Appeal No: CH/2009/PTA/0657
Case No: HC08C03524

Neutral Citation Number: [2010] EWHC 1514 (Ch)
IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
ON APPEAL FROM MASTER BOWLES

Royal Courts of Justice
Strand, London, WC2A 2LL
Date: 25/06/2010

Before:
MR JUSTICE BRIGGS

- -

Between:

FRASERS ISLINGTON LIMITED

Claimant/ Respondent

- and -

(1) THE HANOVER TRUSTEE COMPANY LIMITED
(2) ROBERT ANTHONY BOURNE
(3) SALLY ANNE GREENE
(4) ALAN LAWRENCE BANES
(TOGETHER THE TRUSTEES OF THE RAB PENSION TRUST)

Defendants/ Appellants

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Mr Jonathan Gaunt QC and Mr Mark Sefton (instructed by **Denton Wilde Sapte, One Fleet Place, London EC4M 7WS**) for the Claimant/Respondent
Mr Romie Tager QC and Mr Justin Kitson (instructed by **Howard Kennedy, 19 Cavendish Square, London W1A 2AW**) for the Defendants/Appellants

Hearing dates: 15th – 16th June 2010

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Judgment

Mr Justice Briggs:

1. This is an appeal from the Order of Master Bowles dated 27th October 2009 whereby he granted summary judgment to the claimant Frasers Islington Limited ("FIL") on its claim for specific performance of a contract for the purchase of freehold land in Islington constituted by its exercise of options to that effect contained in two contemporaneous building leases dated 24th July 2002. The building leases made provision for the development of the land the subject matter of the option by the construction (to shell and core) of an underground theatre and ground floor restaurant and public house, together with the construction and fitting out of some seventy flats on upper floors of the site, and the rebuilding or refurbishment of two adjacent town houses, together with the construction at basement level of a ten space car park for use by purchasers or lessees of some of the flats. The defendants are the trustees of the RAB Pension Trust (I will refer to them as "RAB"). They are the freehold owners of the site and the original lessors of one of the two building leases, and the assignees of Robourne Limited, the original lessors under the other. The claimant is itself the guarantor and successor in title of the original lessees under the two building leases. I shall refer to it throughout as FIL, although it was earlier called Fairbriar Projects Limited, before a name change.

2. A condition of the freehold option conferred by the building leases was that RAB should simultaneously obtain a leaseback of the commercial parts of the development for 999 years. The freehold was to be transferred for £1 and the rent under the leaseback was to be a peppercorn. Nonetheless the combined premium for the grant of the building leases, including the options, was some £5.25 million. FIL spent in excess of a further £35 million in carrying out the development.

3. For reasons which were not explained to me, and which do not matter, the land demised by the building leases did not include the whole of the development site. It was therefore necessary for the developer to be granted a licence of that part of RAB's freehold not included in the building leases, to enable it to carry out parts of the development work, and this was achieved by paragraph 16 of the Schedule to one or both of the building leases, in the following terms:

> "The Landlord hereby grants to the Tenant licence to enter onto the remainder of the Site owned by the Landlord and not demised by this Lease with workmen plant and materials to undertake the Tenant's obligations contained in this Schedule."

   As is apparent from that language the Schedule also set out in some detail the developer's obligations in relation to the construction project which I have briefly described.

4. Plans annexed to the building leases also identified, floor by floor, the precise extent of the demise to be included in the lease of the commercial parts of the development ("the Commercial Lease"). These were however amended by a deed of variation dated 16th May 2005 ("the 2005 Deed"), to which modified plans were also annexed.

5. It had become clear to the parties prior to the making of the 2005 Deed (although not at the time of the grant of the building leases in 2002), that it would be necessary for the supply of mains electricity to the residential and commercial parts of the

development to be achieved by two separate transformers connected to the 11,000 volt supply in Essex Road, Islington, rather than directly from the 240 volt mains supply in the same street. Paragraph 13(1) of the Schedule to the building leases had in 2002 dealt with the supply of mains electricity as part of the Tenant's obligations in the following manner:

> "13(1) Notwithstanding that practical completion of the redevelopment or sections thereof shall have been certified the Tenant shall not be considered to have fully complied with the Tenant's obligations hereunder if:
>
> …
>
> (b) any electricity gas telephone and water services are not connected to main public supplies."

The parties did not consider it necessary to amend the Schedule upon becoming aware of the requirement for transformers. I infer that they concluded, as is the case, that equipment to transform voltage from 11,000 to 240 volts is part of the process and system for connection of electricity services to main public supplies.

6. Nonetheless, the requirement for those transformers is reflected in the modified plans annexed to the 2005 Deed. On the ground floor plan there are shown two small adjacent windowless chambers at the northeast corner of the development each marked "substation", with openings onto another larger area described as "Loading Bay/Restaurant Bay Bin stores" accessible from Essex Road by a vehicular entrance described as "loading bay entrance" and, at the other end, by a doorway giving access to the area intended for the restaurant. The two substation chambers have come to be known as the left hand chamber and the right hand chamber. I shall refer to them as "the LHC" and "the RHC" respectively. I was told that the LHC is about 171 sq ft and the RHC is about 180 sq ft. By contrast, the development as a whole contains approximately 82,000 sq ft of developed floor space.

7. As amended by the 2005 Deed, the Commercial Lease was to include the LHC within the demise, the assumption being that the commercial transformer would be located there, and the RHC excluded because the residential transformer would be located there. It is common ground that the intention between the parties was, at that stage, that the two transformers would be installed at the same time. There appears to have been no particular reason why the LHC was chosen as the location for the commercial transformer. Each was equally suitable for that purpose. Since the developer's obligations under the building leases extended only to shell and core in relation to the commercial part of the development, it was not the responsibility of the developer actually to arrange for the installation of the commercial transformer, but it was its responsibility to arrange for the installation of the residential transformer, so as to enable the flats to be fitted out, and for services to be commissioned and tested. Neither of the two substation chambers lay within the demise under the building leases.

8. At some time in 2005 or 2006 it appears to have become impracticable for both transformers to be installed simultaneously and, in the second half of 2006, FIL began discussions with the electricity contractor EDF Energy Networks (LPM) Plc ("EDF")

with a view to the installation by EDF of the residential transformer. It appears from surviving correspondence that EDF's initial attitude was that it required a lease of the space upon which the transformer was to be installed. In August 2006 FIL sought RAB's consent to the grant of the necessary lease (on the mistaken assumption that the substation chambers lay within the demise under the building lease). By October 2006 FIL appears to have been disabused of that assumption and by correspondence invited RAB to grant the requisite lease.

9. In the event, EDF were prepared to install the residential transformer without the prior grant of any lease, and it was in fact installed between April and June 2007 but, unfortunately in the light of what has since transpired, in the LHC rather than the RHC, as originally planned. Without a trial it is impossible to ascertain why this mistake occurred, or who was responsible for it, as between FIL and its building contractors. FIL's evidence suggests that it was done because it would, thereafter, have been much easier for RAB to install its commercial transformer in the RHC than in the LHC, because the latter course would have involved running very high voltage, heavily insulated and potentially dangerous cables through or under the RHC, by then already containing an operational residential transformer. For its part, RAB has been unable to offer any competing explanation, while not admitting that the LHC was chosen for the residential transformer essentially for RAB's convenience. In particular, Mr Tager QC for RAB frankly acknowledged (both to this court and to Master Bowles) that he and his clients could think of no reason why the choice of the wrong chamber might have been motivated by any (let alone any inappropriate) desire by FIL to obtain a commercial advantage by a breach of contract.

10. There is also an issue incapable of resolution before trial as to when RAB found out about the installation of the residential transformer. For present purposes, like Master Bowles, I am constrained to assume that RAB may establish at trial that it did not find out earlier than March or April 2008, and that FIL both knew about it, and chose not to inform RAB earlier.

11. The trigger for the developer's right to exercise the freehold option was the grant of a practical completion certificate for the development. That certificate was issued in April 2008, and unsuccessfully challenged by RAB on the ground that, although completed to shell and core, the LHC was incapable of beneficial occupation by RAB because of the presence within it of the residential transformer. In detailed submissions to the expert appointed to determine issues as to practical completion, RAB complained of its inability to use the LHC either for the installation of the commercial transformer, or for the purpose of storage of materials or equipment (such as scenery or props for the theatre), if an alternative location was found for the commercial transformer. In the same submissions RAB expressly acknowledged that FIL was entitled under the licence in the Schedule to the building leases to install the residential transformer in the RHC, but not the LHC, on the basis that its installation formed part of the Tenant's obligations under the Schedule.

12. RAB having failed successfully to challenge the practical completion certificate, FIL exercised the freehold option on 8th September 2008. FIL proposed to grant the commercial lease with the substitution of the RHC for the LHC, but RAB refused to complete on that basis, with the consequence that the present litigation ensued, beginning in December 2008.

13. Both before Master Bowles and before this court, Mr Tager on behalf of RAB put forward, in substance, six grounds upon which he submitted that RAB had a real prospect at a trial of resisting an order for specific performance. They can be summarised as follows:

    i) For as long as the residential transformer remained in the LHC, FIL could not give vacant possession of the demise promised under the Commercial Lease. That was a breach (albeit small) of an essential term of the contract constituted by the exercised option, so that there was no jurisdiction to grant specific performance.

    ii) FIL had no intention to perform its obligations under the contract when the contract was made (which occurred, he submitted, on exercise of the option). Therefore specific performance should be refused.

    iii) This was a case in which FIL was not unable to perform its obligations, but chose not to do so. It could include the LHV within the Commercial Lease if it first removed the residential transformer, and it would not incur disproportionate cost in doing so.

    iv) The contract which included the option did not on its true interpretation authorise the installation of the residential transformer in either the LHC or the RHC prior to the exercise of the option and the consequential transfer of the freehold. Accordingly, by installing the transformer at an earlier date, FIL had committed a deliberate breach of its obligations, and a trespass, for the selfish commercial purpose of accelerating the date when it could commence the marketing of the residential part of the development. It had, in short, jumped the gun, and should be denied specific performance without first restoring the *status quo ante* by removing the residential transformer.

    v) FIL did not come to equity with clean hands, because it had both deliberately authorised a breach of contract and a trespass in relation to the LHC, and subsequently covered it up for its own commercial gain.

    vi) Specific performance without a lease of the LHC to RAB would be unfair, because it would deprive RAB of the opportunity to use the LHC for the construction of a lift down to the basement, a beneficial project which could not be achieved within or from the RHC.

14. Mr Tager readily acknowledged before me (but probably not before the Master) that, taken as a whole, RAB's case was not that, at trial, FIL should permanently be refused specific performance, but only that it should be granted it on terms which required, as a prior condition, the prior removal of the residential transformer from the LHC, and its replacement, but only after completion, in the RHC or such other part of the residential part of the site as FIL might choose.

15. I will take each of RAB's grounds for opposition in turn, bearing always in mind that, on a summary judgment application, its task was only to establish that it had a real prospect of success at trial. To the extent necessary I will refer at each stage to the Master's reasoning. Needless to say, he rejected all those six grounds as affording RAB any such real prospect of a successful defence. His order was that there should

be specific performance, on the basis that the Commercial Lease should, at RAB's election include or not include the RHC, but not in any event include the LHC, with provision for financial compensation to RAB for any consequential loss.

1: Breach of an Essential Term

16. In a case (such as the present) where a claim for specific performance would not confer upon the respondent to the claim everything for which he contracted, the first question which the court will usually consider is whether nonetheless the respondent will receive substantially that for which he bargained. In Rutherford v. Acton-Adams [1915] AC 866 at 869-70, Viscount Haldane said this:

> "In exercising its jurisdiction over specific performance [a] Court of Equity looks at the substance and not merely at the letter of the contract. If a vendor sues and is in a position to convey substantially what the purchaser has contracted to get, the Court will decrease specific performance with compensation for any small and immaterial deficiency, provided that the vendor has not, by misrepresentation or otherwise, disentitled himself to his remedy."

17. Mr Tager submitted (correctly) that this statement of principle was not intended to enable vendors simply to choose, on completion, for no good reason to remove from the subject matter of the sale any immaterial part of it which, on reflection, they wished to retain, and nonetheless obtain specific performance of the essential balance. The starting point is that a person seeking specific performance must be ready able and willing to perform his obligations under the relevant contract. But in Mehmet v. Benson [1964-1965] 113 CLR 295, at 307-8, Barwick CJ explained that principle as follows:

> "The question as to whether or not the plaintiff has been and is ready and willing to perform the contract is one of substance not to be resolved in any technical or narrow sense. It is important to bear in mind what is the substantial thing for which the parties contract and what on the part of the plaintiff in a suit for specific performance are his essential obligations. Here the substantial thing for which the defendant bargained was the payment of the price: and, unless time be and remain of the essence, he obtains what he bargained for if by the decree he obtains his price with such ancillary orders as recompense him for the delay in its receipt. To order specific performance in this case would not involve the court in dispensing with anything for which the vendor essentially contracted."

18. Mr Tager submitted that the true test is whether or not the applicant for specific performance is proposing to complete on terms which involve a breach of one of the essential terms of the contract. If he is, Mr Tager submitted that it mattered not that it was a trivial breach. It is true that, in some instances, the courts have expressed the issue in that way: see for example Sport International Bussum & others v. Inter-Footwear Limited [1984] 1 WLR 776, at 789. Nonetheless, if pursued to its extreme conclusion, the 'breach of an essential term' test produces potentially absurd results,

and would deny specific performance in a case where that which the claimant proposed would nonetheless confer on the respondent substantially that for which he bargained. It is therefore no more than a useful approximation, rather than a substitute, for the true test.

19. An example considered during argument was that of the vendor of 3,000 acres of farmland who, due to a boundary mistake, found himself unable to give title to one promised acre at the edge of it. Mr Tager acknowledged that, in such a case, specific performance would ordinarily be granted, with financial compensation for the slightly reduced acreage. By contrast, he submitted that if that same acre was available to be sold as a matter of title, but the vendor could not provide vacant possession to it, then specific performance would be refused because of the inability of the vendor to give vacant possession of the whole of the subject matter of the sale, a trivial breach of what he described as an essential term. That would in my judgment be an absurd distinction, as the basis for granting specific performance in the former case, but refusing it in the latter.

20. The present case is, in any event, not strictly about vacant possession. FIL's proffered performance excludes the LHC altogether from the proffered Commercial Lease. Since it consists of a miniscule fraction of the floor area of the commercial part of the development, and since its value is an even more miniscule fraction of the value of the development as a whole, which extends to tens of millions of pounds, failure to include the LHC in the Commercial Lease comes nowhere near to depriving RAB of the substance of its bargain, all the more so since FIL proposes to offer the immediately adjacent and slightly larger RHC in lieu of the LHC.

21. Being therefore of the same view as the Master in this respect, I conclude that the appeal on this ground fails.

2: No Intent to Perform when the Contract was Made

22. This objection proceeded on the basis that, by the time when FIL exercised the freehold option in September 2008, it had already installed the residential transformer in the LHC, and had decided not to include the LHC in the proffered Commercial Lease. As a matter of fact that is correct, but it does not begin to follow that FIL contracted without intending to perform its obligations. Where a contract for the sale of land is constituted by the exercise of an option, I consider that the appropriate date for testing (for this purpose) whether the vendor intended at the time of contract to perform its obligations thereunder is not the date of exercise, but the date of grant, of the option. In the present case the option was granted in 2002, but it may be appropriate to postpone the relevant date until the date of the 2005 Deed, since that is when an obligation to include the LHC in the Commercial Lease was first introduced by amendment. It was not suggested that FIL had by the time of the 2005 Deed decided not to include the LHC within the Commercial Lease or, which is the same thing, to install the residential transformer in the LHC rather than in the RHC. This objection therefore fails.

3: Ability to Perform at Proportionate Cost

23. It is perhaps at first sight surprising that, in principle, a contractor may obtain specific performance where he is merely unwilling, rather than unable to perform his

obligations, even in a case where those which he is willing to perform will confer upon his counterparty the substance for that which he contracted. Nonetheless the Master concluded, by reference in particular to Shepherd v. Croft [1911] 1 Ch 521, that the jurisdiction to grant specific performance in a case where the claimant was not proffering full performance of his obligations was not limited to cases where full performance was impossible: see paragraphs 27 to 45 of his careful reserved judgment. As is there recorded, Mr Tager was disposed to modify his primary submission, and fall back on a less rigorous alternative, namely that the claimant's unwillingness (rather than inability) to perform his obligations would be a bar to specific performance unless performance of his obligations could only be achieved at disproportionate cost.

24. In my judgment the equitable and discretionary power to grant specific performance is not to be confined within a straitjacket of rigid categories. The true principle is that the reasons for the claimant's refusal to perform his obligations in full will almost invariably be relevant, together with all other relevant factors, to the grant or withholding of relief. Thus, as the Master himself accepted, a purely capricious or (as he put it) casual unwillingness to perform by the claimant may lead to a refusal of specific performance, even in a case where the respondent would nonetheless still receive the substance of his bargain. I would go no further than to say that where a contractor seeks specific performance, but is unwilling to perform the whole of his obligations, then he must provide some good reason for that unwillingness. The fact that performance of that obligation could only be achieved at disproportionate cost may be a good reason, but it is does not exhaust the categories of potentially good reasons.

25. Mr Tager's submission was that the removal of the residential transformer in or soon after April 2008, when the matter first became contentious, would have cost no more than about £80,000, and would have involved no significant delay, at that stage, in the bringing of the residential part of the development to market. He did not challenge FIL's evidence, (or the Master's conclusion), that for FIL to remove and relocate the residential transformer by the time of the hearing in 2009 would have involved significant delay in marketing, because EDF would not, during the ten to sixteen weeks of the relocation process, have considered itself obliged to provide a temporary electricity supply to vacant flats, thereby putting the sale or letting of those flats on hold: see paragraphs 75 to 77 of the Judgment. Mr Tager's response was that if the cost of performance was not disproportionate in early 2008, FIL only had itself to blame if it subsequently became disproportionate thereafter.

26. The Master's conclusion was that, on the evidence of cost and delayed marketing to which I have referred, FIL evidently had good reason for its unwillingness to include the LHC, rather than the RHC, in the Commercial Lease. Since he also concluded that RAB had no real prospect of showing that by being given the RHC rather than the LHC, it would thereby suffer any measurable disadvantage, there was nothing of substance to weigh in the balance against granting FIL specific performance and permitting that modest departure from its own contractual obligations.

27. That conclusion necessitated a rejection of RAB's ground 6, to which I shall return. Subject to that, the Master's analysis seems to me wholly unimpeachable. In my judgment it was appropriate for the Master to consider whether FIL had good reason for its unwillingness to include the LHC within the Commercial Lease as matters

stood at the time of the hearing before him, rather than confine himself to an analysis of the perhaps less weighty reasons for FIL's unwillingness in April 2008. Nonetheless, even if that earlier date were to be focused upon as the relevant date, there is still nothing by way of disadvantage to RAB to set against the apparent waste of £80,000 which FIL would incur in moving the residential transformer from the LHC to the RHC, a process which, on evidence which has been unchallenged throughout, would simply make RAB's life more difficult if it subsequently decided (as had originally been planned) to install its commercial transformer in the LHC.

28. Mr Tager attempted to assess the proportionality of FIL's expense in removing the residential transformer from the LHC against the cost and delay which it has undoubtedly incurred in this litigation seeking specific performance against RAB's objection. That is to my mind a wholly false equation. The fact that RAB has chosen to litigate at enormous expense an issue of trivial commercial importance (if divorced from some inappropriate desire to obtain leverage in relation to the negotiation of other matters), does not begin to justify a proportionality analysis which compares the cost of compliance with the cost of litigation about it. This ground of objection therefore fails as well, substantially for the reasons given by the Master.

4 and 5: Jumping the Gun – Followed by Cover-up

29. I can take these two grounds of objection to specific performance together, since they are closely related. Of all RAB's grounds of objection to specific performance, these were the ones to which, on appeal, Mr Tager devoted the greatest time and effort. The objection has nothing whatsoever to do with the placing of a residential transformer in the LHC rather than the RHC. Rather, the objection was that FIL had no business to be installing the residential transformer in either of the sub-station chambers before it acquired title to them by receiving a transfer of the freehold after exercising the option. Therefore, by installing and connecting the residential transformer in advance of exercising (or being able to exercise) the option, FIL thereby stole a march by its trespass upon RAB's freehold and did so for the illegitimate purpose of advancing the date upon which it could begin marketing the residential part of the development. RAB seeks to establish at trial that, having done so, FIL deliberately concealed its trespass from RAB, hoping and expecting to be able to treat the installation of the transformer as a *fait accompli* by the time that RAB found out about it.

30. The necessary foundation stone for RAB's case on this point was that the installation of the residential transformer did not form part of the Tenant's obligations under the Schedule to the building leases. If it did, then far from being a trespass, the installation was permitted by the licence in paragraph 16 of the Schedule. The Master concluded that the installation of the residential transformer clearly formed part of the Tenant's obligations under the Schedule, not least because it was common ground before him that to connect the electrical services required to be installed in the residential part of the development to mains supplies required the installation and use of a transformer. It was conceded by RAB before the Master that the connection required by paragraph 13(1)(b) of the Schedule could not be achieved merely by a temporary connection of the residential electrical services to the 240 volts supply in the street: see paragraph 95 of the Judgment.

31. On appeal, Mr Tager sought to advance RAB's case that the installation of the residential transformer was not part of the Tenant's obligations by two submissions which, I infer from his Judgment, were not made to the Master. The first was that the parties to the building leases cannot have intended to require the installation of a residential transformer before completion of the option, because they should be taken to have known that EDF would want a lease, and they had not granted any sufficient title to FIL in the building leases to enable FIL to grant such a lease to EDF, either in 2002, or by the 2005 Deed.

32. As to that, it is true that in 2002 the parties may well not by then have appreciated the need for transformers. They clearly did so in 2005, because of the inclusion of the LHC in the draft Commercial Lease to be granted on completion of the option, and because the plans annexed to the 2005 Deed described both chambers as sub-stations.

33. In my judgment RAB has no real prospect of establishing at trial that the parties to the 2005 Deed shared an assumption that EDF would require a lease before installing transformers on the development site. Even if they did, the omission to confer title upon FIL to grant a lease comes nowhere near justifying a conclusion that the parties' intention was that the transformers should be installed only after completion of the option. Such a conclusion would be one of those consequences of a literal interpretation of a business agreement that flies in the face of commercial commonsense. I can think of no conceivable reason why either of the parties to the 2005 Deed should have wished to delay the installation of either of the transformers until after completion of the option. This is in any event a question of interpretation rather than subjective intention, and Mr Tager did not identify any aspect of the background matrix of fact which gave him any real prospect of succeeding in RAB's interpretation at trial.

34. The second limb of Mr Tager's submission on appeal was to withdraw his concession that a sufficient electrical connection, for the purposes of paragraph 13(1)(b) of the Schedule, could not be provided by a temporary connection without the use of transformers. This is, again, a question of interpretation of the building leases as amended by the 2005 Deed, and Mr Tager did not identify any facts forming part of the relevant background matrix from which the interpretation on that point canvassed on appeal could realistically be established at trial. Both before the Master and in this court Mr Tager undertook a detailed review of the contractual and other documents relevant to the carrying out of the development. That exercise only served to convince me that the Master was entirely correct to treat the concession that paragraph 13(1)(b) of the Schedule required the installation of a residential transformer as having been both realistic and right.

35. The result of that analysis is that the installation of the residential transformer before exercise and completion of the option was a performance rather than a breach of FIL's obligations under the building leases. The installation was permitted under the licence in paragraph 16 of the Schedule, albeit in the RHC rather than the LHC. FIL were not jumping the gun by installing the residential transformer in 2007, and there was no conceivable reason why FIL should have wished to conceal that installation from RAB. On the contrary, the correspondence shows that, when EDF initially sought a lease, FIL notified RAB of the request, in the manner which I have described.

36. Mr Tager faintly attempted a much reduced alternative case, to the effect that he had a real prospect of showing at trial that FIL decided to act covertly in relation to the installation of the transformer, once EDF had requested a lease but RAB had not responded to the correspondence inviting it to grant one. The short answer to that point is that, in the event, EDF did not persist in its request for a lease, and it is fanciful to suppose that it might be established at trial that, faced with EDF's readiness to proceed with the installation, and authorised by the paragraph 16 licence to instruct it to do so, FIL nonetheless felt constrained to conceal some illegitimate jumping of the gun from RAB. The only thing contrary to the parties' bargain done in connection with that installation was to install it in the wrong chamber, but this has nothing to do with RAB's case about jumping the gun, for the reasons which I have already given. These main grounds of RAB's appeal therefore fail, again, largely for the reasons given by the Master.

6: Alternative Use for the LHC

37. As the pleadings stood after service of RAC's Defence, FIL's case that the RHC would be a more convenient location than the LHC for RAB to install its transformer had been met by a formal denial, which was itself based merely upon non-admissions: compare paragraphs 23 and 24 of the Particulars of Claim with paragraphs 20 and 21 of the Defence. Furthermore, the possible uses of the LHC of which RAB had complained that it was deprived, in its detailed submissions to the expert in 2008, had included only use for the installation of the commercial transformer or storage use. For those uses the RHC was either more convenient, or at least as convenient, for RAB as the LHC.

38. In its evidence in opposition to the application for summary judgment, RAB identified for the first time a contemplated use of the LHC as the location for a passenger lift giving access between the ground floor and the basement car park immediately beneath. It was said that the RHC could not be so used because of its proximity to the car lift down to the car park, and that the installation of a passenger lift from the LHC to the basement would enable RAB to realise its ambition to make part of the basement car park available for VIPs visiting (or performing in) the theatre. RAB therefore had a special use for the LHC of which it would be unjust for the court to deprive it by the grant of specific performance which did not require the removal of the residential transformer and the inclusion of the LHC in the commercial lease.

39. The Master's view was that this assertion of a special use for the LHC was not a genuine statement of RAB's intentions, and that there was no real prospect that it would be shown to be a genuine statement at trial. He reached that conclusion for two main reasons. The first was (as is common ground) that the whole of the basement car park was to form part of FIL's title, for use in connection with the residential part of the development, rather than the theatre or other parts of the commercial development. On the evidence, FIL had no intention of giving up five of the ten spaces in the car park (that number being necessitated by RAB's supposed alternative use). His second reason was that, in any event, had RAB entertained any such genuine intention, it was inconceivable that it would have been kept secret until deployed for the first time in evidence in opposition to the summary judgment application. Mr Tager's only explanation for that secrecy was that RAB wished to wait until the best time for a satisfactory negotiation.

40. Mr Tager went to great lengths before me to clothe the supposed alternative scheme with real substance. I am afraid that, the further that he went, the more contrived and implausible the alternative scheme appeared to get. In its final version it appeared to be based upon the notion that celebrities attending or performing in the theatre would wish to have a way to gain private access out of the public gaze and that this could be afforded by means of basement parking spaces for their cars, a passenger lift up to the ground floor, from which they would then take a staircase back down to the basement theatre. On examination, this tortuous route appeared to involve the hypothetical celebrity emerging from the passenger lift in the LHC into a loading bay full of refuse bins, passing through a locked door into what appeared to be inevitably the kitchen area of the restaurant (since it was adjacent to that loading bay) then into the public area of the restaurant and down a spiral staircase to the theatre which has yet to appear on any plan. By contrast, there is a substantial common boundary between the basement car park and the theatre through which, even if there is at present an insufficient opening, one could be constructed, without the need for a lift up and spiral staircase down as contemplated by the supposed scheme, and without the loss of any car parking spaces.

41. Furthermore, faced with the clear evidence (on solid commercial grounds) that FIL would be disinclined to give up car parking spaces, rather than lease or sell them with residential flats, RAC's evidence even went so far as suggesting that it would buy the flats in order to obtain the car parking spaces.

42. For the reasons which he gave, together with the ever increasing implausibility of the supposed alternative scheme, the more it was investigated on appeal, I am satisfied that the Master was both entitled and correct to treat the evidence that RAB genuinely contemplated such an alternative use for the LHC as a contrivance, capable of being rejected as such without a trial.

CONCLUSION

43. The result therefore is that none of the grounds upon which, both before the Master and on appeal, RAB seeks to resist specific performance, offer any reasonable prospect of success at trial. The Master was entitled to conclude, without the need for a trial, that this was a case in which specific performance ought, in discretion, to be granted notwithstanding that, in a minor respect, not going to the substance of the bargain, FIL was, for good reason, unwilling to perform the whole of its obligations. The appeal is therefore dismissed.