Neutral Citation Number: [2019] EWHC 1301 (Ch)

Case No: 2017-002199

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
PROPERTY PROBATE AND TRUSTS LIST (Ch D)

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 4 June 2019

Before:

HIS HONOUR JUDGE PELLING QC
SITTING AS A JUDGE OF THE HIGH COURT

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Between:

SOPHIE LOUISE HICKS	**Claimant**
- and -	
89 HOLLAND PARK (MANAGEMENT) LIMITED	**Defendant**

- -
- -

Mr Philip Rainey QC and Mr Mark Sefton QC (instructed by **Mishcon de Reya**) for the **Claimant**
Mr Jonathan Karas QC and Ms Stephanie Tozer QC (instructed by **Taylor Wessing LLP**) for the **Defendant**

Hearing dates: 18-22, 25-26 and 28-29 March 2019

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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.

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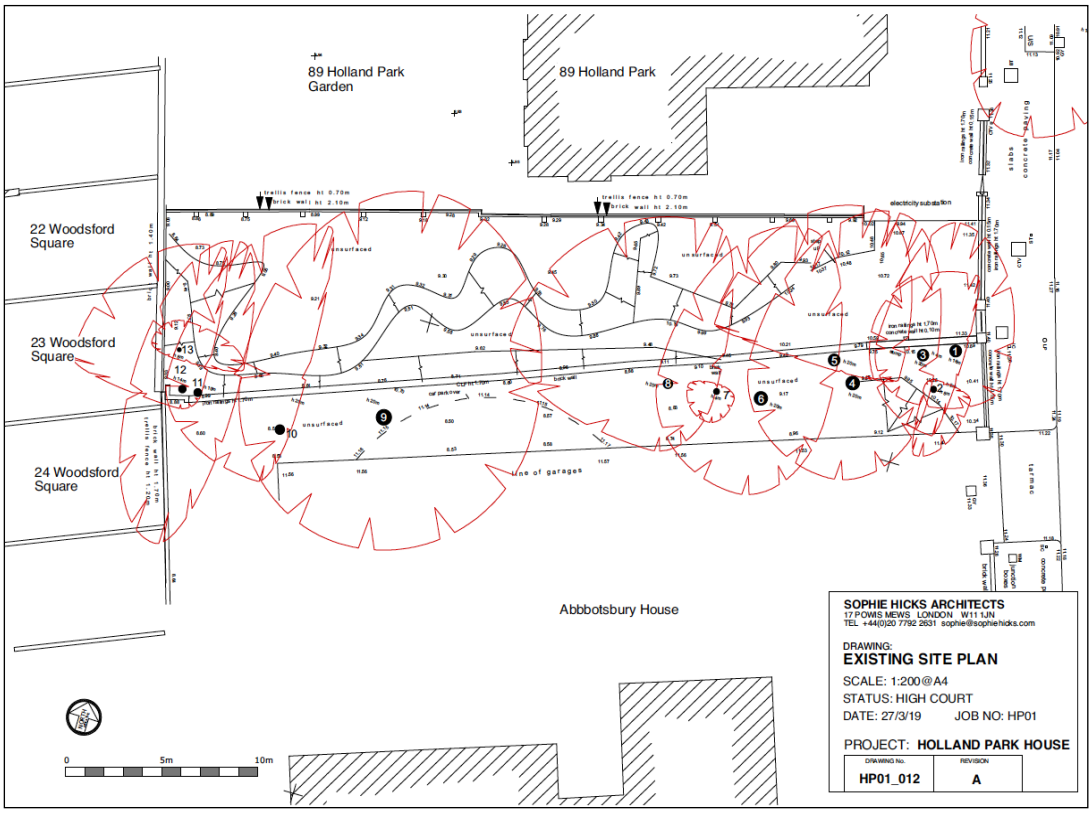
HIS HONOUR JUDGE PELLING QX SITTING AS A JUDGE OF THE HIGH COURT

HH Judge Pelling QC

Introduction

1. The defendant is the owner of the freehold of 89 Holland Park, London W11 ("89HP"), the footprint plan of which is shown hatched in black at the top of the plan set out below ("Plan"). There is an electricity sub-station, demised by the defendant's predecessor in title to the predecessor of London Power Networks Plc located at the southeast corner of the site occupied by 89HP. It is marked "*Electricity Sub-Station*" on the Plan. The buildings to the southwest of 89HP and west of the Site ("Woodsford Square") are houses constructed in the 1970s. The building shown hatched in black at the bottom of the Plan is Abbotsbury House, a 10 storey brown brick clad block of flats built in the 1960s. Abbotsbury House is located about 30 metres to the south of 89 HP. The claimant is the freehold owner of the irregular quadrilaterally shaped site shown on the Plan located immediately to the south of 89HP, to the east of 22 and 23 Woodsford Square and north of Abbotsbury House ("Site").



2. In these proceedings, the claimant, as covenantor under covenants contained in clauses 2(b) and 3 of a Deed made between the predecessors in title of the claimant and defendant dated 10 July 1968 ("the 1968 Deed"), the relevant terms of which are set out in paragraph 7 below, seeks declarations to the effect that the defendant as covenantee has unreasonably refused its approval of her plans drawings or specifications for the redevelopment of the Site under both covenants. The defendant denies that it has unreasonably refused such consent under either covenant and cross claims for its professional costs in evaluating the claimant's redevelopment scheme.

Background

3. 89HP is a large detached Victorian building forming the end of a row of such buildings. It is divided into five flats, each held under a long lease of 999 years duration. The garden to the west and rear of 89HP forms part of the lower ground floor flat lease. Each of the flat's long leaseholders is a shareholder (or in the case of joint long leaseholders are jointly a shareholder) of a share in the defendant. The defendant retains possession of the common parts and external structure of 89HP but is otherwise interested in 89HP only as reversioner.

4. Abbotsbury House dominates the skyline to the south of 89 HP and the Site. As well as being much higher than 89HP, that building extends west beyond the rear building line of 89HP and the buildings similar to it located to the north of 89HP. Its lower stories are partially masked during the summer months by self-sown sycamore trees shown on the Plan marked 1 – 10. Tree 10 plays a relatively minor role in the masking process. Trees 1-10 are located on land forming part of the Abbotsbury House title. During the winter months, when the trees are not in leaf, the masking effect is limited, as was apparent on my view of the Site and 89HP at the start of the trial. Trees 11-13 are also self-sown sycamore trees that perform a similar (and similarly limited) function in relation to Woodsford Square. The current size of the crowns of the trees is shown on the Plan outlined in red.

5. Mr. Marc Jonas ("MJ") is the long lessee of Flat 2, which is the upper ground floor flat. Dr Michael McKie ("MM") and Ms Maria Letemendia ("ML") are the joint lessees of Flat 3 on the first floor of 89 HP. Each of MM, MJ and ML were the directors of the defendant at all times material to this dispute. MJ and ML gave evidence on behalf of the defendant. MM did not. The failure of the defendant to adduce any evidence from MM is criticised by the claimant for reasons that I explain in greater detail below. It is necessary to note at this stage only that the claimant invites me to draw various adverse inferences against the defendant by reason of that failure.

6. Originally, both the Site and 89HP were in common ownership. By 1965, Brigadier W.B. Radford ("BR"), the then freehold owner of 89HP and the Site, had converted 89HP into five flats with caretakers' accommodation in the basement. Each flat was let out on short contractual or statutory tenancies. By a transfer dated 10 December 1965, BR transferred the Site to Ms F.E.D.D. De Froberville ("MDF"). By that transfer ("1965 Transfer") MDF agreed within 2 years to build on the Site a building for which BR had obtained planning permission. MDF did not comply with this obligation and, on 10 July 1968, the obligations created by the 1965 Transfer were varied by the 1968 Deed. The 1968 Deed defined BR as being the "*Adjoining Owner"* and MDF as the "*Building Owner"*. In so far as is material, the 1968 Deed provided that:

> "1. [MDF] hereby covenants with [BR] that she will complete the development of the [Site] … not later than the expiry of 18 months after the date hereof.
>
> 2 (a) In lieu of the drawings referred to in [the 1965 Transfer] [BR] hereby approves the general layout drawing no. 163/13 dated April 1968 prepared by Holmes and Gill.

> (b) [MDF] shall make no applications to the appropriate planning authority nor apply for any other necessary permissions from the local or any other body or authority in respect of any plans drawings or specifications which have not previously been approved by [BR] PROVIDED ALWAYS that if [BR] shall approve the same but [MDF] shall be required to modify or amend the same by the Planning Authority or any other authority or if [MDF] shall herself desire to amend the same then no further application shall be made by her to any such Authority unless the revised or amended drawings and specifications have first been approved by [BR]
>
> 3 No work shall be commenced upon the [Site] before the definitive plans drawings and specifications of the said buildings have first been approved by [BR] or his surveyor."

I refer to the covenants relevant to this dispute (being clauses 2(b) and 3 of the 1968 Deed) collectively as the "*covenants*". I refer to each respectively as "*clause 2(b)*" and "*clause 3*".

7. Although the 1968 Deed was apparently made by BR and MDF personally, it was expressed to be supplemental to the 1965 Transfer (and a Deed made in January 1968 that has not survived and which the claimant and defendant accept is not material to the present dispute). Under the 1965 Transfer, BR was defined as including his successors in title and MDF had expressly entered into the covenants set out in the 1965 Transfer so as to bind the Site and for herself and her successors in title.

8. Various planning permissions were sought and obtained for the Site while it was in the ownership of MDF but in the end nothing was built on the Site, which was sold by MDF to a Ms Lange, who retained the Site without building on it down to the date of her death. The failure of MDF to comply with her covenants led to litigation between BR and MDF – see Radford v. De Froberville [1977] 1 WLR 1262.

9. Following the death of Ms Lange, her personal representatives sold the Site at an auction held on 12 December 2011, attended by MM and ML, at which the claimant was the successful bidder. The claimant completed her purchase on 1 February 2012. It is common ground that the price she paid reflected the development potential of the Site. MM and ML had intended to bid at the auction on behalf of the defendant for the purpose of acquiring the Site for use as a garden for the benefit of 89HP. They were unable to bid for the Site however, because they, their fellow long leaseholders and the defendant did not have sufficient funds available.

10. This dispute is concerned with the effect of clauses 2(b) and 3 of the 1968 Deed and whether, by its letter to the claimant dated 20 January 2017 ("Decision Letter"), the defendant has wrongfully refused approval to the claimant under either or both of those clauses in respect of a proposed development of the Site by the claimant. Each of the covenants imposes a different form of control. It follows that there are three possible outcomes – that the claimant is right in relation to both, the defendant is right in relation to both or each is right in relation to one but not the other covenant.

11. It is unfortunate that relations between the claimant and defendant have been strained from the date when SH acquired the Site. There is no dispute that at that date the leaseholders or most of them were anxious to prevent any proposed development on the Site, which they considered would impact negatively on the five flats at 89HP for most if not all the reasons set out in the Decision Letter. This led to a dispute concerning the enforceability and effect of the covenants. The defendant by its directors considered that it had the benefit of the covenants and that they entitled it to refuse consent in its absolute discretion whereas SH considered that the covenants were not binding upon her but that in any event approval could not be unreasonably withheld under either covenant. This led to litigation ("First Claim") in which the defendant and each of the lessees sought declarations to the general effect that they had the benefit of the covenants and that their effect was to entitle the defendant to refuse consent in its absolute discretion. That claim concluded in a Judgment, the neutral citation for which is [2013] EWHC 391 (Ch), delivered by Mr. Robert Miles QC sitting as a deputy judge of the Chancery Division ("First Judgment"). His conclusion was that both the defendant and the lessees of the flats at 89HP were entitled to the benefit of the covenants contained in the 1968 Deed, which meant that either could seek an injunction restraining any development of the Site by the claimant in breach of either covenant, that the claimant was bound by each of the covenants and that the defendant (but not the lessees) was entitled to withhold consent but could not do so unreasonably. It is unnecessary at this stage that I set out the reasoning that led to these conclusions. There was no appeal from Mr. Miles' order and neither party suggests, or could suggest, in these proceedings that it is wrong.

12. Since she purchased the Site, the claimant has made two planning applications for permission to develop it and three applications for approval under the covenants, two under clause 2(b) and one (that in dispute in these proceedings) under both. Clause 2(b) contemplates that an application for approval under that covenant will be made before any application for planning permission is made. After the commencement of the First Claim, the defendant asked the claimant for an undertaking not to apply for planning permission other than following the consent of the defendant as provided for by Clause 2(b) of the 1968 Deed. The claimant refused to give that undertaking. This resulted in an application in the First Claim for an interim Injunction restraining breach of clause 2(b). That application was compromised on the basis of an undertaking by the claimant to withdraw any application for planning permission if the defendant was successful in the First Claim. The claimant then made her first planning application to the local planning authority, the Council for Royal Borough of Kensington and Chelsea, ("LPA") for a two storey above street-level house with three below street level floors. The LPA refused permission.

13. The major factual dispute between the parties relates to what happened following the hand down of the First Judgment. SH maintains that in reality those who controlled the defendant - MM and actively assisted by ML - were implacably opposed to any development of the Site, whereas the defendant maintains that, as well before as after hand down of the First Judgment, it always approached each application by SH reasonably by taking the relevant professional advice and then acting on the advice received together with their own views as to what in the circumstances they considered was reasonable.

14. Following the First Judgment, on 9 October 2013, the claimant made a second application for approval by the defendant under Clause 2(b) of the 1968 Deed. The structure that she proposed at this stage was significantly smaller than that for which permission had been refused by the LPA. It consisted of a single storey glazed building that constituted the entrance to two floors below street level. The defendant maintains that at this stage it formed a sub-committee consisting of MJ and ML to consider the application in detail. The defendant alleges that this was the mechanism adopted because they perceived that the claimant believed MM was totally opposed to any development of the Site. If that was the reason, the mechanism suffered from two drawbacks – first the creation of the sub-committee (and the reasons for its creation) were not drawn to the claimant's attention by or on behalf of the defendant and, secondly, MM was a director of the defendant and thus was fully entitled to participate in and in fact he participated in all the decision making of its board. The defendant retained the experts that had advised it previously, consulted the leaseholders and ultimately, on 20 November 2013, refused its consent. Meanwhile the claimant had applied for planning permission (her second application) for the scheme the subject of her 2013 application for approval under clause 2(b), having given similar undertakings to those given by her in relation to her first planning application. The LPA refused permission on 16 September 2014, but SH appealed and was successful on appeal when, on 27 October 2015, the Planning Inspector granted full planning permission.

15. Following the refusal by the defendant of the claimant's second application for its approval, on 5 June 2014, SH commenced proceedings against the defendant in which she alleged that the defendant's refusal of approval under clause 2(b) for her October 2013 scheme was unreasonable. In those proceedings, the claimant was ordered to disclose her expert evidence before disclosure and otherwise than on a mutual disclosure basis. There was no appeal from that case management decision. However, the claimant sought an extension of time to comply. She was granted a short extension. However, she did not serve her expert evidence but instead discontinued those proceedings. Although the defendant makes a forensic point concerning the lack of explanation for failing to comply with the disclosure order and for the discontinuance of the proceedings, I do not consider that issue material either to the substantive or credibility issues that arise in these proceedings and I do not need to consider the 2014 proceedings further in this judgment.

16. On 4 November 2016, the claimant applied for approval from the defendant for a revised iteration of her previous proposed development under both covenants. In support of her application she submitted to the defendant the whole of the material that she intended to submit to the LPA when seeking a revision to the permission previously granted by the Inspector for her October 2013 scheme. This material was extensive and extended to some 3 lever arch files of material. The development that the claimant sought approval for from the defendant in November 2016 consists of a single storey entrance pavilion, which is described by the defendant as being a glass cube structure, located at the eastern end of the Site, leading to a sub-terranean structure that covers most of the Site. Natural light is provided by a series of skylights and light wells. The design is uncompromisingly contemporary and it is common ground that it shares "*… none of the design language of the listed buildings of Holland Park …"*. The Planning Inspector who granted Planning Permission described the entrance pavilion as being "*more noticeable at night as a gently glowing*

glass box" that was *"… a somewhat unusual feature*". The scope of the design is shown in plan on the computer-generated representation set out below.

The 2016 scheme differed from that proposed in 2013 by being smaller in overall size, a change from king post to contiguous piling for the construction of the basement, the incorporation of a birch tree to the rear of the Site and some other minor alterations.

17. The defendant refused its approval for that development by its 10-page Decision Letter. ML drafted and signed the Decision Letter on behalf of the defendant. It asserted that in arriving at the decision "*… we have considered the impact on 89 HP as a whole, and on each of the flats in 89 HP. And we have sought the views of all the lessees of the five flats in 89 HP in reaching our decision…"* It refused the application for approval under clause 3 because it considered the material supplied was not definitive as required by that clause.

18. Under the heading "*REASONS FOR REFUSAL*, the letter identified 4 grounds for refusing approval under clause 2(b). They were (1) "*Architectural design, aesthetics and heritage"*, (2) "*Trees*', (3) "*Loss of amenity during the Works"* and (4) *Construction Issues"*. Of the latter the Decision Letter stated that

> "Even if our other concerns outlined above did not exist, we would withhold consent unless and until our engineer's questions had been answered and their concerns had been overcome."

The construction issues and concerns were summarised as being that:

> "… on many points, more information is required which would be of importance in analysing the risks of the development for 89HP, and we consider that much of this information should be provided. There is some confusion about certain aspects, which

> we believe should be clarified. Finally, some of the experts concerns for 89HP seem to be inherent in the design of the basement and the excavation required; and these are most worrying for us."

By a letter dated 17 February 2017, the claimant's solicitors asked that the defendant reconsider its decision but by a letter dated 30 March 2017 the defendant maintained its decision to refuse approval under both covenants.

19. Whilst the grounds on which approval was refused included apparent concerns about the extent of disruption during construction, the impact of the proposed works on the structure of No. 89 and the loss of or damage to, or the risk of loss of or damage to, the trees referred to earlier, it is worth noting that the aesthetics issue was the first ground relied on in the Decision letter. It was also the first ground mentioned on the 30 March letter. Consistent with that is the prominence that aesthetics played in the defendant's opening submissions, where at paras. 10-12, Mr. Karas QC and Ms Tozer QC submitted that:

> 10. We do not all want to live next door to the creative and interesting, or to the unique, or to the contemporary, or to the unconventional, or next to buildings that share none of the design language of the building in which one lives, nor next to gently glowing boxes. The [defendant] (having the leaseholders interests in mind) refused consent for that very reason. The [defendant] objected to a glowing box and innovative semi-terranean building covering literally the entirety of the Site next door to their premises.
>
> 11. It is said by SH (an architect of some renown) that this is unreasonable. While tastes may differ, it really does not stand scrutiny to say that the [defendant's] aesthetic reason for refusal of this application is unreasonable – i.e. that no reasonable neighbour could take the view that they did not want this development next door to them.
>
> 12. That really should be the end of the matter..."

20. The prominence given to this objection suggests that it was the major concern of the decision makers. Whilst the points made in these paragraphs make clear the aesthetic objection in fairly graphic terms, it ignores two points. First, as was the case with the Decision Letter (see paragraph 17 above), it elides the interests of the defendant as freehold owner with those of the long leaseholders. It is not asserted that the aesthetics issue has any impact on the value of the reversion or the defendant's interest in the structure of 89HP. This point applies equally to the defendant's reliance on the risk of damage to or loss of trees (other than in relation to an allegation concerning the risk of damage by heave following damage to or loss of trees) and loss of amenity caused by construction. Secondly, it ignores the context in which such an objection is to be viewed. That context includes that:

i) The Site in its present form is, as Mr. Rainey QC and Mr. Sefton QC put it in para. 26 of their opening submissions, " *... a piece of weed-choked waste*

ground …". As long ago as 1996, the Site was described in a report to the LPA that led to an ultimately abortive compulsory acquisition scheme as having been "*…in a derelict and unkempt state for over 20 years and is an eyesore …*". The only material change was that on 23-24 February 2012 the claimant undertook some ground cover clearance. However, as recently as 10 April 2013, the local authority wrote to the claimant requiring her to tidy up the Site. Following my visit to the Site at the start of the trial, I concluded that notwithstanding the work done in February 2012, the LPA's 1996 description applies with equal force today as it did in 1996;

ii) 89HP is overlooked by (a) Abbotsbury House, a 10 storey brick clad block of flats located about 30 metres from the southern flank of 89HP and (b) to a lesser extent by the Woodsford Square houses; and

iii) As I explain further later in this judgment, from the moment when it was created, the Site was always intended to be developed. It was never intended to be an open space or garden whether for the benefit of 89HP or otherwise.

21. Following the defendant's refusal of permission SH commenced the present proceedings, in which she seeks a declaration that approval has been unreasonably withheld under both covenants. Aside from the major issue concerning refusal, there is a cross claim by the defendant in respect of the professional fees incurred by it in evaluating the applications for permission. I need say nothing more about that at this stage. I return to it at the end of the judgment.

22. The trial took place between 18-22, 25-26 and 28-29 March 2019. I heard evidence from the claimant, MJ and ML and from the parties' respective arboricultural, engineering and heritage and planning experts. I refer to that evidence and the relevant experts as necessary below. At the start of the trial there was a dispute concerning the scope of this trial. The relevant argument is set out at T1/16 – 34. At the time I asked whether the parties required a reasoned judgment for the ruling I gave. Neither party asked for a reasoned judgment at that stage although Mr. Rainey reserved his position until the end of the trial when he asked for a reasoned judgment, which it was agreed I would incorporate into this judgment. Rather than take up space in what will be a lengthy judgment, I have set out my reasons for my conclusions in the Appendix to this Judgment.

The issues

23. The defendant submits that the principal issues between the parties are

i) The true meaning and effect of clauses 2(b) and 3 of the 1968 Deed and

ii) Whether, by its letter to the claimant dated 20 January 2017, the defendant has wrongfully refused approval to the claimant under either or both of the covenants in respect of the proposed development of the Site by the claimant.

In addition, the defendant has a cross claim for the recovery of what it contends to be its reasonable professional costs and expenses in considering the claimant's application for approval under clauses 2(b) and 3 of the 1968 Deed. I do not intend to

say anything more about that part of the claim at this stage. I return to it at the end of the judgment.

24. The claimant agrees with the defendant that it is necessary to determine the scope and effect of clauses 2(b) and 3 of the 1968 Deed. However, the claimant maintains that it is necessary for me to decide what were the true reasons why the defendant refused approval, which will involve an investigation of the process by which the defendant arrived at its decision to refuse permission. This is so because the claimant maintains that the defendant (or more accurately most of the long leaseholders) simply wanted to prevent the Site from being developed in any way and that the defendant has acted arbitrarily, capriciously and/or otherwise than in good faith in refusing approval for that reason or approached the application with a closed mind or with a pre-conceived determination to refuse approval which it is contended would vitiate the decision making of the defendant. In essence, it is submitted that the defendant acting by its directors approached the exercise by looking for reasons to justify a decision that in reality it had taken to refuse any application for approval by the claimant.

Construction of the Covenants

General Principles

25. The parties are agreed that the general principles that apply to the construction of all contractual documentation apply also to the construction of the 1965 Transfer, the 1968 Deed and the covenants. Those principles are well known and are not in dispute. In summary, they are as follows:

    i) The court construes the relevant words of the relevant contract, in its documentary, factual and commercial context, assessed in the light of (i) the natural and ordinary meaning of the contractual provision being construed, (ii) any other relevant provisions of the contract, (iii) the overall purpose of the provision being construed and the contract in which it is contained, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions – see Arnold v. Britton [2015] UKSC 36 [2015] AC 1619 per Lord Neuberger PSC at paragraph 15 and the earlier cases he refers to in that paragraph;

    ii) A court can only consider facts or circumstances known or reasonably available to both parties which existed at the time that the contract was made - see Arnold v. Britton (ibid.) per Lord Neuberger PSC at paragraph 20;

    iii) In arriving at the true meaning and effect of a contract, the departure point in most cases will be the language used by the parties because (a) the parties have control over the language they use in a contract and (b) the parties must have been specifically focussing on the issue covered by the disputed clause or clauses when agreeing the wording of that provision – see Arnold v. Britton (ibid.) per Lord Neuberger PSC at paragraph 17;

    iv) Where the parties have used unambiguous language, the court must apply it – see Rainy Sky SA v. Kookmin Bank [2011] UKSC 50 [2011] 1 WLR 2900 per Lord Clarke JSC at paragraph 23;

v) Where the language used by the parties is unclear the court can properly depart from its natural meaning where the context suggests that an alternative meaning more accurately reflects what a reasonable person with the parties' actual and presumed knowledge would conclude the parties had meant by the language they used but that does not justify the court searching for drafting infelicities in order to facilitate a departure from the natural meaning of the language used – see Arnold v. Britton (ibid.) per Lord Neuberger PSC at paragraph 18;

vi) 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 – see Rainy Sky SA v. Kookmin Bank (ibid.) per Lord Clarke JSC at paragraph 2 - but commercial common sense is relevant only to the extent of how matters would have been perceived by reasonable people in the position of the parties, as at the date that the contract was made – see Arnold v. Britton (ibid.) per Lord Neuberger PSC at paragraph 19;

vii) In striking a balance between the indications given by the language and those arising contextually, the court must consider the quality of drafting of the clause and the agreement in which it appears – see Wood v. Capita Insurance Services Limited [2017] UKSC 24 per Lord Hodge JSC at paragraph 11; and

viii) a court should not 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 because it is not the function of a court when interpreting an agreement to relieve a party from a bad bargain - see Arnold v. Britton (ibid.) per Lord Neuberger PSC at paragraph 20 and Wood v. Capita Insurance Services Limited (ibid.) per Lord Hodge JSC at paragraph 11.

26. All this leads the claimant to submit that the 1968 Deed must be construed as at the date of its execution. I accept that submission. Indeed, I do not understand it to be disputed. Similarly, it is uncontroversial that when construing the covenants both clauses must be read as a whole, together and in the context of the contents of the document containing them again read as a whole.

Relevant Documentary Context

27. The 1965 Transfer imposed on MDF the obligation to build on the Site within 2 years a building for which BR had obtained planning permission. No other construction was permitted unless with the prior approval of BR or his successors – see clause 3(ii) of the 1965 Transfer. MDF did not comply with this obligation and on 10 July 1968, the obligations created by the 1965 Transfer were varied by the 1968 Deed. The 1968 Deed defined BR as being the "*Adjoining Owner"* and MDF as the "*Building Owner"* and obliged MDF to complete development of the Site within 18 months of the completion of the 1968 Deed. Unsurprisingly, given the terms of the 1965 Transfer and the 1968 Deed and the purpose for which the land had been sold to MDF, the Site was called the "*Building Site"* in the 1968 Deed. The default position was that MDF was to construct the building shown on the plan referred to in clause 2(a) of the 1968 Deed unless some other design was approved in accordance with clauses 2(b) and 3 of

the 1968 Deed. Again unsurprisingly, since the drawing referred to in clause 2(a) was a general layout drawing, MDF had to comply with clause 3 before commencing construction. The approval embedded within the 1968 Deed was only one that satisfied the requirements of clause 2(b).

Relevant Factual and Commercial Context

28. In 1964 BR was the freehold owner of 89HP and the Site. He did not live at 89HP at any time that is material. He converted 89HP into five flats, each of which was let out at all times down to the date when the 1968 Deed was entered into on short contractual tenancies of between 4-6 years duration with reservations that permitted development of the Site – see Radford v. De Froberville (ibid.) *per* Oliver J as he then was at 1264 G. Neither party challenges the findings recorded there. BR sold the Site to MDF in 1965 for the purpose of being built on at a price that reflected its value as a development site. I accept the claimant's submission that BR's only interest in 89HP at the time when the 1968 Deed was entered into was in preserving the structure, capital value and revenue generating capacity of his property. I reject the defendant's submission that BR could or should have taken into account the impact of any development on the lessees of the flats. At the date when the 1968 Deed was entered into, the flats were let on short contractual or statutory tenancies. BR was not concerned with the impact of development of the Site on the tenants at 89HP other than to the extent that it might affect the value of his property either as a capital investment or source of income. That much is apparent from the terms of the 1968 Deed, which imposed a positive obligation on the covenantor to develop the Site, and on the fact that he had made his tenants' rights subject to development of the Site. It follows that the covenants were concerned with the protection of BR's property interest in 89HP not the interests of those who were his tenants at the date when the 1968 Deed was entered into.

29. Generally, the sole purpose of a covenant requiring approval by a covenantee is to protect the property interests of the covenantee – see Iqbal v. Thakrar [2004] EWCA Civ 592 *per* Peter Gibson LJ at [26(1)]. If what is proposed has no impact on the covenantee's property interests then it is generally not entitled to refuse consent – see Iqbal v. Thakrar (ibid.) *per* Peter Gibson LJ at [26(2)]. There is nothing within either the language used or the documentary factual or commercial context of this case that suggests that the parties to the 1965 Transfer and the 1968 Deed had any intention other than to protect BR's property interest in 89HP. It follows that the general principle set out in Iqbal v. Thakrar (ibid.) by Peter Gibson LJ at [26(2)] applies to both the covenants in issue in these proceedings.

30. BR's widow sold the flats on long leases between 1988 and 1990, between 20 and 22 years after the 1968 Deed had been entered into. Again this is not in dispute. The defendant was incorporated in 1990 and acquired the freehold of 89HP soon afterwards. In that capacity it owns the common parts and external structure of the building. It is responsible under the terms of the long leases for keeping the parts of the building within its title in good repair and condition, decorated and the windows cleaned. Its ultimate interest is in the reversion expectant on the expiry of the long leases.

31. It is probable and I find that by the date when the 1968 Deed was executed Abbotsbury House had been built – see the claimant's Design and Access Statement, prepared in connection with her 2016 application for approval where, in the section entitled "*History*", she says that planning consent for the construction of a block of 36 flats had been granted in 1949, "*... but were not constructed until the 1960s*". Again, this is not in dispute.

32. As I have said already, the covenants were concerned exclusively with the protection of BR's property interest in 89HP. However, it follows from the contextual material referred to above that "*…the whole purpose of the Agreements was the development of [the Site] by [MDF]. That was why the land was sold to her in the first place. The only purpose for owning the [Site] was to build a house or houses on it. That is reflected too in the fact that in the 1968 Deed [MDF] was described as the Building owner …"* – see paragraph 88 of the First Judgment. It was these circumstances that led Mr. Miles QC to conclude that it would undermine the purpose of the 1968 Deed if it were construed as according to BR an unqualified right to veto any development. I respectfully agree. This is significant. These are not simply negatively phrased covenants that create a presumption against approval being granted. That would defeat the purpose for which the Site had been transferred to MDF by the 1965 Transfer and the variation of the obligations imposed on her by the 1968 Deed. On the contrary, the presumption was that the Site would be developed. It was sold on that basis at a price that reflected the value of the site for redevelopment. The 1965 Transfer and the 1968 Deed imposed a positive obligation on the claimant's predecessor to develop the Site. These conclusions together with the contextual matters referred to earlier lead me to the conclusions I set out below concerning the construction of clause 3 and its interaction with clause 2(b) applying the construction principles set out above.

33. Whilst I accept that construction of the 1968 Deed starts from the point that the underlying purpose of the clauses is to facilitate not impede development, the claimant goes too far when she submits that since clause 2(a) includes express approval of plans for a house it follows that the claimant could, if she obtained planning permission, build that house without further approval. I agree that approval under clause 2(b) would not be required in such circumstances but that much is obvious. Construction could not commence however without approval under clause 3 having been obtained even in respect of a house that came within the scope of the approval contained in clause 2(a) and for which planning permission had been obtained. As Mr Rainey QC submitted when opening the trial on behalf of the claimant, clause 2(b) is concerned with the level of detail necessary for a planning application whereas clause 3 is concerned with the plans drawings and specifications from which the building contractor engaged to construct on the Site would build.

Defendant's Property Interest in 89HP

34. Given my construction of the 1968 Deed set out above, it is necessary to ascertain the nature and extent of the defendant's property interest in 89HP at the date of its decision under challenge in these proceedings – see Cryer v. Scott Brothers (Sunbury) Limited (1988) 55 P & CR 183 *per* Slade LJ at 198 and Waite LJ at 203.

35. By the time when the defendant came to consider the claimant's application for approval, its only relevant interest in 89HP was in the structure of 89HP and the freehold reversion. That is the only interest that the defendant was entitled to consider when deciding whether to grant or refuse approval - see Cryer v. Scott Brothers (Sunbury) Limited (ibid.), where Slade LJ accepted a submission made by counsel for the covenantor that the only circumstances that the covenantee was entitled to take into account in deciding whether to give approval to plans submitted by the covenantor "*... are circumstances relevant to them in their capacity as owners of the land for the benefit of which the covenant is enforceable ...*" and that " *... No other circumstances ... can be invoked to justify a withholding of consent*". As Slade LJ added:

> "The transferors, or their successors in title, are not entitled to withhold their approval from building plans placed before them unless, on reasonable grounds, they consider that the building proposed would be detrimental or injurious to unsold land still remaining in their hands …. The criteria which they apply in deciding whether or not to give such approval must, in my judgment, relate solely to such land …"

- see (1988) 55 P & CR at 197-8. Slade LJ rejected the suggestion that the covenantee was morally obliged to consider the interests of the estate as a whole when addressing the covenantor's application – see (1988) 55 P & CR at 199. As Waite LJ added when concurring, the issue "*... has to be judged within the narrow confines of an enquiry as to what effect the extension would have on the small portions of land still retained in the defendant's ownership."*

36. That being so, I reject the submission made by the defendant that its interest in 89HP was such as to entitle it to prevent works that it reasonably considered detrimental or injurious to the use and enjoyment of 89HP if and to the extent that is contended to go further than Slade LJ's formulation. For similar reasons, I reject the submission made in paragraph 109 of the defendant's closing submissions that the purpose of the covenants was to protect the covenantee from development that "*... might damage the property interests of the owners of ...*" 89HP if by the use of the word "*owners*" it was intended to suggest that the property interests of anyone other than the defendant were relevant.

37. The defendant relies on two authorities that it maintains should lead to a different conclusion. In my judgment neither of these authorities has that effect. My reasons for reaching that conclusion are as follows.

38. The first authority the defendant relies on is Wrotham Park Estate Co. Ltd. v. Parkside Homes Ltd [1974] 1 WLR 798. That case was concerned with a claim by the successors in title to an original covenantee to prevent or reverse construction in breach of a covenant not to develop save in accordance with a layout plan approved by the covenantee. Brightman J as he then was concluded that the covenant was enforceable at the suit of the claimant and then turned to consider the relief that ought to be granted, the claimants having sought a mandatory injunction requiring the occupiers of the properties to acquire other homes within a period of two years using

the proceeds of indemnity assurance. The defendant relies on Brightman J's comment at 809 C-D that:

> "Quite apart from the benefit to the Wrotham Park Estate, the plaintiffs, as I have already said, take the view that they have a moral obligation towards the residents of the building estate to enforce the restrictive covenants as far as they are lawfully entitled to do so. I agree."

The defendant contends that this is authority for the proposition that it has a moral obligation to take account of the interests of the long leaseholders in deciding whether to give its consent under the covenants. In my judgment this approach is mistaken. The defendant's reliance on moral obligation is inconstant with Slade LJ's rejection in Cryer v. Scott Brothers (Sunbury) Limited (ibid.) of the suggestion that the covenantee in that case was morally obliged to consider the interests of the estate as a whole when addressing the covenantors application. The moral obligation being considered in Wrotham Park Estate Co. Ltd. v. Parkside Homes Ltd (ibid.) was to enforce the covenant as far as the claimant company was " … *lawfully entitled to do so*." In other words, the moral obligation impacted on the question whether to bring proceedings to enforce the covenant. That issue does not arise in this case following the First Judgment, where it was held that the long leaseholders were entitled to enforce compliance with the covenants by taking proceedings against the claimant if she failed to comply with it. Brightman J's comment has no relevance at all to deciding the purpose for which the covenant was imposed or to the question whether the claimant is entitled to take account of the wishes of the occupiers when deciding whether to approve a plan submitted for approval under either clause 2(b) or 3 of the 1968 Deed. The answers to those questions depend as I have said on the proper construction of the 1968 Deed and to an understanding of the defendant's property interest in 89HP.

39. The other authority relied on by the defendant in relation to the question I am now considering is Sportoffer Limited v. Erewash Borough Council [1999] 3 EGLR 136, which is relied on as authority for the proposition that a covenantee "… *may take into account property interests even where such property is let …*". Again, in my judgment, reliance on this authority is mistaken. That case was concerned with a tenant's application for a change of use. Lloyd J as he then was concluded that in deciding whether to grant consent, a landlord was entitled to take into account considerations relating to adjoining property it owned even if let. Again there is nothing in this authority that assists in deciding the purpose for which the covenants were imposed in this case or to the question whether the claimant is entitled to take account of the wishes of the occupiers of 89HP when deciding whether to approve a plan submitted for approval under either clause 2(b) or clause 3 of the 1968 Deed. That case was concerned with a landlord's property interest in respect of a neighbouring property that was owned by the landlord but let and is not authority for the proposition that such a landlord is either entitled or obliged to take account of the property or other interests of the tenants to whom the property has been let.

Defendant's Refusal based on Aesthetics, the risk of Damage or Destruction of Trees and Disruption caused by Construction

40. In this case the defendant's property interest lies in the common parts and external structure of 89HP and in the reversion expectant on the coming to an end of the long leases. In my judgment the defendant's property interest in 89HP does not entitle it to refuse approval based on aesthetics, disruption caused by construction or the risk of damage to or destruction of trees, other than to the extent that the risk of such damage or destruction might adversely affect the structure of the building or the value of the defendant's reversion. Refusal on those grounds has nothing to do with protection of the defendant's property interests as I have found them to be. My reasons for reaching those conclusions are as follows.

41. In relation to aesthetics, the defendant relies on the decision of the Court of Appeal in Lambert v. Woolworth & Co Ltd [1938] Ch 883, as supporting its case that there is nothing that prevents the defendant relying on aesthetic considerations. In my judgment that authority does not support such a generally stated proposition. That case was concerned with a different type of covenant (not to carry out improvements to a demised property without the consent of the landlord, such consent not to be unreasonably refused) arising in a different legal context (that of landlord and tenant) and with a covenantee who was an individual not a company. The landlord's property interests in that case were different from those of the defendant in this case.

42. Whilst I accept that it may be unlikely that a company could reasonably refuse approval on aesthetics grounds – see Crest Nicholson v. McAllister [2003] 1 All E.R. 461 at [45] – it is not impossible because, for example, the aesthetics of what is proposed may have an adverse impact on the capital value or revenue yield of a property owned by a corporate covenantee. It all depends on the property interest of the covenantee at the date when the decision is taken. As at the date when approval in this case was refused, the covenant was for the protection of the defendant property interests, not those of the long leaseholders, and whatever the position might have been had approval been sought from BR in the period between 1968 and his death, or from his widow at any time down to the date when the last of the long leases was created, the position so far as the defendant is concerned is that its sole interest is in the external structure and common parts of 89HP and the capital value of the freehold reversion.

43. The defendant's submission that Mr. Miles QC has already decided that the lessees are entitled to the benefit of the covenant is immaterial to the issue I am now considering. As I have said already, Mr. Miles QC decided only that the lessees would be entitled to prevent construction by the claimant by legal action if she failed to obtain approval from the defendant. That is entirely different from the proposition that the defendant is entitled or obliged to refuse approval on aesthetics grounds or because of the risk of loss of or damage to the trees (other than to the extent that their removal might affect the structure of 89HP) or transient disruption caused by construction work because the long leaseholders object on those grounds.

44. There is no evidence that the structure of 89HP or the value of the freehold reversion could be adversely affected in any way by the aesthetics of what is proposed or (subject to one issue concerning the risk of heave to which I refer in more detail later in this judgment) by the loss of or damage to the trees relied on by the defendant or by transient disruption caused by construction work on the Site. In those circumstances, I do not see any need to make any findings in relation to the factual evidence relating to

aesthetics or the tree issue (other than in relation to the heave issue) or the disruptive effect of construction.

45. Before I leave this point I should perhaps say this – this litigation is concerned with private rights and obligations. Nothing that arises has any impact on the public law issues that would arise on a planning application to the LPA or on statutory appeal to a planning inspector. It goes almost without saying that there is nothing to prevent the long leaseholders from objecting to a planning application by the claimant on any of the grounds that I have concluded have nothing to do with the defendant's property interest in 89HP and so are not a reasonable or proper ground for refusing approval under the covenants. Indeed, that point was made on a number of occasions by ML in her correspondence with other long leaseholders and neighbours when the claimant's application for approval for her 2016 scheme was being considered – see by way of example her email dated 2 January 2017 to Ms Watt, one of the long leaseholders at 89HP. In that context objections based on aesthetic considerations set out in the defendant's opening submissions and/or the loss of or damage to trees and/or disruption caused by construction would almost certainly be material considerations although the weight to be attributed to them would be a matter for the LPA or planning Inspector. The approach I have set out above does not leave the long leaseholders without any effective means of objecting to the claimant's proposed development on the grounds I am now considering. Their remedy was to object to the claimant's application for planning consent. In fact those issues have been considered both by the LPA and an Inspector and the outcome was that the Inspector decided to grant planning permission notwithstanding those objections. An attempt to challenge the inspector's decision by statutory appeal to the Planning Court failed at permission stage. However that outcome is immaterial to the issues that arise in these proceedings.

Structural Issues

46. Subject to the Claimant's submission that it was not in truth the or even a reason why approval was withheld, I accept (indeed, Mr. Rainey accepts on behalf of the claimant at paragraph 39 of his closing submissions) that in principle the defendant is fully entitled to take account of the risk of structural damage in arriving at its conclusion as to whether to grant or refuse approval under either covenant. Whether it would be reasonable to refuse approval under clause 3 but not clause 2(b) is a question of fact and degree to which I refer further below.

Scope and Effect of Clause 3

47. Clause 3 requires the provision of "*definitive"* plans drawings and specifications. In this context "*definitive"* means the detailed plans drawings and specifications setting out definitively what the claimant intends to build and how she intends to build it. Although Mr. Rainey submitted that construction method statements are not specifications, I do not agree. It is critical to the protection of the defendant's property interest in 89HP that structural damage to 89HP is avoided. That is the true purpose of the covenants. That does not merely include the impact of what is built on the Site but how it is built. This is most clearly apparent when considering the structural issues relating to movement, which I turn to in detail later in this judgment and is close to

obvious where what is planned is the construction of a deep basement in close proximity to the southerly flank wall of 89HP.

48. I do not accept that whether a plan drawing or specification is definitive is a question of fact. Rather, what the defendant has to consider and either approve or refuse approval for under clause 3 are those plans, drawing and specifications that are submitted for approval under clause 3. However, if she submits a plan drawing or specification to the defendant that she claims to be definitive which contains omissions that reasonably prevent the defendant and its experts from assessing what is to take place and/or the risk posed by what is to take place to the structure of 89HP then she runs the risk that approval of that plan drawing or specification will be reasonably refused. Likewise if such a document contains inconsistencies within it or if it is inconsistent with other documents submitted for clause 3 approval or those submitted for approval and approved under clause 2(b) then that is likely to have the same result unless and until they are resolved subject of course to the requirement for reasonableness.

49. I accept Mr. Rainey's submission that clause 3 does not require a unitary delivery of all definitive plans drawings and specifications necessary to construct what has been planned. Mr. Karas does not dispute that. He accepts that it is not a requirement that all plans drawings and specifications have to be submitted at the same time – see paragraph 72 of his closing submissions. It is likely for example that the definitive plans drawings and specification for the piling work in the basement area will come at a later stage than others as I explain in more detail below. If a particular plan drawing or specification cannot reasonably be considered until the definitive plans drawings and specifications for another element are to hand then that may entitle the defendant to refuse approval until all the plans and specifications relevant to a particular phase are to hand and can be considered. It will depend on the circumstances. However, clause 3 means that construction cannot commence until all the plans drawings and specifications relevant to construction have been approved. If the position were otherwise then clause 3 would be deprived of its practical utility since it could result in a partly constructed building on the Site being abandoned for months while a dispute concerning the approval under clause 3 of the next work stage is approved. I accept Mr. Karas's submission that in this case the defendant was not asked for sequential approval.

50. Identifying the point at which issues relevant under clause 3 are not reasonably relevant under clause 2(b) is a question of fact and degree. In relation to structural issues I consider that there is a distinction to be drawn between a scheme the construction of which the defendant is reasonably advised is likely to cause material damage to the structure of 89HP that cannot be eliminated by detailed engineering design and management – which is likely to be a reasonable basis for refusing approval under clause 2(b) – and a scheme that might result in such damage which can be eliminated by detailed engineering design and management, which is likely to be material only to an application for approval under clause 3. My reasons for reaching this conclusion are those summarised at paragraph 31 above. In testing the reasonableness of a conclusion as to which end of the spectrum any particular structural issue fell it is necessary to apply the principles relating to the assessment of reasonableness referred to in detail below. On the facts of this case, for reasons that I explain below, I consider that Capita, on whose advice the defendant proceeded,

identified a limited number of construction and engineering issues that were capable of justifying reasonable refusal of approval under clause 3 but not under clause 2(b).

51. The claimant relies on the defendant's refusal to accept the 2016 application as an application under clause 3 as providing a decisive answer to its claim in relation to the clause 3 refusal since the claimant's application for approval was expressly made under both covenants and the claimant was fully entitled to make such an application. In my judgment it is apparent from the language of the Decision Letter that the defendant's response was the result of a misunderstanding as to what was meant by the word "*definitive"* in clause 3 and/or because of an erroneous belief that a clause 3 application had to be made separately. If, as I consider was the case, the defendant was reasonably entitled to refuse approval under clause 3 in relation to a limited number of structural issues that were referred to in the Decision Letter and the reports incorporated into it by reference, it would plainly have done so had its directors properly understood clause 3. The same plans drawings and specifications had been submitted for approval under both covenants. The same technical issues arose under each. In those circumstances it would be wrong to conclude that approval had been unreasonably withheld under clause 3 on the broad basis submitted for by the claimant.

General Principles Applicable to this Claim

52. Before turning to the factual issues that arise, it is necessary to set out some general principles applicable to claims by covenantors that approval has been refused on grounds that have nothing to do with the covenantee's property interests or has been unreasonably refused. In summary:

    i) What reasons the defendant had for refusing approval is a question of fact that depends on what was actually in the mind of the decision maker at the time when the refusal decision was taken – see Tollbench Limited v. Plymouth City Council (1988) 55 P & CR 194 *per* May LJ at 200;

    ii) Where the covenantor alleges the covenantee's true reasons were other than those put forward by the covenantee, the legal onus of establishing those allegedly true reasons rests on the covenantor – see Tollbench Limited v. Plymouth City Council (ibid.) *per* May LJ at 200. However as in most other civil claims, the evidential burden rests on the party asserting a positive case to establish that positive case;

    iii) The legal onus of establishing that the covenantee's true reasons were unreasonable rests on the covenantor – see Tollbench Limited v. Plymouth City Council (ibid.) *per* May LJ at 200; and

    iv) The true reasons of the defendant depends on what was in the mind of those who had management and control of the defendant in relation to the act or omission in issue (in this case its directors) – see El Ajou v. Dollar Land Holdings plc. [1994] 2 All ER 685 *per* Nourse LJ at 695G-696D.

53. There is a dispute between the parties as to the correct approach to be adopted in deciding reasonableness. The defendant maintains that the correct approach is that identified in Tollbench Limited v. Plymouth City Council (ibid.) and that the

procedure adopted by the decision maker is immaterial other than to the extent that it is relevant to deciding what the actual reasons for the decision were or the genuineness of those reasons. The defendant maintains that anything in the judgment of Sir Geoffrey Vos CHC in Victory Place Management Company Limited v. Kuehn [2018] EWHC 132 (Ch) [2018] HLR 26 to contrary effect was decided *per incuriam* the decision of the Court of Appeal in Tollbench Limited v. Plymouth City Council (ibid.) and should not be followed. I am not able to accept this submission. My reasons for reaching that conclusion are as follows.

54. As is well known, in the public law arena, decision-making by public bodies and officials can be challenged by reference to the test set out in Associated Provincial Picture Houses limited v. Wednesbury Corporation [1948] 1 KB 223 ("Wednesbury"). There are two limbs to the test – the first focuses on the decision making process and is concerned with whether the decision maker has either taken into account something that ought not to have been or failed to take into account something that ought to have been. The other limb focuses on the decision itself by asking whether the decision reached is one that no reasonable decision maker occupying the position of the maker of the decision under challenge could have reached. In Braganza v. BP Shipping Limited [2015] UKSC 17, it was held that where a term is implied into a contract that requires a decision maker not to act unreasonably in the exercise of a discretion, reasonableness will generally be tested against both elements of the Wednesbury test – see Lady Hale (with whom Lord Kerr agreed) at paragraph 30, Lord Hodge at paragraph 53 and Lord Neuberger at paragraph 103. Victory Place Management Company Limited v. Kuehn (ibid.) was decided after and by reference to Braganza ((ibid.). There is therefore no question of it being decided *per incuriam* the decision of the Court of Appeal in Tollbench Limited v. Plymouth City Council (ibid.). Rather that decision has been overtaken by Braganza (ibid.) and to the extent that it was inconsistent with it, was to be treated as overruled.

55. Victory Place Management Company Limited v. Kuehn (ibid.) was concerned with a covenant in a long lease of a flat that precluded the lessee from keeping animals in the flat without the consent of the management company. Sir Geoffrey emphasised that the implication of terms depends entirely on the circumstances, but that where a term is implied to the effect that a discretion should be exercised reasonably (or a permission or approval not withheld unreasonably), reasonableness in that context "*... involves both a reasonable process and a rational outcome ...*" and that both the process and outcome limbs in Wednesbury were applicable.

56. In this case there is no issue as to what term is to be implied – that has already been decided by Mr. Miles. The only question is as to the effect of that term. Applying Braganza (ibid.) and Victory Place (ibid.) I conclude that the implied term in this case engages both Wednesbury limbs. In consequence if the claimant is able to prove either that the real reason for the decision was a continuing desire to prevent any development on the Site or was otherwise irrational in the Wednesbury sense or that in reaching the decision the defendant took into account something that it ought not to have taken account of or failed to take account of something that it should have taken account of that will vitiate the decision subject to West India Quay point to which I turn below. This approach is relevant when considering submissions on behalf of the claimant to the effect that the material available to the defendant did not justify outright refusal but only a request for additional information or clarification.

57. It follows from what I have said so far that in relying on aesthetics, the effect or possible effect on the trees (other than to the extent relevant to the heave issue) and the disruptive effect of construction, the defendant has relied on facts and matters that it ought not to have taken into account. Both parties are agreed that the impact that has on the defendant's decision to refuse approval is to be resolved applying the principles set out by the Court of Appeal in No. 1 West India Quay (Residential) limited v. East Tower Apartments limited [2018] EWCA Civ 250 [2018] 1 WLR 5682 ("West India Quay"). That case concerned a covenant against assignment in a lease where the landlord had refused consent for three reasons, two of which were good reasons and one of which was bad. The Judge had concluded that the decision was vitiated by reliance on the bad reasons. The Court of Appeal overturned that decision. In that case it was not and could not be argued that the bad reason was the most important reason – see paragraph 34 of Lewison LJ's judgment (with whom the other members of the court agreed). In that case Lewison LJ described the good and bad reasons in paragraph 42 of his judgment as being "*… free standing reasons, each of which had causative effect …"*. Lewison LJ formulated the question to be asked in such situations as being: *"would the landlord still have refused consent on the reasonable grounds if it had not put forward the unreasonable ground?"* If the good reason was no more than a make weight, then the decision would be bad.

58. Mr. Karas submitted that the effect of West India Quay was that where the good reason is free standing and not dependent on the bad reason the decision will still be reasonable – see paragraph 118 of his closing submissions. Mr. Rainey did not dispute that approach – see paragraph 44 of his closing submissions. His point is that reliance on a plethora of bad reasons indicated that none of the reasons relied on (whether or not any might have been good had they been genuinely relied on) were the true reasons. This is a different point. Mr. Rainey did not argue that but for the reliance by the defendant on the aesthetics, trees and disruption reasons, the defendant would not have refused consent by reference to the other reasons on which the defendant relied or, to put it another way, that the construction issues were make weight reasons. His submissions were as I have said first that the true reason for refusing approval was because the long leaseholders were opposed to any form of development on the Site and that if the reasons relied on by the defendant were its genuine reasons for refusing approval they were not reasonably relied on even if in theory they were capable of being good reasons.

59. Given the emphasis placed on the aesthetics and tree issues in the contemporaneous correspondence and on the aesthetics issue in the opening submissions, it might have been, but was not, argued that these were in truth the most important issues relied on and that the remaining issues (structural concerns and transient disruption caused by construction) were in reality make weights. It follows that the claimant does not argue that that if the true reason for refusing approval included the structural issues the decision should nonetheless be held to be unreasonable because the defendant also took into account the aesthetics, trees and loss of amenity caused by construction objections. It further follows that if I reject the claimant's case as to the defendant's true reasons for its decision, it will be necessary for me then to decide whether the defendant acted reasonably in refusing approval under either clause 2(b) and/or could have reasonably have refused approval under clause 3 by reference to the structural issues, including any reliance on heave caused by the removal of or damage to trees.

The True Reasons Issue

60. The claimant's case is that as well after as before the hand down of the First judgment, the defendant by its directors (MM, ML and MJ) were implacably opposed to any form of development of the Site and that before the sale of the Site to the claimant at auction in December 2011, at least MM and ML formulated a strategy that involved purchasing the Site for construction of a communal garden for the benefit of the long leaseholders and for the purpose of adding value to their long leases and in any event to use the mechanism provided by covenants to prevent any development of the Site. The claimant maintains that the strategy did not change after the hand down of the First Judgment. Rather at least MM and ML continued with it and sought to disguise that fact by relying on grounds that might appear objectively justifiable but were in truth no more than pretexts for blocking any form of development of the Site. In advancing this case the onus rests throughout on the claimant to prove it, whilst of course being entitled to do so not merely by direct evidence but also by inference. In my judgment, the claimant has established that MM and ML had adopted the strategy relied on down the date when the First judgment was handed down but has failed to prove that the strategy survived the hand down of the First Judgment. My reasons for reaching those conclusions are as follows.

61. In advancing that case, the claimant maintains that the decision to refuse approval was that of the defendant's board, that MM was a member of the board and as such fully participated in the decision making process. For the detailed factual reasons set out below, I am satisfied that MM played a full part in the decision making of the defendant's board to refuse approval for the claimant's 2016 scheme in the terms set out in the Decision letter. Indeed, that is not seriously in dispute.

62. This leads the claimant to submit that I should draw inferences adverse to the defendant from the failure of the defendant to adduce evidence from MM. The principles that apply to the drawing of inferences in such circumstances are those set out by the Court of Appeal in Wisniewski v. Central Manchester Health Authority [1998] PIQR 324, where at page 340, Brooke LJ summarised the applicable principles as being:

> "(1) In certain circumstances a court may be entitled to draw adverse inferences from the absence or silence of a witness who might be expected to have material evidence to give on an issue in an action.
>
> (2) If a court is willing to draw such inferences, they may go to strengthen the evidence adduced on that issue by the other party or to weaken the evidence, if any, adduced by the party who might reasonably have been expected to call the witness.
>
> (3) There must however be some evidence, however weak, adduced by the former on the matter in question before the court is entitled to draw the desired inference: in other words, there must be a case to answer on that issue.
>
> (4) If the reason for the witness's absence or silence satisfies the court, then no such adverse inference may be drawn. If on

> the other hand there is some credible explanation given, even if it is not wholly satisfactory, the potentially detrimental effect of his/her absence or silence may be reduced or nullified."

It could not be said that this point came as a surprise to the defendant's advisors. The claimant's solicitors informed the defendant's solicitors that this point would be taken in a letter dated as long ago as 22 December 2017.

63. No explanation is offered for MM's absence other than that the decision was the unanimous decision of the board and thus what matters is what the true reasons of the majority were. It is contended that the majority consisted of ML and MJ, each of whom gave evidence. That is not of itself a good answer if in truth MM's role was more dominant than that submission suggests. His physical availability to give evidence is not in doubt. MM and ML live in London, they were both in London during the trial and MM attended at least part of it. ML made clear in the course of her evidence that he was willing to give evidence in contradiction of part of what the claimant had said during her oral evidence – see below. All that said, drawing inferences depends on there being some evidence as to the allegation that it is submitted would be supported by the adverse inference to be drawn from the failure of an available witness to give evidence. That means that I must necessarily postpone reaching a decision concerning the drawing of inferences until I have made findings concerning MM's role and his motivations.

The Position down to the date of the hand down of the First Judgment

64. In my judgment there is no doubt that MM was firmly opposed to any development on the Site at all material times down to the date when the First Judgment was handed down. In September 2011, the personal representatives of Ms Lange offered the Site for sale. MM became aware that the Site was being offered for sale at an auction that was due to take place on 19 September 2011 – see his email to the other long leaseholders dated 5 September 2011, by which he solicited contributions to enable them to purchase the land for conversion into a communal garden.

65. On the day prior to sending this email, MM had written to Druces LLP, the solicitors acting for Ms Lange's personal representative, who was a partner in that firm. In that letter he stated that he was writing to set out "*... the position of the residents of 89 Holland Park....*". He then stated that position to be that "*... we are anxious to prevent any proposed development which might impact negatively upon our block of five flats ...*". He went on to assert that the land could not be developed because the windows established for development by the 1965 Transfer and the 1968 Deed had closed without any development having taken place and that there was a covenant that stated "*... no development can be carried out without the approval of the freeholder of [89HP] (that is us). Hence in any case we can refuse consent for any proposed development.*". By making this comment, it is clear he failed to distinguish between the interests of the long leaseholders on the one hand and the rights of the defendant on the other. He added that the effect of the covenant was to render the land unsuitable for development and that it was "*... disingenuous and irresponsible ...*" for the agents to market the Site as having development potential. The letter concluded with a subject to contract offer to purchase the Site for £300,000. The purpose of this

offer as is apparent from the email of the following day was to purchase the Site and convert it into a communal garden for the benefit of all the long leaseholders.

66. The clear implication of this letter is that any development would be opposed. This is how its recipient understood it – see Druces' letter of 8 September 2011. That much is apparent too from MM's email of 7 September 2011, where he indicated firm opposition to the possible purchase of the Site by the owner of Flat 1 for the purpose of car parking and the construction of an orangery.

67. By 11 September 2011, it had become clear to MM that there was significant interest in the Site from developers. The nature of his objection to development is clear from his email to some but not all of the other long leaseholders dated 11 September 2011, in which he remarked that if the Site was purchased by a developer and such a developer obtained planning consent "*... we are looking at two years of major building works disruption just yards from 89HP and looking out onto some monstrosity of modern eco-building (just the sort of building that is springing up all over London ...*". He added " *… for all the flats with no garden, outside space will put at least a couple of hundred thousand on the value of each flat. We need to re-evaluate what the land is worth to us …"*. This provides the context in which the desire of MM that the land be purchased as a communal garden for 89HP should be viewed.

68. Having taken some legal advice concerning the covenants, on 13 September 2011, MM wrote to Druces stating "*... we have an absolute stop on any development in the form of an enforceable restrictive covenant. And, as the freeholder of 89 Holland Park, we hereby put you on notice of the effect of the said covenant and inform you that no consent for any form of development will be granted…"*. MM added that he expected Druces to alter the Auction legal pack for the Site so as to reflect the existence of the covenants "*... and that the covenant will not be relaxed by the freeholder of 89 Holland* Park". This was combined with a subject to contract ("STC") offer by MM on behalf of the defendant to purchase the Site for £600,000.

69. On the following day, MM wrote to both Ms Freely (Ms Lange's personal representative and the partner at Druces handling the sale of the Site) and Mr. Mooney (the auctioneer at Savills responsible for auctioning the Site) demanding that each state to all prospective purchasers that "*... the covenant will be strictly enforced to prevent any development of the [Site] ...*". When asked about this correspondence ML responded:

> "Q. …The idea here was to deter anyone wanting to develop the site from bidding for it, isn't it?
>
> A. I think there was an element of that, but the main purpose was he believes strongly that the site was being advertised without proper information, which was readily available, on the problems, planning and legal difficulties. So his fear was that the site was -- that the price of the site, the guide price, was being bid up, as it were, because proper information was not available. And I think that the correspondence between Savills

> and Mrs. Freely shows that they were trying to prevent certain information reaching the public.
>
> Q. I see. Again, the difficulty with this, of course, is that it's not simply concerns that the property is being marketed inappropriately or by way of a misrepresentation, he is also trying to persuade Ms Freely to sell the land to the residents of 89 Holland Park?
>
> A. Yes, but he had offered quite a high price, as we saw. We've gone over the 500 that they've received, so we didn't think this was an unfair price that we were offering. What we didn't want was for it to go sky high when I acknowledge we wouldn't then be able to buy it."

70. The 13 September letter is significant in my judgment for three reasons. First, it demonstrates that at that stage those in control of the defendant intended to refuse consent for any form of development for the purpose of sterilising the development potential of the Site and in the hope that ultimately the defendant could acquire it and convert it into a communal garden for the benefit of the long leaseholders. Secondly it is clear from the terms of the letter when read as a whole that the purpose of the uncompromising position adopted by MM was to induce Druces and the vendor to accept the STC offer contained in the letter and, thirdly, it is clear from the letter and the email traffic leading to it that MM was orchestrating the conduct of the defendant in expressing such views with all the other leaseholder directors being content to allow him to do so.

71. This run of correspondence is highly material to an assessment of where the truth lies in relation to the conversation between MM and the claimant at auction which the claimant ultimately purchased the Site, to which I refer below. ML's oral evidence illustrates two points – first the difficulty in attempting to explore the issue I am now considering without the evidence of MM and secondly that whilst ML provided an attractively expressed answer to the questions that she was asked, it is readily apparent from her answer that (a) the idea was to deter developers from bidding and (b) to increase the chances that the offer made by the defendant acting by MM would be accepted. I reject as inherently improbable the suggestion made by ML that MM was in some way motivated by a public interest concern about the manner in which the Site was being marketed. ML's evidence on this issue is relevant to my assessment of her credibility as a witness to which I turn below.

72. Druces responded saying they would obtain counsel's opinion. They obtained an opinion by which they were advised that the covenants were personal to the parties to the 1968 Deed and thus not enforceable by or against those parties' successors in title but in any event would be read subject to a qualification that approval was not to be unreasonably withheld. This opinion was passed to MM who, having noted its contents, wrote to two fellow long leaseholders saying:

> "We are weak legally – Druces have taken counsel's advice. Now it's not about what we can get out of the land. Its about

> stopping development and two years of an adjacent building site."

Plainly this demonstrates that MM's strategy had been to acquire the land for the benefit of the long leaseholders and continued to be to prevent any form of development of the Site. ML's evidence about this email was that even when the defendant's legal position was perceived to be weak the objective remained to stop any development of the Site as this exchange discloses:

> "Q. So at that point, thinking that your position was actually weaker than the deputy judge eventually found it to be, Dr McKie is still making it clear that the point of all this is to stop any development, isn't he?
>
> A. Yes, we wished to buy it to stop development.
>
> Q. And I assume that you shared his view?
>
> A. I think it was quite a wise point of view that we should be prepared to pay more to acquire the land.
>
> Q. To stop any development?
>
> A. Yes, because we believed it to be harmful.
>
> Q. Now, there was then - -
>
> A. Could I also make the point that our understanding of the covenants varied, as you will see, from the correspondence. So - -
>
> Q. Well, it varied as different pieces of advice came in, didn't it?
>
> A. Yes, it did.
>
> Q. That letter was written at a point when you were I suppose at your lowest ebb because there was one advice that had said it couldn't be enforced at all?
>
> A. Yes."

This exchange demonstrates that at that stage ML and MM shared similar views concerning the Site and the strategy to be adopted in relation to it.

73. By an email sent to MM on 15 September 2011, Ms Freely rejected the £600,000 STC offer. MM continued to advocate the uncompromising view set out in his emails to which I refer above. In an email to the other long leaseholders of 15 September 2011, he reported that the offer to purchase at £600,000 had been refused, that the long leaseholder of Flat 1 would attempt to purchase the Site unilaterally and for his own purposes and that if he should fail " *... we will need to get together with all local interested parties to prevent development of the [Site]*". This email was written at a

time when he thought the correct legal position was that the covenants were unenforceable – see above. It was for that reason that he was interested in orchestrating a local campaign to prevent any development of the Site. At this stage, it is clear that ML shared MM's views. On 15 September 2011, she sent an email to Mr. Paul Rose of Robert Crawford Limited, who was providing some planning and property acquisition advice to MM and ML and through them to the defendant, in which she acknowledged that it was likely that the Site would be sold on the basis of its development potential and then added:

> "In that case, we would have to be prepared to fight development on all fronts – legal planning and conservation of trees – and here communal action would be helpful. … Lets hope that it stays a green piece of land!"

This is significant because it shows that ML and MM were of one mind at this stage as to the approach to be adopted and because it shows ML carrying into effect the approach consistently advocated in MM's correspondence – that of stopping any development of the Site.

74. The Site was withdrawn from auction prior to sale for reasons unconnected with the issues that arise in these proceedings. This enabled MM on behalf of the defendant to obtain further legal advice. He explained the purpose of this exercise in an email to the other long leaseholders dated 8 October 2011 as being:

> " … to either block the auction sale (unlikely), or force the seller to put our legal advice into the land-sale legal-pack (likely). The more positive our legal advice is, the more it will discourage buyers and drive the sale-price down, allowing either a group of us or Asi to buy the land at a reasonable price."

"*Asi*" was the long leaseholder of Flat 1. MM's tactics at this stage are apparent from this email. As he put it:

> " Before the last auction, I spoke to a couple of developers and the mention of restrictive covenants seemed to scare them off."

ML did not dispute that she shared MM's views at this stage. ML's explanation of the contents of this email in her oral evidence (T6/30-31) - that the strategy was to obtain the Site at a reasonable price and ensure that the covenants were brought to the attention of anyone intending to buy the Site so they were aware of the position - was less than frank. I take this into account when reaching my conclusions about ML's credibility set out below. In my judgment the strategic purpose was both clear and obvious and was (i) for the defendant or the Flat 1 leaseholder to acquire the Site if possible and (ii) to prevent any development of the Site even if the defendant was unable to purchase it. The reason for obtaining the opinion and having the conversations with potential purchasers was to deliver those objectives. The true motivation was that identified by MM in his email to one such developer dated 10 October 2011:

> "… I have to say that [the defendant] is completely opposed to any development …
>
> … frankly we do not want to live next to a building site or look out on to some developer's monstrosity undertaken only for profit."

At this stage, no plans had been put forward by any potential purchaser for the development of the Site. In context therefore, this reflected what the earlier material set out above reflected – a determination to resist any development of the Site that did not involve the creation of a communal garden for the benefit of the long leaseholders.

75. The restored auction was fixed to take place on 12 December 2011. As soon as that became apparent, on 3 November 3011, MM wrote at some length to Ms Freely at Druces. Having supplied copies of various opinions and having explained what he understood to be the effect of them, MM then asserted that the Site should not be marketed as having possible development potential and demanded that the legal pack to be used in connection with the auction of the Site should include a statement of the defendant's opposition to development of the Site and copies of all the Opinions that had been obtained. This resulted in a letter from Druces of 8 November 2011 in effect rejecting MM's proposals. The letter made clear that Druces and their client did not intend to discuss or negotiate the contents of the pack with third parties or engage in any further correspondence with MM.

76. This run of correspondence ended with a letter dated 2 December 2011 from MM to Ms Freely In which MM stated:

> … I have made it clear that, unfortunately, the issue of development may lead to court action between the freeholder of 89 Holland Park and a potential developer over the restrictive covenants. You are aware of this and the only possible honest answer to 2.2 is that you know of something 'which might lead to a dispute about the property'.
>
> I have spoken to your regulatory body, the Solicitors Regulation Authority, who have confirmed that a complaint would be appropriate in the case of inaccurate answers to the standard enquiries in a sale. I am putting you on notice that if your answers … are not appropriately corrected by 5 pm on 7 December I will make a formal complaint to the Solicitors regulation Authority.
>
> The letter concluded by withdrawing the £600,000 STC offer, making clear that the defendant would not bid at the auction but would " *... injunct anyone who breaches the restrictive covenant*".

As before the only witness that could be asked about this letter was ML and as before ML sought to explain away the effect of this correspondence:

> Q. I would suggest to you that this is indicative of the way that you and he go about things. If you don't get what you want, you resort to being very threatening.
>
> A. I don't think that was threatening. I think it was appropriate, and I think nowadays transparency and openness about restrictions on - - that will affect the sale of a site would be definitely made available to the public.

I reject the notion that MM's correspondence was motivated by a desire for openness or transparency other than to the extent that it supported the strategy of enabling the defendant to acquire the Site if possible and to prevent any development of the Site if it could not. I also conclude that ML knew this to be so and concurred with the approach being adopted.

77. Consistent with this strategy, by no later than 24 November 2011, a laminated sign had been attached to the railings at 89HP closest to the Site stating:

> "Land for Sale by Auction – the land Adjoining 89 Holland Park is subject to restrictive covenants regarding development which benefit 89 Holland Park.
>
> 89 Holland Park advices prospective purchasers that the restrictive covenants will be strictly enforced. ...."

Although ML suggested that the purpose of this notice was to "*... inform people that restrictive covenants were in place and how we would proceed ...*" [T6/33/16-18], I reject that as being the true explanation. In my judgment, as is obvious from the wider context, this was a means of delivering the strategy of enabling the defendant to acquire the Site if possible and preventing any development of the Site if it could not, then being master minded by MM supported by ML, an approach with which all or most of the other long leaseholders agreed.

78. The auction took place on 12 December 2011. MM and ML attended but as foreshadowed in the correspondence referred to above, the defendant did not bid. Following the successful bid by the claimant it is common ground that a conversation took place between her and MM. The claimant's evidence as to the effect of the conversation is contained in paragraphs 32-33 of her witness statement and is to the following effect:

> "Immediately having filled out the paperwork at the end of the auction, I was approached by …[MM] … He introduced himself as the person who manages the affairs of the freehold management company of 89 Holland Park. I explained that I had some initial design concepts for the [Site] and that … it was my intention to work constructively with all the neighbours.
>
> 33. [MM]'s response to this was that he told me that I seemed to be a 'decent person' but that he would not accept, and would oppose, any development at all on the [Site]..."

ML's evidence was that this is not what MM said. She maintains that she and MM had agreed that *"... it would be a friendly gesture for him to introduce himself to ...*" the claimant. The conversation did not take place in ML's presence or hearing. She maintains that MM reported to her the effect of the conversation as being:

> "… she had freely volunteered the comment that she herself in our position would not be happy for the development to go ahead next door. [MM] told me that he did not respond to this and only had time to exchange contact details …"

ML's oral evidence on this issue was contained in the following exchange:

> Q. I can't ask Dr McKie because he's not been called, so I will simply ask this question, although I suspect you're going to say "I don't know, I didn't hear it". But Ms Hicks in her witness statement said that Dr McKie told her that he would not accept and would oppose any development at all on the property.
>
> A. Yes, Michael was very willing to appear to correct that statement. He did not say that.
>
> Q. I see.
>
> A. He has told me he did not say that.
>
> Q. Well, as I said, I've put it to you, and I would suggest that is not correct and what Ms Hicks says in her witness statement is the true account of that.
>
> A. There's a problem in establishing, how do you establish what was said in a private conversation. But Michael is a trustworthy person and that is what he reported to me.

I reject ML's evidence on this issue as to both the motivation for the conversation taking place and its contents. My reasons for reaching that conclusion are as follows.

79. Inherent probability and improbability are appropriate tests for resolving disputed issues of fact where there is no contemporaneous documentation or other corroborative material available that assists – see Onassis and Calogeropoulos v. Vergottis [1968] 2 Lloyds Rep 403 at 407 and 431 and Gestmin SGPS SA v. Credit Suisse (UK) Limited [2013] EWHC 3560 per Leggatt J at paragraphs 15-22. In relation to the issue I am now considering:

i) It is inherently improbable that the claimant would have said what ML alleges she said to MM given that (a) she had just purchased the Site (b) at a price that could be justified only on the basis of its development value (c) with the intention of developing the Site and (d) knowing of the opposition of the defendant and those who controlled it to any development of the Site, as was apparent to her from the Property Information Form in the legal pack that she had obtained prior to the auction – see paragraph 22 of her witness statement. My conclusion as to the inherent improbability of what is alleged is supported

by the fact that by the date of the auction the claimant was an experienced architect and developer of potentially difficult central London sites;

ii) It is inherently improbable that the purpose of the conversation was for the purpose or motivated by the reasons identified by ML. It is inherently probable that the sole purpose of the conversation was to carry forward the strategy I have referred to above and is entirely consistent for example with the approach taken by MM in his email to the unidentified property developer dated 10 October 2011 referred to above and with everything else that he had said and done from the moment he learned that the Site was to be sold. It is these considerations that lead me to reject ML's evidence as to the motivation for MM initiating the conversation; and

iii) It is inherently probable that in substance MM would have said to the claimant exactly what she alleges given his animosity to any development of the Site, which is apparent from the material set out above and in order to further the defendant's strategy of enabling the defendant to acquire the Site if possible and preventing any development of the Site if it could not. Whilst MM and ML had not bid on behalf of the defendant at the auction, that was only because they did not have the funds available to do so. For that reason, by the date of the auction, the primary focus was on preventing development of the Site and what the claimant alleges MM said to her is entirely consistent with that strategy. Whilst many people would not have engaged in a conversation of this sort with the claimant having only just introduced themselves, I consider this point is significantly outweighed by the impassioned if not intemperate nature of MM's communications with other third parties concerning the Site, of which the most relevant example is his email of 10 October 2011 to the developer who had shown an interest in acquiring the sate referred to earlier in this judgment. This is not only highly material to an evaluation of what it is likely was said but also to a conclusion as to why the conversation took place at all. It is inherently much more likely that the conversation took place in order to carry forward the strategy

80. Finally, MM could have given evidence on this issue (and indeed on the other points so far considered) but chose not to do so. There is no reason offered as to why he did not give evidence. The claimant's evidence is sufficient to establish a case to answer as to the effect of the conversation, which goes not merely to credit but to the substantive issue between the parties as to the true reason for the defendant refusing approval under the covenants by its Decision Letter. Thus, in relation to what was said by MM to the claimant at the auction, I draw an adverse inference from the failure of MM to give evidence applying the principles set out in the decision of the Court of Appeal in Wisniewski v. Central Manchester Health Authority (ibid.). It necessarily follows that I must reject ML's evidence that MM was willing to give evidence. There was no reason for him not to do so unless he could not honestly rebut what the claimants says was said in the course of her conversation with him.

81. It is necessary at this stage that I consider the impact of the conclusions I have reached so far on the credibility of ML's evidence. I do so by reference to her evidence identified above and particularly that I have identified above as relevant to this assessment. In my judgment, ML has brought a significant amount of after the

event justification and wishful thinking to bear on the material that I have so far considered. This was apparent in the views she expressed concerning the assertions made in MM's correspondence referred to above but was also clearly apparent in her evidence concerning the conversation between MM and the claimant following completion of the auction. This leads me to conclude that I ought to be cautious before accepting ML's evidence save where it is corroborated, admitted or contrary to the interests of the defendant. This caution is all the more important in these circumstances because (i) MM has not given evidence by choice, (ii) her evidence is critical to an assessment of the reasons and motives of a majority of the board of the defendant for deciding to refuse approval for the 2016 scheme and (iii) MM and ML constituted a majority of the board of the defendant.

82. The conclusions that I have reached so far concerning the approach of the Defendant acting mainly by MM but with the active support of ML is supported by what happened between the date of the auction and the date of the First Judgment.

83. By an email dated 12 December 2011, MM informed one of the long leaseholders of the outcome of the auction and added, "*So we will need to prepare our legal and planning position*". Entirely consistently with my conclusions as to ML's approach when giving evidence about MM's communications, ML attempted to avoid an assertion that this was all about carrying the strategy referred to above into effect by asserting that they were not 100% sure of the legal position and they were anticipating a planning application they would need to respond to. I doubt whether the first of these justifications was correct given that by then the defendant had received a supportive opinion from specialist junior counsel. The second part of her answer – see T6/40/3-5 - was merely a truism. In fact the need to respond to a planning application that had not yet been issued was about carrying into effect the strategy previously identified of seeking to prevent any development of the Site. In the context of what had gone before, preparing a planning position when no planning application had been made could only have been about preparing generic answers to whatever application was made. This further supports my conclusion about the need for caution when considering ML's evidence.

84. That the strategy had not changed following the auction is apparent from the terms of the conversation that took place between the claimant and MM on 12 January 2012. The claimant prepared an attendance note of the conversation. ML maintains that she was present during the conversation although, of course, she would only have been able to hear what MM said not what the claimant said. The claimant's evidence, corroborated by her attendance note, was that the call was initiated by MM and that the pretext for it was a professed belief on his part that the claimant had completed the acquisition of the Site. The claimant records MM as having said:

> "Told me that prior to the auction he had taken 2 separate pieces of expensive and specialist legal advice which both said that categorically the site beside 89 could not be developed at all. That now he would employ a less expensive solicitor.
>
> …

> We both clearly understand that he does not want any development at all on the site and that I have bought it in order to develop it."

ML accepted that MM had instigated the call. She accepted that the pretext was a belief that the claimant had completed the purchase. She accepted that the paragraph of the note commencing "*Told me …*" was accurate. She then added: "*This was the idea that we had unreasonable refusal".* If what ML meant was that MM was telling the claimant that the defendant was entitled to refuse approval in its unfettered discretion, then that is consistent with the position that had been adopted by MM and ML at all times down to the auction, with what I have found that MM said to the claimant at the auction following the sale of the Site to her and with the claimant's note being an accurate summary of the conversation. It was the position that was maintained consistently down to the date when the First Judgment was handed down.

85. I reject ML's contention contained in her witness statement that the reason for making the call was because MM and ML "*… thought [it] would be a friendly gesture.*" There was nothing friendly in any part of what is recorded in the note of the conversation, any more than there was any friendly purpose in the conversation at the auction. The clear implication of what MM said is that if the claimant persisted in plans to develop the Site she would be faced with a potentially expensive and lengthy legal dispute. Under cross-examination ML changed this to a suggestion that the purpose of the call was to be helpful to someone who MM thought might be a naïve purchaser. As she put it in her response:

> "…he thought he was being helpful in informing her about the problems of development on the site , the legal position and other problems, and he was concerned, believe it or not, that she might be a naïve purchaser who perhaps had read Francis's advice and wasn't aware that the covenants could be interpreted ,that they ran with the land and could be invalid and interpreted differently . So Michael is a helpful person and he was trying to help her. That's why he suggested at the end, because it looked as if she hadn't taken any legal advice, that she might need to reconsider her purchase of the site."

This had not been suggested at any stage prior to this evidence being given. There is nothing in the note prepared by the claimant that suggests this was even mentioned. There would be no reason for the claimant not to record such a suggestion at that stage had it been made. It is all the more improbable an explanation because the context in which the call was initiated was a belief on the part of MM and ML that the claimant had completed her purchase. Had MM and ML had any real concerns of this sort the call would have happened before not after they believed completion had taken place. The purpose of this conversation was to discourage the claimant from attempting to develop the Site. This conversation was the conversation referred to in the letter of 27 January 2012 from the defendant's solicitors to the claimant. There is nothing in that correspondence that even hints that this was a concern of MM. On the contrary, it is consistent only with this conversation being part of a strategy of actively discouraging the claimant from attempting to develop the Site. My

conclusions concerning this conversation further strengthen my conclusion that I must be cautious concerning ML's uncorroborated evidence.

86. That what I have referred to above as the defendant's strategy was maintained at all times down to the date when the First Judgment was handed down is apparent from three communications that occurred shortly after this conversation.

87. The first of these communications was an email dated 23 January 2012 from ML to Mr. Yealland, the Chair of the Abbotsbury House Residents Association. The context was an email from Mr. Yealland in which he sought information as to exactly what covenants the defendant had over the land. ML responded that:

> "The freehold at 89 Holland Park (of which each flat owner has a share) has negative covenants running with the adjoining land, which state that no plans can be submitted by the owner of the land or any works carried out on the land without our approval as adjacent freeholder. We have taken expert counsel's advice on these covenants … concluding that we can rely on these covenants to reject development …"

Three points emerge from this email. First, there is nothing within the email that even hints at the potential relevance of the merits of any proposal to develop. It is consistent only with a belief that the covenants were absolute in effect. Secondly, this email is consistent with the position that had been adopted from the autumn of 2011, which was that of preventing any development of the Site by recourse to the covenants. Finally, it shows that ML held similar views to MM although she expressed them somewhat differently. It shows that she shared the views that she says MM expressed in the course of the telephone conversation with the claimant referred to above.

88. The next communication is a letter from Russell-Cooke (the solicitors who by then were acting for the defendant) to the claimant dated 27 January 2012. After some introductory remarks, the letter continued:

> "We understand that [MM] of our client has recently had a brief conversation with you regarding the [Site]. As he explained to you, it is our client's position that there are restrictive covenants that burden the [Site] and which benefit our client. Among other things, they prevent the making of a planning application in relation to the [Site] without our client's consent and they further prevent work with[out] the prior approval of our client.
>
> The purpose of this letter, therefore, is to ensure that you are aware of the covenants that burden the [Site]. That means that, where they require our client's approval, you contact our client before taking any of the steps prohibited by the covenants and ensure that you have any approval required from our client before submitting any application for planning permission and, if planning permission is obtained, before undertaking any work to the [Site].

> …
>
> For the avoidance of doubt, our client assures us that were the covenants of which he has the benefit not adhered to, it will take such action as it considers appropriate to enforce them. As you will no doubt be aware, any such action could include our client seeking an order … that steps taken contrary to the covenants cease and be reversed.
>
> This letter is not sent as a formal 'letter of claim' because at this stage our client is not aware of any intention by you to break the covenants. …"

Although Mr. Rainey submitted that the letter was an attempt to "*bully*" the claimant, that overstates the position. However, the letter was clearly intended to discourage any such development by stating impliedly if not expressly that the covenants were absolute in the discretion they conferred on the defendant and would be invoked should the claimant attempt to apply for planning permission without the prior approval of the defendant or commence work that had not received the prior approval of the defendant. It is not suggested that this letter was expressed in language that exceeded the instructions of the defendant. It is entirely consistent with the position adopted principally by MM but also ML at all stages up to and immediately after the auction at which the claimant purchased the Site. It expressly refers to a *"brief conversation*" with the claimant, which in context is probably a reference to the conversation on 12 January 2012.

89. The third communication is a further letter from Russell-Cooke to the claimant dated 10 April 2012. What stimulated the sending of this letter is unclear. That letter included the assertion that:

> "… neither of the covenants … requires the consent of the [defendant] to be subject to any qualification of reasonableness. The [defendant] may therefore, in considering any plans, drawings or specifications rely on such matters as it considers fit in determining whether or not to grant consent to any application received."

The letter went on to invite the claimant to accept that the covenants were not subject to any qualification that approval must not be unreasonably withheld before asserting that the defendant was "*… of course prepared to consider any plans which you do have for the [Site] … in an objective proper and fair way."* On the face of it that comment is inconsistent with the earlier assertion concerning the right to withhold approval unreasonably. That the earlier assertion was what mattered to the defendant is apparent from the final paragraph of the letter, where the defendant threatened the commencement of proceedings for a declaration as to the true nature and effect of the covenants if the claimant failed to accept that they had the effect asserted.

90. In my view this letter was constructed to induce the claimant to concede the construction of the covenants favoured by the defendant acting by MM and ML by threatening legal proceedings, whilst at the same time suggesting that any plans would be considered objectively notwithstanding what they maintained the covenants

entitled them to do. Its terms are inconsistent with the idea that the January conversation was motivated by the considerations suggested by ML in her evidence and is consistent with maintaining and advancing the strategy that had developed prior to the auction at which the claimant purchased the Site once it had become apparent that the defendant did not have the means to purchase the Site itself. ML's description of this letter in paragraph 75 of her witness statement does not mention the assertion that the defendant was entitled to refuse approval unreasonably even though the purpose of the letter was to obtain a concession from the claimant to that effect by threatening the commencement of proceedings if that concession was not made. It refers exclusively to the sentence in the letter quoted in italics above. In my judgment this is entirely consistent with my conclusions concerning ML's evidence set out earlier.

91. Between the two Russell-Cooke letters, it is clear that behind the scenes the preparatory steps that MM had hinted should be taken in his 12 December 2011 email referred to earlier were being carried into effect by MM and ML. It would unnecessarily lengthen this judgment if I refer to all the email traffic on this topic between respectively ML and MM and various other parties. It is sufficient to note that they identified the adverse effect of development of the Site on the trees I referred to earlier as a potentially important issue. This led them to identify the need to retain an arboriculturalist and to an email from MM to Mr. Adam Holt in these terms:

> "My partner [ML] spoke to you recently … regarding preparing a report on some trees adjoining our property in order to prevent development of the land. (A developer who has recently purchased the [Site] plans to build some kind of house, probably partly underground, hence our concern for the tree roots) …

It is clear that what MM had in mind at that stage at least was to obtain a report that would enable the defendant to prevent development, not to enquire whether development would or would not threaten the trees. Not only is that what MM said in his email but it is how Mr. Hollis understood it, as is apparent from his response in which he advised that it would be better to wait for the developer to prepare a plan and then prepare a rebuttal. MM instructed Mr. Hollis to proceed – see his email of 24 February 2012. After he had confirmed that he would proceed as asked, MM responded asking him to call on MM so *"... we can have a brief discussion ... as to exactly what we need ...*". It is noteworthy that when in November 2012 Mr. Hollis was replaced as the defendant's arboricultural advisor by Dr Frank Hope Pinsent Mason, who by then had replaced Russell-Cooke as the defendant's solicitors, instructed Dr Hope "*... to provide a written report setting out your professional opinion concerning the issues on which [MM] will advise you by telephone.*".

92. In my judgment it is apparent from this correspondence that this was part of the carrying into effect of the strategy to prevent any form of development at the Site. MM had no interest in being advised as to the extent to which development might affect the trees. His sole focus was obtaining a report that would assist the defendant "*...to prevent development of the land...*". Although ML denied that this was what was intended – see T6/55/14-21 – I was un-persuaded by that denial for the following reasons.

93. Firstly, this approach is consistent with that hinted at in the April letter from Russell-Cooke referred to above. Secondly, it is at least impliedly inconsistent with what ML said in her email to Mr. Holt of 12 April 2012. Thirdly, and more importantly, it was consistent with the attempt to engage with the LPA for the purpose of obtaining Tree Preservation Orders ("TPO") over each of the relevant trees. The Chair of the Abbotsbury House Residents Association chair was supportive of obtaining TPOs over the relevant trees. It was he who suggested a joint application for such orders ought to be made by his association and the defendant since that was more likely to succeed than simply asking the LPA to do it. All this was designed to carry into effect the strategy of preventing development of the Site. Finally, in May 2012, Mr. Yealland had entered into correspondence with Mr. Morrison, the official at the LPA responsible for arboriculture Planning. He had advised that since the trees were in a conservation area no TPO was required. Mr. Yealland had replied drawing attention to the fact that the Site had by then been cleared of "*... small trees with no notification and the owners have publicly stated intent to construct a house"* and Mr. Morrison had responded saying that " *it should be noted that the purpose of TPOs is to protect trees of amenity value and should not be used as a method of preventing development*". Mr. Yealland copied this response to ML remarking that he was not finding Mr. Morrison *"... particularly helpful or polite ...*" and, significantly, ML responded:

> "It would be good to reply to Angus to make absolutely clear that your sole aim is in making your request is to protect the trees as a highly valued amenity for the residents; not only are the trees already TPO'd, but the whole group that forms a screen for Abbotsbury House. The issue of a possible development is irrelevant to the resident's request for the protection of the trees. Adam Hollis suggested sending [Mr. Morrison] his report (and I agree), commissioned because of local concern for the trees. … [Mr. Morrison] must be made aware that [LPA] needs to protect our amenity as outlined by Adam"

All this was designed to encourage Mr. Yealland in effect to deny any concern about development when in truth both he and the defendant acting by ML wished to carry forward the strategy of preventing any form of development of the Site.

94. The claimant relies on a letter dated 4 January 2013 by which the defendant acting by its solicitors Pinsent Mason instructed a planning consultant to consider the claimant's application for approval of the plans for the development for which the claimant had applied for planning permission in 2012. The relevant plans and specifications had been sent to the defendant by the claimant's solicitors on 29 November 2012. The context for this letter was not merely approval under the covenants but the claimant's planning application to the LPA. Although the claimant maintains that the instruction in paragraph 2.2.6 to advise the defendant as to "*any grounds on which our clients might object to the planning application"* demonstrates that the defendant was not engaging in an open minded enquiry about the merits of the proposed scheme but was simply looking for grounds that could be relied on to refuse approval, I consider this is mistaken. The instructions were to a planning consultant. The instruction relied on by the claimant concerned the planning application – which as I read the material is

the application for planning permission made to the LPA. As I explained earlier there were two routes open to the defendant – that of refusing approval and objecting to any application for planning permission. The claimant had been able to make her planning application even though approval had not been obtained from the defendant under the covenants by reason of the compromise made in relation to the defendant's injunction application. Indeed, MM made that point in his email to the other long leaseholders of 16 January 2013. In my judgment this element of the instruction was in relation to the application for planning permission and was perfectly proper. Had this instruction been given in the spit alleged by the claimant, then something similar would have appeared in the other letters of instruction but it does not.

95. I do not accept either that there is any real significance in the point made by the claimant concerning the board minutes recording the decision to refuse approval for the 2012 scheme. Although a draft refusal letter was circulated prior to the formal board meeting recording the decision, prior to that all bar one of the directors who was not contactable had concluded that approval should be refused. This conclusion does not detract from anything else I have said so far concerning the defendant's approach.

96. Nonetheless, and leaving these last two mentioned documents out of account as unsupportive of the claimant's case, I conclude on the basis of the material set out above, that both MM and ML were implacably opposed to development of the Site, that they formulated a strategy (which had at least the tacit support of all bar one of the other leaseholders) of seeking to obstruct the development of the site by whatever means were available. This strategy is apparent in what MM said to the claimant after the auction, in the conversation that took place in January 2012, in the contents of the two Russell-Cooke letters and from the manner in which MM and ML proceeded thereafter as set out in detail above.

The Position After Hand Down of the First Judgment

97. The claimant formulates the issue that arises as being whether "*the leopard changed its spots"* by which the claimant means whether the defendant's strategy changed from one of preventing any development to considering each application made by the claimant in the manner that the true construction of the covenants as set out in the First Judgment required. The claimant maintains that since a covenantee is not entitled to refuse consent on grounds that have nothing to do with the covenantee's property interests it follows that if in truth the defendant continued after the first judgment to pursue the approach that it is contended it followed prior to it, then the claimant is entitled to succeed in these proceedings.

98. The claimant relies on a high level of what she contends was deliberately obstructive formality that followed the handing down of the First Judgment as demonstrating that there had been no change in the approach of at least MM and ML to development. I am not persuaded that of itself this sort of conduct demonstrates or from which it can be inferred that there had been no change of approach following the First Judgment. At best what is asserted is an inference that could be drawn from such conduct but it is not the only inference.

99. Given the heavy involvement of lawyers from before the commencement of the First Proceedings, the hostility generated by the need to apply for an injunction to restrain breach of the covenants and the recent completion of hostile litigation, it is unsurprising that the defendant and its directors wished to conduct their relationship with the claimant through solicitors for at least a period after completion of the First Proceedings. Although the claimant wrote what on the face of it was a conciliatory letter to each of the long lessees dated 13 March 2013, that letter made clear that she had not abandoned her plans to develop the Site. The defendant was fully entitled to ask that all further communications be via solicitors, that any application for approval under clause 2(b) should be submitted to the defendant via its solicitors and if its solicitors' indication that an undertaking to pay the defendant's reasonable costs of considering any such application was misplaced then that could be resolved by legal process. However, irrespective of all this, no inferences can properly be drawn from this conduct that helps resolve whether the defendant and its directors had changed their approach in relation to the claimant, the Site and the covenants. It is consistent with either a change of approach or there having been no change. If anything, it marginally supports the contention of a change in approach following the First judgment. What had been perceived as an entitlement to refuse approval on any or even no grounds had become significantly more complex.

100. Some reliance is placed on the board meeting on 18 June 2013 at which the sub committee structure referred to earlier in this judgment was established by the defendant's board. The key points are that the board established a sub committee consisting of ML and MJ who was then the other director of the defendant to assess in the first instance any plans submitted by the claimant and to report to the shareholders and seek their views. MM remained a member of the board and thus party to any decision making as to whether approval should be given or not and he also continued to be the point of contact between the board and the defendant's solicitors as is stated expressly in the minutes of the 18 June 2013 meeting of the defendant's board.

101. The minutes record the directors as having *"… agreed to follow the legal strategy outlined …*" by the defendant's solicitors. The claimant submits that it was not a strategy to consider future applications on their merits and with an open mind. It was submitted that (as ML accepted in the course of her cross examination) a strategy was an approach that has an aim in mind. It was submitted that the only strategy was that identified just prior to the auction in December 2012 – that is to prevent any development of the Site and, perhaps, drive down its value to a level where the defendant and its members could afford to purchase it. This is something that can only be established by inference but bearing in mind my conclusions already concerning what onus rests on which party.

102. First, there is a clear distinction between giving evidence about legal advice and giving evidence about a strategy adopted by the company following legal advice – a point I made when Mr. Karas interrupted ML's cross examination on this issue. Mr. Rainey was fully entitled to ask what strategy the defendant had adopted. As Mr. Karas (correctly) accepted *"If the question is indeed what was the strategy adopted, and no more than that, then I' m content with that"*. Given the issue and given ML's prominent role in the decision making of the defendant, I would have expected her to be able to explain clearly what strategy the defendant had adopted. Unfortunately that question led to the following exchange:

> "Q. … What was the strategy you actually adopted to make it very clear?
>
> A. I ' m afraid I can' t - - I genuinely can't remember what that was.
>
> Q. Oh, come on, you can do better than that, can't you, Ms. Letemendia?
>
> A. Let me just read it again to see if ... I'm sorry, I'm not being devious. I just I can't remember what that was.
>
> Q. I'm sure you can, Ms. Letemendia, but perhaps we can help. Let's come at it from this - - what does " strategy " mean? What do you understand by the word " strategy "?
>
> A. An approach which has an aim in mind.
>
> Q. Precisely. It has an aim in mind. It's how you get from the starting point to a goal or an endpoint or an aim, correct? And what was the endpoint of the strategy?
>
> A. I ' m afraid I can't remember.
>
> Q. It's obvious, isn't it?
>
> A. Can I just read the whole of the minute again?
>
> Q. Please do.
>
> A. I'm sorry, I really can't remember, it's so long ago. Whether it had to do with the excavation, I don't know ... I'm sorry."

When Mr. Rainey put his case as to what the strategy was, the following exchange took place:

> "Q. The strategy, I suggest, had an endpoint, which was refusal of approval to any plans for development.
>
> A. I think that is very unlikely to have been legal advice.
>
> Q. I' m not asking you about legal advice. I've been very clear about it.
>
> A. Yes, or strategy, no. I can't think that that was it. Whether it's something to do with the way plans were dealt with, but I - - it would not have been to decide on the outcome of any appraisal of plans in advance."

I listened with great care to this exchange and have read and re-read the relevant part of the transcript. Regrettably, I found ML's answers to be unconvincing. The strategy being referred to was plainly at the heart of the most important issue facing the

defendant and an issue that was considered by both ML and MM to be of very significant personal concern to them as the correspondence that I have already referred to demonstrates. I have every sympathy for a witness doing his or her best to assist who is unable to remember minor details. However, this issue does not fall into that category. The inability of ML to be able to recall something as fundamental as this provides further support for my view that her evidence needs to be treated with caution.

103. All that said, the strategy referred to here is unlikely to be the strategy I have referred to earlier concerning the prevention of any development of the Site. That strategy was not a "*legal*" strategy. However, the inability of ML to give any evidence as to what the defendant's legal strategy was or what it was designed to achieve does not of itself justify an inference that the real reason for the refusal of approval was to prevent any form of development. It might as easily have been to prevent the development that the claimant proposed and to do so by making the process as difficult as it could be made legally for the claimant whilst bearing in mind the need to act reasonably in refusing approval if approval was refused. As I have said, there were a number of bad reasons for refusing approval on that basis but as is common ground that does not prevent the construction issues being a good reason for refusing permission for the development in fact proposed.

104. It is necessary then to ask what useful function was being performed by the sub-committee consisting of MJ and ML given that the claimant was not informed that it had been established and that MM would continue to be involved in the decision making as a director of the defendant. I have rejected already the explanation that it was created to reassure the claimant that her application would be considered fairly since she was never told of its existence. As ML conceded in the course of her cross examination:

> "I agree it was perhaps a rather useless procedure … because we knew that the decision had to be made by the directors, and Michael was a director, and would participate in that."

Although Mr. Rainey suggested that this was in effect 'window dressing' to make the decision making within the defendant look fairer than he maintains it was, that is difficult for me to accept given that (i) the existence and ostensible purpose of the sub committee was not communicated to the claimant at any stage, (ii) MM was at all material times a director of the defendant who was fully entitled to participate and who in fact participated in the decision making of the defendant's board and (iii) MM's involvement would become apparent on the slightest scrutiny at any rate in a litigation context. It is worth noting that by February 2016, any pretence that MM was not involved must have disappeared because the defendant's solicitors, Pinsent Masons, were suggesting in their letter of 18 February 2016 that if there was to be a meeting to discuss the claimant's emerging development proposals the meeting should be with not only ML and MJ but also MM. The purpose of creating the sub-committee structure remains evidentially opaque. Any conclusion I reach as to its true purpose would be entirely speculative. Had the defendant wished to establish that it was part of a strategy to ensure fair decision-making the evidential burden rested on it to prove that was so. Given that conclusion and the points I made earlier concerning

the claimant's submissions about the sub committee structure, I leave it out of account in arriving at my conclusions.

105. I have no real doubt that the strategy that the defendant followed after hand down of the first judgment was one that involved limiting email communications, insisting on formal applications for approval being made rather than a consensual discussion process in the knowledge that such a process would be more costly and time consuming and to make the process as challenging as possible for the claimant. My reasons for reaching those conclusions are essentially those identified by Mr. Rainey in the course of his closing submissions. This is consistent with a legal strategy to the effect I have referred to above.

106. The first of these points is apparent from the email that ML sent to Ronni Ancona (who represented the interests of the Woodsford Square residents) concerning a proposed design package that had been circulated by her at Abbotsbury House. ML's response to this email was contained in an email from her of 19 June 2013, where she said:

> "Ronni
>
> I totally share your serious concern about the trees – and obviously it's absolutely right for you to express your views on the plans you've received. We have to deal with any plans put forward under our legal covenants in a reasonable manner, as we have done before, and our solicitor has advised us not to discuss our response to Sophie Hicks's plans outside this process. So, sorry not to be able to be more helpful about the trees."

The insistence that any further development plans should be the subject of a formal application rather than an iterative process favoured by the claimant is apparent from Pinsent Mason's letter to the claimant's solicitors of 21 June 2013, the last three paragraphs of which stated respectively that any consent should be sought formally rather than discussed beforehand, that the defendant was committed to providing a reasonable response and that "*... on receipt of any formal application for consent, our client will seek an undertaking that your client pays its experts costs of considering that application"*. The approach of making things as difficult as possible is apparent from Pinsent Mason's letter where they complained of an excavation carried out by the claimant on the Site and added:

> "On your client commencing the recent Works we immediately wrote to you to reserve our client's rights in respect of any breaches of the restrictive covenants. At the time it was suspected that your client may be gearing up to implement the conservation area consent granted by [LPA] … our client had of course refused consent under clause 2(b) … to your client making the application out of which the CAC was granted."

This letter went on to demand undertakings from the claimant that:

> "…in respect of minor investigative works that involve digging or excavation, your client will make an application for our client's consent under clause 2(b) to her making an application for the written consent of RBKC Arboriculture to these works;
>
> Your client will undertake no further works on the [Site] unless and until the plans for a building have been approved by our client under clause 2(b) …"

This is misconceived since there is no requirement imposed by the covenants that the claimant should apply for consents from the LPA that she did not require to carry out any work on the Site and the covenants did not entitle the defendant to insist that it be asked for approval for anything that did not require local authority consent. Demanding undertakings of this sort in my judgment are similar in purpose to those that were demanded of the claimant prior to the commencement of the First Proceedings - an attempt to get the claimant to agree to restrictions that the covenants did not impose for the purpose of making development by the claimant more difficult and therefore more expensive than it need be. The undertakings demanded also created the risk if they were given that the defendant's experts would demand further investigation and that the defendant would be able then to delay or prevent by reference to the undertakings they sought.

Determination of the 2016 Application for Approval

107. By a letter dated 4 November 2016 from the claimant's solicitors to the solicitors now acting for the defendant (Taylor Wessing LLP) the claimant made the formal application for approval that led ultimately to the Decision Letter refusing approval that is the subject matter of these proceedings. The application was made under both clause 2(b) and clause 3. The application consisted of what would be the claimant's entire planning permission application. As I explained earlier, a further planning application was necessary because of relatively minor alterations made by the claimant to the scheme in respect of which the Inspector had granted permission.

108. The defendant commissioned various experts reports to help the defendant evaluate the claimant's application for approval. Under cover of an email dated 24 December 2016, ML sent copies of the reports obtained by the defendant to each of the long leaseholders. ML's initial view is set out in her email to MJ of 2 January 2017, which was copied to each of the other long leaseholders. This email was expressed to be written "*... on behalf of Flat 3*" rather than as a director of the defendant on its behalf. In cross-examination, ML accepted that the email reflected the views of both her and MM – see T7/7/2-4, where she described the contents as being "*... a description of our concerns ...".*

109. The email focuses on various issues including a section under the heading "*CAPITA*". Capita are and were at all times the defendant's civil and structural engineering advisors. By the date when the email was sent the defendant had received Capita's report dated 20 December 2016 relating to the claimant's proposals and it had been sent to each long leaseholder by ML's email of 24 December. The parts of the Capita Report that are relevant when considering the terms of ML's email of 2 January 2017 are paragraphs 26-33. They were to the following effect:

"**Effect of trees**

26. In paragraph 3.5, the Design Statement appears to dismiss any effect of shrinkage and swelling caused by trees. In our opinion this is incorrect because the ground investigation results clearly show that the soil on which [89HP] is probably founded has at least low shrinkage/swelling potential and one of the Atterberg limits results shows it to be medium shrinkage/swelling potential.

27. The issue, as we see it, is that the soil beneath the foundation of [89HP] may currently be affected by roots from the trees on and around the [Site] and these roots are extracting water from the soil. Constructing the basement will sever any roots and they will cease to extract water from the soil. This may cause the soil to take in water and heave, with possible damage to [89HP].

28. We note the arboriculturist's report that an existing wall on the southern side of the development site forms an effective root barrier. We have also made a preliminary assessment of the risk based on guidance in NHBS Standard 4.2 and this shows there to be a low risk of significant foundation heave. Nevertheless, we would expect the Design Statement to offer some justification of the position.

Settlement of [89HP]

29. We note the estimated settlement of 7.5 mm to [89HP]. In our opinion, there is insufficient consideration of how much damage will occur.

30. Document ref ARP/663344/AL revision 6 paragraph 3.8 includes settlement estimates of 9 mm lateral movement and 7.5 mm vertical movement on the line of the foundations of [89HP]. It is unclear who will be responsible for the settlement calculations due to temporary works as these are stated to be contractor responsibility and calculations are described as preliminary.

31. The resulting damage to 89HP is assessed to be 'slight'. We understand that 'slight' envisages cracks up to 5 mm in width. It appears to us that an estimated settlement of 7.5 mm has the potential to cause cracks greater than 5 mm in width, which is beyond the category of slight.

32. We consider the risks to [89HP] are damp, local flooding, dust and cracking of masonry. It is important to note that on the outside fabric of the building, even relatively small cracks will need to be repaired because otherwise water could infiltrate inside. In winter the infiltrated water would freeze and

> expand in volume, increasing the size of the cracks, which in turn increases the amount of water infiltrating the walls. The cycle if unstopped could ultimately lead to the collapse of the masonry wall. The infiltrated water could also cause timber rot in the floor joists.
>
> 33. There is no proposed general method statement for repair of damage to [89HP], should repair be required during or following the works..

ML's email of 2 January 2017 purportedly summarises these paragraphs of Capita's report in these terms:

> "The potential loss of trees is relevant to the Capita report as large trees may have a significant effect on water uptake/extraction in the soil, affecting ground movement. Capita note that there is no justification in the Design Statement about the root barrier of the small southern wall. Severing roots and removal of trees could lead to 'heave' and hence potential damage to [89HP]. … MLM's assessment of settlement is risks … as 'slight' is incorrect on their own data. And there are risks of damp, flooding, dust and cracking. If cracks in the masonry are left unrepaired, water ingress and consequent damage could lead to rot and masonry wall collapse. …"

110. The claimant submits that this summary is both inaccurate and unfair, since it omits any mention of Capita's assessment that " … *assessment of the risk based on guidance in NHBS Standard 4.2 ... shows there to be a low risk of significant foundation heave ...*". The claimant further submits that this omission is explicable only on the basis that ML did not want to be fair or even-handed or because her mind was so closed to the possibility of approving any development of the Site that she could only see the negative aspects of the proposal and was blind to anything that mitigated those aspects. The claimant ultimately submits that this leads to the conclusion that ML wished to persuade MJ (her fellow director and fellow sub-committee member) to agree to the refusal of approval and her fellow long leaseholders to oppose the claimant's proposed development. In evaluating that submission, it is necessary to bear in mind that the long leaseholders had been sent a copy of the reports on 24 December and it could fairly be assumed that each would consider ML's comments in the context of their reading of the full report.

111. In my judgment ML's summary is partly inaccurate when compared to what is set out in Capita's report as is apparent from the relevant paragraphs set out above. She refers to " … *a significant effect on water uptake/extraction in the soil* …" This statement does not appear anywhere within the report. To a less than careful reader it implies that the loss of trees resulting from the development of the site will have such an effect. Her remark that " … *there is no justification in the Design Statement about the root barrier of the small southern wall* …" is not an accurate summary of what Capita says in its report either. ML described it in her cross-examination as being "*... rather badly expressed ...*" – see T7/11/9. The need for justification refers back to the dismissal within the Design statement of any risk of shrinkage and swelling referred

to in paragraph 26 of the Capita report. In truth, ML had not badly expressed this point. She had wrongly summarised it.

112. Most significantly, ML's summary to the effect that "*... severing roots and removal of trees could lead to 'heave' and hence potential damage …*" is misleading because she failed to include Capita's advice that its own assessment of the risk of significant heave was "*low*". When this point was put to ML in cross examination, her only response was that "*… we don't know, precisely, what the effect might be, but in the refusal letter we note the risk may be low ...*" This misses the point made by the claimant that the email was the springboard from which the decision making leading to the refusal letter was launched. However, all that said, ML was fully entitled to summarise Capita's advice concerning the risk of settlement in the terms she did and the contrary was not suggested to her. I regard that as the more significant aspect of what Capita Report because it gave rise to a quantifiable risk of direct and consequential physical damage to 89HP, which in Capita's opinion had been understated by the claimant and her advisors.

113. I am unpersuaded that I can or should draw the inference for which the claimant contends by reference to the omissions from the summary in the 2 January email. First, this submission presupposes that the only material available to the recipients was the email. That is not correct. Each had a full copy of the report because it had been sent to each by ML on 24 December 2016. It is inherently improbable that the recipients of the email would have come to a conclusion without reading the relatively short Capita report. The documentation available suggests that this is what occurred – see the email from Mr. Zarbafi dated 4 January 2017 and the email from MJ dated 11 January 2017. Ms Watts' email of 2 January suggests she may not have read the report but by the same token it does not contain any expression of a decided view either. Secondly, the email made clear that it was not purporting to set out the detail within each report – see the paragraph under the sub heading *"89HP's Experts' Reports".* In my judgment that makes it all the more likely that the recipient of the email would not have acted on its contents without reading the reports they had been sent. Thirdly, the email was not anything other than a statement by ML as to her perception of what was to be gleaned from the reports. It does not purport to be advice. It did not even purport to be written on behalf of the defendant.

114. Finally, the claimant maintains that the inference that the strategy of preventing all development of the Site had never changed is to be inferred from the contents of the Decision Letter. It is submitted that this is the correct inference to draw from the inclusion within the Decision letter of points that simply did not reflect the advice that was given or could not be justified by reference to the defendant's own expert evidence and the inclusion within the letter of every point however minor that could be relied on as apparently justifying refusal.

115. The claimant relies on the inclusion within the letter of an issue concerning concrete toxicity to tree roots as a ground relied on that was not supported by the evidence. On page 6 of the Decision Letter it is stated that:

> "A further caution is given by Mr. Crane, the [claimant's] arboriculturalist, who points out that, besides other risks, concrete is toxic to tree roots and that a plastic membrane must

> be permanently in place to protect the roots from such damage during and after construction."

This point is used as a springboard for the suggestion that the defendant would welcome "*... designs for a house that would substantially reduce or avoid these risks by being less extensive"*. Aside from the point that if the use of a plastic membrane eliminated the problem it does not follow that the ostensible risk needs to be eliminated by making less extensive use of the Site, the claimant submits that on the evidence this was not the effect of Mr. Crane's evidence. Mr. Crane had commented on this issue in his 2016 report at paragraph 3.10 in these terms:

> "Concrete may be toxic to roots. The southern side of any area of poured concrete should, therefore, be separated from parent soil by heavy-duty plastic sheeting which should be permanent. It may be concealed below ground level."

In the course of the trial it emerged that the problem was one caused by wet concrete, which needs to be separated from roots while it dries. The solution is that identified by Mr. Crane. Mr. Rainey described this point as being *"nonsense*" and reliance on it as irrational and unreasonable – see paragraph 94 of his closing submissions – and thus one that shows the decision Letter not to be a statement of the reasons genuinely operating on the mind of the defendant by its directors but simply a collection of every possible reason for refusal that would allow the refusal to be defended and the strategy of ensuring the Site remained undeveloped to be delivered.

116. Mr. Rainey suggested to ML (the author of the Decision letter) that this was not a genuine reason because it had not been mentioned by any of the defendant's own experts. She denied that was so. I consider its inclusion was surprising since no attempt had been made by the defendant to discuss this issue with its own experts prior to reliance being placed on it. I accept that Mr. Crane's comment quoted above, when read in isolation, might be read as suggesting that concrete was toxic as well after as before it had dried. However, if that was the case, it was surprising that the defendant's own experts had not mentioned the point. Had the defendant returned to its own experts they would have been told that (a) the problem only arose while the concrete was wet and (b) the problem was capable of being designed out by the solution identified by Mr. Crane. ML's attempt to rely in her oral evidence on a point not mentioned in either the Decision Letter or in any of the expert's report namely the suggestion that " *... a membrane which possibly could be penetrated at some point, or the durability of the membrane, this was an area of concern* …" reflects how weak this opinion had become by the time ML came to be cross examined about it.

117. In my judgment this point was one that no reasonable covenantee in the position of the defendant could have relied on without first seeking clarification from its own retained experts, applying the tests set out above. There will be points raised where a fair process will include seeking further guidance before reaching a conclusion and this is one of them. When Mr. Rainey pointed out to ML in cross-examination that the evidence of one of the defendant's own experts (Mr. Forbes-Laird, the defendant's [third] arboriculturalist expert) was that the use of membrane was standard and the issue not a problem, ML responded "*Well that's good to know"*. Unless this response was purely sarcastic, it illustrates very clearly that this point would have been

abandoned had it been explored by the defendant with its own experts prior to reaching a conclusion to refuse approval. In any event, it is a point that is relevant to an application under clause 3 not an application under clause 2(b). That said, I am not persuaded that it is appropriate to infer from the inclusion of the point that the reason was not one that genuinely operated on ML's mind or that in consequence I should conclude that approval was being refused simply as part of a strategy of preventing any development of the Site. Relying on a bad reason of itself does not lead to that conclusion. In my view this conclusion is reinforced by the statement on page 7 of the Decision Letter that the defendant would have withheld consent on the basis of what is set out in the section entitled "*Construction issues"* even if the other grounds relied on had not existed.

118. The claimant makes a similar point in respect of heave and movement damage. This is an issue I have referred to earlier when considering the contents of ML's email summary of expert advice in relation to the approval application. The point was relied on in the Decision Letter. At page 8 of the decision letter, the defendant expressed the view that *"We are concerned that the [claimant] may have under estimated the risk of 'heave' and movement damage to 89HP*". Mr. Rainey submitted that this was not the effect of Capita's advice, the substance of which is set out above. In summary, Capita advised that there was a low risk of significant foundation heave and an estimated settlement of 7.5 mm that had the potential to cause cracks of greater than 5 mm in width, which Capita characterised as in excess of the '*slight'* category contended for by the claimant's experts in the reports forming part of the approval application. In my judgment this submission is mistaken for the reasons that follow.

119. In relation to heave, as I have explained, the claimant's advisers had dismissed heave as an issue – see paragraph 26 of Capita's report quoted above. Capita's opinion is that there was a low risk of heave – see paragraph 28 of its report quoted above. It follows that on the evidence of Capita the claimant's advisers had concluded there was no risk of heave whereas Capita had advised the defendant there was a low risk of significant heave. This suggests that if Capita is right the claimant's experts had under estimated the risk of heave. In fact there was no substance to the heave issue for reasons that I explain below but that is not the point for present purposes.

120. Similar considerations apply to the risk of damage caused by settlement movement – see paragraph 31 of Capita's report quoted above. Although there was an attempt to persuade ML in cross examination to acknowledge that these were not genuinely held concerns, she consistently maintained that they were and in my judgment on the material I have referred to she (on behalf of the defendant) was reasonably entitled to reach that view. As she put it in cross examination "*… If this was under estimated the effects on 89 would be very serious and difficult to remedy. I think it was a proper concern of the directors."* Whilst Mr. Rainey is entitled to submit that the point was not a particular concern for MJ, in my judgment that point is neutralised by the fact that different issues will have been of more concern to some directors than others. However there is nothing in MJ's evidence that supports the contention that he considered the point not to be a genuine one for refusing permission or that it was included as a means of justifying a pre-determined refusal.

Conclusions

121. As I explained at the outset, the onus of proving that the defendant had a reason or reasons for refusing approval that was or were different from those set out in the Decision Letter rests on the claimant. I accept that the conduct of the defendant acting principally by MM but also ML with the support of the other long leaseholders prior to the First Judgment was to pursue initially a strategy of attempting to purchase the Site for the purpose of turning into a communal garden and, from shortly before the sale of the Site at auction in December 2011, of preventing any development of the Site even though the defendant did not have the funds to purchase it. However that of itself is not sufficient to support inferentially the finding sought by the claimant. At the time when the defendant acting by MM and ML were carrying forward that strategy, they considered (genuinely but wrongly as it turned out) that the defendant had an absolute discretion to refuse approval. That was the position consistently maintained by MM and ML and the defendant's solicitors down to the date when the First judgment was promulgated.

122. Following the hand down of the First Judgment the defendant made clear in numerous letters and emails to the claimant and various third parties that it was bound not refuse approval unreasonably. This not only reflected what is said in the First judgment but is bound to have been reflected the legal advice that the defendant received following the hand down of the First Judgment. Although the repeated assertion in correspondence of the need for the defendant to act reasonably is categorised in effect as an insincere litany by the defendant's directors, principally ML, in my judgment it is equally consistent with a desire to make clear that the defendant was doing its best to comply with its legal obligations while being opposed to what the claimant was proposing as her 2016 scheme. The reasons why most of the long leaseholders in general and MM and ML in particular were opposed to that scheme are those set out in the Decision Letter. I have no doubt whatsoever that for MM and ML the aesthetic and tree issues were of great importance. As I have said already, those were not good reasons for the defendant to refuse its approval under either covenant. However, that does not lead to the conclusion that the real reason why objection was being taken after hand down of the First judgment was an intention to block all form of development. .

123. Following the First Judgment, the defendant chose to act strictly within what it perceived to be its legal rights and obligations. Although the claimant characterises this as deliberately obstructive, it was a position the defendant was entitled to take. I think it probable that this approach was or was part of the legal strategy that ML was unable to recall. In my judgment the facts and matters relied on by the claimant do not either collectively or individually establish a proper basis for inferring that the true reason for refusing approval was because the defendant wished to prevent any development of the Site. I think it much more likely that it by its directors wanted to prevent the development that the claimant proposed in November 2016 for the reasons set out in the Decision letter, some of which were bad and a lesser number of which were at least potentially capable of being good reasons. In my judgment, the claimant's claim that the true reason for the decision was a continuing desire to block any form of development has not been proved by her.

Withholding of Approval

124. For the reasons already explained in detail earlier in this judgment, I conclude that in relying on aesthetics, the effect or possible effect on the trees (save and so far as trees might impact on structural issues) and the disruptive effect of construction, the defendant has relied on facts and matters that it ought not to have taken into account because they are not material to the protection of the defendant's property interest in the structure and common parts of 89HP and its reversionary interest. To the extent that the defendant relied on those grounds in refusing or withholding approval under clause 2(b) it acted unreasonably applying the principles set out in Braganza (ibid.), Victory Place (ibid.) and West India Quay (ibid.). That would have been equally the case had these ground been relied on as grounds for refusing permission under clause 3.

125. It follows that the defendant can only justify its decision to withhold approval by reference to the construction issues identified on pages 7- 9 of the Decision Letter. The legal onus of establishing that the defendant's reliance on these grounds was unreasonable rests on the claimant. It is not open to the defendant to rely on issues relating to the structure of 89HP not mentioned in the Decision Letter. Thus concerns mentioned by the defendant's expert witnesses that were not mentioned by the defendant's advisors on engineering matters for the purpose of the decision (Capita) are not concerns that the defendant is entitled to rely on as justifying its withholding of approval under either clause.

126. As Mr. Karas rightly accepts in his closing submissions, some points raised by Capita were "*peripheral*". In fact they were not grounds on which any reasonable decision maker in the position of the defendant could refuse or withhold approval under clause 2(b) or clause 3 either because Capita had not mentioned them at all or because they could not reasonably lead to the conclusion that approval should be refused or withheld because the points made could not affect the defendant's property interest as I have defined it above. In my judgment this includes the attempt by the defendant to argue that the WALLAP calculations relied on by MLM in its capacity as the claimant's engineering advisors were wrong. This issue led to a lengthy and highly technical debate between the parties' respective engineering experts (Mr. Tucker for the defendant and Mr. Seller for the claimant) both in their respective reports and their joint report and in their cross examination. Although this issue is one of engineering complexity, it is relevant for present purposes only to whether MLM's assessment of 9 mm lateral displacement and resulting settlement of 7.5 mm of vertical settlement and the likely impact of such movement and settlement on the structure of 89HP was an under estimate or whether Capita's comments were a reasonable professional judgment that could reasonably support the refusal of approval under either covenant. Neither expert suggests (and Capita did not suggest) that there is any risk of serious damage to 89HP that could not be avoided by detailed engineering design and management. While accepting that there are some errors in MLM's calculations, Mr. Sellers does not accept their effect is as asserted by Mr. Tucker and Mr. Sellers' evidence is that if anything that MLM overestimated the risk of damage in their calculations submitted to the defendant.

127. I accept Mr. Rainey's submission that the accuracy or otherwise of MLM's WALLAP calculations is not an issue that is relevant in these proceedings. Capita did not advise the claimant that MLM's movement estimate was an under estimate and the defendant did not purport to refuse or withhold approval under either covenant on the basis that

it was. It follows that I accept Mr. Rainey's further submission, that the defendant could only reasonably have proceeded on the basis that Capita proceeded namely that MLM's calculations were accurate. I return to this issue below.

128. In my judgment there were a number of engineering or construction issues that were either mentioned expressly in the Decision letter or incorporated impliedly by the uncritical adoption of Capita's 2016 report to the defendant that were not good reasons for refusing or withholding approval under clause 2(b) or clause 3 because the points made could not affect the defendant's property interest. It is convenient to identify the various engineering issues by the paragraph numbers used to refer to them in the joint engineering experts report.

129. The item at paragraph 2.3 of the experts' joint report refers to a point concerning risk to human health and water supply lines. This issue was one that affected safety on site not the defendant's property interests. By relying on it as a reason for refusing approval by incorporating the entire Capita Report into the Decision letter, the defendant relied on a bad reason. It was not a ground that any reasonable decision maker in the position of the defendant could have relied on to refuse or withhold approval under either covenant.

130. Similar considerations apply to WAC Testing and gas monitoring referred to in paragraph 2.4 of the joint experts' report. WAC testing and gas monitoring is relevant to the disposal of spoil from site by the contractor carrying out the excavation work. It has no impact on the defendant's property interest and is not a ground on which a reasonable decision maker in the position of the defendant could refuse or withhold consent under either covenant.

131. Similar considerations apply to the issue referred to in paragraph 2.5 of the joint experts' report. This refers to a comment in paragraph 10 of the Capita Report that the defendant relied on by implication by having relied on the report as a whole when refusing approval. Capita did not recommend refusal or withholding of approval either expressly or impliedly by reference to this point. Both experts are agreed that the caveat that Capita draws attention to (which was contained in a Geotech report about site conditions) was entirely standard, normal and routine. No reasonable decision maker could have relied on the presence of this qualification as justifying refusing or withholding approval under clause 2(b).

132. Paragraph 3.3 of the joint expert report is concerned with "*perched'* water. Capita defined this as being water resting on made ground or other near surface soil that cannot seep away naturally because the ground beneath is sufficiently impermeable to prevent it from doing so. Capita's only comment was that the claimant's Design Statement did not explain how any such water was to be managed. Capita did not suggest that approval should be refused or withheld by reference to this issue either expressly or impliedly. Mr. Seller's evidence is that this issue is one that is the responsibility of the appointed contractor and Mr. Tucker agrees that it is an issue that should be addressed by the main and specialist piling contractors in their respective construction method statements. Manifestly, this issue is not one that any reasonable decision maker in the position of the defendant could rely on as a reason for refusing or withholding permission under clause 2(b). It is only relevant if relevant at all to approval under clause 3. Mr. Tucker's accepts this to be so because he says in the

joint expert report that it is material only because the approval application was, as he understood it (correctly), a rolled up application under both covenants.

133. Mr. Rainey submits that this issue is irrelevant to an application under either covenant because perched water could not affect the structure of 89HP. Whilst I accept that this issue is not one that any reasonable decision maker could rely on for the purpose of refusing or withholding approval under clause 2(b) applying what I have said earlier concerning the way in which the two clauses interact, I do not accept that this is so in relation to clause 3. It would only be correct to conclude otherwise if it was possible to conclude that any accumulation of perched water could not affect the defendant's property interests. In my judgment an inadequate method for either preventing the accumulation of such water or disposing of such water if and to the extent that it accumulated could affect the structure of 89HP in a variety of ways and for that reason is an issue that is relevant to an application for approval under clause 3. This issue arises at this stage only because the claimant chose to make a rolled up application under clause 2(b) and 3. Had she approached the need for approval sequentially at least some of the difficulty that has arisen could have been avoided.

134. Paragraph 4.5 of the experts' joint report is concerned with paragraph 18 of Capita's report, which was concerned with calculations to enable piling to be designed being preliminary not definitive. It is not in dispute that this was so. It is common ground that such calculations will normally be provided by the piling sub-contractor and that it is commercially impractical to obtain such a design unless and until the piling sub-contract has been let. I agree with this since it is obvious. No piling sub-contractor would work to a design prepared by others. Appointing a sub-contractor at the preliminary design stage to prepare a detailing piling design would prevent an effective competitive tendering process by the claimant's appointed main or management contractor. I accept therefore that the absence of a detailed design is irrelevant to an application under clause 2(b) and that the defendant acted unreasonably applying the tests I mentioned earlier in purportedly refusing or withholding approval by reference to this point.

135. Mr. Tucker accepted that was so since his only answer to the point was to state that his understanding was that definitive designs had to be submitted. That is only so in relation to applications for approval under clause 3. There is no real doubt that such a detailed design would have to be submitted and approved under clause 3 before construction could commence. This is so because the proper design of the piling is critical to the management of the movement and subsidence risk during construction, to which I refer in more detail below. I accept Mr. Rainey's point that this may (though it does not necessarily) mean the claimant would have to sequentially submit material under clause 3 rather than make a single application containing all material relevant to the clause 3 assessment. This is a consequence of the commercial practicalities I have mentioned. However, unless and until it is done the defendant would be fully entitled to refuse or withhold approval for the commencement of construction under clause 3. Whether the defendant could reasonably maintain such a position after the detailed design had been submitted would depend on its contents and the advice that the defendant received. What is clear however is that no reasonable decision maker in the position of the defendant could refuse or withhold approval under clause 2(b) by reference to this issue applying the tests mentioned

earlier. Similar considerations apply to the issues identified in paragraphs 4.6 and 5.3 of the experts' joint report.

136. Paragraphs 6.1 - 6.3 of the joint experts' report is concerned with the heave issue that I have referred to earlier in this judgment. It is the only tree related issue that is theoretically capable of being relevant to the defendant's property interest in 89HP since if heave occurs it may cause or contribute to structural damage resulting from movement. In essence heave is movement to a building caused by an alteration in the moisture content of the ground under and surrounding the affected building caused by the removal of trees. Such movement can result in cracking to the structure of an affected building, which will be exacerbated if the movement if differential across the affected building.

137. Although this issue was mentioned expressly in the Decision Letter, the defendant now accepts that it (and therefore its directors) appear " *... to have misunderstood the issues relating to trees and heave ...*" and heave caused by the removal of trees is unlikely to be a problem. In my judgment no reasonable decision maker in the position of the defendant could have refused or withheld approval under clause 2(b) or clause 3 by reference to the risk posed by heave in the circumstances known to the defendant at the date when the Decision Letter was sent. The Capita report did not suggest that approval should be refused by reference to this issue under either clause 2(b) or clause 3. Its own assessment suggested that there was a low risk of damage caused by heave. The opinion of the defendant's engineering expert (Mr. Tucker) was that the issue was a reasonable one for Capita to have mentioned because the claimant's engineer had not carried out a heave assessment. However, Mr. Tucker also accepts that there is in fact no significant risk. As he put it in his oral evidence, it was a non-issue.

138. No reasonable decision maker in the position of the defendant could reasonably have decided to refuse or withhold approval under either clause 2(b) or clause 3 on the material set out in the Capita report without first making further enquiries either with Capita or the claimant. Had that step been taken then it would have become apparent that heave was a non-issue as the experts accepted was in fact the position. By purportedly refusing or withholding approval by reference to the heave issue the defendant acted unreasonably applying the tests referred to earlier because it did so without adopting the fair process of making the further enquiries I have referred to.

139. To the extent that it is relevant, three points were made by MLM in its capacity as the defendant's advisor to this point when it was asked for comments on the Decision Letter. The first was that the relevant soil had a "*low shrinkage potential"*, the second was that the root protection areas of the trees did not extend as far as 89HP and the third was that heave occurs when a shrinkable soil has been desiccated by trees prior to the construction of the relevant building. Here the trees all long post-dated the construction of 89HP. The point being made is that any adverse heave impact if it was going to be experienced would have resulted from the growth of the trees. If no such damage occurred it was unlikely that removal of the trees would have an adverse effect in any event. The defendant's response to this was to maintain the refusal based on this ground stating:

> "The loss of the trees could impact on the structural stability of 89HP because if the tree roots no longer take in water, the soil may heave, leading to damage … Though we accept that this may be a low risk because of the distance from the trees to 89HP, tree root growth on this site may be unpredictable: this could only be fully assessed with soil investigations. Such investigations have yet to take place and until they do there remains an area of uncertainty about which we are concerned."

There is no objective basis for this view any more than there was an objective basis for refusing or withholding approval under either covenant by reference to this point on the basis of the information Capita had supplied in its report. It does not even attempt to answer the point made concerning the low shrinkage potential point. It meets the point concerning the absence of any relevant root structures by surmise that is unsupported by any objective justification and it fails even to mention the heave mechanism point. If and to the extent that what is said in the post decision letter correspondence is relevant, it does not assist the defendant. If anything the defendant's response emphasises the unreasonableness of its reliance on this point.

140. Paragraph 8.1-8.2 of the joint experts' report is concerned with a point made by Capita relating to drainage in paragraphs 34-35 of its report to the defendant. In summary Capita asserted that the drainage design for the building that the claimant proposed to construct on the Site did not accord with what was set out in a flood risk assessment for the building. Mr. Rainey submits and I accept that this point has no impact on 89HP or the property interest of the defendant in it. It is concerned exclusively with drainage from the building that the claimant proposes to construct and is a matter exclusively for the claimant, the relevant utility provider and, possibly, the Environment Agency. Its resolution can have no impact on the structure or freehold reversion that is the limit of the defendant's property interest. It follows that it is not a point that any reasonable decision maker in the position of the defendant could rely on as a basis for refusing or withholding approval under either covenant.

141. It will be apparent by now that I consider there is in truth one generic issue of importance that was properly an area of concern for the defendant and that concerned the effect of movement and subsidence caused by the construction of a deep basement area on the Site in close proximity to the southern flank wall of the electricity sub station and 89HP. I accept that is likely to engage a number of different issues identified within the experts' joint report and I accept also that if and to the extent that there is any substance to the movement and subsidence point, the absence of any proposals as to how any resulting damage was to be made good without cost to the defendant would be a legitimate factor for the defendant to take account of in deciding whether to give approval under clause 3.

142. The risk of differential settlement caused by the construction of a large basement area over almost all the Site could be a reasonable ground for refusing or withholding consent under clause 2(b) but given what I said earlier concerning the interaction between clauses 2(b) and 3, that is so only if the defendant's advice at the date of its decision to refuse or withhold approval was that movement and resulting damage was probable and there was no practical way of avoiding it if the claimant's design proceeded. If its advice was or should have been, or would have been had appropriate

further enquiries been made, that these issues could be resolved as a matter of engineering design and management then in my judgment the issue was one that was relevant to an application under clause 3 alone.

143. In essence, the claimant's development scheme proposes the excavation of a basement area that at its deepest is in excess of 7.5 metres below the level of the western pavement of Holland Park. The effect of excavating such a basement in close proximity to the southern walls of the substation and 89HP is to expose each to the risk of both lateral and vertical movement caused by the removal of the support provided by the ground that is excavated to form the basement. Such movement can result in physical damage ranging from hairline cracks of 0.1 mm width or less to that which threatens the structural stability of neighbouring buildings – see the range of possible damage set out in CIREA C580, where such damage is categorised "*Negligible"* (cracks of less than 0.1 mm in width) to *"Very severe"* (movement resulting in structural instability). Movement that is differential is likely to be worse where the affected building uses mixed methods of construction. 89HP suffered bomb damage during the Second World War. Its rear section was re-constructed using steel supports where previously wood had been used. Steel will move less than the remaining wood support structure thereby creating the risk of sheering damage. There are two elements to this movement risk – that caused during the excavation process when the support provided by the excavated earth is removed and that which results over time as a result of settlement caused by the replacement of support provided by the excavated earth with that provided by the development structure.

144. The claimant's design proposed eliminating risk of movement during construction by using contiguous piling while the new structure was being built and the risk of movement after completion of construction mainly by creating a concrete box structure consisting of a concrete basement slab and concrete external walls to provide the support formerly provided by the excavated earth. The claimant's 2016 application to the defendant was supported by a report from MLM, which addressed the movement issues. The part of its report relevant for present purposes is Sections 3 and 4, the material paragraphs of which are in these terms:

> "**3 Design**
>
> 3.1 The basement structure has been designed in reinforced concrete construction forming a very stiff, box structure designed to withstand lateral earth and hydrostatic pressures based on a conservative value for the basement overall depth below ground level. …
>
> 3.2 …The wall design will ensure that there is no significant relaxation of the ground around the basement thus eliminating the risk of any significant movement and avoiding any damaging impact of the subterranean development on the existing neighbouring structures.
>
> 3.3 The basement is designed with steel reinforced concrete walls and slabs that will be cast inside a temporary contiguous piled retaining wall from the bottom of the excavation upwards.

A capping beam will be cast at the tops of the piles before excavations commence and adjustable props will be installed between the piles at lower levels. As the reinforced concrete structure progresses upwards internal propping between the retaining walls will be removed.

3.4 The walls and floor slabs of the basement 'box' have been designed to form a very strong and rigid structure to eliminate any harmful movement or settlement of ground or existing buildings around the basement once excavation within the walls is complete.

…

3.8 A design has been carried out for the contiguous piles wall forming the basement excavation taking into account the loading from the foundations to [89HP]. The calculations are presented in MLM Environmental Limited's calculation sheet 774511/1 to 38 for the design of the contiguous piled wall at the boundary of No. 89. These calculations show that for the long term situation, the maximum lateral deflection about the bottom of the basement is limited to 9 mm and that the likely vertical displacement at ground level on the line of the foundations to [89HP] would be 7.5 mm. Therefore any damage will be 'slight' as defined by Bowland 2001.

3.9 The above calculations also give loads for the design of the propping at capping beam level and lower down the face of the contiguous pile wall as excavation proceeds for detail design to be undertaken by the appointed contractor.

4 Construction method

4.1 the basement will be constructed in such a way as to avoid any damaging or significant movement of adjacent ground levels or nearby or adjacent structures both during construction and through the design life of the structure

…

4.4.1 Propping across the basement between opposing faces of the contiguous piled wall will be designed to match the forces on the outside of the temporary wall at each stage so that we avoid any significant relaxation of the ground behind the wall and under [89HP]. This will involve detailed design calculation that will be carried out as a joint exercise between MLM Consulting Engineers and the contractor undertaking the temporary works.

…

> 4.6 Adjacent to the sub station the piles will be installed just inside of the edge of the sub station foundation … The upper 1.5 metres of casing will be left in situ to maintain separation between the pile shaft and the sub station foundation. The capping beam will then be cast separated from the sub station structure by 25 mm thick flexicell to allow for differential movement.
>
> …
>
> **5 Summary**
>
> The basement Construction Design statement … demonstrates that the development will have no significantly adverse impact on the existing neighbouring structures …"

145. Capita commented on these issues in its report. It observed in paragraphs 6 and 7 that the claimant had undertaken no more ground investigation work since 2013 and added "*… in our opinion, it is essential to know the form of the foundations of [89HP] and the sub station in order to fully evaluate the risk, and we do not see why trial pits should not be possible"*. At paragraphs 15-21 of its 2016 report, Capita commented on the design and construction issues relating to the basement in these terms:

> "**Excavation and ground Support**
>
> 14 …
>
> 15. Calculations have not considered the impact of contiguous piling and excavation of the sub-station foundations, subsequent movement of the sub-station and how the movement of the sub-station would impact on [89HP]. Investigations showing the depth and configuration of the sub-station foundations have not been included in the submission
>
> …
>
> 17 … In our opinion, the impact of the excavations and contiguous piling and works generally on the sub-station and how movements of the sub station would impact on [89HP] have not been sufficiently investigated. As there are discrepancies in the levels shown on the drawings and used in the calculations to assess ground movement, it is unclear to us that the worst case scenario has been considered.
>
> 18. Calculations are stated preliminary, with further detail required from the contractor. Definitive calculations are required with a clear line of responsibility and liability.
>
> 19. The method statement indicated that temporary support to the contiguous pile wall will incorporate steel walings. Since it is not possible to construct contiguous piling in perfectly

> straight lines … more detail is needed on bedding the waling or forming packing to piles such that all the piles in the wall are fully supported.
>
> 20. The design assumes that the perimeter retaining wall will be propped effectively by the floor slab to the basement. At the location we have determined is most likely critical to [89HP], the floor slab does not extend right across the basement, but is interrupted by the swimming pool that is at a lower level. The prop to the retaining wall is therefore effectively cranked.
>
> 21. … the slab arrangement incorporating the step down for the swimming pool is far less stiff than an uninterrupted slab and could allow more movement of the retaining wall. In our opinion the calculations need to justify the stiffness and competence of the cranked section of slab whereas those we have seen currently do not. ”

The Capita report then addressed the question of settlement in these terms:

> **Settlement of [89HP]**
>
> 29. We note the estimated settlement of 7.5 mm to [89HP]. In our opinion, there is insufficient consideration of how much damage will occur.
>
> 30. Document ref ARP/663344/AL revision 6 paragraph 3.8 includes settlement estimates of 9 mm lateral movement and 7.5 mm vertical movement on the line of the foundations of [89HP]. It is unclear who will be responsible for the settlement calculations due to temporary works as these are stated to be contractor responsibility and calculations are described as preliminary.
>
> 31. The resulting damage to 89HP is assessed to be ‘slight’. We understand that ‘slight’ envisages cracks up to 5 mm in width. It appears to us that an estimated settlement of 7.5 mm has the potential to cause cracks greater than 5 mm in width, which is beyond the category of slight.
>
> 32. We consider the risks to [89HP] are damp, local flooding, dust and cracking of masonry. It is important to note that on the outside fabric of the building, even relatively small cracks will need to be repaired because otherwise water could infiltrate inside. In winter the infiltrated water would freeze and expand in volume, increasing the size of the cracks, which in turn increases the amount of water infiltrating the walls. The cycle if unstopped could ultimately lead to the collapse of the masonry wall. The infiltrated water could also cause timber rot in the floor joists.

> 33. There is no proposed general method statement for repair of damage to [89HP], should repair be required during or following the works..

146. In the Decision Letter, under the heading *"Construction Issues*", the defendant made it clear that it relied on the whole of the contents of the 2016 Capita Report, which in turn had incorporated by reference its earlier report prepared in relation to the claimant's second application for approval made in 2013. The decision letter then went on to say (in relation to the issue I am now considering):

> "… Their report gives us serious concerns. In particular it highlights that inadequate investigations have been carried out to date, so that it is not possible to say what the impact on 89HP will be of your proposed development. We are concerned about the risks to the building, to the electricity sub-station and the consequent risks to human health
>
> …
>
> we are concerned by their assessment of the construction design and method and of the construction risks to 89HP.
>
> …
>
> Capita note some significant amendments to the previous 2013 scheme that affect 89HP. These include: more consideration for temporary support; calculations of movement to the perimeter wall, with an estimate of effect on 89HP … and a monitoring plan for movement. ..
>
> But in appraising the application, Capita have found flaws and inadequacies which are of serious concern to 89HP, particularly given the extensive scale of the development. These can be found in their report. We have taken this, and their previous report, into account in considering this application."

147. The issue that arises is therefore whether the claimant has proved that the decision reached by the defendant by reference to the structural issues was one that no reasonable decision maker occupying the position of the defendant could have reached.

148. The claimant submits in effect that on the information that was available to the defendant at the date when the decision letter was sent no reasonable decision maker could have refused or withheld approval under either covenant. As I have said already, the issue concerning the accuracy of MLM's WALLAP calculations is not material. Capita's advice had been that on the settlement figures that MLM had provided, it considered that that cracking in excess of "*slight*" cracking would occur in that as it put it in paragraph 31 of its report to the defendant "*… an estimated settlement of 7.5 mm has the potential to cause cracks greater than 5 mm in width, which is beyond the category of 'slight'"*. The report did not go on to specify what it considered the risk of cracking was. It did not suggest however that 89HP was at risk

of any structural damage other than cracking attributable to the settlement identify by MLM.

149. A principal issue on which the defendant has focussed is the failure of the claimant to expose (or ask for permission to expose) the foundations of 89HP. This derives from the advice from Capita contained in paragraph 7 of its report that "*... it is essential to know the form of the foundations to [89HP] and the substation in order to fully evaluate the risk and we do not see why trial pits should not be possible"*. In my judgment this point is one that is material only to an application under clause 3 not an application under clause 2(b). Although Mr. Tucker suggested otherwise in his comments on this issue at paragraph 2.2 of the joint experts report, his oral evidence was different. He accepted that if access could not be obtained to the defendant's foundations then it was possible and practicable to prepare " … *a preliminary design subject to a number of assumptions that would need to be clarified at a later stage"*. He added that his advice would be to validate the assumptions later by site investigation, possibly as part of the process leading to a Party Wall agreement that would have to be concluded or award that would have to be obtained before development could proceed.

150. I have no real doubt that had the claimant sought access for the purpose of digging trial pits exposing the foundations of 89HP at any stage prior to the claimant obtaining planning permission for the 2016 scheme it would have been refused. It was certainly not suggested in the Decision Letter that such facilities could or would be made available – see pages 8-9 of the Decision Letter. The reality is that the expense and inconvenience of trial pits would not be justified unless and until approval under clause 2(b) and planning permission had been obtained. It is unlikely that planning permission would be granted other than conditionally upon a trial pit investigation being carried out and at that stage it would be in the best interests of the defendant to consent and require such pits to be dug before considering the grant of approval under clause 3. This view is consistent with that expressed by the defendant at page 4 of its letter of 30 March 2017, where having noted the invasive and disruptive nature of such investigations, ML states that "*... it is likely that would only permit these trial pits after all other necessary investigations have been completed to avoid unnecessary disruption ...*" As Capita note in paragraph 7 of its report, the issue concerning trial pits is addressed in MLM's construction method statement. In my judgment consideration of such a statement is relevant and appropriate when determining an application for approval under clause 3 (it being a specification for that purpose) rather than under clause 2(b).

151. Allied to the stability issue is that concerning the effect of groundwater. Groundwater level is critical to the stability and deflection of the perimeter wall of the basement that the claimant proposes to construct. Capita's criticism is that the claimant's calculations assumed the water level to be 6.67 metres below datum level, which was not the worst credible figure available. It is noteworthy that Capita do not suggest what the implications of this point are for the stability of 89HP. They simply advise that "*... further ground water monitoring is essential ...*". Again, this is an issue relevant to a clause 3 application rather than a clause 2(b) application. As Mr. Tucker comments in paragraph 3.2 of the joint experts' report, "*Mr. Seller and I agree that consideration of the impact of higher groundwater levels on the basement structure would be necessary at the detailed design stage"*. This is all the more the case

because groundwater is relevant to the detailed design of the piling scheme, which as I have said already, can only be undertaken at a post planning permission stage. There is no evidence that suggests that the difference in levels identified by Capita would make any material difference. The measurements that were available had been taken when ground water would have been at its highest and as Capita had observed in its 2013 report (which the defendant relied on together with the 2016 report in refusing or withholding approval) " *whilst the readings appear to be consistent with the local geological and topographic conditions, and we would not expect the groundwater level to be significantly higher than indicated, this needs to be confirmed"*. Mr. Tucker agreed with this – see T3/123/17-18. All this leads me to conclude that if and to the extent that Capita advised refusing or withholding approval under clause 2(b) by reference to ground water issues, that was not a reasonable judgment to have made. I am prepared to accept that it was in relation to the application under clause 3 when viewed in combination with the need for definitive specifications.

152. As I have indicated already, the issues concerning the nature and extent of 89HP's foundations, the impact of groundwater and the design of the piling system all have to be read in conjunction with Capita's opinions as to the likely impact of movement on 89HP. Capita observed in paragraph 30 of its report that it was unclear who would be responsible for the settlement calculations. It is now clear and in any event I find that the specialist piling sub-contractor would carry out those detailed calculations. Any calculations relating to the final construction would be the responsibility of the claimant's civil engineer. As I have explained, it could not reasonably be expected that calculations relating to piling could be carried out until after planning permission had been granted and a main or management contractor appointed. It would then be for that contractor to appoint a specialist sub-contractor but work could not begin until those detailed calculations had been prepared and incorporated into a construction method statement that would then have to be submitted to the claimant for approval. It is in that context that the technical issue concerning the correct approach to the civil engineering technicality that was noticeably absent from the Capita report becomes relevant.

153. On the material that was available to the defendant as contained in the Capita report no reasonable decision maker in its position could have refused or withheld approval under clause 2(b) by reference to the risk of cracking in excess of what is defined as slight without seeking further information from Capita. On analysis the Capita report identifies a series of enquiries that might reasonably be made in order to allay all reasonable fears of harm prior to the commencement of construction but suggest that at worst there is a risk of physical damage to the structure of 89HP. There is not a hint that there is any risk of severe damage. Although it suggests that cracking might be greater than slight it does not venture an opinion as to what cracking might be experienced. The expert witnesses are agreed that on the assumption that the settlement figures relied on by the claimant in her presentation and accepted at face value by Capita are correct then Capita's concerns about more extensive cracking are misplaced. A fair reading of Capita's report (unless it was decided to return to Capita for further information) is that there were no reasonable grounds for refusing or withholding approval under clause 2(b) knowing that (a) the claimant would have to apply for planning permission (b) would probably have to obtain a party wall agreement or award and (c) would have to present definitive plans and specifications for approval under clause 3 before any building work could commence. In that

context the dispute concerning frequency of monitoring and the setting of amber and red parameters could be resolved.

Conclusions

154. For the reasons set out above, I conclude that:

i) The defendant unreasonably refused consent under clause 2(b) of the 1968 Deed; but

ii) Had the defendant approached the application under clause 3 by reference to the structural issues relied on by the defendant the defendant could reasonably have refused or withheld consent under clause 3 of the 1968 Deed by reference to all structural issues concerning ground investigations, Groundwater investigations, Excavation and Ground support, monitoring and the risk of settlement on the material as it stood at the date of the Decision Letter.

That being so, provisionally I propose granting a declaration in the terms sought in relation to the defendant's purported refusal or withholding of approval under clause 2(b) but not in relation to the refusal of withholding of approval under clause 3. However, I will hear counsel further as to the appropriate form of order for the purpose of carrying this part of the judgment into effect.

Counterclaim

155. The defendant seeks its professional fees incurred in evaluating the 2016 application capped at £15,000. There is no dispute that the defendant incurred fees in excess of the sum claimed or that the sums claimed were reasonably incurred and reasonable in amount. The basis on which it is alleged that the defendant is entitled to recover any sum is pleaded in paragraph 45 of the defence and counterclaim as being:

> "On the true construction of the 1968 Deed, the owner of the adjoining site was entitled to require as a condition for considering applications for consent under clause 2(b) and/or 3 payment of a reasonable sum in respect of legal or professional costs reasonably incurred in considering the said application."

The defendant submits that it is well established that a covenantee whose consent is sought under a covenant may seek an undertaking in respect of its reasonable professional and legal costs as a condition of considering an application for consent. The claimant's Defence to Counterclaim denies this allegation. It pleads reliance on clause 5 of the 1968 Deed, which in so far as is material provides:

> "… and the Building Owner shall also pay to the Adjoining Owner upon demand the fees incurred by his architect in connection with the approval of the revised plans drawings and specifications or which shall otherwise be properly incurred on behalf of the Adjoining Owners during the course of the erection of the said buildings."

In my judgment the counterclaim fails other than to the extent that the defendant is entitled to succeed applying the express wording of clause 5. I reach that conclusion for the following reasons.

156. In Reading Industrial Co-Operative Society Limited v. Palmer [1912] 2 Ch. 42 Swinfen Eady J rejected such a claim. In that case the judge was concerned with a covenant that required the approval of plans for something that the covenantor would otherwise be entitled do without consent since he was the freehold owner of the land on which he wanted to carry out works. As Swinfen Eady J pointed out, contracts often provide for such fees but he added that where there was no such provision there was no legal basis on which the covenantor could be required to meet such expenses. Whilst all contracts have to be construed in their own relevant context, there is nothing that suggests there should be a different outcome in this case. On the contrary, the effect of clause 5 is to make it more difficult for the defendant to recover its fees otherwise than as provided for by that clause. Its presence negatives the implication of a term having the effect alleged by the defendant applying the principles set out in Marks and Spencer plc v. BNP Paribas Securities Trust Company (Jersey) Limited [2015] UKSC 72; [2016] AC 742. Its presence also demonstrates that it was open to the parties to have agreed a costs clause that permitted the recovery of the costs now claimed had they chosen to do so. Instead they chose to cap the costs that are recoverable in the terms set out in clause 5. That negatives the construction of the 1968 Deed for which the defendant contends applying the principles relating to the construction of contracts outlined earlier in this judgment.

157. Although the defendant submitted that this conclusion was contrary to the decision of the Court of Appeal in Dong Bang Minerva (UK) Limited v. Davina Limited (1997) 73 P & CR 253, I consider that submission to be mistaken for three reasons. First, that case was concerned with a dispute between a landlord and tenant concerning a provision that prevented the tenant from underletting without the consent of the landlord, not to be unreasonably withheld. This is factually and contextually different from the situation that arises in this case and which arose in Reading Industrial Co-Operative Society Limited v. Palmer (ibid.) and merits a different outcome for the reasons explained by the judge in that case. Secondly, that case was not referred to the Court of Appeal. Thus either the judgment in Dong Bang Minerva (ibid.) was arrived at *per incuriam* the judgment in Reading Industrial Co-Operative Society Limited v. Palmer (ibid.) or, much more likely, the very experienced and specialist counsel appearing in that case did not consider Reading Industrial Co-Operative Society Limited v. Palmer (ibid.) relevant for the reasons I have given above. Finally and in any event, Dong Bang Minerva (ibid.) proceeded on the basis of it being common ground that it was generally reasonable for a landlord to require an undertaking so that technically it was not necessary for the Court of Appeal to decide the point and in fact it did not do so – see paragraph (1) of Sir John Balcombe's judgment at page 256.

APPENDIX

1. On the first day of the trial I was asked to rule on the scope of the dispute that was to be resolved by the trial. The reason for this is that after the Decision Letter had been issued, the claimant proposed various changes to the design that had by definition not been considered in the Decision letter. Mr. Rainey wished to rely on this further material in meeting the claim that approval had been unreasonably withheld. My conclusion was that the parties were entitled to rely on post decision letter material to the extent that it was relevant to the reasonableness of the decisions contained in the Decision Letter but it was not open to the claimant to advance a new case concerning what she proposed that was advanced for the first time after the decision letter had been sent. This is how the trial proceeded thereafter. My reasons for reaching that conclusion were and are as follows.

2. The claimant's claim as pleaded was exclusively a challenge to the Decision Letter. Although the Prayer to the Particulars of Claim is expressed in general terms that part of the pleading cannot be read in isolation from what appears in the body of the pleading. After setting out in summary the history relating to the Site and the dispute, the Particulars of Claim pleads at paragraph 24 the making of the 2016 application by the claimant to the defendant for approval under each of the covenants and at paragraph 25 the refusal contained in the letter dated 20 January 2017, which the pleading defines as being the "2017 Refusal Letter". Paragraph 26 of the pleading then alleges that approval under clause 2(b) was unreasonably withheld and at paragraph 27 it is alleged that the reasons listed in the 2017 Refusal Letter were not the true reasons for refusal of approval. Thereafter the claimant's various alternative cases are set out, in each case exclusively by reference to the 2017 Refusal Letter – see paragraphs 28 -39 culminating in paragraph 39 in which it is asserted that the refusal under clause 2(b) was unreasonable "*... even if the reasons expressed in the 2017 Refusal letter are genuinely the reasons which motivated that refusal"*. Thus the whole of the claimant's case proceeded exclusively by reference to a challenge to the decision contained in the 2017 Decision Letter. That letter was exclusively concerned with the application for approval made on 4 November 2016. There is no mention anywhere in the Particulars of Claim to any challenge being advanced by reference to anything other than the refusal of approval of the 2016 Application. Thus whilst what happened after 20 January 2017 may be relevant to an assessment of the reasonableness of the decision to refuse consent for the 2016 Application, there is no pleaded challenge to what occurred afterwards.

3. I am satisfied that the defendant prepared thereafter exclusively on the basis that the challenge was to the refusal of Approval of the 2016 Application contained in the 20 January 2017 Decision letter. There is not anywhere a challenge to the reasonableness of the defendant's conduct thereafter. As Mr. Karas submitted and I accept:

> "If afterwards we had said we don't like it and not in a million years will we allow anything, that would obviously have been material . So we have had to address it on the facts. Whether or not other developments were possible on the site is also relevant to reasonableness, and the very fact that Ms Hicks very properly, very reasonably showed us subsequently other

> designs is potentially relevant to our reasonableness in refusing this design."

However, I also accept that in pleading its case, obtaining evidence from its witnesses and in disclosure its exclusive focus has been the case that has been pleaded against it. The defendant was fully entitled to take this course – indeed, I do not see what other course it could have taken. Although there is a tendency now to suggest that the pleadings have limited importance, I do not agree. Pleadings set the agenda for the parties' preparation, they set the scope for disclosure and for what witnesses are called to give oral evidence and on what issues. In consequence, the pleadings also set the agenda for trial. It is entirely wrong that parties should be expected to trawl through correspondence or witness statements in order to attempt to ascertain what issues will be considered at trial. That is a recipe for delay, avoidable cost and confusion.

4. In this case, as Mr. Karas submitted and I accept:

> It does not mean that subsequent matters are immaterial, but the challenge we face is to the reasons in that letter. And we say, because we have made it clear in the skeleton, we cannot be expected to take into account on 20 January 2017 matters which were not before us then.

The parties are fully entitled to refer to subsequent material in so far as it is relevant to the reasonableness of the decision contained in the 20 January refusal letter (which is exclusively concerned with the 2016 Application) to refuse approval for the scheme the subject of the 2016 Application or the motives of the defendant's directors in taking that decision. What the claimant is not entitled to do is challenge any decision other than that taken to reject the 2016 Application. No other challenge is pleaded. Unless and until that changes the exclusive focus of the trial is the decision of the defendants to refuse its approval of the 2016 scheme in the form that it was rejected by the 20 January Decision Letter.