Neutral Citation Number: [2021] EWCA Civ 1725

Case No: C3/2021/0498

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL
(LANDS CHAMBER)
Judge Elizabeth Cooke
[2020] UKUT 359 (LC)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22/11/2021

Before:

LORD JUSTICE NEWEY
LORD JUSTICE STUART-SMITH
and
LADY JUSTICE ANDREWS

- -

Between:

KENSQUARE LIMITED	**Applicant/ Respondent**
- and -	
MARY ADWOA AKYAA BOAKYE	**Respondent/ Appellant**

- -
- -

James Fieldsend and Edward Blakeney (instructed by **RadcliffesLeBrasseur LLP**) for the **Appellant**
Mark Warwick QC and David Peachey (instructed by **Dale and Dale Solicitors Limited**) for the **Respondent**

Hearing date: 28 October 2021

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be Monday 22 November 2021 at 10:30am

Lord Justice Newey:

1. This appeal from a decision of the Upper Tribunal (Lands Chamber) concerns service and administration charges under a lease. More specifically, it involves issues as to (a) whether time is of the essence in relation to the lease's interim service charge provisions and (b) whether the landlord can recover by way of service or administration charges costs it has incurred in litigation with the tenant.

2. The appellant, Ms Mary Boakye, holds a long lease of Flat 10, 54/55 Kensington Gardens Square, London. The flat is one of 18 in the two blocks which are together termed "the Building" in Ms Boakye's lease. The freehold of the Building is owned by the respondent, Kensquare Limited ("Kensquare"), a tenant-owned company in which Ms Boakye is herself a shareholder. Kensquare and Ms Boakye are successors in title of the original parties to Ms Boakye's lease, which was granted on 15 October 1982 for a term of 125 years from 24 June of that year.

3. In 2017, Kensquare applied to the First-tier Tribunal ("the FTT") for a determination as to whether its interim service charges for 2011-2017 were payable by Ms Boakye. In a decision dated 10 July 2017, the FTT determined that they were, observing that Ms Boakye's representative had made clear that Ms Boakye had "no case to make or defend". "The real thrust of [Ms Boakye's] position", the FTT said, was that "she wishes to make a counterclaim for damages/a set-off which has yet to be made in the county court".

4. Shortly afterwards, Kensquare served on Ms Boakye a notice under section 146 of the Law of Property Act 1925 in respect of Ms Boakye's failure to pay the interim service charges. Ms Boakye's mortgagee then paid what was claimed, but on 27 October 2017 Ms Boakye herself issued County Court proceedings against Kensquare for breach of its repairing obligations. We were told that that claim was settled on the basis that Kensquare paid Ms Boakye £20,000 and some of her costs.

5. In the meantime, on 15 August 2019, Kensquare had sent Ms Boakye a letter requesting payment of "Half-yearly estimated service charge due in advance" and "Half yearly contribution to reserve fund" for three periods: 1 April to 30 September 2018, 1 October 2018 to 31 March 2019 and 1 April to 30 September 2019. Sums totalling £2,103.52 were claimed for each half year. Kensquare further sought administration charges amounting to £8,213.70 in respect of its legal costs of the 2017 FTT proceedings and the preparation and service of the subsequent section 146 notice.

6. Kensquare applied to the FTT for it to determine whether the service and administration charges claimed in the 15 August letter were payable by Ms Boakye. In a decision dated 7 February 2020, the FTT (Judge Nicola Rushton QC and Mr Duncan Jagger MRICS) for the most part rejected Kensquare's case. It decided, first, that interim service charges of only £360 and £180 were payable for, respectively, 2018-2019 and 2019-2020; secondly, that the legal costs which Kensquare was entitled to recover by way of administration charge were limited to the £192.50 incurred in the preparation and service of the 2017 section 146 notice; and, thirdly, that Kensquare's legal costs of neither the present proceedings nor those of 2017 could be included in its service charges.

7. Kensquare appealed to the Upper Tribunal and its appeal was allowed. In a decision dated 18 December 2020, Judge Elizabeth Cooke concluded that the interim service charges which were the subject of the application to the FTT were payable as demanded (paragraph 26 of the decision); that Kensquare's costs of the 2017 proceedings could be recovered under paragraph (5) of the fourth schedule to the lease, subject to the FTT deciding which costs were within the scope of that description (paragraph 76); and that legal costs incurred by Kensquare in both the 2017 proceedings and the present proceedings were recoverable as part of the service charge (paragraph 95).

8. Ms Boakye now challenges that decision in this Court.

Lease provisions

9. By clause 3 of Ms Boakye's lease, the tenant covenanted to observe and perform the obligations set out in the fourth schedule. One such obligation, set out in paragraph (5) of the fourth schedule, is:

> "To pay all costs charges and expenses (including Solicitors' costs and Surveyors' fees) incurred by the Lessor for the purpose of or incidental to the preparation and service of a Notice under Section 146 of the Law of Property Act 1925 notwithstanding forfeiture may be avoided otherwise than by relief granted by the Court and to pay all expenses incurred by the Lessor incidental to the preparation and service of a Schedule of Dilapidations at the expiration or sooner determination of the term hereby granted".

10. Clause 4 of the lease deals with, among other things, service charges. So far as relevant, it reads:

> "THE Lessee HEREBY COVENANTS with the Lessor and with and for the benefit of the owners and lessees from time to time during the said term of the other flats comprised in the Building that the Lessee will at all times hereafter during the said term:-
>
> …
>
> (2) (i) Pay to the Lessor the Agreed Percentage … of the expenditure incurred by the Lessor on the matters specified in the Seventh Schedule hereto and in carrying out its obligations under Clause 5 hereof in respect of the Building (such proportion being hereinafter referred to as 'the maintenance charge')
>
> (ii) Pay the Maintenance Contribution specified in Paragraph 9 of the Particulars or such revised sum as shall be calculated in accordance with the provisions of paragraph (x) of this subclause as a contribution towards the maintenance charge such sum to be paid to

> the Lessor by equal half yearly payments in advance on the 1st day of April and the 1st day of October in each year …
>
> (iii) As soon as practical after the end of each financial year (as hereinafter defined) of the Lessor the Lessor shall furnish to the Lessee an account of the maintenance charge payable by the Lessee for that year due credit being given for the advance contribution relevant to that year and amounts carried forward from previous financial years (if any) and upon the furnishing of such account there shall be paid by the Lessee to the Lessor within twenty eight days any balance or difference found to be payable or there shall be carried forward by the Lessor to the next financial year any amount which may have been overpaid by the Lessee as the case may require
>
> (iv) The expression 'the financial year of the Lessor' shall mean the period from the 1st April to 31st March or such other annual period which the Lessor may in its sole discretion from time to time determine …
>
> (v) The amount of the maintenance charge shall be ascertained and certified annually by a certificate of annual expenditure (hereinafter called 'the Certificate') signed by the Lessor or the Managing Agents so soon after the end of the financial year of the Lessor as may be practicable and shall relate to such years in manner hereinafter mentioned
>
> …
>
> (x) It is further specifically provided that the Lessor may if it thinks fit revise and adjust the Maintenance Contribution for any of the Lessor's financial years to such amount as it shall deem necessary in the light of expenditure reasonably anticipated for that year notice of such revision and adjustment to be served on the Lessee not less than one month prior to the commencement of that financial year and the Maintenance Contribution so revised and adjusted shall be payable by the Lessee in accordance with paragraph (ii) hereof".

11. The "matters specified in the Seventh Schedule", to which there is reference in clause 4(2)(i), include by paragraph 5 of that schedule:

> "The cost of employing such professional advisers and agents as shall be reasonably required in connection with the management of the Building".

The "Maintenance Contribution specified in Paragraph 9 of the Particulars", mentioned in clause 4(2)(ii), is £360 per annum.

12. The lease thus provides for the tenant to make payments by way of interim service charge (or "Maintenance Contribution") on 1 April and 1 October each year. Unless revised pursuant to clause 4(2)(x), the Maintenance Contribution is to be £360 per annum, but the landlord can increase that figure to "such amount as it shall deem necessary in the light of expenditure reasonably anticipated" for the relevant financial year. According to clause 4(2)(x), notice of such an increase is to be served "not less than one month prior to the commencement of that financial year". Once a financial year has come to an end, the landlord is "[a]s soon as practical" to provide the tenant with an account of the service charge payable for that year, giving credit for interim payments, and the tenant must then pay any balance within 28 days.

Legislative provisions

13. Under section 27A of the Landlord and Tenant Act 1985, applications can be made to the FTT to determine whether service charges are payable. Pursuant to paragraph 5 of schedule 11 to the Commonhold and Leasehold Reform Act 2002, the FTT can similarly be asked to rule on whether an "administration charge" is payable. "Administration charge" is defined in paragraph 1 of schedule 11 to the 2002 Act to mean:

> "an amount payable by a tenant of a dwelling as part of or in addition to the rent which is payable, directly or indirectly—
>
> (a) for or in connection with the grant of approvals under his lease, or applications for such approvals,
>
> (b) for or in connection with the provision of information or documents by or on behalf of the landlord or a person who is party to his lease otherwise than as landlord or tenant,
>
> (c) in respect of a failure by the tenant to make a payment by the due date to the landlord or a person who is party to his lease otherwise than as landlord or tenant, or
>
> (d) in connection with a breach (or alleged breach) of a covenant or condition in his lease."

14. Since 1996, it has not been possible for a landlord of premises let as a dwelling to forfeit for non-payment of service charge without the tenant's liability being either admitted by the tenant or established in Tribunal, Court or arbitral proceedings. In its current form, the relevant provision, section 81(1) of the Housing Act 1996, provides:

> "A landlord may not, in relation to premises let as a dwelling, exercise a right of re-entry or forfeiture for failure by a tenant to pay a service charge or administration charge unless—
>
> (a) it is finally determined by (or on appeal from) the appropriate tribunal or by a court, or by an arbitral tribunal in proceedings pursuant to a post-dispute arbitration agreement,

> that the amount of the service charge or administration charge is payable by him, or
>
> (b) the tenant has admitted that it is so payable."

Subsection (4A), inserted by the Commonhold and Leasehold Reform Act 2002, explains that references in the section to the exercise of a right of re-entry or forfeiture include the service of a section 146 notice.

15. The Commonhold and Leasehold Reform Act 2002 also restricts a landlord's ability to serve a section 146 notice in respect of other breaches of a long lease of a dwelling. Section 168 of the 2002 Act states:

> "(1) A landlord under a long lease of a dwelling may not serve a notice under section 146(1) of the Law of Property Act 1925 (c. 20) (restriction on forfeiture) in respect of a breach by a tenant of a covenant or condition in the lease unless subsection (2) is satisfied.
>
> (2) This subsection is satisfied if—
>
> (a) it has been finally determined on an application under subsection (4) that the breach has occurred,
>
> (b) the tenant has admitted the breach, or
>
> (c) a court in any proceedings, or an arbitral tribunal in proceedings pursuant to a post-dispute arbitration agreement, has finally determined that the breach has occurred.
>
> …
>
> (4) A landlord under a long lease of a dwelling may make an application to the appropriate tribunal for a determination that a breach of a covenant or condition in the lease has occurred …."

16. There are only limited circumstances in which the FTT can make a costs order in respect of proceedings before it. Rule 13 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 allows the FTT to order a party to such proceedings to pay costs only if the person "has acted unreasonably in bringing, defending or conducting proceedings".

17. Provisions bearing on a landlord's ability to recover costs of proceedings are also to be found in the Landlord and Tenant Act 1985 and the Commonhold and Leasehold Reform Act 2002. These allow a tenant to apply for an order that costs incurred by the landlord should not be taken into account when calculating any service charge or administration charge. Thus, section 20C of the Landlord and Tenant Act 1985 provides:

> "(1) A tenant may make an application for an order that all or any of the costs incurred, or to be incurred, by the landlord in connection with proceedings before a court, residential property

> tribunal or leasehold valuation tribunal or the First-tier Tribunal, or the Upper Tribunal, or in connection with arbitration proceedings, are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant or any other person or persons specified in the application.
>
> …
>
> (3) The court or tribunal to which the application is made may make such order on the application as it considers just and equitable in the circumstances."

Likewise, paragraph 5A of schedule 11 to the Commonhold and Leasehold Reform Act 2002 states:

> "(1) A tenant of a dwelling in England may apply to the relevant court or tribunal for an order reducing or extinguishing the tenant's liability to pay a particular administration charge in respect of litigation costs.
>
> (2) The relevant court or tribunal may make whatever order on the application it considers to be just and equitable …."

The issues

18. The grounds of appeal give rise to the following issues:

    i) Is time of the essence in relation to the service of a notice to revise the Maintenance Contribution under clause 4(2)(x) of Ms Boakye's lease?

    ii) If the answer to issue (i) is "No", must notice under clause 4(2)(x) of the lease nevertheless be served before the beginning of the financial year to which the relevant Maintenance Contribution would relate or at least in advance of the date on which an instalment would be due in accordance with clause 4(2)(ii) of the lease?

    iii) Are costs incurred by Kensquare in relation to the 2017 proceedings recoverable by way of administration charge under paragraph (5) of the fourth schedule to the lease?

    iv) Can costs incurred by Kensquare in relation to the present proceedings and those of 2017 be recovered as service charge by virtue of paragraph 5 of the seventh schedule to the lease?

Issues (i) and (ii): timing of notices under clause 4(2)(x)

19. Clause 4(2)(x) of Ms Boakye's lease provides for notice of a Maintenance Contribution other than £360 per annum for a financial year "to be served on the Lessee not less than one month prior to the commencement of that financial year". There is no dispute that Kensquare's letter of 15 August 2019 did not comply with this requirement, claiming, as it did, service charges in excess of £360 per annum for

a previous financial year (2018-2019) and a financial year which had already started (2019-2020). Judge Cooke, however, concluded that time was not of the essence and, hence, that the late service of Kensquare's notice did not matter.

20. Judge Cooke's reasoning can be seen in the following passage from her decision:

> "24. Yet no consideration was given by the FTT, nor by the parties in their arguments to the FTT or on the appeal, as to why the clause 4(2)(x) should be construed as if time was of the essence. Why should it be the case that if notice of the revised amount of the interim service charge was not given no less than a month before the commencement of the financial year, it could not be given at all?
>
> 25. [Counsel for Ms Boakye's] response to my suggestion that there is no indication that time is of the essence was to point to the words 'specifically provided' and the words 'so revised and adjusted.' In my judgment those words go nowhere near to indicating that time was of the essence (it is well-established that clear words, or a necessary implication, are required, see for example *United Scientific Holdings Limited v Burnley Borough Council* [1978] AC 904). The draftsman obviously envisaged that interim charges would be calculated early, before the year started, but there is no indication at all that the parties intended the interim charge to revert to its initial (and now wholly inadequate) amount if the demand was sent late. Obviously if the tenant suffered any loss by the late service of the notice she would have a potential claim in damages, but that should be the only consequence of late notice.
>
> 26. Accordingly there is no basis for the construction that the FTT put on clause 4(2)(x) or for its conclusion that the clause had not been complied with. That aspect of its decision is set aside and I substitute the Tribunal's decision that clause 4(2)(x) was complied with. The FTT made no other finding about the interim service charges; submissions were made, it said at paragraph 65 of its decision, as to whether some of the items in the budgets for the interim service charges fell within the Seventh Schedule to the lease (see paragraph 4(2)(i) of the lease …), but made no decision on them because it had reduced the charges to £360. There was no cross-appeal about the failure to decide those points and I take it they are not pursued; if there is any substance in them they will have to be taken up as a challenge to the final service charges in any event. Accordingly the interim service charges that were the subject of the application to the FTT are payable as demanded."

21. Mr James Fieldsend, who appeared for Ms Boakye with Mr Edward Blakeney, took issue with Judge Cooke's analysis. He argued that, contrary to Judge Cooke's view, time is of the essence as regards clause 4(2)(x) of the lease and, accordingly, that the landlord has to serve notice of any adjustment to the Maintenance Contribution "not

less than one month prior to the commencement of that financial year", as clause 4(2)(x) says. If that deadline is missed, Mr Fieldsend submitted, the landlord can still recover expenditure incurred in the relevant year as "maintenance charge" once the year has ended pursuant to clause 4(2)(iii), but it cannot claim more than the £360 per annum set in the particulars on an interim basis. In the alternative, Mr Fieldsend contended that the landlord is not entitled to increase the Maintenance Contribution above the £360 figure when the financial year in question has already begun or, by way of further fallback, that any such notice will take effect only in relation to instalments falling due after the date of the notice. The parties to the lease, Mr Fieldsend said, will not have intended it to be possible for the landlord to serve a notice with retrospective effect at any time, even years after the financial year in question.

22. In contrast, Mr Mark Warwick QC, who appeared for Kensquare with Mr David Peachey, argued that Mr Fieldsend was seeking to draw an unwarranted distinction between interim and final service charges. Mr Fieldsend accepted that time is not of the essence as regards the latter and, Mr Warwick submitted, there is no good reason for the position to be different with interim service charges. Tenants will not know how much their final service charges are until they are demanded. Why, Mr Warwick asked rhetorically, should that not also be the case with interim service charges? Nor, Mr Warwick said, is there anything odd about a tenant being required to pay an interim charge retrospectively. In short, the circumstances are not such as to displace the presumption which exists against time being of the essence.

23. The authority which Judge Cooke cited, *United Scientific Holdings Ltd v Burnley Borough Council* [1978] AC 904 ("*United Scientific*"), concerned rent review provisions. As Lord Diplock explained at 923, the issue in the case was "whether a failure to keep strictly to the time-table laid down in the review clause deprives the landlord of his right to have the rent reviewed and consequently of his right to receive an increased rent during the period that will elapse until the next review date". The House of Lords answered the question in the negative.

24. Lord Diplock concluded at 930 that "in the absence of any contra-indications in the express words of the lease or in the interrelation of the rent review clause itself and other clauses or in the surrounding circumstances the presumption is that the time-table specified in a rent review clause for completion of the various steps for determining the rent payable in respect of the period following the review date is not of the essence of the contract". Earlier in his speech, Lord Diplock had noted at 927 that "the rules of equity, to the extent that the Court of Chancery had developed them up to 1873 as a system distinct from rules of common law, did not regard stipulations in contracts as to the time by which various steps should be taken by the parties as being of the essence of the contract unless the express words of the contract, the nature of its subject matter or the surrounding circumstances made it inequitable not to treat the failure of one party to comply exactly with the stipulation as relieving the other party from the duty to perform his obligations under the contract" and, at 928, that the Court of Chancery had introduced a refinement in the way it dealt with stipulations as to time in contracts for the sale of land, namely, that "[o]nce the time had elapsed that was specified for the performance of an act in a stipulation as to time which was not of the essence of the contract, the party entitled to performance could give to the other party notice calling for performance within a specified period: and

provided that the period was considered by the court to be reasonable, the notice had the effect of making it of the essence of the contract that performance should take place within that period".

25. On the facts, Lord Diplock considered that time was not of the essence as regards the rent review machinery at issue in either of the appeals which were before the House of Lords. In one instance, Lord Diplock observed at 933-934 that the tenant had the remedy in his own hands if he "reckons that the advantage of knowing before the review date exactly how much higher his new rent will be outweighs the economic benefit of having the use of the money representing the difference until the new rent has been determined" since:

> "Quite apart from the fact that he can get a pretty good idea of what the market rent is from his own surveyor or can himself offer to enter into negotiations with the landlord before the stipulated time for serving a lessor's notice has expired, so soon as that time has elapsed he can give to the landlord notice specifying a period within which he requires the landlord to serve a lessor's notice if he intends the market rent to be determined and payable instead of the former rent for the ensuing seven years. The period so specified, provided that it is reasonable, will become of the essence of the contract."

At 932, Lord Diplock contrasted the "absence of any serious detriment to the tenant" with "the detriment to the landlord if strict adherence to the date specified in the review clause is to be treated as of the essence of the contract" as "[i]f it were determined even slightly late the landlord would lose his right to the additional rent for the whole period of 10 years until the next review date".

26. Similar points were made in the other speeches. Lord Fraser, for example, said at 959 that "[a]s the substance of a review clause is … to provide machinery for ascertaining the market rent from time to time, at the intervals agreed in the interests of both parties, rather than to confer a benefit on the landlord, … stipulations as to time ought not to be strictly enforced unless there is something in a particular clause to indicate that time is of the essence in that case". At 960, Lord Fraser observed:

> "If the stipulation in the schedule requiring the rack rent to be ascertained 'during the year' is to be strictly enforced the result would be that if, owing to some accident for which the landlord was not responsible or to the illness or dilatoriness of the arbitrator, the rack rent had not been ascertained until a month or even a day after the end of the year, the review would be abortive and the former rent would continue in force for another 10 years. That result would seem to be inequitable and I do not believe that the parties can have intended it, yet it would follow from the decision of the Court of Appeal that time was of the essence, and that, because the new rent had neither been agreed nor determined by arbitration (nor even referred to arbitration) by the end of the tenth year, no review could now be made."

At 962, Lord Fraser stated this conclusion:

> "For these reasons I am of the opinion that the equitable rule against treating time as of the essence of a contract is applicable to rent review clauses unless there is some special reason for excluding its application to a particular clause. The rule would of course be excluded if the review clause expressly stated that time was to be of the essence. It would also be excluded if the context clearly indicated that that was the intention of the parties - as for instance where the tenant had a right to break the lease by notice given by a specified date which was later than the last date for serving the landlord's trigger notice."

27. In *Starmark Enterprises Ltd v CPL Distribution Ltd* [2001] EWCA Civ 1252, [2002] Ch 306 ("*Starmark*"), at 325, Peter Gibson LJ took Lord Fraser's reference to the presumption against time being of the essence being excluded "if the context clearly indicated that that was the intention of the parties" as "a reminder that in construing a rent review clause, as when construing any other clause of a contract, the exercise in which the court is engaged is the ascertainment of the intention of the parties, viewed objectively, with the aid of the presumption". Peter Gibson LJ went on:

> "There is nothing to prevent parties agreeing that time should be of the essence, thereby defeating the presumption, provided that that agreement is clearly indicated in the lease."

28. That deciding whether time is of the essence in any particular case involves reference to the parties' intentions is also indicated by *Bunge Corporation v Tradax Export SA* [1981] 1 WLR 711 ("*Bunge*"). The House of Lords there endorsed a paragraph from Halsbury's Laws of England, 4th ed., to the effect that "the court will require precise compliance with stipulations as to time wherever the circumstances of the case indicate that this would fulfil the intention of the parties": see Lord Wilberforce at 716 and Lord Roskill at 729.

29. Even before *United Scientific* had reached the House of Lords, time had been held not to be of the essence of a (final) service charge provision in *West Central Investments Ltd v Borovik* (1976) 241 EG 609 ("*Borovik*"). In that case:

> "The plaintiffs were obliged under the lease to arrange for the preparation and audit each year of accounts relating to the costs, charges and expenses incurred in maintaining the flats and to serve on the lessees within two months of the date of the accounts a notice of the proportionate sum due. In fact, the plaintiffs did not have accounts prepared for the years 1970, 1971, 1972 or 1973. Accounts were not prepared until 1974, when the defendants were notified of the amounts they owed for the four preceding years."

The tenants argued that time was of the essence, but MacKenna J rejected the contention.

30. In another of the cases to which we were referred, *Southwark LBC v Woelke* [2013] UKUT 349 (LC), [2014] L&TR 9 ("*Woelke*"), the lease had specifically provided that time was not to be of the essence for service of any notice under its service charge provisions. The question for the Upper Tribunal was not whether a notice could be served late, but as to the adequacy of information supplied to the tenant, in particular in the context of a lease provision requiring the landlord to notify the tenant of "a reasonable estimate of the amount which will be payable … by way of Service Charge". In the course of his decision, the Deputy Chamber President, Martin Rodger QC, commented at paragraph 50 that an "important function of the estimate is to provide the leaseholder with advance warning of the contribution which he will be expected to pay for the services to be provided in the forthcoming year" and that the estimate "has obvious benefits for the leaseholder in setting his own personal budget for the year, and in avoiding an unexpected demand at the end of the year for which no provision may have been made". Earlier in his decision, at paragraph 40, the Deputy President had said:

> "The service charge provisions of leases are practical arrangements which should be interpreted and applied in a businesslike way. On the other hand, precisely because the payment of service charges is a matter of routine, a businesslike approach to construction is unlikely to permit very much deviation from the relatively simple and readily understandable structure of annual accounting, regular payments on account and final balancing calculations with which residential leaseholders are very familiar. When entering into long residential leases, the parties must be taken to intend that the service charge will be operated in accordance with the terms they have agreed. Leaseholders should be able to work out for themselves whether a sum is due to be paid by reading the lease and comparing the process it describes with the information provided in support of the demand by the landlord, without the involvement of lawyers or other advisers."

31. *London Borough of Southwark v Akhtar* [2017] UKUT 0150 (LC), [2017] L&TR 36 ("*Akhtar*"), the other case I think it relevant to mention in this context, concerned a lease which was in relevant respects identical to that at issue in *Woelke*. It provided for the tenant to pay "in advance on account of Service Charge the amount of such estimate by equal payments on 1st April, 1st July, 1st October and 1st January in each year". In February 2013, the landlord served an estimate in respect of 2012-2013. Judge Cooke, once again sitting in the Upper Tribunal, held that the notice was invalid. She said:

> "33. … It might be said that since time is not of the essence it is artificial to have a cut-off date and to say that the landlord cannot recover an estimated charge after the final quarter day. But it appears to me that that is the intention of the draftsman of this lease, because the whole point of the provision of estimated charges—both for the landlord's benefit and for the tenant's—is to require payment by instalments on the quarter days. That gives the landlord a cash flow and the tenant a

> steady payment obligation …. The estimate is to relate to service charges payable 'in that year', and the lease specifies the payment days; but in this case the notice was served after the last of the payment days. In those circumstances what the draftsman of the lease appears to have intended was that the landlord would instead issue a final demand after the end of the financial year, and therefore make an adjustment to the payments for the forthcoming quarter. Late service of the para.2(1) notice, after 1 January, does not enable the landlord to take the estimate all at once on 1 April.
>
> 34. It was argued for the appellant that that approach would make time of the essence. I disagree. Time is not of the essence, and so the landlord has flexibility within the year; but that flexibility does not mean that time can be extended indefinitely ….
>
> 35. It was held in *Woelke* that the service of a notice under para.2(1) of Sch.3 is an obligation of the landlord, although failure to fulfil it will not usually give rise to more than a liability for nominal damages (at [52] of *Woelke*). The late service of the para.2(1) notice insofar as it related to 2012–2013 seems to me to have the effect that the landlord has failed to give such a notice for those charges in that year and therefore lost the opportunity to have that estimate paid in the way envisaged by Sch.3. It is free to make a final charge for the major works incurred in 2012–2013 in accordance with cl.4(1); it may not be able to do so immediately after the end of that financial year, as the appellant points out, but it can do so later (subject to the provisions of s.20B) of the Landlord and Tenant Act 1985, enacted to operate in just these circumstances)."

32. In the present case, the terms of Ms Boakye's lease, if taken at face value, would signify that any notice to increase the Maintenance Contribution must be served at least a month before the beginning of the relevant financial year. Thus:

i) Clause 4(2)(x) provides in terms for notice of a revision to the Maintenance Contribution to be served "not less than one month prior to the commencement of that financial year";

ii) Clause 4(2)(x) allows the landlord to revise the Maintenance Contribution "in the light of expenditure reasonably anticipated for that year". That suggests that the financial year in question is yet to come. Certainly, expenditure for a year could hardly be "reasonably anticipated" once the year was over and the relevant expenditure had been incurred;

iii) Under clause 4(2)(x), the Maintenance Contribution, as "revised and adjusted", is payable in accordance clauses 4(2)(ii), which refers to payment "by equal half yearly payments in advance on the 1st day of April and the 1st day of October". To meet that timetable, the amount of the Maintenance Contribution for the year must be known before it begins;

iv) A linked point is that the lease says nothing about what is to happen if a notice to revise the Maintenance Contribution is served after the relevant financial year has started. If it had been envisaged that the Maintenance Contribution could be varied later than the deadline specified in clause 4(2)(x), the parties might have been expected to explain whether the tenant was to become liable at once for instalments that would already have been due had the notice been served on time. Yet the lease does not address such issues; and

v) No notice need be served for there to be a Maintenance Contribution for a year. The lease provides for a £360 Maintenance Contribution in the absence of a notice changing the figure.

33. Of themselves, the matters mentioned in the previous paragraph might not suffice to displace the presumption against time being of the essence which applies in relation to rent reviews and also, it seems to me, final service charges (as in *Borovik*). However, parties should, I think, more readily be taken to have intended time to be of the essence in the context of interim service charges. In *United Scientific*, Lord Diplock highlighted the detriment to the landlord if he lost the right to a reviewed rent and Lord Fraser said that he could not believe that the parties could have intended such an "inequitable" result. Similarly, the parties to a lease should not lightly be assumed to have intended that a landlord should lose any right to recover service charges for a year. In a case such as the present one, in contrast, there is no question of the landlord being deprived of all ability to levy service charges. The dispute is essentially as to timing. Is the landlord restricted to collecting *final* service charges (which, under the terms of Ms Boakye's lease, it is supposed to do as soon as practical after the end of the financial year)? Or is it also open to it to require the tenant to pay *interim* service charges? In such circumstances, it is much more likely that the parties meant the time limits specified in their lease to be strictly complied with.

34. That the parties to Ms Boakye's lease intended that a notice to raise the Maintenance Contribution should be effective only if served "not less than one month prior to the commencement of that financial year", as stated in clause 4(2)(x), is, as I see it, further indicated by the following:

i) The parties agreed terms under which the tenant would have at least a month's warning before he had to pay the first half of an increased Maintenance Contribution and at least seven months' warning before the balance fell due. To echo the Deputy President, such a regime has "obvious benefits for the leaseholder in setting his own personal budget". The tenant is unlikely to have wished to forfeit such advantages, but he would do so on the basis of Judge Cooke's reading of Ms Boakye's lease;

ii) While a tenant may be able to "get a pretty good idea of what the market rent is from his own surveyor" before a rent review is triggered (to quote Lord Diplock in *United Scientific*), the parties to Ms Boakye's lease could not have assumed that the tenant would be well placed to assess how far, if at all, the Maintenance Contribution for any year might be increased. The fact that the landlord is now a tenant-owned company may possibly give tenants greater access to information about anticipated expenditure, but the original landlord was not tenant-owned;

iii) Taking the parties to have intended Ms Boakye's lease to operate in the way which its terms specify on their face is consistent with the desirability of tenants being "able to work out for themselves whether a sum is due to be paid by reading the lease and comparing the process it describes with the information provided in support of the demand by the landlord, without the involvement of lawyers or other advisers" (to quote the Deputy President in *Woelke* again).

35. In *Akhtar*, Judge Cooke, while recording that time was not of the essence, inferred that the parties to the lease with which she was concerned had intended that, if the last of the payment days specified in the lease had passed, "the landlord would instead issue a final demand after the end of the financial year". The decision plainly lends support to Mr Fieldsend's contention that the original parties to Ms Boakye's lease cannot have meant the landlord to be able to invoke clause 4(2)(x) at any time, potentially long after the relevant financial year. However, the reasoning which led Judge Cooke to hold that a notice could not be served after the last payment day can also, I think, be invoked to support the contention that the landlord could not serve an effective notice under clause 4(2)(x) later than 1 April in the material year since, after that, it would be impossible for the tenant to pay "by equal half yearly payments in advance on the 1st day of April and the 1st day of October" as the lease required. If, though, it can be inferred that the parties intended the landlord to "issue a final demand after the end of the financial year" rather than to increase the Maintenance Contribution if it failed to operate clause 4(2)(x) by 1 April, it is but a short step to conclude that the landlord also had to give notice of any revision to the Maintenance Contribution a month earlier, in accordance with clause 4(2)(x): in other words, that time is of the essence as regards the deadline set in clause 4(2)(x).

36. In short, it seems to me that the presumption against time being of the essence is displaced with clause 4(2)(x). The terms of this lease, taken in their context, clearly indicate that the landlord must serve any notice under clause 4(2)(x) "not less than one month prior to the commencement of that financial year" if it is to have effect. As Peter Gibson LJ noted in *Starmark*, the Court has to seek to discern "the intention of the parties, viewed objectively, with the aid of the presumption". In the present case, to adapt words of Lord Wilberforce in *Bunge*, "the circumstances of the case indicate that [requiring precise compliance] would fulfil the intention of the parties".

37. It follows that, in my view, Kensquare's letter of 15 August 2019 was ineffective and that Ms Boakye's Maintenance Contribution for 2018-2019 and 2019-2020 remained £360 per annum.

Issue (iii): recovery of litigation costs under paragraph (5) of the fourth schedule

38. Ms Boakye is required by paragraph (5) of the fourth schedule to her lease to pay "all costs charges and expenses (including Solicitors' costs and Surveyors' fees) incurred by the Lessor for the purpose of or incidental to the preparation and service of a Notice under Section 146 of the Law of Property Act 1925 notwithstanding forfeiture may be avoided otherwise than by relief granted by the Court".

39. It is Kensquare's case that this provision entitles it to recover from Ms Boakye costs it incurred in the 2017 FTT proceedings which, by virtue of section 81 of the Housing Act 1996, it had to bring before it could serve a section 146 notice on Ms Boakye.

The FTT disagreed, concluding in paragraph 76 of its decision that "the only element of [Kensquare's] legal costs which falls within the terms of paragraph 5 of the Fourth Schedule is the £192.50 which relates to the preparation and service of the Section 146 Notice". In contrast, Judge Cooke held in paragraph 76 of her decision that "the 2017 proceedings were taken for the purpose of serving a section 146 notice, and that the costs of those proceedings can be recovered by the landlord under paragraph 5 of the Fourth Schedule". After referring to a number of previous cases, including *Freeholders of 69 Marina, St Leonards-on-Sea v Oram* [2011] EWCA Civ 1258, [2012] L&TR 4 ("*69 Marina*"), *Barrett v Robinson* [2014] UKUT 322 (LC) ("*Barrett*") and *Willens v Influential Consultants Ltd* [2015] UKUT 362 (LC) ("*Willens*"), Judge Cooke said in paragraph 69:

> "I take the view that the clauses in question in *69 Marina*, *Barrett*, *Willens* and the present appeal were all doing the same thing; they were all ensuring that the landlord could recover from the tenant the costs of serving a section 146 notice and of everything that the landlord had to do in order to serve that notice. Since the amendment of the Housing Act 1996 by the addition of section 81(4A) that has included the obtaining of a determination of payability by the FTT, as the appellant did here."

In the previous paragraphs of her decision, Judge Cooke had explained:

> "67. As a matter of ordinary language I see no difference in this context between 'for the purpose of' and 'in contemplation of'.
>
> 68. Nor do I see any difference between costs incurred for the purpose of, or in contemplation of, the preparation and service of a section 146 notice and costs incurred in contemplation of or for the purpose of proceedings under section 146; the only point of serving a section 146 notice is to enable the bringing of proceedings under section 146. Anything done for the purpose of serving the notice is also done for the purpose of taking the proceedings. As I observed above, leases are beset by torrential drafting, and the use, out of caution or of habit, of more than one expression often does not mean that more than one thing is meant."

40. Mr Fieldsend argued that, contrary to Judge Cooke's view, costs incurred by Kensquare in the 2017 FTT proceedings were neither incurred "for the purpose of … the preparation and service of a Notice under Section 146 of the Law of Property Act 1925" nor "incidental to" the preparation and service of such a notice within the meaning of paragraph (5) of the fourth schedule to Ms Boakye's lease. He stressed two matters in particular: first, the fact that, unlike the clauses seen in cases such as *69 Marina*, *Barrett* and *Willens*, paragraph (5) of the fourth schedule does not feature the word "proceedings" and, secondly, that the legislative framework has changed since the lease was granted in 1982. With regard to the latter point, Mr Fieldsend cited, among other things, a passage from the decision of Martin Rodger QC as Deputy President in *Geyfords Ltd v O'Sullivan* [2015] UKUT 683 (LC). Summarising

submissions advanced on behalf of tenants in relation to a lease granted in 1978, the Deputy President said at paragraph 45 of his decision:

> "With regard to the facts and circumstances known to the parties at the time they entered into the Lease, [counsel for the tenants] pointed out that in the 1970s it was standard practice for the payment of service charges to be enforced by proceedings in the County Court for forfeiture of the lease. Forfeiture would be avoided only by the leaseholder (or their mortgagee) paying what was owed and indemnifying the landlord against its costs of the proceedings. Nor, in 1978, would the parties have contemplated that the [landlord] might be required to incur expenditure in establishing the quantum of the service charge before a statutory tribunal operating in a largely costs-free jurisdiction; service charge disputes were determined in the County Court, where the successful party would recoup its costs from the unsuccessful party. The joint expectation would therefore have been that (barring any change to those ground rules) the appellant would not find itself out of pocket if it proved necessary to collect service charge contributions by legal action, and so would have no need to recoup its legal expenses through the service charge. The only exception to that expectation might have been where the claim was defeated or had to be compromised without full recovery of costs …."

41. Mr Fieldsend maintained that, in the circumstances, the omission of any reference to "proceedings" in paragraph (5) of the fourth schedule to Ms Boakye's lease should be taken to be deliberate and significant. Since when the lease was granted (a) a landlord was not required to bring FTT proceedings before serving a section 146 notice and (b) a landlord could expect to recover the costs of any proceedings which might ensue after service of a section 146 notice by way of either a costs order in its favour or a condition of the tenant obtaining relief from forfeiture, it will not have been thought necessary for the lease to cater for the costs of any proceedings which might follow on from the service of a section 146 notice, let alone for the costs of proceedings in advance of such a notice being served.

42. However, comparison with leases which have featured in other cases does not provide a reliable guide to how Ms Boakye's lease is to be construed. As Judge Bridge, sitting in the Upper Tribunal, said in *Sinclair Gardens Investments (Kensington) Ltd v Avon Estates (London) Ltd* [2016] UKUT 317 (LC), at paragraph 21, "Each case is fact-specific, in the sense that what must be construed is the particular clause in the particular lease of the particular property, and conclusions arrived at by previous courts or tribunals in relation to other clauses in other leases of other property are unlikely to be of much assistance". In a similar vein, Sir Stephen Sedley noted in *Rees v Peters* [2011] EWCA Civ 836, [2011] P&CR 18, at paragraph 30, that, "despite the usefulness of standard phraseology in conveyancing, the instrument which contains it must still be read and understood as a unique text directed to a specific transaction with its own parties and purposes" and, rather longer ago, Sir George Jessel MR observed in *Aspden v Seddon* (1875) 10 Ch App 394, at 397 footnote 1, that "it is the

duty of a Judge to ascertain the construction of the instrument before him, and not to refer to the construction put by another Judge upon an instrument, perhaps similar, but not the same".

43. In the present case, the relevant lease provision obliges the tenant to pay "all costs charges and expenses (including Solicitors' costs and Surveyors' fees) incurred by the Lessor for the purpose of … the preparation and service of a Notice under Section 146 of the Law of Property Act 1925". I agree with Mr Warwick that, read naturally, those words are quite wide enough to apply to the costs of the FTT proceedings which Kensquare had no choice but to bring if it wished to serve a section 146 notice. It is true that, at the date of the lease, a landlord did not need to make an application to the FTT (or any other Tribunal or Court) before serving a section 146 notice. That requirement arrived years later, with the Housing Act 1996 and the Commonhold and Leasehold Reform Act 2002. That does not matter, however. The parties to the lease agreed that the tenant should bear costs incurred for the purpose of the service of a section 146 notice, and the costs which Kensquare incurred in the 2017 FTT proceedings fit that description.

44. In my view, therefore, Judge Cooke was right to decide that Kensquare could recover costs of the 2017 FTT proceedings from Ms Boakye pursuant to paragraph (5) of the fourth schedule to her lease.

Issue (iv): litigation costs and service charges

45. Paragraph 5 of the seventh schedule to Ms Boakye's lease provides for service charges to encompass:

> "The cost of employing such professional advisers and agents as shall be reasonably required in connection with the management of the Building".

46. Kensquare contends that this provision allows it to recover its costs of the present proceedings and those of 2017 as service charges. The FTT, however, decided otherwise. After citing *Sella House Ltd v Mears* (1989) 21 HLR 147 ("*Sella House*"), the FTT said in paragraph 101 of its decision:

> "While such questions of construction are very fact sensitive, the tribunal considers that both the clauses and the factual matrix in the present case are materially similar to *Sella House*. The tribunal does not consider that the language used in paragraphs 5 and 9 can be said to show a clear or unambiguous intention to extend to legal costs incurred in obtaining a determination of service charges. On the contrary, on a natural reading neither clause appears to be intended to legal costs."

47. On appeal, Judge Cooke attached particular importance to *Iperion Investments v Broadwalk House Residents Ltd* (1995) 27 HLR 196 ("*Iperion*"). Differing from the FTT, she concluded in paragraph 95 of her decision:

> "Reverting to the clause in question in the present appeal, I find its construction difficult. The purpose in the relevant clause is

> the management of the building. Of the cases cited by counsel, it comes closest to the one in *Iperion*, although it is arguably wider because of the words 'in connection with'. I do not think that the different form of the legal action in *Iperion*, involving a claim for an injunction, makes any difference to the construction of the clause as [counsel for Ms Boakye] argues. I take the view that the landlord's legal costs incurred in the 2017 and 2019 proceedings were incurred in connection with the management of the building and are therefore recoverable as part of the service charge."

48. In *Iperion*, Peter Gibson LJ, with whom Staughton and Waite LJJ expressed agreement, said at 201 that he was not able to derive any assistance from *Sella House*, the language of the relevant provision being very different from that in the case before him. The lease at issue in *Iperion* referred to "all … costs properly incurred by the landlord in carrying out its obligations … under the covenants and conditions contained in the Head Lease … and in the proper and reasonable management of in and about [Broadwalk House]". The Court of Appeal held that the landlord was entitled to include in the service charges costs which it had incurred in litigation against the tenant in which the tenant had been largely successful. Peter Gibson LJ said at 202:

> "[Counsel for the defendant landlord] in my opinion was right to submit that the definition of the landlord's costs was not drawn by reference to the costs of successful (as opposed to unsuccessful) action taken by the landlord in its management of Broadwalk House. All costs properly incurred in the proper and reasonable management of the property were included and they will include costs of unsuccessful proceedings properly brought in managing the property. Throughout the defendant was acting with legal advice. A landlord faced with a tenant who had acted in flagrant breach of covenant is always likely to bring forfeiture proceedings against the tenant even if relief from forfeiture is likely to be granted on terms at the end of the day. I find it difficult to draw a satisfactory line between the costs of enforcing tenant's covenants and of claiming an injunction on the one hand and the costs of forfeiture proceedings on the other. All such costs may be described as costs incurred in managing the property, and it matters not whether the rights enforced are rights under covenants prohibiting certain acts by the tenant or rights conferred by the condition for re-entry …. The judge, although ruling against the defendant on most issues did not say that it had acted improperly or unreasonably in the litigation. I would therefore hold that the costs incurred by the defendant in the litigation were costs which are included in the landlord's costs and so recoverable from underlessees by way of the service charge."

49. In *Cannon v 38 Lamb Conduit LLP* [2016] UKUT 371 (LC), Judge Bridge, in the Upper Tribunal, observed at paragraph 64 that *Iperion* is "a decision which, with the

benefit of judicial hindsight, now fits somewhat uneasily with the weight of other authority".

50. Turning to *Sella House*, on which the FTT relied, the landlord there sought to recover by way of service charge legal expenses incurred in pursuing other tenants for rent and service charges. The landlord argued that the expenditure arose from its fulfilling its obligations under clause 5(4)(j) of the lease, which required the landlord:

> "(i) To employ at the Lessors' discretion a firm of Managing Agents and Chartered Accountants to manage the Building and discharge all proper fees salaries charges and expenses payable to such agents or such other person who may be managing the Building including the cost of computing and collecting the rents and service charges in respect of the Building or any parts thereof
>
> (ii) To employ all such surveyors builders architects engineers tradesmen accountants or other professional persons as may be necessary or desirable for the proper maintenance safety and administration of the Building."

Dillon LJ, albeit after "certain hesitation", "[o]n the whole" came to the conclusion at 156 that "the judge was right in his view that the fees of solicitors and counsel are outside the contemplation of either limb of Clause 5(4)(j) of the lease". Agreeing, the other member of the Court, Taylor LJ, said at 156:

> "I add only a few words on the issue whether legal fees can be included in the service charge under this lease. Nowhere in Clause 5(4)(j) is there any specific mention of lawyers, proceedings or legal costs. The scope of (j)(i) is concerned with management. In (j)(ii) it is with maintenance, safety and administration. On the respondents argument a tenant, paying his rent and service charge regularly, would be liable via the service charge to subsidise the landlord's legal costs of suing his co-tenants, if they were all defaulters. For my part, I should require to see a clause in clear and unambiguous terms before being persuaded that that result was intended by the parties. Accordingly, I agree with my Lord that the terms of paragraph (j) of clause 5(4) do not extend to cover legal costs in the service charge."

51. A similar issue arose recently in *No. 1 West India Quay (Residential) Ltd v East Tower Apartments Ltd* [2021] EWCA Civ 1119 ("*No. 1 West India Quay*"). The landlord was there seeking to recover from a tenant a proportionate share of costs which the landlord had incurred in litigation with the tenant. The landlord relied on, among other things, service charge provisions referring to:

> "The reasonable and proper fees and disbursements … payable by the Lessor to procure the proper management of the Residential Premises as contemplated by the provisions of this

> Underlease, the provision of services, the calculation of service charges and the provision of service charge accounts ….”

The Deputy President considered that “[t]he language is directed towards the provision of management services, not litigation”, and Henderson LJ, with whom Underhill and Dingemans LJJ agreed, said that he was satisfied that the Deputy President had been right. Henderson LJ thought it “apposite … to have regard to” *Sella House*, “where it was held that generally worded provisions in the service charge machinery contained in a residential long lease of a flat in Central London did not include litigation costs incurred by the landlord” and, after quoting Taylor LJ’s judgment in that case, Henderson LJ said in paragraph 71:

> “I consider that, *mutatis mutandis,* the same points may be made about the provisions with which we are now concerned.”

52. It is also relevant to note the guidance as to the interpretation of service charge provisions which was given in *Arnold v Britton* [2015] UKSC 36, [2015] AC 1619. Lord Neuberger, with whom Lords Sumption and Hughes agreed, said in paragraph 23:

> “… [R]eference was made in argument to service charge clauses being construed ‘restrictively’. I am unconvinced by the notion that service charge clauses are to be subject to any special rule of interpretation. Even if (which it is unnecessary to decide) a landlord may have simpler remedies than a tenant to enforce service charge provisions, that is not relevant to the issue of how one interprets the contractual machinery for assessing the tenant’s contribution. The origin of the adverb was in a judgment of Rix LJ in *McHale v Earl Cadogan* [2010] HLR 412, para 17. What he was saying, quite correctly, was that the court should not ‘bring within the general words of a service charge clause anything which does not clearly belong there’.”

Accordingly, service charge provisions are not subject to any special rule of interpretation, but the Court should not “bring within the general words of a service charge clause anything which does not clearly belong there”.

53. Supporting Judge Cooke’s decision, Mr Warwick submitted that “management of the Building” could be expected to involve the collection of service charges and, potentially, enforcement action. He pointed out, moreover, that the “professional advisers” mentioned in paragraph 5 of the seventh schedule to Ms Boakye’s lease must include lawyers and that the paragraph extends to costs incurred “in connection with” the management of the Building, not just, say, costs “for” such management. Judge Cooke was therefore right, Mr Warwick argued, to conclude that legal costs incurred by Kensquare in its litigation with Ms Boakye are costs of employing “professional advisers” “in connection with the management of the Building” and so within paragraph 5 of the seventh schedule.

54. On balance, however, I agree with Mr Fieldsend that Kensquare’s litigation costs do not fall within paragraph 5 of the seventh schedule to Ms Boakye’s lease. I can well

understand why Judge Cooke found the construction of paragraph 5 difficult and *No. 1 West India Quay* had not yet reached the Court of Appeal. Like the FTT, though, I have concluded that, read naturally, paragraph 5 does not extend to litigation costs. While the reference to "professional advisers" is apt to apply to lawyers, they are not mentioned specifically and nothing is said about legal proceedings. As in *No. 1 West India Quay*, the focus is on management services rather than litigation and, to adapt words of Rix LJ which Lord Neuberger quoted in *Arnold v Britton*, a decision in favour of Kensquare would involve "bring[ing] within the general words of a service charge clause" something "which does not clearly belong there". The fact that paragraph 5 speaks of advisers and agents being employed "in connection with" the management of the Building, not "for" its management, does not seem to me to matter.

Conclusion

55. I agree with Judge Cooke that Kensquare can recover costs of the 2017 FTT proceedings from Ms Boakye pursuant to paragraph (5) of the fourth schedule to her lease. On the other hand, I respectfully take a different view from Judge Cooke as regards Kensquare's letter to Ms Boakye of 15 August 2019 and the scope of paragraph 5 of the seventh schedule to the lease. In my view, the 1etter did not serve to increase the Maintenance Contribution and paragraph 5 does not extend to litigation costs.

Lord Justice Stuart-Smith:

56. I agree.

Lady Justice Andrews:

57. I also agree.