Neutral Citation Number: [2022] EWHC 969 (Ch)Double-click to add NC number

Case No: BL-2020-001453

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
PROPERTY, TRUSTS & PROBATE LIST (ChD)

Rolls Building
Fetter Lane
London

Before:

Her Honour Judge Claire Jackson

- -

Between:

MR CHARLES BERESFORD DAVIES-GILBERT	**Claimant**
- and -	
(1) MR HENRY JAMES GOACHER	
(2) MR STEVEN ADRIAN CHESTER	
	Defendants

- -
- -

Ms Caroline Shea QC and Mr Gavin Bennison (instructed by **Mishcon de Reya LLP**) for the **Claimant**
Ms Camilla Lamont (instructed by **Fladgate LLP**) for the **Defendants**

Hearing date: 24 January to 31 January 2022
Date draft circulated to the Parties: 24 March 2022
Date handed down: 10 am on 28 April 2022

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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.

If this Transcript is to be reported or published, there is a requirement to ensure that no reporting restriction will be breached. This is particularly important in relation to any case involving a sexual offence, where the victim is guaranteed lifetime anonymity (Sexual Offences (Amendment) Act 1992), or where an order has been made in relation to a young person.

JUDGMENT

1) The Claimant is the owner and/or estate manager of a significant area of land in East Sussex. The Claimant refers to the combination of the land holdings as the Gilbert Estate. The approximate extent of the Estate is shown in the plan below which was produced by the Claimant's expert, Mr Beer. The land to which this claim relates, but which is not part of the Gilbert Estate, is shown in turquoise on the plan.

2) Part of the land the Claimant owns is located in the village of East Dean, East Sussex, within the South Downs National Park. The land is owned under more than one title. The Claimant's various predecessors in title also owned other areas of the village which were then sold by them. As part of the contracts of sale restrictive covenants were granted in favour of the vendor's retained land.
3) The Defendants are each the freehold owner of a parcel of land in the village on the South and East side of Little Beeches and Maryland, Gilberts Drive, East Sussex, being the land shown in turquoise on the above plan and

registered at HM Land Registry under respectively title numbers ESX398834 & ESX398835 ("the Defendants' Land"). The Defendants' Land was previously owned by a predecessor in title of the Claimant and is subject to restrictive covenants in favour of part of the land now owned by the Claimant. The Defendants each wish to construct a detached residential property for themself on their parcel of land as part of a scheme.

4) The plan below shows the combined plot owned by the Defendants with reference to other properties in East Dean. The First Defendant owns the lower part of the site including the extended strip of land to the west. The Second Defendant owns the upper part of the site.

5) To assist the reader of this judgment the road running from north to south, to the west of the Defendants' Land, is called Gilberts Drive. The village of East Dean consists of the properties to the west and east of Gilberts Drive. The village as far as it lies to the west of Gilberts Drive is within a conservation area. The lighter coloured parcel of land to the south and east of the Defendants' Land belongs to the Claimant. The village extends further south than the above plan with a ribbon development continuing both sides of Gilberts Drive. The most southerly buildings relevant to this case (and not on the above plan) are properties known as The Fridays. This is a new non-linear development on the west of Gilberts Drive.

6) It will aid the reader of this judgment if they locate the following buildings on the above plan:
    a) The Old Parsonage (to the north of the Defendants' Land).
    b) Little Beeches, Maryland, Medleigh and Birling House (to the west of the Defendants' Land and to the east of Gilberts Drive).
    c) The Vicarage (to the south of the Defendants' Land and to the east of Gilberts Drive).

d) The pale area of land to the west of Gilberts Drive with East Dean written across it, and which is referred to herein as the Horsefield. This land belongs to the Claimant.
e) The Dipperays and the Walled Garden (to the west of the Horsefield). This land also belongs to the Claimant.
f) The land marked with ESS which is referred to herein as the Old Orchard and which is at the junction of Upper Street and Eastbourne Road. Again, this land belongs to the Claimant, and
g) The War Memorial and the Tiger Inn (to the far west of the plan) which is also the site of the Village Green and belongs to the Claimant.

7) The Village Green lies on land sloping west to east and north to south. The valley bottoms out in the Horsefield and then rises on the eastern side of Gilberts Drive, such that the Defendants' Land occupies a slightly elevated position from Little Beeches, Maryland, Medleigh and Birling House.
8) The main issue raised in this case is whether the Claimant has unreasonably refused consent to the Defendants' proposed construction of dwellings on their land: The Claimant says he acted reasonably; The Defendants say he did not.
9) Despite the refusal of consent the Defendants have carried out some works on their land. It is accepted by the Defendants that some of the works carried out, being the erection of retaining walls, were undertaken in breach of a restrictive covenant. Works ceased at the site in September 2020.
10) At the trial, the Claimant was represented by Ms Shea QC and Mr Bennison of Counsel. The Defendants were represented by Ms Lamont of Counsel. Counsel worked extremely hard, together with their instructing solicitors, both in preparing this matter for trial and during the trial. I am grateful to them for their hard work and common sense. One point I note at the outset is that I do not accept an allegation made against Ms Lamont that she has conducted herself in a way which was shady. There was no basis for such a submission to be made and Ms Lamont was rightly offended by it.
11) The common sense applied to the case was best shown by the insistence of the lawyers that a site visit take place. I undertook a site visit on the second day of the trial, accompanied by Ms Shea QC and Ms Lamont with a "visitor's guide" bundle they had prepared for me. The visit was illuminating. It enabled me to see, in a way which pictures and plans cannot illustrate, the topography of the land, the general setting of the village, the present state of the village and buildings within the village and the relationship between those buildings. This is especially important in this case given the focus in the proceedings on questions of aesthetics, heritage, "feel," character and amenity. My findings as to the reasonableness or otherwise of the Claimant's refusal of consent have inevitably been influenced by the site visit.
12) Counsel also provided pre-reading from the trial bundles and from the authorities bundles for the Court. I have as part of the preparation of this judgment re-read the full bundles.

Background

13) I am indebted to the parties for the case summary provided within the trial bundle and the background sections of Counsels' skeleton arguments from which this section of the judgment draws heavily.

14) The Claimant owns a large area of land in East Dean. He is entitled to the benefit of a restrictive covenant ("the Covenant"), entered into on 2 July 1960 as part of the sale of the Old Parsonage (as it then was) between (1) Walter Raleigh Gilbert and Lancelot Prideaux-Brune as vendors and (2) Rhoda Mary Hayes and Kathleen Mary Greenway as purchasers. The Covenant provides:

"(B) NOT to erect upon any part of the property hereby conveyed any other messuage erection building or wall whatsoever without such previous written licence as aforesaid such licence not to be unreasonably withheld."

15) Most of the Defendants' Land, being the land other than the southerly 3 metre strip at the south of the First Defendant's land, previously formed part of the rear garden of the Old Parsonage. It is therefore burdened by the Covenant. The parties agree that the Covenant is a qualified covenant. A further restrictive covenant within the 1960 conveyance, whilst pleaded by the Claimant, is not relevant to the case before me.

16) On 5 April 1991, the trustees, one of whom was the Claimant's father, as predecessor in title of the Claimant sold a small portion of land, being the southerly 3 metre strip at the south of the First Defendant's land, to the owner of the Old Parsonage, Jennifer Conlin, to allow access to the south of the gardens of the Old Parsonage. That conveyance included an absolute covenant ("the 1991 Covenant") whereby Ms Conlin promised:

"Not to erect or build or permit to be erected or built any structure or building on any part of the property hereby transferred.
To erect within two (2) months of completion good and sufficient stockproof fences along the boundaries of the property marked with a "T" inwards on the plan bound up within and forever thereafter to maintain the same in stockproof condition.
To make good any damage caused in the construction of the accessway and fencing."

17) On 14 February 2003, the land which formed the remaining, unsold part of the Gilbert Estate as defined in the 1960 Conveyance ("the Benefited Land") was conveyed by the then-trustees of the Estate to the Claimant and was subject to first registration at HM Land Registry under title number ESX266268. The Claimant took over the day-to-day management of the Estate at that time.

18) In a clarification of his case shortly before the trial the Claimant accepted that not all the Gilbert Estate, and not all the land he owns in the village, is benefited land under the Covenant. In particular the Claimant accepted that the Dipperays and the walled garden did not benefit from the Covenant. I will return to this concession later in this judgment. The extent of the Benefited Land is shown in yellow on the plan below with the Defendants' Land shown in blue.

19) On 6 October 2017, the then owner of the Old Parsonage working with a property developer, Ben Ellis, submitted a planning permission application for the rear and western land of the Old Parsonage. These plans were approved on 10 April 2018 and the principle that the rear land of the Old Parsonage could be used, as far as the planning authorities were concerned, for the purpose of constructing dwellings was established. An application was then made to the Claimant for consent under the Covenant. That consent was initially refused. Following discussions between the Claimant and Mr Ellis, including as to the appearance and lay out of the properties, the Claimant, on 9 December 2019, granted permission upon payment of a licence fee of £25,000 per property for two detached properties to be construed to the west of the Old Parsonage.
20) The land to the rear of the Old Parsonage was sold to the Defendants who purchased their respective parcels of land on 17 May 2019. They were each aware of the Covenant at the date of their purchase. Prior to the purchase the Defendants had agreed that the Second Defendant would build his own property at his cost, and the First Defendant's property at cost plus 10% to the First Defendant.
21) The Defendants then each, through their architect, Mr Terry Burdett of Morgan Carn Partnership Architects, submitted applications for planning permission on 12 July 2019 and 16 July 2019 respectively and each obtained planning permission on 28 October 2019. The Defendants' proposed scheme is a modification of the scheme submitted by Ben Ellis. The First Defendant further applied to vary the approved floor plans and elevations in respect of his property on 3 January 2020. This was approved on 7 February 2020.
22) On that date, the Defendants, through their solicitor, made a joint application to the Claimant for permission pursuant to the Covenant ("the Application"). The Application, as far as relevant, read:

"*Without prejudice to my client's contention that you have not yet made out the requisite ingredients to show that you can enforce the covenants by way of injunction, my client is prepared to proceed (on a without prejudice basis) as if you are able to enforce the 1960 covenants. That being so, I have been instructed to apply for your consent (in accordance with clauses A and B of the Schedule to the 1960 conveyance) to the proposed scheme; such consent not to be unreasonably withheld (which would include unreasonable delay).*

…

I believe that the attached is sufficient for you to make your decision and I hope you agree that it is not unreasonable to expect you to make your decision within 21 days of today's date (ie by 4pm 28 February 2020). My client intends to commence ground works in March with the first bricks being laid at the end of March.

…

Whilst I do not expect you to refuse consent (since I cannot envisage how consent to this scheme could be reasonably withheld), please provide full written reasons (with supporting evidence) in the event that you decide to refuse consent so that I am able to consider the prospects of challenging such a decision by way of court proceedings. Any unreasonable delay and/or failure to provide clear and justifiable written reasons (with supporting evidence where necessary) is likely to lead the court to conclude that consent has been unreasonably withheld."

23) The Application was accompanied, or subsequently supported, by documents exceeding 700 pages.
24) On 3 March 2020, the Claimant emailed the Defendants' solicitor asking for clarification regarding measurements on the plans which in his view did not reflect the position on the ground and infringed the 1991 Covenant.
25) On 6 March 2020, the Defendants' solicitor provided two updated plans reflecting the Claimant's comments, the effect of which was to move the footprint of the whole scheme away from the southern boundary so that no part would be constructed in breach of the 1991 Covenant. The Defendants applied for planning permission in this regard on 31 March 2020 and this was approved on 5 June 2020 together with approval of hard and soft landscaping for the development.
26) Before this date, and on 18 March 2020, the Claimant refused consent to the Application on the basis that "*In short, if the development were to proceed: (a) it would have a detrimental impact on the amenity value of the Estate and (b) it could threaten the future use and commercial value of the neighbouring land.*"
27) In this letter ("the Refusal Letter") the Claimant also stated that:

"Although planning permission has been granted, it goes without saying that I have to examine other matters, which are separate from those of the planning department in coming to a decision as to whether or not I should either grant a licence, in respect of the 1960 covenants, or give consent in respect of those imposed on part of the Servient Land in 1991. Consequently, due consideration has been given to, amongst other matters, the following:

- *The positive or negative impact of the proposal on my neighbouring land*
- *Its impact on the future anticipated use and value of that land*
- *Its impact on the amenity value of the Gilbert Estate in the locality as a whole; and*
- *The effect on boundary treatment and long-term maintenance"*

28) The Defendants sought clarification of the reasons for the refusal by the Claimant by way of letter dated 28 April 2020 which set out ten questions to which the Defendants sought answers. The questions included identification of the land the Claimant had taken into consideration.
29) The Claimant replied by way of letter dated 13 May 2020 ("the Explanatory Letter") which did not reply to the 10 questions. The letter set out a "*couple of the issues that led me to my decision below*." The issues highlighted were boundaries and design. In relation to boundaries the Claimant stated that the plans submitted to the planners had contained an error in that it stated that the access strip to the site was 4m when it is 3m. The loss of the metre resulted in the boundary feature, a hedge, suggested as part of the planning permission, no longer being fully within the Defendants' Land. The Claimant stated that the hedge proposed by the Defendants could not be planted successfully. The Claimant also questioned ownership and maintenance of the boundary.
30) In relation to design the Claimant concluded that the scheme was "*far from pleasing and has a negative impact on the Estate*." He considered that the "*ordinary*" and "*suburban*" development would not fit in the conservation area. The "*scale and mass of development and unnecessary and excessive use of the ordinary within your clients design so close to my neighbouring land and the attractive assemblage of buildings, mainly owned by the Estate, lead me to believe that your clients proposal would have a negative impact on the Estate now and in the future*."
31) On 13 May 2020, the Defendants' solicitor gave the Claimant a further opportunity to answer the ten questions. The Claimant replied to this correspondence but did not set out any other reasons.
32) The Defendants considered the refusal of consent unreasonable. In June 2020, the Defendants commenced work on the site. This was questioned by the Claimant's solicitors and representations were received from the Defendants that the works did not and would not extend beyond ground works. The Claimant agreed these were within the Covenant and permitted them to continue.
33) On two further occasions, in August and September 2020, questions were raised over works the Defendants were undertaking which included the erection of retaining walls.
34) Proceedings were commenced by the Claimant on 14 September 2020 following an application for an interim injunction made on 11 September 2020. The injunction application was settled on undertakings given by the Defendants not to continue any works on their land without the Claimant's agreement or without 14 days' written notice. The costs of the application are reserved to trial.

The Parties' Positions

35) The Claimant seeks a final injunction restraining the Defendants from carrying out any further works of construction or erection on the Land without the Claimant's consent, and a declaration that the Claimant has not unreasonably withheld consent to the Defendants' Application.

36) In their Defence, the Defendants assert that the Claimant's reasons for refusing consent to the Application had no reasonable basis and that no reasonable beneficiary of the Covenant could have refused consent. They ask the Court to draw adverse inferences from the lack of detail in the Claimant's response to the Application. The Defendants also make various contentions as to whether the works undertaken prior to the commencement of these proceedings were (i) within the scope of the Covenant; (ii) (reasonably) believed by the Defendants to have been within the scope of the Covenant; and (iii) (reasonably) believed by the Defendants to be within the scope of what their solicitors had confirmed would not be done by them. In their Counterclaim, the Defendants seek declarations that the Claimant unreasonably withheld consent to the Scheme and that the Defendants were lawfully entitled to implement the Scheme.
37) In his Reply and Defence to Counterclaim, the Claimant maintains that his refusal of consent to the Application was reasonable and (as far as may be required) adequately reasoned. The Claimant does not accept that the works undertaken by the Defendants as far as they relate to retaining walls were within the Covenant or were undertaken in the reasonable belief they were within the Covenant.

The Law

38) Master Shuman by way of her Order dated 28 January 2021 required the parties to produce an Agreed Statement of Applicable Law for the purposes of the trial. This is not something I, or Counsel in the case, had encountered before. It was however an immensely helpful direction in the case requiring Mr Bennison for the Claimant and Ms Lamont to work together to produce the statement. I have no doubt that the reason the statement provided to me was of the high quality it was, and was of such benefit during the trial, is because of the hard work, dedication, and co-operation they showed in its production. Rather than reconstruct the note for this judgment I attach the statement they produced at Annex A to this judgment. A reader of the statement will, I am sure, be impressed by the quality and detail therein and for its accurate summary of the legal principles I must apply in determining this case. I have applied the agreed principles herein.
39) As is clear from the statement there were four areas of disagreement on the law between the parties at the outset of the trial. These were:
    a) The burden of proof (paragraphs 17 to 18 of the statement).
    b) General principles of reasonableness (paragraphs 26 to 27 of the statement).
    c) Aesthetic considerations (paragraphs 36 to 37 of the statement), and
    d) Whether the injunctive relief sought by the Claimant should be granted (paragraphs 47 to 48 of the statement).
40) Given a concession made by Ms Lamont in opening submissions it is not necessary for the Court to determine the latter issue.
41) On the burden of proof issue, the submission of the Claimant is the correct submission. Whilst in the case of RM Cole v Russell (Tulse Hill) Ltd (1955) 165 EG 389 the County Court judge did find that if the covenantor establishes a prima facie case the onus shifts to the covenantee that was in the context of a

case where the landlord could not withhold consent to an assignment if the proposed assignee was respectable and responsible and the evidence before the Court satisfied the Court that that was the case. That is distinguishable from this case. There is no conditionality which applies to the withholding of consent by the Claimant in this case save for the issue of reasonableness.

42) Given that the burden of proof in cases without conditionality was considered by the Court of Appeal in 1986, 31 years after the RM Cole decision, and that decision was not followed, in my judgment the correct burden for the court to apply is the agreed general position between the parties at paragraph 16 of the Agreed Statement of Applicable Law.

43) On the general principles of reasonableness issue, having considered the authorities referred to by Counsel, I can find no judicial authority binding on me to support the Defendants' proposition derived from the decision in Hicks v 89 Holland Park (Management) Ltd [2021] EWHC 930 (Comm) that where an outright refusal is said to be unreasonable by reference to a factor or circumstance that could have been neutralised by a condition, generally the refusal will be unreasonable.

44) The authority for the position noted by HHJ Pelling QC in Hicks was the judgment of Lewison J in Sargeant v Macepark (Whittlebury) Limited [2004] EWHC 1333 (Ch). However, the proposition of Lewison J was:

"*when considering the reasonableness of conditions, it seems to me that if the landlord would have been entitled to refuse consent on some particular ground, a condition neutralising the landlord's concern will ordinarily be reasonable*."

45) It is therefore a different proposition to that put forward by HHJ Pelling QC. Judge Pelling's proposition is also contrary to the binding authority of Iqbal v Thakrar [2004] EWCA Civ 592 wherein the Court of Appeal found that such a duty did not arise:

" *I do not accept that a landlord can be found to have unreasonably refused consent to a proposed alteration on the basis that a conditional consent should have been given by the landlord. It is for the tenant to put forward the proposals for the alterations or additions."*

46) I am bound by the decision of the Court of Appeal, which accords with the proposition of law propounded by Lewison J in Sargeant, and therefore with regret I disagree with HHJ Pelling QC and find that the proposition contended for by the Defendants is incorrect.

47) On aesthetic considerations this issue arises from the Court of Appeal's decision in 89 Holland Park Management Ltd v Hicks [2020] EWCA Civ 758. The following comments from Lewison LJ from that decision are to be noted:

" *...in some contexts, a decision-maker asked to give consent to works may refuse on aesthetic grounds..."*

"I am inclined to agree with him that merely to say that the proposed building is not to the taste of the Company or the leaseholders would be entirely subjective; and would not be enough. On the other hand, to limit aesthetic objections to a case in which there is an effect on capital or rental value is too narrow. ..."

"...an objection that a proposal is "out of keeping" or that it would have "a potential adverse effect upon the amenities" of the land with the benefit of the covenant may be enough"

"...the current state of the land may also be a relevant consideration."

48) Having considered the judgment of the Court of Appeal I consider that the proper legal principle is different from that proposed by both parties. In my judgment the proper legal principle is that if an objection to an application for consent is based on aesthetic grounds, then it would not be enough merely to say that the proposed building/alterations were not to the taste of the covenantee (or others entitled to the benefit of the covenant) as this would be entirely subjective.
49) What will not be apparent from the Agreed Statement of Applicable Law is that during the trial, and following a factual concession by the Claimant, a further disagreement on the law arose between the parties as to the effect of a covenantee taking into account irrelevant matters when considering an application for permission.
50) Ms Lamont submits on behalf of the Defendants that the Claimant was not reasonable in refusing consent as whilst the Claimant gave two reasons for refusing consent those reasons were not reached by a proper procedure and process as the Claimant took into account irrelevant matters and was influenced by factors which should not have influenced him.
51) In closing submissions Ms Shea QC objected to Ms Lamont making this submission on the grounds it was not a pleaded issue in the case, was not an agreed issue in the case and had not been addressed in the Agreed Statement of Applicable Law.
52) Having considered the pleadings in the case (which should of course plead facts not law) I was satisfied that it was open to Ms Lamont to pursue this line of Defence. In the Defence the Claimant is put to strict proof as to the extent of the land the Covenant attached to. This was the issue that the factual concession related to. The Defendants then plead that "*The Defendants aver that the Claimant has unreasonably withheld his consent to the Application and that accordingly the Defendants are lawfully entitled to carry out the Scheme without breaching Covenant B*." This is supported by paragraphs 21 and 58 to 60 of the Defence which give reasons why the decision of the Claimant was said to be unreasonable. This requires the Court to look at the decision-making process of the Claimant.
53) In any event the Defendants could only, in relation to procedure, plead to the facts put before it by the Claimant as the Defendants did not know the decision-making process of the Claimant or the land he had taken into account, this having not been pleaded in the Amended Particulars of Claim. The Claimant having made a concession as to an issue on which he was put to strict proof early in the trial in my judgment the Defendants were entitled to pursue a legal argument they considered arose.
54) As to the agreed list of issues in my judgment the submission Ms Lamont sought to make was permissible under the list of issues given such included:

"What was the extent of the land benefited by the Covenant at the date of the Refusal? What were the factors that actually influenced C's mind when refusing the Application? In particular was C influenced by all or any of the matters he now relies upon in the Reply [13] as justifying the Refusal and, if so, which matters?"

55) The argument sought to be pursued by Ms Lamont fell squarely in my judgment within the final of these issues.

56) As to the Agreed Statement of Applicable Law the issue sought to be pursued was included therein at paragraph 24 (albeit not in as much detail as the submissions now placed before the Court).

57) Ms Lamont had also prefaced the point in her skeleton argument:

"*Ds contend that C was not entitled to take into account the impact of the Scheme (if any) on any of the land within the Dipperays Title, including the Grade II listed house known as The Dipperays and or the adjacent holiday cottages and walled garden. So far as he has done so, his decision was demonstrably unreasonable.*"

58) Finally, Ms Lamont had not sat back when the factual concession was identified by the Claimant in opening submissions. In opening submissions Ms Lamont expressly and fairly made clear that her case was that:

"Mr Davies-Gilbert has made his decision, back in March 2020. He has, clearly, on his own case taken into account factors he shouldn't have done. I say that invalidates his entire decision. I hear my learned friend is going to try and portray that, as I understand it, as a sort of two-reasons case. I say it's not a two-reasons case. I say that this matter goes to the heart of the decision."

59) Ms Shea QC had in her initial closing submission on day five of the trial anticipated that this point was to be made by Ms Lamont and made a request for some notice during the weekend of what that argument was going to be.

60) Ms Lamont gave such notice by an email sent early in the afternoon of 29 January stating she would be inviting the Court to find that on the facts the Claimant's true reasons were not as set out in the Refusal Letter such that the refusal fell foul of both limbs of Braganza v BP Shipping Ltd [2015] 1 WLR 1661 or alternatively that if the reasons stated were the real reasons that they were bad reasons because the Claimant had taken into account irrelevant considerations or had adopted an unreasonable process. Matters identified by Ms Lamont in her email were that the Claimant had taken into account land other than the Benefited Land, and the views of third parties and that the Claimant had assumed for himself the role of custodian/steward of the wider locality. As a result, there was no remaining good reason that could justify the refusal. Further the refusal was an unreasonable outcome. Ms Lamont also set out some additional cases she considered should be placed before the Court.

61) On the Monday of the second week of the trial, Ms Shea QC informed me that she was unable to properly address the new point that had been raised. I therefore gave permission for the Claimant to file written submissions on this point by the end of that week which Ms Shea QC and Mr Bennison duly did. (Ms Lamont's written closing submissions already addressed the point).

62) The Claimant's submissions are that whilst the Claimant accepts he took into account the Dipperays and the walled garden, which is not Benefited Land, on the amenity issue this was only one matter which operated on his mind. The other matters which were operating on his mind on this issue were all relevant matters. The other matters complained of by the Defendant (i.e. the views of third parties and the custodian/steward role) were in the Claimant's mind but had not been shown to have operated on his mind when he made the decision. Hence his decision on amenity is reasonable when the vast weight of evidence is looked at in the case and the decision on the neighbouring land issue was not affected by the irrelevant consideration in any event.

63) The legal difference between the parties which has arisen, and which is not addressed in the Agreed Statement of Applicable Law, therefore relates to the consideration a court should give to the process employed by a covenantee when considering an application for permission, and the impact on a decision reached by the covenantee if matters taken into account by the covenantee were not matters that the covenantee could properly have regard to. This raises an issue as to whether factors taken into account in relation to a decision are to be considered as separate from the reasons given for the decision.

64) Having read the submissions of the parties and all authorities filed by them in relation to this issue in my judgment the following legal principles arise which are relevant to the case before me:

a) The primary finding of fact the Court must make in such a case is what were the reason or reasons which resulted in the refusal of permission (Bromley Park Garden Estates Ltd v Moss [1982] 1 WLR 1019).

b) This requires the Court to find the reason or reasons that influenced the mind of the covenantee at the relevant time and not later (Minerva (Wandsworth) Ltd v Greenland Ram (London) Ltd [2017] EWHC 1457).

c) There is no magic in the use of the word 'reasons' in case law. The Courts when seeking to establish why a covenantee has refused consent have used several different terms for what is to be established: Reasons in Minerva; Decision, factor, consideration in Cryer v Scott Bros (Sunbury) Ltd 55 P&CR 183; Ground in Lambert v FW Woolworth and Co Ltd [1938] Ch 883, and Conclusions in Sargeant. To avoid difficulties, I will use the word "reason" in this judgment.

d) The process by which the reason was come to, and the reason itself, must be reasonable, requiring consideration of both limbs of the *Wednesbury* principle (Braganza and the obiter comments in Victory Place Management Company Limited v Kuehn [2018] EWHC 132 (Ch)).

e) It will be unreasonable for a covenantee to refuse consent for the purpose of achieving a collateral or uncovenanted advantage (International Drilling Fluids Limited v Investments (Uxbridge) Limited [1985] EWCA Civ 11).

f) A decision maker as part of a reasonable decision-making process must in reaching their reason exclude extraneous considerations whilst taking into account those considerations which are obviously relevant to the decision in question (Associated Provincial Picture Houses, Limited v Wednesbury Corporation [1948] 1 KB 223 and Braganza).

g) Not all considerations which are in the mind of the covenantee will influence the mind of the covenantee (Cryer at 199-200). Therefore, simply because a consideration has been taken into account it does not mean it contributed to the reason as a consideration can be given a zero weighting in the decision-making process (JML Direct Ltd v Freesat UK Ltd [2009] EWHC 616 (Ch)).

h) Where approval is not to be unreasonably withheld and the covenantee refuses consent for a mixture of reasons, some good and some bad, where the result would still have been a refusal without the bad reasons then the result will remain reasonable and will not be vitiated (No. 1 West India Quay (Residential) Ltd v East Tower Apartments Ltd [2018] 1 WLR 5682). This requires the Court to consider if there is a connection between the reasons or if the reasons are free-standing and the good reason, which is more than a makeweight, is not dependent on the bad (paragraphs 35 and 40 of No 1 West India Quay).

65) In my judgment, therefore, it follows from the above analysis that considerations (ie the things taken into account by the covenantee) and reasons (ie the justification for the refusal) are not the same thing. Nor is it enough to say a consideration was taken into account, it must be a consideration which contributes to the reason. To avoid any difficulties regarding language in this decision I will refer to considerations and reasons as already defined in this paragraph.

The Issues

66) Counsel in preparing the case for trial produced a list of issues for the case. That list of issues is extremely detailed and sets out 17 issues for the determination of the Court. Counsel were agreed at the outset of the trial that whilst the list set out each consideration the Court would need to consider in the case the issues for determination could be limited to 3 issues. The agreed issues are:
    a) What were the Claimant's reasons for refusing consent to the scheme?
    b) On those reasons was the Claimant's refusal of consent to the Application unreasonable?
    c) Did the Defendants believe that none of the Works undertaken in June to August 2020, in particular the erection of 'retaining walls', fell within the scope of the Covenant? If so, was this belief reasonable?

67) One issue which no longer required a decision by the Court because of the concession by the Claimant was the extent of the land benefited by the Covenant. Following the concession, it is now agreed that it is the Claimant's land registered under title number ESX266268 which has the benefit of the Covenant. That is the land shown in yellow on the plan at paragraph 18 of this judgment. It is agreed that that land is the Benefited Land. It is also agreed that the Benefited Land does not include the Dipperays or the walled garden.

68) I should further note that on day five of the trial I raised with Counsel a concern which had developed following my pre-reading of what were agreed to be the key authorities in the case. The pre-reading included the decisions of the High Court and the Court of Appeal in Hicks. I noted when reading the judgments that HHJ Pelling QC in considering the case at first instance formed the view that given the claim before him sought permission under two restrictive covenants that he should consider the claim as consisting of two applications for permission and that each needed to be reviewed based on reasonableness.

69) Whilst in the case before me permission was sought by the Defendants pursuant to only one covenant, I raised with Counsel whether the fact that it was an application for permission for two houses resulted in this also being a

claim considering two applications for permission, rather than one application. Counsel considered this over the weekend and on day six of the trial made submissions on the point as far as they were able.

70) Having considered those submissions and re-read the papers in this case and the authorities, in my judgment, the claim before me is a claim arising out of a single application for permission and not two applications for permission. It is distinguishable from Hicks, if a distinction is necessary, on the facts and the pleaded cases.

71) In this case at the time permission was sought permission was sought for a single scheme by the Defendants jointly. No suggestion was made nor was the Claimant invited to consider the proposal both as a whole and in its constituent parts. This is clear from the Application which expressly provides:

"*I have been instructed to apply for your consent (in accordance with clauses A and B of the Schedule to the 1960 conveyance) to the proposed scheme....*"

72) In my judgment for the Court to consider the scheme as two applications for two separate properties the Claimant had to be given that option at the relevant time. He was not. This is supported by the straightforward evidence of the Defendants in their witness statements that they have treated the application as an application for a single scheme. The Second Defendant notes in his statement, having defined the land as being the land to the rear of the Old Parsonage in East Dean or in other words, both plots of land, that

"*In February 2020 CPG applied to Mr Davies-Gilbert for consent to build on the land and this was refused by Mr Davies-Gilbert.*"

73) Factually therefore in my judgment the Claimant was faced with an application for permission for a scheme adopted by the Defendants jointly to build two houses. This was a point expressly noted by the Claimant in the Refusal Letter

"You have not suggested that one unit should be considered separately from the other. For those reasons I have considered the two developments as one."

74) If I am wrong in that regard, then in any event neither party has asserted a case that the Defendants should be treated separately and that they each made an application.

75) In my judgment therefore the Court is dealing with a single application for permission under the Covenant.

Witnesses of Fact

76) The Court heard oral evidence from 4 witnesses of fact. Each witness had supplied a witness statement to the court. In this section of the judgment, I set out my overall impressions and conclusions in relation to the witnesses.

Mr Davies-Gilbert

77) The sole factual witness for the Claimant was the Claimant. He is clearly a man who is deeply passionate about the heritage aspect of East Dean and about maintaining the Gilbert Estate as a functioning and, ultimately, profitable enterprise. He has a personal preference for what was referred to during the trial as the "Sussex Style". This building style is present and evident within East Dean. However, it is not the sole building style.

78) Mr Davies-Gilbert does, in my judgment, see himself as a guardian of the Estate and seeks to further the development of East Dean in accordance with

his preferred building style. These conclusions are supported not solely by the testimony, both written and oral, of Mr Davies-Gilbert, but also by his actions since he became the owner of the Benefited Land, which is abundantly demonstrated from the papers before the court.

79) Having heard the evidence of the Claimant, I do however, have reservations as to how his wishes and desires have impacted the evidence he has given to the Court. In my judgment Mr Davies-Gilbert has in presenting his evidence to the Court sought to rewrite his decision-making process, the weight he gave to factors within that process and the reasons he refused consent at the time.

80) In this regard, the change of position by the Claimant shortly before trial regarding the Dipperays is of crucial importance. Until the commencement of the trial, it was the Claimant's pleaded case and his evidence that the Dipperays was part and parcel of the Benefited Land under the Covenant and he took that land into account when considering the Application.

81) This position changed on 17 January 2022 and then further changed during Mr Davies-Gilbert's evidence. First the Claimant accepted in the week before the trial that the Dipperays was not part of the Benefited Land. Whilst I am told that change was notified to the Defendants no application to amend the pleaded case was made until the first day of trial. That application was opposed by Ms Lamont but following an amendment to the draft text before the Court was agreed on the third day of trial.

82) The amended pleaded position of the Claimant was, and is, that the Dipperays was not part of the Benefited Land, but the Claimant accepted that he took into account as part of his decision-making process, and was influenced by, the impact the Defendants' scheme would have on the view from the Dipperays.

83) Unsurprisingly this was an area of evidence Ms Lamont explored with Mr Davies-Gilbert in his cross examination. Ms Lamont put to Mr Davies-Gilbert that he had lied in his witness statement because he had put forward a factual proposition that the Dipperays was part of the Benefited Land. Having heard the evidence of Mr Davies-Gilbert, I am not satisfied that he did lie in his witness statement as the relevant statements of truth state that he believed the facts stated to be true and his evidence was he believed it to be true.

84) However, I am satisfied that his witness statement and his original pleaded case put forward a definitive factual position when the Claimant was by his own admission confused about the point. Mr Davies-Gilbert is therefore in my judgment a witness who was willing to put belief as fact to the Court without investigating whether there was any factual foundation for the belief.

85) Of more concern regarding the Dipperays was however Mr Davies-Gilbert's attempt during his evidence to, without regard to his own pleaded case or his own witness statement, seek to assert that he did not take the Dipperays into account when considering the Application:

Q. And you knew that you had taken into account the Dipperays title land in coming to your decision; yes?

A. No, I didn't. Because the fundamental point here is on the boundary treatment to the neighbouring field is the defendants' scheme. In order to satisfy the needs of the planning officer and the planning system, in effect the planting was -- it had an instant impact on my neighbouring field, the field right next door. That was the -- that is the sort of primary hurdle

to overcome, and then the issues are: well, let's consider these other matters along the lines of height and, you know, the characteristics of the properties being proposed. So, to pinpoint The Dipperays would probably be inaccurate.

86) Given that the Claimant's pleaded case, even as amended, and his written evidence, was that the Dipperays was taken into account in refusing permission, the above evidence was an astonishing volte-face. The justification given for the denial was a deflection to another part of the case, to avoid making an admission he had already made. In my judgment this wrongful denial, together with the late change of position on the Dipperays, demonstrates that Mr Davies-Gilbert has during the proceedings sought as issues have arisen with the decision-making process to reformulate it to seek to deflect from issues within that process.

87) It is one thing for a witness to be mistaken about a fact. It is quite another for a witness having made a factual error because of a presumption to then seek to rewrite their case twice in a day: first to accept a belief was not factually correct and second to say the belief was irrelevant in any event.

88) This was not the only occasion in his evidence when Mr Davies-Gilbert sought to rework his decision-making process and rationale before the Court.

89) As owner of the Benefited Land Mr Davies-Gilbert has considered other applications for permission to build under a qualified covenant. One of these properties was a property called Maryfield. In his witness statement Mr Davies-Gilbert stated that he was not aware at the time of the application for permission in relation to Maryfield, 2012, that he could withhold consent irrespective of any grant of planning permission. On the evidence before the Court, however, it was clear that Mr Davies-Gilbert had refused consent in relation to another property (1 Cornish Cottage in 2010) when planning permission had been granted. This led to the following exchange with Ms Lamont:

Q. You now say that you were not then aware, that you felt you had to give consent because planning permission had been granted. Well, I put it to you that two years earlier you had had no qualms about refusing your consent where there was a planning application. Isn't it the case that you're only saying what you're saying in your evidence because you're trying to distance yourself from the fact that you gave consent to this alteration which doesn't fit your heritage aesthetic, if I can put it that way?

A. Yes, absolutely. This taught me, my Lady, such a lesson, really, that John D Clarke Architects are a well-known good firm of Eastbourne architects. I employed them to -- they designed the walled garden development for me, and they are renowned for their historical work on churches. And the property here, Maryfield, is -- I'd visited it about two years earlier. There were two ladies living in there and they had been there some years, and they were, I understand, actually I think maybe through this application, they moved into a nursing home shortly afterwards. Now, John D Clarke Architects wrote to me about this application, and this house was completely screened. I mean, if you turned in the bundle to page C4/1948 which is the design and access statement for this planning application, and it was part of the planning application, part of the thought process. So here is a view across from Eastbourne, the road into East Dean, coming down the hill. There is a house, I am afraid it's black and white, but you can just make out a house there, which is Friston Lodge. Maryland is to the right of that building, and it is -- you can't see it, and -- you can't see Maryland. Now, in the correspondence with the planning authority or with myself, as part of this application, John D

Clarke say there are no plans to take any trees down, we're -- you know, the views we have already, we've got this viewing deck and what have you, and I'm aware of my own land, the bowling green, at the top of the bowling green there is a little sliver of land where there are trees. I felt confident that this house would continue to be screened. And on that basis -- and actually a local resident had complained as well who lived in a house, it's called Linden Mead, it's just above the claimant's land on the Village Green, and he had complained about the views, and he had been given reassurance that those trees were not going to be taken down. So the applicant obtains their planning consent, they've got a very good architect, who historically is very good, but I took my eye off the ball because the works -- and the house did need work, so there's no doubt about it, it needed something. But the scale of it, they then hopped over the fence and cut the trees down, and it's just opened it up hugely. So going forward, we now have to put some fencing up and – or come to -- try and resolve this. . but what a lesson.

90) Whilst Mr Davies-Gilbert in a convoluted drawn-out answer sought to deflect from the answer he had to give, a common trait of his evidence, he admitted at the start of his answer that his evidence was not an accurate record of his decision-making process at the time and was a reworking to fit the facts as being placed before the Court.
91) Having considered Mr Davies-Gilbert's evidence I am therefore satisfied that, whilst he is genuine in his belief that any further development in the village of East Dean should follow the Sussex Style, that he was not a credible witness as to his own decision-making process and that he has sought to re-rationalise and rework his process in order to avoid the criticisms made of it by the Defendants. In my judgment when considering the issues in the case I must treat the oral and written evidence of the Claimant with care and should prefer contemporaneous evidence where available.

<u>Mr Goacher</u>

92) A particular difficulty with the evidence of both Defendants in this case was that they sought to assert that the relevant knowledge in the case was held by other persons. Mr Goacher said that Mr Chester knew the answers to questions regarding the construction works and Mr Burdett knew about the hedge, whilst Mr Chester said that Mr Goacher dealt with the Covenant. Mr Burdett had not provided any evidence on the hedge. The Court was therefore left on significant issues in the case with questions as to who, on the Defendants' side, knew what, when they knew it and what they did with that knowledge.
93) Having said that Mr Goacher was overall a pleasant, amiable witness who, in my judgment, helped the Claimant's case more than his own.
94) On the issue of reasons and reasonableness Mr Goacher was aware of the Sussex Style. He liked it and he wanted to live near it. He was not happy with the design for which planning permission had been granted in 2018 as it did not have enough of the Sussex Style flavour to it. He therefore wanted to change it and to add "*the former windows, the flint work, the artisan flint work, the windows, casement windows and – all the best bits, really*". He accepted that Mr Chester whose property was designed using the same design principles he, Mr Goacher, was rejecting did not want the same changes as him. Mr Goacher was in many ways as fierce an advocate for the historic core

of East Dean as the Claimant and was as great an admirer of the Sussex Style as Mr Beer, the Claimant's expert.

95) He accepted that a hedge that was at the date of the Application proposed to be laid as part of the plans would possibly grow onto the Claimant's land.

96) In relation to the works undertaken on the Defendants' Land Mr Goacher accepted he was aware of the Covenant when he bought the property - "*I was aware of the covenants before I bought it ..., but I was desperate to buy it*." He accepted that Mr Chester was to undertake the building work but he, Mr Goacher, regularly visited the land and was therefore aware of the works as they were proceeding.

97) He said he was aware that groundworks could be undertaken, saying that such works meant below ground when the works were finished. He then sought to change his evidence to say that retaining walls were acceptable because they would be below the next ground level. This change of evidence by Mr Goacher was less convincing than the balance of his evidence as previously Mr Goacher had been conciliatory and reasoned but when changing his evidence changes in the manner of his answer and his demeanour suggested he was being less than straightforward. He did however accept that he knew that a wall which was visible and above ground level was erected on the site between July and August 2020 and that works were undertaken after 12 August 2020.

98) Given the number of concessions made by Mr Goacher which assisted the Claimant in the case I accept, save for the contradiction in his evidence regarding what works were ground works, Mr Goacher's evidence as true.

<u>Mr Chester</u>

99) Mr Chester was less enamoured with the Sussex Style than Mr Goacher. Mr Chester wanted to move to East Dean less for the heritage aspect of the village and more for the Tiger Inn. He was therefore less concerned with the architectural features of the plans and from his evidence appeared to the Court more concerned with getting on with the job and building the two houses.

100) Mr Chester accepted that he was aware there was a covenant which governed building on the land but asserted that he left dealings with the Covenant to the First Defendant. This is surprising given Mr Chester was the builder who was going to be building the two houses on the land but is evidence I accept.

101) Nevertheless, Mr Chester knew there were restrictive covenants in place. He knew that the works could not simply start, and that permission was needed save for groundworks which he understood he could undertake without permission. He was aware permission was refused but he still started the works. He knew they were questioned by the Claimant and an understanding was reached between the solicitors that the works could continue but only in relation to groundworks.

102) Mr Chester admits as part of his Defence that he went beyond groundworks in that he erected the retaining walls. However, in his evidence Mr Chester sought to say that the works he undertook were not a breach of the

Covenant as groundworks included retaining walls if at the conclusion of the development they would be beneath the level of the original ground.

103) No proper explanation was given by Mr Chester as to why his position had changed from his Defence to his evidence: He sought to say that there was a "not" missing in the Defence and that the Defence therefore did not properly represent his position. However, no application to amend the Defence was made and the Defendants adduced no evidence that the signatory to the Defence had not been authorised by them to sign it.

104) Having witnessed Mr Chester giving evidence I was left with the forceful impression that he is a no-nonsense man who knows what he wants and knows in terms of his business how to get it. He is not a man who readily admits his mistakes and is not a details man outside of building projects. He was and is happy to leave legal niceties to others and therefore did not check whether the works he was undertaking at any time were permitted. The clash between his pleaded case and his oral testimony was due to Mr Chester not wanting to admit to the Court that he had acted wrongly and that he had acted in breach of the Covenant. He therefore ignored his pleaded case.

105) A credible witness is willing to admit when they are wrong. They are willing to make concessions and to own their mistakes. They will wish to explain how the mistake happened, but they at least admit them first. A credible witness will also have a proper explanation when they seek to change their pleaded case and withdraw an admission. Applying these considerations to Mr Chester, in my judgment, he lacked credibility in relation to his belief at the time the walls were erected on the Defendants' Land in breach of the Covenant.

Mr Burdett

106) Mr Burdett is the architect who introduced the Defendants to each other and to the land and who has then assisted them with their plans. In my judgment his evidence went to background information only. He confirmed the planning permission applications which were made but he was not privy to the decision to seek permission from the Claimant. He was a straightforward witness and I have no difficulty in accepting his evidence as far as it goes.

Expert Witnesses

107) Master Shuman in her order dated 28 January 2021 gave permission for the parties to rely on expert evidence. The permission was not however a general permission as Master Shuman set out the issues the experts were to address. Paragraph 25 of Master Shuman's order provides:

Each party has permission to call one expert witness in the field of surveying to give oral evidence, as to whether the Defendants' proposals:
a) would affect the amenity of the land,
b) would be out of keeping the surrounding land, and/ or
c) may affect future development opportunities.

108) In my judgment and for the reasons set out below both experts in this case failed to comply with their duties to the Court, failed to follow their instructions and were partisan in formulating both their reports and their evidence to the Court.

109) As to the Claimant's expert, Mr Beer, he was a fervent advocate for the Sussex Style. His report set out in detail what that style was and how it was found in the village of East Dean. He gave extensive evidence as to the heritage value to the Estate. That is acceptable. An expert is instructed to form a view on the issues they have been asked to address and to address them. If in forming that view the expert considers they need to explain a style of building, then they are entitled to do so. If they feel they need to evidence that a style of building is present in a locale, then they are entitled to do so. If the presence of that style affects the value of land, then given the instructions in this case Mr Beer was entitled to address it.

110) However, Mr Beer was instructed to answer all the issues raised by Master Shuman and this is clear from his report at paragraph 1.4. (How those issues came to be rewritten by him in the conclusions section of his report with the first question then referring to the Estate rather than the land is not clear.) Further to Mr Beer acknowledging the order of the Court, those instructing him expressly asked him, amongst other things, to consider "*whether the scheme would be in keeping with the existing density, size and character of the residential properties immediately to the west and north of the Defendants' land or the dwellings in this historic core of the village.*"

111) Master Shuman therefore required the experts to consider not just the estate of the Claimant but also the surrounding land. The Claimant's solicitors asked Mr Beer to consider the residential properties immediately in the vicinity of the Defendants' Land as well as the historic core of the village.

112) Despite these clear instructions, it is clear from his report and his oral evidence to the Court that Mr Beer was so enamoured of the Sussex Style that he decided to disregard those parts of his instructions that asked him to consider other buildings. Mr Beer therefore ignored those parts of the instructions of both the Court and those instructing him as far as they required him to consider anything which may detract from his passionate advocation of the Sussex Style.

113) Mr Beer also decided to ignore the facts as put before him in reaching his conclusions. For example, despite Mr Beer noting that he had been provided with the Claimant's witness statement which notes that the First Defendant is obliged by the 1991 Covenant to maintain "*stockproof fences*," on the southern boundary of his land, Mr Beer concluded (without the Claimant even advocating for such) that the southern boundary should be a flint wall.

114) Mr Beer's explanation for ignoring his instructions and the facts was that as an expert he had discretion when producing his report. I accept that experts have a level of discretion when producing their reports and that they can emphasise for the Court the factors that they opine are most important or influential in reaching the opinion they have. However, it is not for an expert to disregard the instructions they have received from the Court and the party instructing them and to thereby whole scale ignore evidence which does not support their opinion.

115) In my judgment, an independent expert properly fulfilling his duties to a Court answers the questions asked of him by the Court having looked at all the relevant factors, not just the factors that tend one way. If the answers based on all the relevant factors raise difficulties for their client so be it. Mr Beer was not therefore entitled to ignore Little Beeches, Maryland, Medleigh and

Birling House, the nearest properties to the Defendants' Land, when producing his report. Having undertaken a site visit those nearest properties to the Defendants' Land are not part of the historic core of East Dean and do not fit the Sussex Style. Yet Mr Beer singularly ignores that fact and only addresses the second issue regarding the Claimant's Land and the Estate, not the surrounding land. In my judgment he thereby refused to engage with the second issue he was instructed to address to assist the Court and in doing so he ignored his duties to the Court. His evidence must therefore be treated with care.

116) Mr Samuel was subject to strong criticism by Ms Shea QC in closing submissions. I do not accept all her criticisms of him and do not accept that his reference to the earlier planning permission granted to Ben Ellis in 2018 shows that Mr Samuel was confused as to the Scheme he was to consider given the part of his report in which Mr Samuel referred to that planning decision sets out the full planning history including the Defendants' applications. Having said this I am satisfied that Mr Samuel placed too much relevance on the grants of planning permission.

117) The interests of a private landowner are different to those of a planning authority. The planning authority is seeking to comply with its public law duty for the benefit of the public. A private landowner must comply with the duty of reasonableness to protect his own land. Planning applications and covenant applications therefore seek to achieve different ends through different means. That is not to say that a covenantee faced with an application for permission cannot have regard to the planning process. It is commonly the case the documents submitted for consent are planning documents. Where they are not given, they are publicly available documents that can be taken into account. However, planning and consent applications are different, and the grant of planning does not mean that permission must be granted. Each process must be analysed independently with regard to the group or land which is to be benefitted by the process.

118) The Claimant therefore was entitled to take into account planning documents, but he was not bound to follow the planning decision, nor was he required to apply planning policies when reaching his decision. The weight of Mr Samuel's evidence however was formulated on the basis that planning policy should have influenced the decision of the Claimant.

119) Further I accept Ms Shea QC's criticism that Mr Samuel was partisan to the Defendants as demonstrated by his frequent overstepping of the bounds of his instructions both in his written report and in his oral evidence and his refusal to answer questions which were averse to the view he professed.

120) Mr Samuel again knew the questions he was to answer and therefore the limits of his role. He knew he was to provide an opinion on the issues identified by Master Shuman to assist the Court in its role in determining the issues. He was not to give an opinion as to whether the reasons given by the Claimant for refusing permission were reasonable.

121) Despite this in both his written report and his oral evidence Mr Samuel continually stepped over the line. He referred to the Claimant's objections as inappropriate, but it was not his job to assess the merits of the Claimant's objections. He refused to answer how he could consider that increased flint levels on the design would be inappropriate, but the First Defendant had requested them. Instead of answering the question Mr Samuel sought to find a

reason for the First Defendant's position (being conciliatory to the Claimant) but in doing so he ignored the First Defendant's testimony to the Court. Mr Samuel could have simply answered the questions but chose instead to engage in wild speculation ignoring the facts as tendered in evidence to the Court. This is not appropriate for an expert as it does not show objectivity, independence and it in no way assisted this Court. In my judgment this can only be explained by Mr Samuel taking a partisan position in the proceedings.

122) As a result of my findings the evidence of both experts must, in my judgment be treated with care, and should only be accepted where tested during oral testimony to the Court, with most weight given to any concessions made by the relevant expert.

Issue 1: What were the Claimant's reasons for refusing consent to the scheme?

123) In the Refusal Letter the Claimant gave two "*reasons*" based on four express but non-exclusive "*considerations*" for refusing consent to the scheme. That letter is not particularly detailed, but it does set out that those two reasons are the Claimant's reasons for refusing consent. The Claimant did not refuse to give reasons, he just gave brief reasons. When asked to explain his reasons he refused to take the opportunity of answering the detailed questions formulated by the Defendants' advisers, but he did in the Explanatory Letter outline "*a couple of the issues that led me to my decision.*" Those matters were not stated to be reasons and fell within the bounds of the two reasons already stated.

124) In my judgment given the Claimant gave reasons and when pushed gave detail of some of the considerations for those reasons the Court should not draw any adverse inferences against the Claimant.

125) Having heard the evidence of the Claimant and reached the conclusion I have about the credibility of his evidence as to his reasons and his process in my judgment the Refusal Letter and the Explanatory Letter are the best evidence the Court has as to the Claimant's reasons for refusing permission. The Claimant's pleadings and witness statement also only refer to two reasons (see for example paragraph 112 of the Claimant's witness statement).

126) In closing submissions, it was suggested by Ms Shea QC that the Claimant had a third "*category*" of objections, with the third being design. This arose due to a distinction made by Ms Shea QC between amenity (including views, density, spacing) and design (including roof height, amount/type of flint). Ms Shea QC did not submit that this was of itself a reason for refusal. If it had been put in that way, then I make clear that I would have rejected the contention that design was a third reason. First this is not the pleaded case of the Claimant. The pleaded case of the Claimant refers to two reasons. Further in paragraph 13 of the Amended Reply and Defence to Counterclaim the Claimant lists the factors that operated on his mind in relation to the reasons, and the design features highlighted by Ms Shea QC fell within the considerations on amenity. Second the evidence does not support the conclusion that design was a separate reason to amenity. The evidence both contemporaneous and before the Court supports the conclusion that design was part of the considerations on amenity and not a separate reason.

127) I also reject a submission made by Ms Shea QC in her closing submissions that the Claimant had a "basket of reasons" for refusing permission and that the Court needed to analysis each of the reasons and then consider if the basket was sufficient to amount to a reasonable outcome. The basket of reasons was said to comprise views, density, spacing, roof height, amount and type of flint, with the issues regarding the neighbouring land a separate reason.

128) I do not accept that the Claimant had a basket of reasons for refusing consent. First it was the Claimant's case throughout the process and the proceedings, until closing submissions, that he had two reasons albeit each of these reasons was influenced by several considerations. That is both the pleaded case of the Claimant and the evidence presented to the Court. Second the law as already noted recognises that a party can reach a reason with several considerations being taken into account but only some of those influencing a reason. This is not, in my judgment, the same as saying that each of those considerations is a reason and/or that the Court when assessing reasons is to a) establish each consideration, b) to assess if each was reasonable and c) if so to then assess if a cumulative reason made up of the reasonable considerations was a reasonable outcome. As the Claimant put it during his evidence:

I don't know how you put a price on one element of design over another, but I think you just have to look at it in the whole.

129) Finally, the Defendants have sought to assert that the Claimant had another reason for refusing permission, namely that he hoped to extract a premium for the granting of permission. In this regard the Defendants referred to the history of applications under similar covenants, including Maryfield. The Claimant accepted in his evidence that the covenant on Maryfield was a qualified covenant. It was the Claimant's evidence, which for the reasons set out previously I do not accept, that in relation to Maryfield he considered he had to grant permission as planning permission had been granted. Despite this the Claimant did not simply give permission for the works to be undertaken at Maryfield. Rather, the Claimant only gave permission when the owners of Maryfield agreed to pay him a premium for his consent. The Claimant sought to explain this, together with the payment by Ben Ellis of a premium for the properties he was granted permission to build to the west of the Old Parsonage, on the grounds that the parties offered to pay him the premium.

130) Having read the licensing files put before the Court I am satisfied on the evidence before me that the Claimant has on occasion, including in relation to Maryfield, wrongfully extracted a premium in exchange for granting permission under a qualified covenant when there was no entitlement for him to seek a premium under the covenant and when he had formed a view that he had no reasonable reasons for withholding permission. I am satisfied that the Defendant in most cases in which he has granted permission required a premium and that such is not just sought where it is offered. I am satisfied that the premiums requested by the Claimant are of significant sums and that those moneys are then used by him to fund the Gilbert Estate.

131) However, in this case I am not on the evidence before me satisfied that the Claimant refused permission in March 2020 as a mechanism for extracting

a premium from the Defendants. It may be that in the fullness of time if the plans were amended to otherwise be unobjectionable to the Claimant, then he may then have sought to extract a premium. However, no premium was mentioned in the Refusal Letter nor in the Explanatory Letter. Instead, the Claimant refused permission on other grounds. The Claimant accepted that later in discussions a premium was raised, however this was after the date of the refusal. Looking to the facts before me regarding this case I do not find that at the time he refused permission the Claimant did so as a means of extracting a premium.

132) I therefore find that the Claimant's reasons for refusing permission were that the development:

a) would have a detrimental impact on the amenity value of the Estate and
b) it could threaten the future use and commercial value of the neighbouring land.

Issue 2: Was the Claimant's refusal of consent of the Application unreasonable?

First Reason

133) As to the first reason given by the Claimant, he refused consent to the Application due to the perceived effect of the development on the Estate (my emphasis added). The focus of the Claimant and the land he took into account for this reason was the Estate according to his express explanation at the time both in the Refusal letter and the Explanatory Letter. The Claimant in his evidence accepted that he knew the Estate and the Benefited Land were different things, but from the contemporaneous documents the land to which the amenity reason applied was the Estate.

134) Whilst there was an attempt in the Amended Reply and Defence to Counterclaim to explain that in an earlier paragraph of the Refusal Letter "*Neighbouring Land*" and the "*Gilbert Estate*" meant the Benefited Land, save as far as other land was accepted to have been taken into consideration (see paragraphs 6 and 7 thereof), no such limit was placed on the word "*Estate*" as utilised by the Claimant when setting out his reasons in the Refusal Letter. As far as other land was accepted in the Claimant's pleaded case to have been taken into account this was the Dipperarys, which is not Benefited Land, in relation to the amenity reason.

135) In my judgment an after-the-event definition of phrases (neighbouring land and Gilbert Estate) by a party in relation to the land they had considered cannot, and in this case does not, automatically translate as a definition of a different phrase (Estate) when a party is setting out their reasons. As the Claimant submitted and I accepted above not all considerations in relation to a decision are considerations material to the reason and this is particularly so when the Refusal Letter states in the considerations section. "*Consequently, due consideration has been given to, amongst other matters, the following*" (my emphasis added). Ms Lamont in her cross examination raised with the Claimant what he meant by the phrases "*Neighbouring Land*" and the "*Gilbert Estate*" in the considerations part of the Refusal Letter. She did not question the definitions used in the reasons section of the Letter.

136) Having considered all the documents in this case and the oral testimony of the Claimant when the Claimant refers to the Estate, he is referring to land exceeding the Benefited Land. The Estate is the entirety of the Gilbert Estate and not just the Gilbert Estate at East Dean (as per the 1960 conveyance). This is clear from his oral evidence to the Court

[when referred to the plan at paragraph 1 of this judgment] That's the estate, as you understand it, isn't it, in your witness statement when you refer to "the Estate"; that's what you're referring to, isn ' t it?
A. The −− yes.
...
Q. So why do you refer to the estate at all in your witness statement? Why don't you just say "I own the claimant land"? Why are we talking about the estate if really your case is just about the claimant's land?
A. I have to agree with you that the definition of "Estate" is something I've really grown up with. It has no company number or no sort of boundary, but in common language, in the Estates Gazette, or the estate as a whole, people refer to it as "the Estate," our documents are listed −− I suppose because they're so old, they −− I don't know what the −−
Q. Essentially you're saying that you think the estate is sort of everything that you have got, a polite way of putting it , an interest in , as part of the estate , the wider Gilbert Estate?
A. Yes, we have an estate office , which manages the property and farming and other business concerns, and whether it's in a trust or in a company or what have you is operated out of the estate office , and I'm perhaps being loose with that
...
So the estate, I suppose, is effectively a business that we manage and have done for over 200 years here, a family member, and these parts are parts of it .

137) The Claimant's use of the phrase "*Estate*" in the reasons section of the Refusal Letter in my judgment is not therefore a reference solely to the Benefited Land. Rather it refers to the Gilbert Estate. Further having considered the evidence of the Claimant it is obvious that this error happened as the Claimant approached his decision-making on this issue donning his self-appointed role as steward of the Estate.

Q. And at paragraphs 43 and 27, you are essentially saying that you approach applications with the mindset of a custodian and steward for the estate?
A. Yes.
Q. By which you mean the wider estate that we've been looking at earlier this morning?
A. Yes.
Q. And also you say that you do so in light of your overarching commitment to the estate, at paragraph 30; yes?
A. Yes.

138) I accept that taking into account the Gilbert Estate as part of the decision-making process, due to the Claimant considering himself to have the mantle of steward, would not necessarily have vitiated the decision of the Claimant as to amenity if the Claimant having considered the Estate determined to then disregard it when forming his reasons. However, in this case on the facts, the Claimant did not do so and that is the problem, not the existence of the Estate. His reason for refusing consent was the detrimental impact on the amenity of the Estate and not just the Benefited Land: This is

clear from his own words. The Claimant therefore undertook his review on amenity with his mantle of steward firmly in place and this resulted in the wrong land being actively considered in relation to the first reason.

139) A covenantee is not entitled to take into account matters that do not affect the land with the benefit of the covenant (Cryer and the Court of Appeal in Hicks). The Claimant in his evidence accepted that at the time of his decision he knew that. He did not therefore proceed on an error of law. Yet it is clear in this case that the first reason given by the Claimant for refusing consent related not just to the Benefited Land but to other land in his ownership or operation. In my judgment if a covenantee cannot take into account matters that do not affect the land with the benefit of the covenant they cannot reasonably rely on reasons in relation to land without the benefit of the covenant.

140) As far as it is submitted by the Claimant that the irrelevant land was taken into account due to confusion on his part as to whether the Dipperays was included within the Benefited Land in my judgment a reasonable person who was confused as to the extent of the Benefited Land would have sought and obtained advice, or would have formed a view without regard to the questionable land, because a conclusion had to be drawn by the Claimant as part of the process as to what land was to be taken into account. A reasonable person knowing a) that the extent of land to be considered was important but b) that they were concerned about this, would not have done as the Claimant did in this case which was to plough on regardless and justify their decision based on land which they harboured doubts they could have regard to. In doing as he did the Claimant acted on a conclusion that the Estate was the relevant land due to the view he takes of himself as steward. This conclusion was wrong.

141) In my judgment therefore it is clear from the Claimant's own words that the refusal of permission on the first ground was not reasonable as it related to irrelevant land. I am therefore satisfied that the Defendants have shown on the balance of probabilities that the first reason is a bad reason on its face.

142) Even if I am wrong in this regard and the reference to the Estate in the reason is limited to the Benefited Land then in my judgment the decision-making process employed by the Claimant in relation to the first reason was an unreasonable process as the Claimant by his own admission took into account irrelevant considerations which directly contributed to the Claimant reaching the reason he did.

143) It is the Claimant’s pleaded case that in relation to amenity he took into account how the views from the Dipperays would be affected by the construction of the properties. The Dipperays was not Benefited Land and therefore the impact on the views from that property was irrelevant and should not have been taken into account as part of the decision-making process. The Claimant however admits that it was.

144) Not only however was this irrelevant consideration taken into account it is admitted in the Reply and Defence to Counterclaim that this irrelevance

was a fact and matter which was in the Claimant's mind at the relevant time. This shows in my judgment that this irrelevancy was a consideration actively taken into account by the Claimant when he reached his conclusion. This was unreasonable.

145) I accept that the Claimant had other facts and matters which also directly influenced his decision in this regard, however it is not the Court's job to rewrite the decision or decision-making process of the Claimant. I specifically reject the contention that the Claimant having adopted an unreasonable process, it is the role of the Court in relation to the reason reached by that process (the amenity affect) to reconsider such by reference to only relevant material. To do so would amount to the Court becoming the decision-maker.

146) The Claimant knowing all the facts and matters which concerned him regarding the design and aesthetic of the scheme reached only one reason in that regard. It is the Claimant's own pleaded case that in relation to this first reason he actively took into account an irrelevant consideration. The reason is therefore a bad one.

147) The Defendants have raised further concerns as to the admission by the Claimant that he took into account as part of his process the views of other residents in the area during the planning permission exercise.

Q. So when you were considering the application you were also not only thinking about -- you didn't just have your estate hat on, you also had your hat on about -- you had an eye to the interests of others that would be affected by your decision; yes?

A. Yes.

Q. And those people would presumably be people who had made planning objections?

A. Yes.

Q. So you read those and took those into account?

A. Yes.

Q. Did that include the Shephard's, who live at Little Beeches?

A. Yes.

Q. Because they were concerned, weren't they, that the scheme was (inaudible) the house. So those were all factors that you took into account in refusing consent?

A. And the Parish Council.

Q. Your view is the Parish Council failed to take this into account, but you did?

A. No, I considered the views of the Parish Council.

Q. And the Parish Council as well. So you're basically considering all of that and then weighing it up and coming to something that in your eyes is a fair decision; is that a fair assessment of it?

A. Yes. Yes.

148) However, having heard the evidence of the Claimant I am not satisfied that such was an active consideration which led to the first reason, as opposed to being a consideration which arose, was looked at but did not lead to the reason. The Claimant in his evidence confirmed that he had regard to the views of others when considering the application but that this was to check his decision was not out of line with the views of others. I accept that evidence. On this basis the views of third parties were taken into account by the

Claimant as a check and balance on his own reasoning but were not one of the active considerations in relation to the reason.

149) As such in my judgment the Claimant's first reason was not the result of a reasonable process as it either was a reason relating to land that did not benefit from the Covenant or a consideration which led to the reason related to land that did not benefit from the Covenant. The first reason was not therefore reasonable.

150) It is not therefore necessary for me to consider the other individual matters which are said by the Claimant to have been considerations in relation to the first reason. Given however that a second claim relating to permission has already been issued by the Defendants (Claim number PT-2021-000955) and/or this judgment may result in further applications by the Defendants to the Claimant the following observations may assist the parties settle or avoid a future dispute:

a) The proposals by the Defendants did not satisfy the Claimant's Design Code. However, that is a document drafted by the Claimant to set out the rules he applied to himself in relation to the Estate's building plans for the land. It is not on its face a code which applies to applications for permission under restrictive covenants, nor should it be used as such.

b) The Claimant is sincere in his belief that developments in East Dean should reflect the Sussex Style and echo the heritage feel of the historic core of the village.

c) The Defendants' proposals would not be in keeping with the historic core of East Dean. However, they are not being built in the historic core of East Dean. They are being built on brown field land behind the twentieth century ribbon development on Gilberts Drive. The scheme should therefore be viewed in context of the site as it was when purchased by the Defendants and with proper regard to the properties in the immediate vicinity. I am not satisfied that proper regard had been paid in relation to amenity to those properties by the Claimant.

d) The roof line of the properties will impact on the view from the Benefited Land. However, that impact must be taken in the context of views which already contain roof lines. The presence of roof lines will not therefore present a new view; it will instead be additional roofs in the roof line which already exists.

e) The properties will have a limited impact on the view from the Village Green and the Tiger Inn. The impact of the development will therefore be of minimal effect on the commercial heart of East Dean.

f) The impact of the roof lines on the remainder of the Benefited Land will depend on the part of the Benefited Land on which a viewer is stood. I am not satisfied on the evidence before me and having visited the Benefited Land that the finger of green referred to in the Claimant's evidence will be lost from the Benefited Land. If it is, then it will be from the minority of views. It does not help in this regard for the decision maker to have a mock view of the skyline from one point,

with the mock view showing a garish white building, when this is not proposed by the Defendants, and when the image used is zoomed. Indeed, given the effects of foreshortening which occur when an image is zoomed, zoomed images should where possible be avoided when reaching or justifying a decision.

g) None of the design elements of the scheme are novel or new to East Dean as a whole. Whilst there may not be buildings which have so many of the features at the same time the design does reference the design features of the village.

h) It is however unusual for one property in a close-build two-property development to have such different designs to each other as is the case here and it means that the design of the properties feels incoherent and imbalanced in terms of the referencing of the Sussex Style. This could however easily be remedied.

i) The density, massing or spacing of the scheme does feel out of context for East Dean both as a whole and in relation to the immediate vicinity. Whilst there are terraced properties in the village there were no properties which on my visit to the village had the close interrelationship with each other which was as close as that proposed by the Defendants (and evidenced by the image in the bundle at page 1747).

j) Whilst I accept the new Fridays development has a more urban feel to it than the rest of the village the space between the two properties in the Defendants' proposed development felt in contrast with the rest of East Dean, including the Fridays, claustrophobic and lost the sense of space, openness, and flow of air which is one of the hallmarks of the village.

k) However, whether only the considerations having merit in them could together amount to a reasonable objection based on the amenity of the Benefited Land only is an analysis which has not yet been undertaken by Claimant.

<u>Second Reason</u>

151) The second reason given by the Claimant relates to the neighbouring land of the Claimant. Ms Lamont submits that given the Claimant took into account and considered irrelevant matters in his consideration of the Application, that it necessarily follows that the reasons given by the Claimant are unreasonable.

152) I have already set out my legal analysis of the applicable law. Given my conclusions on the law it does not follow that simply because a person has taken into account an irrelevant consideration, whether as part of their overall reasoning or their reasoning on a specific issue, that their reasons are automatically bad. The consideration taken into account must have been part of the considerations actively considered as part of the reason complained of. It does not follow that because a reason given is bad that all reasons given are bad.

153) If taking into account an irrelevant consideration as any part of a process led to every reason being bad, then it follows that No 1 West India Quay must be wrongly decided. After all in that case as part of the overall considerations not only did the covenantee take into account the quantum of costs which he sought to recover but that was an active consideration as it formed one of the three reasons. However, that was not the outcome of the case. In that case because there were two good reasons the decision stood despite the third bad reason. No 1 West India Quay is binding on this court and therefore it follows that in analysing a reason given by a covenantee the Court must look at the active considerations which led to the reason complained of and not all considerations unless the reasons are not free-standing. I am satisfied that Ms Lamont's submission is therefore incorrect.

154) When the requisite analysis is undertaken in this case it is, in my judgment, clear on the evidence before the Court that the two reasons given by the Claimant were freestanding. The second reason refers to the neighbouring land. It does not refer to the Estate and therefore does not face the same issues on its face as the first reason.

155) The neighbouring land was not defined in the Refusal Letter. I have already summarised the pleaded position in relation to the use of neighbouring land in the Refusal Letter (it is mentioned in both the considerations and the reason but only defined in relation to considerations) In cross-examination Ms Lamont obtained confirmation that neighbouring land in relation to the considerations included the Dipperays.

Q. You are talking about the broad factors that you referred to in your refusal letter ; yes?
A. Mm, yes.
Q. And you're there saying underneath those italics reasons, you're saying: "The neighbouring land and Estate referred to the rest of the Estate with the benefit of the Covenants Against Construction." So basically you're saying there, aren't you, that the neighbouring land and the estate, both are phrases which include the Dipperays land, aren't they?
A. Yes. As we discussed earlier , yes.

156) In relation to the considerations therefore the Claimant accepted he took into account the Dipperays but he was not cross examined as to whether the phrase neighbouring land in relation to the reasons part of the Letter meant the same thing. Indeed, the Claimant was not challenged on the assertion in the amended pleadings that this was only a consideration which was active in relation to the amenity issue, an assertion supported by his narrative on the neighbouring land issues in his witness statement at paragraphs 124 to 129.

157) Nor in my judgment is the use of the phrase neighbouring land indicative of a reference to the Dipperays. Neighbouring land usually means land next to or near to land (see for example paragraph 41 of the Court of Appeals decision in Hicks [2021] Ch 105: *a neighbour has a legitimate interest in the appearance of what is built next door to him).* The Dipperays is not next to the Defendants' Land and whilst it is in the same village it is not close enough in my judgment to be considered next to or near to the land. As the plan at paragraph 5 hereof shows there is a main road and several properties dividing the Dipperays from the Defendants' Land.

158) In my judgment, having regard to all the evidence before the Court, as far as the reason given by the Claimant related to neighbouring land, it related to the Claimant's field to the South and East of the Defendants' Land and hence to Benefited Land. The reason therefore relates to different land to the first reasons and is freestanding.

159) I am further satisfied having heard the Claimant's evidence and the evidence of the experts on this issue that this is not a makeweight reason. It is a reason which is of substance in its own regard. Indeed, Mr Samuel, the Defendants' expert, conceded such in cross examination

Q. Is it a legitimate concern of a landowner to be worried about what the screening is going to look like when the development is completed?

A. Yes

... Q. Right. So, the question I asked was: do you recognise that as a legitimate concern for a landowner faced with a development project?

A. Yes, I do.

Q. Or under any circumstances?

A. Yes.

160) I am therefore satisfied on the evidence before me that the second reason is freestanding of the first reason and is of substance. It must therefore be considered on its own merits in relation to process and outcome.

161) The Defendant has complained of three considerations in relation to the decision-making process of the Claimant: Taking into account the Dipperays, the views of third parties and the Claimant's stance as steward of the Estate. All the matters of complaint, in my judgment, relate to the first issue where the Claimant admits that he actively took into account the Dipperarys, admits he took into account the views of third parties and accepts he has donned the mantle of steward. There is however no evidence before me that any of these considerations were taken into account in relation to the decision-making process on this issue. I am therefore satisfied that this reason was reached using a reasonable decision-making process.

162) Whilst in his Refusal Letter the Claimant did not set out the considerations which led to this reason, in the Explanation Letter the Claimant did give further details in relation to the reason, being boundary issues. The Claimant in his pleaded case has given more particulars in that regard. Looking at those particulars and having considered the evidence at trial there are three considerations which I find led to the second reason upon which the application was refused. These are:

a) Boundary ownership of the access track (referred to in the Refusal Letter and the Explanatory Letter)
b) Overlooking (referred to in the pleadings)
c) The boundary treatment and maintenance thereof taking into account the width of the access track (referred to in the Refusal Letter, the Explanatory Letter, and the pleadings).

163) In relation to the suggestion raised for the first time in his witness statement that the Claimant took into account boundary demarcation issues and access to his field, given my concerns about the Claimant as a historian and his attempts to rewrite the considerations that influenced his mind as the

case has developed, I do not accept this operated on the Claimant's mind when he formed his reason. It is not noted in the Refusal Letter or the Explanatory Letter and is not pleaded in the Amended Reply and Defence to Counterclaim.

164) If I am wrong in that regard, then I am satisfied that a reasonable person when presented with a development proposal for land is entitled to take into account whether the development fails to respect boundary demarcation or will cause any access difficulties for their land. In my judgment therefore the Claimant was entitled to take into account these matters. Having done so however I am satisfied that it was not a reasonable outcome for the Claimant to have refused permission on this ground as the evidence which was before him did not present difficulties in that regard.

165) The updated plans, presented to the Claimant in March 2020 and before his decision, dealt with the boundary issue and respected the demarcation. Further, whilst the updated plans show that part of the entrance route to be constructed across the footpath to Gilberts Drive goes in front of the gate giving access to the Claimant's land, at this time the gate opens onto a grass verge not tarmaced access to Gilberts Drive. The access way does not therefore negatively affect access to the Claimant's land.

166) Looking to the considerations that led to the decision I am satisfied that it was not a reasonable outcome to this application to refuse permission solely due to the access track being used by both Defendants as this does not raise a question over ownership, and therefore responsibility for maintenance of the boundary, in relation to the Claimant. Whilst ownership and maintenance of the track was a factor which could be taken into account the proposed joint user of the track was not a sufficient factor to found a reason to refuse permission. The access track continues to belong to the First Defendant. If he chooses to allow another property to use that access, then he is entitled to do so and does not need the Claimant's permission for that. It is for the Defendants to agree as between them who will maintain both the track and the boundary but as between the Claimant and the Defendants the ownership and liability rests with the First Defendant and there is no ground for confusion in that regard.

167) I am satisfied that there is a potential for the Claimant's land to be developed and for up to four houses to be constructed thereon. I am satisfied that there is no immediate prospect of that as that is not the Claimant's intention at this time but there is a possibility of development to which the Claimant has not shut his mind.

168) There was no suggestion either in the parties' cases or on the evidence adduced at trial that the general proposition that if a piece of property is overlooked by another its development value is less than if it was not overlooked (blight as Mr Beer referred to it) is incorrect. The dispute into overlooking before me is therefore whether there is a risk of the Defendants' properties overlooking the Claimant's land and any properties constructed thereon.

169) Ms Lamont obtained concessions from both the Claimant and from Mr Beer that there was no prospect of overlooking the land from the catslide roof

on the First Defendant's property. This is obvious given it does not contain any windows. However, I am not satisfied that that resolves the risks of overlooking from that property as the design for that property has to the east of the catslide roof, windows and a conservatory which would face toward the Claimants' land. There are also windows in the Second Defendant's property which face that land.

170) It is of course impossible when viewing a development plan on one plot of land and a possibility of development, with no plan, on another plot of land to assess whether a specific property will overlook another property. However, there is a possibility of overlooking from both Defendants' properties onto the land of the Claimant and there is a possibility of that land being developed for housing later. Whilst any development of the Claimant's land, if it is to fit into the existing developments on Gilberts Drive could be expected to be a ribbon development facing Gilberts Drive, there is no guarantee this would be the case, especially give the Vicarage which is the property to the south of the Claimant's field does not face Gilberts Drive, an issue highlighted by Mr Beer during his evidence:

A. It was not part of my decision-making as to the specific position of windows or, you know, on my -- on that, what do we call it, gap field. Yes, there's going to be some housing there potentially, what's the impact of this open boundary between the two properties. That was a concern.

Q. But surely you can't assess the likelihood or danger of overlooking from my clients' scheme if you don't consider what is actually proposed and where the windows are or are not?

A. But I hadn't assumed that the houses would all be fronting Gilberts Drive, or I hadn't -- you know, I'm interested to see what happens with The Vicarage and how that links in. So...

Q. What I don't understand is how you could have had any concern about overlooking, given that the side end of plot C, which faces into this area, that is – wherever you put your development is a -- would be facing on to that area, because there's no windows in the side of that at all, so the only prospect of -- and if you look at how my clients' scheme is orientated, the only prospect of overlooking would be from the windows that were in plot B, which would be up nearer the Old Parsonage; correct?

A. Correct. Is overlooking just restricted to the windows; is that the -- does it not encompass the sort of gardens and the...

...

Q. And now you're telling us that you didn't actually consider whether there were any windows or where there would be overlooking from?

A. I didn't consider the specifics of the exact position of which window and where, but the -- as I say, the potential to overlook, it has this -- I'm not exactly sure on the position of where these four houses can go in light of, you know, the mood of the National Park Authority at the time, or what does the estate decide, or how do we make this work?

I've put it in there. Privacy and screening go hand in hand, and that is reflected through the planning documents.

...

171) Having heard the evidence in the case and the evidence of the experts I am satisfied that there is a risk of overlooking from the Defendants' properties onto the Claimant's land. Even if minimal this would affect the value of the Claimant's land and may impact on any development of such in the future. This was therefore a

relevant consideration for the Claimant to have taken into account and the view he reached, refusing consent, was reasonable.

172) To assist the parties moving forward however I am also satisfied having looked at the plans for the development that planting on the boundaries (leaving to one side at this time the access track) was proposed either to be maintained or increased in the relevant areas and therefore whilst there is a risk of overlooking this is a risk which could be managed by appropriate conditions on any permission granted by the Claimant. The failure by the Claimant to specify conditions did not, however, make his decision unreasonable.

173) This then leaves the issue of the access track. The Defendants in their application for planning permission proposed that screening should be undertaken to the access track. Further the concession that screening would be in place appears to have contributed to the decision of the planning authority. Screening was therefore on the papers submitted to the Claimant offered by the Defendants.

174) However according to the original plans submitted to planning and for approval the access track was 4 metres wide and could therefore contain within it, and with minimal impact on the Claimant's neighbouring land, both the access track accessible by vehicles and a boundary comprising trees (which are already in situ) and infill hedging. An example plan is at 523.9 of the bundle.

175) Those plans were, however, wrong, a fact pointed out to the Defendants before the Claimant reached his decision. Following this the Defendants submitted alternate plans to the Claimant for his approval. Those plans show the access rack as 3 metres wide but still containing the track for vehicular access and the boundary feature. The plans are contained at 555 and 556 of the bundles.

176) As is apparent from the plans, the change between the proposals was the moving of the boundary line, not what was to be contained within the track. Hence the infill hedge was no longer to be contained within the Defendants' Land but was now directly on the border with the Claimant's land with the hedge growing evenly onto the Claimant's and the Defendants' Land.

177) It is to be noted that at the time the Claimant was asked to give approval to the plans the final landscaping design had not been approved by the local authority. However, the Claimant having read the documents supplied for planning formed the view that the infill planting was to be a native hedge. Having considered the evidence I am satisfied that that was a view open to the Claimant.

178) The Claimant's evidence is that having considered the width of an average vehicle being 2 metres wide that left 1 metre for the hedge to grow but he did not consider that sufficient. He accessed the Royal Horticultural website and found that a native infill hedge required 3 metres to grow. The Claimant oral evidence was:

So, it's a native hedge, common on -- it's part of a farm environmental scheme, so we've put them in on our farms and I've planted some myself. I have worked with – you know, I've got a landscape consultant's drawing with -- you know, you need a metre wide in which to plant these and there's four or five plants over a metre, double staggered, and, you know, the ground -- well, in fact the applicants' own landscape or tree report refers to the compaction of ground and how much space needs to be dug out in order to accommodate the bare root plant that goes into that. So, I've got some good experience of that.

Q. Yes.

A. Obviously -- and as I referred to in the letter back to Mike Scott, there's the RHS, I just confirmed where to plant it, how to avoid being knocked into – upsetting your neighbours, et cetera.

Q. Yes. That's ironic.

A. Yes.

Q. And what is your knowledge and experience of the kinds of dimensions that such hedges reach?

A. I looked it up at the time and they can obviously become -- unmanaged, they can -- you know, a beech hedging plant can effectively be a beech tree.

Q. That's in terms of height?

A. I believe so.

Q. What about a managed hedge in terms of depth or width?

A. I believe -- I don't think my experience goes far enough to know that actually -- if someone was out there trimming it every day you can nurture a plant to go in any direction. Espalier is to...

But that wasn't -- the wording of the applicants' report, the submissions to the planning authority, gave the impression that this was to be a native hedge really for wildlife enhancement and the benefits that a native hedge would provide.

Q. Are there any such hedges on your land on the estate?

A. Yes, in fact I planted one on the other side of Gilberts Drive along the boundary there, and it's a metre and a half, two metres wide.

Q. Deep? From side to side?

A. From side to side, yes.

179) Therefore, the Claimant concluded for the hedge to be a successful screen as the Defendants proposed it would have to grow over his land, which the amended plans show. I am satisfied that the Claimant was entitled to reach that conclusion on the facts before him. I am further satisfied that this could affect the Claimant's future use of his land as either the suggested landscaping conditions would result in a hedge growing over the first 1 metre of his land resulting in maintenance issues for his land, or the screening proposals the Defendants had offered would not be fulfilled and the access track would overlook the land. Both issues are raised in the pleadings in relation to the second reason.

180) Given it was the Defendants who proposed that the plans would include screening of the access track in my judgment the Defendants cannot now turn around and say screening is unimportant. It plainly was important as they proposed it. In taking such consideration into account and reasoning as he did, I am satisfied that this was a reason the Claimant could reach, and the outcome based on such was therefore a reasonable outcome. This is the conclusion supported by Mr Samuel during his oral evidence:

Q. So, you are saying, as I understand it, that you would expect a native hedge to be built along that boundary at the point it opens out into the curtilage of the houses?

A. Yes.

Q. But not before?

A. I would argue that there -- I accept the point that you are trying to make here, that a native hedge would be difficult to plant in that space there on that boundary line along that line of the access point – access route.

…

Q. Can I suggest it would be very difficult because native hedges grow to a depth of three, four, five feet across?
A. And more.
Q. Exactly. And in order to grow a native hedge you would either encroach upon the access way which must, itself, be kept at 3 metres as a planning requirement, or you would inevitably encroach on the claimant's land, wouldn't you? The hedge would, not you.
A. Not necessarily if it was maintained and cut back.
Q. But the access way is only 3 metres wide.
A. Yes, I accept that. It's not going to be a very big hedge.
Q. It can't have a depth of zero, can it, because if it has any depth at all --
A. It wouldn't have a depth of zero.
Q. Exactly.
A. look, as I have said to you, I do not consider in my professional opinion, my Lady, the need for a hedge along that length of the track.
Q. Understood. So, we have planning requirements which are uncertain. We have planning requirements which contemplate, at least, the planting of a native hedge, and you see grave difficulties with that?
A. Along that stretch, yes.

181) Therefore, in my judgment the Claimant followed a reasonable decision-making process in relation to the second issue and reached a reasonable outcome when he refused permission on that basis.

Issue 3: Did the Defendants believe that none of the Works undertaken in June to August 2020, in particular the erection of 'retaining walls', fell within the scope of the Covenant? If so, was this belief reasonable?

182) Given my finding that the refusal of permission by the Claimant was reasonable I must now consider the third issue being the belief of the Defendants when works were undertaken between June to August 2020.

183) The Claimant was not present during the works which were undertaken. He was however informed of the works by an owner of property neighbouring the Defendants' Land, Mrs Shepherd. As a result, the Claimant has disclosed emails exchanged with Mrs Shepherd and photographs to show the progression of the works.

184) The Defendants have submitted evidence of the works they undertook, the time the works were undertaken and their belief at the time.

185) Having considered the evidence presented to the Court I am satisfied that the works undertaken by the Defendant prior to the issue of the proceedings can be divided into three periods of time: First the works undertaken as at 30 July 2020 when correspondence between the litigation solicitors commenced; Next the works undertaken between 31 July 2020 to 13 August 2020 when the Defendants gave confirmation to the Claimant that the Defendants would "*stop work on any walls at the property and will not recommence work on them without giving 5 working days notice to you,"* and; Finally the works undertaken after that confirmation.

186) I am satisfied that in those periods the following work took place:

a) First Period – clearing the site of the rubbish thereon, then the excavation of the site, the laying of foundations and walls beneath ground level (ie the level at which the works were being undertaken).

b) Second Period – further works on the foundations and the erection of retaining walls above ground level (this later point being the admitted position of the Defendants).
c) Third Period – applying waterproof membrane to walls, tidying up the retaining wall and footings including back filling, levelling, removing the site cabin and plant.

187) It is the shared position of the Claimant and the Defendants that groundworks were not a breach of the Covenant. This was noted by the Claimant (see for example his emails to Deborah Shepherd dated 30 and 31 July 2020) and agreed between the solicitors in emails dated 30 July 2020. Groundworks were not defined in the correspondence between solicitors although the Claimant understood groundworks not to include the erection of retaining walls, whilst the Second Defendant says it did include the erection of retaining walls.

188) In my judgment it was a sensible position for the parties to take that groundworks would not be a breach of the Covenant as even if the Covenant is intended to protect the amenity of the area, groundworks, for the reasons I set out below, will not be visible whether the building is constructed or not. I do not therefore go behind the agreement the solicitors reached. As a result, I do not consider that an alternative submission made in the Claimant's skeleton argument that the works were a breach of the Covenant as they were the construction of a messuage is applicable in this case as the only works on a messuage (as opposed to retaining walls) were to groundworks which the solicitors agreed could occur.

189) It is the Defendants' pleaded position that the erection of the retaining walls was a breach of the Covenant not to erect a wall. This admission was not withdrawn, nor the pleadings amended. Hence it is an admission which binds the Defendants.

190) In any event groundworks are not a legal term of art, nor is there any evidence before me that they are a term of art in the construction industry. The highest the evidence gets is: (1) Mr Chester avers, ignoring the admission in the Defence, that his understanding of groundwork is that it includes retaining walls as they will be below the upper ground level, and (ii) Mr Goacher's change of position in this regard and his assertion in his witness statement that he spoke to an unnamed building surveyor who agreed that retaining walls were groundworks.

191) In the absence of evidence from an expert surveyor on this point, and given the concession in the Defence, I find that groundworks means works that are within the ground and which will be covered by the ground (ie not visible and below the finished ground level) when finished. They are works for the sub structure of a building which are preparatory to the above ground works.

192) In my judgment therefore the Defendants were not in breach of the Covenant because of the works undertaken up to and including 30 July 2020 as these related to clearing the site of detritus, and then work which would be enclosed within the ground when the properties were constructed.

193) In the second period of work walls were erected on the Defendants' land which would not be covered if the buildings were erected. The walls, even if retaining walls, were not groundworks as they were not within the ground on which the building would be situate and were not part of the substructure of the buildings.

194) In any event, even if the works could in the building trade be considered as groundworks, the works during this phase were in law a direct breach of the Covenant given it prohibited the erection of walls on the land without permission. The Defendants did not have permission under the Covenant to erect walls. The works undertaken in the second period were therefore works which breached the Covenant as admitted by the Defendants in the Defence and Counterclaim.

195) The works undertaken in the third period included works to the walls which had been erected, including tidying up and waterproofing. Those works were not only a breach of the Covenant but were also a breach of the assurance given by the Defendants through their solicitors to the Claimant on 13 August 2020 as they were works on walls at the site.

196) Given the concessions made by Mr Goacher in his evidence that the erection of the retaining wall went above ground level, that anything that went above ground level would be a breach of the Covenant and that he knew that at the time of the erection of the walls, in my judgment Mr Goacher did not believe that the works undertaken in the second period were permitted under the Covenant. Mr Goacher therefore did not honestly believe that the works undertaken in the second phase were within the scope of the Covenant.

197) Mr Chester knew of the Covenant and knew permission for the walls had not been given. He knew the position had been questioned by the Claimant and he knew solicitors were instructed. He was in contact with Mr Goacher who he says was dealing with the Covenant and who, as found above, knew erection of the retaining walls was a breach of the Covenant. Mr Chester therefore had no factual reason to believe that he could erect the walls. Despite this Mr Chester chose to commence to erect the walls at the site.

198) Mr Chester says this was down to his understanding that retaining walls were part of groundworks according to the building trade. Given Mr Chester's refusal to accept his own pleaded case and for the reasons already set out I do not place any weight on Mr Chester's alleged belief of the building trade. If groundworks were a term of art as Mr Chester seeks to assert not only could that have properly been evidenced but the admission in the Defence would have been withdrawn. Neither of these matters occurred and instead Mr Chester in his evidence has chosen to take a self-serving stance whereby he refuses to admit he did anything wrong, ignoring his defence. I therefore do not accept Mr Chester's evidence of his belief at the time.

199) Even if I am wrong in relation to the second phase of works there is in my judgment no basis on which the Defendants can contend that they reasonably believed that the works undertaken in the third phase were permitted given the terms of the confirmation given by their solicitor to the Claimant. The confirmation was not nuanced and did not require the

application of terms of art from any area of business. It was a straightforward confirmation that no works would be undertaken to walls without notice being given to the Claimant. Application of a waterproof membrane and tidying up of walls are works to walls. Whilst the Defendants may have wished to undertake works to weatherproof the site, such a wish does not amount to a belief that the works were permissible.

Conclusion

200) In conclusion therefore the Claimant was reasonable in his refusal of permission to the Defendants to construct the properties on the Defendants' Land. It follows from this that the Claimant is entitled to a declaration that he did not unreasonably withhold consent to the application in March 2020. The Defendants are not entitled to the declaratory relief that they seek.

201) The Defendants undertook the works between 31st July 2020 and September 2020 without a reasonable belief that the works were permissible under the Covenant or the solicitor's confirmation. Ms Lamont in her opening submissions concedes that if the court found that the refusal by the Claimant was not unreasonable that the Claimant would be entitled to injunctive relief. Given that concession I will grant an injunction in favour of the Claimant, unless the parties agree that an undertaking will suffice. If the parties are unable to agree an undertaking or the wording of the injunction, I will hear submissions from them following the handing down of this judgment. I would note that even if Ms Lamont had not made the concession, having considered the relevant authorities, I would have granted an injunction in favour of the Claimant in any event.

IN THE HIGH COURT OF JUSTICE **Claim No. BL-2020-001453**

BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES

PROPERTY, TRUSTS & PROBATE LIST (ChD)

B E T W E E N:

CHARLES BERESFORD DAVIES-GILBERT

Claimant

and

(1) HENRY JAMES GOACHER

(2) STEVEN ADRIAN CHESTER

Defendants

AGREED STATEMENT OF APPLICABLE LAW

The applicable principles of law are set out below by reference to the paragraph number of the agreed List of Issues for trial to which they relate. They are agreed between the parties, save where indicated.

Issue 4

The extent of the land benefited by the Covenant

1. There is no dispute between the parties that the burden of the Covenant will bind the Defendants, and *prima facie* be enforceable against them by the Claimant, if and to the extent that the Claimant owns land which enjoys the benefit of the Covenant.

2. Subsequent owners and occupiers may be competent claimants against a successor in title of the covenantor if the covenant satisfies the six basic requirements for transmissibility, namely that: (i) the covenant must be negative in substance; (ii) the covenant must relate to the user of land; (iii) the covenant must have been entered

into for the benefit of (i.e. touch and concern) land "belonging to" the covenantee; (iv) the covenant must as a matter of fact benefit land in which the claimant has a sufficient interest at the time of enforcement; (v) the words of covenant must be such as to show that the covenant was not intended to be personal to the original covenantee or to be confined to a category of persons to whom the claimant does not belong; (vi) the covenant must have been entered into by a competent covenantor having a sufficient interest in the burdened (subjective) land, and they can show entitlement to the benefit of the restrictive covenant by reason of (a) annexation; (b) express assignment; or (c) a building scheme: See *Scammell and Gasztowicz on Land Covenants* (2nd ed., 2018) at para. 5.1.

3. In the absence of express assignment or a building scheme (neither of which is applicable here), the Covenant will only be enforceable by the Claimant against the Defendants if and to the extent that that the Claimant owns land to which the benefit of the Covenant was annexed under the 1960 Conveyance, either expressly or by operation of section 78(1) of the Law of Property Act 1925.

4. The benefit of the Covenant was expressly annexed by the 1960 Conveyance to the "Vendors' "*Gilbert Estate at East Dean and every part thereof or so much thereof as shall for the time being remain unsold*". A covenant expressed to be made for the benefit of unsold property, and not merely for the benefit of the whole land, can in principle effect annexation of the benefit of the covenant to simply the unsold portion of such estate: see Marquess of Zetland v Driver [1939] 1 Ch 1 at 8-9.

5. The extent of the "*Gilbert Estate at East Dean*" in fact retained by the Vendors at the date of the 1960 Conveyance is a question of fact which may be determined by reference to extrinsic material beyond the text of the conveyance Bath Rugby Ltd v Greenwood [2021] EWCA Civ. 1927 at [53], per Nugee LJ, and [90], per Newey LJ.]. In construing the 1960 Conveyance, the general principles set out below in respect of Issues 11 and 12 apply.

6. Likewise, whether as at the date of the Refusal (or enforcement of the Covenant) the Claimant's Land (or any part thereof) and or any other land owned by the Claimant comprised in whole or in part the unsold portion of the Vendors' "Gilbert Estate at

East Dean" is a question of fact which may be determined by reference to extrinsic evidence: see Bath Rugby Ltd v Greenwood [2021] EWCA Civ. 1927 at [81-83], per Nugee LJ. The general principles of construction set out below in respect of Issues 11 and 12 apply.

Issues 11 and 12

The scope of the Covenant

NB: 'the Covenant' reads "***(B) NOT to erect upon any part of the property hereby conveyed any messuage erection building or wall whatsoever without such previous written licence as aforesaid such licence not to be unreasonably withheld***."

7. A restrictive covenant of the nature of the Covenant in this case is to be interpreted in accordance with ordinary principles of contractual interpretation, as expounded authoritatively by the Supreme Court in Arnold v Britton [2015] AC 1619 at [14]-[23], per Lord Neuberger, and in Wood v Capita Insurance Services Ltd [2017] AC 1173 at [8]-[14], per Lord Hodge. In summary:

    (1) The exercise of interpretation involves identifying the parties' intention objectively, as it would have been understood from the perspective of a "reasonable person" (aka the "reasonable reader").

    (2) The task is to ascertain the objective meaning of the language in which the parties have chosen to express their agreement. That meaning is most obviously to be gleaned from the language of the provision.

    (3) The less clear the "centrally relevant words to be interpreted" are, or (to put it another way) the worse their drafting, the more readily the court may properly depart from their natural meaning.

    (4) The court should not search for drafting infelicities in order to facilitate a departure from the natural meaning of the words used.

    (5) Interpretation is a unitary exercise; where there are rival meanings, the court can give weight to the implications of rival constructions by reaching a view as to which construction is more consistent with common sense.

This unitary exercise involves an iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences are investigated.

(6) Commercial common sense is only relevant to the extent it assists in ascertaining how matters would or could have been perceived by the parties, or by reasonable people in the position of the parties, at the date that the contract was made. A court should accordingly be very slow to reject the natural meaning of a provision as correct simply because it appears to be a very imprudent term for one of the parties to have agreed.

(7) The hypothetical "reasonable person" is to be taken to have been aware of such background facts or circumstances which existed at the time that the contract was made, and which were known or reasonably available to both parties (not just to one of them). This is sometimes referred to as the "factual matrix".

(8) Evidence of (i) the prior negotiations of the parties to the contract and (ii) their subjective intentions, is not admissible as part of the factual matrix.

8. Where, as in the present case, the burden of the restrictive covenant has been protected by notice entered in the charges register of the affected title at HM Land Registry, the court should be cautious before placing weight upon documents which would not be publicly accessible from HM Land Registry when carrying out the exercise of interpretation:

> Bryant Homes Southern Ltd v Stein Management Ltd [2017] 1 P&CR 6 at [27]-[30], per Norris J. In particular, at [30]:
>
> "*At the date that the 1993 Conveyance and the 1993 Agreement were entered the reasonable reader's background knowledge… would also include a recognition that the Vendor and the Buyers had deliberately chosen to put the covenant in the registrable document open to public inspection and the release mechanism for the covenant in a private document… In the light of those considerations the reasonable reader would understand that the true nature of the covenant was more likely to be set out in the registered document of title and would not treat the 1993 Agreement as containing material of sufficient weight entirely to recast the nature of the obligation as so disclosed.*"

Issues 5 and 14

The reasons for C's refusal of consent to the Application

Whether C's refusal of consent to the Application was unreasonable

Reasonableness of a refusal to consent is a question of secondary fact to be decided by the court

9. The reasonableness or otherwise of a covenantee's refusal to consent is a matter of (secondary) fact for the Court to determine in all the relevant circumstances, including the primary facts as found at trial.

> Ashworth Frazer Ltd v Gloucester City Council [2001] 1 WLR 2180 at [4], per Lord Bingham (a landlord and tenant case, but the relevant principle is the same): "*the question whether the landlord's conduct was reasonable or unreasonable will be one of fact to be decided by the tribunal of fact.*"
>
> International Drilling Fluids Ltd v Louisville Investments (Uxbridge) Ltd [1986] Ch 513 at 521, per Balcombe LJ (a landlord and tenant case, but the relevant principle is the same): "*it is in each case a question of fact, depending upon all the circumstances, whether the landlord's consent to an assignment is being unreasonably withheld*".

It is necessary to have regard to the covenantee's actual reasons at the date of the refusal.

10. To determine whether a refusal of consent is reasonable the court is required to first consider what the covenantee's actual reasons were for refusing consent.

> Bromley Park Garden Estates Ltd. v. Moss [1982] 1 WLR 1019 at 1034E, per Slade LJ: "*The decision of this court in Lovelock v. Margo [1963] 2 QB 786 clearly establishes that in cases such as the present the court has to have regard to the landlord's actual state of mind at the relevant time. The test is not a purely objective one, though no doubt inferences may be drawn as to his state of mind from his words and actions and all the other circumstances of the case*".
>
> Lovelock v Margo [1963] 1 QB 786 at 789, per Lord Denning M.R: "*I am quite clearly of opinion that it is not right to say that this is an objective question, as counsel said. This matter cannot be considered without regard to the state of mind of the landlord herself as to her reasons for refusing consent. How otherwise can a lessee hope to see whether he can assign unless he knows the landlord's reasons for objection*?"

11. A covenantee is not *per se* required to communicate to the covenantor his or her reasons for refusing an application for consent at the date that the decision to refuse consent is made. The relevant principle is that the covenantee can only rely upon

reasons, whether communicated or otherwise, which actually operated on their mind at the relevant date.

> Tollbench v Plymouth City Council (1988) 56 P&CR 194 at 200, per May LJ: "*To determine whether a landlord's refusal of consent is reasonable, accepting the submission on behalf of the appellant, requires a consideration of two questions. First, what reason did the landlord actually have for refusing consent, that is to say upon what reason did he act in refusing that consent? That is a subjective enquiry, if one needs so to describe it, in the sense that one has to discover what was in the mind of the landlord at the time when he was refusing his consent. The onus is on the tenant to show that the reason the landlord had was unreasonable and the onus therefore is on the tenant to show the reason and that that reason was unreasonable. One may have, in whole or in part, to infer in certain cases what was in the landlord's mind at the relevant time. In particular I comment that if the landlord gives no express reasons for withholding his consent, then the court will more readily imply that that withholding was unreasonable, as Lord Goddard, C.J. pointed out in Berry Ltd. v. Royal Bank of Scotland [1949] 1 K.B. 619, at 623. Having then found what reason the landlords did have in mind at the relevant time, one turns to what can perhaps properly be described as an objective enquiry, whether that reason in the landlord's mind was reasonable or unreasonable*"
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> Minerva (Wandsworth) Ltd v Greenland Ram (London) Ltd [2017] EWHC 1457 at [162]-[165], per Rose J (discussing the common law principles on refusal of consent, in the context of contractual overage agreement under section 106 of the Town and Country Planning Act 1990). In particular:
>
> "*163. Greenland accept that the issue of whether their refusal was reasonable or not must be judged on the basis of the reasons that influenced their mind at the date of refusal. But they argue that provided that those reasons did influence their mind at the relevant time, it is not necessary that the reasons were all communicated to Minerva in order to be relied on in these proceedings…164. Slade LJ [in Bromley Park Estates v Moss [1982] 1 WLR 1019] therefore was content to assume, without deciding, that that is the legal position subject only to the proviso that the landlord can only be permitted to rely on reasons which did actually influence his mind at the relevant date. After hearing the judgment delivered by Slade LJ, Cumming-Bruce LJ and Dunn LJ agreed with Slade LJ's judgment on this point. 165. The parties before me agree that the position at common law is still that the party refusing consent can rely on reasons that influenced his mind at the time even though he did not express those reasons to the counterparty. That position has been changed by statute as regards the consent of a landlord to assignment of a lease in certain circumstances. But in the present context, the parties were agreed that that is the law to be applied*."

12. The covenantee cannot rely upon factors or reasons that were not present in their mind at the time that the decision to refuse consent was made. Accordingly, the reasonableness or otherwise of a refusal of consent must be assessed as at the date that the decision to refuse consent was made.

> Cryer v Scott Bros (Sunbury) Ltd (1988) 55 P&CR 183 at 199, per Slade LJ: "*Mr. Scott did not specifically say that these particular factors had been present to the defendants' minds when the decision to reject the plaintiff's plans was*

> *made. If they were not in fact present to their minds at that time, I do not think it would be open to them retrospectively to invoke these particular considerations for the purpose of justifying their refusal of consent*".
>
> Minerva (Wandsworth) Ltd v Greenland Ram (London) Ltd [2017] EWHC 1457 at [163], per Rose J: "*Greenland accept that the issue of whether their refusal was reasonable or not must be judged on the basis of the reasons that influenced their mind at the date of refusal*."

13. That said, there are obiter remarks by Lord Briggs in Sequent Nominees Ltd v Hautford Ltd [2020] AC 28 at [30] and [32] which suggest (in a landlord and tenant context) that the reasonableness of the decision falls to be assessed by reference to the circumstances prevailing on the date at which the consent is sought.

> "*30. … He [Lord Denning MR] used the risk of enfranchisement as an example of the infinitely variable circumstances in which the landlord has a choice to consent or refuse consent, illustrative of the need to address the reasonableness of a refusal by reference to the facts as they are at the date of the tenant's request…"It is over-simplistic, … to approach this question in any rigid or doctrinaire way, still less solely by reference to original purposes of the covenant … It will in every case be a question of fact and degree measured as at the date upon which the relevant consent is sought*."

14. When Hicks was remitted from the Court of Appeal to the High Court – Hicks v 89 Holland Park (Management) Ltd [2021] EWHC 930 (Comm) – HHJ Pelling QC stated at [16](b) that, "*What is or is not reasonable is in every case a question of fact and degree, to be assessed at the date when the relevant consent is sought*". Yet compare HHJ Pelling's contrary earlier remarks at [2019] EWHC 1301 (Ch) at [52] ("*at the time when the refusal decision was taken*").

15. To the extent that the point is not clearly settled, as a matter of principle the former position – the relevant date being the date of refusal – is to be preferred.

Burden of proof

16. Generally the burden of proof lies on the covenantor to prove, on the balance of probabilities, that the covenantee's refusal of consent was unreasonable, and not on the covenantee to prove that their refusal was reasonable.

> International Drilling Ltd v Louisville Investments [1986] 1 Ch. 513 at 520C per Balcombe LJ: "*The onus of proving that consent has been unreasonably withheld*

is on the tenant: see Shanly v Ward (1913) 29 TLR 714 and Pimms Ltd v Tallow Chandlers Company [1964] 2 QB 547, 564."

Hicks v 89 Holland Park (Management) Ltd [2021] EWHC 903 (Comm) at [16a] per HHJ Pelling QC: "*The legal onus of establishing that the defendant's reasons for refusing permission were unreasonable rests on the claimant – see Tollbench Limited v Plymouth City Council (1988) 55 P&CR 194 per May LJ at 200 and International Drilling Fluids Limited v. Investments (Uxbridge) Limited [1986] 1 Ch. 513 per Balcombe LJ at 520C*"

17. **[Defendants only]**: If the covenantor establishes a *prima facie* case the onus shifts to the covenantee: RM Cole v Russells (Tulse Hill) Ltd (1955) 165 E.G 389.

18. **[Claimant's response]**: The Claimant does not agree that the case cited establishes the proposition cited at paragraph 17 above, and notes that it is a decision of the County Court. The proposition of law at paragraph 17 is therefore denied.

19. **[Defendants only]**: Although the covenantor is not bound to give any reasons for his refusal and is not confined to the reasons expressly put forward in refusing consent (as set out above), if he gives no reason for his refusal the burden of proof may be transferred to him, and the court may more readily imply that the withholding of consent was unreasonable.

Lambert v. F. W. Woolworth & Co [1938] 1 Ch 883 at 906 per Slesser LJ: "*the onus of proving that the withholding is unreasonable is on the tenant, but if the landlord gives no reason but merely refuses that, in itself, I think, puts upon him the duty of showing that his action was reasonable*".

Frederick Berry Ltd v Royal Bank of Scotland [1949] 1 K.B. 619 at 623 per Lord Goddard CJ: "*I do not think that the dictum of [*Slesser LJ in Lambert v F.W. Woolworth & Co*] means any more than that if the landlord gives no reason the court would more readily imply that the withholding was unreasonable*".

Tollbench Ltd v Plymouth City Council (1988) 56 P. & C.R. 194 at 200 per May LJ: "*In particular I comment that if the landlord gives no express reasons for withholding his consent, then the court will more readily imply that that withholding was unreasonable, as Lord Goddard, C.J. pointed out in Berry Ltd. v. Royal Bank of Scotland [1949] 1 K.B. 619 , at 623.*"

Preston & Newsom, *Restrictive Covenants Affecting Freehold Land* (11th ed., 2020) at [6-046]: "*The refuser is not under a legal duty to give reasons for his refusal, but, if he does not give reasons, the onus of proof shifts to him, at least in the sense that his failure to give reasons could lead to the inference that there is no good reason to give.*"

20. **[Claimant's response]**: The Claimant does not dispute the proposition of law in paragraph 19 above, but does not consider that that proposition is relevant or applicable to the present case.

21. It is not necessary for the covenantee to prove that the conclusions which led them to refuse consent were justified, if those conclusions might have been reached by a reasonable person in the circumstances.

> Ashworth Frazer Ltd v Gloucester City Council [2001] 1 WLR 2180 at [5], per Lord Bingham (a landlord and tenant case, but the relevant principle is the same), citing Pimms Ltd v Tallow Chandlers Company [1964] 2 QB 547 at 564, per Danckwerts LJ: "*it is not necessary for the landlords to prove that the conclusions which led them to refuse consent were justified, if they were conclusions which might be reached by a reasonable man in the circumstances …*".

General principles

22. What is or is not reasonable is in every case a question of fact and degree with the reasonableness concept being given a broad common sense meaning.

> Hicks v 89 Holland Park (Management) Ltd [2021] EWHC 930 (Comm) at [16](b), per HHJ Pelling QC:
>
> *"What is or is not reasonable is in every case a question of fact and degree, to be assessed at the date when the relevant consent is sought – see Sequent Nominees Ltd (formerly Rotrust Nominees Ltd) v Hautford Ltd [2019] UKSC 47; [2020] AC 28 per Lord Briggs JSC at paragraph 32 – with the reasonableness concept being given a broad common sense meaning – see Sequent Nominees Ltd (formerly Rotrust Nominees Ltd) v Hautford Ltd (ibid.) by Lord Briggs JSC at paragraph 25 and 30 – tested by asking whether "… a notional hypothetically reasonable person in … the position of the defendant might have arrived at the conclusion under challenge – see by analogy Hayes v Willoughby [2013] UKSC 17; [2013] 1 WLR 935 per Lord Sumption JSC at paragraph 14; International Drilling Fluids Limited v Investments (Uxbridge) Limited (ibid.) per Balcombe LJ at 520C-d (Proposition (4)) and Mahon v. Sims [2005] 3 EGLR 67, where Hart J observed that a qualification to the effect that consent was not unreasonably to be withheld " … does not have the consequence that the court can, at the invitation of the covenantor, simply substitute its judgment as to what is reasonable for that of the covenantee. All the proviso means is that refusal of approval will be unreasonable if the court is satisfied that no reasonable covenantee would have refused approval in the circumstances".*

23. The court cannot simply substitute its judgment as to what is reasonable for that of the covenantee. The court must rather be satisfied that no reasonable covenantee would have refused consent in the circumstances.

> Sims v Mahon [2005] 3 EGLR 67 (QBD) at [29], per Hart J:

"In the present context I do not think that it does make any practical difference whether the implied proviso is expressed as "not to be arbitrarily or capriciously withheld" or as "not to be unreasonably withheld". If the implied proviso takes the latter form it is important to bear in mind that this does not have the consequence that the court can, at the invitation of the covenantor, simply substitute its judgment as to what is reasonable for that of the covenantee. All that proviso means is that refusal of approval will be unreasonable if the court is satisfied that no reasonable covenantee would have refused approval in the circumstances."

24. The concept of reasonableness in this context involves both a reasonable process and a reasonable outcome, namely:

(1) Has the decision-maker taken into account things he or she ought not to have taken into account or failed to take into account things he or she ought to?

(2) Is the decision one which no reasonable decision-maker could have reached?

Hicks v 89 Holland Park (Management) Ltd [2019] EWHC 1301 (Ch), per HHJ Pelling QC at [53]-[56] (not challenged on appeal), in particular:

"*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."

25. The court is not to confine the range of reasonable bases for a refusal of consent to bases which would impede or frustrate the original purpose of the covenant; nor should it focus unduly upon what that "purpose" of the covenant in question is.

> Sequent Nominees Ltd v Hautford Ltd [2020] AC 28 at [35] and [37], per Lord Briggs. In particular, at [35], "*In my opinion none of those three strands of reasoning supports the conclusion reached by the courts below. All of them seek to address the question whether the landlord's consent was unreasonably withheld by reference to an over-refined attempt to identify a limited original purpose behind clause 3(19), contrary to Lord Denning MR's dictum in the Bickel case [1977] QB 517, approved in the Ashworth Frazer case, that it is wrong in principle to address the question "under the guise of construing the words".*"
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> Apache North Sea Limited v INEOS FPS Ltd [2020] EWHC 2081 (Comm) at [41], per Foxton J: "*I accept that Lord Briggs JSC's judgment [in Sequent Nominees] provides a salutary warning that a court cannot substitute its own judgment for that of the contractual decision-maker, and turn what is essentially an evaluation of fact into an issue of law for the court by concluding that a consent provision was originally included in a contract to serve a particular purpose, and then holding that refusing consent for any other purpose falls outside the consent provision as a matter of construction…. However [Sequent Nominees] clearly did not decide that it is no longer necessary to construe a consent provision in the context of the contract as a whole, nor render illegitimate the approach of constructing such clauses on the basis that they are not ordinarily intended to allow the consent provider to override or nullify a contractual right conferred elsewhere*"
>
> See also Hicks v 89 Holland Park (Management) Ltd [2021] Ch 105 at [52] to [54] per Lewison LJ, applying Sequent Nominees Ltd v Hautford Ltd on this point.

26. **[Defendants only]**: Where an outright refusal is said to be unreasonable by reference to a factor or circumstance that could have been neutralised by a condition, generally the refusal will be unreasonable.

> Sargeant v Macepark (Whittlebury) Limited [2004] EWHC 1333 (Ch) per Lewison J at [48]: "*when considering the reasonableness of conditions, it seems to me that if the landlord would have been entitled to refuse consent on some particular ground, a condition neutralising the landlord's concern will ordinarily be reasonable."*
>
> Hicks v 89 Holland Park (Management) Ltd [2021] EWHC 930 (Comm) at [16](g), per HHJ Pelling QC: "*Where an outright refusal is said to be reasonable by reference to a factor or circumstance that could be have been neutralised by a condition, generally the refusal will be unreasonable – see by way of example Sargeant v. Macepark (Whittlebury) Limited (ibid.) per Lewison LJ at paragraph 48*".

27. **[Claimant's response to paragraph 26]**: The Claimant does not agree that the passage cited from Sargeant is authority for the proposition stated at paragraph 26 above. On a plain reading, the proposition (which is accepted), is that it is reasonable for the *tenant* (i.e. the *covenantor* in the freehold context) to propose a condition which addresses a basis on which the *landlord* (the *covenantee*, in this context) could reasonably have refused consent. The Claimant considers that the proposition was wrongly set out (with no suggestion of it being consciously reformulated or expanded) in Hicks [2021] EWHC 930 (Comm) by HHJ Pelling QC to suggest that there is a duty upon the *covenantee* (rather than the *covenantor*) to propose conditions or modifications the fulfilment of which would mean that consent could then reasonably be granted. That is not correct.

28. Generally, the purpose of covenants that require the covenantee's approval to designs or plans for construction or alteration work to freehold property is to protect the covenantee from the servient tenement being used in a way that is undesirable from the point of view of the covenantee.

> Hicks v 89 Holland Park (Management) Ltd [2021] EWHC 930 (Comm) at [16](c), per HHJ Pelling QC: "*Generally, the purpose of covenants such as the covenants is to protect the covenantee from the subservient tenement being used in a way that is undesirable from the point of view of the covenantee – see International Drilling Fluids Limited v. Investments (Uxbridge) Limited (ibid.) per Balcombe LJ at 519H"*.

29. Though, when applying the principle above, the covenantee need usually only consider their own interests, there may be cases where there is such a disproportion between the benefit to the covenantee and the detriment to the covenantor if the covenantee withholds their consent that it is unreasonable for the covenantee to do so.

> Hicks v 89 Holland Park (Management) Ltd [2021] EWHC 930 (Comm) at [16](e)(ii), per HHJ Pelling QC: "*There may be cases where there is such a disproportion between the benefit to the landlord and the detriment to the tenant if the landlord withholds his consent that it is unreasonable for the landlord to refuse consent – see International Drilling Fluids Limited v. Investments (Uxbridge) Limited (ibid.) per Balcombe LJ at 521C-D (whose summary of the applicable principles in this area was approved in Sequent Nominees Ltd (formerly Rotrust Nominees Ltd) v Hautford Ltd (ibid.) by Lord Briggs JSC at paragraph 21); Iqbal v. Thakrar [2004] EWCA Civ. 592 per Peter Gibson LJ at paragraph 26 and Sargeant v. Macepark (Whittlebury) Limited [2004] EWHC 1333 (Ch), where the principle was applied by Lewison LJ at paragraph 78*".

30. Whilst the covenantee need usually consider his own relevant interests, it will be unreasonable for a covenantee to refuse consent for the purpose of achieving a collateral or uncovenanted advantage.

> Hicks v 89 Holland Park (Management) Ltd [2021] EWHC 930 (Comm) at [16](e)(i), per HHJ Pelling QC: "*It will be unreasonable for a covenantee to refuse consent for the purpose of achieving a collateral purpose, or as Mr Rainey QC put it on behalf of the claimant, for the purpose of obtaining an uncovenanted advantage – see International Drilling Fluids Limited v Investments (Uxbridge) Limited (ibid.) per Balcombe LJ at 520B; and Mount Eden Land Ltd v. Straudley Investments Ltd (1996) 74 P. & C.R. 306*".

Relevance of (i) the extent of the benefited land and (ii) the nature of the covenantee's interest

31. The covenantee cannot take into account the effect of the proposals on land which does not enjoy the benefit of the covenant.

> Cryer v Scott Bros (Sunbury) Ltd (1988) 55 P&CR 183 at 197-198, per Slade LJ:
>
> "*The first of these two questions involves considering what reasons for the withholding of approval are capable of falling within the scope of the covenant. Mr. Hague submitted in effect that, in deciding whether or not to give their approval in any given case, the defendants are entitled to take into account any circumstances whatever which they may reasonably consider relevant, whether or not relating to the Benwell Meadow Estate. In the alternative, he submitted (and this seems to have been the learned judge's view) that the defendants are at least entitled to take into account any circumstances relating to the estate as a whole, or any part of it, which they may reasonably consider relevant. On the other hand, Mr. Lloyd submitted that the only circumstances which the defendants are entitled to take into account are circumstances relevant to them in their capacity as owners of the land for the benefit of which the covenant is enforceable (as things are, the two yellow plots). No other circumstances, in his submission, can be invoked to justify a withholding of consent*.
>
> *I accept Mr. Lloyd's submission on this point… 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 m their hands. In other words, the criteria which they apply in deciding whether or not to give such approval must, in my judgment, relate solely to such land, that is to say the two yellow plots, which alone enjoy the benefit of covenant no. 4 and alone are said to be capable of being benefited by it.*"
>
> 89 Holland Park (Management) Ltd v Hicks [2021] Ch 105 at [27]-[34] and [43], per Lewison LJ and in particular at [28]:
>
> "*In my judgment, the essential point in Cryer was that the covenantee was not entitled to take into account matters that did not affect the land with the benefit of the covenant. In my judgment that is the real principle.*"

32. The covenantee can, however, take into account the interests of all those with the benefit of the covenant, including those with derivative interests in the benefited land (e.g. lessees) and occupiers of it, and not merely the consenting party's own interests (e.g. as freeholder).

> 89 Holland Park Management Ltd v Hicks [2021] Ch 105 at [27]-[34] and [43], per Lewison LJ. In particular, at [32]:
>
> "*I consider that the inescapable conclusion is that the decision-maker considering whether or not to approve plans is entitled to take into account the interests of those with the benefit of the covenant. Those persons include both the owners and the occupiers of the land. If it were otherwise the general purpose of the covenant would be undermined*."

33. The current state of the benefited land (i.e. its state at the date of the decision to refuse consent) may be a relevant consideration:

> 89 Holland Park (Management) Ltd v Hicks [2021] Ch 105 at [56], per Lewison LJ: "*Lambert [v F. W. Woolworth & Co. Ltd [1938] Ch 883] shows that the current state of the land may also be a relevant consideration*."

Aesthetic considerations

34. A covenantee with the benefit of a covenant requiring consent to works of construction or alteration may in some contexts (i.e. subject to reasonableness) refuse consent on aesthetic and/or environmental grounds whether or not the aesthetic or environmental objections are associated with any detrimental effect on the capital or rental value of the benefited land.

35. Such a refusal may potentially (but need not) be articulated in terms of "loss of amenity" of the benefited land (in other words, an adverse effect on the "amenity value of the right to enjoy the property", as opposed to its market value) or on the basis that the proposed development would be "out of keeping" with the covenantee's benefited land.

36. **[Defendants only]**: It would not be enough to say that the proposed building/ alterations were not to the taste of the covenantee (or others entitled to the benefit of the covenant) as this would be entirely subjective.

37. **[Claimant's response]**: The Claimant would express the proposition at paragraph 36 above in a slightly different manner, namely: In assessing whether or not objections on aesthetic or environmental grounds are reasonable, it would generally not be enough for the covenantee merely to say (i.e. without additional reasons or further reasoning) that the proposed building/ alterations were not to the taste of the covenantee (or others entitled to the benefit of the covenant) as this would be entirely subjective. The Claimant will explain his reasons in oral argument, so far as necessary.

38. The current state of the land may also be a relevant consideration in considering an objection based on aesthetic considerations.

> As to the above paragraphs: 89 Holland Park (Management) Ltd v Hicks [2021] Ch 105 at [35]-[49] and [56], per Lewison LJ. The passages are too extensive to be set out here: see the Appendix to this Statement (below).

Relevance of planning permission

39. Though the grant of planning permission in respect of the subject matter of the covenantor's application for consent under a restrictive covenant is capable of being a material consideration in the covenantee's decision-making, the fact that planning permission has been granted is not determinative of the reasonableness or otherwise of the covenantee's decision to refuse consent. Planning permission and restrictive covenants are separate legal regimes which serve two distinct interests: the public interest (in the case of the former) and the private interest of the covenantee (the latter).

> Re Martin's Application (1989] 57 P&CR 119 at 124-125, per Fox LJ (a LPA 1925 s.84 discharge application, but the principles apply equally to a reasonableness of refusal case):
>
> "*When a restrictive covenant is entered into between owners of adjoining, or otherwise affected, lands the fact that the owner for the time being of the burdened land subsequently obtains planning permission to develop that land in a manner which is prohibited by the covenant does not entitle him to ignore the covenant. The benefit of the covenant is an interest in land and it is not extinguished by the acts of a planning authority… while the two regimes impinge upon each other to some extent, they constitute different systems of control and each has, and retains, an independent*

existence. In my view, the applicants' contention is wrong in so far as it suggests that the granting of planning permission by the Secretary of State necessarily involves the result that the Lands Tribunal must discharge the covenant. The granting of planning permission is, it seems to me, merely a circumstance which the Lands Tribunal can and should take into account when exercising its jurisdiction under section 84. To give the grant of planning permission a wider effect is, I think, destructive of the express statutory jurisdiction conferred by section 84."

Hicks v 89 Holland Park (Management) Ltd [2019] EWHC 1301 (Ch) at [45], per HHJ Pelling QC: "*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.*"

See also Scammell and Gasztowicz on *Land Covenants* (2nd ed., 2018) at 10.95 to 10.98 (particularly 10.97 and 10.98).

Mixtures of reasons

40. Where approval is not to be unreasonably withheld, and the covenantee refuses consent for a mixture of reasons, some good and some bad, if the decision would have been the same without the bad reasons, then the decision overall will remain reasonable and will not be vitiated.

No.1 West India Quay (Residential) Ltd v East Tower Apartments Ltd [2018] 1 WLR 5682 at [41], per Lewison LJ (affirmed in 89 Holland Park (Management) Ltd v Hicks [2021] Ch 105 at [63-65], per Lewison LJ):

"*The theme running through all these cases is that if the decision would have been the same without reliance on the bad reason, then the decision (looked at overall) is good. In that situation the bad reason will not have vitiated or infected the good one. That approach seems to me to be justified in principle. In addition, I consider that to hold otherwise might lead to considerable practical difficulties.*"

Issue 13

In considering Issue 5, ought the Court to draw any adverse inferences from the content of C's 'Refusal Letter' dated 18 March 2020, or subsequent correspondence, as contended for by Ds in paragraphs 22, 61 and 62 of the Defence? If so, what inferences?

41. See paragraphs 19 and 20 above. The Defendants' position is that although the covenantor is not bound to give any reasons for his refusal and is not confined to the reasons expressly put forward in refusing consent (as set out above), if he gives no reason for his refusal the burden of proof may be transferred to him, and the court may more readily imply that the withholding of consent was unreasonable. The Claimant does not dispute these propositions of law but denies their relevance or applicability to the present case.

42. Where a party can, without apparent difficulty, give or call relevant evidence on an important point, a failure to do so might in some circumstances entitle the court to draw an inference adverse to that party.

> Nield-Moir v Freeman [2019] Ch 85 at [15], per HHJ Paul Matthews:
>
> "*First, a principle has been developed that, where a party could without apparent difficulty give or call relevant evidence on an important point, a failure to do so might in some circumstances entitle the court to draw an inference adverse to that party, which will be sufficient to strengthen evidence adduced by the other party or weaken evidence given by the party so failing: see for example Thames Valley Housing Association v Elegant Homes (Guernsey) Ltd [2011] EWHC 1288 (Ch) , [19].*"

43. The Supreme Court has recently given additional guidance on the drawing of inferences from the failure to call relevant evidence on an important point. The principles involved are not rules of law. The inferences to be drawn are a matter for the tribunal, and are a matter of ordinary rationality. Tribunals should be free to draw or to decline to draw inferences from the facts of the case before using their common sense.

> Royal Mail Group Ltd v Efobi [2021] 1 WLR 3863 at [41], per Lord Leggatt:
> "*The question whether an adverse inference may be drawn from the absence of a witness is sometimes treated as a matter governed by legal criteria… I think there is a risk of making overly legal and technical what really is or ought to be just a matter of ordinary rationality. So far as possible, tribunals should be free*

to draw, or to decline to draw, inferences from the facts of the case before them using their common sense without the need to consult law books when doing so."

Issue 15

Ought the injunctive relief sought by C to be granted and, if so, on what terms?

44. Injunctive relief being an equitable remedy, whether and, if so, the terms on which injunctive relief is granted, are matters for the court's discretion (just as is the decision as to whether to grant an injunction or instead to award damages in lieu).

45. Nonetheless, the *prima facie* position is that an injunction should be granted for an actionable breach of a restrictive covenant, so the legal burden is on the covenantor to show why it should not.

46. The relevant principles are contained in the speech of Lord Neuberger in Coventry v Lawrence [2014] AC 822 (at [100] to [132]). To summarise those principles:
    (1) A successful claimant has a *prima facie* entitlement to an injunction which means that the defendant bears the legal burden of establishing that an injunction should not be granted (para. 101, 121);
    (2) As a matter of practical fairness, each case is likely to be fact sensitive such that any firm guidance is likely to do more harm than good (para. 120). However, the courts can lay down rules as to what factors can, and cannot, be taken into account by a judge when deciding whether to exercise his or her discretion to award damages in lieu (para. 121);
    (3) The outcome should depend on all of the evidence and arguments and subject to the legal burden being on the defendant as aforesaid, there should be no inclination in favour of or against the grant of an injunction (para. 122);
    (4) The defendant's conduct remains a highly relevant factor and an injunction will often be appropriate if the defendant has acted in a high handed manner (para 121)
    (5) Whilst no longer imposing a fetter on the discretion, the guidance contained in *Shelfer* remains of some value (para. 123);

(7) As to the continued modified relevance of the *Shelfer* guidance, (i) the application of the four tests must not be such as to be a fetter on the exercise of the court's discretion; (ii) it would, in the absence of additional relevant circumstances pointing the other way, normally be right to refuse an injunction if those four tests were satisfied; and (iii) the fact that those tests are not all satisfied does not mean that an injunction should be granted (para. 123).

As to paragraphs 44 to 46 above, see: Coventry v Lawrence [2014] AC 822 at [120]-[123], per Lord Neuberger. The passages are too extensive to be set out here: see the Appendix to this Statement (below).

47. **[Claimant only]**: Where there is doubt as to whether or not a restrictive covenant applies or whether consent under a restrictive covenant is being unreasonably withheld, if the covenantor commences work without the issue having been resolved, and is later shown to have acted in breach of the restrictive covenant, it will require very strong circumstances for an injunction to be refused.

Mortimer v Bailey [2005] 2 P&CR 9 at [41], per Jacob LJ: "*Where there is doubt as to whether a restrictive covenant applies or whether consent under a restrictive covenant is being unreasonably withheld, the prudent party will get the matter sorted out before starting building, as could have been done in this case. If he takes a chance, then it will require very strong circumstances where, if the chance having been taken and lost, an injunction will be withheld*."]

48. **[Defendants' response to paragraph 47]**: The Defendants do not accept the Claimant's proposition as a statement of law. As set out in Coventry v Lawrence [2014] AC 822, the court's discretion is unfettered. It has already been accepted (in paragraph 44(4) above) that a defendant's conduct remains a highly relevant factor and an injunction will often be appropriate if a defendant has acted in a high handed manner. No further gloss is necessary or justified.

Issue 16

Ought the declaratory relief sought by C or Ds to be granted and, if so, on what terms?

49. The court's jurisdiction to grant a declaration derives from statute, the present statutory foundation being in section 19 of the Senior Courts Act 1981 and also CPR

Part 40.20. The decision as to whether and, if so, the terms on which such relief is granted is a matter for the court's discretion.

50. The principles were summarised by Aiken LJ in Rolls-Royce plc v Unite the Union [2010] 1 WLR 318 at [120]. Not all of these principles are relevant to the present case. Only such principles as are relevant are set out below.

    (1) The power of the court to grant declaratory relief is discretionary.

    (2) There must, in general, be a real and present dispute between the parties before the court as to the existence or extent of a legal right between them.

    (3) Each party must, in general, be affected by the court's determination of the issues concerning the legal right in question.

    (4) In all cases, assuming that the other tests are satisfied, the court must ask: is this the most effective way of resolving the issues raised? In answering that question, it must consider the other options of resolving this issue.

51. A negative declaration (i.e. a declaration that X is or will not be the case) may be granted by application of the same principles, provided that it would be a practical or useful step for the court to make such a declaration.

> Wellbarn Shoot Ltd v Shackleton [2003] EWCA Civ 2 at [47], per Carnwath LJ. In particular, at [54]: "*the issues [with the grant of a negative injunction] are ones of practicality and utility, rather than principle" and [60]: "Once it is accepted that the judge had jurisdiction to make the order, the question becomes one of discretion. As the recent authority shows this is to be judged by issues of practicality and utility.*"

52. The effect of a contravention of a proviso by an unreasonable refusal of consent is to release the covenantor in respect of the scheme in relation to which consent has been refused from their obligation to obtain consent: Treloar v Bigge (1873-74) L.R. Ex. 151 at 156, per Amphlett B (concerning assignment of a lease without the landlord's consent, but the underling principle being the same).

53. Following an unreasonable refusal of consent, the covenantor can carry out the works without consent and/or apply to the court for a declaration that consent has

been unreasonably refused: see *Woodfall: Landlord and Tenant* at 11.128 for the applicable principles (which apply beyond the landlord and tenant context).

*

APPENDIX

89 Holland Park v Hicks [2021] Ch 105 at [35]-[49] and [56], per Lewison LJ:

Were aesthetics irrelevant?

35. There are two linked points under this head:

- *(i) Were aesthetics relevant at all?*
- *(ii) If so, is a corporation entitled to refuse consent on that ground?*

36. There is no doubt that, in some contexts, a decision-maker asked to give consent to works may refuse on aesthetic grounds. Lambert v F W Woolworth and Co Ltd [1938] Ch 883 concerned a covenant in a 42-year lease against alterations without consent subject to a proviso (inserted by section 19(2) of the Landlord and Tenant Act 1927) that consent was not to be unreasonably held. The freeholders were two individuals. The property was a shop. Slesser LJ said, in colourful language (at p 907):

> *"I agree with Mr Radcliffe that many considerations, aesthetic, historic or even personal, may be relied upon as yielding reasonable grounds for refusing consent, which I do not think it necessary or possible here to catalogue. The wider the connotation given to the idea of improvement, the more necessary it may be that the landlord should have his protection. In the present general decline of taste and manners, a shop-keeper, looking at the matter from a purely commercial point of view, may be right in saying that the removal of some beautiful casement and the substitution of a garish window or façade of false marble may prove an attraction to the public and so, from his point of view, be an improvement. It is most important that the landlord should be able to be heard to say that it may be reasonable that he should withhold his consent to the perpetration of contemplated atrocities. In the present case, as the photographs show, no such considerations could possibly be urged. The erection of a kind of Assyrian façade, appropriate to and possibly copied from an archaic heathen temple, may or may not be in accordance with the spirit of the age; it is impossible to say that, architecturally, it can be regarded as any worse than the sordid front, of late Victorian architecture, for which it was substituted."*

37. MacKinnon LJ said that a landlord might object to improvements on a number of grounds:

> *"(1) He might object on aesthetic, artistic, or sentimental grounds.*
> *"(2) He might object that the alterations would damage the demised premises or diminish their value.*
> *"(3) He might, perhaps, object that the alteration would damage his neighbouring premises, or diminish their value. I say 'perhaps', as to this, having in mind the possible effect of the principle of Houlder v Gibbs [1925] Ch 575…*
> *"(4) He might object that, as the alteration would not add to the letting value of the premises, he would have to undo it and reinstate the old conditions at the end of the term. Of these (1) I believe and hope remains unaffected by anything in the Act of 1927. No court, as I hope and believe, will ever hold that under section 19, subsection 2, a landlord must consent to the hideous degradation of the front of his building by a sheet of plate glass, and be satisfied by a money payment for the loss of graceful eighteenth century windows. But a glance at the photograph of these premises shows that no aesthetic considerations can be involved in this case. If we had no photograph, that might be inferred from the address—'Nos 18 and 20 Commercial Road, Bournemouth'."*

38. Slesser LJ did not confine his observations to a case in which the aesthetic merits (or otherwise) of the proposal had an impact on the landlord's property rights in the narrow sense. MacKinnnon LJ put the two objections into different and apparently free-standing categories.

Neither judge felt any inhibition about deciding whether an aesthetic objection was or was not reasonable.

39. The covenant with which we are concerned relates to the approval of "plans drawings and specifications". The purpose (or at least one of the purposes) of plans, drawings and specifications is to demonstrate what a proposed building will look like. It would, in my judgment, be extraordinary if, in considering whether to grant or refuse consent to those plans, drawings and specifications, the decision-maker could not take into account what the proposed building would look like.

40. The judge was referred to Lambert, but at para 41 distinguished it as follows:

> *"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."*

41. I do not consider that these grounds of distinction are convincing. It is true that the legal context was different, but it is difficult to see why that should matter on the facts of this case. The covenant in our case was a covenant between neighbours; and in my judgment a neighbour has a legitimate interest in the appearance of what is built next door to him. Approval under clause 2(b) had to be obtained before making an application for planning permission. If all that mattered under the covenant was the effect on bricks and mortar; and the capital and rental value of Brigadier Radford's interest, it is difficult to see why clause 3 on its own was not enough. Clause 5 of the 1968 Deed contemplated that the Building Owner might engage an architect in connection with the approval of plans and drawings, which also suggests that aesthetics were at least potentially contemplated as being within the scope of the covenant. It is also true that the covenantee in Lambert was an individual (in fact two individuals). In that connection the judge placed some reliance on an observation of Neuberger J in Crest Nicholson [2003] 1 All ER 46. Having referred to Lambert Neuberger J said at para 46 that it was fair to say "on the facts of this case" a refusal on aesthetic grounds looked unlikely because the approval would be that of a company. Neuberger J gave no reasons for that observation. It may be that Neuberger J had some special feature of the case in mind. It seems counter-intuitive to deny that, in principle, a corporation can make aesthetic judgments, given that many major corporations spend huge sums of money on corporate and product design. The purpose of such expenditure may be to attract increased custom, but the choices nevertheless are aesthetic choices. In addition, it would, I think, be irrational to say that if an interest was held by a partnership aesthetic judgments were open to it, but that if that interest was held by a corporation or an LLP aesthetics were forbidden territory. Moreover, what the judge appears to have forgotten is that in our case the covenantee (Brigadier Radford) was also an individual.

42. A similar point arose obliquely in Cryer 55 P & CR 183, upon which the judge relied for a different point. The original covenantees in that case were three individuals, but by the time of the events in issue the benefit of the covenant was vested in a company. That, too, was a case in which approval to plans was required, such approval not to be unreasonably withheld. In discussing the potential grounds upon which approval could be withheld, Slade LJ referred expressly to aesthetic considerations. He said at p 197:

> *"Let it be supposed that the owner for the time being of 22 Pine Wood were to propose an extension to his house which would be exceptionally unsightly and entirely out of keeping with the rest of the Benwell Meadow Estate. I am not satisfied that in such circumstances it would be of no value to the defendants, as owners of the two yellow plots, to be able to prevent new building of such an outrageous character. I am not satisfied that the erection of such an extension, albeit to a house at some distance away, would necessarily have no effect on the*

value of the larger yellow plot or a house built on the larger yellow plot, which also form part of the Benwell Meadow Estate—particularly since, as the learned judge found, this estate is a 'very attractive one' in which 'the types of houses have been intermingled to the best effect'."

43. But Slade LJ rejected the covenantee's argument that in considering an application for consent it could consider the "knock on" effect on parts of their estate which did not have the benefit of the covenant. He continued at pp 200–201:

> *"On the evidence, I can see [no] good reason to suppose that the extension of 22 Pine Wood by the addition of another bedroom would have any detrimental effect at all on the two yellow plots. Both of them are situated several hundred yards away from that house, which is not visible from them. It is not suggested that the plaintiff's plans are offensive in themselves ... If in any given case they cannot reasonably take the view that a proposed extension is likely to affect the value of either of the two yellow plots, there will be no ground upon which they can properly withhold their approval and the plaintiff's extension will make no difference to this. If, however, they can reasonably take that view (for example because a proposed extension would take place near to one or other of these two plots and would be entirely out of keeping with the other houses in the immediate vicinity), then the mere fact that they have given consent in the present case would not in any way debar them from refusing their consent in the new case before them." (Emphasis added.)*

44. These passages seem to me clearly to contemplate a refusal of consent on aesthetic grounds. Indeed, in our case the assertion that Ms Hicks's proposal was "out of keeping" was expressly made. In a concurring judgment Waite J said at pp 202–203:

> *"The land retained by the defendants—small though it has become—is still capable of being benefited by the first limb of covenant 4. There is no difficulty about imagining a form of extension to an existing dwelling house which would be so offensive in size or style as to make it reasonable to regard it as having a potential adverse effect upon the amenities of the retained land (or upon the part of it which is still capable of future development) or on the market value of such land. A right of prior approval of plans for the extension of any dwelling house built on the other plots would accordingly be a real and tangible benefit for the retained land."*

45. It is to be noted that he regarded an effect on the amenities of the retained land (not merely its value) as potentially relevant. On the facts, however, he stressed the small part of the land which enjoyed the benefit of the covenant. He continued:

> *"That limited perspective necessarily rules out any objection on purely visual or aesthetic grounds personal to the owners of the retained land, for the two properties are at opposite ends of a developed estate and invisible from each other."*

46. As I read this, the reason why aesthetic grounds were impermissible in that case was not that the covenantee was a company; nor that aesthetic grounds did not affect value. It was because the proposed building was invisible from the land with the benefit of the covenant.

47. Mr Rainey, on behalf of Ms Hicks, made the powerful point that aesthetic objections cannot be objectively evaluated ("De gustibus non est disputandum"). That might have been an argument raised in both Lambert and Cryer; but in my judgment both those authorities recognise that aesthetic objections may be valid, even where a covenant contains a proviso that consent may not be unreasonably withheld. He also argued that an aesthetic objection could only be relevant if it was tied to a detrimental effect on the value of the land with the benefit of the covenant. But that, in my judgment, is to take a very narrow view of what interests a covenant of this kind is intended to protect. I shall return to this point shortly.

48. The judge's final point was that the Company's property interest was not that of a landlord. It seems to me that this point must be considered in stages. As I have said, the judge held that at the date of the covenant Brigadier Radford's only interest was in preserving the structure, capital value and revenue generating capacity of his property. That also seems to me to be too narrow a view. At the date when the covenant was given the flats were let out on short contractual or statutory tenancies. Brigadier Radford was entitled to the reversion. As and when the tenancies fell in, he would have been entitled to turn the flats to account, either by reletting them; or by selling them; or by living in one or more of them himself. Indeed, he (or a subsequent owner) might have turned the Building back into the mansion that it once was and lived in it.

49. The judge's contrary view seems to me to have been based on his interpretation of what Peter Gibson LJ meant in Iqbal v Thakrar [2004] 3 EGLR 21 by a landlord's "property interests". In Sargeant v Macepark (Whittlebury) Ltd [2004] 4 All ER 662 (to which the judge was not referred) I discussed the ambit of that concept. I referred to a number of authorities (including Lambert v Woolworth [1938] Ch 883) which had not been cited in Iqbal v Thakrar, and held that detriment to a landlord's trading interests in his capacity as a neighbour were potentially relevant grounds for refusal of consent to alterations. I remain of that view. In my judgment relevant "property interests" in connection with a covenant of this kind go further than a mere interest in bricks and mortar or the capital or rental value of property. As well as trading interests, they would include the amenity value of the right to enjoy the property in question. It is probable, in the light of Cryer 55 P & CR 183, that in the case of a restrictive covenant affecting freehold land a covenantee's broader interests are confined to land to which the benefit of the covenant is annexed, but that would not in my judgment preclude the Company from having regard to broader interests in the Building. In the context of the discharge and modification of restrictive covenants under section 84 of the Law of Property Act 1925 the Lands Tribunal (and now the Upper Tribunal) has always taken a broad view of what amounts to a "practical benefit" secured by a restrictive covenant. ...

56. It was, I think, common ground that if the appeal were to be allowed on this ground, the matter would have to be remitted to the judge to decide whether or not the aesthetic and environmental objections were or were not reasonable. The letter of refusal presents a rational case; but rational is not necessarily the same as reasonable. Apart from Mr Rainey's general submission that it was impossible to evaluate an aesthetic objection, the question what might be appropriate criteria for that evaluation was not fully explored in argument. I am inclined to agree with him that merely to say that the proposed building is not to the taste of the Company or the leaseholders would be entirely subjective; and would not be enough. On the other hand, to limit aesthetic objections to a case in which there is an effect on capital or rental value is too narrow. As Cryer 55 P & CR 183 shows, an objection that a proposal is "out of keeping" or that it would have "a potential adverse effect upon the amenities" of the land with the benefit of the covenant may be enough. Lambert [1938] Ch 883 shows that the current state of the land may also be a relevant consideration. If necessary, expert evidence may be adduced (see, for example, Mosley v Cooper [1990] 1 EGLR 124). The judge will also be able to take into account the fact that the 1968 Deed contained a positive covenant to build, and an express approval of a particular design. Whether against that background (and any other relevant consideration) the refusal of consent was reasonable on the facts will be for the judge to decide.

Coventry v Lawrence [2014] AC 822 at [120]-[123], per Lord Neuberger:

120. The court's power to award damages in lieu of an injunction involves a classic exercise of discretion, which should not, as a matter of principle, be fettered, particularly in the very constrained way in which the Court of Appeal has suggested in Regan and Watson. And, as a matter of practical fairness, each case is likely to be so fact-sensitive that any firm guidance is likely to do more harm than good. On this aspect, I would adopt the observation of Millett LJ in Jaggard [1995] 1 WLR 269, 288 where he said:

> *"Reported cases are merely illustrations of circumstances in which particular judges have exercised their discretion, in some cases by granting an injunction, and in others by awarding damages instead. Since they are all cases on the exercise of a discretion, none of them is a binding authority on how the discretion should be exercised. The most that any of them can demonstrate is that in similar circumstances it would not be wrong to exercise the discretion in the same way. But it does not follow that it would be wrong to exercise it differently."*

121. Having approved that statement, it is only right to acknowledge that this does not prevent the courts from laying down rules as to what factors can, and cannot, be taken into account by a judge when deciding whether to exercise his discretion to award damages in lieu. Indeed, it is appropriate to give as much guidance as possible so as to ensure that, while the discretion is not fettered, its manner of exercise is as predictable as possible. I would accept that the prima facie position is that an injunction should be granted, so the legal burden is on the defendant to show why it should not. And, subject to one possible point, I would cautiously (in the light of the fact that each case turns on its facts) approve the observations of Lord Macnaghten in Colls [1904] AC 179, 193, where he said:

> *"In some cases, of course, an injunction is necessary—if, for instance, the injury cannot fairly be compensated by money—if the defendant has acted in a high-handed manner—if he has endeavoured to steal a march upon the plaintiff or to evade the jurisdiction of the court. In all these cases an injunction is necessary, in order to do justice to the plaintiff and as a warning to others. But if there is really a question as to whether the obstruction is legal or not, and if the defendant has acted fairly and not in an unneighbourly spirit, I am disposed to think that the court ought to incline to damages rather than to an injunction. It is quite true that a man ought not to be compelled to part with his property against his will, or to have the value of his property diminished, without an Act of Parliament. On the other hand, the court ought to be very careful not to allow an action for the protection of ancient lights to be used as a means of extorting money."*

122. The one possible doubt that I have about this observation relates to the suggestion in the antepenultimate sentence that the court "ought to incline to damages" in the event he describes. If, as I suspect, Lord Macnaghten was simply suggesting that, if there was no prejudice to a claimant other than the bare fact of an interference with her rights, and there was no other ground for granting an injunction, I agree with him. However, it is right to emphasise that, when a judge is called on to decide whether to award damages in lieu of an injunction, I do not think that there should be any inclination either way (subject to the legal burden discussed above): the outcome should depend on all the evidence and arguments. Further, the sentence should not be taken as suggesting that there could not be any other relevant factors: clearly there could be. (It is true that Colls , like a number of the cases on the issue of damages in lieu, was concerned with rights of light, but I do not see such cases as involving special rules when it comes to this issue. Shelfer itself was not a right to light case; nor were Jaggard and Watson. However, in many cases involving nuisance by noise, there may be more wide ranging issues and more possible forms of relief than in cases concerned with infringements of a right to light.)

123. Where does that leave A L Smith LJ's four tests? While the application of any such series of tests cannot be mechanical, I would adopt a modified version of the view expressed by Romer LJ in Fishenden 153 LT 128 , 141. First, the application of the four tests must not be such as "to be a fetter on the exercise of the court's discretion". Secondly, it would, in the absence of additional relevant circumstances pointing the other way, normally be right to refuse an injunction if those four tests were satisfied. Thirdly, the fact that those tests are not all satisfied does not mean that an injunction should be granted.