highway verges.

5. However, once the Defendants bought their own council houses in the 1990s FDDC levied no charge on these freeholders for the maintenance costs of these grassy areas between the 1990s and 2003, despite what the Claimant now alleges was a clause in the conveyance to each Defendant entitling FDDC to do so. The consequence was that the costs of cutting and maintaining these grassy areas were totally absorbed by the remaining tenants on the estate, who paid for it within their rent. The new freeholders paid nothing. Although the conveyances by FDDC to the Defendants contained a list of rights granted to each purchaser, as well as rights reserved to the Council, and also covenants and stipulations on the part of the purchaser expressed to bind the property purchased or the purchasers and their successors in title, there was no express

provision requiring the purchaser explicitly to contribute towards the cost of maintenance of the grass verges, open spaces or amenity land.

6. The issue, therefore, which I have to decide is whether the terms of the Defendants' conveyances oblige them to pay service charges to FDDC's successor in title, namely the Claimant housing association.

7. In March 2003 the Claimant, a large and newly created registered provider of social housing, purchased from FDDC a large quantity of that Council's housing stock and associated land, including FDDC's estates in (i) Newnham, where the first Defendants live, (ii) Newent, where the second Defendants live and (iii) Lydney, where the third Defendants live.

8. The fourth Defendants, who were once party to this case, Mr and Mrs Harding, lived on FDDC's Sunnybank Estate at Coleford in Gloucestershire. The fourth Defendants have not played any part in this litigation after filing their defence on 23rd May 2010. Their defence, albeit broadly similar to the defence of the other Defendants, was struck out in April 2011 because of the fourth Defendants' failure to comply with case management directions.

9. After the purchase of their former council houses from FDDC, the Council never raised any charges on the Defendants for the cost of maintaining the grass verges, grassy areas or amenity land, in the eleven years immediately preceding the sale of its housing stock to the Claimant in March 2003. Until 2009, the Claimant did not seek to raise invoices for these maintenance works, however, before 2009, the Claimant had clearly indicated that it intended to charge freeholders for these services, and the intervening period of time was spent trying to engage in a consultation process and trying to find some common way of satisfying what were the inconsistent needs and wishes of the tenants and the freeholders.

10. The current claims, based on invoices raised in August 2009, are as follows: £70.51 against the first Defendants, £9.57 against the second Defendants, £27.53 against the third Defendants. The invoice sent to the fourth Defendants was for £76.03.

2. TRANSFER OF HOUSING STOCK BY FOREST OF DEAN DISTRICT COUNCIL TO THE CLAIMANT

11. When FDDC transferred its housing stock of some 3577 houses and associated land to the Claimant under the LSVT, the Claimant entered into a Deed of Covenant in the Fifth Schedule of the LSVT, whereby the Claimant covenanted with FDDC *inter alia* as follows, under the heading "Open Space and Amenity Land", in clause 2.5.1 to 2.5.4:

> "2.5.1 Whilst the same remain as open spaces and amenity land (meaning land designed and intended to be used as such) and without prejudice to the Company's right (subject to planning controls) to develop the same to maintain and keep in good order all such open spaces and amenity land transferred

pursuant to the terms of the Transfer Contract to the same standard as that to which similar spaces of land are maintained by the Council.

2.5.2 Maintain and keep in repair all private roads, parking places, footpaths and ways forming part of the Property and the kerbs, pavements, street lighting, signposting and notices thereon for so long as such facilities serve the Retained Land.

2.5.3 Maintain and keep in repair all private drains, sewers, culverts, ditches and ponds forming part of the Property and all private water and gas pipes and electricity cables serving the Property which are in the ownership of the Company for so long as such facilities serve the Retained Land.

2.5.4 Permit the Council, its successor's in title, the Company's tenants and lessees and any other person to use and enjoy any of the amenities referred to in this clause 2.5, until rendered unavailable by reason of any subsequent development or change of use subject in the case of access and services to the Company providing suitable alternatives."

The references in that series of covenants to "the Company" are to Forest of Dean Housing, the name by which the Claimant was previously known.

12. Despite being given the opportunity to do so, the Claimant has not put in evidence before me any part of the LSVT, except the Deed of Covenant, which is the Fifth Schedule to that LSVT.

13. It is interesting to observe that clause 2.5.1 in the Fifth Schedule to the LSVT envisaged the possibility of the Claimant developing the open space and amenity land, subject only to planning control. It is also noteworthy that the Claimant specifically undertook an obligation to FDDC to maintain and keep in good order the open spaces and amenity land and to permit any persons, not just tenants and lessees, to use and enjoy any of the amenities.

14. The Claimant has persuaded the relevant local highway authority for these estates to make a contribution towards the maintenance of highway verges. That contribution has been taken off the gross cost of the maintenance of these grassy areas, before the calculation of the service charges. However, the only other way in which the Claimant can recoup its other costs of the maintenance of the grassy areas is through the rent paid by the remaining tenants or, if the Claimants are correct in this litigation, through freeholders who live on the estate within which such grassy verges or areas are located.

15. The Claimant is required by statute to maximise all possible sources of income and alleges that, if it cannot recover a contribution from these freeholders on the estates, then the burden of such maintenance will fall unfairly and solely on the shoulders of the remaining tenants within their rent.

16. Given that the Claimant is not in any form of contractual relationship with these Defendants, the Defendants having purchased their properties from FDDC, on what basis does the Claimant justify charging these Defendants?

3. THE BASIS OF THE CLAIMANT'S CHARGES

17. I have already indicated that the conveyances by FDDC to the Defendants contained no reference to grassy areas, amenity land or open spaces or to the maintenance and the defraying of the costs thereof. Indeed, no obligation in those conveyances was cast upon FDDC to maintain any grassy area. Nor, as I have indicated, is there now any contractual relationship between the Claimant and these Defendants.

18. Before the Claimant acquired the housing stock from FDCC, there was considerable consultation with the existing tenants and the local MP. Indeed, when the problems about the recovery of these costs from freeholders on the estates arose, the local MP wrote, on 28th October 2009, to one of his constituents. A relevant passage of that letter, which explains the difficulty lying at the heart of this case, included the following:

> "I think it is worth saying at the outset that Two Rivers is 'between a rock and a hard place'. When the Forest of Dean District Council, then under solid Labour control, transferred all its housing stock to what is now Two Rivers in 2003 it also transferred lots of common areas of land and even twelve sewerage treatment works. It would have been much more sensible if decisions about who paid for the care and maintenance of these had been taken then. Unfortunately those decisions were avoided. Since then the maintenance charges have been effectively paid for out of the rents paid by the tenants. Owner occupiers on these estates, living in houses bought under the Right to Buy scheme, have not been paying anything. It is clear that Two Rivers has a real problem to solve - for example, they currently spend about £240,000 on grass cutting and hedge trimming. The body which regulates Two Rivers has told them that they are not allowed to continue paying for all the maintenance costs from tenants' rents. Moreover, they have also taken the view that expecting tenants to bear all the cost when others benefit as well is not reasonable. Since they don't have any shareholders to foot the bill this is what had led them to propose the service charges."

19. I should make plain that, although that letter was written by the local MP, it forms part of the evidence disclosed by the Claimant, and it is apparent that the MP had circulated that letter in draft to the Claimant's hierarchy for their consideration. Indeed, Mr Watkins, a financial manager of the Claimant, who gave evidence before me, was on the circulation list.

20. Another document, dated 29th July 2009 at page 216 in volume one of the trial bundle, noted questions and answers about the "service charge" in an interview of John Watkins by the BBC. After making the point that the

Claimant's tenants could not continue to subsidise services enjoyed by freeholders, the following exchange was recorded:

> "Q: What situation did Two Rivers Housing inherit?
>
> Mr Watkins: Freeholders' homes were originally owned by FODDC and some homes were purchased under the Right to Buy scheme. Since the stock transfer to Two Rivers Housing more residents have bought their homes under this scheme. All Right to Buy conveyance documents include a clause relating to service charges. Since the transfer, service charges have been funded out of the rent paid by tenants. Effectively tenants have been covering the costs of services enjoyed by the entire neighbourhood. As a non-profit making social housing provider, the introduction of service charges enables us to continue to improve homes, make them more energy efficient and build new affordable homes for others in the local community."

21. It is plain that the reference to the 'clause' in the conveyance, entitling the Claimant to charge service charges, is the Fifth Schedule to the conveyance to these Defendants, on the basis of which the Claimant claims to be entitled to levy these charges. I have been told my Mr McCafferty, counsel for the Claimant, that, since the problems associated with recovering monies from freeholders have arisen, the Claimant now uses a different clause or covenant when new tenants now seek to exercise their Right to Buy to cover estate charges. It is no longer expressed in the same terms with which I must wrestle, namely that set out in the Fifth Schedule of the conveyance of each of these Defendants.

4. THE CHARGING PROVISION: THE FIFTH SCHEDULE TO THE CONVEYANCES TO THE DEFENDANTS

22. It is common ground between the Claimant and the Defendants that the only provision in the conveyance by FDDC to the Defendants, on which the Claimant could rely, is that set out in clause five of the conveyance and in the Fifth Schedule to the relevant conveyances. Those provisions are as follows:

> "IT IS HEREBY AGREED AND DECLARED in the manner specified in the Fifth Schedule hereto."

23. I now turn to what that Fifth Schedule says. I quote:

> "THE FIFTH SCHEDULE hereinbefore referred to
> (Agreements and declarations)
>
> 1. In addition to the grants and reservations herein expressly made all or any rights or privileges now used and enjoyed by the Property over the adjoining or neighbouring property or properties of the Council and by such adjoining or neighbouring property or properties over the Property and which had the Property and such adjoining or neighbouring property or properties been in separate ownership for

more than forty years would have been easements quasi-easements or rights or privileges in the nature of easements shall continue to be so used and enjoyed by the owners or occupiers for the time being of the properties affected thereby such owners or occupiers contributing from time to time a fair and proper proportion of the cost of cleaning repairing and maintaining all things used in common.

2. Any difference or dispute arising as to the proportion or the amount payable as to the contribution of cleansing repairing and maintaining all things used in common shall be determined by a single arbitrator appointed under the Arbitration Act 1950 or any statute amending or replacing the same.

3. Any notice demand or consent to be issued by the Council shall be deemed to have been properly communicated to the Purchaser if it is addressed to him at the Property and posted by recorded delivery service in this manner on one of two or more Purchasers will be deemed to be proper service on all persons comprising the Purchaser.

4. The expression "the Property" shall include any part of the Property."

24. It can be seen that the reference in the recorded interview with the BBC, to which I referred to above, somewhat over simplified the position, when it noted 'all Right to Buy conveyance documents include a clause relating to service charges.'

25. Although it has not been an issue in this case, I have questioned how the Claimant is entitled to enforce the Fifth Schedule against the Defendants. However, the central issue remains - what does the Fifth Schedule mean and what does it enable the Claimant to do?

26. Not only do these provisions, in clause five and in the Fifth Schedule of the conveyances to the Defendants, make no express reference to service charges, but also FDDC made plain to the Defendants, in their Right to Buy offer, that no service charges were payable after purchase. Mr McCafferty explained to me how that was only a commitment that no such service charges would be levied for the first five years after the purchase was completed. However, the purchase price paid by the Defendants would have been less had there been any ongoing liability to service charges, at least for those first five years.

27. Accordingly, the Defendants paid a higher purchase price because there was considered to be no ongoing service charge at least for the first five years. In any event, as I have already indicated, FDDC never raised any service charge against these Defendants, even after that first five year period following their purchase had elapsed.

28. It is now necessary to consider, albeit briefly, the details of the individual purchases of their homes by these Defendants, and the terms of the conveyances under which they became owners.

29. I must of course consider these conveyances as a whole, in order to understand where clause five and the Fifth Schedule fit in.

5. THE DEFENDANTS IN GREATER DETAIL

30. The Defendants purchased their former council houses from FDDC as follows:

> (1) The first Defendants: 2 East View, Newnham, Gloucestershire, under a conveyance dated 2 December 1996;
>
> (2) The second Defendants: 101 Glebe Road, Newent, Gloucestershire, under a conveyance dated 21 December 1992;
>
> (3) The third Defendants: 39 Harrison Way, Lydney, Gloucestershire, under a conveyance dated 22 May 1995;
>
> (4) The fourth Defendants: 8 Crescent Close, Sunnybank, Coleford, Gloucestershire under a conveyance dated 1 October 2001.

31. Because the fourth Defendant has taken no further part in the case after filing their defence, I have not seen a copy of the conveyance between FDDC and the fourth Defendants. However, copies of the conveyance by FDCC to the first, second and third Defendants are set out in the trial bundles at pages 494 to 503, 412 to 420 and 511 to 518.

6. THE TERMS OF THE CONVEYANCES

32. The common parts of all three conveyances are set out below, although there are variations in relation to some rights of way in each of the three properties with which I shall deal briefly.

33. After the identification of the parties, namely FDDC and the individual Defendants, and the preamble explaining that the purchase was taking place under the Right to Buy provisions of the Housing Act 1985 and that the discounted purchase prices had been determined in accordance with the 1985 Act, the material provisions continued:

> "NOW THIS DEED WITNESSETH as follows:-
>
> 1. IN consideration of the sum of [the purchase prices paid by these Defendants ranged between £19,000 and £23,000] paid by the Purchaser to the Council and of the covenants by the Purchaser hereinafter contained the Council with full title guarantee in pursuance of the provisions of the Act convey unto the Purchaser ALL THAT the property more particularly described in the First Schedule (hereinafter called "the property") TOGETHER WITH (so far as the Council can grant the same) the rights and easements specified in the Second Schedule hereto BUT EXCEPTING AND RESERVING to the Council and their successors in title the owners and occupiers for the

time being of all or any part of the Council's adjoining property or properties and their respective servants and licensees the rights and easements set out in the Third Schedule hereto TO HOLD the same unto the Purchaser in fee simple (as beneficial joint tenants) SUBJECT TO:

(a) the exceptions and reservations covenants conditions agreements and declarations and other matters contained mentioned or referred to in the Conveyance or other documents mentioned in the Sixth Schedule hereto so far as the same relate to or effect the property and are still subsisting capable of taking effect and of being enforced

(b) the covenants on the part of the Purchaser and the agreements and declarations hereinafter contained.

2. THE Purchaser for himself and his successors in title the owners and occupiers for the time being of the Property hereby covenants with the Council that if within a period of three years from the date hereof there is a disposal of the property falling within section 159 of the Act then and in such an event the Purchaser or his successors in title shall forthwith pay to the Council on demand an amount calculated in accordance with sub-section (2) of section 155 of the Act as amended by section 2 of the Housing and Planning Act 1986 PROVIDED ALWAYS that if there shall be more than one disposal then such payment shall be made only on the first thereof.

3. FOR the benefit and protection of the adjoining land and premises of the Council (if any) and in accordance with the provisions of section 609 of the Act so as to bind the Property into whosoever hands the same may come (but not so as to render the Purchaser personally liable after he shall have parted with all interest in the Property) the Purchaser for himself and his successors in title and any persons deriving title under him or them HEREBY FURTHER COVENANTS with the Council at all times hereafter to observe and perform the restrictive covenants and stipulations contained in the Fourth Schedule hereto.

4. The Council hereby reserve unto themselves the right to modify vary waive or dispense with the said restrictions and stipulations set forth in the Fourth Schedule hereto or any of them.

5. IT IS HEREBY AGREED AND DECLARED in the manner specified in the Fifth Schedule hereto."

34. I should make plain that I have not set out in this judgment all the provisions of these conveyances, but only those which I consider to be material.

35. However, each of the conveyances contained five material schedules. The First Schedule identified the property which was being sold. The Second Schedule, again reading from the first Defendants' conveyance, contained the following:

"THE SECOND SCHEDULE hereinbefore referred to
(Rights granted to the Purchaser)

1. The full and free right of passage and running of water and soil gas electricity all other services and smoke through all drains channels gutters sewers pipes watercourses cables wires chimney stacks and flues which are now or may at any time within twenty one years from the date hereof be in over or under the neighbouring land and premises of the Council or their successor in title thereof.

2. The right for the Purchaser and his successors in title the owner or owners of the Property to enter al all reasonable times the adjoining properties now or formerly in the possession of the Council and having such a right thereby granted for the purpose of cleansing repairing and renewing the said sewers drains pipes wires and cables or any of them doing as little damage as possible to the property entered upon and making good the surface without unnecessary delay at his her or their own cost and making compensation for any damage done or occasioned by the exercise of such power but without prejudice to any right to claim a contribution to the expenses thus incurred from any person or persons liable to contribute.

3. All easements quasi-easements privileges rights and advantages now or heretofore occupied or enjoyed therewith or which would be implied against the Council on the severance hereby effected except rights of light or air or other easements which would restrict or interfere with the use of any adjoining or neighbouring property now belonging to the Council and which would restrict or interfere with the free use of the same for building or other purposes.

4. A right of way from time to time and at all times hereafter and for all purposes of domestic use and enjoyment of the Property but not for any other purpose whatsoever for the Purchaser and his successors in title the owners and occupiers for the time being of the Property or any part thereof and his or their respective servants or licensees (in common with the Council and all other persons having the like right) on foot only to and from the Property or any part thereof and all or any buildings thereon over and along the pathway coloured yellow on the plan annexed hereto subject to the payment of a one-half share of the expense of maintaining and keeping the whole or any part or parts of such pathway in repair.

5. A right of way from time to time and at all times hereafter and for all purposes of domestic use and enjoyment of the Property but not for any other purpose whatsoever for the Purchaser and his successors in title the owners and occupiers for the time being of the Property or any part thereof and his or their respective servants or licensees (in common with the Council and all other persons having the like right) on foot only to and from the Property or any part thereof and all or any buildings thereon over and along the pathway coloured blue on the plan annexed hereto.

6. A right of way from time to time and at all times hereafter and for all purposes of domestic use and enjoyment of the Property but not for any other purpose whatsoever for the Purchaser and his successors in title the owners and occupiers for the time being of the property or any part thereof and his or their respective servants and licensees (in common with the Council and all other persons having the like right) with or without vehicles of any description to and from the Property or any part thereof and all or any buildings thereon over and along the roadway coloured brown on the plan annexed hereto between the private driveway of the Property and the point at which the said roadway coloured brown connects with and adjoins the public highway subject to the payment of a one-thirtieth share of the expense of maintaining and keeping the whole or any part or parts of the said roadway in repair."

36. What is important to note is that, although there are six paragraphs in Mr and Mrs Harrison's Second Schedule, only the first three appear in all three conveyances.

37. The fourth paragraph in the Second Schedule to Mr and Mrs Harrison's conveyance appears in the first and second Defendants' conveyances, but does not appear in the conveyance of the third Defendants. Paragraphs five and six in the Second Schedule of Mr and Mrs Harrison's conveyance appear only in their conveyance.

38. I should point out that the reference to a yellow pathway, in paragraph four in the Second Schedule above, is to a pathway which leads on to the shared front path serving Mr and Mrs Harrison's house and their next door neighbour.

39. The relevant plan referred to in paragraph five of the Schedule above is at page 499 in the trial bundle. It should be observed that there is no obligation cast upon Mr and Mrs Harrison in paragraph five to make any contribution to the cost of the maintenance and repair of the blue pathway specifically, yet that blue pathway skirts an oval grassland immediately in front of Mr and Mrs Harrison's house.

40. The blue pathway forms, as it were, the lower half of the circle surrounding that oval grassland. The northern half of the circle is the public highway known as Station Road. So, the fifth paragraph confers a right to use an identified pathway adjacent to an oval area of grassland, but with no obligation to pay for its maintenance.

41. It can be seen that the roadway marked brown serves the rear of these properties, specifically Mr and Mrs Harrison's property. It is much wider of course than the blue pedestrian path in front of it, and it accommodates vehicular traffic. Mr and Mrs Harrison have to drive off the public highway, Station Road, along this rear roadway to gain access to their garage, which is at the back of their house. Indeed, Mr and Mrs Harrison use this rear roadway as their major point of ingress to and egress from their property.

42. That concludes the quotation from the Second Schedule of the conveyances, which are in common form in relation to paragraphs one, two and three. Paragraph four is in common language for the first and second Defendants. Paragraphs five and six relate solely to Mr and Mrs Harrison.

43. The Third Schedule in all the conveyances stated:

> "THE THIRD SCHEDULE hereinbefore referred to
> (Rights excepted and reserved)
>
> 1. The full and free right of passage and running of water soil gas electricity all other services television and radio signals and smoke through all drains channels gutters sewers pipes watercourses cables wires chimney stacks and flues which are now or may at any time within twenty one years from the date hereof be in through under or over the land hereby conveyed.
>
> 2. The right for the Council and their agents or contractors and other the owners or occupiers of the adjoining properties served thereby at all reasonable times to enter upon the Property with or without workmen for the purpose of inspecting repairing cables or any of them the person exercising such rights doing as little damage as possible to the Property and making good the surface without unnecessary delay at his or their own cost and making compensation for any damage done or occasioned by the exercise of this power but without prejudice to any right to claim a contribution to the expenses thus incurred from the owners or occupiers for the time being of the property.
>
> 3. The right for the Council and their agents and servants (and if authorised by the Council the lessees tenants and occupiers of adjoining premises belonging to the Council) with all necessary workmen and appliances at all reasonable times to enter upon the Property to execute repairs or alterations on any adjoining premises now or hereafter belonging to the Council or to construct connect alter repair cleanse or maintain any sewers drains gutters and other pipes in on or under the property for the accommodation of any adjoining premises now or hereafter belonging to the Council all damage thereby occasioned being made good by the person or persons exercising such rights.
>
> 4. All easements quasi-easements liberties privileges rights and advantages now or heretofore occupied or enjoyed by the Council and occupiers of the adjoining or neighbouring properties now belonging to the Council over or in respect of the Property and which would be implied by statute or by reason of severance in favour of a purchaser of the said adjoining or neighbouring properties if the same had been conveyed to such purchaser and the property had been retained by the Council."

44. They are in a form common to all conveyances. They are, in summary, the rights excepted and reserved for FDDC over the land which was being sold to these Defendants.

45. The Fourth Schedule in all the conveyances, but again reading from Mr and Mrs Harrison's conveyance, contained the following:

> "THE FOURTH SCHEDULE hereinbefore referred to
> (Covenants and stipulations on the part of the Purchaser)
>
> 1. Not to use the Property or any part thereof for the purpose of any manufacture trade or business of any description or for any purpose other than as a single private dwelling house and residential curtilage.
>
> 2. Not to do or permit to be done any act or thing on or about the Property which shall be or grow to be an annoyance or nuisance to the Council or their successors in title or the owners or occupiers of the adjoining land or premises or which may tend to lessen or depreciate the value of other premises in the neighbourhood.
>
> 3. At all times hereafter to maintain and keep in repair at his own expense the boundary walls fences and hedges marked with a "T" inwards on the plan annexed hereto the ownership of the remaining boundary walls fences and hedges including house walls which are not so marked shall be party walls fences and hedges and shall be maintained and repaired as such.
>
> 4. Not to paint exterior wall surfaces of the Property where these surfaces are constructed of stone stoneblocks facing brick or similar material."

46. There are four paragraphs in Mr and Mrs Harrison's Fourth Schedule, namely covenants and stipulations on the part of the purchaser. These are the restrictive covenants or the fencing obligation accepted by the Defendants when they purchased their house.

47. When one looks at these three conveyances, there are four such covenants in the case of Mr and Mrs Harrison, but five in relation to one or more of the other Defendants. That distinction is more apparent than real because what has happened is that in the case of Mr and Mrs Harrison the first covenant reads:

> "Not to use the Property or any part thereof for the purpose of any manufacture trade or business of any description or for any purpose other than as a single private dwelling house and residential curtilage."

That has brought together in the first stipulation in their case something which has been listed as two separate covenants in relation to other Defendants. For example in the other Defendants' conveyances, there is a separate covenant which says:

> "Not to use the said Property for any purpose other than as a residential dwelling house and curtilage."

There is no material distinction between them.

48. The Fifth Schedule to the conveyance and clause five, which brought it into effect, have already been set out earlier in this judgment. However, for the sake of completeness I repeat the Fifth Schedule here.

> "THE FIFTH SCHEDULE hereinbefore referred to
> (Agreements and declarations)
>
> 1. In addition to the grants and reservations herein expressly made all or any rights or privileges now used and enjoyed by the Property over the adjoining or neighbouring property or properties of the Council and by such adjoining or neighbouring property or properties over the Property and which had the Property and such adjoining or neighbouring property or properties been in separate ownership for more than forty years would have been easements quasi-easements or rights or privileges in the nature of easements shall continue to be so used and enjoyed by the owners or occupiers for the time being of the properties affected thereby such owners or occupiers contributing from time to time a fair and proper proportion of the cost of cleansing repairing and maintaining all things used in common.
>
> 2. Any difference or dispute arising as to the proportion r the amount payable as a contribution to the cost of cleansing repairing and maintaining all things used in common shall be determined by a single arbitrator appointed under the Arbitration Act 1950 or any statute amending or replacing the same."

7. COMPARISON WITH OTHER ESTATE MAINTENANCE PROVISIONS

49. The provisions in the Fifth Schedule to the Defendants' conveyances should be contrasted with those used in different areas of the country. In Thamesmead Town Limited v Allotey [1998] 3 EGLR 97, the Court of Appeal refused to enforce the burden of the positive covenants, set out by me later, against a successor in title to the original purchaser. Nevertheless, the clause which was used in that case shows how express provision can be made between the original contracting parties to impose a clear right to levy service charges. There the tenant purchaser covenanted in clause 3(B)(i):

> "To contribute and pay to [the Claimant] on demand from time to time a fair proportion of all fees expenses and costs of repairing maintaining and replacing removing and cleansing (including the fees expenses and costs of [the Claimant's] employees and agents in connection therewith):

(a) all roads footpaths or access ways sewers drains pipes cables or other apparatus on … the Estate.

(b) the landscaped and communal areas on the Estate which are maintained from time to time by [the Claimant] including the grass trees shrubs plants and other vegetation thereon and equipment used therein or in connection therewith such proportion to be agreed between the Transferee [defined as the original council tenant and their successor in title] and [the Claimant] or in the case of dispute determined by [the Claimant] or such qualified person (who may be one of its own officers) as [the Claimant] may appoint."

50. Clause 6 of that transfer in that case also provided:

"In the event of disposal of the Property to any person other than [the Claimant' … the Transferee will include in the … Transfer a provision that his successor in title will enter into a deed of covenant in similar terms to … clauses 3 [and 6] … with [the Claimant] and that any successor in title will undertake that on any other subsequent transfer of the Property to any person other than [the Claimant] a similar provision … will be included in the subsequent … transfer."

51. In Thamesmead, the transfer by the original Council to the original tenant did not purport to give any rights to the tenant over the landscaped and communal areas on the estate maintained by the Council, nor did it require the Council to maintain such areas.

52. Another example of a clearly worded clause imposing a service charge is shown in the case of Sheffield C.C v Jackson and Others [199] 31 HLR 331 where the covenant was expressed thus:

"Mr and Mrs Jackson [the Council tenant] (for themselves and their successors in title) covenanted with the Council to pay to the Council:

'such reasonable contribution as the Council shall from time to time require (hereinafter referred to jointly as 'contributions' and individually as a 'contribution) to the costs expenses and outgoings lawfully incurred or to be incurred by the Council in respect of the upkeep or regulation for the benefit of the locality (that is to say the Housing Estate of the Council) of which the Property forms part or any part of such locality of any land building works ways or watercourse such contributions to be made in respect of such of the benefits to the said locality or part thereof of the type described in the column headed 'The Benefit Referred to' of the SCHEDULE OF BENEFITS hereto annexed as are indicated by means of a tick or the word 'Yes" or other affirmative indication in the column headed 'Where applicable or not' as being applicable to such locality or part thereof and such contributions to be determined in accordance with Part IV of the said Schedule

> hereto and collected by the City Treasurer or other duly authorised officer of the Council.'

The schedule of benefits annexed to the conveyance had the following sub-heading:

> "Being a list of benefits enjoyed by the estate upon which the property is situated towards the cost of which the purchaser(s) will contribute in accordance with the provisions of Clause 5(2) of the conveyance/transfer.'

The relevant applicable benefit was described as 'upkeep of landscaping and play areas'."

53. As I have already indicated, since the problems with this case and no doubt others arose, the Claimant has changed the terms of its conveyances when granting transfers to tenants exercising their Right to Buy their council house on the Claimants' estates.

8. THE LOCATION OF THE DEFENDANTS' PROPERTIES IN RELATION TO THE GRASSED AREAS

54. Annexed to this judgment, as Appendices 1, 2 and 3, are plans of each of the three estates involved showing the position of each Defendant's house on its estate and the grassed areas on that estate in respect of which the Claimant seeks to recover maintenance costs.

55. They are as follows: for Mr and Mrs Harrison, the first Defendant, page 306; for Mr and Mrs Jones, the second Defendants, page 405 and for Mrs Page and her son, Geoffrey Davis, the third Defendants, at page 328.

56. Each plan shows the boundaries of the estate in red and the grassed areas in green, in relation to each of the Newnham, Newent and Lydney estates. There is, I think, a slight omission in the case of the second Defendants' plan in that, if one turns left out of their front door and goes up the road and comes to the second road junction, there is an area of grassland there which has a track skirting. If my memory serves me correctly, the actual plan omits the green shading for the grassland there, although the area of the grassland is actually noted on that plan.

57. From a perusal of these documents, one can see just how dispersed and remote the individual houses are from the areas of grassland. The only grassy area near any of the Defendants' houses is that oval shaped area of grass, which I have already referred to, outside the home of Mr and Mrs Harrison, which is shown on page 306.

58. I am satisfied the first Defendants never used or enjoyed, either as tenants or as owners, that oval area of grassland for the simple reason that there was absolutely no need for them to do so.

The First Defendants

59. Mrs Harrison, was originally married to a Mr Ford, from whom she was divorced in 1983. The tenancy was then transferred into her name. It remained in her name, even after her marriage in October 1992 to her current husband, Mr Harrison. She produced, as an exhibit to her witness statement, the documentation which she had relating to her tenancy. There was nothing in the tenancy documentation which indicated that she had, as a tenant, any express rights over, or to use, any grassed area, nor was there any reference to her having to pay for the maintenance of any such grassed area.

60. As Appendix 1 indicates, the only grassed area visible from the property of Mr and Mrs Harrison is the oval shaped grass area in front of the row of houses in which they live. This grassy area has always been there. It is shown in the lower photograph on page 380 in the second volume of the trial bundle.

61. The first Defendants have stated, and I accept, that they have never used or passed over that oval shaped grass area in front of their house. Indeed, they never had cause to use or walk over the grass area before or after they bought their house.

62. The front entrance of their house is opposite that oval grassed area, so that anyone wanting to use their front path would walk straight from the estate road, Station Road, along that path which is shown blue on their conveyance, which skirts the grassed area, to go to that shared pathway which leads onto the common front entrance to their house and their neighbour's house. Their garage is at the rear of their property.

63. Opposite the front of their house is not only that oval shaped area of grassland but also the village school, on the other side of Station Road. Within the school grounds, is a very attractive play area and playing field, where the local team and the village children play football. All of that is fenced off from the road, but there is access to for those who live there. It belongs to the Local Authority, not the Claimant.

64. These paths and the rear access to Mr and Mrs Harrison's property are, as I have already indicated, shown in the plan at page 499, which is the plan within their conveyance.

65. When the first Defendants were in the process of purchasing their council house, the Landlord's Notice stated, under the section heading "Service Charge", by a line drawn through the relevant box on the form, that no service charges or maintenance charges were payable. That document is set out at page 382 in the trial bundle. It is important that I read it because under the bold heading "Service Charges" the following is written:

> "The Landlord estimates the average amount (at current prices) which will be payable under each head of service charge in the reference period specified below as follow:
>
> Services
> Repairs

Maintenance
Insurance
Management"

A line was struck through the column in which those figures would be entered. A line is put through the total, effectively showing zero pounds each year.

66. This is not a case in which, in my judgment, anybody could have been unaware of the possibility of service charges or the need to levy them if appropriate, because staring FDDC in the face when it completed the document was this big heading in bold type "Service Charges", one of which was maintenance, services, repairs, insurance and management.

67. When it came to identifying the reference period for those charges, Mr McCafferty told me that, by statute, the period is five years. However, no number of years had been inserted in the relevant box on the form.

68. I have already made the finding of fact that, both as tenants and as owners, Mr and Mrs Harrison have never used and enjoyed any of the grass areas including the oval area in front of their house. This is a conclusion I have reached for the following obvious reasons.

69. First, their main access is along that roadway to the rear of their property. Secondly, if they wanted to go on a grassed area, they had the amenity of the school grounds across the road and thirdly. Thirdly, they have a large front garden of their own which is separated by a hedge from the blue pathway, which skirts the oval grassy area.

The Second Defendants

70. The second Defendants, Mr and Mrs Jones, became tenants of FDDC on 25 March 1985. As is shown in Appendix 2, from their property no grass is visible. The second Defendants' evidence, which I accept, was that during the time they lived at 101 Glebe Road, both before and after their purchase, they had made no use of any of the grassed areas, as the grassy areas providing visibility splays or highway verges are located on a junction or on roads which are not theirs, are of limited size and, perhaps more significantly, are frequently and wrongly used as a dog toilet area or for parking cars.

The Third Defendants

71. Appendix 3 shows the home of Mrs Page, where she lives with her sons, Geoffrey and Peter (who is disabled). She moved to Lydney in the early 1980s, and originally lived at 12 Purton Place. She moved into 39 Harrison Way in 1992, after swapping houses with her granddaughter. Initially she rented 39 Harrison Way from FDDC, but eventually completed her purchase in 1995.

72. The only grassed areas near their property are a few patches of grass, which are probably highway verges in any event, between the pavement and the road, as shown in Appendix 3 and in the photographs at pages 399 to 301.

73. From her house the only patches of grass which Mrs Page can see are small patches on the opposite side of the road between the pavement and the road. Her evidence, albeit very rigid on this point, was that, at no point either before or after purchasing 39 Harrison Way, had she ever used or passed over the grassed areas in the vicinity of her property. She had no need to use or pass over the grass areas in order to gain access to her property and, given that she has a disabled son with her, she would not use the grassy areas in any event.

74. I have not seen the offers for purchase in relation to the second and third Defendants, but I assume that those offers contained no requirements to pay any service charges after purchase.

75. The Claimant has adduced no evidence of actual user of any of the grassed areas by any of these Defendants either before or after they purchased their property, apart from anonymous informants who have not given evidence before me.

76. I accept the evidence of all five Defendants, that is both first Defendants, both second Defendants and Mrs Page, who is the only third Defendant who gave evidence before me. I regard them all as honest, accurate and reliable witnesses.

77. Their evidence comes to this: although they felt that they were entitled to use or walk on any of the grassed areas or verges, and if it had been convenient to do so would have done so, each Defendant had powerful and logical reasons, which I accept, why there was absolutely no need to do so.

78. Indeed, based on the plans and photographs of their estates, it is clear and obvious why they did not need to do so.

9. HOW ARE THE CHARGES CALCULATED?

79. In the case of all Defendants, the invoices raised by the Claimant are expressed to be in respect of:

> "Maintenance of general areas. This includes grass cutting, path clearance, hedges and weed killing where applicable."

The charges have been calculated without reference to any frontage of any property to a grassed area. They have been calculated on an estate-wide basis by taking:

> 1) the total grassed area in an individual estate;
> 2) the costs referable thereto, after deducting any contribution received from the Highway Authority;

3) dividing that cost by the number of properties, whether privately owned or rented.

80. The charges are made up as follows:

	First Defendants	**Second Defendants**	**Third Defendants**
Total area maintained	3,688 m^2	2,204 m^2	16,945 m^2
Cost of Area Maintained	£3,172.83	£1,866.87	£15,359.33
Number of Properties Contributing in the Area	45	195	525
Cost to Individual Property	£70.51	£9.57	£27.53

10. THE CLAIMANT'S EVIDENCE

81. On behalf of the Claimants, I heard evidence from Barry Thompson, the director of resources of the Claimant, and John Watkins, the finance manager, not financial director, of the Claimant.

82. Like all witnesses in this case I found these two gentlemen to be honest, accurate and reliable witnesses. However, Mr Thompson only joined the Claimant in 2005 and could not speak of events before that. Mr Watkins worked for FDDC between 1983 and 2003, when he transferred across to the Claimant.

83. Neither witness had knowledge of day-to-day use of the estates by tenants and owners. Both men accepted that clause 2.5.1 and clause 2.5.4 of the LSVT seemed to permit the Claimant to develop the open spaces and amenity areas on the estate, subject only to obtaining planning permission. Specifically FDDC did not suggest in that document that freeholders had acquired easements or proprietary rights over the grassed areas, or that any development would be subject to obtaining their consent as well as obtaining planning permission.

84. I not regard the Claimant's letter to residents concerning the possible sale of some amenity land on a wholly different estate (see page 270), as the Claimant seeking a waiver by a freeholder of the freeholder's proprietary rights. In my judgment, it was merely a consultation process to see if any residents, whether or not tenants, objected to the sale of amenity land.

85. The failure to mention any freeholder's rights in this schedule of the LSVT is, in my judgment, consistent with the failure by FDDC ever to seek to levy maintenance charges from freeholders, such as these Defendants, between 1992 and 2003 as well as with the deletion of any service charges in the Landlord's Offer Notice under section 125 of the Housing Act 1985.

86. Mr McCafferty submitted that this only prevented FDDC from levying maintenance charges for the first five years after purchase by these Defendants, and that FDDC may have wished to extract the highest possible purchase price by excluding such charges for the first five years. As I have already indicated, had FDDC included such charges the Defendants would have paid less for their homes. However, that submission did not explain why FDDC never charged those who exercised their right to buy for the cost of grass cutting or estate management at all, even after those first five years. The whole burden was left to fall on the remaining tenants of the estates.

87. Mr Thompson emphasised that freeholders benefited from the maintenance of the grassed areas because such maintenance enhanced the visual appeal of the neighbourhood and of the area; it ensured that hazardous objects, such as broken bottles, were removed from grassy areas and it preserved, maybe even enhanced, the values of the Defendants' properties.

88. Mr Thompson was taken through some of the photographs supplied by the Claimant in the trial bundle. Those photographs showed cars parked and black plastic bags deposited on grass verges and grassy areas within estates. Mr Thompson could not say whether those cars or bags belonged to or had been deposited by freeholders or tenants. However, and in any event, neither activity, whether parking the car or dumping a bag, were activities which the Claimant approved, condoned or permitted. Accordingly, they were hardly rights or privileges used and enjoyed by the residents of the estates.

89. Both men accepted that the Claimant did not, and would not, seek to restrict access to the grassy areas on the estate to those who lived on the estate. The public were free to come onto the estate and frequent the grassy areas as much as they wanted. The estate roads and pavements were, after all, public highways. The absence of any restriction to access these lands is consistent with clause 2.5.4 of the LSVT referred to above and with a letter written by the Claimant to homeowners in May 2008, where some FAQs (frequently asked questions) were set out with answers.

90. At page 528 in the second volume of the trial bundle the following was recorded:

> "Q. Should the cost of these services be paid out of Council Tax?
>
> A. Councils already pay for grass to be cut in certain locations and there is an argument that the maintenance of grass verges and strips of land which are adjoining adopted highways and paths should be paid for out of Council Tax as they are, to all intents and purposes, public land. It is also true to say that access over this land is not restricted and that any member of the public can access the land and enjoy the benefit of the green space that it creates. As Two Rivers Housing is not a local authority and does not have the ability to make this decision we have no choice but to charge residents."

91. Mr Watkins made it clear how impracticable, if not simply impossible, it would be to charge freeholders on the basis of their own actual and individual use of the grassy areas. Mr Watkins also produced some anonymised hearsay observations made by tenants or owners (it was not stated which) on the estates to the effect that everyone used the grassy areas. One referred to Mr Harrison standing on a grassy area having a conversation with another man about what the anonymous witness thought was the topic of service charges. Mr Harrison denied standing on any grassy area. He accepted, of course, that he did have a conversation with a man, but it was on the roadway to the rear of his house. He was having the conversation not only with the gentleman concerned but also a local councillor.

92. I prefer and accept the evidence of Mr Harrison on that point and, in any event, I cannot place any safe reliance on any such anonymised reports from people whom I have not seen and have not been able to assess.

11. PROCEDURAL HISTORY

93. I should like to make a few preliminary observations about these proceedings. This is not a test action. These are not representative proceedings. Each Defendant is the first purchaser from FDDC still in occupation of their former council house which they purchased. Nevertheless, although these are not representative proceedings, I fully acknowledge the importance of these proceedings to the Claimant because their impact go far beyond the small sums involved in these cases.

94. The claims themselves were issued in April 2010 and a defence and counterclaim settled by Mr Paton, who appears for the Defendants, was filed in like form for each Defendant on or about 2nd June 2010. I made directions for trial and case management on 28th October 2010.

95. On 9th February 2011, the Defendants applied for summary judgment, contending that, as the Claimant had provided no evidence of "use and enjoyment" which on their case was required as a pre-condition to any financial claim under Schedule 5 of the conveyance, the Claimant had no real prospect of success at trial. That application came on before District Judge Daniel on 3rd June 2011, and he reserved judgment at the hearing. By order dated 7th June 2011, he dismissed the Claimant's claim and ordered the Claimant to pay the Defendants' costs. He then vacated the trial, which was then listed for the slot which we now occupy.

96. He said this in his judgment between paragraphs 9 and 14:

> "9. … He [Mr Paton] says (and this is accepted by the Claimant) that the Claimant has adduced no evidence at all of any use by the Defendants of these grassed areas during their tenancy. Indeed, the Defendants specifically deny any such use either during their tenancy or during their period of owner occupation. Mr Paton also prays in aid the rule *Wheeldon v Burrow* arguing that where a tenant purchases a property from

his landlord he can only acquire easements which he has actually used.

10. Mr McCafferty, for the Claimant, deals with this point in this way. Firstly, that the clause should be interpreted in a manner which reflects what must have been the intention of the parties. This, he says, involves interpreting the clause in a way which is practical and does not give rise to absurd or impossible consequences. To interpret the clause in the manner proposed by the Defendants, he says, would put the Claimant in an impossible position. In respect of each Conveyance a list would have to be retained indefinitely. Further, it would be absurd if the extent of the clause depended on unstated pre conditions. He says that it must at least be arguable that, at trial, the clause would be construed as having been intended simply to reflect the rights the owners had had as tenants and that no usage would have been necessary. He says that the words "*now used and enjoyed*" by "*the property*" must mean rights attached to the property and granted under the tenancy irrespective of whether those rights were used.

11. Whilst understanding the practical difficulties that may now arise as a result of this "catch all" provision, what seems to me to be far more compelling in determining whether this alleged right was intended to come within the clause is that it would have been very easy to have provided an express provision in the Conveyance in respect of these grassed areas. These grassed areas were present at the time and a lack of specific reference to them seems to me more an indicator that no rights or obligations were intended to arise in respect of them. Furthermore, the Claimant now appears to argue that the word "*used*" should simply be ignored in order to give effect to what it says must have been the parties' intentions. To argue that a word of simple meaning should just be ignored because of practical difficulties in otherwise identifying the extent of a covenant seems to me to be such a tenuous argument that I have to find that it has no reasonable prospect of success at trial. The Claimant's argument does not address why the word "used" should have been inserted at all, and, of course the rule in Wheeldon v Burrows supports the Defendants in their assertion that the use of any rights is crucial. I cannot see any arguable reason why a perfectly understandable and practical clause requiring both usage and enjoyment should be interpreted in a manner different from its literal meaning. In my judgment, the Claimant has no reasonable prospect of successfully arguing at trial that the clause means something other than it specifically states, namely the right had to have been both used and enjoyed during the tenancy.

12. The Defendants' second argument is that, even if the Claimant did not have to establish usage during the tenancy, it cannot establish that the Defendants in any event had possessed rights in the nature of an easement over the grassed area under their tenancy. In other words, there is no evidence that the tenants had a right to use the grassed area even if, as a matter of fact, they did so use them. I have already expressed my doubts about the Claimant's argument that the rights of the tenants over these areas can be inferred without any evidence being required. The Claimant would, at trial, bear the burden of establishing an implication to this effect. I cannot see any prospect of it doing so in the absence of evidence. It may well be that many tenants did use the grassed areas without any opposition or with tacit consent of the Council but that does not by itself create a right to do so in the absence of some specific clause in the tenancy agreement or some evidence that could persuade a trial judge that such usage gave rise to an inference that an entitlement existed under the terms of the tenancy.

13. I should deal with one further argument raised by Mr McCafferty, namely that the Defendants' remedy is to apply under S. 181 Housing Act 1985 and argue that the clause is unreasonable. I do not agree. There is nothing unreasonable on the face of the clause. The question here is not whether the clause is reasonable but whether it applies.

14. I can find no other reason for the matter to go to trial and therefore dismiss these claims with costs to the Defendants subject to detailed assessment."

97. The Claimant appealed against District Judge Daniel's order and, after a hearing which lasted a whole day before me, I granted the Claimant permission to appeal and allowed the appeal on the basis, amongst others, that the Claimant should be entitled to develop its argument on interpretation at trial, given that their interpretation was arguable and also because there was an intention, or certainly a possibility, that further evidence was going to be filed on behalf of the Claimant. Further evidence indeed was filed, and it was the evidence of Mr Watkins.

98. Accordingly, I set aside the order of District Judge Daniel, reinstated the matter for trial in this time slot which had already been allocated to it, and gave directions permitting parties to amend their statement of case or to adduce further evidence by 31st August 2011. I reserved the costs of that appeal.

12. THE CLAIMANT'S SUBMISSIONS

99. I have read carefully the written submissions which have been supplied to me by Mr Paton on behalf of the Defendants and Mr McCafferty on behalf of the Claimant and I have, of course, had the benefit of spending virtually all of

Wednesday listening to their oral arguments developing these submissions. However, for the sake of clarity and ease of exposition, I have decided to record their submissions largely in the form in which they have been supplied to me in the written submissions. I acknowledge the debt which I owe to both counsel for their helpful written and oral submissions.

100. Mr McCafferty contended that there was but a single issue before the court, namely whether, on a true construction of paragraph one of Schedule 5, the Claimant is entitled to recover from the Defendant those maintenance costs in respect of the grassy areas on the estates. He argued that paragraph one of Schedule 5, which I shall refer to for the purpose of his submissions as the 'disputed clause', stipulated on its face a contribution from the Defendants to the cost of cleansing, repairing and maintaining all things used in common. He argued that that phrase plainly encompassed the cost of maintenance of the estate land.

101. If he were wrong in that contention, he argued that this clause, when considered in the context of the legal, statutory and factual background, meant that it was plain and obvious that that was an estate service charge.

102. Accordingly, his submissions were then developed on two parallel tracks. The first was that, on its proper construction, the words used in Schedule 5 plainly and obviously entitled the Claimant to levy the service charge. The second but parallel track was that, if the meaning was not plain and obvious from the words actually used, it was plainly and obviously a service charge when considered in the legal, statutory and factual context. On the general issue of context, he relied upon the well-known passage in ICS Ltd v West Bromwich Building Society [1998] 1 WLR 896, 912-913 from the speech of Lord Hoffmann.

103. Of course, Mr McCafferty knew, because of the number of times that these arguments have been deployed, what Mr Paton was going to contend. Therefore, Mr McCafferty's submissions not only developed his own arguments but also sought to engage with Mr Paton's arguments. It is helpful, therefore, at this stage, if I briefly set out in very succinct form what are the main points of the Defendants' case. This will then put Mr McCafferty's submissions into context.

104. In a nutshell, the Defendant's case is set out in paragraph 21 of Mr Paton's skeleton argument, as expanded in oral argument, in the following five propositions:

> 1) There was no right or privilege attached to these properties occupied by the Defendants as tenants, therefore there was no right or privilege attached to each of the property's *qua* property when they were tenanted prior to the exercise of their right to buy.
>
> 2) By *qua* property, it is meant that they must show that such a right or privilege was in the nature of an easement or quasi-easement, appurtenant to that particular property, rather than being either a mere

free-standing personal right, privilege or freedom. A right or privilege not appurtenant to a particular property or occupier at all, but simply enjoyed in common with all the public, is insufficient. S.62 envisaged something which is the subject of individual or class enjoyment, as opposed to general enjoyment: Le Strange v Pettefar [1939] L.T. 300, at 301.

3) The Claimant must show that such a right or privilege was "now used or enjoyed" at the date of the conveyance and satisfy the hypothetical easement test set out at some length in paragraph one of Schedule 5; or

4) The Claimant must persuade the court that the obvious reference to "now used and enjoyed" should be ignored, or that user should simply be inferred or assumed, just because the areas in question are there, were there and always had been there.

5) The Claimant must prove that, whatever rights or privileges it is suggested these Defendants had and/or exercised as tenants, these rights or privileges were somehow converted into a right within the ambit of paragraph one of Schedule 5, and required the Claimant to prove that the Defendants were not entitled to opt out of any liability simply by electing not to use any of the grassy areas.

105. I hope I do no injustice to Mr Paton by identifying those five submissions as lying at the heart of his case. I shall, of course, develop them at greater length when, after having dealt with the Claimant's submissions, I turn to deal with the Defendant's submissions.

CLAIMANT'S SUBMISSIONS IN DETAIL

Meaning plain and Obvious on its face:

106. I turn now to deal with Mr McCafferty's first major point, namely that it is plain and obvious on the face of Schedule 5 that the Claimant is entitled to levy service charges against freeholders in relation to the cost of maintenance of all grassy areas on the estate. I make it plain that here I am relying heavily on paragraphs 34 to 54 in his skeleton argument.

107. Mr McCafferty's starting point is that these grassy areas are situated in areas of housing – broadly, 'housing estates' - all of which were owned by the local housing authority and which have a number of grassed areas and verges. He argued that it was common ground that the Defendants were secure tenants of FDDC, from whom they acquired the freehold of their properties by the exercise of their statutory right to buy. These Defendants are still the original purchasing tenants, who must have signed their conveyances in the full knowledge that the conveyance contained the disputed clause. It is reasonable to assume, therefore, that the Defendants had the benefit of proper legal

advice, that they regarded the disputed clause as a reasonable stipulation, that they read it, understood it and entered into it knowing that they had to pay.

108. He went on to argue that it was clear, on the face of Schedule 5, that it required a contribution to the cost of cleansing, repairing and maintaining all things used in common. After referring to the precise words of Schedule 5, he emphasised that the words 'rights or privileges now used and enjoyed' were such rights and privileges used and enjoyed by the "property", that is the house bought by the individual Defendant. He submitted that that word "property" was important, because it clearly implied that the use, the rights and the privileges flowed from the occupation of the property, and that the temporal reference to "now" must refer to a council property subject to a secure tenancy. Because the disputed clause was worded that way, he submitted the following:

> a) those 'rights or privileges' being expressed as used and enjoyed by the property were not limited to, nor were they expressed to be dependent on identifiable use by a particular individual and;
>
> b) the reference to 'rights or privileges' must be a reference to any rights or privileges attaching to the property and enjoyed by the property as a secure tenant of the Council.

109. He drew my attention to the fact that the conveyance used was in the standard form where secure tenants were exercising their right to buy. Therefore, if viewed in the light of what was going on, the meaning of the disputed clause is plain and obvious. In a nutshell, he submitted that the disputed clause is in general terms capable of being applied to all and any tenant who chose to exercise his statutory right to buy.

110. He stigmatised the construction contended for by Mr Paton as being impracticable and unworkable, requiring, as it would, an individual register on a daily basis, if not an hourly basis, of the use made by individual occupants of the estate, if they were freeholders, of the grassy areas. He argued that such an approach simply cannot be right, where a Council, here FDDC, was *obliged* to transfer property if statutory criteria under the statutory code were met. This was not a conventional, arm's length agreement of sale and purchase between a willing vendor and a willing purchaser.

111. He contended that Mr Paton's submissions and suggested construction flew in the face of the legislative intention behind Part V of the Housing Act 1985, because those provisions were clearly designed to be a clear simple code, imposed on local housing authorities, whereby, on the tenant's fulfilling the basic statutory criteria, that authority was obliged to convey the property together with all rights attaching to it.

112. Therefore, the Defendants' interpretation of the disputed clause, which required records of actual use by each tenant – an impracticable, absurd and unenforceable system – would thwart the statutory process by rendering difficult if not impossible the identification of those rights to be transferred.

This would be obviously inconsistent with the broad brush approach which the statutory code envisaged.

113. Moreover, he argued, the Defendants' interpretation only concentrated on the word "used" in the phrase "now used and enjoyed" and largely ignored the word "enjoyed", a word with a much wider meaning than "used". He developed this argument about the width of the word "enjoyment" by submitting that it was possible for a right or privilege to be enjoyed without being exercised, particularly where the nature of the rights or privileges, here use and enjoyment of estate land, is considered and where there will be a wide variation from individual to individual of the time, periods and circumstances under which the right to use these grassy areas would be exercised.

114. Therefore, he submitted, what was being swept up in Schedule 5 was the bundle of rights and privileges which the tenant had as a secure tenant. This bundle the tenant would continue to enjoy as a freeholder. Whether the tenant knew it or not, he was, *qua* tenant, in fact paying for the maintenance of these areas in his rent. Therefore, a purchasing tenant was allowed to continue to use and enjoy what he could before, i.e. all these grassy areas, with the obligation to pay for them, *qua* freeholder, separately as a service charge rather than included in his rent.

115. Mr McCafferty, in paragraphs 47 to 58 of his skeleton argument, went on to identify the source of the rights and privileges in relation to the grassy areas, which were absent from the written terms of the tenancy. He argued that the "rights and privileges" which were intended to be conferred on the owners were deliberately expressed to be in general terms. They were "all or any rights or privileges which are in the nature of easements or quasi-easements over the adjoining or neighbouring property or properties of the Council." He emphasised that such rights were to "continue to be so used and enjoyed by the owners and occupiers". He submitted that can mean only one thing: "The rights or privileges you have before as tenants, you keep as owners."

116. Therefore, he answered Mr Paton's question "What rights or privileges did the current owners have when they were tenants?" by responding that they were those rights and privileges which inevitably stemmed from ordinary and routine day-to-day living on a large scale council developments. He said that the common or grassy areas could only be for the tenants' use as a matter of pragmatism. They had rights to walk over, cross over, let the children play on them, as appropriate. I think he expanded upon this list, more poetically, in the course of his submissions by including rights to picnic and fly kites. He went on to say that it was not disputed that the grassed areas in question were routinely used by residents of the estates in general and, therefore, as a matter of common sense, practical living and the design and lay-out of the developments, such rights or privileges must be implied on the granting on a tenancy agreement and, as a result, to be carried over and continued under Schedule 5 of the conveyances.

117. He met Mr Paton's point, about the absence of any written expression of these rights, by saying that such an omission was not significant because:

a) Written tenancy agreements are a comparatively modern practice.

b) Even in the earlier limited or more modern version of a written tenancy agreement, only a number of detailed provisions are highlighted, such as the Council's repairing obligations to the tenant, the tenanted property's permitted use as a dwelling house only, and the prohibition of antisocial behaviour, any proven breach of which would give rise to possession proceedings.

c) It would be extraordinary to find what Mr Paton is looking for, namely a detailed and painstaking recitation of rights to use grass verges or grassy areas.

d) Much of what happens to make the landlord Council/ tenant relationship work, including the bundle of rights and obligations, is really to be implied as a matter of necessity or common sense. He particularly pointed out rights of access, right to park or to use the communal refuse facilities and so forth. They are not set out in any detailed modern Council tenancy agreement. They must be implied as a matter of efficacy, necessity and common sense. He submitted that it is unrealistic to approach a Council tenancy agreement, as Mr Paton would seek to do, as if it were a lease between two private parties covering all their respective rights and obligations, and, on that basis, to make findings depending on what is not or what is set out in the written agreement. Such an approach not only would conflict with the reality on the ground but would also lead to the absurd position of a tenant either avoiding areas or seeking permission to use them.

118. Mr McCafferty went on to point out that there are other ways in which these rights could be transferred impliedly, for example s.62 of the Law of Property Act 1925 and as a matter of necessity.

119. S.62 could elevate a merely permissive licence or tacit consent into a right, when the 'Right to Buy' provisions were invoked. S.62 is expressed in broad terms, and the case law on s.62 does not itself require actual use of a tacit consent or privilege before it can be elevated into a right under s.62. In that regard, he placed heavy reliance of Re Yately Common, Hampshire [1977] 1 WLR 840 @ 850-851. He submitted that this case clearly showed that there is no requirement of actual use under s.62 . The word "use" does not feature in s.62. The word "enjoyment" does.

120. Mr McCafferty then pointed out that the disputed clause in the Fifth Schedule is not confined to 'rights' but extends to 'privileges', a broad catch-all word, and argued that that privileges take effect whether exercised or not.

121. Finally, and no doubt with Le Strange v Pettefar in mind, he contended that these rights and privileges were enjoyed by the Defendants, not merely as members of the public but as members of a defined class, namely secure tenants of the Council. Merely because one enjoyed a right *qua* member of

the public does not prevent the same right arising *qua* secured tenant, and one is independent of and exists outside the other.

122. All those matters were relied upon by Mr McCafferty in support of his first submission, namely that it is plain and obvious, on the wording of the covenant itself, that the Claimant is and was entitled to levy service charges, in relation to the maintenance of the grassy areas, on freeholders such as these Defendants.

Meaning plain and obvious when considered in its legal and factual context

123. Mr McCafferty's alternative submission is that in the light of (i) the legal and statutory framework within which these purchases took place and (ii) the nature of the land involved, namely a large scale council estate and in the context of the modern landlord and tenant relationships, where even now not all rights and obligations are expressed and where much is left to inference or implication, the disputed clause in Schedule 5 means that the Claimant is entitled to levy these charges against the Defendants for the maintenance of the grassy areas within their individual estates.

124. As far as the legal context is concerned, I remind myself of Lord Hoffman's observations in ICS Ltd v West Bromwich Building Society, to which I referred above. I also remind myself of the legal and statutory context which Mr McCafferty set out between paragraphs 24 and 32 of his skeleton argument, part of which I must recite.

> "24. Part V, Housing Act 1985 ("the RTB provisions") contains a complete statutory code governing the sale of local housing authority property to secure tenants. It grants the secure tenant a number of rights (including rights of appeal to the county court) and places obligations and restrictions on the housing authority.
>
> 25. These statutory provisions form an integral part of the legal and factual background to the entering into of the conveyances.
>
> 26. Section 139 of and Paragraph 1 of Schedule 6 to, the Housing Act 1985 prohibit the exclusion of the general words implied under section 62 Law of Property Act 1925 without the tenant's consent.
>
> 27. Paragraphs 2-4A of Schedule 6 make specific provision for rights to be included in any grant or conveyance; broadly, as far as possible, to grant the same rights as previously enjoyed by the purchaser when a secure tenant.
>
> 28. Paragraph 5 of Part 1 of Schedule 6 provides as follows:
>
> > 5. Subject to paragraph 6, and to Parts II and III of this Schedule, the conveyance or grant may include such other covenants and conditions as are reasonable in the circumstances.

29. Section 127 HA 1985 requires the housing authority to take into account the effect, if any, of any covenant in assessing the value of the house."

125. Sheffield CC v Jackson and Others [1999] 31 HLR 331 is a helpful authority not only because it gives the example, as I have indicated, of how a carefully worded clause seeking to levy service charges could be drafted but also for its confirmation that, if any challenge is going to be made to the reasonableness of a provision in a 'Right to Buy' conveyance, then that challenge can only be made to a local court before the conveyance is executed or, if afterwards, by reference to the Secretary of State for a direction. There was no such challenge to Schedule 5 by any of these Defendants.

126. Mr McCafferty has sought to argue that these Defendants are seeking to go behind Sheffield CC v Jackson and Others, and effectively now to argue, out of time and without jurisdiction, that Schedule 5 is unreasonable.

127. I do not agree with that analysis. It seems to me that, from first to last, the Defendants are simply arguing that Schedule 5 does not capture or contain a right to levy a service charge. It is a matter, in my view, of the Defendants' arguing over the correct interpretation of the clause, and not alleging that the clause is unreasonable.

128. Indeed, one would have to ask how could it ever be unreasonable? It cuts both ways. This is not just a one-way street allowing FDDC or the Claimant to make a purchasing tenant pay a service charge. It also provides expressly that the purchasing tenant can, in appropriate circumstances, require FDDC or the Claimant to make a contribution as well. Such an even-handed clause seems to me to be one which is eminently reasonable. What I am concerned with is the meaning of the disputed clause. What does the clause mean? What does it enable the parties to do?

129. Mr McCafferty also drew my attention to Rushton v Worcester City Council [2001] EWCA Civ 367 for the proposition that, when a tenant buys under a Right To Buy provision, it is not an arm's length conventional contract. It is the implementation of a statutory process under a statutory code. Therefore, as that case itself demonstrated, where the selling Council wrongly omitted to refer to a defect or series of defects, the claim by the purchasing tenant against the Council was not the common law or statutory claim under the Misrepresentation Act 1967, but was a claim against the selling Council for breach of statutory duty, its duty being to provide accurate details of defects in the property.

130. By parity of reasoning, Mr McCafferty has argued that, merely because FDDC did not charge service charges in the reference period of five years after the purchase by these Defendants, this in no way precludes the Claimant from doing so. If these purchasing Defendants were misled by the offer notice, Mr McCafferty submitted that is a matter for them to sue FDDC for breach of statutory duty for leading them to believe that they would not have to pay any

service charges. However, this failure does not prevent the Claimant from enforcing those service charges if, as a matter of construction, the clause bears the meaning and confers the power claimed by Mr McCafferty.

131. So, I have very much in mind the points that this is not an arm's length transaction and it takes place against this legal and factual matrix. As the later case of Billson v Tristrem [2000] L & TR 220 demonstrated, robust interpretation is often required by courts to make practical sense, if the drafting is unhappily expressed or creates gaps which need to be filled, provided that that is the proper meaning which must be attributed to the clause.

132. What then is the relevant factual and legal matrix to which Mr McCafferty wishes me to have particular regard? He identified the following factors as important and highly material:

> "(i) The properties were all constructed as social housing;
>
> (ii) The properties were let under secure tenancies;
>
> (iii) The purchasers were all secure tenants and had been for some time;
>
> (iv) The sales were being conducted under the statutory Right to Buy scheme with all that that entailed, including:
>
> > (a) the purchasers were entitled by statue to certain easements;
> >
> > (b) they were entitled to a discount on the 'market price' which had to be paid back if the property was sold on within a certain period;
> >
> > (c) they had a right to seek an independent valuation of the property from the District Valuer;
> >
> > (d) they had a right to object to any term in the conveyance they believed to be unreasonable."

133. Mr McCafferty submitted that Mr Paton's approach ignored this background, factual and legal, and interpreted the disputed clause as if it had been drafted with a single conveyance in mind between two private parties. Moreover, he had placed unrealistic emphasis on *actual* use and too much reliance on the rule in Wheeldon v Burrows [1879] LR 12 Ch D 31.

134. Mr Paton's approach, argued Mr McCafferty, simply ignored the fact the conveyance was made under the 'Right to Buy' scheme, namely a statutory right to acquire the freehold which arose when the tenant had fulfilled the qualifying period of two years. Mr McCafferty doubted whether, in that context, Wheeldon v Burrows had any application at all.

135. To reinforce his point about the importance of the legislative background in the correct interpretation of the conveyance, Mr McCafferty also relied on Kent v Kavanagh [2006] EWCA Civ 162 as an illustration of a purposeful interpretation of a conveyance, compelled by another comparable statutory scheme which also prohibited the exclusion of s.62 on any conveyance under the scheme. The case concerned the leasehold enfranchisement of two adjacent properties, separated by a shared path, where no express right of way had been granted over the path in the conveyance. Nevertheless, the court held that rights of way benefitting and burdening the respective freeholds, formerly in common ownership, had passed on the conveyance of the first freehold under s.62, which had supplemented the leasehold enfranchisement statutory code. Mr McCafferty has urged me to hold that the bundle of rights enjoyed by the Defendants, as tenants, had included the right to use the grassy areas, and that these rights had passed to them under the disputed clause.

136. In my judgment, there is another highly material factor in the factual matrix, namely that these Defendants, *qua* members of the public, could have used all these areas and facilities as of right, even if they were not secure Council tenants.

137. Furthermore, in my view, there was absolutely nothing in that statutory code which prevented FDDC from drafting a clear, unambiguous and explicit clause, as in Thamesmead and Sheffield, which put beyond doubt what was covered, what they could do and for what they could charge freeholders. Instead, the Claimant has had to resort to the very wide, catch-all, words in the disputed clause in Schedule 5, albeit constrained by its references to the right or privilege having to have some easement-like quality.

138. Mr McCafferty maintained that the central purpose of the disputed clause was to grant to the owners the rights or privileges they enjoyed as secure tenants, albeit with an obligation to make a direct financial contribution, as opposed to indirectly through their rents as previously. For that reason, he argued that the disputed clause demanded a wide interpretation to enable general rights and privileges over adjoining and neighbouring Council land, which were enjoyed as secure tenants, to be preserved for their benefit in their new position as freehold owners. The clause was not, he argued, specifying a direct correlation between the actual use of the land and the obligation to pay for its maintenance.

139. He suggested that the Defendant's approach and construction was narrow, semantic and completely devoid of any context or background, and not sustainable in the light of Lord Hoffman's comments. Nevertheless, in my judgment, that criticism of Mr Paton's argument itself ignores the fact that the disputed clause operated both ways. It gave freeholders rights against FDDC and the Claimant, as successor to the Council. It did not just give FDDC and the Claimant rights against the purchasing tenants.

140. He characterised the Defendants' construction as one which failed to take into account the fact that, as secure tenants they would, as a matter of law, have to pay a contribution through their rents to the upkeep of the grassed areas.

141. Under the Local Government and Housing Act 1989, all expenditure on housing land must be accounted for within the housing revenue account and met from rents or Central Government subsidy. Accordingly, Mr McCafferty argued - in addition to the arguments above that 'rights or privileges' were acquired as a matter of common sense, every day living on a council development – (i) that the 'rights or privileges' were acquired as a result of the contribution to the upkeep of those areas, and (ii) that the Defendants' construction has the result that the cost of the maintenance to the tenants has increased, unless paid voluntarily by owners.

142. Finally he drew it all together on this question of interpretation by saying that the resulting position on the ground on the Defendant's construction is chaotic, unworkable and unfair. Those occupiers remaining as secure tenants pay an increasing burden as more properties are sold, though they retain the same rights and privileges. On the other hand, owners such as these Defendants can now make use of the same facilities as previously without continuing to pay a service charge or a charge which had been built into their rent. Alternatively, they must avoid walking on any grass area. In both areas, Mr McCafferty argued, they benefit generally from the good upkeep of the grassed areas and that such a situation would be impossible to police and unrealistic to expect people living in close proximity to each other to abide by.

143. Mr McCafferty went on to deal with the last of Mr Paton's points, namely that, even if Mr McCafferty is correct on every single point which he has advanced thus far, this is a 'pay as you go' obligation; you only pay for the cost of the grass area maintenance if you use and enjoy it. Therefore, if you do not use it, if you elect not to use it, then you cannot be made to pay.

144. Mr McCafferty countered that by contending that, although Schedule 5 may be unhappily drafted, the court should take a broad based approach as exemplified in Billson v Tristrem to extract the obvious common sense purpose of the clause, namely that it imposed a service charge on freeholders which they had to pay, irrespective of any impracticable requirement of keeping detailed records of who used what and when. He submitted that the only conditionality inherent in Schedule 5 is that the Claimant must *first* cut and maintain the grass *before* it can invoice the Defendants for that work. Moreover, Mr McCafferty said that, even if the Defendants were correct on that election argument, such an argument cannot apply were the parties to be charged are the original contracting parties, such as these Defendants, and not a successor in title to the original purchaser as in Halsell v Brizell [1957] Ch 169 and in the Thamesmead Town Limited v Allotey.

145. In drawing together his arguments on construction and election, he maintained that Schedule 5 must mean *something*. The Defendants signed a conveyance, no doubt with the benefit of legal advice. They must have regarded Schedule 5 as a reasonable provision, and they must have had to expect to pay for something, including shared facilities. These Defendants had the right to use these facilities, as members of the class of secure tenants. Those rights were carried over and were still used as owners. Accordingly, as freeholders, they

must continue to pay for them, just as the tenants must continue to pay for them.

146. I hope that is a fair summary, albeit at length, of Mr McCafferty's arguments. They were developed orally, but I do not understand any point to have been advanced orally which is not inherent or contained within that analysis.

13. THE DEFENDANT'S SUBMISSIONS

147. Mr Paton argued the following points.

148. First, the Claimant did not plead or prove any specific express or even implied 'right or privilege' to use those areas as having existed in the Defendants' previous tenancy agreements. None of those agreements contained the grant of any such right; no basis for the implication of such a right or privilege is or was pleaded. Therefore, he argued, a useful exercise with which to test the Claimant's claim is to ask the question: What exactly is the alleged right or privilege? To what easement, known to law, does it correspond? How would it be put into words?

149. Secondly, as the Claimant itself stated, these areas are all publicly accessible. Some of them may even be highway verges. No "property" could be said to have, or to have exercised, rights or privileges in the nature of an easement over such areas. The general ability to wander over publicly accessible spaces in common with any other member of the public is quite different from a private easement appurtenant to a specific property. The areas in question, these grassy areas, simply are not appurtenant to, nor do they accommodate the Defendants' properties *qua* properties.

150. Thirdly, the Claimant did not even attempt to satisfy the hypothetical easement test in Schedule 5 by seeking to establish that such use and enjoyment was such that it would have given rise to 'easements, quasi easements or rights or privileges in the nature of easements' had the occupiers' property on the one hand and the relevant grassed areas on the other been in separate ownership up to that time, rather than the common ownership of the Council.

151. Fourthly, Mr Paton accepted that the authorities under s.62 of the Law of Property Act 1925 are not unanimous in their requirement of *use* of the relevant privilege or liberty at the time of the relevant conveyance. The words *use* or *used* do not appear at all in s.62, yet such use at the time of the conveyance was required in Wall v Collins [2007] Ch. 390, but not required (albeit obiter) in Re Yately Common, Hampshire [1977] 1 WLR 840 @ 850-851. However, whatever judicial diversity there is on that issue is immaterial, he submitted, in this case, because the actual wording of the Fifth Schedule puts the point beyond debate. It is, therefore, not necessarily for me to agonise over whether s.62 requires actual use before any permission can be elevated to a right, when all I have to do is to look at Schedule 5, which contains the words "use and enjoyment". Mr Paton submitted that it would be remarkable

if Schedule 5, which if anything is drafted more explicitly than s.62, required anything less than user.

152. Fifthly, far from being impracticable, as alleged by the Claimant, Mr Paton submitted that claims of the kind truly envisaged by Schedule 5 are commonplace in private easement litigation, particularly where there has been some prior diversity of occupation in the tenements, such as e.g. occupation and use by a tenant of a right of way. One could, he submitted, posit a situation where Schedule 5 to these conveyances was engaged, for example in the case of a well-trodden or visible path leading to and from a subject property across estate land. In such a case, there would be evidence of actual use and occupation by the person as a secure tenant, because the path accommodated the tenanted property. That would be the sort of right or privilege which would carry over and continue to be used by freeholders, with a concomitant obligation to contribute to its maintenance.

153. His sixth point was to ask what if the boot was on the other foot? In other words, what if the Claimant wanted to develop some of these grassy areas and was met by the argument from these Defendants, or other home owners, that the Claimant simply could not sell the relevant area, because the Defendants had prior property rights over the grassed areas? Mr Paton contended that, in such litigation, a judge would give the Defendants short shrift, and say that there was no sufficient evidence of user to engage the disputed clause and give rise to an easement which would have priority over the Claimant's right to sell. In other words, the Defendants in that court would clearly require sufficient evidence of user to engage and the clause and establish their right, as well as meeting the other requirements, such as user *qua* easement, and that the right asserted was capable of being an easement. Mr Paton asked whether Claimant was saying that, in such a hypothetical case, the court should accept a submission along the lines of:

> "We do not have any evidence of use of these areas, but they are there so we must have some rights over them."

Indeed, he argued that the Claimant would like to read into the Fifth Schedule a provision which said that, whether or not the rights and privileges were in fact used and enjoyed, it would be enough if they were merely *available* for use or enjoyment.

154. Mr Paton's seventh point was that, if the Claimant seeks to get around the lack of contiguity and accommodation of any dominant tenement by these areas, and argue that the mere existence of the areas as an amenity or a privilege, there is, as Mr McCafferty accepted, no easement or right in the nature of an easement, of right to a view. What, therefore, asked Mr Paton, are the rights relied upon by the Claimant in this case and what sort of easements are they?

155. The eighth point advanced by Mr Paton was the broad proposition that, looking at the matter in the round, objectively and from a distance, there never was any intention to impose a service charge through the disputed clause in this conveyance. Mr Paton pointed to the fact that the lack of such an

intention could be demonstrated because (i) the service charge provision was struck through and (ii) specifically in the case of Mr and Mrs Harrison where two of the three rights of way had correlative obligations to pay, yet the expressly granted right to use the blue path, which skirted the oval grassland, had no correlative obligation to contribute to maintenance costs. yet it was right next to the piece of grass for whose maintenance the Claimant does seek to charge Mr and Mrs Harrison.

156. I ask the question why, if the draftsman had focused on their property and the oval grassed area sufficiently to grant an express right of way over the blue pathway around it, but without imposing any express obligation to contribute to its maintenance or that of the blue path, Mr and Mrs Harrison should have to pay for the maintenance of the oval grassed area under the general and residual provisions in the disputed clause. Why not deal with any obligation to maintain this area expressly at the same time as dealing with the blue path, if it was intended to make them liable for the maintenance of the adjacent oval grassed area?

157. Mr Paton's ninth point is the election point. He accepted that Thamesmead and Halsall v Brizell were cases where the Council sought to make someone, who bought from the original tenant, pay for using facilities on an estate and, as such, had no direct applicability to this case. Nevertheless, indirect assistance is provided them and by Rhone and Another Appellants v Stephens (Executrix of May Ellen Barnard, Decd.) Respondent [1994] 2 WLR 429; [1994] 2 AC 310 for the following reasons:

(i) Paragraph 1, in Schedule 5, is not in the form of a freestanding positive covenant, as in Thamesmead or, indeed, Sheffield or as in the case of the covenants contained in Schedule 4 in each conveyance. The words alleged by the Claimant to entitle them to payment come at the end of a potential grant of easements by general formula in the paragraph capable of arising only in the manner to which I have already referred. So the point becomes this: if no rights or privileges or easements actually existed before the conveyance and were then "now used and enjoyed", there would be nothing in that regard to be 'continued to be so used and enjoyed.'

(ii) In other words, there is no freestanding or unconditional obligation on the tenants to pay money. They were only obliged to pay money under Schedule 5 *if* the Claimant got over all the hurdles in the first part of Schedule 5, which precedes the payment obligation. If there were any rights, for example, over the grassland outside Mr and Mrs Harrison's house, and even if the Claimant were to establish that it was a piece of land which was right next door and accommodated their house and was appurtenant to it, then the most that could be said is that the Harrisons would be entitled to continue to use it and pay for it but, as he indicated, the payment obligation presupposed that one continued to use it. There is a right to choose, he submitted. The Claimant simply cannot extract money for a facility which someone chooses not to use.

158. Finally, Mr Paton submitted that the Claimant has no direct right of action against these Defendants for a monetary claim. The Claimant's best position would be to say to a freeholder, "You cannot use these grassy areas unless you pay your fair share." If they then refused to pay their fair share, the only remedy open to the Claimant would be to seek an injunction to stop the freeholder using those areas until they paid their fair share. The Claimant would have no direct right to sue for the money, as the Claimants seek to do in this case.

159. I trust that I have faithfully reproduced the essence of Mr Paton's submissions, so that the reader of this judgment can now understand and appreciate the arguments of both counsel.

14. CONCLUSIONS

160. I prefer and accept all Mr Paton's submissions. I reject Mr McCafferty's submissions, cogent and persuasive though they were. In my judgment, the statutory context of the conveyance simply does not sufficiently fill any gap in the drafting of the disputed clause if, that is, there is any such gap. On the contrary, and for the reasons set out below, I consider that the common intention of the parties to the conveyances was that these Defendants should not have to pay any service charges for the maintenance of the grassy areas.

161. It would have been so easy for FDDC to have incorporated a service charge covenant into the conveyance to the Defendants, if it wished to do so. It was done in Thamesmead and in Sheffield with particularity and clarity of definition. Here, FDDC simply did not seek to do so.

162. FDDC undertook no obligation in the conveyance to these Defendants to maintain anything. The Claimant undertook in the LSVT a positive obligation *to FDDC* to maintain all these open spaces and grassy areas.

163. Schedule 5 operates both ways. It does not operate just in favour of FDDC or the Claimant, as one might expect in a clause imposing a service charge. Both the Defendants and FDDC could look to each other for a contribution to the maintenance costs of quasi easements used in common.

164. As a matter of construction, and despite Mr McCafferty's submissions to the contrary concerning the important legal, statutory and factual background, I am clearly of the view that the Fifth Schedule is simply not apt to permit the Claimant or FDDC to levy estate-wide service charges in respect of these dispersed areas of grass, in the vast majority of cases not remotely appurtenant to the property to be charged. They are often highway verges adjacent to roads and pavements, adopted by the local highway authority or grassy visibility splays at the mouth of road junctions. I accept that, in the case of Mr and Mrs Harrison, one oval grassy area is in front of a row of semi-detached houses, of which their property is only one.

165. Although the Fifth Schedule makes provision for determining the apportionment of service charges between adjoining or neighbouring properties owned by freeholders and the Claimant, this is much less protection than the tenants would enjoy if they wished to challenge the total amount of service charges before apportionment amongst their neighbours. Tenants have a regime for challenging service charges which would be denied to these Defendants if Schedule 5 did, in fact, entitle service charges to be levied against them.

166. The public has access to these areas, in any event. The right to do so does not, and never did, depend on the status of being a member of the class of secure tenants. No such rights had been expressly granted to them in their tenancy agreement and, in my judgment, there is no basis for inferring or implying them.

167. As a matter of fact, these grassy areas were always part of the estates. I find that they never were used and enjoyed by any of these Defendants or members of their household when they were tenants, and have not been so used and enjoyed as owners. There was no need to do so, and it would make much more sense for them not to use those areas than to use them. They were dispersed areas of grass remote from their property which it would be illogical for them to walk on.

168. FDDC never sought to raise these charges against freeholders before the LSVT to the Claimants in 2003. The prices paid by the Defendants were predicated on the basis that they would be paying no service or maintenance charges. FDDC had in front of it when making an offer the clear details, which I have recited above, of how such a service charge could be made up. It was staring FDDC in its face, yet FDDC made no detailed provision for service charges in the conveyance.

169. Moreover, in my judgment, it was not just a matter of the deletion of service charges from the calculation of the purchase price or of the non-levying of charges before 2003. When it came to the LSVT, there was no suggestion in it, that I have seen, that any of the Claimant's rights or FDDC's rights over these grassy areas had been in any way encumbered by the rights of tenants or freeholders. The Claimant was stated to be free to develop these areas, without reference to any freeholders, so long as they could get planning permission. It seems to me that that is inconsistent with the Defendants having prior property rights in the nature of an easement over those same areas.

170. In the case of Mr and Mrs Harrison, outside whose home was this oval grass area, the conveyance implied too that service charges would not be levied in relation to such grass. Although the yellow and brown paths and ways were rights of way expressly conferred, subject to payment of the stipulated share of maintenance costs, an additional right of way over the blue path in front was granted with no obligation to make any payment in respect of it, when that blue path actually surrounded, albeit in part, the oval grass area.

171. I hold that the rights and privileges which the Claimant alleges the Defendants enjoy over these grassy areas are simply not within a known category of easement or quasi easement. They are not appurtenant to the property of the Defendants. They are dispersed pieces of land. The mere existence of regularly maintained communal areas did not give rise to a 'right' for the benefit for the property to be charged. The alleged rights enjoyed by the Defendants over them are simply too diffuse to come within Schedule 5.

172. In my judgment, Schedule 5 requires a much greater degree of contiguity or proximity of properties than is inherent in an estate-wide charge, and the nature of the rights granted envisage a much greater degree of inter-dependence or mutuality than the Claimant seeks to assert by these charges, incurred in relation to grassy areas dispersed throughout the estate and, in the main, remote from the Defendants' properties and in no ways serving them.

173. Even if the Claimant were correct in all its submissions, they would have no right to sue the Defendants for payment. The Defendants retained the right to choose whether to use those grassy areas or not. They did not use them. They still choose not to use them. At best, the Claimant had the right to restrain a Defendant from using a grassy area, if that Defendant refused to pay the service charge.

174. In my view, the Defendant, Mr Jones, summed up the whole case admirably in his letter dated 6 August 2008 to the Claimant, where he said this:

> "Having studied my copy of the conveyance dated 21 December 1992, I find your use of the selected phrase "Fair and Proper Proportion of Cost of Cleansing/Maintaining & Repair of All Things Used in Common" as a "catch all" phrase very misguided as you are using the phrase out of context.
>
> If you refer to Schedule 5 of the conveyance the first paragraph which contains the selected phrase refers to the property (101 Glebe Road) and adjoining or neighbouring properties. It does not refer to other properties.
>
> I have always understood that this paragraph was inserted as a cover all phrase for shared items relating to the property like mains services and gutters and such like, not for items which we only use in common with the general public, and in his case are to be found some distance from the property."

175. In my judgment, on its proper construction and set within its legal and factual matrix, Schedule 5 is not apt to permit, and does not empower or entitle, the Claimant to levy these charges on these Defendants for the maintenance of the grassy areas on their respective estates.

176. Accordingly, this claim fails and is dismissed, since there is no basis for charging the Defendants other than through the narrow gateway of Schedule 5 in their conveyance.