Neutral Citation Number: [2021] EWHC 930 (Comm)

Case No: LM-2021-000011

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
LONDON CIRCUIT COMMERCIAL COURT

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

Date: 29/04/2021

Before:

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

- -

Between:

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

- -
- -

Mr Philip Rainey QC and Mr Mark Sefton QC (instructed by **Mishcon de Reya**) for the **Claimant**
Mr John McGhee QC and Mr James Hanham (instructed by **Gowling WLG (UK) LLP)** for the **Defendant**

Hearing dates: 23 - 24 March 2021

- -

Approved Judgment

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

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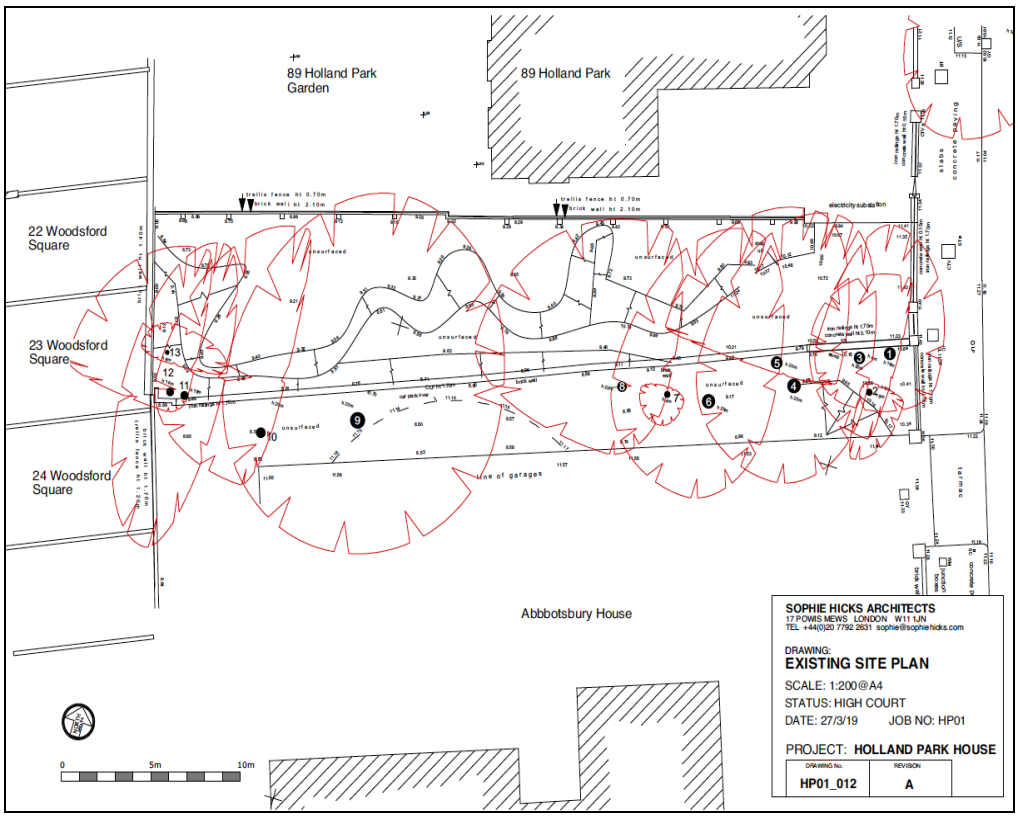
HIS HONOUR JUDGE PELLING QC, SITTING AS A JUDGE OF THE HIGH COURT

HH Judge Pelling QC:

Introduction

1. The defendant is the owner of the freehold of 89 Holland Park, London W11 ("89HP"), the footprint plan of which is shown hatched in black at the top of the plan ("Plan") at Paragraph 2 of my earlier judgment in these proceedings handed down on 4 June 2019 ("2019 Judgment"). The claimant is the freehold owner of the irregular quadrilaterally shaped site shown on the Plan located immediately to the south of 89HP ("Site"). The Plan is reproduced below for convenience.



2. In these proceedings, the claimant, as covenantor under covenants contained in clauses 2(b) and 3 of a Deed made between the predecessors in title of the claimant and defendant dated 10 July 1968 ("the 1968 Deed"), the full text of which is set out in both my earlier judgment and below, seeks declarations to the effect that the defendant as covenantee has unreasonably refused its approval of her plans drawings or specifications for the redevelopment of the Site under both covenants. The defendant denies that it has unreasonably refused such consent under either covenant.

3. By the 2019 Judgment, I held that the claimant's claim in respect of the defendant's refusal under clause 2(b) of the 1968 Deed succeeded because the defendant's refusal of consent on the grounds of aesthetics, trees and temporary loss of amenity was unreasonable since they did not affect the defendant's property rights (which were limited to loss of capital or rental value) and thus could not be relied on and the refusal on structural grounds was unreasonable in fact. The claimant's claim in

respect of clause 3 failed. I dismissed the defendant's counterclaim concerning sums it sought to recover in respect of the cost of considering the claimant's applications.

4. The defendant appealed on the grounds that in law the defendant was able to take account of the property interests of the lessees of the flats at 89HP and that the decision on structural issues was inconsistent with the conclusions I had reached on clause 3. There was no appeal against my dismissal of the defendant's counterclaim. In the result, the appeal succeeded on the first ground but failed on the second and the Court of Appeal directed that the claim be remitted to me to determine whether in fact the refusal on aesthetics, loss of trees and temporary loss of amenity was reasonable. This is the trial of those issues. The trial proceeded by way of submission by reference to the evidence as it was in 2019.

Relevant Background

5. I can take the background to the issues that remain to be determined from the 2019 judgment. It is relevant for present purposes that the buildings shown on the Plan to the southwest of 89HP and west of the Site ("Woodsford Square") are houses constructed in the 1970s. The building shown on the Plan hatched in black at the bottom of the Plan is Abbotsbury House, a 10 storey brown brick clad block of flats built in the 1960s. Abbotsbury House is located about 30 metres to the south of 89 HP. The crown of the trees relevant to this dispute are shown as they were in 2019 on the Plan outlined in red and are numbered. I refer to the trees individually by those numbers to the extent necessary below.

6. The defendant did not appeal my findings at paragraphs 3-4 and 20 (i) (ii) and (iii) of the 2019 Judgment and I proceed in this judgment on the basis of my findings that:

> "89HP is a large detached Victorian building forming the end of a row of such buildings. It is divided into five flats, each held under a long lease of 999 years duration. The garden to the west and rear of 89HP forms part of the lower ground floor flat lease. Each of the flats' long leaseholders is a shareholder (or in the case of joint long leaseholders are jointly a shareholder) of a share in the defendant. The defendant retains possession of the internal common parts and external structure of 89HP but is otherwise interested in 89HP only as reversioner.
>
> Abbotsbury House dominates the skyline to the south of 89 HP and the Site. As well as being much higher than 89HP, that building extends west beyond the rear building line of 89HP and the buildings similar to it located to the north of 89HP. Its lower stories are partially masked during the summer months by self-sown sycamore trees shown on the Plan marked 1 – 10. Tree 10 plays a relatively minor role in the masking process. Trees 1-10 are located on land forming part of the Abbotsbury House title. During the winter months, when the trees are not in leaf, the masking effect is limited, as was apparent on my view of the Site and 89HP at the start of the trial. Trees 11-13 are also self-sown sycamore trees that perform a similar (and similarly limited) function in relation to Woodsford Square…"

and that:

> "The Site in its present form is, as Mr. Rainey QC and Mr. Sefton QC put it in para. 26 of their opening submissions, "*... a piece of weed-choked waste ground ...*". As long ago as 1996, the Site was described in a report to the LPA that led to an ultimately abortive compulsory acquisition scheme as having been "*...in a derelict and unkempt state for over 20 years and is an eyesore ...*". The only material change was that on 23-24 February 2012 the claimant undertook some ground cover clearance. However, as recently as 10 April 2013, the local authority wrote to the claimant requiring her to tidy up the Site. Following my visit to the Site at the start of the trial, I concluded that notwithstanding the work done in February 2012, the LPA's 1996 description applies with equal force today as it did in 1996;
>
> 89HP is overlooked by (a) Abbotsbury House, a 10 storey brick clad block of flats located about 30 metres from the southern flank of 89HP and (b) to a lesser extent by the Woodsford Square houses;
>
> … from the moment when it was created, the Site was always intended to be developed. It was never intended to be an open space or garden whether for the benefit of 89HP or otherwise"

7. The Site has had a long and complex history. At paragraph 6 of the 2019 Judgment I found that:

> "Originally, both the Site and 89HP were in common ownership. By 1965, Brigadier W.B. Radford ("BR"), the then freehold owner of 89HP and the Site, had converted 89HP into five flats with caretakers' accommodation in the basement. Each flat was let out on short contractual or statutory tenancies. By a transfer dated 10 December 1965, BR transferred the Site to Ms F.E.D.D. De Froberville ("MDF"). By that transfer ("1965 Transfer") MDF agreed within 2 years to build on the Site a building for which BR had obtained planning permission. MDF did not comply with this obligation and, on 10 July 1968, the obligations created by the 1965 Transfer were varied by the 1968 Deed. The 1968 Deed defined BR as being the "*Adjoining Owner"* and MDF as the "*Building Owner"*. In so far as is material, the 1968 Deed provided that:
>
> > "1. [MDF] hereby covenants with [BR] that she will complete the development of the [Site] … not later than the expiry of 18 months after the date hereof.
> >
> > 2 (a) In lieu of the drawings referred to in [the 1965 Transfer] [BR] hereby approves the general layout drawing no. 163/13 dated April 1968 prepared by Holmes and Gill.
> >
> > (b) [MDF] shall make no applications to the appropriate planning authority nor apply for any other necessary permissions from the local or any other body or authority in respect of any plans drawings or specifications which have

> not previously been approved by [BR] PROIVIDED ALWAYS that if [BR] shall approve the same but [MDF] shall be required to modify or amend the same by the Planning Authority or any other authority or if [MDF] shall herself desire to amend the same then no further application shall be made by her to any such Authority unless the revised or amended drawings and specifications have first been approved by [BR]
>
> 3 No work shall be commenced upon the [Site] before the definitive plans drawings and specifications of the said buildings have first been approved by [BR] or his surveyor. …"

As in the 2019 Judgment, in this judgment I refer to the covenants relevant to this dispute (being clauses 2(b) and 3 of the 1968 Deed) collectively as the "*covenants*". I refer to each respectively as "*clause 2(b)*" and "*clause 3*" and to each of the individuals referred to in paragraph 6 of the 2019 judgment using the same abbreviations.

8. Various planning permissions were sought and obtained for the Site while it was in the ownership of MDF but in the end nothing was built and the Site was sold by MDF to a Ms Lange, who retained the Site without building on it down to the date of her death – see paragraph 8 of the 2019 Judgment.

9. In 2019, Mr. Marc Jonas ("MJ") was the long lessee of Flat 2, which is the upper ground floor flat. Dr Michael McKie ("MM") and Ms Maria Letemendia ("ML") were the joint lessees of Flat 3 on the first floor of 89 HP. Each of MM, MJ and ML were the directors of the defendant at all times material to this dispute. MJ and ML gave evidence on behalf of the defendant at the trial leading to the 2019 Judgment. At paragraph 9 of the 2019 Judgment, I found that:

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

10. As is apparent from what I have said so far, the covenants are in apparently absolute terms. This led to an initial dispute between the parties as to whether this entitled the defendant to refuse permission on any ground that it chose to rely on. As I said in paragraph 11 of the 2019 Judgment:

> "The defendant by its directors considered that it had the benefit of the covenants and that they entitled it to refuse consent in its absolute discretion whereas SH considered that the covenants were not binding upon her but that in any event approval could not be unreasonably withheld under either

> covenant. This led to litigation ("First Claim") in which the defendant and each of the lessees sought declarations to the general effect that they had the benefit of the covenants and that their effect was to entitle the defendant to refuse consent in its absolute discretion. That claim concluded in a Judgment, the neutral citation for which is [2013] EWHC 391 (Ch), delivered by Mr. Robert Miles QC sitting as a deputy judge of the Chancery Division (First Judgment"). His conclusion was that both the defendant and the lessees of the flats at 89HP were entitled to the benefit of the covenants contained in the 1968 Deed, which meant that either could seek an injunction restraining any development of the Site by the claimant in breach of either covenant, that the claimant was bound by each of the covenants and that the defendant (but not the lessees) was entitled to withhold consent but could not do so unreasonably."

11. As I recorded at paragraph 12 of the 2019 Judgment, notwithstanding the terms of clause 2(b) the claimant has made two planning applications to the Local Planning Authority ("LPA") (the Council for Royal Borough of Kensington and Chelsea) for permission to develop the Site and three applications for approval under the covenants, two under clause 2(b) and one (that in dispute in these proceedings) under both. The first planning application to the LPA was for a two storey above ground house with three sub-terranean floors. The LPA refused permission on grounds that it is necessary to refer to in more detail later in this judgment.

12. On 9 October 2013, the claimant made her second application for approval by the defendant under Clause 2(b) of the 1968 Deed. The structure that she proposed was significantly smaller than that for which permission had been refused by the LPA. It consisted of a single storey glazed building (referred to below as the "entrance pavilion") that constituted the entrance to two sub-terranean levels. On 20 November 2013, the defendant refused its consent. Meanwhile the claimant had applied for planning permission for the scheme the subject of her 2013 application for approval under clause 2(b). The LPA refused permission on 16 September 2014, but SH appealed and was successful on appeal when, on 27 October 2015, the Planning Inspector granted full planning permission.

13. On 4 November 2016, the claimant applied for approval from the defendant under both covenants for a revised iteration of the development that had been rejected by the defendant in 2013 but which had received planning approval from the Inspector. I described this proposal at paragraph 19 of the 2019 Judgment in these terms:

> "The development that the claimant sought approval for from the defendant in November 2016 consists of a single storey entrance pavilion, which is described by the defendant as being a glass cube structure, located at the eastern end of the Site, leading to a sub-terranean structure that covers most of the Site. Natural light is provided by a series of skylights and light wells. The design is uncompromisingly contemporary and it is common ground that it shares "*… none of the design language of the listed buildings of Holland Park …"*. The Planning Inspector who granted Planning Permission described the entrance pavilion as being "*more noticeable at night as a gently*

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

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

14. That application was refused by the defendant by its decision letter dated 20 January 2017 ("Decision Letter"). It is that refusal that is the subject of these proceedings. As I said at paragraph 20 of the 2019 Judgment:

> "The defendant refused its approval for that development by its 10-page Decision Letter. ML drafted and signed the Decision Letter on behalf of the defendant. It asserted that in arriving at the decision "*… we have considered the impact on 89 HP as a whole, and on each of the flats in 89 HP. And we have sought the views of all the lessees of the five flats in 89 HP in reaching our decision…"* It refused the application for approval under clause 3 because it considered the material supplied was not definitive as required by that clause.
>
> Under the heading "*REASONS FOR REFUSAL*, the letter identified 4 grounds for refusing approval under clause 2(b). They were (1) "*Architectural design, aesthetics and heritage"*, (2) "*Trees*', (3) "*Loss of amenity during the Works"* and (4) *Construction Issues"*."

15. As I have explained, it is the first three of those issues with which this judgment is concerned. In relation to the first of these grounds, there were broadly three underlying reasons for the refusal being (a) the glazed entrance pavilion was said not to be in keeping with the high Victorian architecture of 89 HP and its northerly neighbours; (b) it involves extensive basement excavations and (c) it extends beyond

the rear building line of 89 HP to virtually the whole of the Site and necessitates the removal of Trees 11-13. The most important issues for the defendant were the aesthetics and tree issues. Although Mr Rainey submits by reference to paragraph 59 of the 2019 judgment that I have held that transient disruption caused by construction was a makeweight, that is not the effect of that paragraph.

Applicable Principles

16. In summary:

    a. 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;

    b. 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*".

    c. 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;

    d. Whilst the purpose of the covenants is to protect property interests, those interests are not limited to adverse effects on the capital or rental value of the property but extend to the amenity value of the right to enjoy the property in question – see Lewison LJ's judgment in this case at paragraph 49;

    e. Whilst a landlord need usually only consider his own relevant interests applying (c) above:

        i. 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; and

ii. 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;

f. Where reliance has been placed on grounds, some of which are unreasonable and some of which are reasonable, then if the reasonable grounds were ones on which consent would in fact have been refused even if the unreasonable grounds had not been put forward, the refusal will be reasonable; but if the unreasonable ground was the most important reason for refusal, with the other grounds being makeweights then the refusal will be unreasonable – see No. 1 West India Quay (Residential) limited v. East Tower Apartments limited [2018] EWCA Civ 250 [2018] 1 WLR 5682 *per* Lewison LJ at paragraphs 34 and 42; and

g. 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.

17. The point summarised at paragraph 16(e)(ii) above is of particular importance in this case. As Mr Rainey puts it in paragraph 63 of his written submissions:

> "The instant case is such a case. It is a matter of record that planning consent for a more conventional above-ground house was refused. Planning consent was refused because such a house would fill a townscape gap. It is obvious that if a largely subterranean house of the sort proposed by C is refused, then the Building Site cannot realistically be developed. It will be sterilised. That is plainly a detriment out of all proportion to any perceived harm (if there is any) to D / the lessees in preventing a house being built in accordance with the proposed plans and it follows that it is unreasonable to withhold consent under clause 2(b).
>
> This point is particularly relevant to the ground for refusal which relies on the alleged additional disruption caused by additional excavation above and beyond what would be required for an above-ground house …"

Mr McGhee QC does not dispute that if that is the effect of the evidence then that would be an unreasonable outcome. Indeed he positively accepts that to preclude this

site from being developed at all would be unreasonable on this basis. As he puts it at paragraph 14 of his written submissions:

> "The question of reasonableness is to be considered against the background that the purpose of the 1968 Deed was to facilitate development of the Site not to impede it. Accordingly, it would not have been reasonable for the Company to refuse consent on the basis it did not want there to be any development of the Site. Nor would it have been reasonable for it have objected to a particular form of development if it appeared that there was realistically no other form of the development which could be built on the Site."

Mr McGhee is entirely correct in these submissions, applying the principles summarised in paragraph 16(e) above and in the circumstances of this case since as Lewison LJ said at paragraph 50 of his judgment in this case, "*... the 1968 deed contains a positive obligation to build ...*". Mr McGhee is also correct to accept as he does at paragraph 20 of his written submissions that the current state of the Site supports the argument that construction of a building could not be reasonably opposed. For the avoidance of doubt, it is not open to the defendant to contend that the Site is not as I described it in the 2019 Judgment. That was a finding of fact against which there has been no appeal.

18. In my judgment this issue (which I refer to below as the "*Sterilisation Issue*") is likely to have a material and possibly decisive effect on the outcome of the issues that I have to determine and therefore is an issue that I ought to consider ahead of the other issues that arise.

The Sterilisation Issue

19. I start with the claimant's case on this issue. In summary it depends on the refusal of the claimant's first planning application to the LPA for a conventional house and the grounds for its refusal and the proposition that the claimant is precluded from constructing an above ground property by reason of 89HP's right to light. It is submitted by the claimant when these factors are taken together it means that the only way of developing the site is by constructing to the design that the defendant has rejected. It is on this basis that Mr Rainey submits on behalf of the claimant at paragraph 63 of his written submissions that:

> "It is obvious that if a largely subterranean house of the sort proposed by C is refused, then the Building Site cannot realistically be developed. It will be sterilised. That is plainly a detriment out of all proportion to any perceived harm (if there is any) to D / the lessees in preventing a house being built in accordance with the proposed plans and it follows that it is unreasonable to withhold consent under clause 2(b)"

Mr McGhee submits on behalf of the defendant that on proper analysis the evidence does not establish that the only possible development of the Site is that proposed by the claimant.

20. It is or should be common ground that the Site is an exceptionally difficult development site. This is so because it has a narrow frontage, its frontage is narrower

than the rear of the Site and the Site falls away from its front to its rear boundary by about 2.5 metres.

21. The first planning application submitted by the claimant to the LPA was for a two storey above ground house with three sub-terranean floors. It was refused by a decision letter dated 21 February 2013. The primary reason for refusal was that stated in paragraph 1of the reason for refusal namely:

> "The proposed dwellinghouse would infill an important townscape gap, would harm the setting of neighbouring listed buildings and would fail to preserve or enhance the character or appearance of the Holland Park Conservation Area,"

At Paragraph 3, the scheme was rejected because:

> "The proposed dwellinghouse, by reason of its height and proximity to the western boundary of the site, would result in a harmful sense of enclosure for the occupiers of 22 and 23 Woodsford Square, contrary to policies of the Core Strategy"

Permission was also refused because:

> "The proposed skylights and lightwells, by reason of their prominent location, excessive size and unsatisfactory design, are not discreetly designed or located and would harm the setting of neighbouring listed buildings and would fail to preserve or enhance the character or appearance of the Holland Park Conservation Area,"

and because the " … *proposed dwellinghouse, by reason of its location and design, would result in harm to protected trees* …" and " … *the proposed subterranean development, by reason of the extent of site coverage and insufficient topsoil, would fail to protect or provide for maintenance of the green and leafy appearance of the Borough and would harm the setting of neighbouring listed buildings and would harm the character and appearance of the Holland Park Conservation Area …*"

22. Given the prominence that was given to the infilling of the "*townscape gap*", as a reason for refusing planning consent, Mr Rainey submits that any development that involves above ground development will fall foul of this objection because, he submits, the narrowness of the frontage to the Site means that any above ground development of the Site would require construction to the full width of the frontage.

23. The claimant sought to address these issues and in particular the townscape gap point by the design that eventually received planning approval on appeal. The townscape point was addressed whilst at the same time making full use of the Site by a design that the Inspector described at paragraph 15 of his report as being a new house that:

> "… would occupy the full extent of the site, with the principal accommodation on 2 floors below pavement level. There would be a small, translucent, glazed entrance pavilion at ground floor level, set back to the prevailing building line behind refurbished Victorian railings. The accommodation below would be arranged around a series of deep courtyard gardens, providing light and ventilation to the lower floors. The pavement-level

> roof deck would be laid out to incorporate strip skylights within shallow-sloping slate roof decking and would provide a variety of planted areas."

This led the Inspector to conclude that:

> "RBKC argues that the house would infill an important townscape gap. However, with the exception of the small glazed entrance pavilion, the house would lie entirely below pavement level. The large volume of open space above it would remain, as would the trees. For that reason, while physically the house would lie between No.89 and Abbotsbury House, I consider that it would not be perceived from the surrounding streets as filling the townscape gap. The open space would continue to separate the 2 properties and the trees would still provide a landscape link."

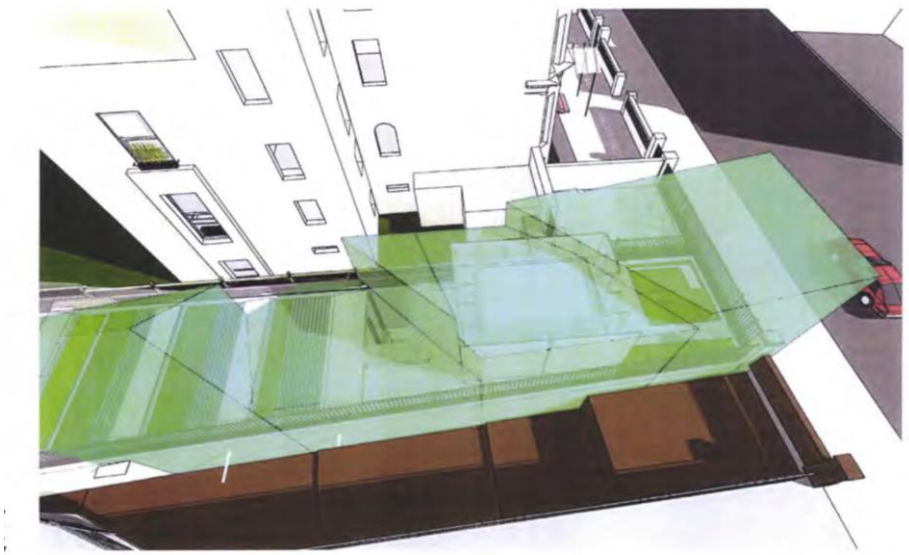
24. It was these conclusions that led Mr Rainey to submit at paragraph 62 of his written submissions that:

> "…It is a matter of record that planning consent for a more conventional above-ground house was refused. Planning consent was refused because such a house would fill a townscape gap. It is obvious that if a largely subterranean house of the sort proposed by C is refused, then the Building Site cannot realistically be developed. It will be sterilised. That is plainly a detriment out of all proportion to any perceived harm (if there is any) to D / the lessees in preventing a house being built in accordance with the proposed plans and it follows that it is unreasonable to withhold consent under clause 2(b)."

In relation specifically to the defendant's refusal based on the temporary loss of amenity that it is said would result from construction of the design it had rejected, it led to Mr Rainey submitting that:

> "If D is right about it, then it has the potential to prevent the land from ever being developed in any form. A "conventional above-ground house" cannot realistically be built on the site. It would not secure planning permission, because it would fill in the townscape gap: hence C's original planning application was refused. Equally importantly, D would say it infringes its rights to light: there is an illustration of the rights to light constraint …. So a house on the site has to be largely subterranean in order to secure planning permission and in order to satisfy D's claims on rights to light. But if, at one and the same time, it is a good reason for refusing to approve a subterranean house that the necessary excavations mean it will be more disruptive than building a conventional house, then this has the very real potential to make the site impossible to develop. Indeed, that is probably D's intention in running this point."

25. The point concerning the right to light is made by reference to a computer generated three dimensional representation submitted as part of the claimant's planning application to the LPA, which is reproduced below.



The purpose of this drawing was described in the claimant's planning presentation in these terms:

> "In order not to infringe the rights-to-light of neighbouring properties, a 3D rights-to-light envelope was commissioned from Savills and has been imported into the design drawings. The entrance building of the house has been positioned facing the blank stucco flank wall of 89 Holland Park, so as to avoid any potential over-looking, and designed so that it does not penetrate the rights-to- light envelope. The resulting small building needs to be built of special materials so that it has a presence, albeit modest, in the street scene."

26. The green areas are what have been described as the "*rights to light envelope*". It purports to demonstrate two points. The entrance pavilion is shown schematically within that envelope. First it suggests that the entrance pavilion in its current form cannot be moved further back in the Site without impacting the right to light to the south eastern flank wall of 89HP. This is apparent from the way in which the south western corner of the pavilion touches the black sight line so as to illustrate that if the pavilion was moved westwards away from the road and front building line of 89HP it would encroach upon the right to light of the areas to the rear. Secondly, if more of the house that is to be built on the Site was to be constructed above ground rather than below it, then the right to light of at least some of the flats with windows on the south western flank wall of 89HP would be adversely affected.

27. Turning to the right to light point, Mr McGhee submits that it is entirely without substance. In support of this submission, Mr McGhee starts with the terms of the long leases. First he refers to clause 8(i), which provides that neither the Lessor (the

defendant) nor "*... owners of adjoining or adjacent premises shall have power without obtaining consent from, or making any compensation to lessee to deal as they think fit with the land or premises adjoining or contiguous to the Demised premises and to erect ... any buildings whether such buildings shall or shall not effect or diminish the light ... which may ... be enjoyed by the lessee ... of the demised premises ..."* Mr McGhee submitted that this point gained further support from the third schedule within the long leases, which contains a series of "*Excepted Rights*". Clause 4 of the third schedule conferred on the lessor (the defendant) the right to deal with any part of the building or adjacent lands, whether or not such works diminished the lessee's right to light.

28. Mr McGhee submits and I agree that the effect of these provisions is to preclude a lessee from asserting a right to light but in my view the lessees are only precluded by these provisions from asserting such a right as against the Lessor. I do not see how a covenantor in the position of the claimant could enforce either of these provisions against the defendant, much less the lessees. Furthermore, the fact that, as between the lessees and the defendant, the lessees are precluded from asserting a right to light does not lead to the conclusion that the defendant could not assert the loss of a right to light as a reason for refusing permission under the covenants, particularly having regard to the factors I have summarised at paragraphs 16(b) to (d) above.

29. I am equally unpersuaded that Mr McGhee is correct when he submits that the effect of paragraph 26 of Mr Jonas' statement is that there would be no objections to a loss of a right to light in any circumstances. The concession recorded in that paragraph is entirely opportunistic: it was put forward solely in the context of a hope that the claimant would accept an alternative proposal for above ground Victorian pastiche construction conceived by ML for which LPA planning permission could at least probably not be obtained and which the defendant's own relevant expert has said he could not support (see further below). Being willing to give permission only for a development for which there was no realistic prospect of obtaining planning permission would be unreasonable applying the principles summarised at paragraph 16(e)(ii) above. I am also unpersuaded that because Mr Rainey did not pursue this point further than he did in cross examination it is no longer available. It is entirely unclear what was said to Mr Rainey *sotto voce* that caused him to break off cross examination but it does not matter because right to light issues had not been identified as a reason for refusing permission in the Decision Letter because the current proposal does not affect right to light as is demonstrated by the computer generated image reproduced above.

30. The point Mr Rainey makes at this hearing, in light of the Court of Appeal's decision, is that any request for permission that affected the right to light of the tenants would be relied on. I agree that is probable given the approach of the defendant to date. It is probable that such an objection would of itself be regarded as reasonable applying the principles summarised at paragraphs 16(b) to (d) above. In that event, refusal of the (supposedly) only other possibility for development (being that the subject of these proceedings) on the grounds relied on in the Decision Letter that I have to consider in this judgment would have the effect of rendering the Site sterile and in my judgment that would be unreasonable applying the principles summarised at paragraph 16(e)(ii) above.

31. The only real point that arises therefore is whether the claimant has demonstrated to the standard required that the only way of developing the site without encroaching on the right to light of 89 HP and its occupants is by constructing to the design that the

defendant has rejected. In that regard, the key point is the size of the development that the claimant seeks permission for. Whilst it is true to say that the house that was to be built in 1968 filled the whole of the width of the Site, it did not extend beyond the rear building line of 89HP. The 1968 house had nowhere near the volume of the development proposed by the claimant, which will create a single dwelling of some 4600 square feet, which is large by Central London standards at least.

32. Although Mr McGhee submits that there is no evidence to support the contention that planning permission would be refused now for an above ground building that filled the whole width of the Site, I do not agree. That was the or at least a reason why the 2013 planning application failed and it was the basis on which the LPA opposed planning consent at the hearing before the Inspector concerning the previous iteration of the scheme now relied on by the claimant. The reason why that submission was rejected by the Inspector is set out in full above but in essence it was because "… *with the exception of the small glazed entrance pavilion, the house would lie entirely below pavement level* …". The claimant is fully entitled on this material to ask me to infer that planning consent would be refused by the LPA for an above ground construction filling the full width of the Site. Whilst the legal burden rests on the claimant to prove that permission has been unreasonably refused by the defendant, it remains the case that had the defendant wished to advance a positive case either that there was a reasonable prospect of planning consent being granted for an above ground dwelling that extended across the full width of the Site or that it was practical to design and build an above ground dwelling that did not fill the whole width of the Site and did not extend further than the rear building line of 89HP, then the evidential burden of proving that rested on the defendant. There is no evidence that supports either of these propositions. The shape and configuration of the Site and its planning history including but not limited to the 1968 house suggests there was no such prospect.

33. In those circumstances, the focus of attention must be two issues. The first is whether planning permission could be obtained for the development as designed but with an entrance pavilion of a design other than the fully glazed structure contended for by the claimant. This assumes that the objection by the defendant to the glazed entrance pavilion would be one that a "… *hypothetically reasonable person in…"* the position of the defendant was entitled to rely on but for the point I am now considering. The second is whether planning permission could be obtained for a design essentially in the form now contended for by the claimant (whether with the fully glazed entrance pavilion or some alternative for which planning consent might reasonably be expected to be obtained) but which did not extend further than the rear building line of 89HP. Again, this assumes that the objection to the current scheme on the basis that it extends beyond the rear building line of 89HP is one that a reasonable person in the position of the defendant was entitled to rely on but for the point I am now considering. Whether such a reasonable person might have refused permission on either of these two points but for the issue I am now considering is something I turn to below.

34. In cross examination, the claimant accepted that she could have "*under implemented*" the area of the basements for which planning consent had been obtained without re-applying for planning consent from the LPA – see T2/53/8-13 and that she would have been open to that as a proposal had it been made to her by or on behalf of the defendant. Although it was suggested on behalf of the defendant that this would require a new planning consent, the claimant did not accept that to be so and that was not then further challenged – see T2/54/1-16. When Mr Karas QC (then leading counsel for the defendant) asked the claimant if she was willing to discuss under

implementation, she indicted that "*… if you drop the proceedings, yes"*. This answer was a little unclear since of course these proceedings have been brought by the claimant. Nonetheless the essential thrust of what was being said is plain.

35. Expert architectural evidence was given on behalf of the claimant by Mr Giles Quarme. In cross examination his evidence on the availability of alternative designs for the Site was as follows:

> "Q. And you're not suggesting anywhere, I think, that the only design solution must involve developing the entire length of the site, are you?
>
> A. No, I'm not.
>
> Q. And you nowhere suggest that a smaller subterranean element than that provided by Ms Hicks is not possible?
>
> A. I'm neither - - I'm not suggesting it's not possible."

He added a little later:

> "Q. And you don't suggest that it wouldn't be possible - - it might be difficult, but you don't suggest it wouldn't be possible, to provide a design solution which does share the architectural language of 89 Holland Park?
>
> A. Yes and no, if I may answer in that way. Yes, you can use the language, but architecture is about more than just language, ie columns and windows. It's about proportion and form and things like that. And that's the difficulty with developing the site in a classical manner, it's a very small site, and to do it in a classical manner would be incredibly difficult (inaudible) (if not) impossible.
>
> ….
>
> Q. So I think we can agree that the design solution doesn't have to include a glass box?
>
> A. Yes.
>
> Q. And the design solution doesn't need to incorporate a development across -- along the entire length of the site?
>
> A. Yes, that is correct."

So far as the defendant's heritage expert, Mr Kitchen, was concerned, his evidence on these issues was:

> "The big difference is that I think it would be far preferable to look out upon undeveloped garden land and for the rear building line of 89 Holland Park to be respected. I take the point that it's not a manicured garden in its current state , but I think one has to consider then a whole range of issues around -- presumably in the 1968 house it was envisaged that that would

> be maintained as a garden, not that we would be left with the 1968 house and the present condition . So I think you raised the point about the benchmarking against 1968, and to some extent I may be doing that with respect to the garden because I appreciate it's an opportunity for an attractive garden, it's not an attractive garden as it stands today."

Mr Kitchen added that he didn't have a particular problem with the cube – see T5/15311-19. Later on in his evidence he made clear that he could not support the alternative design contended for at one stage by the defendant (being the Victorian pastiche concept referred to earlier) – see T5/157/17-24..

36. In the light of this evidence I conclude that (a) planning consent will probably not be obtainable for an above ground building that extends across the whole of the front of the Site for the reasons identified by the LPA when refusing permission for the 2013 design; (b) planning consent may be obtainable from the LPA for an alternative form of entrance pavilion (something I return to in detail below) but not one that is a Victorian pastiche and (c) it is probable that a less extensive development could be built without further applications for LPA planning consents by under implementation of the existing design and agreement between the parties or in any event by further planning application to the LPA with the support of the occupiers of 89HP. To that limited extent therefore, but only to that limited extent I accept the defendant's submission that the refusal of permission for the scheme as designed does not render the Site a sterile site. Had I concluded that a less extensive development that otherwise follows the existing design would require a further application for planning consent and that such an application would be resisted by the defendant and would probably be refused by the LPA I would have concluded that refusal of consent was unreasonable because it would in effect prevent any development of the Site, which in the circumstances would be disproportionate. If and to the extent that it is contended by the defendant that it would be practicable to develop the Site with an above ground house that does not fill the full width of the Site at the front, I reject that proposition. If and to the extent the defendant will agree only to such a design then that would render the Site sterile because there is no realistic prospect of such a design receiving planning consent for the reasons identified earlier. There is no evidence that it would be practical to develop the Site using an above ground design that does not fill the whole of the front of the Site.

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37. As indicated earlier, the focus of this part of the case is on (a) the glazed entrance pavilion allegedly not being in keeping with the high Victorian architecture of 89 HP and its northerly neighbours; (b) on the extensive basement excavations that the claimant seeks permission to construct and (c) it extends beyond the rear western building line of 89 HP to virtually the whole of the Site.

38. It is not suggested and there is no evidence that supports the contention that the value of either the leasehold interests of the lessees of the flats within 89HP or the defendant's reversionary interest would be affected by the development that has been proposed. However, whilst that point is relied on by the claimant, it is not an answer to the suggestion that permission might reasonably be refused on the or any of the grounds with which I am concerned.

39. In considering each of these points it is necessary to remember that the immediate area surrounding 89HP is a mixed development area. I start with the point that 89HP lies at the end of a row of large mid-Victorian properties, within the Holland Park Conservation Area. 89HP and the rest of properties in the row of which 89HP forms part are Grade II listed by reason of their special architectural and historic interest. There is no doubt that if 89HP is viewed looking north from its front entrance, it and the remaining properties within the row constitute a shared setting that as the Planning Inspector put it in paragraph 21 of his report "*... makes a major contribution to the significance of the villas as heritage assets"*. However that is not the whole of the relevant context.

40. As I have explained Woodsford Square is a development of houses constructed in the 1970s and Abbotsbury House is a 10 storey block of flats built in the 1960s, located about 30 metres to the south of 89 HP, which Mr McGhee described in his written submissions as "… *an unfortunate fact of life, an "ugly" aberration …*" No one can pretend that either Woodsford Square or Abbotsbury House are in keeping with the high Victorian architecture of 89HP and the buildings to the north of it. Having inspected the Site on the day before the start of the trial, I recall very clearly the substantial and subjectively adverse impact that Abbotsbury House has by reason of its size, design and proximity to 89HP. It is true to say that the trees were not in full leaf at that time but that is beside the point. The bulk of Abbotsbury House is always visible to a lesser or greater extent. Woodsford Square is less visible because the houses are obviously not as high as Abbotsbury House, are further away and to an extent are concealed by Trees 11-13, although again not all the time and not totally. Thus whilst Mr McGhee submits that it is "*... an objective fact that the leaseholders have chosen to live in a prestigious part of London with a period feel (Holland Park) and in a Grade II listed period property …"* I do not accept as Mr McGhee submits that this can be viewed without regard to the presence and proximity of Woodsford Square or Abbotsbury House, nor do I accept that it can be viewed without regard to the state of the Site now and as it has been for many years.

41. The other contextual factors to be born in mind are (a) the Site was sold to be built on and the covenants were entered into on that basis; (b) planning permission cannot be obtained for an above ground development that covers the whole width of the site for the reasons I have set out above; (c) if the Site remains undeveloped, it will continue much as it is – that is a site consisting of "…*rubble infill with limited weed and scrub covering which contributes little to the quality of local urban green spaces …"* – see paragraph 20 of the Planning Appeal inspector's decision. As the Inspector observed at paragraph 22 of his Report, the Site is "… *in a semi-derelict condition, contributes very little to the significance of No.89 as a heritage asset*". This accords and if anything understates what I observed on my inspection. The neglected and discordant state of the Site was obvious to all as an obvious eyesore. That effect had been exacerbated by the fly tipping of a quantity of lopped fig tree branches that someone with the authority of the defendant had cut from the trees on 89HP's boundary with the Site and deposited over the boundary wall onto the Site. This activity had also had the effect of enhancing rather than reducing the visibility of in particular Abbotsbury House from the rear garden of 89HP; and (d) no one has suggested any credible way that the Site can be developed other than by a scheme that follows the sub terranean concept adopted by the claimant, given the LPA's opposition to above ground construction on the Site.

42. Against that background, I turn first to the entrance pavilion issue. In my judgment this objection must be considered in the context of there being no practical means of

developing the Site other than a scheme that follows the basic sub-terranean structure that the claimant has adopted. In my judgment the defendant or at least ML has never accepted that as so. In the Decision Letter refusing permission, ML on behalf of the defendant stated under the heading "*The Way Forward"* that:

> "we envisage an above ground house, behind the existing garden wall with 89HP, which respects the front and rear building lines of 89HP. The architectural style would be in keeping with 89HP, and we would suggest that a stucco wall should join the new house to 89HP, incorporating a wrought-iron gate to the basement flat of 89HP, creating a unified frontage viewed from the street."

Internally, ML had sketched what she considered this should look like. It is necessary for me to reproduce only the front elevation sketch that she had produced:

Unsurprisingly, Mr Kitchen (the defendant's own heritage expert) indicated in cross examination that he could not support that alternative – see T5/157/17-24. It goes without saying that such a design would not obtain planning consent from the LPA for all the reasons that led Mr Kitchen to reject this approach out of hand. It follows that development of the Site is only practicable adopting the claimant's basic sub-terranean design and it follows that it is necessary for there to be an above ground entrance pavilion. Refusal of permission under clause 2(b) on the basis that the only acceptable design was an above ground house with a frontage as sketched by ML would be manifestly unreasonable in these circumstances and would not be a decision that a reasonable decision maker in the position of the defendant could reasonably come to since there is no realistic prospect of it ever obtaining planning permission. Since the only design that will enable the Site to be developed in the circumstances as they were at the time relevant to these proceedings is one that accords with the basic sub terranean design prepared by the claimant it follows that there will have to be an entrance pavilion of some sort. Refusal of permission on the basis that no design incorporating such a pavilion would be unreasonable since it would have the consequence that the Site could not be developed at all.

43. The sole point available to the defendant in relation to the entrance pavilion is that a reasonable person in its position was entitled to refuse permission solely on the basis it did not consider the proposed design one that was in keeping with 89 HP. Although Mr McGhee summarises the defendant's objection to what was proposed as being an objection " *… to the style form and material of the glass pavilion … when placed next to 89HP and in the Holland Park streetscape* …", in my judgment that is much too

narrow a formulation to form the basis of a decision by a reasonable decision maker. The reasonableness of an objection to the glazed structure has to be judged against three other factors being (a) the proximity and impact of Woodsford Square and Abbotsbury House (b) the impracticability of developing the Site other than by adopting a sub-terranean design that by definition will require an entrance pavilion; and (c) the existence of any credible alternative design for the entrance pavilion that has any real prospect of getting planning permission. As I have mentioned already, Mr Kitchen (the defendant's own heritage expert) acknowledged in his oral evidence that he didn't have a particular problem with the cube – see T5/153/11-19. This suggests that at its best this objection is not the strongest one available to the defendant and is one that a hypothetical reasonable person in the position of the claimant would give relatively little weight.

44. Following the refusal of consent by the defendant, the claimant by her solicitors suggested by a letter of 10 March 2017, three alternative design styles of entrance pavilion. In my judgment this is an important concession because it suggests that the claimant accepts that her glazed pavilion design is not the only one that might realistically be expected to obtain planning permission.

45. In putting forward those proposals, the claimant emphasised, correctly in my judgment, that to be acceptable any alternative design would have to obtain planning consent from the LPA and that would not be likely if and to the extent that any alternative represented " *... "any attempt to mimic the design style of the traditional houses..."* because such a design would as the Planning Inspector had remarked in his Decision " … *undermine the original quality of the historic surroundings"*. In consequence, the claimant's solicitors maintained that the claimant "… *cannot provide pure reproduction Victorian architecture*". I accept that proposition. There is no realistic prospect of such a design obtaining planning consent from the LPA. Although it was suggested there was no evidence to that effect, I disagree. The claimant is fully entitled to rely on the clearly expressed view of the Planning Inspector, which must be viewed in the context of the LPA refusing consent and maintaining its opposition at the Inquiry before the Inspector. Thus, if and to the extent that the claimant was minded to refuse permission under clause 2(b) for any entrance pavilion other than one that followed the frontage design sketched by ML and set out above, that would be an unreasonable refusal because there is no realistic prospect of that design receiving planning consent from the LPA and thus such a decision would prevent development of the Site.

46. The claimant said and I accept that alternatives were possible but there "… *will need to be a contemporary twist for the application to be approved by the local authority*". I accept it because it is entirely consistent with the analysis of the Planning Inspector. On an issue such as this it is close to inconceivable that the LPA would take a different view or that such a view would not be challenged by an interested party if they did.

47. The claimant put forward three alternative designs being (a) a Victorian Stucco design, (b) a plain Stucco design and (c) a Screened glass design, in each case with a modern twist designed to avoid the suggestion that they were pastiches. Of these the front elevation of the Victorian stucco design was shown in a computer generated image in this form:

The plain Stucco design was shown in a similar image in this form:

:

and the screened glass version was shown in a similar image in this form:

There followed a series of drawings and other detail in respect of each alternative design. These very detailed alternative proposals were not given either the respect or consideration that they deserved or should have received had there been any goodwill between the parties. In fact the alternatives were never considered in detail at all. Instead the defendant by its solicitors responded substantively by a letter of 30 March in these terms:

> "Subsequently, in your letter of 10 March 2017, you provided "further information" which you asked our client to consider in relation to the November Application. In our letter of 15 March 2017, we invited you to clarify if you intended our client to treat your letter of 10 March as containing a fresh application. You confirmed on 20 March 2017 that you were not making any fresh application, and your request remained that our client should reconsider the November Application.
>
> Accordingly, we wrote to you on 24 March 2017 and indicated that we understood that the application our client was to consider was for the house detailed in the November Application and not any of the 3 alternative designs referred to in your letter of 10 March 2017 and we asked you to confirm that our assumptions were correct. As we understand your reply on the same date, your client is not making an application for consent in relation to any of these alternative designs but merely wishes our client to engage with them and consider their acceptability in principle (that is, whether they are the sort of designs for which approval could be given if the proposals were fully worked up and an application made).
>
> If (contrary to our understanding) you are making an application in relation to the 3 alternative designs, please let us know and our client will consider its response to that application.
>
> If, however, you are merely inviting our clients to discuss possible alternatives to the glass cube before any further application for consent is made, we have advised our client that strictly it is under no obligation to engage in such a discussion, for its obligation is limited to dealing reasonably with applications which are made. However, our client is willing to discuss these proposals in order to see if a mutually acceptable solution can be reached. Can we suggest a meeting between lawyers and clients might be the best way to take this forward?"

48. Mr Kitchen accepted in cross examination that each of these proposed alternative designs would (a) remove the glass cube design which the defendant and lessees ostensibly objected to and (b) eliminate the light emissions from the glass cube design, which again the defendant and lessees ostensibly objected to. Mr Quarme was taken to these designs by Mr Karas in cross examination but only very briefly. Mr Karas was careful not to suggest that any of these alternatives would be acceptable to the defendant whilst suggesting that the availability of the designs showed that alternatives to the entrance pavilion as designed were practicable. Having regard to

the terms of the defendant's solicitors' letter, the careful way in which Mr Quarme was cross examined on this issue and Mr Kitchen's concessions as to the effect of the alternative designs, I infer that none of the alternatives that were suggested were acceptable to the defendant notwithstanding the effect of the alternatives conceded by Mr Kitchen. In my judgment if that was so, then it is likely to have been driven by the entirely unreasonable belief either that ML's concept for an above ground house was something that could reasonably be thought capable of obtaining LPA planning permission (an impossible position in light of what Mr Kitchen said about it) or which the defendant was entitled to insist on or by a belief that any entrance pavilion should be designed as a Victorian pastiche similar in style to the front elevation shown in ML's sketch design referred to above.

49. Having considered this material with some care I have come to the conclusion that a reasonable person in the position of the defendant might have objected to the entrance pavilion in the design for which permission had been sought for the reasons that are relied on by the defendant (that is that it is a purely glass structure and the light emission that was the consequence of that design) but only if and to the extent that there was a reasonable prospect that an alternative design might have a reasonable prospect of obtaining planning consent from the LPA and would eliminate the defendant's ostensible concerns.

50. Given that the alternative designs referred to above were put forward by the claimant expressly on the basis that in her view they stood a reasonable prospect of obtaining planning consent it is impossible to say that there was no prospect of one of the alternative designs being approved. However, as I have said already there is no prospect of a Victorian pastiche design receiving planning approval and if and to the extent that any alternative other than such a design will be refused consent by the defendant that would be disproportionate and therefore unreasonable applying the test referred to above since (for the reasons set out earlier) it would have the effect of preventing any development of the Site.

51. I have considered whether it could be said to be unreasonable to have refused permission under clause 2(b) without also considering whether one of the alternatives would be acceptable and I make clear that I would have concluded that it would have been but for one factor alone namely that, as recorded by the defendant's solicitors, the claimant did not in the end seek the defendant's consent for any of the alternatives. Had the defendant chosen to approach this issue in a spirit of cooperation I have little doubt that the entrance pavilion design issue could have been resolved by discussion around one of the three alternative designs put forward by the claimant and most probably the Victorian Stucco design. The failure of the defendant sensibly and proactively to engage in that process but rather to stand on legal formality is one that regrettably I am critical of, not least because it suggests an implicit unwillingness to consider anything other than something that is unlikely to receive planning consent. As I have explained such an approach would be unreasonable applying the principles summarised earlier since it would render the Site incapable of practical development. However, strictly, I accept that a reasonable person in the position of the defendant could have refused permission for the fully glazed design since alternatives that eliminated the ostensible concerns created by that design could be eliminated by an alternative design that is likely to obtain LPA planning consent.

52. Finally, I should mention the suggestion that the entrance pavilion as designed extends in front of the front building line of 89HP. This point loses any significance that it might have had once the design moves away from the fully glazed structure

adopted by the claimant. In fact the degree to which what has been designed is in front of the front building line of 89HP is immaterial and in my judgment no reasonable person could object to the design on that ground alone, particularly since moving it backwards would impact adversely albeit minimally on the lessees' right to light. .

53. I now turn to the two other design elements. In summary, this element of the defendant's case is that a reasonable person in the position of the defendant would have been entitled to refuse permission in respect of the claimant's design under clause 2(b) because (a) it involves basement excavations that the defendant considers are too extensive and (b) it extends beyond the rear western building line of 89 HP to virtually the whole of the Site. To an extent these points are interlinked. No question arises of the development having to be as extensive as the rejected design is in fact. I set out the relevant oral evidence earlier. In summary, the claimant accepts that she could under implement the design without the need to seek planning consent to do so from the LPA.

54. As the argument developed the major or at least a major professed concern on the part of the defendant concerned the degree to which the construction extended beyond the rear building line of 89 HP. It was set out in the Decision Letter in clear terms:

> "The footprint of the house is so extensive that there will be no real garden at the rear (other than small areas In light-wells, the deep bases of which would not appear to be visible from 89HP). It is possible to envisage the design of a house that stops at ground level in line with the rear of 89HP (as did the Approved House) allowing a rear garden. The lack of a true, proportionate garden, would mean the permanent loss of an attractive amenity for 89HP. The absence of a rear garden would be highly unusual In this setting, as the rear gardens of the row of Victorian villas, Including that of 89HP, appear to have been designed to be in line so that the amenity of views of lawns, shrubs and screens of mature trees In the row of gardens may be enjoyed from the windows."

55. In my judgment, a reasonable person in the position of the defendant was entitled to object to a construction that extended beyond the rear building line of 89HP, unless it could be shown that development was only practical if it extended as planned. At no stage has the claimant ever alleged that to be so.

56. In my judgment the consequences of the development not extending beyond the rear building line would be threefold, each of which a reasonable person in the position of the defendant was entitled to take into account in deciding whether to give permission applying the principles referred to above. The first is that the part of the Site to the rear of the 89HP rear building line would necessarily be a conventional garden. This is what is at the rear of 89HP, each of the properties to the north of 89HP and at Woodsford Square. It is true to say that there is no garden area that forms part of Abbotsbury House. However, that does not render the point I am now considering one that a reasonable person in the position of the claimant was not entitled to take into account in arriving at a conclusion concerning what the claimant was proposing. The claimant has placed much weight on the nature and extent of the 1968 house that it was anticipated would be built on the Site when the covenants were entered into as a comparator against which what the claimant has proposed should be judged. The

extent to which the claimant can rely on that as a factor is to an extent controversial between the parties – but it is worth noting that the 1968 house was not planned to extend west of 89HP's rear building line.

57. The second concerns trees. The effect of limiting construction to the rear building line of 89HP not only means that the space to the rear of what is to be constructed would be a conventional garden space but it would remove the need to remove or otherwise interfere with the trees on the boundary between the Site and Woodsford Square, that is trees 11, 12 and 13. Aside from the fact that the trees are healthy and there is no arboricultural reason for removing any of them, the real point is that it is necessary to remove them only if the development of the Site is as extensive as the claimant has sought in the proposal rejected by the defendant and in the view of the defendant the trees provide a valued amenity to it and its residents in the form of a screen between 89HP and Woodsford square. Again this point is one that the defendant focused on in its Decision Letter in these terms:

> "Furthermore, because the proposal involves development almost to the rear wall of the site, the felling of three mature sycamores on the site is required. At present, these trees are a valued amenity in screening 89 Holland Park at the rear from the unattractive, modern, redbrick houses of Woodsford Square. We consider that other forms of development, without this marked projection of footprint at ground and basement levels, would not necessitate felling these trees, as there would be adequate garden-space at the end of the site In which they could grow. We appreciate the planting of a single birch tree In the rear 'garden' light well to the north, but, as will be explained below, we do not consider it to be an adequate replacement as an amenity for the larger screen of the group of three mature trees."

As I have said, these trees do not provide a screen between 89HP and Woodsford Square that is total or one that is the same in extent throughout the year. However, a reasonable person in the position of the defendant would be entitled to conclude that it is more extensive than the mitigatory alternative offered. I do not understand it to be in dispute that the trees on the Site's western boundary would be unaffected if the development was confined to the eastern edge of 89HP's rear building line.

58. The third consequence would be of much less significance to a reasonable decision maker in the position of the claimant than the other two but would nonetheless be a factor that it was entitled to take account of in arriving at a conclusion. Reducing the extent of the development of the Site and confining it to the eastern edge of the 89HP rear building line would reduce the length of time necessary for the excavation work necessary to develop the Site and thus the length of time the defendant and the long leaseholders will be exposed to the "… *noise, dust and vibration* …" caused by the excavation. I consider this is of limited significance for reasons I expand upon below and because it will be temporary and will cease once that element of the work has been completed. Nonetheless, a reasonable person in the position of the defendant is entitled to limit the level of temporary disturbance to a minimum and the consequence of confining the development in the manner I have been considering will reduce the length of time to which the residents at 89HP will be exposed to such disturbance.

59. In light of these conclusions it is not necessary that I consider the objections concerning the design of the surface of the flat roof, particularly since I would expect that if the claimant is minded to under implement the design so as to confine the development to within the rear building line of 89HP that will require a further redesign of sky lights, light wells and escape hatch. There are a number of points that arise from that. First, although there is no evidence available to me, I think it is unlikely that a sub-terranean dwelling would be practical without skylights and/or lightwells. Secondly, I think it is unlikely that a sub-terranean dwelling would be regarded as safe without a means of escape. In my judgment an outright refusal of consent under clause 2(b) by reference to these issues would be plainly unreasonable tested in the way of I have referred to above if development would not be possible using a sub-terranean design without such features because it would have the effect of preventing any development at all. In any event the fact that these features would be visible is not to the point. Some part of any building constructed on the Site will be visible. The Site was sold on the basis that it would be developed. As I have explained the only form of development that is practical is one that involves sub-terranean development. Such construction will require sky lights and light wells. Even if that is not so, it would have to be shown that a reasonable decision maker in the position of the defendant might reasonably consider the visibility of features such as light wells and sky lights more damaging to the amenity of those living in 89HP than the alternative. There is no evidence from which such a conclusion could be reached.

60. If and to the extent that light emission from such features is an issue again no attempt has been made to assess how light from such sources would be materially more deleterious to the amenity of those living at 89HP over what would occur from any other form of construction on the Site, no attempt has been made to consider the impact in the context of light emitted from the windows of Abbotsbury House and the street light between 89HP and Abbotsbury House. Finally no account has been taken of the practical point that at night the residents of 89HP are likely to have drawn their own curtains – see T7/34 - , which of itself is a relevant consideration when assessing the alleged incremental effect of light emission from sky lights and light wells over light emission from any other construction at the Site. In any event any light emission can reasonably be addressed by adjustments concerning the use of light or other automatic activated blinds. In my judgment therefore no reasonable person in the position of the claimant could reasonably refuse permission by reference to this issue.

61. Mr Jonas appeared to suggest at one point when he was being cross examined that he did not want to see any of these features but wanted to look down on a garden or even the Site in its current state. As Mr McGhee correctly accepted that was not a reasonable ground for refusing permission and indeed it is entirely untenable. Regrettably it reflects an unreasonable approach to the issues that arise or should arise in a case of this sort.

62. It was submitted on behalf of the claimant that the desire by the defendant to obtain the creation of a garden at the rear of the Site was an attempt to obtain an "*uncovenanted advantage*". I am not able to accept that analysis. A reasonable person in the position of the defendant is fully entitled to proceed on the basis that it does not want a building to extend beyond the rear building line of its building in the interests of limiting as much as possible the visibility of what is being created. A likely consequence of that is that the owner of the new building will wish to create a garden to the rear of the new building. That is something that a reasonable person in the position of the defendant is entitled to have regard to, particularly in combination with the fact that trees 11-13 will also be preserved.

63. In summary therefore, I consider that a reasonable person in the position of the defendant was entitled to refuse consent under clause 2(b) by reference to the limited points identified in this section of the judgment.

Trees

64. Given the conclusions I have so far reached, strictly it is not necessary for me to consider this issue further. In fact, I have already reached some conclusions about the three trees on the western boundary of the Site. In my judgment had it been demonstrated that the Site could only be developed practically by developing the Site to its full extent then the presence of the trees at the rear of the Site would not have been a basis for the reasonable refusal of permission tested in the manner described above because it would preclude the development of the Site. Such a conclusion is supported by the evidence concerning the quality of these three trees, as to which it was accepted by the defendant's expert that "*... arboriculturally, they are not particularly good specimens ...*" and because the screening provision that they offer is limited albeit materially beneficial. Thus whilst the incidental preservation of trees 11-13 by confining the extent to which the Site is to be built on is something that a reasonable person in the position of the defendant could reasonably seek to do, the trees are not of a quality or amenity effect that would justify blocking any development of the Site simply to preserve them applying the test referred to earlier. However that point does not arise because it is accepted by the claimant that the Site could be developed practically by limiting the area of the Site that was subject to development.

65. Turning now to the remaining trees, the Decision Letter addressed this point in these terms:

> "In addition, there is a risk to the trees on the Abbotsbury House site (protected by TPOs because of their importance to the area) because of the extent of the excavations needed across the entire site. These trees are essential to screen Abbotsbury House from 89HP. The largest tree within this group is Tree 9, which sits behind the rear building line of 89HP. Dr Hope states, and we agree, that the loss of this mature tree would be 'catastrophic' in terms of amenity for 89HP. …
>
> Dr Hope … believes that there is an "extremely high probability" that if the proposed house is built, this tree will be lost, because its roots which enter the site will be severed. His opinion is based on the evidence of air-spading investigations (requested by RBKC in 2013 for the protection of tree roots) Roots of significant size, in particular from Tree 9, were revealed entering the land.
>
> Dr Hope suggests that the development should be re-designed so as to take the tree 9 roots into account. Without carrying out further investigations, we cannot say what constraints this poses, but we note that this tree is behind the rear building line of 89HP."

Trees 9 and 10 cease to be material once it is accepted that a reasonable person in the position of the defendant was entitled to refuse consent other than for a development that did not extend west of the 89HP rear building line. As is apparent from the Plan

reproduced at paragraph 1 above, if development was confined in this way those trees would be unaffected by the development. Although Mr Rainey submits that that there is very little amenity value provided by Tree 9, in my judgment the defendant is right to say that it provides some by providing some limited screening of Abbotsbury House with the level of screening provided depending on the seasons. However, a reasonable person in the position of the defendant could not reasonably refuse permission to develop on the basis of a fear that such development might have an adverse effect on Tree 9 if the consequence is that no development at all would be practical on the Site.

66. It is now necessary to consider whether Dr Hope (the defendant's arboricultural expert retained to advise in relation to the claimant's applications to the defendant for permission to develop the Site) could reasonably have come to the conclusion that Tree 9 would be at risk if the development planned by the claimant proceeded. Dr Hope's view expressed in his reports to the defendant were that there was a particular risk to Tree 9 because test pits dug at the boundary opposite Tree 9 showed extensive root penetration beneath an old boundary wall which if damaged by piling at the boundary to facilitate the development could result in significant harm or perhaps the death of the tree.

67. For litigation purposes the defendant retained Mr Forbes-Laird as its arboricultural expert. Mr Crane was the claimant's arboricultural expert. As Mr Rainey submits, Mr. Forbes-Laird accepted in cross examination that the roots from T9 seen in the trial pit are adventitious roots, which did not grow under the wall. It was common ground between him and Mr Crane that such roots do not form a significant or substantial part of the root structure of the tree. This leads Mr Rainey to submit and I agree that it is not objectively reasonable to conclude that a significant part of the root structure of T9 will be damaged if the defendant consented to the claimant's currently proposed form of development. In any event a reasonable decision maker in the position of the defendant could not reasonably refuse permission for development on the ground of a risk to the health of Tree 9 alone because of the limited amenity value that it provides. It certainly could not do so in the circumstances of this case if the effect was to prevent any practical development of the Site. That the defendant was entitled for other reasons to refuse permission for a development covering in effect the whole of the Site for other reasons is not to the point. That may have the incidental effect of eliminating any risk to Tree 9 but is not the reason for it. This reasoning applies *a fortiori* to Tree 10.

68. Trees 1-3, 5 and 7 were not relied on by Mr McGhee in his oral submissions. I do not intend to take up time in this judgment explaining why these trees are not relied on but in summary it is not alleged that the roots to trees 1-3 or 7 will be affected by the proposed development of the Site and I accept Mr Rainey's submissions in relation to Tree 5 summarised at paragraph 147(2) of his written submissions.

69. This leaves Trees 4, 6 and 8. Each of these trees (like Trees 9 and 10) is located within the boundary of Abbotsbury House. The defendant's case is that development of the Site will harm Trees 4, 6 and 8 depends on whether any part of the root systems of any of these trees penetrates so significantly onto the Site that development will harm them or any of them.

70. The evidence for this is an assertion contained in the 2013 report by Dr Hope. He maintained in his 2013 report on the basis of a ground penetrating radar examination of the Site that there was significant root penetration onto the Site from each of these

trees. However by the time he came to prepare his supplemental report relevant to the application the subject of these proceedings, his concern was in relation to Tree 9 but not expressly in relation to any of Trees 4, 6 or 8.

71. The report was prepared following the "Air Spade" investigation which Dr Hope said showed "…*clearly extensive and significant visible root incursion from tree 9 into the site*…" As I have explained neither litigation expert is able to support these views. However, he added that other Air Spade investigations elsewhere on the Site revealed "… *the presence of extensive root encroachment into the site …"* and earlier on in the supplemental report he had said that his earlier report remained valid.

72. I reject Mr Rainey's submission that the impact of the development on other trees apart from Tree 9 and Trees 11-13 were not mentioned in the Decision Letter. The first sentence quoted above shows that the concern was wider than merely Tree 9 and Trees 10-13. The emphasis given to Tree 9 reflects the emphasis that Dr Hope had given to that tree in his supplemental report.

73. Mr Rainey sets out some extensive submissions as to what the correct conclusions are to be derived from the technical examinations carried out at the Site. The questions that remain are (a) whether Dr Hope could have had that view by the time he came to write his supplemental report and (b) whether that could have justified a refusal of permission. I do not accept Mr Rainey's submission that because Dr Hope could not reasonably hold the view he expressed about Tree 9 he is necessarily wrong about Trees 4, 6 or 8. In cross examination of Mr. Forbes-Laird, Mr Rainey only challenged the conclusions reached by Dr Hope in respect of Tree 8 (and not either trees 4 or 6) and in relation to that Mr. Forbes-Laird responded only that Dr Hope " … *takes a different view regarding tree 8 than Mr Crane does. Mr Crane could be right, Dr Hope could be wrong, but in the section in which I reviewed Dr Hope's report I report what he says* …". Mr Crane accepted that Dr Hope's advice was not negligent. In those circumstances, I am bound to conclude that the views expressed by Dr Hope concerning these trees in his initial report remained his views and that the material available at trial does not enable me to conclude he had either abandoned those views or could not reasonably have held them. In those circumstances, a reasonable decision maker in the position of the claimant was fully entitled to conclude that the severing of roots put the trees at risk. There is room for debate as to how significant the risk would be with Mr Crane maintaining the risk would be very low and Dr Hope maintaining that there was a significant chance that severance of any of the roots over 25mm in diameter created a significant risk that the health of the tree concerned would be adversely affected or would cause the tree to die.

74. I would accept that a reasonable decision maker in the position of the claimant would be entitled to refuse permission for a construction scheme that created such a risk but for the fact that, as I have said on a number of occasions already, the Site was sold on the basis that it would be and the whole of the front of the Site will have to be developed if any practical development of the Site is to take place. In my judgment if the defendant was to contend in these proceedings that there was a practical way in which the Site could be developed without creating any risk to the trees I am now considering, it had the evidential burden of making good that case. It does not advance any such case and there was no evidence available to it at the time it took its decision that would have enabled it to arrive at such a conclusion.

75. As I have concluded already, if the Site is to be developed practically then the development at the front will have to extend across the whole width of the Site. This

is because of the very narrow width of the Site at the front. The need to develop this way is plain when the design of the 1968 house is considered. Any objection based on the risk of harm to the trees I am now considering would have to be considered in that context and applying the principles set out earlier, no reasonable decision maker in the position of the defendant could reasonably refuse permission for development by reference to that risk simply because it would render the Site incapable of practical development. I have accepted that a reasonable decision maker in the position of the defendant would be entitled to refuse permission in respect of development west of 89HP's rear building line, which will incidentally protect trees 9 to 13 – trees that would have been unaffected by construction of a house to the 1968 design. Refusing permission for the purpose of eliminating a risk of damage to trees 4, 6 and 8 goes further than a reasonable decision could go in the circumstances.

76. I do not accept that an issue developed during the trial concerning the effect of the development on a desire to prune trees overhanging the Site is one that is material since it does not feature in the Decision Letter or as part of the defendant's pleaded case as a reason for refusing permission. Had it featured, I should make clear that I regard it as a point that no reasonable decision maker could rely on as a reason for refusing permission for development in the circumstances. In any event, Dr Hope did not suggest that the pruning that the claimant wished to undertake was of itself excessive but rather that in his view further pruning beyond that indicated would have to be undertaken. I accept Mr Rainey's submission on that point – the correct way of addressing that point if material was to give permission conditional on there being no more pruning than indicated, not refusing permission outright. However, the real point about this issue is that it does not arise at all. If and to the extent this required more detailed consideration it could and should be reserved for a clause 3 application.

Loss of Amenity During the Works

77. I can address this issue relatively shortly. I have already noted that an incidental effect of a reasonable refusal by reference to development beyond the rear building line of 89HP is that the extent of the excavation necessary to complete the development is likely to be less than would otherwise be necessary and therefore the extent of the transient disruption caused by the development would be reduced.

78. More generally however, the Decision Letter correctly identifies that this point is one a reasonable decision maker in the position of the defendant could take into account only to the extent that there was a margin of difference between the disruption caused by the construction of a sub-terranean dwelling and the construction of a conventional property. ML accepted in the course of her cross examination that the defendant had not received any professional advice about this issue – see T7/70/4-9. ML asserted that the point "… *was in common sense terms a very obvious problem with such a huge development*." In my judgment before a reasonable decision maker in the position of the defendant could arrive at a conclusion that permission should be refused by reference to a margin of difference such as this some expert evidence would be required particularly if it was to be concluded that the flats at 89HP would become uninhabitable as a result of the noise dust and vibration. Further, as ML accepted the defendant had expert evidence to contrary effect. Even so, she said in cross examination that the decision makers "*believed"* what had been asserted. If that was the genuine belief of the decision makers it was a belief that no reasonable decision maker could have on the material available to it. ML's attempts to avoid this issue in cross examination did her no credit – see T7/73/4-74/4. As Mr Rainey submitted, "*this assertion is demonstrably irrational and arbitrary* …"

79. I conclude that there was no material available to the defendant that would have enabled a reasonable decision maker in the position of the claimant to arrive at the conclusion that the excavation work would render 89HP uninhabitable or otherwise that the disruption would be such as to justify in itself a refusal of permission. This is not capable of being resolved on a common sense basis because in the course of the trial, it was accepted that some excavation work would be required in order to remove the made ground and because piling to the front of the Site would be required in any event. Thus a careful comparison of what would be involved in each scheme and the duration and nature of the works and the noise vibration and escape of dirt and dust caused by each required but had not been undertaken by any of the experts available to the defendant down to the date of the Decision Letter or indeed by the experts who gave evidence at trial.

80. In any event, as I have explained, development of the Site is only practical if a sub-terranean design is adopted and refusing permission by reference to transitory inconvenience which is time limited and would in any event be limited to certain times of the day and night would be disproportionate and unreasonable tested in the manner I have set out above because it would prevent the Site being developed at all. As I have said already and as Mr Rainey submitted in relation specifically to the issue I am now considering (and as quoted earlier):

> "A "conventional above-ground house" cannot realistically be built on the site. It would not secure planning permission, because it would fill in the townscape gap: hence C's original planning application was refused. Equally importantly, D would say it infringes its rights to light …. So a house on the site has to be largely subterranean in order to secure planning permission and in order to satisfy D's claims on rights to light. But if, at one and the same time, it is a good reason for refusing to approve a subterranean house that the necessary excavations mean it will be more disruptive than building a conventional house, then this has the very real potential to make the site impossible to develop. Indeed, that is probably D's intention in running this point"

Conclusions

81. For the reasons outlined above I accept that a reasonable decision maker in the position of the defendant was entitled to refuse permission for the claimant's proposed design on aesthetics grounds (i) in relation to the glazed form of the entrance pavilion (but only on the basis of the concession by the claimant that there is a reasonable prospect of obtaining planning consent from the LPA for an alternative in one of the three alternative formats she suggested and to which I have referred above) and (ii) because the claimant proposed that the development would extend beyond the rear building line of 89HP, but again only on the basis of the claimant's acceptance that practical development could be achieved by underutilising the LPA permission that had been obtained. I do not accept that a reasonable decision maker in the position of the defendant was entitled to refuse permission by reference to the transitory disruption that construction of the scheme would cause other than to the extent of such disruption caused by construction of a development that extended beyond 89HP's rear building line. I reject the defendant's contention that a reasonable decision maker in the position of the decision maker would be entitled to refuse

permission by reference to the risk of damage to trees 4, 6 or 8. Damage or destruction of the other trees does not arise for the reasons I have explained.