Neutral Citation Number: [2024] EWHC 3295 (Ch)

Claim Number: PT-2024-000386

IN THE HIGH COURT OF JUSTICE

BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES

PROPERTY, TRUSTS AND PROBATE LIST (ChD)

Rolls Building
7 Rolls Buildings
Fetter Lane
London, EC4A 1NL

18th December 2024

Before :

MR JUSTICE EDWIN JOHNSON

- -

Between :

LONDON BOROUGH OF BEXLEY

Claimant

and

LONDON & QUADRANT HOUSING TRUST

Defendant

- -

- -

Kelvin Rutledge KC and Alistair Cantor (instructed by London Borough of Bexley Legal and Democratic Services) for the Claimant
Matt Hutchings KC (instructed by Trowers & Hamlins LLP) for the Defendant

Hearing date: 7th November 2024

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JUDGMENT

Remote hand-down: This judgment was handed down remotely at 10.30am on Wednesday, 18th December 2024 by circulation to the parties and their representatives by email and by release to the National Archives.

Mr Justice Edwin Johnson:

Introduction

1. By a stock transfer agreement dated 3rd February 1998, the Claimant agreed to sell a substantial part of its housing stock to London & Quadrant Bexley Housing Association Limited. The sale was completed by a transfer executed on 9th February 1998.

2. By clause 7 of the stock transfer agreement (**"the STA"**) the parties agreed to enter into various additional agreements by deed, on completion of the transfer. One of these deeds, executed on completion of the transfer on 9th February 1998, was described as a nomination rights deed. I shall use the same expression, **"the Nomination Rights Deed"**, to refer to this deed.

3. Clause 6.1 of the Nomination Rights Deed provides as follows (italics have been added to all quotations in this judgment):

> *"6.1 In the event that any merger amalgamation transfer of engagements or any other transaction involving the Association would cause or require the transfer or disposal of the Property or part thereof to a third party save for a disposal under the Right to Buy or similar statutory scheme or otherwise with the consent of the Council not to be unreasonably withheld the Association shall not so merge amalgamate transfer engagements or complete such other transaction unless it has procured that the said third party undertakes directly with the Council to comply with the burden of all relevant covenants and obligations herein contained which pass to that third party subject always to a contrary direction of the Housing Corporation."*

4. The Defendant is the successor in title of London & Quadrant Bexley Housing Association Limited, as owner of the housing stock transferred by the Claimant in 1998. An issue has arisen between the Claimant and the Defendant as to the meaning and effect of clause 6.1 of the Nomination Rights Deed, in relation to the sale by the Defendant of individual dwellings out of the housing stock. The Claimant's case is that the sale of individual dwellings by the Defendant is caught by the terms of clause 6.1, with the consequence that no such sale can take place without the Defendant obtaining from the purchaser the direct undertaking to the Claimant which is referred to in the latter part of the clause. The Defendant's case is that the sale of individual dwellings is not caught by the terms of clause 6.1, with the consequence that there is no obligation to obtain the specified direct undertaking from the purchaser.

5. By application notice issued on 20th August 2024 the Defendant has sought the determination of this issue of construction (**"the Construction Issue"**) on a summary basis pursuant to the provisions of CPR Part 24. This is my reserved judgment on the Construction Issue.

6. At the hearing of the Construction Issue the Defendant was represented by Matt Hutchings KC. The Claimant was represented by Kelvin Rutledge KC and Alistair Cantor. I am grateful to all counsel for their assistance, by their written and oral submissions, in my determination of the Construction Issue.

The parties

7. The Claimant, the London Borough of Bexley, is and has at all times material to this dispute been a local housing authority for the purposes (amongst other purposes) of the Housing Act 1996 and, prior to the Housing Act 1996, the Housing Act 1985. In this capacity the Claimant was and remains subject to duties in relation to the provision of housing accommodation, which I will need to consider in more detail later in this judgment.

8. As explained above, London & Quadrant Bexley Housing Association Limited (**"L&QHA"**) was the party which acquired part of the Claimant's housing stock pursuant to the terms of the STA. L&QHA was a housing association, registered with the Housing Corporation, and a registered society (registered social housing provider) within the meaning of what was then the Industrial and Provident Societies Act 1965 (**"the 1965 Act"**).

9. The parent society of L&QHA was called London & Quadrant Housing Trust. In 2008 an amalgamation took place between L&QHA, which by then had changed its name to L&Q Bexley Homes Limited, London & Quadrant Housing Trust and other registered societies pursuant to the provisions of Section 50(1) of the 1965 Act. The Defendant is the amalgamated society which resulted from this amalgamation, known as London & Quadrant Housing Trust. The amalgamation was completed on 31st March 2008, when the Defendant was registered as a registered society under the provisions of the 1965 Act. As such, the Defendant was and remains a registered provider of social housing.

10. As part of this amalgamation, the housing stock previously acquired by L&QHA from the Claimant was transferred from L&QHA to the Defendant. It should be noted that this transfer did not require a separate instrument of transfer. By virtue of Section 50(1) of the 1965 Act, the property of L&QHA was the subject of a statutory vesting in the Defendant, which took place without the necessity for any form of conveyance other than that contained in the special resolution which was required to give effect to the amalgamation.

11. On the same date as completion of the amalgamation (31st March 2008), the Claimant, the amalgamating parties and the Defendant entered into a deed of novation (**"the Deed of Novation"**) by which the Defendant agreed to be bound by the Bexley Agreements. The Bexley Agreements were defined in the Deed of Novation to mean the STA and the various agreements entered into between the Claimant and L&QHA in 1998 pursuant to the terms of the STA. Effectively therefore the STA and the other agreements entered into in 1998 were novated between the Claimant and the Defendant, in order to ensure that the Defendant, as successor in title to L&QHA, became subject to the same obligations as L&QHA in relation to the transferred housing stock.

The Bexley Agreements

12. By the STA the Claimant agreed to transfer around half of its housing stock, located in the southern part of the Borough of Bexley, to L&QHA. The remainder of the housing stock in the borough was transferred to another housing association. The housing stock to be transferred to L&QHA was defined in the STA as *"the Property"*. I will use the same expression (**"the Property"**) to refer to this housing stock. According to the Defence filed by the Defendant in this action (**"the Defence"**), the Property comprised approximately 4,123 residential dwellings. I should also make it clear that my references

to the Property mean the entirety of the housing stock, as it was transferred to L&QHA and as it was thereafter constituted from time to time, first in the ownership of L&QHA and subsequently in the ownership of the Defendant. My definition therefore takes account of the fact that, as I understand the position, dwellings have been disposed of out of the Property from time to time.

13. The transfer of the Property by the Claimant to L&QHA was completed by the deed of transfer dated 9th February 1998 (**"the 1998 Transfer"**).

14. Under the terms of the STA, L&QHA also agreed to enter into a series of further deeds of agreement with the Claimant. These deeds of agreement included the Nomination Rights Deed.

15. I will use the same expression as is used in the Deed of Novation, that is to say **"the Bexley Agreements"**, to refer, collectively, to the STA and the various deeds of the agreement entered into pursuant to the terms of the STA.

The statutory context to the Nomination Rights Deed

16. As mentioned above, the Claimant is and has at all material times been a local housing authority for the purposes of the Housing Act 1985 (**"the HA 1985"**) and the Housing Act 1996 (**"the HA 1996"**). In this capacity the Claimant is subject to duties in relation to the provision of housing which, in broad terms, require the Claimant to have access to suitable and affordable accommodation which can be provided to those to whom the Claimant owes housing duties.

17. In particular, and at the time of the Bexley Agreements, the Claimant was subject to the following duty, in subsections (1), (2) and (3) of Section 193 of the HA 1996:

> *"(1) This section applies where the local housing authority are satisfied that an applicant is homeless, eligible for assistance and has a priority need, and are not satisfied that he became homeless intentionally. This section has effect subject to section 197 (duty where other suitable accommodation available).*
> *(2) Unless the authority refer the application to another local housing authority (see section 198), they shall secure that accommodation is available for occupation by the applicant.*
> *(3) The authority are subject to the duty under this section for a period of two years ("the minimum period"), subject to the following provisions of this section. After the end of that period the authority may continue to secure that accommodation is available for occupation by the applicant, but are not obliged to do so (see section 194)."*

18. The classes of persons with priority need included households with dependent children, persons who were vulnerable due to old age, mental illness or disability or physical disability, persons displaced due to flood, fire or other disaster, victims of domestic abuse, care leavers and ex-prisoners. Subsections (5), (6) and (7) of Section 193 of the HA 1996 set out the circumstances in which the local housing authority would cease to be subject to the duty under Section 193.

19. One way in which the Claimant could bring its duty under Section 193 to an end was to make an offer of accommodation pursuant to its powers to allocate housing accommodation under the HA 1996. By Section 167 of the HA 1996 the Claimant was

required to have an allocation scheme for the purposes of determining housing priorities and as to the procedure to be followed in allocating housing accommodation. The Claimant was not however required to hold its own housing accommodation or to make allocations from its own housing accommodation. So far as compliance by the Claimant with its duties in respect of the allocation of housing was concerned, Section 159(2) of the HA 1996 gave the Claimant the following options:

> *"(2) For the purposes of this Part a local housing authority allocate housing accommodation when they—*
>
> *(a) select a person to be a secure or introductory tenant of housing accommodation held by them,*
>
> *(b) nominate a person to be a secure or introductory tenant of housing accommodation held by another person, or*
>
> *(c) nominate a person to be an assured tenant of housing accommodation held by a registered social landlord."*

20. By virtue of Section 159(2)(c) one way in which the Claimant could allocate housing accommodation was to nominate a person to be an assured tenant of housing accommodation held by a registered social landlord.

21. These options, and the absence of a requirement for a local authority to hold its own housing stock are also reflected in Section 206(1) of the HA 1996, which remains in force and provides as follows:

> *"(1) A local housing authority may discharge their housing functions under this Part only in the following ways—*
>
> *(a) by securing that suitable accommodation provided by them is available,*
>
> *(b) by securing that he obtains suitable accommodation from some other person, or*
>
> *(c) by giving him such advice and assistance as will secure that suitable accommodation is available from some other person."*

22. At the time of the Bexley Agreements, the power of a local authority to dispose of its housing stock derived from Section 32 of the HA 1985. Section 32(2) provided however that the consent of the Secretary of State was required for a disposal of housing stock. The matters to which the Secretary of State was to have regard, in deciding whether to grant such consent, were expressed to include the matters referred to in Section 34(4A) of the HA 1985. Section 43 of the HA 1985 also contained provisions requiring the consent of the Secretary of State for the disposal by a local authority of a house let on a secure tenancy or an introductory tenancy or of which a lease had been granted pursuant to Part V of the HA 1985. The matters to which the Secretary of State was to have regard, in deciding whether to grant consent were set out in Section 43(4A), in the same terms as Section 34(4A).

23. In December 1993 the Department of the Environment published a document, entitled Large Scale Voluntary Transfers Guidelines, for the guidance of local authorities in relation to transfers of ownership of their housing stock and in relation to the obtaining of the consent of the Secretary of State to such transfers. The introduction to these Guidelines (**"the Guidelines"**) acknowledged that a large number of local authorities had made such transfers since 1988, in the following terms:

"1.1 Since 1988 a number of local authorities have, with the agreement of their tenants and the consent of the Secretary of State, transferred the ownership of their housing stock to housing associations. These disposals are known as Large Scale Voluntary Transfers or LSVTs. They have brought benefits in terms of investment in the housing stock, better service, increased accountability to tenants and capital receipts for local authorities. The Government is committed to a continuing programme of LSVTs."

24. The Guidelines set out what was intended to be guidance on best practice in relation to the transfers of housing stock to housing associations. In section 5 of the Guidelines local authorities were advised to enter into both a transfer agreement, which determined the terms of the sale of the housing stock, and collateral agreements which would determine the continuing relationship between the local authority and the purchaser.

25. In relation to collateral agreements, at paragraph 5.6, the Guidelines contained the following guidance on the need for the local authority to demonstrate, when seeking the consent of the Secretary of State, its ability to meet its continuing statutory obligations:

"5.6 The local authority should be able to demonstrate that it will be able to discharge its continuing statutory obligations, and, in particular, its duties towards those accepted as homeless under Part III of the Housing Act 1985 ("Housing the homeless"), section 39 of the Land Compensation Act 1973, section 28 of the Rent (Agriculture) Act 1976 and section 27 of the Children Act 1989. This will normally be done by means of a Nomination Rights agreement with the new landlord."

26. In relation to nomination rights, the Guidelines gave the following guidance, at paragraphs 5.8 and 5.9:

"5.8 An authority should retain nomination rights to its former housing only in so far as it is necessary to carry out its statutory duties. Otherwise it is for the acquiring landlord to regulate access to the transferred housing. Where there are several purchasers, an allocation system and referral service common to the purchasers should be considered.

5.9 The Secretary of State would normally expect a purchaser of local authority stock to give first priority in the allocation of all its new lettings to nominations by the authority of persons accepted as statutorily homeless. Where there are other social landlords in the area the Nomination Rights agreement will need to determine how the authority will allocate homeless nominees between these landlords and the purchaser(s). It will need to specify the proportion of homeless acceptances that each purchaser will be expected to accommodate."

27. In his oral submissions Mr Hutchings stressed to me that the Guidelines were somewhat out of date by the time of the Bexley Agreements, because they drew a direct link between duties to the homeless and allocation of social housing. Mr Hutchings was at pains to stress to me that, by the time of the Bexley Agreements, the relevant legislation in force contained a clear separation between duties towards the homeless and the allocation of social housing. I have taken note of these submissions, but for present purposes I do not think that this level of precise analysis is required. For present purposes it seems to me that it is the overall statutory context, at the time of the Bexley Agreements, which is relevant to a general understanding of how the Bexley Agreements came about. The Guidelines seem to me to be relevant for the same reason, even if they had become out of date, in their references to statute, by the time of the Bexley Agreements.

The Nomination Rights Deed

28. As I have just indicated, I have provided the above summary of the statutory context because it explains why the transfer of the Property involved the entry of the Claimant and L&QHA into the set of agreements which I am referring to as the Bexley Agreements. In particular, it explains why the Bexley Agreements included the Nomination Rights Deed. The essential purpose of the Nomination Rights Deed was to allow the Claimant to draw upon the portfolio of housing accommodation which comprised the Property, for the purposes of meeting its statutory housing duties. This was reflected in recitals (A) and (D) to the Nomination Rights Deed, which stated as follows:

> *"(A) The Council has various statutory duties to those in housing need."*
>
> *"(D) The Association has agreed to assist the Council to perform its statutory duties to those in housing need to the extent and in the manner hereinafter appearing."*

29. This purpose was achieved by the Claimant having a right to nominate persons for housing in the Property as tenants of L&QHA. Effectively, the Nomination Rights Deed gave the Claimant the ability to allocate housing accommodation to those to whom it owed duties in respect of housing, by the route set out in Section 159(2)(c) of the HA 1996; that is to say by the Claimant nominating persons to be assured tenants of L&QHA as a registered social landlord.

30. This right of nomination is contained in clause 2 of the Nomination Rights Deed, in the following terms:

> *"In consideration of the completion by the Council of the transaction contemplated by the Principal Agreement, the Association hereby grants to the Council the right to nominate Nominees for housing in the Dwellings as tenants of the Association PROVIDED ALWAYS and it is hereby agreed that the Council's right to make nominations under this Agreement will extend only to seventy five per cent (75%) of the True Voids. The allocation of Dwellings to the Council for nomination shall be fair and equitable having regard to:*
>
> *(i) housing need in the area;*
>
> *(ii) the supply of Dwellings, in particular the type, size, location and quality."*

31. A Dwelling is defined in the Nomination Rights Deed. A Dwelling:

> *"shall mean such of the properties (being dwellings formerly owned by the Council and the subject of transfers of even date) which the Association normally lets upon assured tenancies (as defined in the Housing Act 1988) other than any which the Association cannot use for housing Nominees due to planning restrictions or restrictive covenants;"*

32. True Voids are defined in the Nomination Rights Deed. True Voids:

> *"shall mean in any financial year those Dwellings forming part of the Property that are available for letting but excluding any that are used for:-*
>
> *(i) Transfers of tenants of the Association*
>
> *(ii) As a result of an exchange referred to in the Tenancy Agreement for Qualifying Tenants a copy of which is contained in the Fifteenth Schedule to the Principal Agreement (the "Tenancy Agreement");*

(iii) As a result of the exercise of the rights of succession contained in the Tenancy Agreement;

(iv) *In order to permit any high priority improvements or repairs to be carried out to another dwelling owned by the Association."*

33. As can be seen, the effect of clause 2 is to give the Claimant the right to nominate a tenant for three out of every four dwellings which fall into the category of True Voids.

34. The procedure for nomination is, by clause 3 of the Nomination Rights Deed, governed by another of the Bexley Agreements (the Allocations Agency Deed) or, if the Allocations Agency Deed has been terminated, by the procedure set out in clause 3.2.

35. Clause 4 of the Nomination Rights Deed deals with the terms of the tenancy to be offered to those nominated by the Claimant as Nominees. Clause 5 imposes an obligation upon the Claimant to act fairly and reasonably in exercising its rights of nomination, having regard to its rights of nomination with other providers of social housing in the borough.

36. Clause 6.1 of the Nomination Rights Deed is the subject of the Construction Issue. For ease of reference, I set out clause 6.1 again, together with clause 6.2:

"6.1 In the event that any merger amalgamation transfer of engagements or any other transaction involving the Association would cause or require the transfer or disposal of the Property or part thereof to a third party save for a disposal under the Right to Buy or similar statutory scheme or otherwise with the consent of the Council not to be unreasonably withheld the Association shall not so merge amalgamate transfer engagements or complete such other transaction unless it has procured that the said third party undertakes directly with the Council to comply with the burden of all relevant covenants and obligations herein contained which pass to that third party subject always to a contrary direction of the Housing Corporation.

6.2 The provision of this Deed above shall not bind any mortgagee or chargee of the Association nor any receiver appointed by any such mortgagee or chargee nor any successor in title of any such mortgagee, chargee, or of the Association acting through such receiver save where the appointment of any receiver is for the purposes of the voluntary reconstruction rationalisation or other reorganisation relating to the Association."

37. Clause 6.1 is, in one sense, a familiar clause. It provides for a third party transferee or disponee of the Property or part thereof to give a direct undertaking to the Claimant to comply with the burden of the covenants and obligations of L&QHA (now the Defendant by reason of the Deed of Novation) under the Nomination Rights Deed, in the circumstances set out in clause 6.1 and to the extent set out in clause 6.1. A clause requiring the giving of such a direct covenant on a transfer or disposal of land is a familiar device for dealing with the problem, where it arises, that the burden of a positive covenant does not, as a general rule, run with land. The requirement to give such a direct covenant ensures that the transferee or disponee of the relevant land becomes subject to the burden of the positive covenants entered into by their predecessor in title. The Construction Issue is essentially concerned with the circumstances, in the present case, in which the obligation arises to procure the undertaking from a third party transferee or disponee.

38. It is not necessary to make specific reference to the remaining clauses of the Nomination Rights Deed. Clause 7 contains a dispute resolution clause, providing for expert determination in the event of a dispute between the parties. Neither party has sought to invoke this clause in relation to the current dispute.

39. In the remainder of this judgment all references to Clauses, without more, mean the clauses of the Nomination Rights Deed.

The current dispute

40. The current dispute has its origins in changes to the provisions of the Housing Act 1988 (**"the HA 1988"**). As at the time of the Bexley Agreements Section 133(1) of the HA 1988 provided as follows:

> *"(1) Where consent is required for a disposal (in this section referred to as "the original disposal") by virtue of section 32 or section 43 of the Housing Act 1985 and that consent does not provide otherwise, the person who acquires the land or house on the disposal shall not dispose of it except with the consent of the Secretary of State; but nothing in this section shall apply in relation to an exempt disposal as defined in section 81(8) above."*

41. Clause 5 of the 1998 Transfer provided as follows:

> *"5. The Association HEREBY FURTHER COVENANTS with the Council that it shall not dispose of the Property or any part thereof except with the consent of the Secretary of State for the Environment Transport & the Regions (for so long as such Secretary of State has jurisdiction and is empowered to give such consent and thereafter such other Secretary of State Minister or person who shall for the time being have such jurisdiction and be empowered) PROVIDED THAT no such consent shall be required if the disposal is an exempt disposal as defined in Section 81(8) of the Housing Act 1988 or any similar successor legislation"*

42. As explained above, the 1998 Transfer did require the consent of the Secretary of State pursuant to Sections 32 and 43 of the HA 1985. In consequence, the consent of the Secretary of State was required for a subsequent disposal of the Property by L&QHA, by virtue of Section 133(1) of the HA 1988 and by virtue of clause 5 of the 1998 Transfer, save for the categories of exempt disposals referred to in Section 81(8) of the HA 1988. Such consent for a subsequent disposal of the Property was also required by the Defendant, by virtue of its succession of title to the Property.

43. It should be noted that the Guidelines did address the question of when the consent of the Secretary of State should be granted pursuant to Section 133 of the HA 1988. In particular, Annex IV to the Guidelines dealt with the question of tenanted market value of housing stock. Paragraph 2 of Annex IV pointed out a number of *"important constraints on the tenanted market value of the stock"*. These constraints included, at paragraph 2d, the following constraint:

> *"d. commitment to long term social rented housing provision: acquiring landlords are required to relet housing which becomes vacant. Except for the preserved Right to Buy, acquiring landlords cannot sell property without the consent of the Secretary of State. Such consent would normally only be given in extreme financial situations."*

44. Section 81(8) of the HA 1988, as it was at the time of the Bexley Agreements, listed the following categories of exempt disposals:

> *"(8) In this section an "exempt disposal" means—*
>
> *(a) the disposal of a dwelling-house to a person having the right to buy it under Part V of the Housing Act 1985 (whether the disposal is in fact made under that Part or otherwise);*
>
> *(ab) the disposal of a dwelling-house to a person having the right to acquire it under Part I of the Housing Act 1996 (see sections 16 and 17 of that Act, whether or not the disposal is in fact made under provisions having effect by virtue of section 17 of that Act;*
>
> *(b) a compulsory disposal, within the meaning of Part V of the Housing Act 1985;*
>
> *(c) the disposal of an easement or rentcharge;*
>
> *(d) the disposal of an interest by way of security for a loan;*
>
> *(e) the grant of a secure tenancy or what would be a secure tenancy but for any of paragraphs 2 to 12 of Schedule 1 to the Housing Act 1985;*
>
> *(f) the grant of an assured tenancy or an assured agricultural occupancy, within the meaning of Part I of this Act, or what would be such a tenancy or occupancy but for any of paragraphs 4 to 8 of Schedule 1 to this Act; and*
>
> *(g) the transfer of an interest held on trust for any person where the disposal is made in connection with the appointment of a new trustee or in connection with the discharge of any trustee."*

45. It will be noted that the categories of exempt disposals did not include the disposal of an individual dwelling-house save for the specific circumstances listed in paragraphs (a) to (g). It will also be noted that the grant of an assured tenancy or a secure tenancy did constitute an exempt disposal.

46. In addition to this, Section 9 of the HA 1996 provided that the consent of the Housing Corporation was required for a disposal of land by a registered social landlord pursuant to the power of disposal which was contained in Section 8 of the HA 1996. This was subject to the exceptions listed in Section 10 of the HA 1996, which were in the following terms:

> *"(1) A letting by a registered social landlord does not require consent under section 9 if it is—*
>
> *(a) a letting of land under an assured tenancy or an assured agricultural occupancy, or what would be an assured tenancy or an assured agricultural occupancy but for any of paragraphs 4 to 8, or paragraph 12(1)(h), of Schedule 1 to the Housing Act 1988, or*
>
> *(b) a letting of land under a secure tenancy or what would be a secure tenancy but for any of paragraphs 2 to 12 of Schedule 1 to the Housing Act 1985.*
>
> *(2) Consent under section 9 is not required in the case of a disposal to which section 81 or 133 of the Housing Act 1988 applies (certain disposals for which the consent of the Secretary of State is required).*
>
> *(3) Consent under section 9 is not required for a disposal under Part V of the Housing Act 1985 (the right to buy) or under the right conferred by section 16 below (the right to acquire)."*

47. In 2017 the law changed. With effect from 6th April 2017 paragraph 4(3) of Schedule 4 to the Housing and Planning Act 2016 substituted a new subsection (1B) into Section 133 of the HA 1988, which provided as follows:

> *"(1B)This section does not apply if the original disposal was made to a private registered provider of social housing."*

48. In the present case the original disposal was the 1998 Transfer, which was made to a private registered provider of social housing, namely L&QHA. The effect of the introduction of subsection (1A) was therefore to remove the restrictions on the disposal of the Property which had previously been imposed by Section 133.

49. In addition to this, paragraph 15 of Schedule 4 to the Housing and Planning Act 2016, again with effect from 6th April 2017, repealed Sections 172-175 of the Housing and Regeneration Act 2008 (the successor provisions to Sections 8-10 of the HA 1996). Paragraph 16 of Schedule 4 substituted a new Section 176 into the Housing and Regeneration Act 2008 which contained the following requirement:

> *"(1) If a private registered provider disposes of a dwelling that is social housing it must notify the regulator.*
> *(2) If a non-profit registered provider disposes of land other than a dwelling it must notify the regulator.*
> *(3) Subsection (1) continues to apply to any land of a private registered provider even if it has ceased to be a dwelling.*
> *(4) The regulator may give directions about—*
> *(a) the period within which notifications under subsection (1) or (2) must be given;*
> *(b) the content of those notifications.*
> *(5) The regulator may give directions dispensing with the notification requirement in subsection (1) or (2).*
> *(6) A direction under this section may be—*
> *(a) general, or*
> *(b) specific (whether as to particular registered providers, as to particular property, as to particular forms of disposal or in any other way).*
> *(7) A direction dispensing with a notification requirement—*
> *(a) may be expressed by reference to a policy for disposals submitted by a registered provider;*
> *(b) may include conditions.*
> *(8) The regulator must make arrangements for bringing a direction under this section to the attention of every registered provider to which it applies."*

50. Again, the effect of this change in the law was to remove the restrictions on the disposal of the Property which had previously been imposed by Sections 8-10 of the HA 1996 and their statutory successors in the Housing and Regeneration Act 2008. There is now simply the duty to notify the regulator on the disposal of a dwelling which is social housing.

51. Following this change in the law the Defendant has sold individual dwellings from the Property, to private buyers on the open market. By reference to the statements of case in the action there does not appear to be agreement between the parties as to the number of dwellings sold, or when they were sold. What is common ground is that the Defendant

has sold individual dwellings to private buyers on the open market, and that the Defendant has done so without obtaining from each such purchaser the undertaking referred to in Clause 6.1. This has given rise to the Construction Issue. As I have already identified, the Defendant's case is that these individual sales are not caught by Clause 6.1. The Claimant's case is that they are.

52. On 15th September 2023 the Claimant wrote to the Defendant expressing its concern at what it asserted was *"the concerning number of disposals"* being made by the Defendant out of the Property and making reference, amongst other matters, to Clause 6.1. Further correspondence took place between the Claimant and the Defendant and between the Claimant and the Defendant's solicitors. The parties were not however able to resolve their differences. In May 2024 the Claimant sought interim injunctive relief to restrain the sale of individual dwellings. This application and a cross-application made by the Defendant were dealt with by an order of His Honour Judge Jonathan Klein, sitting as a Judge of High Court, made on 18th July 2024. By that order, and upon undertakings given by the parties to the court, the application and cross-application were dismissed and directions were given in this action, which the Claimant commenced by claim form issued on the same date as the order (18th July 2024). The directions given by the order provided for statements of case to be filed and served in the action, limited to the Construction Issue and setting out all facts relevant to the Construction Issue. The directions also provided for the Defendant to make this application for summary judgment, for the resolution of the Construction Issue.

53. The Defendant duly issued the application for summary judgment (**"the Application"**) which has come before me for determination. Although the relief sought by the Application is not framed in these terms, the parties are agreed that I can and should use the Application to determine the Construction Issue. In this context my attention has been drawn to the principles set out by Lewison J (as he then was) in *Easyair Ltd v Opal Telecom Ltd* [2009] EWHC 339, at [15], in relation to the correct approach on applications for summary judgment by defendants. For present purposes it is not necessary to set out all of these principles. So far as points of law or construction are concerned, Lewison J said this, in the first part of [15(vii)]:

> *"On the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it."*

54. Neither party has put any evidence before the court in relation to the Application, beyond the Bexley Agreements and certain other contemporaneous documents. As I have said, the parties are agreed that I can and should use the Application to determine the Construction Issue, on the available documents. On this basis, and bearing in mind the relevant principle stated by Lewison J in *Easyair*, I am satisfied that I can and should determine the Construction Issue on the Application.

55. I should also mention, for the sake of completeness, that the Claimant has contended, in its Particulars of Claim, that the burden of Clause 6.1 runs with the Property and any part of the Property, on the basis that Clause 6.1 constitutes a restrictive covenant binding the Property and any part of the Property. This particular issue seems to me to lie outside the Construction Issue and was not pursued at the hearing of the Application. In any

event, it is not clear to me how success on this issue would assist the Claimant, if the Defendant is right on the Construction Issue.

The Construction Issue – relevant principles

56. There was no material dispute between counsel as to the general principles which should guide me in my approach to the Construction Issue.

57. In their skeleton argument the Claimants' counsel submitted that the modern-day rules on contractual interpretation are substantially to be found in three decisions of the Supreme Court; namely *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50 [2011] 1 WLR 2900, *Arnold v Britton* [2015] UKSC 36 [2015] AC 1619, and *Wood v Capita Insurance Services Ltd* [2017] UKSC 24 [2017] AC 1173. The Claimant's counsel provided me with a useful summary of the rules, or principles to be derived from these decisions. Based on this summary, I highlight the following broad principles.

58. First, as Lord Clarke JSC explained in *Rainy Sky*, at [21], in the context of the construction of a commercial contract:

> *"21 The language used by the parties will often have more than one potential meaning. I would accept the submission made on behalf of the appellants that the exercise of construction is essentially one unitary exercise in which the court must consider the language used and ascertain what a reasonable person, that is a person who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract, would have understood the parties to have meant. In doing so, the court must have regard to all the relevant surrounding circumstances. If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other."*

59. Second, the *"one unitary exercise"* referred to by Lord Clarke *"involves an iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences are investigated"*; see Lord Hodge JSC in *Wood*, at [12]. As Lord Hodge went on to explain, at [12] and [13]:

> *"12 This unitary exercise involves an iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences are investigated: the Arnold case, para 77 citing In re Sigma Finance Corpn [2010] 1 All ER 571, para 12, per Lord Mance JSC. To my mind once one has read the language in dispute and the relevant parts of the contract that provide its context, it does not matter whether the more detailed analysis commences with the factual background and the implications of rival constructions or a close examination of the relevant language in the contract, so long as the court balances the indications given by each.*
>
> *13 Textualism and contextualism are not conflicting paradigms in a battle for exclusive occupation of the field of contractual interpretation. Rather, the lawyer and the judge, when interpreting any contract, can use them as tools to ascertain the objective meaning of the language which the parties have chosen to express their agreement. The extent to which each tool will assist the court in its task will vary according to the circumstances of the particular agreement or agreements."*

60. Third, while the court is entitled to have regard to contextual factors, modern authorities have stressed the primacy which is to be given to the actual words used by the contracting

parties. In *Arnold*, at [16]-[23], Lord Neuberger PSC emphasized seven factors in relation to the interpretation of contracts. At [17] Lord Neuberger stressed the primacy of the language used in the relevant contract in the following terms:

> *"17 First, the reliance placed in some cases on commercial common sense and surrounding circumstances (e g in Chartbrook [2009] AC 1101, paras 16—26) should not be invoked to undervalue the importance of the language of the provision which is to be construed. The exercise of interpreting a provision involves identifying what the parties meant through the eyes of a reasonable reader, and, save perhaps in a very unusual case, that meaning is most obviously to be gleaned from the language of the provision. Unlike commercial common sense and the surrounding circumstances, the parties have control over the language they use in a contract. And, again save perhaps in a very unusual case, the parties must have been specifically focussing on the issue covered by the provision when agreeing the wording of that provision."*

61. Fourth, the greater the complexity of a contract and/or the level of skill and care with which it has been drafted, the more weight the court will place on textual analysis. As Lord Hodge explained in *Wood*, at [13]:

> *"Some agreements may be successfully interpreted principally by textual analysis, for example because of their sophistication and complexity and because they have been negotiated and prepared with the assistance of skilled professionals. The correct interpretation of other contracts may be achieved by a greater emphasis on the factual matrix, for example because of their informality, brevity or the absence of skilled professional assistance. But negotiators of complex formal contracts may often not achieve a logical and coherent text because of, for example, the conflicting aims of the parties, failures of communication, differing drafting practices, or deadlines which require the parties to compromise in order to reach agreement. There may often therefore be provisions in a detailed professionally drawn contract which lack clarity and the lawyer or judge in interpreting such provisions may be particularly helped by considering the factual matrix and the purpose of similar provisions in contracts of the same type. The iterative process, of which Lord Mance JSC spoke in Sigma Finance Corpn [2010] 1 All ER 571, para 12, assists the lawyer or judge to ascertain the objective meaning of disputed provisions."*

62. Fifth, as Lord Clarke explained in *Rainy Sky*, at [21], if there are two possible constructions arising from the language employed by the court, the court is entitled to prefer the interpretation more consistent with common sense, and reject the other. This does not however displace the primacy of the words used by the parties in the relevant contract, as Lord Neuberger explained in *Arnold*, at [20]:

> *"20 Fourthly, while commercial common sense is a very important factor to take into account when interpreting a contract, a court should be very slow to reject the natural meaning of a provision as correct simply because it appears to be a very imprudent term for one of the parties to have agreed, even ignoring the benefit of wisdom of hindsight. The purpose of interpretation is to identify what the parties have agreed, not what the court thinks that they should have agreed. Experience shows that it is by no means unknown for people to enter into arrangements which are ill-advised, even ignoring the benefit of wisdom of hindsight, and it is not the function of a court when interpreting an agreement to relieve a party from the consequences of his imprudence or poor advice. Accordingly, when interpreting a*

contract a judge should avoid re-writing it in an attempt to assist an unwise party or to penalise an astute party."

63. To the same effect is the following pithy summary of the principles of construction by Aikens LJ in *BMA Special Opportunity Hub Fund Ltd v African Minerals Finance Ltd* [2013] EWCA Civ 416, at [24]:

> *"24. There was no dispute between the parties on the principles of construction that the court must use in interpreting this commercial document. There has been considerable judicial exposition of these principles by the House of Lords and the Supreme Court in recent years.7 There is no point in my going over the same ground again at any length. The court's job is to discern the intention of the parties, objectively speaking, from the words used in the commercial document, in the relevant context and against the factual background in which the document was created. The starting point is the wording of the document itself and the principle that the commercial parties who agreed the wording intended the words used to mean what they say in setting out the parties' respective rights and obligations. If there are two possible constructions of the document a court is entitled to prefer the construction which is more consistent with "business common sense," if that can be ascertained. However, I would agree with the statements of Briggs J, in* ***Jackson v Dear,*** *first, that "commercial common sense" is not to be elevated to an overriding criterion of construction and, secondly, that the parties should not be subjected to "…the individual judge's own notions of what might have been the sensible solution to the parties' conundrum". I would add, still less should the issue of construction be determined by what seems like "commercial common sense" from the point of view of one of the parties to the contract."*

64. Sixth, and in terms of the parameters of the relevant factual background which the court can take into account, Lord Neuberger explained the position in the following terms in *Arnold*, at [21]:

> *"21 The fifth point concerns the facts known to the parties. When interpreting a contractual provision, one can only take into account facts or circumstances which existed at the time that the contract was made, and which were known or reasonably available to both parties. Given that a contract is a bilateral, or synallagmatic, arrangement involving both parties, it cannot be right, when interpreting a contractual provision, to take into account a fact or circumstance known only to one of the parties."*

65. In terms of the relevant factual background one further point can be added. In determining what background information was reasonably available to the parties, the court may take account of specialist or unusual knowledge which parties entering into a contract of the type concerned might reasonably be assumed to have had, subject to this not including information which a reasonable observer would think that the parties merely might have known; see the judgment of Hildyard J at first instance in *Challinor v Juliet Bellis & Co.* [2013] EWHC 347, at [279(2) and (3)]. The decision of Hildyard J was overturned on appeal, but I do not read the decision of the Court of Appeal as disapproving this particular statement of principle.

66. In his skeleton argument Mr Hutchings also drew my attention to the decision of the Court of Appeal in *Cherry Tree Investments Ltd v Landmain Ltd* [2012] EWCA Civ 736. In his judgment in this case Lewison LJ considered the question of the distinction

between the use of background material in the interpretation of ordinary commercial contracts on the one hand, and the interpretation of negotiable and registrable contracts or public documents on the other. It was however common ground that the facts of the present case did not engage this particular authority. Accordingly, I need say no more about it.

The Construction Issue – the Same Class Principle

67. In his written and oral arguments Mr Hutchings relied heavily on what is often referred to as the *"eiusdem generis"* principle of construction. In order to avoid use of the Latin words, which mean of the same type or class, I will use the expression **"the Same Class Principle"** to refer to this principle. Before I come to the competing arguments of the parties, it is useful briefly to explain how this principle operates.

68. The Same Class Principle derives from a principle of statutory interpretation which can apply where there are several words of description followed by a more general word of description. Where the several words refer to a subject matter which has a confined meaning and constitutes a particular class or group, the general word is taken not to extend in its effect beyond subject matter of the same type or class as the subject matter of the preceding words. It is well-established that the Same Class Principle can also be applied to the construction of contracts. The principle depends on the assumed intention of the framer of the relevant instrument; namely that the relevant general word or words were only intended to guard against some accidental omission in the subject matter of the preceding words, and were not intended to extend to subject matter of a wholly different kind. The principle has been said to follow as a corollary of the principle that the whole of the relevant contract which falls to be construed must be considered, so that every word is taken in conjunction with the words which accompany that word; see generally Chitty on Contracts, 35th Edition, at 16-116 to 16-119, where the Same Class Principle is explained.

69. The Same Class Principle was helpfully summarised by his Honour Judge Cawson KC, sitting as a Judge of the High Court, in *Magee v Crocker* [2024] EWHC 1723 (Ch), at [321]:

> *"321. Applying the reasonable objective observer with knowledge of the background facts test at the relevant time approach to contractual interpretation, I do not consider that the reasonable objective observer would consider a tripartite agreement of this kind involving, effectively, the extinction of rights under the 2010 SHA and the entry into of a new agreement (with new rights), as being encompassed by the dealings envisaged by clause 18.1. I consider that the ejusdem generis principle applies, which is that if it is found that things described by particular words have some common characteristic which constitutes them a genus, the general words which follow them ought to be limited to things of that genus – see Lewison, The Interpretation of Contracts, 8th Ed., Chapter 7, Section 10. Clause 18.1 includes the general words "or deal in any way with, any of its rights", but these general words follow a reference to assigning, granting any encumbrance, or sub-contracting, which, as I see it, point to some bilateral disposition concerning the rights under the 2010 SHA involving a party to the 2010 SHA and a third-party, rather than some agreement that involves a consensual arrangement, such as a novation, including both parties to the*

2010 SHA and involving a termination of the rights under the 2010 SHA, rather than a disposition thereof involving a third party."

70. The editors of Chitty make two further points in their explanation of the Same Class Principle. The first point is that the principle can only be applied where there is a class to which the relevant general words can be restricted. If the relevant preceding words do not establish an identifiable common class or category, the principle cannot operate to restrict the scope of the general words which follow. The second point is that the principle is a canon of construction, and not a rule. It is a guide to be applied by the court when seeking to interpret the relevant contract.

71. The operation of the Same Class Principle is illustrated by two particular authorities to which I was referred.

72. In *Burrows Investments Ltd v Ward Homes Ltd* [2017] EWCA Civ 1577 [2018] 1 P.&C.R. 13 the Court of Appeal were called upon to construe a clause in a sale agreement which defined a Permitted Disposal as "*the transfer … of land … for roads, footpaths, public open spaces or other social/community purposes*". The question which arose was whether the words *"land….for…..other social/community purposes"* were wide enough to include the transfer of a completed dwelling house. The Court of Appeal concluded that these words did not extend to such a transfer. In reaching this conclusion the Court of Appeal relied upon the Same Class Principle. In his judgment, with which Rupert Jackson LJ agreed, Henderson LJ explained the role of the Same Class Principle in the following terms, at [48]:

> *"48 Mr McGhee is right to say that disposals of Market Units could also fall within paras (b) and (e), but this does not in my view meet the point that in para.(c) it would be very strange to describe the transfer of a completed dwelling as a transfer of land, particularly when regard is had to the specific instances of transfers of land which are itemised in the paragraph. Land which is transferred for the site of an electricity sub-station, gas governor kiosk or sewage pumping station, or for use as a road or footpath, or as a public open space, is unlikely to have any buildings on it at the date of transfer, and will certainly not have a dwelling house on it. This, it seems to me, is the essential point of the ejusdem generis argument, which I prefer to regard not as a rigid canon of construction, but rather as a flexible aid to construction which reflects the twin requirements of commercial common sense and the need to construe contractual provisions as a whole and in their context. Another way of making the same point is to say that the words "or other social/community purposes" in the second part of para.(c) have to be read in the light of the three specified purposes which precede them, and with at least a provisional inclination to interpret the social and/or community purposes which the parties had in mind as being purposes akin to the provision of land for roads, footpaths or public open spaces."*

73. In *89 Holland Park (Management) Ltd v Dell* [2023] EWCA Civ 1460 [2024] L&TR the issue before the Court of Appeal was the recoverability of litigation costs through the service charge provisions in a lease. The litigation costs had been incurred by the owner of a property in West London comprising a Victorian villa converted into five flats. The costs were incurred in the course of a long running legal dispute with a neighbour. The respondents were the tenants, on a long lease, of one of five flats in the property. The appellant was the owner of the property and the respondents' landlord. The adjoining

site, which was subject to covenants imposed for the benefit of the property, was acquired by an architect who wished to develop the site. The residents of the property objected to the plans, which in turn resulted in extensive litigation in relation to the covenants, involving three separate claims, one of which went to the Court of Appeal and resulted in a remission of the relevant claim by the Court of Appeal. The landlord incurred significant irrecoverable costs in this litigation, which it sought to recover from the tenants of the flats through the service charges provisions in their leases. The respondent tenants disputed the right of the landlord to recover these costs by the service charge provisions in the lease of their flat.

74. The landlord relied upon the definition of General Expenditure in the lease, which was in the following terms:

> *"'General Expenditure' means the total expenditure … incurred by the Lessor in any Accounting Period in carrying out her obligations under Clause 4(4) of this Lease and any other costs and expenses reasonably and properly incurred in connection with the Building including without prejudice to the generality of the foregoing…"*

75. The landlord also relied upon clause 4(4) of the lease, which contained a covenant by the landlord to provide various services, the costs of which were recoverable as General Expenditure. The list of services in clause 4(4), as summarised by Falk LJ in her judgment (and with her underlining), was in the following terms:

> *"(a) To maintain and keep in good and substantial repair and condition [the main structure, common tanks, pipes and cables and the common parts and boundaries].*
> *(b) [To paint the exterior and non-demised parts at least once every five years.]*
> *(c) [To insure the Building.]*
> *(d) [To clean the windows in the common parts.]*
> *(e) [To pay rates and other charges.]*
> *(f) For the purpose of performing the covenants on the part of the Lessor herein contained at her reasonable discretion to employ … one or more caretakers porters maintenance staff gardeners cleaners…"*
> *(g)*
> *(i) At the Lessor's discretion to employ an Agent to manage the Building…*
> *(ii) <u>To employ all such surveyors builders architects engineers tradesmen solicitors accountants or other professional persons as may be necessary or desirable for the proper maintenance safety and administration of the Building.</u>*
> *(h) [To maintain communal television aerials.]*
> *(j) [To maintain and install fire extinguishers.]*
> *(k) [To maintain an electric porter system.]*
> *(l) <u>Without prejudice to the foregoing to do or cause to be done all such works installations acts matters and things as in the reasonable discretion of the Lessor may be considered necessary or advisable for the proper maintenance safety amenity and administration of the Building.</u>*
> *(m) [To keep a reserve fund.]*
> *(n) [To pay the costs of the formation of a lessee-owned company.]"*

76. The landlord relied upon the two underlined paragraphs as being sufficiently widely drawn to render the litigation costs recoverable as costs incurred in the provision of services falling within those paragraphs.

77. In her judgment, with which Phillips and Arnold LJJ agreed, Falk LJ concluded that Judge Elizabeth Cooke, in the Upper Tribunal (Lands Chamber), had been right to decide that the litigation costs were not recoverable as heads of expenditure under paragraphs (g)(ii) or (l) of clause 4(4) of the lease. Falk LJ also rejected the argument, which was a new argument raised in the Court of Appeal, that the litigation costs fell within the definition of General Expenditure in the lease.

78. For present purposes the most relevant part of the reasoning of Falk LJ is to be found in her analysis of the wording of paragraphs (g)(ii) and (l) of clause 4(4), at [37] in her judgment:

> *"37 The key operative words of paragraphs (g)(ii) and (l) are "for the proper maintenance safety and administration of the Building" and "for the proper maintenance safety amenity and administration of the Building" respectively. In the context of a clause that clearly focuses on management and maintenance of the building itself, these words naturally refer to expenditure of that kind. In my view it would strain those words to read them as extending beyond costs incurred in maintaining and running the building, and keeping it safe. Although amenity is expressly referred to in paragraph (l) that most naturally refers, in context, to the amenity of the building itself rather than to (for example) the attractiveness of views from it."*

79. While Falk LJ did not make express reference to the Same Class Principle in this part of her judgment, it seems to me that her reasoning was consistent with the application of this principle.

80. Finally, and while this is not quite on point, it is convenient, while referring to *89 Holland Park*, to make reference to the judgment of Falk LJ at [22], which Mr Hutchings submitted was relevant to the construction exercise in the present case:

> *"22 There appears to be an element of tension between the principle that service charge clauses are not subject to any special rule of interpretation and Lord Neuberger's approval of Rix LJ's statement in McHale v Earl Cadogan. However, I consider that this is more apparent than real. It must be borne in mind that leases are typically long-term obligations with the potential for significant future liabilities. It is inherently unlikely that parties entering into such a transaction would intend to commit themselves to obligations that are neither expressly spelled out nor of a nature that clearly fall within general words, read in their context."*

81. Bearing in mind the guidance provided by the authorities cited to me, both in relation to the general principles of construction and in relation to the application of the Same Class Principle, I turn to my analysis of the Construction Issue.

<u>The Construction Issue – analysis</u>

82. While keeping in mind that my construction of Clause 6.1 is one unitary exercise, it is convenient to divide the analysis of the Construction Issue into stages, and to start with the language of Clause 6.1.

83. In his submissions Mr Hutchings divided Clause 6.1 into five parts. I found this division to be helpful for the purposes of my own analysis, while keeping in mind that the Clause falls to be read as a whole. My own division, as derived from Mr Hutchings' proposed division, is as follows:

> *"In the event that*
> (1) *any merger amalgamation transfer of engagements or any other transaction involving the Association*
> (2) *would cause or require the transfer or disposal of the Property or part thereof to a third party*
> (3) *save for a disposal under the Right to Buy or similar statutory scheme or otherwise with the consent of the Council not to be unreasonably withheld*
> (4) *the Association shall not so merge amalgamate transfer engagements or complete such other transaction*
> (5) *unless it has procured that the said third party undertakes directly with the Council to comply with the burden of all relevant covenants and obligations herein contained which pass to that third party*
> *subject always to a contrary direction of the Housing Corporation."*

84. I will continue to use this numbering system in my analysis of Clause 6.1. The actual restriction imposed by Clause 6.1 is to be found at (4) and (5). Subject to the exceptions at (3), the trigger for the restriction to apply is at (1) and (2). The essential dispute between the parties is concentrated upon the words *"or any other transaction"* in (1). The Claimant's case is that these words are wide enough to include the sale of a single dwelling by the Defendant. The Defendant's case is that the words *"or any other transaction"* are limited to the type of transaction encompassed by the words *"merger amalgamation transfer of engagements"*, so that the words *"or any other transaction"* are not wide enough to include the sale of a single dwelling.

85. So far as the triggering circumstances in (1) and (2) are concerned, the starting point is to identify what is meant by the reference to *"any merger amalgamation transfer of engagements"*. The answer to this seems fairly clear to me. At the time of the Bexley Agreements amalgamations and transfers of engagements by registered societies, which were both forms of merger, were governed by Sections 50-54 of the 1965 Act. It is important to keep in mind that such amalgamations and transfers of engagements were transactions which involved a statutory transfer of rights, liabilities and property from one registered society to another. An example of this statutory transfer of property can be found in the present case. The amalgamation of L&QHA into the Defendant engaged a statutory transfer of the Property from L&QHA to the Defendant, pursuant to Section 50(1) of the 1965 Act.

86. Viewed in this light it seems to me that the words *"any merger amalgamation transfer of engagements"* can be regarded as constituting a class or type of transactions; namely amalgamations and transfers of engagements between entities of the kind referred to Sections 50-54 of the 1965 Act. These words clearly share *"a common characteristic"*; to use the language of Judge Cawson KC in *Magee v Crocker*. Indeed, in their skeleton argument the Claimant's counsel stated that, for the purposes of the hearing of the Construction Issue, the Claimant was prepared to accept that these words were capable of falling within a single category or genus. It was also accepted that the word *"merger"* could be treated as a synonym for amalgamations and transfers of engagement. In my

view these concessions were correctly made. What was not conceded on the Claimant's side was whether the reference to *"or any other transaction"* was similarly limited. The Claimant's case is that these words introduce an alternative and open category, leaving no room for the operation of the Same Class Principle.

87. If one concentrates simply on the words *"or any other transaction"*, I can see the Claimant's argument. The word *"or"* may be expected to introduce an alternative to what has gone before, while the words *"any other transaction"* are, on their face, a reference to any transaction (itself a general form of expression) which is other than one falling within the class of merger, amalgamations and transfers of engagement. I do not find it necessary to go through the authorities and dictionary references to which my attention was drawn on the meaning of *"or"* and *"any"*. Looking at the words *"or any other transaction"* in isolation, I broadly accept Mr Rutledge's submissions that they are capable of wide meaning.

88. The words *"or any other transaction"* must however be read with the remainder of Clause 6.1. In particular, they must be read with the second part of the triggering circumstances, at (2). Those triggering circumstances require that the relevant merger, amalgamation, transfer of engagements or other transaction involving the Association (L&QHA) must be one which *"would cause or require the transfer or disposal of the Property or part thereof to a third party"*. In the case of mergers, amalgamations and transfers of engagements, this makes sense. The relevant transaction is the merger or amalgamation or transfer of engagements. Such a transaction can naturally be described as causing or requiring the transfer or disposal of the Property or a part of the Property to a third party; namely the registered society produced by the merger or amalgamation in which L&QHA came to be involved or the transferee of the engagements of L&QHA. Indeed, just such a consequential transfer of the Property did occur when L&QHA was amalgamated into the Defendant.

89. This analysis does not work if the words *"or any other transaction"* are taken as an open category, capable of including the sale, by transfer, of an individual dwelling to a private purchaser. On this hypothesis one has to read the reference to any other transaction as including a transfer of part of the Property, including by the sale of an individual dwelling to a private purchaser. One then has to treat this transaction, namely a sale of an individual dwelling to a private purchaser, as a transaction which *"would cause or require the transfer or disposal of the Property or part thereof to a third party"*. This does not make sense. One would not naturally refer to a transfer of part of the Property, by private sale of an individual dwelling to a private purchaser, as causing or requiring the transfer or disposal of part of the Property to a third party. The private sale is the transfer of the relevant part of the Property to the third party. The triggering circumstances in (1) and (2) seem to me to contemplate a two stage process, where there is a transaction of the kind mentioned in (1), which in turn causes or requires the transfer or disposal in (2). Treating the sale of a single dwelling to a private purchaser as falling within this two stage process strikes me as a very odd reading of Clause 6.1, and not one intended by the parties to the Nomination Rights Deed.

90. In his oral submissions Mr Rutledge sought to escape from this difficulty by arguing that if one had an exchange of contracts on the sale of an individual dwelling to a private purchaser, that would supply the first stage transaction, which would then cause or require the second stage transaction, which would be completion of the contract. I was

not persuaded by this analysis. It seems clear to me that the terms of (1) and (2) are not apt to mean or to include an exchange of contracts followed by completion, independent of the problem that Mr Rutledge's submission assumed an exchange of contracts followed by completion. On the Claimant's case, the words *"or any other transaction"* would be capable of referring to various types of transfer or disposal in relation to individual dwellings where there would not be, or would not necessarily be a prior exchange of contracts. In such cases, the two stage analysis of contract and completion would not work.

91. These points can be taken further. What must be caused or required in (2) is the transfer or disposal of the Property or part thereof to a third party. Disposal is a word of wide meaning. It is capable of meaning the grant of any interest or estate in land, whether by creating a new interest or transferring an existing interest; see (by way of example) Patterson J in *R (O'Neill) v The London Borough of Lambeth* [2016] EWHC 2551 (Admin), at [14]. If however the reference to *"or any other transaction"* in (1) is also an open category, it would seem that the combined effect of (1) and (2) is that the grant of any interest or estate in land to a third party, whether by creation or transfer, must be treated as causing or requiring the grant of the same interest or estate in land to a third party. This does not make linguistic sense.

92. This leads on to a further point on the language of Clause 6.1. In circumstances where Clause 6.1 is engaged, its effect is to impose a restriction on L&QHA (and now on the Defendant). L&QHA shall not *"so merge amalgamate transfer engagements or complete such other transaction"* without procuring the specified direct undertaking from the relevant third party. What is restricted by Clause 6.1 is the merger, amalgamation, transfer of engagements or other transaction referred to in (1), not the resulting transfer or disposal referred to in (2). If however, as the Claimant contends, the transactions referred to in (1) included any transfer or disposal in relation to the Property or a part of the Property, save for those excluded at (3), it seems odd that the restriction was not simply framed as a restriction on transferring or disposing of the Property or any part thereof or, even more simply, as a restriction on disposing of the Property or any part thereof. This much simpler drafting technique was used in clause 5 of the 1998 Transfer which, reflecting the terms of the restriction in Section 133 of the HA 1998, was drafted as a covenant by L&QHA *"that it shall not dispose of the Property or any part thereof except with the consent of the Secretary of State"*. I understood it to be common ground between the parties that clause 5 of the 1998 Transfer has now ceased to have effect, following the amendment of Section 133 of the HA 1988. This does not however affect the point which I have just made, which relates to the drafting technique used in clause 5 of the 1998 Transfer.

93. By contrast, one can see the sense in restricting the merger, amalgamation, transfer of engagements or any other transaction, as opposed to the resulting transfer or disposal, if all of these transactions belonged to the same class. As Mr Hutchings explained in his submissions, there is authority to the effect that a transfer of engagements pursuant to Section 51 of the 1965 Act was capable of vesting the benefit of a building agreement in a transferee, notwithstanding a prohibition against assignment in that building agreement; see *Stansell Ltd v Co-operative Group (CWS) Ltd* [2006] EWCA Civ 538 [2006] 1 WLR 1704. With this in mind, the way in which the restriction is worded in (4) makes sense.

94. These conclusions on the language of Clause 6.1 are reinforced when one comes to consider the operation of Clause 6.1, on the rival constructions of the parties. If the Claimant is correct on the Construction Issue, it is necessary for the Defendant on any disposal of a part of the Property, save for the exclusions at (3), to procure an undertaking from the disponee to comply with the burden of the covenants and obligations contained in the Nomination Rights Deed, *"which pass to that third party"*. I will come back to the final words at (5), which I just quoted, but for present purposes the relevant point is this. The obligation to procure the specified undertaking would, on the Claimant's case, extend to disposals such as the sale of an individual dwelling to a private buyer, and to the grant of a tenancy of a dwelling. In the latter case, the grant of a tenancy would include the grant of an assured tenancy to a tenant nominated by the Claimant pursuant to its rights of nomination in the Nomination Rights Deed. I understood Mr Rutledge to argue, in his oral submissions, that the reference to *"or any other transaction"* should not be taken as extending to the grant of an assured tenancy but, on the Claimant's construction of Clause 6.1, I could not see any basis for this exclusion of assured tenancies.

95. On the Claimant's construction of Clause 6.1, the consequences seem to me to be bizarre. In circumstances where the housing stock constituted by the Property or a part of that housing stock is transferred to another registered society, pursuant to an amalgamation or a transfer of engagement, it makes sense that the new owner should be required to sign up directly to the Nomination Rights Deed, in order to make it clear that Claimant's rights of nomination in respect of the housing stock are preserved against the new owner. The same result makes no sense in the case of the sale of an individual dwelling to a private purchaser. Nor does this result make sense in the case of the grant of a tenancy of an individual dwelling. Put simply, on this hypothesis it is difficult to see how the machinery of nomination in the Nomination Rights Deed could actually work, as against the freehold owner of a dwelling or as against the tenant of an individual dwelling.

96. The statutory context at the time of the Bexley Agreements seems to me to be important in this part of the analysis. At the time when the Bexley Agreements were entered into, the parties, who were professionally represented, can be taken to have known of the restriction on disposals on the Property or any part of the Property contained in Section 133 of the HA 1988. Indeed, clause 5 of the 1998 Transfer was based on that restriction. In my view, and applying the guidance provided by the authorities on the extent of the knowledge of the parties which can be taken into account in the construction of a contract, the parties can also be taken to have known that the consent of the Secretary of State was only likely to be available in cases of severe financial difficulty; see paragraph 2d of Annex IV to the Guidelines, and see also paragraph 8.7 of the Guidelines. Further or alternatively, and in case I am wrong to focus only on the Guidelines, it seems reasonable to assume that the parties can be taken to have known that the consent of the Secretary of State was likely to be difficult to obtain, in the absence of exceptional circumstances.

97. On the basis set out in my previous paragraph, it also seems reasonable to assume that the parties would have envisaged that disposals of individual dwellings were unlikely to take place. What was more likely was an amalgamation or transfer of engagements pursuant to the provisions of the 1965 Act, or some similar type of transaction, in which case Clause 6.1 was available to ensure that the amalgamated entity or transferee entity provided the undertaking to observe the Claimant's nomination rights under the Nomination Rights Deed, in respect of the transferred housing stock. This, again,

suggests that the words *"or any other transaction"* at (1) were intended to be limited to transactions of the same type as mergers, amalgamations and transfers of engagements.

98. It seems to me to be beside the point that, as I understand the position, the obligations of L&QHA in the Nomination Rights Deed would have transferred in any event in the case of an amalgamation or transfer pursuant to the provisions of the 1965 Act. Clause 6.1 was available to make sure that this was made express on this type of transaction, whether or not statute provided for the same result.

99. This leads into a further point made by Mr Hutchings, which I indicated that I would come back to, and which it is convenient to deal with in this context. So far as the undertaking in Clause 6.1 is concerned, it is an undertaking to comply *"with the burden of all relevant covenants and obligations herein contained which pass to that third party"*. In the case of a transaction, such as a transfer of engagements, where the burden of such covenants and obligations passed by statute, this makes sense, for the reason set out in my previous paragraph. Clause 6.1 required the transferee of the burden of the covenants and obligations to give a direct undertaking to the Claimant to observe those covenants and obligations. As I have said, it seems to me to be beside the point whether this was strictly necessary.

100. The reference to *"all relevant covenants and obligations herein contained which pass to that third party"* seems to me to make much less sense if one is considering a sale of an individual dwelling to a private purchaser. In this latter case the burden of the positive obligations of L&QHA in the Nomination Rights Deed would not normally pass to the purchaser; see *Rhone v Stephens* [1994] 2 AC 310. This in turn would suggest that the transactions referred to in (1) were not intended to extend to a transaction such as the sale of an individual dwelling to a private purchaser. Indeed, it seemed to me that the Claimant's arguments did not really engage with this difficulty in its case. If this particular point is pursued to its logical conclusion, it is not easy to see what advantage would accrue to the Claimant, if it could require the Defendant to procure the undertaking on a sale of an individual dwelling, out of the Property, to a private purchaser. On that hypothesis, the undertaking to be procured from the purchaser would be an undertaking to comply with the burden of all relevant covenants and obligations in the Nomination Rights Deed *"which pass to that third party"*. This wording would, it seems to me, exclude from the undertaking positive obligations in the Nomination Rights Deed the burden of which did not otherwise pass to the private purchaser. Given the nature of the obligations imposed upon L&QHA by the Nomination Rights Deed, which include positive obligations, it is not easy to see what use Clause 6.1 would be to the Claimant, in the case of an undertaking procured from a private purchaser of an individual dwelling. This, again, seems to me to militate against giving an open meaning to the words *"any other transaction"*.

101. In addition to these points, I also accept the point made by Mr Hutchings that there was, effectively, an additional contractual restriction on disposals out of the Property within the Bexley Agreements. Clause 2 of the Nomination Rights Deed provided that the Claimant's rights of nomination extended to 75% of the True Voids, as defined in the Nomination Rights Deed. One of the other Bexley Agreements was the Temporary Accommodation Deed. The Temporary Accommodation Deed conferred rights of nomination upon the Claimant, in exchange for a fee, in respect of 15% of True Voids. Although it is asserted in paragraph 81 of the Defence that the Temporary

Accommodation Deed now falls to be treated as rescinded or discharged (a matter which I am not in a position to decide), looking at the position in 1998, I can see Mr Hutchings' point that, in any financial year where the Temporary Accommodation Deed applied, L&QHA was effectively subject to a contractual restriction on disposing of more than 10% of True Voids in that financial year. With this contractual restriction in mind it again seems unlikely that Clause 6.1 was intended to catch any transfer or disposal of the Property or a part thereof.

102. In his submissions Mr Rutledge argued that Clause 6.1 must be capable of applying to a transaction involving a single dwelling. Clause 6.1 refers to the transfer or disposal of the Property or part thereof to a third party. The Property was defined to mean the entirety of the housing stock transferred to L&QHA. As such, and in the absence of limiting words, the reference to part of the Property is capable of applying to any part of the Property, down to an individual dwelling.

103. This in turn paved the way for Mr Rutledge's argument that, if Clause 6.1 is not capable of applying to the sale of individual dwellings, the exceptions in (3) for disposals under the Right to Buy legislation (**"RTB"**) or similar statutory scheme would be redundant. Any exercise of the RTB or similar statutory rights would be an exercise of rights of acquisition by a tenant in relation to a single dwelling. If however Clause 6.1 is not capable of applying to a transaction involving an individual dwelling, these exceptions would be redundant. Mr Rutledge made a similar point in relation to the third exception in (3), where the Claimant's consent is obtained. His point was that consent was irrelevant, by which I understood him to mean not required, in relation to an amalgamation or transfer of engagements.

104. I am not persuaded by these points, which do not seem to me to address the key question raised by the Construction Issue. I can accept that Clause 6.1 is capable, in theory, of applying to an individual dwelling. The reference to the Property or part thereof seems to me to be capable of embracing an individual dwelling. Indeed, it seems to me that the Defendant's argument does not necessarily require, at least in theory, that transactions involving individual dwellings are treated as falling outside Clause 6.1.

105. The key question is what is meant by the reference to *"or any other transaction"* at (1). Such a transaction must be one which causes or requires the transfer or disposal of the Property or part thereof, and such transfer or disposal may, in theory, be a transfer or a disposal involving a single dwelling. This does not however answer the question of what is meant by the reference to *"or any other transaction"*. Any other transaction can, in theory, be a transaction in relation to an individual dwelling, but this does not explain how the transfer, by sale, of an individual dwelling to a private purchaser or the grant of a tenancy of an individual dwelling can legitimately be described as a transaction causing or requiring the transfer or disposal of the relevant dwelling. As I have already noted, in a case of this kind, the transaction does not cause or require the relevant transfer or disposal. The transaction is the relevant transfer or disposal.

106. If however the reference to *"or any other transaction"* is taken to refer to a transaction of the same type or class as a merger, amalgamation or transfer of engagements, the exceptions in (3) make sense. On this hypothesis, as I have explained, there was the possibility of the triggering circumstances in (1) and (2) catching a transaction involving a single dwelling, although it also seems to me that this possibility was theoretical, rather

than real. Nevertheless, and given the existence of this possibility, it is not surprising that the parties thought it wise, at least as a matter of precaution, to except the exercise of RTB and similar statutory rights of acquisition, in order to make it clear that the exercise of these rights was outside Clause 6.1.

107. Similar reasoning seems to me to apply to Mr Rutledge's argument that the exception for the Claimant's consent was redundant. This argument assumes, again, that the parties were aware, when they entered into the Nomination Rights Deed and on the Defendant's construction of Clause 6.1, that there were no circumstances in which the Claimant's consent could ever be required to a transaction. This seems to me to be an unsafe assumption, given that, even on the Defendant's case, the class of transactions caught by Clause 6.1 was not limited to amalgamations and transfers of engagements, but also included other transactions of a similar type. Again, there was the possibility, even if more theoretical than real, of a transaction occurring within the class in respect of which the consent of the Claimant would not be irrelevant.

108. Independent of these points, I would be wary of the argument of redundancy in any event. Even if the Claimant is right, and the exceptions at (3) or one or some of them were genuinely and clearly redundant, I would not be inclined to attach much weight to such redundancy. As I have explained, the argument of redundancy does not address what I have identified above as the key question of construction. Mr Rutledge stressed to me in his oral submissions that the Nomination Rights Deed was not a standard form contract but a professionally drafted and bespoke contract, where one would not expect to find redundant provisions. For the same reason as I have expressed in the first part of this paragraph, I would not have been persuaded by this submission, even if I had been persuaded that the exceptions at (3) or one or some of them were genuinely and clearly redundant.

109. In this context I also note what was said by Leggatt LJ (as he then was) on this question in *Merthyr (South Wales) Ltd v Merthyr Tydfil CBC* [2019] EWCA Civ 526 [2019] JPL 989, at [39]:

> *"39. It is, however, by no means uncommon, including in professionally drafted contracts, to find provisions which are unnecessary and could, without disadvantage to either party, have been omitted. For this reason, arguments from redundancy seldom carry great weight. Many judicial observations to that effect are collected in Sir Kim Lewison's book on The Interpretation of Contracts, 6th edn (2015). para.7.03. For example, in Arbuthnott v Fagan [1996] L.R.L.R. 135; [1995] C.L.C. 1396 at 1404, Hoffmann LJ, discussing a Lloyds' agency agreement, said that "little weight should be given to an argument based on redundancy", as it is "a common consequence of a determination to make sure that one has obliterated the conceptual target". More generally, in Total Transport Corp v Arcadia Petroleum Ltd [1998] 1 Lloyds Rep. 351 at 357; [1998] C.L.C. 90, Staughton LJ, citing two judgments of Devlin J to similar effect, said:*
>
> > *"It is well-established law that the presumption against surplusage is of little value in the interpretation of commercial contracts."*
>
> *Sir Kim Lewison summarises the relevant principle, in terms that I would adopt, as being that "an argument based on surplusage cannot justify the attribution of a meaning that the contract, interpreted as a whole, cannot bear".*"

110. It seems to me that the Claimant's argument based on redundancy is one to which the judicial observations, cited by Leggatt LJ in *Merthyr*, do apply.

111. Mr Hutchings sought to argue that the RTB exception was also redundant on the Claimant's case, because the exercise of RTB is a form of compulsory acquisition initiated by the tenant, which is not capable of constituting a transaction, within the meaning of Clause 6.1, in any event. I am doubtful that this additional point has merit. I do not think that it is necessary to decide the question of whether the reference to a transaction in Clause 6.1 could include a form of compulsory acquisition such as the exercise of RTB. I incline to the view that, in theory, it could. Whether I am right in expressing this view or not, it seems to me that the Claimant's argument based on redundancy lacks weight for the reasons which I have already given, independent of Mr Hutchings' additional argument.

112. Mr Rutledge also supported the Claimant's case on the Construction Issue by reference to what he identified as the factual matrix. In summary, Mr Rutledge's point was that, by the 1998 Transfer, the Claimant was divesting itself of its entire housing stock. While the 1998 Transfer did not transfer the entirety of the Claimant's housing stock, I accept that the 1998 Transfer had this effect, bearing in mind that the remainder of the housing stock was, as I understand the position, transferred to another housing association at or around the same time. Following the 1998 Transfer the Claimant would remain subject to its statutory duty (which Mr Rutledge characterised as an absolute and immediate duty) to provide accommodation to homeless individuals and households. If the pool of housing stock transferred to L&QHA was drained by the sale of individual dwellings to private purchasers, this would reduce the pool of housing stock available for the exercise of the Claimant's rights of nomination, which would in turn be capable of compromising the ability of the Claimant to comply with its statutory duties and would be capable of placing the Claimant under additional financial pressure in sourcing the required accommodation. In these circumstances, so Mr Rutledge submitted, it was entirely reasonable and likely that the Claimant would have wished to retain the control over the Property, including in relation to individual dwellings, which was, on the Claimant's case, provided by Clause 6.1.

113. I note that the statements of case in the action have engaged with the question of whether the sales out of the Property of individual dwellings, which the Defendant has so far made to private purchasers, have had the prejudicial effects alleged by the Claimant. The Defence contends that the Claimant's difficulties with sourcing accommodation have nothing to do with the sale of individual dwellings which have so far taken place. It is not necessary for me to go into this question. The difficulty with the case advanced by the Claimant on the factual matrix to the Bexley Agreements is that this case essentially amounts to a complaint that, as matters have turned out, the Defendant is able to sell, out of the Property, individual dwellings to private purchasers, without being caught by the restriction, such as it may be, in Clause 6.1. With the benefit of hindsight, it may be said that the Claimant should have sought a greater measure of control over the ability of the Defendant to deal with the housing stock in this way. What matters however, as the authorities demonstrate, is how the factual matrix stood at the time of the Bexley Agreements.

114. I have already explained the statutory context, as it was at the time of the Bexley Agreements. Given that statutory context there is no reason to assume that the parties

intended, by Clause 6.1, to confer upon the Claimant the level of control over disposals of the housing stock entailed by the Claimant's construction of Clause 6.1. To the contrary, it seems to me much more likely that the intention of the parties was to ensure that, in cases of merger, amalgamation, transfer of engagements and other similar transactions, the acquiring entity should be required expressly to sign up to the obligations in the Nomination Rights Deed.

115. In this context, the courts have repeatedly made it clear that the process of construction cannot be used to relieve a party from what can, with the benefit of hindsight, be characterised as a bad bargain; see in particular Lord Neuberger in *Arnold v Britton* at [20], and Aikens LJ in *BMA*, at [24], both as quoted earlier in this judgment. In the present case I do not think that it is right to characterise Clause 6.1 as necessarily being a bad bargain for the Claimant, if the Defendant is right on the Construction Issue. I prefer to put the matter this way. In its appeal to the factual matrix, it seems to me that the Claimant is seeking to achieve a level of control over disposals of the Property and parts of the Property which, it can be seen with the benefit of hindsight, may be of some advantage of the Claimant. Viewing the factual matrix as it was at the time of the Bexley Agreements, and looking at the language of Clause 6.1, there is no reason to think that the parties intended the Claimant to have this advantage when they entered into the Nomination Rights Deed.

116. Also in this context, it seems to me that there is some significance in a point made by Mr Hutchings in his oral submissions. Mr Hutchings drew my attention to a deed of covenant between L&QHA and the Claimant, which constituted one of the Bexley Agreements. This deed of covenant was entered into pursuant to clause 15 of the STA, in the form contained in the Sixth Schedule to the STA. This deed of covenant contained various covenants given by L&QHA, as set out in a schedule to the deed of covenant. These covenants included covenants requiring L&QHA effectively to recycle the proceeds of sales of parts of the Property into the Property or to apply the same within the Borough of Bexley. There is specific reference to the sale of Dwellings within these covenants. These covenants do not seem to me to be consistent with the argument that Clause 6.1 was intended to give the Claimant the measure of control over sales of individual dwellings out of the Property contended for by the Claimant on its construction of Clause 6.1.

117. There is one other point which, it seems to me, needs to be dealt with in the context of considering what was and was not in the contemplation of the parties at the time when they entered into the Nomination Rights Deed. If, as is common ground, the reference to *"merger amalgamation transfer of engagements"* constituted a particular class of transactions, it may be said that a question arises as to what the parties had in mind, in their reference to *"or any other transaction"*, if this was a reference to any other transaction of a similar kind to the preceding class of transactions. In his skeleton argument Mr Hutchings did give an example of such a transaction, namely a compromise or arrangement sanctioned by order of the court under what was then Section 427 of the Companies Act 1985, in the event that L&QHA had converted itself into a registered company pursuant to the provisions of the 1965 Act. The important point in this context seems to me to be this. Mr Hutchings' argument was that the reference to *"or any other transaction"* was a classic sweeping up provision. On this basis these words were put into (1) by the parties in order to ensure that any other transactions similar to mergers amalgamations and transfers of engagements were caught by Clause 6.1. In my view,

and for the reasons which I have set out in my analysis of Clause 6.1, Mr Hutchings was right to describe these words as a sweeping up provision. As such, it does not seem to me that the Defendant's arguments on the Construction Issue require the identification of a specific example of a transaction falling within the sweeping up provision. Nor is it necessary to demonstrate a specific example of a transaction or specific examples of transactions which the parties could have had in mind in the sweeping up provision. What matters is that the parties were using the words *"or any other transaction"* to ensure that transactions similar to those captured by the words *"merger amalgamation transfer of engagements"* were captured within the class.

118. Mr Rutledge also sought to support the Claimant's case on the basis of business common sense. It seems to me however that business common sense points strongly against the Claimant's case, for the reasons which I have already set out in my analysis of the Construction Issue. I do not need to repeat those reasons. The essential point seems to me to be that, if the Claimant is right, the restriction imposed by Clause 6.1 and the obligation to procure the undertaking to comply with the terms of the Nomination Rights Deed (to the extent specified in Clause 6.1) apply to any sale of an individual dwelling and to the grant of a tenancy of an individual dwelling, including the grant of an assured tenancy pursuant to a nomination made by the Claimant under the terms of the Nomination Rights Deed. This construction of Clause 6.1 seems to me contrary to business common sense.

119. Drawing together all of the above analysis, and returning to the specific question raised by the Construction Issue, namely the meaning of the reference to *"or any other transaction"* at (1), I can summarise my analysis in the following terms.

120. Taken in isolation, the words *"or any other transaction"* could be said to extend to any transfer or disposal of a part of the Property, including the sale of an individual dwelling to a private purchaser. It seems clear to me however that these words have a much more restricted meaning, for two related reasons.

121. First, it seems to me that this is a case where it is appropriate to apply the Same Class Principle. As I have noted, it is common ground that *"merger amalgamation transfer of engagements"* constitute a class or type of transaction. This class or type is clearly not wide enough to encompass sales of individual dwellings to private purchasers. The question then becomes whether this class has a limiting effect upon the reference to *"or any other transaction"*. In my view it does. It seems to me that the reasoning of Henderson LJ in *Burrows Investment* and the reasoning of Falk LJ in *89 Holland Park*, both of which I have quoted above, apply by analogy in the present case. It seems clear to me that the words *"or any other transaction"* have to be read in the light of and subject to the class of transactions which precede them at (1). As I have said, I accept the submission of Mr Hutchings that these words constitute a sweeping up provision, as opposed to the introduction of a new class of transactions. It is clear that the Same Class Principle is a flexible aid to construction, which does not necessarily apply simply because one has limited words of description followed by a general word of description. In the present case however, and based on my analysis of Clause 6.1 above, it seems to me that this is a case where it is appropriate to apply the Same Class Principle, so as to give a limited meaning to the words *"or any other transaction"*. Putting the matter another way, and again based on my analysis above, I can see nothing to displace the application of the Same Class Principle in the present case.

122. Second, it seems to me that the same conclusion can be reached without it being strictly necessary to rely upon the application of the Same Class Principle. As a matter of textual analysis and contextual analysis it seems to me to be clear, for the reasons which I have set out in my analysis above, that the words *"or any other transaction"* are limited in their meaning, and do not extend to sales of individual dwellings to private purchasers. While I rely on the entirety of my analysis above for this conclusion, the point I would particularly highlight is that the words *"or any other transaction"* do not appear in isolation. They have to be read as part of Clause 6.1 and, more widely, as part of the Nomination Rights Deed. The Nomination Rights Deed must, in turn, be read as part of the suite of agreements entered into by the parties in 1998, which I am referring to as the Bexley Agreements. The words *"or any other transaction"* have therefore to be read with the words which precede and follow these words in Clause 6.1. In particular, *"any other transaction"* cannot be any transaction. It must be a transaction which *"would cause or require the transfer or disposal of the Property or part thereof to a third party"*. For the reasons which I have explained, it seems to me an unnatural use of language to describe the sale of an individual dwelling to a private purchaser as falling within this category of transaction.

123. I therefore conclude that Clause 6.1 does not apply to sales, out of the Property, of individual dwellings by the Defendant to private purchasers. The types of transaction which engage the restriction in Clause 6.1 do not include such sales.

<u>The Construction Issue – conclusions</u>

124. For the reasons set out in my analysis of the Construction Issue, I conclude that the Defendant is correct on the Construction Issue. Specifically, my conclusions are as follows:
    (1) The words *"or any other transaction"* in Clause 6.1 are limited in their meaning. They refer only to transactions of the same class or category as those encompassed by the words *"any merger amalgamation transfer of engagements"*.
    (2) The words *"or any other transaction"* in Clause 6.1 do not extend to the sale, out of the Property, of an individual dwelling to a private purchaser.
    (3) Accordingly, the restriction on merger, amalgamation, transfer of engagements or any other transaction in Clause 6.1 does not apply to the sale, out of the Property, of an individual dwelling to a private purchaser.
    (4) As such, the Defendant is not required to procure the undertaking referred to in Clause 6.1 on the sale, out of the Property, of an individual dwelling to a private purchaser.

<u>The outcome of the Application</u>

125. The outcome of the Application is that the Defendant succeeds on the Construction Issue. The Defendant is entitled to a declaration which reflects my conclusions on the Construction Issue. Following circulation of this judgment in draft form for corrections, the parties have helpfully agreed, subject to one area of dispute, a form of order to be made consequential upon this judgment. I have resolved the area of dispute, for reasons communicated separately to the parties. Subject to that resolution, and subject to some other revisions which I have made to the draft form of order, I will make an order in the terms of the draft order.