Neutral Citation Number: [2012] EWHC 2918 (Ch)

Case No: HC12CO0648

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22/10/2012

Before :

MR JUSTICE MANN

- -

Between :

(1) Fanfare Properties Ltd	**Claimants**
(2) Trevor David Spiro	
- and -	
(1) Grafton Estate No. 2LP (Nominee One) Ltd	**Defendants**
(2) Grafton Estate No. 2 LP (Nominee Two) Ltd	
(3) Grafton Estate No. 2 Limited Partnership	
(Defendants)	

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Mr Romie Tager QC, Mr Nicholas Trompeter (instructed by **McFaddens LLP**) for the **Claimants**
Mr Mark Wonnacott (instructed by **Mishcon de Reya**) for the **Defendants**

Hearing dates: 17th & 18th October 2012

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Judgment

Mr Justice Mann :

Introduction

1. The dispute between the parties in this matter has led to these proceedings, within which there are two or three applications. The one with which I am dealing with first is a summary judgment application made by the claimants for a declaration as to whether or not certain works which the defendants seek to carry out in Mayfair, and which require access to the land of the claimants, are permitted within the terms of a particular provision in a deed of 1996. The declaration is not actually in those terms but that is the gist of the matter; I will come to its terms in due course.

The land holdings and the rights

2. It is unnecessary for me to go into the chain of conveyancing transactions by which the claimants and the defendants came to be entitled to the land which is the subject of this action. Nor is it necessary for me to distinguish between the various claimants and the defendants respectively inter se. For the purposes of this judgment and in the interests of brevity I can treat each side as one party.

3. The claimants are the owners of land known as Barlow Place in London's Mayfair under a sub-underlease dated 21st August 1973. It forms a wide passageway, broadening into a service area in the central part, running between Grafton Street in the south and Bruton Street in the north. It is an inverted L-shape. At the Grafton Street end it passes under a building bridge - the building above is 4 storeys high. At the southerly end the passageway is bounded on one side by numbers 8 to 10 Grafton Street and on the other by 22 and 24 Bruton Lane of which the defendants are owners (together with the bridge building) under their own long lease. It is for most of its width three or more car widths wide, and it is used by the defendants to provide car parking for a number of cars. The site of the passageway can be seen from the plan which I have annexed to this judgment, which is in fact a copy of the plan annexed to the 1996 deed which I describe hereafter.

4. The claimants' sub-underlease clearly anticipates use of the property as a car park. It does not contain a user clause restricting or providing in the usual terms that the property shall be so used, but there is a clear permission for the property to be so used in clause 5 (c), and that was the clearly intended purpose. The term of the lease expires in 2055. The property is subject to rights of way in favour of the abutting properties.

5. By June 1996 the landlord of the property was Scottish Amicable Life Assurance Society (”SALAS”). The tenant was the first claimant ("Fanfare"). On 24th of June 1996 those two parties entered into a deed ("the 1996 deed") which clearly anticipated development of the property by SALAS. Photographs of the property reveal that it was, and still is, a typical 1960s office build (at least on that part backing onto the claimants' passage), and much of the external face comprises steel windows with panels above, below and to the side.

6. The 1996 deed provided, so far as material, as follows. The recitals included the following:

> “Whereas”
>
> (a) Fanfare has agreed to facilitate the Proposed Redevelopment by the grant of certain temporary rights during the period of the development and of a crane oversail licence…
>
> (c) Fanfare has agreed (to the extent aforesaid) to grant permanent rights for SALAS to maintain a cradle and to install window bays and to open windows and to erect smoke vents so as to overhang the Fanfare Property…”

7. Clause 1 contained the following definitions (amongst others):

> “the "Cradle" – shall mean the window cleaning equipment to be employed upon the SALAS Property from time to time pursuant to clause 4 so as to overhang the Fanfare Property”
>
> The "Crane" – shall mean any tower crane or cranes installed upon the SALAS Property and being used by or on behalf of SALAS in connection with the Proposed Redevelopment
>
> The "Planning Consent" – shall mean a conditional consent acceptable to SALAS granted in respect of [a specified planning application]

> The "Proposed Redevelopment" – shall mean SALAS's proposal (a) to demolish certain of the buildings currently upon the SALAS Property and to construct new buildings within that part of the SALAS Property shown hatched pink on the Plan pursuant to the Planning Consent and (b) to refurbish the building known as 8 Grafton Street.
>
> The "SALAS Property" – shall mean all that parcel of land…being [8, 9 and 10 Grafton Street and 22/24 Bruton Street] as shown edged red on the Plan [save for the underside of the bridge building]."

8. Clause 2 provided arrangements for redeveloping the property:

> "Redevelopment of the SALAS Property
>
> 2.1 Fanfare hereby agrees not to object to any buildings or other structures constructed as a result of the Proposed Redevelopment or their effect…
>
> 2.2 Fanfare hereby covenants with SALAS that during the Proposed Redevelopment Fanfare:
>
> (a) shall following not less than 10 working days' prior written notice permit the installation maintenance dismantling and removal of scaffolding upon that part of the Fanfare Property shown coloured green on the Plan…
>
> (b) shall not object to the demolition redevelopment reconstruction and refurbishment (as appropriate) of any buildings on the site of the Proposed Redevelopment including in particular but without prejudice to the generality of the foregoing those parts of the SALAS Property or the Fanfare Property above the SALAS Property but within SALAS's airspace shown cross hatched black or hatchback on the Plan."

9. Clause 4 was entitled "Surrender of part of the Fanfare Property and rights granted over the Fanfare Property" and clause 4.2 is the provision which lies at the heart of this application:

> "4.2 Fanfare hereby grants permission to SALAS:
>
> a) to excavate along the boundary between the Fanfare Property and the remainder of the SALAS Property to a width of 2 metres and to lay and thereafter retain repair maintain renew replace and relay wall footings and foundations of concrete or brick or stone within that part of the Fanfare Property shown coloured green on the Plan as a foundation for the wall of the new building to be constructed on the SALAS Property
>
> b) to install maintain use and remove a Cradle from time to time for the cleansing and maintenance of any building constructed on the SALAS Property so as to overhang that part of the Fanfare Property shown coloured green on the Plan
>
> c) to install and retain outward-opening windows above ground floor level only within that part of the Fanfare Property shown coloured green on the Plan
>
> d) to install and retain window bays smoke vents and other projections above ground floor level so as to overhang that part of the Fanfare Property shown coloured green on the Plan immediately adjacent to the land hatched pink and blue on the Plan but only so as to project into the Fanfare Property airspace by 0.6 metres
>
> e) to lay make connections to repair maintain inspect improve renew relay and replace electricity cables within that part of the Fanfare Property shown hatched black and cross hatched black on the Plan or such other location as Fanfare shall first approved such approval not to be unreasonably withheld in respect of unbuilt upon areas
>
> f) to enter upon the Fanfare Property from time to time with or without workmen machinery scaffolding equipment and materials for the purposes hereby permitted
>
> 4.3 The permissions given in clause 4.2 are subject to the following terms and conditions:
>
> a) SALAS shall take all appropriate measures to ensure that the appropriate works are carried out in a good and workmanlike manner

> and shall make good without unavoidable delay any physical damage thereby caused to the Fanfare Property or any services contained thereon or thereunder without cost to Fanfare
>
> b) SALAS shall use all reasonable endeavours to maintain or to procure the maintenance of all works or items hereby permitted upon the Fanfare Property in such repair and condition so as not to interfere with the safety of persons using the Fanfare Property"

I interject that the word "install" is in fact spelt with one L throughout the deed; I have used two.

10. The redevelopment anticipated by the 1996 deed did not occur. Rights under the provisions of clause 4.2 were never invoked by SALAS. As will appear, the primarily relevant provisions of the deed for the purposes of this application are paragraphs (c) and (f) of clause 4.2.

11. The defendants in due course acquired the relevant interest in the Grafton Street and Bruton Street properties (and other adjoining property), and thereby the reversion on the claimants' lease, and produced plans for their own redevelopment. The claimants got wind of the content of those plans when planning permission was sought. They acquired details of the works to be carried out. Those works essentially involved, amongst other things, stripping out the property, and, crucially for the purposes of the present application, the removal of the windows and surrounding panels and brickwork on most of the face of those buildings where they abut the claimant's property, including the inner face of the four-storey bridge building linking the Grafton Street and Bruton Lane parts of the property. The claimants considered that those activities would require that the defendants carry out certain activities on their land, including erection and maintenance of scaffolding and the storage of materials. They taxed the defendants with this and an extensive debate occurred in correspondence as to the entitlement of the defendants to do that sort of thing. I do not need to go into that correspondence for the purposes of this application.

12. The claimants did not get satisfaction from that correspondence and commenced these proceedings on 20th February 2012. The proceedings sought declaratory relief as to the ability or otherwise of the defendants to carry out their development without infringing the claimants' proprietary rights (in other words, trespassing on their land). Various points have been taken as to the appropriateness of the form of declaratory relief claimed at the time, but those points have been overtaken by events and further drafting. The defendants immediately launched a strike-out application. I do not need to deal with that

application in this judgment. It, too, has been overtaken by events, though there may be important costs points arising out of it.

13. The claimants issued their own application for summary judgment on the footing that the defendants had no real prospect of successfully defending the claim to the declaration that is sought. The application was issued on 12th March 2012, based on material submitted for and in connection with the defendants' planning application, which was then still outstanding but likely to be granted. In support of the application the claimants procured a witness statement from Mr Anthony Stanford, an architect. He considered the information that he had about the methodology of the proposed development, and expressed the view that a number of aspects of it would indeed infringe the property rights of the claimants because various activities would have to take place on their land, including the erection of scaffolding. At the time the claimants thought that the debate would be about a provision in a superior lease which they believed would be invoked by the defendants, and not clause 4.2 of the 1996 deed.

14. On 29th March 2012 the defendants obtained their planning permission. However, they also responded to the points made by the claimants by preparing a revised scheme, supported by a method statement describing how various aspects of the scheme would be carried out. Both schemes involved the removal of the outer cladding, windows and brickwork on, inter alia, the faces of the defendants' buildings fronting onto the green lines shown on the 1996 plan at the southern end of the defendants property, including the face of the bridge building. The original plan provided for those faces to be completed by adding fixed glazing, panels and brickwork. The new scheme provided for outward opening windows to be used in each of those faces. An application has been made to amend the planning permission to reflect this new scheme.

15. That change generated a shift of focus as to the relevant provisions of the documentation. In particular, it brought into focus the provisions of clause 4.2 of the 1996 deed, because it became apparent that the defendants were relying on what they saw as their rights to enter on the claimants' land with workmen and scaffolding to install outward opening windows. Mr Stanford prepared a further witness statement expressing the view that the newly proposed works would still require the defendants to enter on the claimants' land, and the claimants continue to maintain that that could not be done without their consent.

16. The response to that evidence was a witness statement in general terms from a director of the first and second defendants, Mr Peter Dee-Shapland, claiming, in general terms, that there was no intention to infringe the claimants' rights and that the defendants were merely invoking their own rights. In particular, so far as there were proposals to enter on the claimants' land and air space (which it is accepted there were), it was said that they

were justified because, in the circumstances, the defendants were doing so in order to install "the new outward opening window system". Scaffolding would be placed on the claimants' land, within the green-marked area, for that purpose and for that purpose only.

17. The defendants also procured evidence from Mr Stephen Tagg, another architect. Mr Tagg gave further details of the methodology proposed to carry out the development, and stated that, contrary to the impression of the claimants, the removal of the existing facade and the creation of the new one would, for the most part, be done from within the defendants' own property and would not require works to be done from the scaffolding which, it clearly appears, would be placed on the green-marked land. Scaffolding would still be required, but only for the purpose of installing the outward opening windows, and that use of the defendants' land was sanctioned by those 4.2 of the 1996 deed. I return below to the details of the defendants' proposals in this respect.

The issues

18. That, therefore, is the background to the present dispute. The effect of the recent exchange of evidence is to narrow much of the scope of the dispute. It has become a dispute about whether or not the scaffolding which the defendants admittedly intend to place on the claimants' land can be justified by clause 4.2 or whether it is a trespass. The claimants have amended their claim form and their application notice so as to seek a declaration in the following terms:

> "IT IS DECLARED THAT:"
>
> The erection and retention of scaffolding (together with associated sheeting and hoarding) in the areas shown green on the Plan that abut the rear elevations of 8 Grafton Street and 9/10 Grafton Street as well as both elevations of the Bridge Link, during the period between the dismantling phase of the New Scheme and the stage of the final clean and de-snag (before the scaffolding is struck), in the manner described in the Method Statement, would constitute a trespass upon the land demised by the 1973 Fanfare Sub-Underlease.
>
> [Remainder of Order to be provided for]

SCHEDULE

In this Order the following expressions shall have the following meanings:

"**the 1973 Fanfare Sub-Underlease**" means the sub-underlease dated 21 August 1973, and made between (1) Abbey Life Assurance Company Limited and (2) Fanfare Properties Limited

"**the Plan**" means the plan annexed to the deed dated 24 June 1996, and made between (1) Scottish Amicable Life Assurance Society and (2) Fanfare Properties Limited

"**the Bridge Link**" means the five-storey bridge link which passes over the Bruton Lane end of Barlow Place

"**the Method Statement**" means the Preliminary Logistics and Method Statement dated 4 October 2012, prepared by McLaren Construction (which is exhibited to the witness statement of Mr Stephen Tagg dated 10 October 2012)

"**the New Scheme**" means the scheme of development intended to be carried out by the Defendants in the manner described the witness statement of Mr Stephen Tagg dated 10 October 2012 and in the Method Statement

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19. There is a dispute between the parties as to the usefulness of that declaration, and therefore as to whether it should be granted or not. I deal with that below. If the declaration is potentially a proper one to grant then there are issues between the parties as to whether the activities proposed by the defendants amount to the installation of outward opening windows within the meaning of clause 4.2. This requires a consideration of the meaning of "install", and whether what the defendants are putting into the building (to use a neutral term) is just a series of outward opening windows or whether it is doing something else.

More detail of what the defendants propose to do

20. However, before considering those issues it is necessary to set out more detail of what it is that the defendants propose to do. First, it is necessary to give some further details of the current plans (as they appear in the evidence of the defendants) in relation to the faces of the relevant buildings and of their claimed need for scaffolding.

21. This detail appears from the witness statement of Mr Tagg, from a method statement of McLarens, exhibited by him, and from plans which are exhibited by Mr Dee Shapland. They demonstrate the following features:

(a) the plans show the current walling and fenestration and the proposed walling (again using a neutral term). They show the old walling as being the windows and panelling, together with brickwork (mainly on the Grafton Street properties) and the glass, panelling and brickwork of the new building. The new building face has large glass panels on every floor which will be openable in an outward direction. The latest evidence is that they will be hinged at the top. Mr Tagg says that the defendants have confirmed their desire to "future proof" their properties, so as to

enable them to be used in a flexible way. He refers to environmental concerns about running air-conditioning systems, and property owners are, he says, looking at mixed systems which allow for opening windows so that the air conditioning can be switched off when not required. It is hard to believe that that is the real motivation for the change of plan. It is overwhelmingly more likely that the defendants have changed their plans for the fenestration because they see it as giving them a better opportunity to erect scaffolding which is required. This view is reinforced by the fact that the opening windows occur only in the faces of the buildings which abut the claimants' land and where clause 4.2 is relied on as justifying the presence of scaffolding. However, nothing in this application turns on that.

(b) Those plans confirm that the complete external face of each of the buildings, including the bridge, are to be taken down, apart from some areas where the face of the concrete frame comes out to the face on the bridge. The concrete frame will remain (though additional works are to be done to it). The entire face will be replaced at first floor level and above by glass. This glass will be a mixture of large opening windows, a lot of smaller non-opening panels providing additional fenestration, some obscure glass above and below the opening panels, and glass panels covering structural members. Mr Stanford has calculated the percentage area of the openable windows and says that they comprise about 50% of the area of the bridge and just over 30% of the area of the other two buildings.

(c) Mr Tagg explains that the construction method will enable all the removal of the existing walls and windows to be done from within the defendants' property. According to his methodology (which is the one referred to in the declaration) it will not be necessary to work from the outside or carry debris outside their property and over the defendants' land. The same is said to be largely true of the installation – the window units and other elements can be brought through the defendants' land and do not have to be installed from the outside. However, his witness statement does describe the "new window framing, spandrels and glazing" being taken though the building, offered through the opening "and fixed in place from the scaffolding". The exhibited method statement also refers to "a final scheme and de-snag" taking place from scaffolding. In his submissions Mr Wonnacott, who appeared for the defendants, also described the need for men to be on the scaffolding during the demolition phase, but that does not appear in Mr Tagg's evidence. He describes demolition but does not describe this need.

(d) Mr Tagg confirmed that scaffolding would be required on the green land. He does not in terms specify what the duration of that scaffolding would be, either in terms of timing or in terms of the phases of the building operation, though as Mr Wonnacott accepted his evidence strongly suggests that it would be present for the whole of works affecting the property, expect perhaps for internal fitting out. It certainly does not suggest that it will be confined to a limited, single, continuous process of removing the face of the buildings and replacing it with the new glass facing, with nothing going on in between. The scaffolding would be wrapped with Monoflex sheeting and would also have a hoarding at ground floor level "to secure

the works area". Other evidence shows that the scaffolding would protrude 1.35 m from the face of the building, with the hoarding adding another 75 mm, and indicates that a major the purpose of the scaffolding was (as one would expect) to protect neighbouring occupants and passers by from the escape of rubble, dust and other things which should not be allowed to escape.

(e) The McLaren method statement states that the face of the building would be covered by scaffolding "where allowed". It also confirms that the brickwork and existing windows and other glass would be removed internally and their replacement installed likewise.

(f) The overall length of the project has been specified by the defendants as being 20 months.

Whether the declaration should be granted

22. Mr Wonnacott's first submission was that the declaration sought should not be granted because it would serve no useful purpose. The declaration related to a draft methodology which the defendants were free to change, and if they did so then the declaration would be rendered useless. He suggested some declarations which might, in the circumstances, be useful (for example, whether clause 4.2 could be used to justify the erection of scaffolding to remove windows as opposed to putting them in, though that is just an example which is not germane to this case, because there is no dispute about that), but the presently sought declaration was said not to have any use. He submitted that it is not useful to grant a declaration in relation to a whole scheme. Furthermore, the declaration did not serve a useful purpose because it did not give any guidance as to what the defendants could do. In addition, the declaration would not assist the parties because all it would do would be to rule in its own terms, with no guidance being given in relation to any other course of action.

23. I do not accept that submission. The defendants have propounded various schemes. The schemes represented their intention from time to time in relation to the works described therein. The defendants intend to redevelop the property, and have sought planning permission. They have amended those permissions, and it is a proper inference that they intend to carry out what they have applied for. The witnesses have expressed the view that they are entitled to do the works contained in the latest proposals. Mr Tagg describes the overall scheme in general terms, and repeats that:

> "The Defendants propose to re-clad the properties with a new flush outward opening window system."

In order to carry out the development the defendants have had a preliminary methodology prepared. Of course it is preliminary, and of course it may change, but what is in evidence is their latest proposals. Mr Tagg states:

> "I am informed by Mr Dee-Shapland that, if there is any likelihood of the works infringing on rights held by the claimants [sic] the method of those works will be changed so that there is no such infringement."

24. It is plain from the evidence that the defendants consider that the current methodology does not infringe any of the claimants' rights; it is plain that the claimants say that they do. There is therefore a dispute which can usefully and properly be resolved so that the defendants can, if they think fit, alter their method to ensure there is no infringement, as Mr Dee-Shapland said he wanted to do. If nothing is done, it is highly likely that the defendants will go ahead with their current proposals (subject to any injunctions being granted). If they are declared to be unlawful, they will not go ahead with their proposals. To that extent, therefore, the declaration will serve a useful purpose. It is ruling on a real current dispute between the parties.

25. Nor is it right to say that the declaration will be useless because it does not tell the defendants what they <u>can</u> do. In circumstances such as the present, the court does not perform an advisory function. It will, if circumstances require, grant a declaration as to the propriety of past or intended future conduct when measured against a claimed right to do it, but will not plot a course of action for one or other of the parties. Nonetheless, it is likely that the parties would gain some assistance outside the strict terms of the declaration, or of a refusal to grant it. In considering whether or not it is right to grant the declaration in this case, certain points of construction will have to be decided. If decided, they will appear in the judgment. Those findings are likely to be binding on the parties, and thus to give some "guidance" on their future conduct. The terms of the judgment may not govern every possible aspect of the future conduct of the parties in relation to their dispute, but they are likely to go beyond the strict terms of the declaration.

26. Accordingly, I refuse to rule out this declaration at the outset on the ground that it can serve no useful purpose. If granted, it will serve a useful purpose.

Whether this case is suitable for summary judgment

27. Both parties recognise that relatively short questions of construction could be appropriately made the subject of an application for summary judgment. Mr Tager QC, who appeared for the claimants, submitted that this was such a case. Mr Wonnacott

disputed that. He said that the points of construction that arose in relation to clause 4.2 needed to be put in a wider factual matrix which did not currently appear. In particular he said that the critical words had to be construed against the background of the actual plans which SALAS was proposing in 1996, and they were not available in this application.

28. The force of this point can only be judged in the context of a consideration of the nature of the construction points that arise, and I shall return to it in that context.

The argument on construction of clause 4.2 and its application to the present case

29. The claimants accept that the provisions of clause 4.2 create rights in the nature of an easement enforceable against and by successors in title to the two relevant properties. Although the declaration is couched in terms of trespass, the real issue is as to the extent of the permission to enter given by clause 4.2 (f) of the 1996 deed. The defendants say they are entitled to enter and erect scaffolding because they are going to be installing outward-opening windows above ground floor level within clause 4.2 (c) and that is all they are doing on that face; the scaffolding is required for that purpose and for no other purpose. The argument against them is that they are not "installing" anything within the meaning of that provision, and what they are proposing to do is not to install windows. That is not a proper description of their work. Nor is it a proper description of the purpose of the erection of the scaffolding. The scaffolding is really there to protect the surrounding properties from the potentially dangerous effects of the works and to bound the development site.

30. The defendants claim that their works do indeed involve the installing of windows – they are installing a windows system, as they describe it. They say that when the word "install" is properly construed, it covers what they are proposing to do. The scaffolding will be there solely for the purpose of that installation. It is not there for any other purpose, and will not remain there for any longer than is necessary to achieve that end.

31. The two questions of whether the defendants are seeking to "install" anything, and whether or not the subject matter of the activity is properly described as an outward-opening window (or a series of them) are to a considerable degree linked, because the nature, or more particularly the extent, of the activity involved reflects on whether or not it is windows (as opposed to something else) that are going in (or are being placed on) the buildings. However, there are aspects of each which make it appropriate to consider them separately.

32. The Oxford English Dictionary defines "install" as follows:

> "To place (an apparatus, a system of ventilation, lighting, heating, or the like) in position for service or use."

Mr Tager says that that involves the concept of placing the installed item in an existing surrounding. Thus it would cover the placing of a window in a wall which already existed. The act of installation does not involve erecting the surrounding environment (such as a wall) as well. I agree with him, so far as this definition goes.

33. There is some support in the 1996 deed for that having been the intended meaning. The word (or its derivatives) occurs at various points. I have set them out above. Thus the Crane is to be "installed". It is to be placed upon the existing property. The property is not to be built as part of the installation. Clause 2.2 (a) allows the "installation" of scaffolding on the green land. It goes within, or against, what is there. The natural reading of that word in that context coincides with the dictionary definition. Clause 3 uses "installation" in relation to the Crane in a similar sense, as does clause 4.2 (b).

34. *Engineering Industrial Training Board v Foster Wheeler* [1970] 1 WLR 881 deals with the meaning of installation in the context of a statutory instrument which provides a very different context from that of the 1996 deed. The essential point in that case was whether the process of assembling a boiler from pre-manufactured elements was "the installation… of… plant", which is a different question to that which arises in this case. However, it does give it a meaning which is in line with a dictionary definition.

> "The word 'installation' in this context means the bringing of an entire piece of plant on to a site and putting it into position on the site. It does not mean the putting together of parts as is done here, piece by piece, pipe by pipe, bolt by bolt, weld by weld, until it gradually becomes one whole." (per Lord Denning at page 885D)

> "It conveys putting in place something already made so that it can be used. There may be an element of assembly required; but basically a thing installed is ready to work when it is put in its place and, if necessary, connected up." (per Lord Wilberforce at page 887)

35. It does not seem to me that, giving that word a common-sense meaning in its present context, what the defendants are proposing to do is an actual installation at all. In reality what they are doing is demolishing a rear wall, or rear face, of a building and putting up a new one. Even allowing for the fact that outward-opening windows are to be included in the new one, the process is not, in my view, properly described as "installation" of those windows, though it may involve that as part (but only part) of the activity. It is a different overall activity. It seems to me that in the context of the deed the parties were indeed contemplating the act of placing a window in an existing context. That is not, in reality, the process which the defendants propose.

36. Nor does it seem to me that what is being put in place is just windows. It is true that on the latest plan they will be windows and they will be outward-opening. However, what is being placed on the land is a new facade, and not just windows. Mr Wonnacott (and his clients) sought to get around this difficulty by describing what they propose to put in place as a "windows system". Whether or not that is an adequate description in any context (and Mr Stanford had not come across the expression "outward-opening window system" before), I do not think that it helps the defendants to get out of the difficulty they are otherwise in. What is being done is the construction of curtain walling. Part of that walling includes outward-opening windows, but a very large part does not. It also comprises non-opening glass panels giving on to interior spaces, obscure glass panels across vertically rising columns in part and across other minor structures in others, and glass panels across the edges of the floor slabs. It is basically a wall made of glass. One does not make it a window by adding the word "system". Nor does it improve one's chances of making it a window (or windows) by making sure that the rest of the "system" is of the same material as windows (glass - an unnecessary refinement if Mr Wonnacott's arguments were correct).

37. Mr Wonnacott seized on the use of the word "system" in the OED definition, but that does not help him. That is merely an example. A "ventilation system" makes sense. A "window system" does not make sense (unless it is part of the modern tendency to increase the significance of simple objects by adding the word "system" to their name). I do not think that what the defendants were proposing to put in was a "window system" at all. It is an expression devised (or contrived) in order to try to make the thing fall within clause 4.2 (and perhaps even with an eye to the dictionary definition). It fails. Whether or not there is a stage in the operation in which the actual outward-opening windows are installed within the true meaning of that verb, on any footing the defendants want to erect scaffolding to achieve far more than that. They want it to put up the whole wall.

38. It is also important to look at the phrase in the round. The concept in clause 2.4 is installing outward-opening windows, as a whole concept. Incursions into the claimants' property are justified if that is the activity. One then looks at the works that are proposed

to the rear elevations of the defendants' property and asks if that is a description of what they intend to do, looking at the works which the scaffolding is said to support (literally and figuratively). It seems to me that the answer to that is No. What the defendants are proposing is the demolition of the rear face (with the exception of concrete supports where they form part of the face, as they seem to for the bridge) and the rebuilding of that face with and in glass. This is not merely a question of immaterial labelling. That is an accurate description of what is happening. It is not in substance an accurate description of what is happening to say it is installing outward-opening windows. As I have observed, at some stage in the operation there may be something which conforms to that description (at the point at which the opening windows are put in place), but it is not an accurate description of the process as a whole. The defendants are entitled to deploy scaffolding in order to install outward-opening windows. They are not entitled to deploy it for the whole of an operation of which installation of such windows forms part. The use becomes colourable in those circumstances. It matters not that the rest of the face is glass, or that some of it (but not all) might be called windows. So far as the non-opening parts are windows they are not (obviously) outward opening, and so far as they are not even windows (which applies to those pieces of glass used to face concrete structural members) then they cannot begin to qualify. They are not in any meaningful sense part of the outward-opening windows; nor are they (as Mr Wonnacott submitted) "components which are necessary in order to make the outward opening windows work". They have nothing to do with such a function. They are there to be bits of the wall that are not windows, just as bricks would be. And this picture is not changed by grandly describing the whole thing as a "windows system". That is applying a fancy label in order to make the face something that it is not in order to bring it within the wording of clause 4.2 so that it can then be called a "window" (or lots of windows). That piece of verbal sleight of hand does not work. Mr Tagg almost gives the game away when in one paragraph of his witness statement he refers to the "curtain walling and glazing systems" (see paragraph 43). Other than the unnecessary addition of the word "systems", that is a far more accurate description of what is being put in place than "window systems".

39. For those reasons, therefore, I find that on the material before me the activities during which outwardly opening windows will be placed in the building do not come within the activities described in clause 4.2(c). However, Mr Wonnacott says that I should not grant the declaration sought because there is a real prospect that the conclusion will be different in the light of extrinsic evidence which is not available at this hearing. The matter should go to trial. He points out that the 1996 deed was executed in the context of development plans which were apparently known to both parties to the deed. The terms of the proposed redevelopment, and in particular details of the fenestration proposed by SALAS, were said to be capable of bearing on the points of construction arising before me. If it were the case that the development proposed by SALAS could be seen to have similarities with the defendants' scheme, in that it contained large outward opening windows, then that would shed light on whether the "window system" proposed by the defendants is within clause 4.2. Those plans were not available at the hearing before me. He made a particular point about windows in the face of a proposed new (or extended)

bridge. The terms of the deed were capable of applying to that face, and it therefore demonstrated that the parties had in mind that outward-opening windows might be installed in both an old and new building, and he said that was capable of going to construction.

40. I do not think that there is a real prospect that any such evidence would assist the debate. If it showed that there were no outward-opening windows in the SALAS proposals, then it would not assist. If it showed that there were some, and they were not as extensive as those proposed by the defendants now, then again it would not assist. Even if (which is in my view fanciful) the plans showed huge areas of glass with some large outward-opening windows, that would not assist the debate on the arguments on which I have hitherto found against the defendants. The installation of those windows and their surrounding glass would be justified by the general development permission in clause 2. Other than permitting them to be opened over the claimants' land, clause 4 would have nothing to do with them. So on no sensible (or even non-sensible) hypothesis would those drawings help. Furthermore, if anything might have assisted the defendants, it would have been the third and most extreme possibility which I have posed. Mr Stanford says that the large windows proposed by the defendants are much larger than any side-hung outward-opening windows that he or a leading window manufacturer have encountered. They would be very heavy and special technical considerations would be needed to establish how they could be supported by hinges. The defendants in fact propose vertically hung large windows. These technical obstacles are not insuperable (probably) but they make it all the less likely that SALAS would have proposed such a thing, particularly since, unlike the defendants, they did not need to pose such technical problems for themselves.

41. I therefore regard the likelihood of any further relevant evidence being available at the trial which might go to the point as being fanciful. It is therefore not a bar to my granting summary judgment if I would otherwise be minded to do so.

42. Another point was taken in relation to the method to be deployed according to the evidence, which Mr Tager said had the effect that the scaffolding that was proposed on or over the claimants' land was not there solely to facilitate the installation of windows. In essence he relied on the length of time that scaffolding would be there and the fact that it was necessary not merely for the installation of windows, or even to permit the demolition and reconstruction of the rear faces of the buildings, but also to form a secure site boundary and to protect neighbouring occupiers from the escape of noise, debris and other deleterious matters from other aspects of the development.

43. In support of that submission he took me to the statements about scaffolding and the scope of the project in method statements preceding that which was exhibited by Mr Tagg. Those seem to show that the scaffolding would be put in place to secure the site at the latest when works of demolition of the rear facades took place, and that other works of demolition and reconstruction would take place in the buildings behind the scaffolding before the new rear facades were put in place. Furthermore, the scaffolding would then remain for a further period until there was a final wash-down of those facades. That process meant that the scaffolding was not there merely to facilitate the installation of windows even if the demolition and reconstruction phases could be regarded as within clause 4. The scaffolding had a wider purpose which was not permitted. Mr Tagg's evidence, which was not quite so clear on the question of the nature of works that would be carried out behind scaffolding, was nonetheless consistent with the previous scheme. Accordingly, for that reason too, the scaffolding did not qualify.

44. I think that Mr Tager is probably right about this and that provides a further reason why the proposals of the defendants cannot be implemented without a technical trespass. However, it remains right to say that Mr Tagg's witness statement does not so clearly suggest that the scaffolding would be used for extraneous purposes. I strongly suspect that that would be the intention, and Mr Wonnacott accepted that the evidence made it look as though the scaffolding would therefore be there during the whole of the construction works. This impression is strengthened by the fact that the direct use of the scaffolding in the alleged installation process is very limited – see above. That means that the principal activity, at least in terms of the length of time the scaffolding's presence, is protective, and the need for protection of neighbours exists in respect of a lot of activities beyond the demolition of the existing wall structures and the recreation of the new. Nonetheless, it is the scheme as described by Mr Tagg that has to be considered when it comes to the declaration. Since it is not completely clear on the point, I prefer to rest my decision on the points which I have already decided rather than this one, though I repeat that I think it is one on which the claimants are highly likely to succeed so far as one is construing Mr Tagg's scheme.

Conclusion

45. I have therefore come to the conclusion that the construction of the relevant document, the relevant factual material and the legal arguments arising are clear enough that it can be said that the defendants have no real prospect of defending this claim. No useful purpose would be served by a trial, at which the issues would be the same and would be decided the same way. There is no real prospect of any further material coming to light during the journey to trial, or the trial process, which would assist the defendants. They have made their current proposals for redevelopment, and they demonstrate that the defendants are intending to erect scaffolding on the claimants' land for a purpose that does not fall within clause 4.2 of the 1996 deed. Accordingly they are proposing a trespass, and it is right to grant the declaration sought.