Neutral Citation Number: [2020] EWCA Civ 758

Case No: 2019/1573

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
His Honour Judge Pelling QC
HC-2017-002119

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16th June 2020

Before :

LORD JUSTICE LEWISON
LORD JUSTICE FLAUX
and
LORD JUSTICE HOLROYDE

- -

Between :

89 HOLLAND PARK MANAGEMENT LIMITED	**Appellant**
- and -	
SOPHIE LOUISE HICKS	**Respondent**

- -
- -

John McGhee QC and Tim Calland (instructed by **Gowling WLG**) for the **Appellant**
Philip Rainey QC and Mark Sefton QC (instructed by **Mishcon de Reya LLP**) for the **Respondent**

Hearing date: 4 June 2020

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 10:30am on Tuesday 16th June 2020.

Lord Justice Lewison:

Introduction

1. Ms Sophie Hicks is an award-winning architect. She owns a plot of land at the rear of 89 Holland Park ("the Site") on which she wishes to build a house. But she is bound by a restrictive covenant which prohibits the making of any application for planning permission in respect of any plans, drawings or specifications which have not been approved by the freeholder of 89 Holland Park. Following previous litigation between the parties, it has been decided that approval cannot be unreasonably withheld. The principal issue on this appeal concerns the permissible grounds upon which the freeholder may withhold consent.

2. 89 Holland Park ("the Building") 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, four of 999 years' duration, and one of 125 years. The freehold is owned by 89 Holland Park (Management) Ltd ("the Company"). 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 Company. The Company retains possession of the common parts and external structure of the Building but is otherwise interested in the Building only as reversioner.

3. Although each of the leaseholders is entitled to enforce the covenant, the only person whose consent to plans etc is relevant is the Company. HH Judge Pelling QC held that in deciding whether or not to give consent, the Company was not entitled to take into account the views or interests of the leaseholders; and was not entitled to raise objections to Ms Hicks' proposal on aesthetic or environmental grounds, because there was no evidence that the structure or value of the freehold reversion would be affected by the aesthetics or environmental concerns. His judgment is at [2019] EWHC 1301 (Ch).

The facts

4. I can take the detailed facts from the judge's comprehensive judgment. I summarise only those facts which are necessary to an understanding of the issues raised on this appeal.

5. Originally, both the Site and the Building were in common ownership. By 1965, Brigadier W.B. Radford, the then freehold owner of the Building and the Site, had converted the Building 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 Brigadier Radford transferred the Site to Ms De Froberville. By that transfer ("1965 Transfer") Ms De Froberville agreed within 2 years to build on the Site a building for which Brigadier Radford had obtained planning permission. The 1965 Transfer also contained a number of other covenants by Ms De Froberville. Those covenants were given by Ms De Froberville:

> "… so as to bind the land hereby transferred and to benefit the Vendors property known as No. 89 Holland Park London W11"

6. She did not comply with that obligation and, on 10 July 1968, the obligations created by the 1965 Transfer were varied by the 1968 Deed, which was expressed to be supplemental to the 1965 Transfer. The 1968 Deed defined Brigadier Radford as being the "Adjoining Owner" and Ms De Froberville as the "Building Owner". In so far as is material, the 1968 Deed provided that:

> "2. The Building Owner hereby covenants with the Adjoining Owner that she will complete the development of the [Site] … not later than the expiry of 18 months after the date hereof.
>
> (a) In lieu of the drawings referred to in [the 1965 Transfer] the Adjoining Owner hereby approves the general layout drawing no. 163/13 dated April 1968 prepared by Holmes and Gill.
>
> (b) The Building Owner 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 the Adjoining Owner PROVIDED ALWAYS that if the Adjoining Owner shall approve the same but The Building Owner shall be required to modify or amend the same by the Planning Authority or any other authority or if the Building Owner 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 the Adjoining Owner
>
> 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 the Adjoining Owner or his surveyor."

7. Clause 4 stated that subclauses 3 (i), (ii) and (iii) of the 1965 Transfer were abrogated but that in all other respects the covenants and provisions contained in the 1965 Transfer relating to the development of the building site remained in force to the extent they were not inconsistent with the provisions of the 1968 Deed. Clause 5 contained a covenant to pay to the Building Owner "the fees incurred by his Architect in connection with the approval of the revised plans drawings and specifications".

8. Ms Hicks acquired the Site at auction on 12 December 2011. By that time, the freehold of the Building had become vested in the Company, and the long leases had been created.

9. The first dispute between the parties concerned the enforceability of the covenants, and the question whether consent could be unreasonably withheld. The dispute was

determined by Mr Robert Miles QC, sitting as a judge of the Chancery Division. His decision is at [2013] EWHC 391 (Ch). He decided that both the Company and the leaseholders were entitled to enforce the covenants. The intention of the covenants was to benefit the owners for the time being of the Building. The entitlement of the leaseholders to enforce the covenants came about because of the effect of section 78 of the Law of Property Act 1925. He next decided that Ms Hicks was bound by the covenant. Finally, he decided that it was necessary to imply a proviso to the effect that consent (whether under clause 2 (b) or under clause 3) was not to be unreasonably withheld.

10. On 9 October 2013 Ms Hicks applied to the Company for consent under clause 2(b) of the 1968 Deed. The structure that she proposed was a single storey glazed building that constituted the entrance to two floors below street level. The Company, with the advice of experts, consulted the leaseholders and ultimately, on 20 November 2013, refused its consent. Meanwhile, Ms Hicks had applied for planning permission for the scheme. Although the local planning authority refused permission, Ms Hicks appealed; and on 27 October 2015 a planning inspector allowed the appeal and granted full planning permission.

11. On 4 November 2016 Ms Hicks applied to the Company for approval of a revised iteration of her previous proposed development under both covenants. In support of her application she submitted the whole of the material that she intended to submit to the local planning authority when seeking a revision to the permission previously granted by the inspector for her October 2013 scheme. This material was extensive and extended to some 3 lever arch files of material. The letter of application stated that the submitted drawings were "the final and definitive drawings of the building, including construction drawings and specifications." The revised development for which she sought approval consists of a single storey entrance pavilion, which is described by the Company as being a glass cube structure, located at the eastern end of the Site, leading to a subterranean 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 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. Ms Hicks submitted this material to the Company before applying to the local planning authority for approval to the revised scheme.

12. On 20 January 2017 the Company refused approval under both clause 2 (b) and clause 3. It is that refusal which is in issue on this appeal. The refusal was contained in a 10-page decision letter. It stated that:

> "… our decision is to refuse consent for aesthetic reasons and the loss of the amenity of the trees, but in any event … we must withhold consent unless and until you satisfy the serious concerns raised by Capita."

13. Capita were engineering and hydrology experts retained by the Company. The letter went on to say 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.

14. Under the heading "REASONS FOR REFUSAL", the letter identified four 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". Under the first heading, the letter stated:

> "In our view the design of the proposed house with its "cube" entrance and extensive rear projection is out of keeping with that of 89 Holland Park and the Radford estate. The new house would detract from 89 Holland Park and the setting of the villa.
>
> We have considered the appearance of the glazed cube, the front part of the house above ground, in terms of what might be built as the frontage of the house next to 89 HP, and it does not seem to us to be an attractive choice. We note that the Appeal Inspector described it as "a somewhat alien feature". Also, Mr Fidgett in his earlier report in 2013, described it [as] a "clearly alien feature."

15. The letter went on to make a number of points about the glass cube: at night it might appear strange as it would emit a glowing light; the sense of privacy for the basement flat would be harmed. It commented on the proposed light wells which it said would be intrusive features, and would facilitate overlooking into the Building. Some of the objectionable features could be controlled by covenants, but policing them would be a burden. The proposal would require the felling of three mature sycamores which were said to be a valued amenity in screening the Building from the modern houses in Woodsford Square. The Company's arboricultural expert said that the loss of one particular mature tree would be "catastrophic" in terms of amenity for the Building.

16. Under heading (3) the letter stated that:

> "We are also concerned about the amount of time it would take to carry out the proposed development compared with the construction of a conventional above-ground house. Also the extent of the excavation and construction will cause noise, dust and vibration greatly in excess of what would occur in building a conventional houses. We believe that for a period flats in 89HP will be rendered not properly habitable."

17. Under the last heading the decision letter stated that

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

18. The construction issues and concerns were summarised as being that:

> "… on many points, more information is required which would be of importance in analysing the risks of the development for 89HP, and we consider that much of this information should be provided. There is some confusion about certain aspects, which we believe should be clarified. Finally, some of the experts concerns for 89HP seem to be inherent in the design of the basement and the excavation required; and these are most worrying for us."

19. The judge found that the aesthetics issue was the major concern of the decision makers. He also found that the aesthetics issue had no impact on the value of the reversion or the Company's interest in the structure of the Building. That point applied equally to the Company's reliance on the risk of damage to or loss of trees (other than in relation to an allegation concerning the risk of damage by heave following damage to or loss of trees) and loss of amenity caused by construction.

The judge's judgment

20. The judge began by setting out familiar principles relating to the interpretation of contracts. He went on to consider the background circumstances as they existed at the date of the 1968 Deed. At [28] he said:

> "I accept the claimant's submission that [Brigadier Radford's] only interest in [the Building] at the time when the 1968 Deed was entered into was in preserving the structure, capital value and revenue generating capacity of his property. I reject the defendant's submission that [Brigadier Radford] could or should have taken into account the impact of any development on the lessees of the flats. At the date when the 1968 Deed was entered into, the flats were let on short contractual or statutory tenancies. [Brigadier Radford] was not concerned with the impact of development of the Site on the tenants at [the Building] other than to the extent that it might affect the value of his property either as a capital investment or source of income. That much is apparent from the terms of the 1968 Deed, which imposed a positive obligation on the covenantor to develop the Site, and on the fact that he had made his tenants' rights subject to development of the Site. It follows that the covenants were concerned with the protection of [Brigadier Radford's] property interest in [the Building] not the interests of those who were his tenants at the date when the 1968 Deed was entered into."

21. The judge then proceeded to consider the general purpose of the covenants. He said at [29]:

> "Generally, the sole purpose of a covenant requiring approval by a covenantee is to protect the property interests of the covenantee – see *Iqbal v. Thakrar* [2004] EWCA Civ 592 per

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

22. Having decided that "the covenants were concerned exclusively" with the protection of Brigadier Radford's property interest, the judge next considered what that interest was. He held that by the time that the Company came to consider Ms Hicks' application for consent, its only relevant interest was in the structure of the Building and the freehold reversion. That was the only interest that the Company was entitled to consider when deciding whether to grant or refuse approval. He concluded on this point at [36]:

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

23. Having decided that the Company's interest lay in the common parts and external structure of the Building the judge held at [40] that it was not entitled:

> "… to refuse approval based on aesthetics, disruption caused by construction or the risk of damage to or destruction of trees, other than to the extent that the risk of such damage or destruction might adversely affect the structure of the building or the value of the defendant's reversion. Refusal on those grounds has nothing to do with protection of the defendant's property interests as I have found them to be."

24. Because the judge decided that the aesthetic and environmental grounds upon which the Company had refused consent were simply not open to it, he did not consider (and had no need to consider) whether they were reasonable. As the judge put it at [57]:

> "… in relying on aesthetics, the effect or possible effect on the trees (other than to the extent relevant to the heave issue) and

> the disruptive effect of construction, the defendant has relied on facts and matters that it ought not to have taken into account."

25. The judge went on to say that the concerns about the structural impact of the proposed development were a free-standing reason on which the Company was potentially entitled to rely. He held, however, that there was a critical distinction between a request for approval under clause 2 (b) and a request for approval under clause 3. In relation to clause 2 (b), he held at [142] that risk of differential settlement caused by the construction of a large basement area over almost all the Site could be a reasonable ground for refusing or withholding consent; but only if the Company's advice at the date of its decision to refuse or withhold approval was that movement and resulting damage was probable and there was no practical way of avoiding it if the proposed design proceeded. If its advice was or should have been, or would have been had appropriate further enquiries been made, that those issues could be resolved as a matter of engineering design and management then the issue was one that was relevant to an application under clause 3 alone.

26. The judge then considered the engineering advice that the Company had received. He held that the concerns that had been raised were insufficient to justify refusal of consent under clause 2(b); but were potentially good grounds for refusal of consent under clause 3. Accordingly, he granted a declaration that consent under clause 2 (b) had been unreasonably withheld. He refused to make a declaration to like effect as regards clause 3.

Could the Company take account of the interests of the leaseholders?

27. As noted, the judge held that the Company was only entitled to take into account matters that affected its own reversionary interest. It was not entitled to take into account any interest of the leaseholders (whether or not they were property interests). His conclusion was based largely on *Cryer v Scott Brothers (Sunbury) Ltd* (1988) 55 P & CR 183. In that case the covenants were given "for the benefit of the remainder of the land comprised in the above title or the part thereof for the time being unsold". By the time of the events in issue the only part of the title unsold was a small area. This court decided that the covenantee could not rely on the effect of the proposals on land which did not enjoy the benefit of the covenants. That is an unsurprising conclusion (and was also the conclusion of this court in *Marquess of Zetland v Driver* [1939] Ch 1). Slade LJ accepted the submission that:

> "… the only circumstances which the [covenantees] are entitled to take into account are circumstances relevant to them in their capacity as owners of the land for the benefit of which the covenant is enforceable."

28. Mr Rainey QC emphasised the phrase "in their capacity as owners of the land". He said that, in a case such as this one, all that the Company had was its reversionary interest. That was the only interest that it was entitled to consider. The fact that its interest was now no more than a husk (as he put it) had limited the scope of its power to refuse consent. I do not agree.

29. In *Cryer*, and other similar cases, the land in question was in effect regarded as existing only in three dimensions. But in a case like this there is another dimension:

that of time. This is a case in which there are concurrent interests in the land to which the benefit of the covenant is annexed. Slade LJ's observations must be read in the context of the case he was deciding. There were no other interests involved in the land which had the benefit of the covenant. His words should not be read as a statutory text. In my judgment, the essential point in *Cryer* was that the covenantee was not entitled to take into account matters that did not affect the land with the benefit of the covenant. In my judgment that is the real principle. As Flaux LJ pointed out in argument, if the Company is not entitled to take into account the position of the leaseholders, Mr Miles' conclusion that they are entitled to the benefit of the covenants is almost worthless. Any other conclusion would also have surprising effects. Take the example of a building scheme, in which a series of purchasers in a defined area all have the benefit of a scheme of restrictive covenants, one of which requires building plans to be approved by the common vendor. It would, I think, be a surprising conclusion to hold that the person with the power to approve plans had to ignore the interests of the persons entitled to the benefit of the covenants. I understood Mr Rainey QC to have accepted that this was so; but he suggested that there might be some special rule that applied to building schemes and analogous schemes of management. But if the principle is as I have stated it to be, there is no need for any special rule.

30. *Crest Nicholson Residential (South) Ltd v McAllister* [2002] EWHC 2443 (Ch), [2003] 1 All ER 46 was another case of a restrictive covenant. At [45] Neuberger J envisaged that a person whose consent to plans is required is entitled (though not obliged) to take into account the interests of the persons who are entitled to the benefit of the covenant at the time when consent is sought; but at [46] appears to have partially retreated from that view. We are not bound by that inconclusive and obiter view.

31. The starting point, in my judgment, is to identify the land for the benefit of which the covenant was given. The 1968 Deed was supplemental to the 1965 Transfer. It was for that reason that Mr Miles held that the class of beneficiaries of the covenants in the 1968 Deed was as broad as those entitled to the benefit of the covenants in the 1965 Transfer. The covenants in the 1965 Transfer were given "to benefit the Vendors property known as No. 89 Holland Park London W11." What was "known as" 89 Holland Park was the whole building. What was being described was "the Vendor's property" as a physical entity: not the vendor's property interest in that property. Mr Miles decided that the leaseholders were among those who benefitted from the covenant. As he put it at [52]:

> "… the general purpose of the covenants was to control the development of the Property for the benefit of No. 89…"

32. In addition, the effect of section 78 of the Law of Property Act 1925 is to write certain words into the covenant. Section 78 deems a covenant to be made with the covenantee and (a) his successors in title and (b) the persons deriving title under him. What is more, the covenant has effect as if those words were expressed. The expression "successors in title" includes the owners and occupiers for the time being of the land of the covenantee intended to be benefitted. If one adds together (a) the general purpose of the covenants and (b) the class of person entitled to their benefit and with whom the covenant is deemed to have been made, I consider that the inescapable conclusion is that the decision-maker considering whether or not to approve plans is

entitled to take into account the interests of those with the benefit of the covenant. Those persons include both the owners and the occupiers of the land. If it were otherwise the general purpose of the covenant would be undermined.

33. Accordingly, *Cryer* does not, in my judgment, bear on this case where the covenants were expressed to be for the benefit of No 89 Holland Park and the leaseholders are entitled to the benefit of the covenants. I do not consider that the case is authority for the proposition that the judge drew from it.

34. In my judgment the Company was entitled to take into account the interests of the leaseholders. The gives rise to the next question: what are those interests?

Were aesthetics irrelevant?

35. There are two linked points under this head:

    i) Were aesthetics relevant at all?

    ii) If so, is a corporation entitled to refuse consent on that ground?

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

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

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

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

38. Slesser LJ did not confine his observations to a case in which the aesthetic merits (or otherwise) of the proposal had an impact on the landlord's property rights in the narrow sense. McKinnnon LJ put the two objections into different and apparently free-standing categories. Neither judge felt any inhibition about deciding whether an aesthetic objection was or was not reasonable.

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

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

> "That case was concerned with a different type of covenant (not to carry out improvements to a demised property without the consent of the landlord, such consent not to be unreasonably refused) arising in a different legal context (that of landlord and tenant) and with a covenantee who was an individual not a company. The landlord's property interests in that case were different from those of the defendant in this case."

41. I do not consider that these grounds of distinction are convincing. It is true that the legal context was different, but it is difficult to see why that should matter on the facts of this case. The covenant in our case was a covenant between neighbours; and in my

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

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

> "Let it be supposed that the owner for the time being of 22 Pine Wood were to propose an extension to his house which would be exceptionally unsightly and entirely out of keeping with the rest of the Benwell Meadow Estate. I am not satisfied that in such circumstances it would be of no value to the defendants, as owners of the two yellow plots, to be able to prevent new building of such an outrageous character. I am not satisfied that the erection of such an extension, albeit to a house at some distance away, would necessarily have no effect on the value of the larger yellow plot or a house built on the larger yellow plot, which also form part of the Benwell Meadow Estate—particularly since, as the learned judge found, this estate is a "very attractive one" in which "the types of houses have been intermingled to the best effect."

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

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

44. These passages seem to me clearly to contemplate a refusal of consent on aesthetic grounds. Indeed, in our case the assertion that Ms Hicks' proposal was "out of keeping" was expressly made. In a concurring judgment Waite J said at 202-3:

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

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

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

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

47. Mr Rainey QC, on behalf of Ms Hicks, made the powerful point that aesthetic objections cannot be objectively evaluated ("*De gustibus non est disputandum*"). That

might have been an argument raised in both *Lambert* and *Cryer*; but in my judgment both those authorities recognise that aesthetic objections may be valid, even where a covenant contains a proviso that consent may not be unreasonably withheld. He also argued that an aesthetic objection could only be relevant if it was tied to a detrimental effect on the value of the land with the benefit of the covenant. But that, in my judgment, is to take a very narrow view of what interests a covenant of this kind is intended to protect. I shall return to this point shortly.

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

49. The judge's contrary view seems to me to have been based on his interpretation of what Peter Gibson LJ meant in *Iqbal v Thakrar* by a landlord's "property interests." In *Sargeant v Macepark (Whittlesbury) Ltd* [2004] EWHC 1333 (Ch), [2004] 3 EGLR 26 (to which the judge was not referred) I discussed the ambit of that concept. I referred to a number of authorities (including *Lambert v Woolworth*) which had not been cited in *Iqbal v Thakrar*, and held that detriment to a landlord's trading interests in his capacity as a neighbour were potentially relevant grounds for refusal of consent to alterations. I remain of that view. In my judgment relevant "property interests" in connection with a covenant of this kind go further than a mere interest in bricks and mortar or the capital or rental value of property. As well as trading interests, they would include the amenity value of the right to enjoy the property in question. It is probable, in the light of *Cryer*, that in the case of a restrictive covenant affecting freehold land a covenantee's broader interests are confined to land to which the benefit of the covenant is annexed, but that would not in my judgment preclude the Company from having regard to broader interests in the Building. In the context of the discharge and modification of restrictive covenants under section 84 of the Law of Property Act 1925 the Lands Tribunal (and now the Upper Tribunal) has always taken a broad view of what amounts to a "practical benefit" secured by a restrictive covenant.

Loss of trees and disturbance

50. Mr Rainey QC was right, in my judgment, to stress the fact that the 1968 deed contains a positive obligation to build, and the approval of a particular design. But the Company's objection was to the particular form of the proposed building and the excess of disturbance over a more conventional design. These objections were linked both to the amenity value of the Building and also to the potential sterilisation of the flats for residential purposes during the construction period.

51. I do not consider that we can rule out these matters at this stage. Whether the trees in fact provide any real amenity value; and whether the Company's fears about the effect of the construction period on the habitability of the flats are reasonable ones, go to the

question whether the objections are reasonable ones. They do not go to the prior question whether they can be raised at all.

52. The Supreme Court has recently considered the approach to be taken in relation to the question whether consent has or has not been unreasonably withheld: *Sequent Nominees Ltd v Hautford Ltd* [2019] UKSC 47, [2020] AC 28. The court accepted (by a majority) the submission made by Mr Rainey QC, based on Lord Denning MR's judgment in *Bickel v Duke of Westminster* [1977] QB 517, 524 "that the court must not determine by strict rules the grounds on which a landlord may, or may not, reasonably refuse his consent, nor be limited by the contract to any particular grounds, not even "under the guise of construing the words"." Lord Briggs, who gave the judgment of the majority, characterised Lord Denning's observations at [30] as:

> "… a warning against addressing the reasonableness of a refusal by reference to an over-refined construction of the lease as at the time of its grant, something which Lord Denning MR called "the guise of construing the words"."

53. He added at [32] that:

> "It is over-simplistic, and contrary to the principles as laid down in the *Ashworth Frazer* case [2001] 1 WLR 2180, to approach this question in any rigid or doctrinaire way, still less solely by reference to original purposes of the covenant in clause 3(19) which may have been within the contemplation of the parties when the lease was granted. It will in every case be a question of fact and degree measured as at the date upon which the relevant consent is sought by the tenant."

54. In the present case I consider that the judge fell into the trap, under the "guise of construing the words," of approaching the question of reasonableness by reference to the original purpose of the covenant (as he perceived it); and by formulating rigid rules for what the covenantee could or could not take into account.

55. I would therefore hold that ground 1 of the grounds of appeal succeeds.

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

be able to take into account the fact that the 1968 Deed contained a positive covenant to build, and an express approval of a particular design. Whether against that background (and any other relevant consideration) the refusal of consent was reasonable on the facts will be for the judge to decide.

Was the judge wrong to hold that structural concerns were insufficient to refuse consent under clause 2 (b)?

57. The judge drew a distinction between approval under clause 2 (b) and approval under clause 3. Clause 2 (b) approval was a prelude to obtaining planning permission; not to actual construction. Approval for constructing a building for which planning permission had been obtained was required separately under clause 3. That is why clause 3 (but not clause 2(b)) required the approval of "definitive" plans, drawings and specifications; which, in the judge's view, also included construction method statements. The documents which required approval under clause 3 were more detailed than those which required approval under clause 2 (b). The judge expressed the distinction at [50]:

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

58. The judge then went on to consider the detailed objections raised by reference to the report prepared by Capita. His ultimate conclusion at [153] was as follows:

> "On the material that was available to the defendant as contained in the Capita report no reasonable decision maker in its position could have refused or withheld approval under clause 2(b) by reference to the risk of cracking in excess of what is defined as slight without seeking further information from Capita. On analysis the Capita report identifies a series of enquiries that might reasonably be made in order to allay all reasonable fears of harm prior to the commencement of construction but suggest that at worst there is a risk of physical damage to the structure of 89HP. There is not a hint that there is any risk of severe damage. Although it suggests that cracking might be greater than slight it does not venture an opinion as to what cracking might be experienced. The expert witnesses are

> agreed that on the assumption that the settlement figures relied on by the claimant in her presentation and accepted at face value by Capita are correct then Capita's concerns about more extensive cracking are misplaced. A fair reading of Capita's report (unless it was decided to return to Capita for further information) is that there were no reasonable grounds for refusing or withholding approval under clause 2(b) knowing that (a) the claimant would have to apply for planning permission (b) would probably have to obtain a party wall agreement or award and (c) would have to present definitive plans and specifications for approval under clause 3 before any building work could commence. In that context the dispute concerning frequency of monitoring and the setting of amber and red parameters could be resolved."

59. Mr Calland, who argued this ground on behalf of the Company, did not dispute the judge's analysis of the scope of clause 3 as opposed to clause 2 (b). Rather, his criticism of the judge's judgment came down to two points:

    i) The judge was wrong to treat Ms Hicks' application for consent as being two separate applications. She made one application for consent under both covenants. She asked for consent under both covenants to be dealt with together and within a short time frame. She did not suggest that any detailed matters of implementation could be left for later.

    ii) The Company did not in fact refuse consent under clause 2 (b) on constructional grounds. Rather, it withheld consent on the basis that it would be for Ms Hicks to satisfy the concerns raised by Capita.

60. Mr Rainey QC supported the judge's interpretation of the two covenants. Approval under clause 2 (b) is the prelude to the making of an application for planning permission. The grant of consent under that clause does not entitle Ms Hicks to build anything: she still needs approval under clause 3. Although Ms Hicks applied simultaneously for approval under both covenants, the fact remains that they are directed to different ends. On the basis of the judge's detailed findings, none of the detailed constructional issues needed to be resolved before an application for planning permission could be made. They could all await stage two in the overall process: namely the approval of definitive plans, specifications and drawings under clause 3. The mere fact that a single application was made for approval under both covenants based on the same material did not entail that the outcome of each application would be the same. I accept this submission.

61. As far as the distinction between "refusing" consent and "withholding" consent is concerned, I agree with Mr Rainey QC that, in the context of this series of covenants, it is a distinction without a difference. If the decision-maker has only one opportunity to give or refuse consent, then he may well be entitled to withhold or refuse consent if insufficient information is given to him. But in this case, the Company's consent is required at both stages. The judge approached the question whether sufficient information had been given as a question of fact and degree. I do not consider that this court is in a position to overturn his evaluation.

62. I would therefore hold that ground 3 of the grounds of appeal fails.

A good reason and a bad reason

63. Where approval is not to be unreasonably withheld, and the decision-maker refuses consent for a mix of reasons, some good and some bad, the question arises whether the whole decision is vitiated. I addressed this situation in *No.1 West India Quay (Residential) Ltd v East Tower Apartments Ltd* [2018] EWCA Civ 250, [2018] 1 WLR 5682 in a judgment with which both Floyd and Peter Jackson LJJ agreed. Having considered a number of cases I said at [41]:

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

64. If, as I consider, the judge was wrong to rule out aesthetic and environmental grounds, but right in his conclusion that the construction issues were relevant to clause 3 rather than to clause 2 (b), it becomes necessary to consider whether the decision to refuse consent under clause 2 (b) (looked at overall) was unreasonable.

65. On the basis of the judge's findings, the aesthetic reasons were the most important. It can therefore fairly be said that if the construction issues had not been put forward consent would still have been refused on aesthetic grounds. In my judgment those reasons are potentially valid reasons for refusing consent (although their reasonableness has not been tested). In those circumstances I consider that it follows that the judge's declaration must be set aside; and the matter remitted to the Chancery Division for the judge to consider whether the aesthetic and environmental reasons were reasonable ones.

Lord Justice Flaux:

66. I agree.

Lord Justice Holroyde:

67. I also agree.