Case No: C10CL211

IN THE COUNTY COURT AT CENTRAL LONDON
CHANCERY BUSINESS

Before:

MR RECORDER MORGAN

- -

Between:

FRANCIA PROPERTIES LIMITED — **Claimant**

- and –

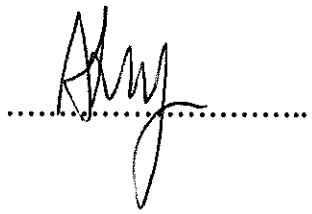
(1) ARISTOS ARISTOU — **Defendants**
(2) ROBERT KINGSTON AND ALISON CAMERON
(3) SARAH BARTON
(4) ELAINE McCORMACK
(5) SONIA CAMPBELL
(6) JENNY DUNCAN
(7) RICHARD EVERETT
(8) SUSAN SUMA AND NABIE SUMA
(9) OPTIC RTM COMPANY LIMITED

Michael Walsh (acting by way of Direct Access Instruction) for the Claimant
Jonathan Upton (instructed by Judge & Priestley LLP Solicitors) for the 8th and 9th Defendants

Hearing dates: 3rd and 4th August 2016

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.



MR RECORDER MORGAN:

INTRODUCTION

1. This is my judgment on the trial of a Part 8 claim by which the Claimant seeks a declaration that it is entitled to develop a new flat on the roof space of a building known as The Optic, 2A Rochelle Close, London SW11 2RX ("the Building").

2. That relief is opposed by the Eighth Defendant, Mr and Mrs Suma, who are the lessees of Flat 8 in the Building and which, as matters presently stand, is on the top floor. It is also opposed by the Ninth Defendant, Optic RTM Company Ltd ("the Company") which is the managing agent of the Building.

3. I am grateful to both Counsel for their detailed and well-presented written and oral arguments in a case which puts into sharp focus the conflict between the rights of a landlord to build on his own property, the rights of a tenant to quiet enjoyment and the rights of a right to manage ("RTM") company acquired pursuant to the *Commonhold and Leasehold Reform Act 2002* ("the 2002 Act"). In respect of the conflict between the landlord and the RTM company there is no direct (and little by way of indirect) authority on the point.

4. The value of the ability of the Claimant to build on the Building has not been quantified in the evidence before me, but it is unlikely that it would wish to do so unless it would make a profit from so doing. The rights of the tenant and the Company are not readily capable of monetary quantification, but it was evident from the demeanour of Mr and Mrs Suma in court that this case involves an issue that is very personal to them.

THE FACTS

5. The Building is a purpose-built block of eight flats constructed in around 2003. With one important caveat, the leases are in similar terms to that for Flat 8, which is dated 8th October 2003 ("the Lease"). It was for a term of 125 years and was made between (1) Shirebrook Properties Ltd, (2) Optic Management Company Ltd and (3) Mr and Mrs Suma.

6. Plan B to the Lease identifies that Flat 8 includes within it a private roof terrace with a balcony edge ("the Terrace"). This may be seen in the photograph at page 35A in the bundle. It is a fat L-shape of sufficient size to accommodate a round table with four chairs, pot plants around the edge and to leave residual space which could be used for a variety of purposes, including congregation of a number of adults or for the drying of washing. Importantly, the Terrace is orientated towards the northeast meaning it does not receive the same amount of sunlight that a south or west facing terrace would do.

7. On 14th August 2014, the Company acquired the right to manage the Building pursuant to the 2002 Act, which it has done through its appointed agents.

8. The roof of the Building is retained by the Claimant, which is now the freeholder and landlord. In around February 2015, planning permission was granted for a one storey, two bedroom flat on the roof of the Building ("New Flat"). It appears from the plans at page 20 in the bundle that a new staircase will be erected adjoining Flat 8 so as to lead up to the New Flat.

9. On being notified of these plans, Mr and Mrs Suma objected and instructed their current solicitors who now also represent the Company. Mr and Mrs Suma are in a different position from the other leaseholders (the First to Seventh Defendants) in that they have the benefit of the Terrace. They say that the New Flat will significantly restrict the sunlight to it.

10. Correspondence was exchanged but, in the absence of agreement, the Claimant issued these proceedings on 5th August 2015. The other Defendants have taken no active part in the proceedings.

THE EVIDENCE

11. The Claimant relied on a short statement from its company secretary, Martin Clitheroe. Mrs Suma provided a statement in response, as did Robert Kingston on behalf of the Company. The parties also jointly instructed an expert, Richard Staig, in relation to the expected loss of direct sunlight on the Terrace if the New Flat were constructed. No cross-examination took place as the parties agreed that the matter could be dealt with on the basis of submissions.

THE ISSUES

12. The issues between the parties may be formulated as follows:
    i) Whether paragraph 4.1 of the Fifth Schedule to the Lease precludes the Claimant from altering, developing or building upon the Building;
    ii) Whether the construction of the New Flat would amount to a breach of the covenant for quiet enjoyment and/or derogation from grant by reason of restricting the amount of direct sunlight received by the Terrace;
    iii) Whether the construction of the New Flat would unlawfully interfere with the management functions exercisable by the Company;
    iv) What relief, if any, should the Claimant be granted.

13. I should note that, although initially pursued in correspondence, Mr and Mrs Suma no longer argue that there is a letting scheme in relation to the Building so that there was an implied covenant that no additional units would be constructed.

14. Further, this case is not about the right to light in the sense of one capable of forming an easement. The Lease contains no express grant of such rights to the Flat or any part thereof and the Building was constructed insufficiently long ago for any rights to have arisen by reason of prescription. No such rights could arise in relation to the Terrace (which is open land) in any event.

ISSUE 1: CONSTRUCTION OF PARAGRAPH 4.1

The Law

15. Mr Walsh referred me to the oft-cited principles as set out in *Investors Compensation Scheme v West Bromwich Building Society* [1998] 1 WLR 896, which I shall not repeat here. Mr Upton directed me to the helpful summary in *Marley v Rawlings* [2014] UKSC 2; [2015] AC 129, where at [19] Lord Neuberger PSC said:

> "*When interpreting a contract the court is concerned to find the intention of the party or parties and it does this by identifying the meaning of the relevant words (a) in the light of (i) the natural and ordinary meaning of those words (ii) the overall purpose of the document (iii) any other provisions of the document (iv) the facts known or assumed by the parties at the time that the document was executed (v) common sense but (b) ignoring subjective evidence of any parties' intentions.*"

16. He also referred to *The Interpretation of Contracts*, Sir Kim Lewison, 5th Ed, Ch 7, Section 3 in support of the proposition, which I accept, that in construing a contract all parts of it must be given effect where possible, and no part of it should be treated as inoperative or surplus.

17. To these I would add only the seven principles as to construction set out by Lord Neuberger in *Arnold v Britton* [2015] AC 1619 at [17]-[23]. Of particular relevance to a commercial instrument is his first principle that:

> "*...the reliance placed in some cases on commercial common sense and surrounding circumstances (eg 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.*"

The Provisions

18. By clause 1.1(c) of the Lease, "the Development" means "*the land known for development purposes as The Optic, 2a Rochelle Close, Battersea SW11 2RX and described in the First Schedule hereto*".

19. The First Schedule describes the Development as "*ALL THAT land comprised in the Landlord's Title Numbers with any buildings or structures erected thereon...together also with any adjoining land that may be added thereto*

within the Perpetuity Period together also with any buildings or structures erected or to be erected thereon or on some part thereof".

20. By clause 1.2(d) of the Lease, "the Building" means "*the building known as THE OPTIC and shown on Plan A comprising several apartments of which the Demised Premises [the Flat] forms part and all structural parts thereof including the roof gutters rainwater pipes foundations floors all walls bounding individual apartments therein and all external parts of the building...*"

21. So the Building was part of the Development but the two were not coterminous.

22. By clause 2 of the Lease, the Flat was demised subject to the lessor's rights set out in the Fifth Schedule. Paragraph 4 of that Schedule reserved (emphasis added):

> "*The right for the Landlord at any time or times hereafter without obtaining the consent of or paying compensation to the Tenant:*
> *4.1 To build or rebuild or alter permit or suffer to be built or rebuilt or altered any buildings or erections upon the Development* ***(other than the Building)*** *according to such plans and to such height extent or otherwise and in such manner as the Landlord shall reasonably think fit notwithstanding that such buildings as so built rebuilt or altered may obstruct any lights windows or other openings in or on the Demised Premises [the Flat].*"

23. I note that clause 6.7 of the Lease provides that, in similar terms to the above, the parties agree and declare:

> "*That the Tenant shall not be entitled to any right of access or light or air to the Demised Premises (except those expressly hereby granted) which would restrict or interfere with the free use of land adjoining or neighbouring the Development belonging to the Landlord for building or any other purpose*".

Submissions and Discussion

24. Mr Upton focused his submissions on the words in parenthesis in paragraph 4.1 to argue that no building, rebuilding or alteration work was permitted upon the Building. Looking at the ordinary meaning of the words used in paragraph 4.1, there are at least three possibilities as to what was intended:
    i) That no building, rebuilding or alteration work was permitted upon the Building at all;
    ii) That such work was permitted upon the Building only if it did not obstruct any lights, windows or other openings in or on the Flat;
    iii) That it was no more than confirmation that paragraph 4.1 was not intended to have any application to such work upon the Building and that the relevant rights and obligations of the parties were to be governed by other provisions within the Lease and/or the general law.

25. In my judgment, the starting point is to consider the rights of the Claimant to build, rebuild or alter buildings or erections upon the Building and the Development in the absence of paragraph 4.1. The position as regards the Building is as set out by Bernard Livesey QC in *Hannon v 169 Queen's Gate Ltd* [2000] 1 EGLR 40 at [6]:

> "*In determining this case it is necessary to start from the proposition that prima facie a landlord is entitled to use its retained property as it pleases, even where that will be detrimental to the interest of his lessee... The claimant has not sought to contradict, limit or distinguish this proposition. Since it is accepted that the defendant's retained property includes the roof space and roof surface, it will have a prima facie entitlement to pursue the proposed development as planned. A lessee will generally be able to prevent a landlord acting in pursuance of such entitlement only where there is some express or implied covenant in the lease which will enable him to so do...*"

26. It was common ground that the roof is part of the Claimant's retained parts and is specifically excluded from the demised premises. Therefore, absent an express or implied prohibition, the Claimant is entitled to develop the roof of the Building. The point is *a fortiori* in relation to (1) such parts of the Development as exclude the Building or (2) other adjoining land owned by the Claimant. They are not part of the structure in which the Flat is contained.

27. Accordingly, paragraph 4.1 of the Fifth Schedule (and for that matter, clause 6.7) is not required in order to permit *per se* building, rebuilding or alteration upon property retained by the Claimant. The key words in paragraph 4.1 are those starting with "*notwithstanding that such buildings...*" and following. On the face of it, the commercial purpose of the clause, which is fairly standard in leases, is therefore to act as a consent under s.3 of the *Prescription Act 1832* and thereby prevent the tenant acquiring the right to light over the adjoining land of his own landlord, which would (or might) prevent the landlord from developing such land: see Nugee J in *Century Projects Ltd v Almacantar (Centre Point) Ltd* [2014] EWHC 394 (Ch) at [34]. As Mr Walsh submitted, the provision is permissive rather than prohibitory.

28. On that footing, at least in relation to the Development Land, the clause operates to extend or at least protect the Claimant's rights. That is consistent with the fact that it appears within the Fifth Schedule which is headed "*Rights to which the Demised Premises are subject*". Further, the primary purpose therefore has nothing to do with the right of the Claimant to develop or alter the very building in which the Flat is situated.

29. Set in that context, it is difficult to construe paragraph 4.1 as simultaneously extending the landlord's building rights beyond those provided by the general law in relation to the Development, but eliminating or restricting such rights in relation to the Building. My initial impression is that much clearer words would be required entirely to oust the landlord's ordinary right to carry out building work on its own property, the Building (i.e. option (i)).

30. But the other possible interpretations are not without difficulty. Option (ii) poses the potential issue as to why the parties thereby intended that the landlord could build in a less restrictive manner upon land forming part of the Development than upon the Building itself. Option (iii) raises the point that it may be said to render the words in parenthesis as superfluous.

31. In my judgment, the position of paragraph 4.1 within the (permissive) Fifth Schedule, the brief and ambiguous reference to the Building in parenthesis, and the fact that clear words would be required to establish that a landlord has given up or altered his (potentially very valuable) building rights under the general law, leads me to conclude that option (i) is not the correct interpretation of paragraph 4.1. Those points also lead me to the same conclusion in relation to option (ii). On that interpretation, the landlord apparently could not build so as to "*obstruct any lights windows or other opening*", regardless of whether (1) there was an express or implied right of light and (2) the degree of obstruction. This is a different proposition from his rights under the general law as qualified by the broad concepts of quiet enjoyment and non-derogation from grant.

32. In my judgment, the words in parenthesis were included to make it clear that the provision had no operation in relation to the Building. On a narrow basis, that was not a superfluous provision because otherwise the reference to the Development would almost certainly have included the Building, the latter being part of the former by virtue the terms of the First Schedule. But it may still be asked why the landlord (and by extension, the parties) would wish to treat the Building differently from the remainder of the Development.

33. There are at least two possible answers to this. The first is that, in reality, the Building was not being treated differently. The structure of the Building is such that the only realistic place for any additional dwellings was on top of Flat 8 and that position was very unlikely to interfere with the light received into Flat 8 itself (as opposed to on the Terrace) and therefore which might be the subject of an easement. This is to be contrasted with the construction of a building on adjoining land, which could readily directly interfere with the light received into Flat 8. It was therefore unnecessary to provide for the Building in the terms of paragraph 4.1, particularly when so doing may have adjusted the parties' other rights under the Lease and the general law.

34. Second, in so far as the provisions did produce a different result in relation to the Building, the Lease contains a package of rights and obligations, which may be assumed to reflect a commercial settlement between the parties. By including the words in parenthesis, the parties expressly preserved their positions under the general law. The Lease did not go further in favour of the landlord and provide any express right to build on the Building in terms, such as in the recent case of *Timothy Taylor Ltd v Mayfair House Corporation* [2016] EWHC 1075 (Ch), that qualified the tenant's right to quiet enjoyment and/or to prevent the landlord derogating from grant, such that a balance needs to be struck between the respective interests of the parties. Equally, it did not subject the landlord to potentially more restrictive obligations than under the

general law. The wording used therefore achieved a readily understandable form of bargain.

Conclusion

35. Accordingly, on this issue, I hold that paragraph 4.1 of the Fifth Schedule to the Lease does not prevent the Claimant from building the New Flat (or indeed any structure) upon the Building.

ISSUE 2: QUIET ENJOYMENT

The Provisions

36. Paragraph 2 of the Ninth Schedule to the Lease contains a covenant on the part of the Claimant for quiet enjoyment of the Demised Premises (i.e. the Flat).

37. Clause 1.1(d) of the Lease defines "the Demised Premises" as "*...ALL THAT apartment hereby demised situated on Rochelle Close, Battersea SW11 2RY as described in the Third Schedule.*"

38. The Third Schedule to the Lease provides as follows:

> "*ALL THAT Apartment identified in Clause 1.1 (d) and shown edged red on Plan B including any garden shown edged red on Plan A. TOGETHER WITH (for the purpose of obligation as well as grant)*
> *(a) the doors and windows thereof including the glass but not the external decorative parts thereof*
> *(b) the interior faces of the ceilings up to the underside of the joists slabs or beams to which the same are affixed*
> *(c) the floors down to the upper side of the joists slabs or beams supporting the same*
> *(d) the plaster face of all external and structural walls*
> *(e) internal walls which are not structural and*
> *(f) half of the non structural walls (severed medially) which divide the Demised Premises from adjoining Apartment(s) or the External or Internal Communal Areas and Facilities TOGETHER WITH Service Installations used solely for the purpose of the Demised Premises AND TOGETHER WITH the floor surface only of the balcony (if any) serving the Demised Premises*
>
> *EXCEPTING AND RESERVING from the demise the main structural parts of the Building including the roof foundations and external parts thereof*".

39. Plan A is not relevant to the Flat as it is on the top floor. I have already referred above to the fact that the Terrace is included within the land shown on Plan B as forming part of the Flat.

The Law and Submissions

40. Mr Walsh argued that, if anything, Mr and Mrs Suma's case raised the issue as to whether there had been a derogation from grant. He relied on *Browne v Flower* [1910] 1 Ch 219 where Parker J defined the principle as follows (emphasis added):

> "*The implications usually explained by the maxim that no one can derogate from his grant do not stop short with easements. Under certain circumstances there will be implied on the part of the grantor or lessor obligations which restrict the user of the land retained by him further than can be explained by the implication of any easement known to the law. Thus if the grant or demise be made for a particular purpose the grantor or lessor comes under an obligation not to use the land retained by him in such a way as to render the land granted or demised* ***unfit or materially less fit for the purpose for which the grant or demise was made.***"

41. Mr Upton put his case on the basis of breach of the covenant for quiet enjoyment, but said that this made no material difference. He relied on what Lord Millet said in *Southwark LBC v Mills* [1999] 3 WLR 939 at 23C-H, including that:

> "*Once these artificial restrictions on the operation of the covenant for quiet enjoyment are removed, there seems to be little if any difference between the scope of the covenant and that of the obligation which lies upon any grantor not to derogate from his grant. The principle is the same in each case: a man may not give with one hand and take away with the other...*".

42. He also referred to the observations of Neuberger J (as he then was) in *Platt v London Underground Ltd* [2001] 2 EGLR 121 that (emphasis added):

> "*4. There is a close connection, indeed a very substantial degree of overlap, between the obligation not to derogate from grant, the covenant for quiet enjoyment and a normal implied term in a contract ... In Southwark Borough Council v. Mills (1999) 4 AER 449 at 467F Lord Millett explained that, to a large extent, the covenant for quiet enjoyment and the obligation of a landlord not to derogate from his grant amounted to much the same thing...*
>
> *6. When considering a claim based on derogation from grant, one has to take into account not only the terms of the lease, but also the surrounding circumstances at the date of the grant as known to the parties.*
>
> *7. One test which is often helpful to apply where the act complained of is the landlord's act or omission on adjoining land is whether the act or omission has caused the demised premises to become* ***unfit or substantially less fit for the purpose for which they were let...***"

9. The circumstances as they were at the date of the grant of the lease are very important."

43. So, subject to an important caveat, the parties were essentially agreed as to the correct test to be applied. Neither counsel sought to draw any distinction between the tests of "materially" and "substantially" less fit.

44. The caveat is that Mr Walsh raised preliminary matters to the effect that (1) the Lease did not give any right to "sunlight" and (2) given the terms of the Lease as I have construed them above, there could be no expectation that there would not be a new building above Flat 8 which restricted the amount of sunlight that the Terrace in fact received from time to time. He quoted a further section from Lord Millett's judgment in *Southwark v Mills* at 23H to the effect that both the obligation not to derogate from grant and the covenant for quiet enjoyment have in common "*that the grantor's obligations are confined to the subject matter of the grant*". In short, they do not have the effect of enlarging the rights contained within the lease. I shall deal with these points first.

Mr and Mrs Suma's Rights

45. In relation to point (1), Mr Upton rightly disclaimed any reliance on any "right" to sunlight properly so-called. He argued that the right to quiet enjoyment was capable of protecting aspects of enjoyment of the Flat that were not the subject of express or implied grant by way of formal easement. An example he gave was the ability of a tenant to prevent the landlord altering the property above so as to cause a noise nuisance.

46. He relied in that context on the judgment of Lord Hoffmann in *Southwark LBC v Mills* at 14E-15C, where his Lordship considered the case of *Sampson v Hodson-Pressinger* [1981] 3 All ER 710. In that case the landlord had, after demising a flat to the plaintiff, constructed a tiled terrace and roof garden on the flat above resulting in a noise nuisance below. Eveleigh LJ also held that the landlord was in breach of the covenant for quiet enjoyment. Of this case, Lord Hoffmann said:

> "*At the time when the plaintiff was granted his lease, it must have been contemplated by the parties that the flat upstairs would be used for ordinary residential occupation in accordance with the way it was constructed. It could not therefore have been intended that such use would be a breach of the covenant for quiet enjoyment. It could have amounted to a breach only if the cause of the noise was some act of the landlord or the tenant of flat 7 claiming under him which could not fairly have been within the contemplation of the parties when the plaintiff took his lease. If the terrace had not then been in existence, I can see the argument for saying that the parties could not have contemplated that the plaintiff would have people walking about on his roof. As the building then stood, that may have been an unreasonable use to make of the roof. If people did so regularly, with the authority of the landlord, in such a way as to cause substantial interference with*

his enjoyment of the premises, it could have been a breach of the covenant for quiet enjoyment. And if the landlord adapted the roof to enable his tenant and her guests to walk upon it, he would be obliged to do so in a way which protected the tenant beneath from unreasonable noise. But this argument depends entirely upon the adaptation of the terrace taking place after the grant of the plaintiff's lease. It has no application to the present case in which the premises were in their present condition when the appellants took their tenancies."

47. I accept the analogy with noise is a good one. The Lease does not expressly provide the tenant with a right not to experience excessive noise, but in the type of circumstances described by Lord Hoffmann (and no doubt, others) the tenant may rely on the covenant for quiet enjoyment to protect his position. In argument, I raised with Mr Walsh that there was no express right in the lease (and certainly not one protectable by an easement) for a view from the Terrace or for it to receive fresh air. But he realistically accepted that the actions of the landlord in enveloping the Building and thereby blocking the view and/or fresh air would probably constitute a breach of the covenant. Likewise, in his argument in reply he accepted that the construction of a new building so as to completely eliminate all sunlight from a south-facing terrace would present him with difficulty in arguing that the covenant was not engaged. In my judgment these concessions were appropriately made and they support the conclusion that I reach, namely, that restriction on sunlight is capable of giving rise to breach of the covenant.

48. As to point (2), Mr Walsh's argument derives force from the fact that, as construed, the Lease permits the construction of some form of building above the Flat. Paraphrasing Lord Hoffmann in the passage cited above, he therefore says that the parties could never have contemplated that there would not be a restriction on the sunlight reaching the Terrace. It is right to say that the covenant for quiet enjoyment is prospective in operation, but I reject this argument for the following reasons:

i) As a matter of fact, there is no evidence that a building cannot be built above Flat 8 that does not restrict the sunlight reaching the Terrace. Indeed, Mr Walsh invited me if I was against him on Issue 2 nevertheless to make a declaration on Issue 1 thereby (subject to the other issues) permitting some alternative form of structure to be built;

ii) It therefore does not automatically follow from the terms of the Lease that a new building would inevitably restrict the sunlight reaching the Terrace and therefore this was the necessary contemplation of the parties;

iii) In any event, the passages at [6] and [9] in Neuberger J's judgment in *Platt*, support the conclusion that the court should not confine its inquiry as to the terms of the lease in question, but may have regard to the surrounding circumstances in fact known to the parties at the time of its grant. There is no evidence to indicate that the parties knew a new dwelling would be constructed at all, or in a manner to restrict the sunlight reaching the Terrace;

iv) That approach is also supported by the passage from Lord Hoffmann already cited above. In the case of *Sampson* to which he referred, the lease must have permitted the landlord to construct the terrace thereby allowing people to walk on the plaintiff's roof, but that did not stop the tenant from establishing liability on the part of the landlord on the basis that the noise was not contemplated at the time of grant.

49. Mr Upton said that the correct approach to the potential conflict between the rights under the Lease and the contemplation of the parties was to be found in *Petra Investments Ltd v Jeffrey Rogers plc* [2000] L&TR 45. In that case there was an express reservation for the landlord to build notwithstanding it might interfere with certain rights of the tenant. At 471, Hart J said (emphasis added):

> "*Mr Gaunt QC on behalf of the claimant did not seek to argue that the effect of this reservation was to oust entirely the doctrine of non-derogation from grant. He submitted, however, that the paragraph could be relied upon as indicating various types of activity by the landlord (viz. Alteration of the Building, the letting of any part of the Centre for any purpose, or "otherwise dealing therewith") **which were plainly contemplated as not necessarily being inconsistent with the irreducible minimum implicit in the grant itself**. In broad terms I accept that submission, but I do not find it helpful in identifying what that irreducible minimum was, or what obligations (either positive or negative) are thereby owed by the landlord. If the paragraph is construed as ousting the doctrine in its entirety it is repugnant to the lease and should itself be rejected in its entirety. If it does not, is has itself to read subject to a saving of the irreducible minimum. The most that the clause shows is that not every alteration to the centre, either physical or in terms of its use, was contemplated as being incompatible with the rights expected to be enjoyed by the defendant. That does not, however, take one very far.*"

50. Like Hart J, I accept that the concept of "the irreducible minimum" may provide some assistance in squaring the circle, but it falls a long way short of answering the question as to whether the covenant has in fact been breached. In my judgment, the question of whether or not the clause has been breached (as to which see below) has to be approached on the basis that:

i) It should reasonably have been within the contemplation of the parties that a new building *might* be built in a manner that restricted sunlight;

ii) There is a real difficulty in identifying the irreducible minimum of sunlight contemplated as being not necessarily inconsistent with the landlord's right to build a new building;

iii) This is not a case where there is a right to build that expressly qualifies the covenant of quiet enjoyment and therefore the court is required to strike a balance between those competing rights (c.f. *Timothy Taylor*).

Alleged Breach

51. It was common ground that whether or not the Flat was rendered "materially" or "substantially" less fit for the purpose for which it was let was a question of fact and degree: per Lord Hoffmann in *Southwark LBC v Mills* at [10].

52. In addition to the points made in paragraph 50 above, the following matters seem to me to be relevant:
    i) The Terrace is part only of the Flat and does not consist of the main living area;
    ii) The Terrace may reasonably be taken to serve a number of purposes including the provision of additional amenity space (including for socialising, cultivating pot plants and drying laundry), a view and access to fresh air;
    iii) Accordingly, whilst the enjoyment of sunshine may be part of the purpose of the Terrace, I reject Mr Upton's written submission that this is "*the particular purpose, if not the principal purpose*" of a roof terrace in central London;
    iv) That is particular so where (a) as here, the Terrace faces in a north-east direction and cannot properly be described as a "suntrap" and (b) even in the absence of direct sunlight, benefit can be obtained from light and fresh air;
    v) Whilst, as Mr Upton submitted, the amount of sunlight that a roof terrace receives *may* influence the value of the demised premises that will depend on the circumstances and in the present case there is no evidence as to the effect (if any) that the building of the New Flat will have on the value of Flat 8.

53. Turning to the expert evidence that we do have, Mr Staig carried out measurements of the direct sunlight received by the Terrace on an hour-by-hour basis on 21st March (spring equinox) and 21st June (midsummer) on the basis of (1) its existing state and (2) if the New Flat is constructed. In a letter dated 10th May 2016 he clarified that the March results would show the same length of shadows as on 21st September (autumn equinox) and that the length of shadow would increase between midsummer and the equinoxes. He did not explain or show diagrammatically how they would progress month-by-month.

54. On the basis of his measurements he produced shadow / sun drawings. The March drawings at pages 129-130 in the bundle show that, even on the current configuration of the Building, the Terrace receives little direct sunlight during the day. The New Flat would reduce the modest levels of direct sunlight received between 10-11am and eliminate what little direct sunlight was received at the edges of the Terrace between 12-3pm. Realistically, Mr Upton did not press March as being the strong point of his case, but rather June and the summer months. In reality, I am therefore concerned with the effect for around three months of the year.

55. In relation to June, the drawings at pages 132-133 show that the New Flat would make limited difference to the levels of direct sunlight received between 8am and 11am. The more noticeable effect was between 12 and 1pm

when what was at or approaching 50% of direct sunlight was reduced to a much smaller area; and between 2-3pm when a corner of the Terrace would more or less cease to receive direct sunlight. After this time, the New Flat would make little difference to the little direct sunlight was received.

56. In my judgment, taking into account this evidence and the points I have already made in paragraphs 50 and 52 above, I do not consider that building of the New Flat would render the Flat substantially or materially less fit for the purpose for which the grant or demise was made. It will have an effect on the amenity afforded to the demised premises, but in my judgment this has a limited qualitative and quantitative effect on the use of the Terrace and the Flat as a whole. It cannot be said that the increased shadowing is beyond that contemplated by the parties at the time of grant or, so far as helpful, that it reduces the rights of Mr and Mrs Suma to below the irreducible minimum.

Conclusion

57. Accordingly, I hold that the building of the New Flat in accordance with the existing planning permission would not constitute a breach by the Claimant of the covenant for quiet enjoyment or constitute a derogation from grant by reason of the restriction on sunlight received by the Terrace. I necessarily leave open the question of whether the building of the New Flat could so interfere with other aspects of Mr and Mrs Suma's occupation so as to give rise to alternative claims.

ISSUE 3: INTERFERENCE WITH MANAGEMENT FUNCTION

The Legislation

58. The 2002 Act is part of a sequence of legislation intended to remedy the problems experienced by the holders of long leasehold interests in flats. Most relevantly, prior to the 2002 Act, Parliament had enacted the *Leasehold Reform, Housing and Urban Development Act 1993* ("1993 Act"). This provided leaseholders with the right to acquire either the whole premises or a new lease. Importantly, in either event, a fair price was required to be paid to the landlord by way of compensation for his property rights.

59. Chapter 1 of Part 2 of the 2002 Act makes provision for the acquisition of the right to manage a self-contained building or part of a building without having to prove shortcomings on the part of the landlord and without payment of compensation. It was not intended to replace rights under the 1993 Act, but rather to provide an alternative option for leaseholders who are dissatisfied with the management of the building. The overall scheme of the legislation was set out by Gloster LJ in *Ninety Broomfield Road RTM Co Ltd v Triplerose Ltd* [2016] 1 WLR 275 at [22]-[33] and I do not repeat all of those matters in this judgment.

60. The "right to manage" is granted to a company (referred to as a RTM company) which may "*acquire and exercise those rights*": s.72. An RTM company must be a private company limited by guarantee and where its

articles of association state that its object, or one of its objects, is the "*acquisition and exercise of the right to manage the premises*": s.73(2). Persons who are entitled to be members are qualifying tenants of flats contained in the premises and, from the date the RTM acquires the right to manage, landlords under leases of the whole or any party of the premises: s.74(1).

61. For present purposes, the most important sections are section 96 and 97, which relevantly provide as follows:

> "***96. Management functions under leases***
> *(1) This section and section 97 apply in relation to management functions relating to the whole or any part of the premises.*
> *(2) Management functions which a person who is landlord under a lease of the whole or any part of the premises has under the lease are instead functions of the RTM company.*
> *(3) And where a person is party to a lease of the whole or any part of the premises otherwise than as landlord or tenant, management functions of his under the lease are also instead functions of the RTM company.*
> *(4) Accordingly, any provisions of the lease making provision about the relationship of—*
> *(a) a person who is landlord under the lease, and*
> *(b) a person who is party to the lease otherwise than as landlord or tenant,*
> *in relation to such functions do not have effect.*
> *(5) "Management functions" are functions with respect to services, repairs, maintenance, improvements, insurance and management.*
> *(6) But this section does not apply in relation to—*
> *(a) functions with respect to a matter concerning only a part of the premises consisting of a flat or other unit not held under a lease by a qualifying tenant, or*
> (b) *functions relating to re-entry or forfeiture.*
>
> ***97. Management functions: supplementary***
> *(1) Any obligation owed by the RTM company by virtue of section 96 to a tenant under a lease of the whole or any part of the premises is also owed to each person who is landlord under the lease.*
> *(2) A person who is—*
> *(a) landlord under a lease of the whole or any part of the premises,*
> *(b) party to such a lease otherwise than as landlord or tenant, or*
> *(c) a manager appointed under Part 2 of the 1987 Act to act in relation to the premises, or any premises containing or contained in the premises,*
> *is not entitled to do anything which the RTM company is required or empowered to do under the lease by virtue of section 96, except in accordance with an agreement made by him and the RTM company.*
> *(3) But subsection (2) does not prevent any person from insuring the whole or any part of the premises at his own expense.*
> *(4) So far as any function of a tenant under a lease of the whole or any part of the premises—*

(a) relates to the exercise of any function under the lease which is a function of the RTM company by virtue of section 96, and

(b) is exercisable in relation to a person who is landlord under the lease or party to the lease otherwise than as landlord or tenant,

it is instead exercisable in relation to the RTM company.

(5) *But subsection (4) does not require or permit the payment to the RTM company of so much of any service charges payable by a tenant under a lease of the whole or any part of the premises as is required to meet costs incurred before the right to manage was acquired by the RTM company in connection with matters for which the service charges are payable.*"

62. Accordingly, "management functions" of the landlord and any management company are instead functions of the RTM company: ss.96(2), (3). Importantly, the landlord and any management company is not entitled to do anything that the RTM company is required or empowered to do (save for insuring the building at the landlord's own expense) otherwise than pursuant to an agreement with the RTM company: s.96(4) and s.97(2), (3).

63. I agree with Mr Upton that the reference in s.97(2) to "empowered" means that "management functions" is wider than merely "obligations" or "duties" and includes "powers". It was common ground that the definition of "management functions" in s.96(5) is problematic, referring as it does to various aspects including "management".

64. I agree with Mr Upton that, on the face of it, the legislation gives the RTM company control over the relevant parts of the building.

65. It is clear that the provisions effect a transfer of rights and duties that are contained in the lease, but do not modify them or create new ones: per George Bartlett QC in *Wilson v Lesley Place (RTM) Company Ltd* [2010] UKUT 342 (LC); [2011] L&TR 11 at [13]. They also do not interfere with certain property rights of the landlord, including the right to ground rent and premiums on extension or enfranchisement as well as those specified in s.96(6), namely, all those relating to a flat not held under a lease by a qualifying tenant (e.g. commercial premises) or those relating to re-entry or forfeiture. In my judgment it must also include the right to grant a new lease (which is not a management function) following forfeiture or otherwise and I reject Mr Upton's submission to the contrary.

66. This scheme allows qualifying leaseholders to take over management of their own blocks through the instrumentation of RTM companies; the purpose of the legislation was not intended to allow anyone else to do so: per Gloster LJ in *Ninety Broomfield* at [35] and [44].

Construction of 2002 Act

67. It will be immediately apparent that this scheme creates a potential issue in respect of the proposed building of the New Flat on the roof. There was no dispute that the roof forms part of the Building for which the Company now

has "management functions" pursuant to the 2002 Act – see clause 5 of, together with the Sixth and Tenth Schedules to, the Lease. The Company's obligations include keeping the roof in good repair.

68. (There was debate as to whether its functions extended to the space above the roof required for maintenance. The decision of Warren J in *Dartmouth Court Blackheath Ltd v Berisworth Ltd* [2008] EWHC 350 (Ch); [2008] P&CR 3 would suggest that it does, but the resolution of this issue is not critical to the result and I therefore make no findings as to this point.)

69. On the other hand, as construed, the Lease gives the Claimant the right to build the New Flat. The method of construction of the New Flat will involve removing the current roof on the Building (with suitable protection during the works), constructing the New Flat and then fitting a new roof at a higher level than is currently the case. It is obvious, and Mr Walsh did not dispute, that (1) during the period of construction the Company's management of the roof would suffer a degree of interference and (2) the landlord (rather than the Company) was determining the size and method of construction of the new roof (albeit it was said that the Claimant was willing to provide undertakings that it would be in substantially the same form as the existing roof).

70. In opposition to the claim, Mr Upton put forward eleven reasons why the Claimant was not permitted to construct the New Flat. For convenience, I annexe those submissions to this judgment. I shall deal with some of them individually below, but it is not necessary to deal with each and every one because the broad thrust of his submissions, from which he did not shirk, was that s.97(2) imposed an absolute prohibition on any landlord from developing any part of a building in respect of which an RTM company exercised its function. In other words, the effect of the 2002 Act is to trump the aspects of the landlord's proprietary rights associated with development of the building.

71. If correct this would, as Mr Upton accepted, have a dramatic effect on the ability of landlords to develop their own property. Moreover, the acquisition of the right to manage by an RTM company is in many cases (including the present) very likely to cause a significant diminution in value of the property. A landlord has property worth £1m, but then obtains planning permission for development on the roof with the result it is worth £1.5m. He may sell the freehold on the open market for £1.5m. If the tenants then wish to enfranchise then they will have to pay a price that reflects the increase in value. But if, prior to either of those events, an RTM company acquires the right to manage the building including the roof, then the development cannot happen, the landlord will not receive compensation and he will thereby suffer a substantial financial loss.

72. The other extreme position is that the right to build trumps all aspects of the RTM's right to manage. This was not contended for by Mr Walsh. An example which indicates the problems with such a position is where the RTM company had placed bins or decided to place bins on an open part of land as part of a necessary management decision to provide proper waste facilities for the premises. Leaving aside any easement the tenants might have for storage, a

decision by the landlord to place a new building on the open land could well frustrate the proper exercise of the functions of the RTM company.

73. What Mr Walsh argued for was a more nuanced approach, but based on the fundamental premise that the 2002 Act was not intended to take away property rights of the landlord. In this respect he referred me to the same pre-legislation materials that Gloster LJ referred to (having already made her decision without reference to the same) at [55] in her judgment in *Ninety Broomfield.* Mr Upton objected to this approach, but in my judgment I am entitled to have regard to the same because the words in s.97(2) are ambiguous as to (1) their effect on the landlord's property rights in relation to building and (2) how the court is to reconcile the tension between the respective rights when one may interfere with the other.

74. At page 116 of the Commonhold and Leasehold Reform Bill and Consultation Paper there is a section headed "*OVERALL OBJECTIVE OF PROPOSALS*". It states:

> "*10. The main objective is to grant residential long leaseholders of flats the right to take over the management of their building collectively without having either to prove fault on the part of the landlord or to pay any compensation...The allocation of responsibilities should be clear-cut, and the body through which the leaseholders take on management responsibility should enjoy all necessary powers to properly discharge its functions. At the same time, the legitimate interest of the landlord in the property should be properly recognised and safeguarded.*
>
> *11. Except where specifically provided to the contrary, RTM is not intended to override any aspect of the lease, other than to transfer relevant functions or responsibilities to the managing body. Nor should RTM affect ownership of any interest in the building...*"

75. These passages provide support for Mr Walsh's argument. There is little indication from the materials before me that Parliament intended to provide a mechanism whereby a landlord's property rights were to be compromised in the manner contended for by Mr Upton, particularly in the absence of compensation. Moreover, the law of landlord and tenant is not a stranger to balancing competing rights and in other contexts, the courts have rejected an absolutist approach to such conflicts – see for example *Timothy Taylor* (especially at [19] and the citation from Nugee J in *Century Projects Ltd*).

76. Returning to the words of s.97(2), whilst the prohibition is wide, it is not part of the function of the RTM in this case (or generally) to construct new dwellings. In those circumstances, what the Claimant is proposing to do is not *per se* something the Company is "*required or empowered to do under the lease*". What the Company is required or empowered to do is to manage the roof. True it is that this management will be affected during and by the

building work, but that in my judgment is not expressly prohibited by the Act. Further, the Company can continue to exercise management function in relation to the roof by, for example, applying to court for an injunction in the event that the development results in an ingress of the elements through the roof.

77. My provisional view is that the tension is to be reconciled by permitting a landlord to carry out development works providing it has taken all reasonable steps to minimise the disturbance to the management functions of the RTM both during and after the works.

78. The fact that the development works may alter the size and scope of a building and therefore the responsibilities of an RTM does not seem to me to be an absolute bar, although it will clearly be relevant to the reasonableness of the works. As noted above, s.96(6)(a) excludes commercial premises from the responsibilities of the RTM. What if the commercial tenant defaults, the landlord evicts and then converts the (possibly large) premises into a residential unit? This would alter the responsibilities of the RTM in potentially a significant manner, but that appears to be contemplated by the legislation.

79. There may come a point when the development scheme is so significant in its effects on the RTM that it cannot be said that the landlord has taken all reasonable steps. For example, the replacement of a pitched roof with a flat roof that is likely to cost enormous sums to maintain. Likewise, the example discussed above in relation to the provision of bins. But that would have to be resolved on a case-by-case basis.

80. In my judgment, I am not precluded from reaching the above provisional conclusions by the decision of the Adjudicator to HM Land Registry in the case of *Kintyre Ltd v Romeomarch Property Management Ltd*, 31st October 2005 (unreported). That was a case under the 1993 Act where it was held that the landlord could not grant a lease of the roof to a third party thereby depriving the tenants from being able to manage it following enfranchisement. There are passages within the decision that support Mr Upton's arguments – see in particular [24(2)] where it was said that "*In particular, I find it impossible to see how there can be proper management of the roof space by the management company when Kintyre is building flats on it or placing mobile telephone masts on it*" (and see also [24(4)]). But, aside from the fact that it is at best persuasive, I agree with Mr Walsh that it is distinguishable by reason of the different scheme of the 1993 Act (including the payment of compensation). It is also distinguishable on the facts of the present case where it is proposed the (new) roof will be restored to the management of the Company whereas in the *Kintyre* case the roof was permanently removed from the control of the tenants.

European Convention on Human Rights

81. I have referred above to my provisional conclusions because Mr Walsh bolstered his argument by reference to Article 1, Protocol 1 of the *European*

Convention on Human Rights, incorporated directly into English law by reason of the *Human Rights Act 1998*. It provides:

> "*(1) Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.*
> *(2) The preceding provisions shall not, however, in any way impair the right of a state to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.*"

82. Section 3(1) of the *Human Rights Act 1998* provides: "*So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.*"

83. In *Thomas v Bridgend County Borough Council* [2011] EWCA Civ 862; [2012] QB 512, Carnwath LJ noted at [30] that the ECHR had interpreted the protocol as involving "three distinct rules": the peaceful enjoyment of property; deprivation of possessions subject to certain conditions; and that states are entitled to control the use of property in accordance with the general interest. By reference to ECHR authority he held at [31] that:

> "*First, the three rules are not "distinct in the sense of being unconnected"; the second and third rules are to be "construed in the light of the general principle enunciated in the first rule". Secondly, although not spelt out in the wording of the article, claims under any of the three rules need to be examined under four heads: (i) whether there was an interference with the peaceful enjoyment of "possessions"; (ii) whether the interference was "in the general interest"; (iii) whether the interference was "provided for by law"; and (iv) proportionality of the interference.*"

84. In relation to head (i), Carnwath LJ (with whom Hedley J and Mummery LJ agreed) held that it was not necessary to prove that the interference was unlawful and that interference could be shown by evidence that the value of property was substantially diminished. It is not enough to show mere interference with the enjoyment of property. See in particular at [34] to [48].

85. Mr Walsh argued that a blanket ban on landlord development constituted an interference with the peaceful enjoyment of possessions by reason of prevention of the exercise of property rights coupled with a diminution in the value of the property. A difficulty arises in that the Claimant did not put in any evidence on this point in relation to the value of the freehold of the Building. In brief written submissions after the conclusion of oral argument, Mr Walsh sought to persuade me to admit a document showing the price that a party was willing to pay for a licence to develop the roof of the Building. But this came too late to be fairly admitted in evidence and, as Mr Upton said, it did not consist of expert evidence required to prove the diminution in value. I think it

would be dangerous to assume any particular diminution in value in this case by reason of the loss of the right to build.

86. But there will clearly be cases, as postulated above, where the landlord will suffer a significant diminution in value. Mr Upton advanced his arguments on the facts of this case but, as noted above, also on the footing that the 2002 Act had the universal effect of causing the RTM's rights to trump those of the landlord. It therefore seems to me to be legitimate to test that construction against the protocol in circumstances where the landlord has suffered a significant diminution in value. In that event, it seems to me that head (i) would be satisfied.

87. I accept that the 2002 Act makes provisions "in the general interest" (see above) and that the interference is "provided for by law". The issue that then arises is whether the interference is proportionate: does it strike the requisite fair balance between the demands of the general interest of the public and the requirements of the protection of the individual's fundamental rights, or whether it imposes a disproportionate and excessive burden on them – see Carnwath LJ at [49].

88. This is a difficult issue and is not a matter on which I have received any detailed argument (the *Thomas* decision was identified as being relevant after the conclusion of oral argument) and therefore my conclusions must be expressed in tentative terms.

89. If Mr Walsh's submissions are correct as to the construction of the 2002 Act then there may be no interference at all (because there is no substantial diminution in value), but even if there is it is improbable (although not impossible) that the interference would be regarded as disproportionate because the respective rights are being balanced in a careful manner. But if Mr Upton's submissions are correct, then it is to my mind highly likely that there will be cases where the financial effect on the landlord is very large, but the effect on the RTM's management function slight, such that the interference will – in the absence of compensation - be regarded as disproportionate (*c.f. James v United Kingdom* 9 EHRR 123).

90. In those circumstances, a court would be obliged to read the legislation so far as possible in a manner which is compatible with the Convention rights. In my judgment, the 2002 Act can be read in such a manner, namely, as I have set out in the previous section of this judgment. Accordingly, as the legislation can only have one meaning, the impact of the protocol is such as to reinforce my provisional conclusions above, namely, that Mr Upton's blanket approach is not the correct one.

91. I make no decision as to whether or not, if Mr Upton's construction were in fact correct, this would constitute a breach of the Claimant's rights under the protocol in the present case. That is not a question that I consider can be answered on the evidence before me.

Conclusions

92. I therefore conclude that, on a proper interpretation of the 2002 Act, the appointment of the Company as the RTM company for the Building does not, of itself, prevent the Claimant from building the New Flat on the roof. But the Claimant's right is not untrammelled and it is required to take all reasonable steps to minimise the disturbance to the management functions of the RTM both during and after the works.

93. There are a plethora of potential issues that arise as to the method and mode of construction of the New Flat, the materials to be used, the terms of the grant of any development / new lease and no doubt many others as well going to the reasonableness of the Claimant's works. It is undesirable (if not to say, impossible) for the court to give any further guidance as to these matters at this stage and how they may impact on the balancing exercise between the respective rights.

ISSUE 4: DISCRETION

94. Mr Upton very properly referred me to *Rolls-Royce plc v Unite the Union* [2009] EWCA Civ 387; [2001] 1 WLR 318 and *CIP Property (AIPT) Ltd v Transport for London* [2012] EWHC 259 (Ch) as to the limits on the court's discretionary power to grant declaratory relief. I will not lengthen this judgment by setting out the principles, but I have borne them closely in mind throughout this judgment. Mr Upton suggested that the declaration sought by the Claimant is too broad and would not bring finality to the dispute.

95. In my judgment, the three issues (and sub-issues) that I have dealt with above constitute real and present disputes between the parties who will be directly affected by the court's determination. Each party has been ably represented by counsel who have advanced their arguments in detail. Granting declarations in appropriate terms in relation to those issues will significantly narrow the issues between the parties. I cannot identify another means of resolving the issues raised and were I to decline to give any declaratory relief this would mean than the costs of this trial would have been wasted (albeit likely to be borne by the Claimant).

96. I agree with Mr Upton that the declaration sought by the Claimant is too broad, but relief can be fashioned in the terms of my conclusions set out above as to which I will hear further argument from counsel.

THE RESULT

97. I will give declaratory relief to the Claimant to reflect my conclusions above in a form to be agreed between counsel or, in default of agreement, determined by me.

Dated this 4th day of August 2016

Annexe: Section of Mr Upton's Submissions

1. First, Optic RTM Co would not be able to manage part of the premises during any building works.

2. Second, the proposed development would destroy (or, more neutrally) alter a part of the premises the maintenance of which is the responsibility of Optic RTM Co. Put another way, the proposed development would destroy or alter a part of the Building (which includes the airspace above the roof) that the qualifying tenants have, through Optic RTM Co, the right to manage. Accordingly, the proposed development would plainly interfere with the exercise by Optic RTM Co of its management functions and is not permissible.

3. Support for these two rather obvious propositions can be found in *Kintyre Limited v Romomarch Property Management Limited*, 31 October 2005 (unreported). In that case, a block contained 14 flats. The leases of the flats were in tri-partite form and a ManCo was obliged to keep the roof structure in good and substantial repair. The qualifying tenants claimed the right to collective enfranchisement. The landlord granted a lease of the surface of the flat roof of the block and the structure beneath the surface to a third party, Kintyre, for the purposes of developing flats above the roof. The issue was whether the acquisition (by the nominee purchaser on behalf of the qualifying tenants) of Kintyre's lease was reasonably necessary for the proper management of the common parts: see s.2(2), (3) of the Leasehold Reform Housing and Urban Development Act 1993 ("the 1993 Act"). If it was necessary, the lease was void by virtue of s.19 of the 1993 Act.

4. At para 24(2) the Deputy Adjudicator to HM Land Registry held:
   "[it was] impossible to see how there can be proper management of the roof space by the management company when Kintyre is building flats on it."

5. He continued at para 24(4):
   "I am unable to see how the management company can effectively manage the roof of the block if Kintyre can at any time demolish it, reconstruct it and even take over responsibility for it by reconstructing a dwelling over all or part of it, imposing new liabilities on the management company in respect of a new roof over which it had not control."

6. Third, in many cases, development works carried out by a landlord may significantly change the nature, size, structure and fabric of the premises over which the RTM company has acquired the right to manage. If, contrary to Optic RTM's submissions, such development is permitted, the RTM company would be obliged to maintain a building which may be quite different to that which existed when it acquired the right to manage. In theory, the RTM company would be obliged to manage an entirely new building erected on appurtenant property. The effect would be to impose obligations on the RTM company to manage property which was far more extensive than that which existed on the date of acquisition.

7. Fourth, it is instructive to consider the RTM company's right to manage the appurtenant property. In *Gala Unity Ltd v Ariadne Road RTM Co Ltd* [2012] EWCA Civ 1372; [2013] 1 W.L.R. 988 Sullivan LJ held at [16]:

> "Appurtenances such as gardens and yards are frequently enjoyed by a building, or a part of a building or a flat, in common with other buildings, parts of buildings or flats. In ordinary language, the car parking ports/spaces included in the leases of the flats "belong to" the flats which comprise the self-contained block, whereas the bin area, access road and gardens are "enjoyed with" the flats which comprise the two blocks."

8. He concluded at [17]:

> "... there is no requirement that the appurtenant property should appertain exclusively to the self-contained building which is the subject of the claim to acquire the right to manage."

9. It is submitted that the landlord is plainly not entitled to do or build anything which restricts and/or interferes with the RTM company's right to manage the appurtenant property. By example, a building may have next to it an external area, such as a yard or garden. Any building works on such land carried out by the landlord would prevent the RTM company from exercising its management functions over such premises. Moreover, the RTM company may wish to keep the yard or garden in its present condition. The landlord would not be entitled to erect buildings on such a yard or gardens without the RTM company's agreement.

10. Fifth, as foreshadowed above, many leases provide that the landlord or ManCo may provide such facilities as it considers reasonable and/or in the interests of good estate management. On acquiring the right to manage, an RTM company may wish to build a bin store on the appurtenant property. It may not be able to do so if the landlord erected buildings on the same land. In other words, the erection of buildings by the landlord would fetter the RTM company's ability to exercise it management functions.

11. Sixth, the same conflict arises where the lease allows the landlord and/or ManCo to carry out improvements. The right to carry out improvements may entitle the RTM company, in excising it management functions, to alter or add to the building in a way in which is contrary to the wishes of the landlord. In such circumstances, the RTM company's right to manage "trumps" the landlord.

12. Seventh, it is submitted that the grant of a lease which affects the service charge regime at the premises is a management function exercisable by the RTM company only. Accordingly, even if the landlord were entitled to build additional flats, it would not be entitled to grant leases of such flats.

13. Eighth, if that is wrong, the RTM company would have no say as regards the terms of the new leases granted by a landlord but would nevertheless be responsible for performing the management functions in those leases. The management obligations in the new leases may not be the same as those in the leases of the existing flats. It is conceivable that a landlord may impose more onerous management obligations in the hope of obtaining a higher premium. In

such circumstances, the RTM company's obligations may go far beyond what the RTM company voluntarily accepted to undertake when it acquired the right to manage.

14. Ninth, the service charge payable by the lessees of the new flats may be calculated or apportioned differently to that under the leases of existing flats. The grant of new leases may make it necessary for the RTM company to vary the service charge payable by lessees of existing flats. The new leases may not allow the RTM company (exercising the management functions of the landlord or a management company) to vary the service charge payable by the new lessees.

15. Tenth, if a landlord is entitled to carry out development works, alterations to the building may make maintenance more costly: for example, an asphalt roof erected as part of a roof development may need replacing in 25 years whereas the original roof would have lasted 50 years with regular maintenance.

16. Finally, development works carried out by the landlord may increase the RTM company's exposure to liability for failing to comply with any of its obligations (for example, failing to insure the building).