



Neutral Citation Number: [2024] EWHC 259 (Ch)

Case No: CH-2023-000140

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
CHANCERY APPEALS (ChD)

Rolls Building
Fetter Lane
London, EC4A 1NL

Friday 9 February 2024

Before :

MR JUSTICE FANCOURT

Between :

Matthew Blake Jacobs	<u>Appellant</u>
- and -	
Chalcot Crescent (Management) Company Limited	<u>Respondent</u>

Tom Morris (instructed by **Memery Crystal**) for the **Appellant**
Simon Williams (instructed by **the Respondent**) for the **Respondent**

Hearing date: 22 January 2024

APPROVED JUDGMENT

This judgment was handed down via remotely at 10.00 am on 9 February 2024 by circulation to the parties or their representatives and by release to the National Archives.

Mr Justice Fancourt:

1. This is an appeal against an order of HHJ Hellman (“the Judge”) made in the County Court at Central London on 8 June 2023. The Judge declared that the defendant company had not unreasonably withheld its consent to alterations to Flat 4, 46 Chalcot Crescent, London NW1 (“the Flat”) made by the claimant lessee. The Judge further declared that the works were therefore a breach of the covenant in the lease not to make such alterations without consent of the lessor (not to be unreasonably withheld). The Judge dismissed the claimant’s claim for a declaration that consent had been unreasonably withheld.
2. The claim and counterclaim were tried between 21-23 November 2022 with oral closing submissions over a further day on 1 December 2022. The Judge heard evidence from the claimant, Mr Jacobs, from Professor Schehtman and Ms Simone Schehtman, directors of the defendant company, and from Mr Levy, the building surveyor retained by the defendant company to advise it on the application for consent. The Judge handed down a detailed and carefully considered judgment on 10 January 2023.
3. Permission to appeal on 4 grounds was granted by Miles J on 26 September 2023, with the application for permission to appeal on a further ground (Ground 3) adjourned to the hearing of the appeal.
4. The grounds of appeal are (in summary):
 - i) It was not open to the Judge to find for the defendant on the only basis that he did (reasonable concern about fire damage to the structure of the building) because that distinct basis of objection to the alterations had not been pleaded, nor had it been fairly raised or addressed as a ground of refusal at the trial.
 - ii) The Judge was wrong to conclude that the defendant did in fact withhold consent on that ground, which was a conclusion that was not supported by the evidence and was a finding that no reasonable judge could have reached.
 - iii) The Judge should have found that even if it was a ground on which consent was refused, it was only an ancillary consideration that was outweighed by the other bad grounds for refusal, and so overall the withholding of consent was unreasonable.
 - iv) The Judge should have held that consent had been unreasonably withheld by 24 April 2020 (i.e. well before the letter of refusal dated 16 July 2020) and was wrong to hold that there was no withholding of consent by reason of the delay in addressing the claimant’s application.
 - v) The Judge was wrong to find that it was reasonable for the defendant to withhold consent on the ground of concern about fire damage to the structure of the building.
5. Given the grounds of appeal, in particular ground 1, it is of some relevance to refer to the basis on which the Judge refused permission to appeal. He gave as his brief reasons for refusal:

“Reasons given by D to C for withholding consent included that the proposed works prejudiced the fire safety of the block. I took this to include prejudicing

the structural integrity of the building. I found that D's position was objectively reasonable and one which, based on the available information, D could reasonably have adopted

This was a central issue at trial. Confronting it was unavoidable. There is no real prospect of C establishing on appeal that the court ought not to have considered the issue or could not properly have decided it in that way."

6. The building in question is not a block in any conventional sense but a converted terraced house, with flats on the basement, ground and first floors, and the Flat on the second and third floors, extending into the roof space at third floor level (as I was told at the hearing). Above the Flat is the roof covering. Professor Schehtman and his family own the three lower flats in the building and he lives in one of them.
7. The Judgment does not deal with the extent of the demise of the Flat, as described in the lease of the Flat, but it appears to have been understood and accepted that the demise did not include the roof covering (and any associated structure) itself. Whether it included the lateral walls at second and third floor levels is unclear.
8. It is unnecessary to refer further to the terms of the 999-year lease of the Flat because it was common ground that the effect of the alterations covenant and s.19(2) of the Landlord and Tenant Act 1927 was that the defendant could not unreasonably withhold consent to the alterations that the claimant had proposed and – in the event – had carried out, without consent in fact having been granted by the defendant.
9. The request for consent was made by Mr Jacobs by letter dated 23 August 2019. It included a letter from Mr Darren Ettles of Integral BC Solutions Limited, an Approved Inspector for Building Regulations, which confirmed that the proposed alterations to the Flat would meet the requirements of the Building Regulations 2010.
10. Professor Schehtman emailed Mr Jacobs on 18 September 2019 saying that the defendant would instruct its surveyors to review the application while at the same time looking to protect the ownership rights of the landlord and the other long leaseholders in the building. Mr Levy then contacted Mr Jacobs on 8 October 2019 introducing himself as the appointed surveyor and asking for a payment of fees on account for his work, to which Mr Jacobs agreed and which he paid on the same day.
11. Thereafter matters proceeded much more slowly. The details of the correspondence are set out in paras 22 to 51 of the Judgment, ending with the letter from Mr Levy to Mr Jacobs dated 16 July 2020, which is agreed to be the letter by which consent was actually refused on behalf of the defendant. For present purposes, it is sufficient to note that the 9½ months that followed Mr Levy's initial involvement included:
 - i) more than one request for substantial further details and drawings, which were provided by Mr Jacobs on 28 November 2019;
 - ii) notification from Mr Levy on 4 December 2019 that he found the plans unacceptable, in that the second floor would comprise an open plan layout without any compartmentation of the staircase to the third floor, and a bedroom leading directly into the living area without separate means of escape (Mr Levy confirmed

in evidence that he disagreed with Mr Ettles' assessment that the works would comply with Building Regulations);

- iii) a response from Mr Jacobs on 5 February 2020, explaining that compliance with Fire Regulations was a matter for Building Control, on which Mr Ettles was an expert and Mr Levy was not;
 - iv) a letter from Mr Jacobs to the defendant dated 12 February 2020 asserting that there was unreasonable delay in dealing with the application;
 - v) a letter from Mr Levy to Mr Jacobs dated 17 February 2020 raising a new issue about the fabric of the floor at second floor level and whether it could accommodate the new pipework that Mr Jacobs' plans indicated would be laid, and a detailed reply from Mr Jacobs on 17 April 2020;
 - vi) a further letter from Mr Levy to Mr Jacobs dated 24 April 2020 stating that he was seeking independent expert advice on the application of the Building Regulations so far as fire protection, separation and layout was concerned, and that no further work would be done on the application until all outstanding fees were paid by Mr Jacobs;
 - vii) a further letter from Mr Levy to Mr Jacobs dated 29 May 2020 noting that works had started, saying that consent would not be granted until all the defendant's existing and future costs had been paid, and enclosing an opinion of a Mr Percival, also an Approved Inspector, who to some extent shared Mr Levy's view that the proposed layout was unacceptable;
 - viii) a reply from Mr Jacobs on 30 May 2020 agreeing with Mr Percival that even if there was non-compliance with Approved Document B ("Fire Safety") of the Building Regulations, changes that made the position no worse than it already was were acceptable;
 - ix) a letter from Mr Levy to Mr Jacobs dated 4 June 2020, in which Mr Levy summarised his concerns about fire safety. These were that (a) Mr Ettles had not properly considered the fire safety implications of the layout, in particular compartmentation and means of escape; (b) the increased size of the kitchen and open plan layout unquestionably worsened the fire safety position overall; and (c) owing to the lack of compartmentation of the staircase, if fire broke out on the second floor it might "chimney up the open 2nd/3rd floor stairwell by convection, causing the fire severity to increase and risking far greater damage to the block structure in general as well as endangering the other residents of the block".
12. The 4 June 2020 letter therefore raised two points that were concerned with the interpretation and application of the "Fire Safety" part of the Building Regulations (Mr Levy's concerns (a) and (b)), and a third (concern (c)) that stood outside those Regulations and was principally about the extent of potential damage to the landlord's property if there was a fire. In fact, only the roof covering and associated structure and possibly the party walls at high level were in issue under (c), given that the Flat was at the top of the building and within the roof space, and there were no other residents of the building above the first floor. The remainder of the building lay below a concrete floor at second floor level.

13. On 16 July 2020, Mr Levy wrote the letter of refusal. It set out, in four numbered paragraphs, matters that were said to require Mr Jacobs' "cooperation and compliance", though in view of the Judge's unchallenged findings, only para 1 of the letter is material to this appeal:

"1. As previously advised, the interior layout to Flat 4 that you propose is regarded as unsatisfactory in the context of fire safety and prejudices the fire safety of the block as a whole. The layout you propose is not agreed and you are invited to revise this. If you have proceeded to alter the partition layout within Flat 4 to the design illustrated on the drawings you have supplied to date, you have done so at your own risk, and you are, therefore, recommended to cease all further work in this area, pending your supply of a satisfactory layout design."

14. The first sentence appears to be about fire safety, not just of the Flat but of the building too. It may or may not have been intended to encompass the specific issue about risk of damage to the fabric of the building that was raised by Mr Levy in his 4 June 2020 letter. As will be seen, if it was intended to encompass that specific point, the point was nevertheless not raised again until day 2 of the trial.
15. Mr Jacobs did not cease work but in due course completed it. A final certificate pursuant to reg. 16 of the Building Approved Inspectors Regulations 2010 was issued by Mr Ettles on 29 January 2021.
16. The claim form was issued as a Part 8 claim by Mr Jacobs on 20 August 2020. Evidence was filed in support of the claim and in response, and a first hearing of the claim took place on 25 November 2020. At that stage, the court directed that the claim should continue as a Part 7 claim, and the parties filed particulars of claim and a defence and counterclaim.
17. The content of the statements of case is material to Ground 1 of the appeal. The statements of case were not amended before or during the trial.
18. The Particulars of Claim, which refer to the Flat as "the Property", plead at some length the exchanges of correspondence leading up to August 2020 and then the following, at para 42:

"The Claimant avers that:

- (a) By 4 June 2020, the Defendant had unreasonably delayed in determining the Application. Further or alternatively;
- (b) In substance, by no later than 16 July 2020, the Defendant had refused consent to the works, on the basis that there were no circumstances in which it would accept the layout of the Property proposed by the Application, on the basis of fire safety. Alternatively;
- (c) If the Defendant had not determined the Application by 16 July 2020, it had unreasonably delayed in determining the Application by that date."

So the Claimant was averring that consent had been actually withheld on the ground of fire safety.

19. Para 43 then pleads that the refusal or delay was unreasonable and that the Claimant was entitled to proceed with the works without consent.
20. A reasonable time for determining the application for consent was pleaded to be 30 October 2019, alternatively 4 June 2020, alternatively 16 July 2020.
21. Para 46 provides particulars of the basis on which the refusal was said to be unreasonable:

“...by no later than 16 July 2020, the Defendant unreasonably withheld consent to the scheme of works described in the Application as revised. In particular, refusal on the basis that the proposed layout was unsatisfactory on fire safety grounds was unreasonable where:

- (a) The compliance of the proposed works with the fire safety requirements of the Building Regulations 2010 had been confirmed by an approved building inspector; and
- (b) It was unreasonable for Mr Levy, who is not an approved building inspector nor insured to act as such, to reject the expert view of Mr Ettles of Integral BCS; and
- (c) The proposed works would substantially improve the fire safety of the Property because ...”

and four different respects in which fire safety would be improved were then explained, which were concerned with better detection of and escape from a fire in the Flat.

22. The Particulars of Claim therefore assert that consent had been unreasonably withheld because the works complied with the fire safety requirements of the Building Regulations or improved fire safety in a number of respects, and the view that they did not was unreasonable.
23. The other unreasonable reasons for refusing consent are pleaded as being the requirement to pay the entirety of Mr Levy’s fees and an alleged failure to provide a drawing showing the construction of the floor at second floor level as being of concrete construction. No other alleged reasons for refusal were identified.
24. The Defence pleads to paras 42 and 43 of the Particulars of Claim as follows:

“20. ...it is admitted that, by 16 July 2020, the Defendant was refusing consent to the Application on the basis of the fire safety of the proposed alterations to the Property, but it is denied that such refusal was unreasonable or that the Defendant had unreasonably delayed in determining the Application ...”

25. Para 22(b) pleads that the confirmation of compliance with the Building Regulations “was and remains open to question”, and para 23 pleads:

“Paragraph 46 is denied. In particular, adopting the same sub-paragraph lettering:

- (a) It is a matter of expert opinion whether the proposed works comply with the safety requirements of the Building Regulations; in particular, whether the proposed layout of the Property is no worse

than the then existing layout from a fire safety point of view; the Defendant will adduce expert evidence to the effect the proposed layout of the Property is worse than the then existing layout from such a point of view and does not therefore comply with the Building Regulations;

- (b) Mr. Levy did not reject the view of Mr. Ettles; applying his own experience as a building surveyor he simply did not agree with it;
- (c) Whilst no admission is made as to whether any of the matters alleged represents an improvement on the pre-existing position, none of them, either individually or cumulatively, outweighs the negative impact on fire safety of removing the partitioning of the kitchen from the other parts of the Property and of removing the partitioning of the only escape route from the Property, the staircase.”

- 26. The Defence also engages with the two other reasons identified by the Particulars of Claim for refusing consent (unreasonably) and disputes them. Importantly, the Defence does not dispute that the reasons identified in the Particulars of Claim were the reasons for refusal of consent or plead any other reasons for refusal.
- 27. The defendant then, by repeating the content of the Defence, counterclaimed a declaration that it had not unreasonably withheld consent to the proposed alterations and that the works are therefore a breach of covenant, as well as a mandatory injunction requiring Mr Jacobs to carry out “such works as are necessary to reinstate the Property to its former condition and/or to render it Building Regulations compliant/safe”.
- 28. It is clear, therefore, that the Defence and Counterclaim does not rely on the separate issue (outside the scope of issues of compliance with the Building Regulations) of potential damage to the structure of the building as a ground for refusing consent.

The Judgment

- 29. The Judge concluded that, on the basis of reasonable concern about potential fire damage to the structure of the building and only for that reason, consent had been unreasonably withheld. The relevant paragraphs of the Judgment, which give the Judge’s reasons for so concluding, are the following:

“156. I turn to consider the merits of Ground 1. There are two aspects to fire safety: the safety of the occupants and the safety of the building. Both aspects were covered by Volume 1 of Approved Document B, as is apparent from the headings on the first page, although, there is force in Mr Jacobs’s submission that only the latter aspect engages the landlord’s property interests and is, therefore, relevant to whether consent has been unreasonably withheld.

157. It would not have been reasonable for the Defendant to object on grounds that the requirements of the Building Regulations – that is Volume 1 of Approved Document B have not been complied with. That is because the approved inspector’s approval of the plans for the proposed work was conclusive of that question...

....

159. There is a further issue, however, namely whether, irrespective of approval by an approved inspector, the proposed alterations in fact made the fire safety situation worse for the structural integrity of the building. The Defendant could reasonably have withheld consent if they had reasonable grounds for concluding that the proposed alterations did.

160. These grounds are not to be found in the e-mail from Dr Davis. He does not say whether the proposed amendments would make the situation worse by increasing the risk to the occupants, or to the building, or both....

....

163. I conclude that neither Dr Davis nor Mr. Percival nor anyone else in Mr Percival's organisation, provided the Defendant with a reasonable ground for concluding that the proposed alterations increased the fire risk to the building.

164. That leaves Mr Levy. Mr Jacobs places considerable reliance on the fact that under intense cross-examination Mr Levy accepted that the position in paragraph 1 of the 16 July 2020 letter was inconsistent with his professional advice, as contained in the summary section of his 19 June 2020 report to the Schehtmans. However, there is no evidence that Mr Levy gave advice to that effect, i.e. as contained in his 19 June 2020 report, on any other occasion. For example, he said he spoke to Ms Schehtman before writing the 16 July 2020 letter, but he could not remember what he said. Even if he had given evidence as to any further advice he gave, at this removing time, and absent any contemporaneous note, I could put but limited reliance on that evidence.

165. Notwithstanding Mr Levy's concession, it is not clear to me that the 16 July 2020 letter does contradict the summary in Mr Levy's 19 June 2020 report. The insurer never commented upon the proposed layout. Moreover, it was certainly Mr Levy's view, as expressed in re-examination, that the insurer misunderstood his concerns about compartmentalisation. The decision-making process about the 16 July 2020 letter is not altogether clear. I find there was a discussion between Ms Schehtman, who had spoken to her father, and Mr Levy before the letter was written. The upshot of the discussion was that the Defendant would maintain their objection to the proposed works on the grounds that Mr Levy was to raise in the letter until such time as those grounds were satisfactorily addressed. Ms Schehtman and Professor Schehtman were content to leave the wording of the letter to Mr Levy. They stood behind it and have continued to do so. The reasons given in the letter were the Defendant's grounds for objecting to the proposed alterations, as the proposal then stood.

166. Although I do not know what was said in the discussion between Ms Schehtman and Mr Levy, I draw the reasonable inference that whatever Mr Levy said, it did not dissuade Ms Schehtman from maintaining an objection on fire safety grounds.

167. It is obvious to me that for the reasons given in the body of his 19 June 2020 report, and elaborated in cross-examination, in Mr Levy's professional opinion the proposed layout did increase the risk of fire damage in the building. He did not believe that the insurers had addressed his concerns adequately or at all. That was an opinion which he could reasonably have held. He was a chartered building surveyor and, as stated in his 19 June 2020 report, he had over 35 years of professional practice.

168. Professor Schehtman and Ms Schehtman would have read Mr Levy's 19 June 2020 letter and his e-mail of 7 July 2020. They would have been in no doubt as to his opinion and could reasonably have preferred the opinion expressed in the body of the 19 June 2020 report to the concession contained in the summary. It was reasonable for them to give weight to that opinion, and it is reasonable for them to have approved and to stand behind the objection contained in paragraph 1 of the 16 July 2020 letter. In the premises, ground 1 in the 16 July 2020 letter was an objectively reasonable position and one which, based on the available information, the Defendant could reasonably have adopted."

30. The Judge clearly rejects as reasonable grounds for refusal anything within the scope of the Building Regulations. This included both the safety of the building in so far as it came within Volume 1 of Approved Document B, concerned with fire safety, and the question of whether, despite non-compliance with the Building Regulations, the alterations did not make the fire safety position any worse than it was. The impact on the structural integrity of the building was treated as a separate issue, which could be a reasonable ground for refusal even if the alterations satisfied the requirements of the Building Regulations. Only Mr Levy had that concern, but the Judge was satisfied that it was a reasonable concern that Mr Levy had, and which the defendant had because the Schehtmans read his report.

Ground 1

31. Mr Tom Morris, who represented Mr Jacobs before me and at the trial, submitted that the basis on which the Judge held for the defendant was not a basis that was open to him on the statements of case, as the matter was never an issue to be determined at the trial.
32. Mr Morris relied on the decision of the Court of Appeal in Al-Medenni v Mars UK Limited [2005] EWCA Civ 1041. At trial in that case, the issue had been whether the claimant was injured at work because of her own carelessness or the carelessness of another identified employee, whom she was helping at the time. The judge raised the possibility that the person at fault had been another, unidentified employee. This was referred to as the "third man theory".
33. Counsel for the claimant warned the judge that the only case that the claimant had to meet was the pleaded case that the claimant caused the danger and not the identified employee. The third man theory was not taken up with any of the witnesses, but it was adopted by counsel for the employer as an alternative finding in her closing submissions.
34. Dyson LJ said:

“[21] In my view the judge was not entitled to find for the claimant on the basis of the third man theory. It is fundamental to our adversarial system of justice that the parties should clearly identify the issues that arise in the litigation, so that each has the opportunity of responding to the points made by the other. The function of the judges to adjudicate on those issues alone. The parties may have their own reasons for limiting the issues or presenting them in a certain way. The judge can invite, and even encourage, the parties to recast or modify the issues. But if they refuse to do so, the judge must respect that decision. One consequence of this may be that the judges compelled to reject a claim on the basis on which it is advanced, although he or she is of the opinion that it would have succeeded if it had been advanced on a different basis. Such an outcome may be unattractive, but any other approach leads to uncertainty and potentially real unfairness.

[22] The starting point must always be the pleadings

[23] In the present case the claimant's pleaded case was that Mr Braich and no one else placed the reel on the machine. If the claimant wished to advance the third man theory as an alternative to her primary case, then she had to seek permission to amend her pleadings. It may be that she had sound tactical reasons for not taking this course.... There was no hint of the third man theory in the witness statements, the way in which the case was opened or in the evidence of the claimants witnesses. I accept that there was a rather faint-hearted espousal of the theory by Miss Harmer in her closing submissions, but in my judgement it was by then far too late for the claimant to take the point.

[24] As the judge himself recognised, the third man theory was not explored with any of the witnesses. If the defendants had been alerted to the fact that this theory was in play, then they would at least have wished to consider exploring it with some of the witnesses who were called to give evidence....

[25] Having concluded, as he did, that neither the claimant herself nor Mr Braich was responsible for placing the reel in the position from which it fell, the judge should have concluded that the claim was not proved and he should have dismissed it. In my judgment that should have been the inevitable consequence of his findings. By making findings for which the claimant was not contending, it seems to me that the judge crossed the line which separates adversarial and inquisitorial systems. What he did may have been legitimate in an inquisitorial system. It was, in my judgment, impermissible in our end system.”

35. Tuckey LJ and Brooke LJ agreed with Dyson LJ.
36. In that case, the judge had taken the initiative in raising the third man theory and had been warned off by Counsel for the employer, on the basis that the issue had not been raised as an issue for trial. The essential facts of this case are therefore not entirely on all fours because, at trial, Mr Morris did not warn the Judge about reaching a conclusion based on the risk of structural damage. It can also be said that that issue was at least touched on in the evidence of Mr Levy, whereas the third man theory was not explored

at all with the witnesses. Otherwise, the essential facts of this case are very similar to what happened in Al-Medenni v Mars.

37. Mr Morris took me in some detail through the correspondence before and after the claim was issued, and the evidence filed by the defendant on the Part 8 claim, to show that the defendant had never advanced as a separate reason for withholding consent a ground that, regardless of whether the fire safety requirements of the Building Regulations were satisfied, a fire could cause more serious damage to the landlord's retained structure. Although Mr Levy certainly raised that concern in his letter dated 4 June 2020 (see [11(ix)] above), and later advised his client to take an expert opinion on that question (which the defendant did not take), what principally matters is, first, whether in fact the defendant refused consent for that additional reason; and second, whether it was pleaded as a reason for refusing consent, thereby making the separate reason an issue for trial.
38. It is, with respect to Mr Williams, who appeared on behalf of the defendant and who did his best to argue the contrary, clear that the separate reason for refusing consent was not pleaded, if it was indeed a separate reason on which the defendant had relied. Whether it was a separate reason is a more tricky issue, since the 16 July 2020 letter is ambiguous as to what Mr Levy meant by "unsatisfactory in the context of fire safety and prejudices the fire safety of the block as a whole".
39. The conclusion that the issue was not pleaded is reinforced by a consideration of the witness statements and expert evidence that were filed in preparation for trial, none of which addresses a separate concern that a fire could be more intense and more damaging to the landlord's roof or other retained structure as a result of the open plan layout at second floor level. That specific reason for refusal of consent, if it existed, is different from the issues of fire safety under the Building Regulations, which is concerned with the safety of the occupants of the building. It is also different from a general proposition that a landlord dealing with an application for consent to alterations has a legitimate interest in avoiding prejudice to its own property interests.
40. Mr Williams had prepared written outline opening submissions for the defendant at trial. These identified the issues in the claim and said that the principal issue concerned the fire safety of the new layout of the Flat and Mr Jacobs' case that the final certificate of Mr Ettles was conclusive on that question. Although Mr Williams referred in his outline to Mr Levy's letter dated 4 June 2020, he only referred to the paragraph that addressed the Building Regulations issues, not the paragraph that explained the risk of "chimneying" of a fire in the Flat. Instead, Mr Williams asserted that compliance with Building Regulations was a matter of opinion and referred to what Mr Levy and a Dr Davis had said about compliance. Then his opening turned to the other reasons in a paragraph that starts "Consent was also refused on a number of other bases...", but which does not include any reference to the potential impact of a fire on the landlord's retained structure.
41. The disputed reason was therefore not part of the defendant's case at the start of the trial. It is obvious that if the defendant was intending to rely on a separate justification for refusal that neatly sidestepped the entrenched dispute about the application of the fire regulations, it would have been referred to, both in the written evidence and in the opening submissions. The first time that the issue arose was in cross-examination by Mr Morris of Mr Levy.

42. Mr Williams, in cross-examining Mr Jacobs first, did not put to him the separate reason for refusing consent, distinct from compliance with the Building Regulations: he put only the general proposition that a freeholder has an interest in the integrity and safety of the whole building (transcript day 2, p.18D-G). When he did so, Mr Jacobs disagreed, asserting that Mr Levy had continually said that the works were not compliant with Building Regulations and was not looking at whether the works did anything to damage the interest of the freeholder in the property. Mr Williams raised the general point again later (transcript day 2, p.33B) (“he has to consider the interests of the defendant and the building as a whole”) and again Mr Jacobs disagreed, on the basis that the issue was about life safety of the occupants.
43. In cross-examining Mr Levy, Mr Morris asked him about the conversation that Mr Levy had had with Mr Percival (who was an Approved Inspector and whose expertise was therefore with Building Regulations) and then about the principle under Approved Document B “Fire Safety” that if alterations did not fully comply with Building Regulations they should at least make the fire safety situation no worse. Mr Levy said:
- “Yes, I was satisfied and I was aware that what the interpretation of the regulations is it should not be made worse as a consequence of the alternations. And I was satisfied for various reasons that the layout (*inaudible*) was worse. The reasons are: (a) the partition around the staircase had been removed and that would encourage the chimneying of smoke and flames ... Secondly, the kitchen was larger. A larger kitchen has a great number of appliances in it, and appliances are quite frequently the cause of fire. These are all the reason that I said that I didn’t believe that it was compliant.” (transcript day 2, p.40C-G)
44. Later, at p.44A-F, Mr Morris asked Mr Levy about Mr Percival’s interpretation of the Building Regulations and whether Mr Levy thought Mr Percival was wrong, and Mr Levy said that he was, because he had not considered (or referred to) the issue of the fire spreading into the stairwell area and the chimneying effect that would affect the welfare of the building as a whole.
45. At p.46A-C, in answer to a question about why Mr Levy thought himself better placed than Mr Ettles or Mr Percival to opine about fire safety concerns, Mr Levy said that his concern was the welfare of the building as a whole, not just the Flat, and the risk of the fire spreading into the roof. He said that that was something which sits outside the Approved Inspectors’ duties to make sure that the Building Regulations are complied with.
46. This was the full extent of the evidence given about risk of fire damage to the roof structure. It was given in answer to questions about compliance with Building Regulations and the principle that non-compliance does not matter if it does not make fire safety worse: so Mr Morris cannot be said to have invited the answers that he received. Mr Levy simply took the opportunity to voice a concern that he had had.
47. That evidence did not, however, give the full picture, because of two further points that emerged from the documentary evidence. First, Mr Levy had advised his clients to take the advice of an expert in this regard, Dr Davis, but they had not done so. Second, when the question turned to whether giving permission would have adverse insurance

consequences, Mr Levy took the position, in a letter to Professor and Ms Schehtman dated 19 June 2020, that despite his concern that the design could cause a more severe fire and damage the structure of the building “I recommend that this report [setting out the concern] is sent to your building insurers inviting them to comment. If they consider the proposed layout agreeable on account of Building Regulation approval having been obtained from an Approved Inspector, then I will be prepared to accept the proposals”. So Mr Levy was willing to defer to others on whether his concerns should be maintained.

48. Closing submissions were made only orally, some days after the conclusion of the evidence. Without advance notice to Mr Morris, Mr Williams submitted to the Judge that it became clear as the trial went on that there were two aspects to “fire safety” – the Buildings Regulations compliance aspect and the integrity of the building from the landlord’s point of view (day 4, p.32E-F). He said that the second aspect emerged from Mr Levy’s evidence and from the letter of 4 June 2020 and was an important consideration that should be taken into account (p.34F-G). The Judge remarked that there was a contrast between the life safety of those in the Flat, giving them more time to get out, and the structural integrity of the building, burning down after they had got out (p.35E). It is true that those are different considerations.
49. When Mr Morris followed with his closing submissions he did not take the point that Mr Williams was seeking to rely on a second aspect of “fire safety” that had not been pleaded or fully addressed in evidence by both parties. In dealing with the refusal of consent on the distinct ground that the design drawings had not been altered to make clear the position in relation to the construction of the floor at second floor level, the Judge observed that it would have been reasonable to grant permission subject to a condition of correcting the plans, but then continued “The real issue is the fire safety with respect to the structure of the building”. Mr Morris did not engage directly, and made a submission about the reliability of Ms Schehtman’s evidence about the attempts to obtain an opinion from Dr Davis (which related to a point that the Judge should not accept that the defendant had obtained proper evidence to support that argument). Then Mr Morris addressed the question of the acceptability of the works being referred to the insurers of the building.
50. The discussion with the Judge later turned to the email that Dr Davis had sent, which was in agreement with Mr Levy’s view that the alterations made the overall fire safety position worse (p.86), though it said that a “building control body” might find it acceptable. The Judge asked Mr Morris whether he was talking about worse from a fire safety regulation point of view or from a risk to structural integrity point of view, and Mr Morris answered that it was the former because the test itself came from the terms of Regulation 4(3). The Judge then asked whether the Building Regulations drew a clear line between the safety of the occupants and the safety of the building (p.86H), to which the answer was that the Regulations “just do not ask about the structure of the building” other than how long it would take the building to burn, which was relevant to escape time. Mr Morris then submitted that it could not be reasonable for a landlord to rely on a point when it has ignored the advice of its surveyor to get an expert opinion on the point.
51. The structural integrity issue was therefore advanced by the defendant, taken up by the Judge and not in terms dealt with by Mr Morris because he was focusing on the issue relating to the Building Regulations. It is important to note that the layout of the Flat,

and the lack of compartmentation of the staircase, was relevant to those issues and not just to the structural damage issue.

52. Mr Williams, in responding on Ground 1 of the appeal, did not argue that Mr Morris had failed to point out to the Judge in closing submissions that the structural damage issue was not a pleaded issue and so it could not be advanced on appeal. Instead, he argued that the issue was amply covered in the preparation of the case and at trial. He was inclined to agree that if an objection had been taken by Mr Morris at trial it would have required an amendment to the pleaded case of the defendant, but said that it would have been proper to grant that amendment, having regard to the way that the issue had been covered in evidence by Mr Levy, and, given the nature of the issue (risk of fire damage to the roof), it did not need expert opinion evidence to address it.
53. Despite Mr Williams not taking the point, I must consider whether the failure by Mr Morris to object at trial to the new issue precludes Mr Jacobs from relying on the point as a ground of appeal.
54. In this regard, the first point to make is that the fact that Counsel for the employer in Al-Medenni v Mars told the judge during the hearing that the third man theory was not a pleaded issue does not feature at all in the reasoning of Dyson LJ. The focus is instead on the absence of a pleaded issue and the fact that it had not therefore been explored in evidence, or been addressed in argument until it was too late.
55. However, the Court will not usually allow a procedural impropriety that should have been raised at the time and could then have been put right to found the basis of a successful appeal, when it is then too late to put the matter right. Parties are expected to take their procedural or other objections to the course of a trial at the time, rather than keep quiet and use them as ammunition for an appeal. That is particularly so if the irregularity is of the kind that the affected party could sensibly choose to let pass, or acquiesce in, on the basis that it did not really affect the fairness of the trial or impinge on the main issues.
56. It is pertinent to note that the issue, though identified by the Judge, was not raised in such a way as to make it clear that it was a self-contained issue that was being relied on by the defendant as justifying refusal of consent. The refusal letter of 16 July 2020 had not raised it in terms as a ground of refusal, and Mr Levy's concern about the fire risk to the structure was not presented in evidence by him as being separate from issues of compliance with (or acceptability of the layout of the Flat under) the Building Regulations. Given that Mr Levy had intended to have the issue resolved by Dr Davis, or by insurers, it is not obvious that, despite being raised by Mr Levy and acknowledged by the Judge, it was being regarded as a freestanding ground for a reasonable refusal of consent. I therefore do not consider that Mr Morris was at fault in not identifying that that was where the point was heading and objecting at the time.
57. Further, where an issue has clearly not been pleaded and was not relied on at the start of the trial, I consider that the onus lies as much on counsel for the party seeking to rely on it as on their opponent to raise the matter with the judge and seek permission to amend. For the reasons given by Dyson LJ in Al-Medenni v Mars, a party is entitled to rely on the pleaded case as defining the ambit of the issues to be decided at trial.

58. Even if objection had been made by Mr Morris at trial, it is tolerably clear that matters could not have been put right at the stage of closing submissions, a week after the evidence had concluded.
59. If it had been pleaded that, regardless of compliance with the Building Regulations, Mr Levy's concern about harm to the structure justified refusal of consent, I have no doubt that Mr Morris would have taken up in cross-examination the basis for Mr Levy's views and his qualification to express an opinion, in light of the facts that Mr Levy had recommended his clients to take an expert's opinion and then to follow the insurer's views. It is clear from the transcript that Mr Morris did not engage with Mr Levy's allusion to the risk of structural damage when he mentioned it in a different context, as he was fully entitled not to do given the pleaded issues. Pleading of the issue would also have given rise to a line of questioning about whether in fact the defendant, through Mr Levy, was relying on that reason as a freestanding reason, and not merely as a point tending to reinforce the fire safety issues based on the Building Regulations. That gave rise to a potential issue about whether reliance on it was merely a makeweight, or was infected by reliance on a bad reason, or both: see No.1 West India Quay (Residential) Ltd v East Tower Apartments Ltd [2018] EWCA Civ 250, per Lewison LJ at [32]-[42].
60. As a very late application to amend (if made), the Judge could only properly have given permission to amend, if it necessitated an adjournment of the trial to re-open the evidence, where, exceptionally, there was a very good reason for the late pleading of the issue: see the principles established in Swain Mason v Mills and Reeve [2011] EWCA Civ 14; [2011] 1 WLR 2735 and Quah v Goldman Sachs International [2015] EWHC 759 (Comm) at [38]. There appear to have been no exceptional circumstances in play or good reasons why, if the structural damage risk issue was a freestanding issue, it had not been identified in the statements of case at the outset, or at the latest at the start of the trial. Mr Williams' argument that the defendant was only responding to how Mr Jacobs had framed the issue about withholding consent was unpersuasive, not least because the defendant was counterclaiming a declaration that consent had been reasonably withheld. If there were other reasons that had been relied on for refusing consent on 16 July 2020, it was necessary for the defendant to plead them if it wanted to rely on them at trial.
61. Further, the question of whether the layout of the Flat gave rise to a significant risk of greater damage being done to the structure of the building in the event of a fire was a matter for expert opinion evidence. The question was not whether, if there was a fire, it would spread upwards to the roof but whether the open plan layout of the Flat, without compartmentation of the staircase, meant that the severity of any fire would be greater and cause worse damage to the main structure of the building. The answer to that question would inevitably be an opinion and not an objective fact or matter of experience of a general building surveyor, and the answer might well depend on what other mitigation measures, such as a misting system, could or should be deployed.
62. By recommending to the defendant that they obtain an expert opinion from Dr Davis on this matter, which he would accept whether it concurred with his view or not, Mr Levy was recognising that he was not an expert on fire engineering, even though, as an experienced general building surveyor, he felt that he had an informed view. More to the point, Mr Jacobs would have been entitled to adduce and rely on his own expert opinion evidence addressing the issue and not be saddled with the inexpert views of Mr Levy alone. The issues addressed by the experts who prepared reports for the trial did not include the risk of damage to the structure.

63. Accordingly, in my judgment, on account of the lateness of the application and the prejudice to the trial process, the Judge would have been bound to reject an application to amend the Particulars of Claim had it been made at the stage of closing submissions. To grant it would have been wholly contrary to the overriding objective, as it would have necessitated an adjournment of the trial for some weeks at least, and then the hearing of further evidence at a much later date, when the trial had otherwise nearly concluded. To grant the amendment without allowing Mr Jacobs to adduce further evidence on the new point would have been a serious injustice.
64. The Judge said, in refusing permission to appeal, that the structural integrity issue was a central issue and confronting it was unavoidable. It was not a central issue: it emerged from nowhere at the trial only when Mr Levy chose to say something about it when asked about a different issue. It may have been central to Mr Levy's thinking, but that is irrelevant. To say that confronting the issue was unavoidable would only be true if the trial were inquisitorial in nature. Since it is adversarial and the structural integrity question (even if intended to be covered by the terms of the 16 July 2020 letter) was not a pleaded issue for trial, it was not with respect right to confront it and make it the basis of the decision. In my judgment, this case is indistinguishable in principle from the Al-Medenni v Mars case: the fact that, though unpleaded, Mr Levy briefly volunteered his opinion on the structural integrity issue, did not make it appropriate to engage with the issue.
65. For these reasons, the appeal succeeds on Ground 1. It was not open to the Judge to decide the case in favour of the defendant on the basis of an unpleaded issue. Apart from his conclusion on that issue, the Judge rejected all the grounds on which the defendant relied as reasons for withholding consent. It follows that the declaration made in the Order must be set aside and replaced by the declaration that Mr Jacobs sought, namely that consent was unreasonably withheld by the defendant.
66. My decision on Ground 1 is sufficient to dispose of the appeal. However, since the other grounds were argued in full, I will more briefly indicate my conclusion on each.

Ground 2

67. As the issue of risk to the structural integrity of the building was not live at trial, it follows that the question of whether consent was in fact withheld on that basis was not fully explored. The letter dated 16 July 2020 is ambiguous. It is not obvious that that issue was being referred to.
68. As this was a dispute about consent to alterations rather than assignment or sub-letting, the terms of s.1 of the Landlord and Tenant Act 1988 do not apply. That means, relevantly, two things. First, the burden lies on Mr Jacobs to prove that consent to the alterations was unreasonably withheld (i.e. that no reasonable landlord would have refused consent). Second, the defendant is not restricted to the terms of the letter of refusal. If in fact there were other reasons for refusal, though not expressed in the letter, the defendant was at liberty to prove and rely on those reasons too.
69. This was not therefore a case of having to take the terms of the letter of 16 July 2020 at face value. The language could be explained and any omissions corrected, though the letter might have had strong evidential value on the question whether there were in fact other reasons. Had there been a pleaded issue that the risk of damage to the structure was

a reason for refusal, that question would, as I have said, have been likely to have been investigated further. But assuming for this purpose that Ground 1 did not succeed, Mr Jacobs argues that there was no sufficient evidence for the Judge to be able to find, as a fact, that the defendant refused consent for the reason (among others) of risk to the structural integrity of the building.

70. It will be recalled that the Judge considered the decision-making process to be “not absolutely clear” but felt able to draw inferences that certain matters would have been discussed between the Schehtmans and Mr Levy and on that basis that the Schehtmans would have relied on what Mr Levy had previously said in his letters of 4 June and 19 June 2020 about the risk of structural damage.
71. Neither Professor Schehtman nor Ms Schehtman had given evidence that they had this in mind, nor did Mr Levy say that they did. The Judge was disinclined to rely on their memories of what they might have discussed.
72. To succeed on this ground, Mr Morris accepted that he had to persuade me that the finding was unsupported by evidence or otherwise a decision that no reasonable judge could have reached, and that it was not sufficient that I considered that I would have reached a different decision: see the summary, per Hamblen LJ, at [30] in Haringey LBC v Ahmed [2017] EWCA Civ 1861; [2018] HLR 9.
73. Mr Morris submitted that there was no evidence to support the Judge’s conclusion in the witness statements, nor any direct evidence given from the witness box about who instructed whom to rely on the structural integrity point. The Judge based his inferences on conflicting evidence. Mr Levy said that he discussed the matter with Ms Schehtman before writing the 16 July 2020 letter and that it was written on the basis of her instructions. Ms Schehtman said that she left it to Mr Levy on the basis that he felt that there was no sufficient reason for objecting on fire safety grounds. The issue had been sent to insurers, through Mr Levy’s 19 June 2020 report, and they had not raised an objection (though it appears that they did not properly engage with the specific point). Mr Morris pointed to other evidence that strongly suggests that Mr Schehtman’s interest in objecting to the works was disappearing at the relevant time, because she was satisfied that there were no adverse insurance consequences.
74. Well though the argument was sustained, I do not consider that Mr Morris has reached the high threshold that he correctly acknowledged for overturning the factual finding of the Judge. The reason why the position is unclear is partly because the evidence was not directed to the non-issue (which is why the appeal succeeds on Ground 1). There was evidence that Professor Schehtman was more hawkish on the subject than his daughter. Despite her move towards granting consent, consent was in fact refused, so it is evident that her views did not carry the day. Although the evidence was confused, I consider that the Judge was entitled on the totality of the evidence to conclude that:
 - i) the separate issue of structural integrity was one that Mr Levy was genuinely concerned about and had not written off;
 - ii) the Schehtmans would have read his expressions of concern in that regard and been aware of them, and also aware that a further expert opinion had not removed the concern because none had been obtained;

- iii) Mr Levy and Professor Schehtman ultimately did not consider that the point was irrelevant on the basis that insurers had raised no concerns: Mr Levy believed that they had not addressed the specific point;
- iv) Mr Levy on behalf of the defendant meant by para 1 of his letter dated 16 July 2020, and had authority to include, the structural integrity issue as well as fire safety, even though it was referred to as fire safety of the block;
- v) The defendant, acting through Mr Levy, therefore did have the issue in mind as part of its reasons for refusing consent on the ground of fire safety.

Ground 5

- 75. As Mr Morris submitted, logically the next ground of appeal to consider is whether it was reasonable for a landlord, in the circumstances, to object to the alterations proposed on 16 July 2020 on the basis of risk to structural integrity of the building.
- 76. Mr Williams accepted that a landlord could not assert the reasonableness of a ground of refusal simply by saying that he had had professional advice: the reasonableness of the advice had to be examined.
- 77. Even accepting that Mr Levy was genuinely concerned and that the defendant (through him) had the issue in mind when refusing consent, Mr Morris submits that the Judge was wrong to hold that the reason was a reasonable basis of objection for the following reasons:
 - i) Mr Levy was not an expert on fire engineering, which he recognised by advising the defendant to obtain the advice of Dr Davis, who was an expert;
 - ii) Mr Levy had advised the Schehtmans on 1 June 2020 to obtain the opinion of a leading expert on fire engineering to address the “chimneying” issue, in addition to an advice from Mr Percival on Building Regulations, but the defendant did not do so. Mr Levy accepted that he should defer in his views to those of Dr Davis.
 - iii) The Judge did not address the submission that it could hardly be reasonable to refuse consent on this basis when the defendant had failed to obtain the expert opinion to substantiate the point, contrary to the advice of Mr Levy, nor did he address the evidence that the Fire Brigade, who were approached for their view, said that it was a matter for the Approved Inspector.
 - iv) Additionally, Mr Levy had rejected as a solution installing misting equipment on the second floor in 2019 at a time when it was believed that the floor structure below was timber (and so porous). By mid-June 2020, it had become clear that there was in fact a concrete slab between the first and second floors. Mr Levy accepted, in answer to the Judge’s questions, that a misting system would resolve the question satisfactorily and that he had previously rejected it because he thought the floor was wooden. He said that a misting system would cost between £5,000 and £6,000.

78. Mr Williams submitted that a report from Mr Davis could not be obtained, owing to his unavailability, and it was not a case of the defendant declining to follow Mr Levy's advice. He accepted however that they did not try to find someone else with similar expertise, but sought to resolve the issue by referring it to insurers instead. He also said that the position about the concrete floor was not finalised by 16 July 2020.
79. In reply, Mr Morris pointed to the email of 1 June 2020 in which Mr Levy described how "[Dr Davis] is able and willing to provide a quotation for the supply of an independent report on this matter" and that Ms Schehtman's evidence that emerged only in cross-examination, on the basis of which Mr Williams argued that Dr Davis was unavailable, was what the Judge was unwilling to accept without some supporting evidence. He also pointed to an email of 8 June 2020 from Mr Levy to Mr Jacobs in which he stated that, having tested the floor, it was unquestionably masonry and not timber.
80. In my judgment, the arguments advanced by Mr Morris are all sound. If and in so far as the defendant was seeking to rely, over and above Building Regulations issues, on a concern about risk of fire damage to the structure of the building, which was a matter of expert opinion evidence, it was quite unreasonable for that to be a free-standing reason for refusal of consent when the evidence that Mr Levy recognised was needed to support it was not obtained. Whether Dr Davis was available or not, there was nothing precluding the defendant from obtaining an opinion from a colleague of Dr Davis or someone else similarly expert in fire engineering. The fact that Mr Levy was (properly) willing to cede his view to the greater expertise of a fire engineer (or indeed the views of the insurers) shows that it was not reasonable for the defendant to rely only on Mr Levy.
81. Moreover, by 16 July 2020, if it was reasonable to have a concern in this regard at all, there was a sensible alternative to refusing consent on that ground, which was to grant consent conditionally on Mr Jacobs installing a misting system. Mr Levy accepted that this would provide the necessary mitigation of risk and that he had only refused to consider that previously because of the risk of water penetration into the first floor flat. As soon as the floor was realised to be concrete, that should have been revisited as an obvious and more proportionate solution. It cannot be reasonable to object entirely to works of alteration to the interior layout of a flat when there is another, reasonable solution to an issue that would enable the works safely to proceed.
82. Accordingly, I would also allow the appeal on Ground 5, on the basis that if consent was withheld on the ground of risk of structural damage, no reasonable landlord would have done so without a supporting expert opinion, or when there was a reasonable alternative to refusing consent that protected its legitimate interests.

Ground 4

83. Mr Jacobs contends that in any event the Judge should have held that consent had been unreasonably delayed and therefore withheld by a date significantly before the letter of 16 July 2020, namely 24 April 2020, when Mr Levy wrote to Mr Jacobs saying that he would not be doing further work until his outstanding fees were paid.
84. Although Mr Jacobs pleaded various alternative dates (30 October 2019, 4 June 2020 and 16 July 2020) by when the defendant had unreasonably failed to determine the application for consent, this was not one of them. The only date by when it was pleaded that the defendant had unreasonably refused consent was "no later than 16 July 2020".

Mr Jacobs' case under ground 4 is accordingly one that was neither pleaded nor advanced below.

85. The issue it raises is not just whether there had been unreasonable delay by 24 April 2020 but whether the delay by that date was such that it can be inferred that consent was being withheld, not just delayed. The Judge correctly directed himself that unreasonable delay in and of itself did not amount to withholding of consent, but the question was whether the delay did in the circumstances amount to a withholding of consent.
86. He addressed that question in relation to 30 October 2019 and rejected it. He then analysed the reasons for the overall delay between August 2019 and 16 July 2020. He found that the defendant was engaging and acting in good faith and that 5 months of the overall delay were attributable to delays by Mr Jacobs in responding to Mr Levy's letters. There is no challenge to those findings, only to the finding that throughout the application remained under active consideration. Based on that finding, the Judge held that there was no withholding of consent at all before 16 July 2020.
87. In my judgment, this is a challenge to a finding of fact of the Judge that Mr Jacobs cannot make on appeal. There is no reference in the Judge's factual findings to the position as at 24 April 2020. That is unsurprising. The argument based on the terms of Mr Levy's letter of that date is clearly an afterthought by Mr Jacobs, who desires to argue that the refusal of the defendant's surveyor to do more vis-à-vis Mr Jacobs until his fees were paid amounted to a deemed withholding of consent by the defendant.
88. Mr Morris's argument is based on an interpretation of what was said in the letter dated 24 April 2020 that was not explored with Mr Levy or the Schehtmans in evidence. It is not self-evident on the face of that document that the defendant was refusing; indeed, the opposite appears to be the case, because the letter said that Mr Levy was instructed to recommence his appraisal of the most recent package of documents "upon receipt of payment of the attached invoice". In the event, the defendant paid the invoice and the appraisal was made.
89. The appeal on this ground is therefore dismissed.

Ground 3

90. Mr Jacobs does not have permission for this ground, which was not argued at trial. In his skeleton argument, Mr Morris says that it is in the alternative to Grounds 1 and 2. I can see why. Some of the force of Mr Morris's argument on Ground 1 is that Mr Jacobs was denied the opportunity to run and explore this point (among others) effectively at trial when the Judge decided the case on a basis that had not been pleaded.
91. I have accepted that the appeal succeeds on Ground 1, on the basis that there were a number of arguments that Mr Jacobs was denied the opportunity to explore at trial (see [58] above). Had the other grounds of appeal failed, Mr Morris would have wished to pursue this ground even on the basis of the evidence, such as it was, that did emerge.
92. The argument as to why this Ground should be permitted to be advanced now ("does not necessitate any new evidence and would not have resulted in the trial being run differently – it is a 'pure point of law'") cuts across the arguments on Ground 1. On that basis, it is not appropriate to grant permission for it to be relied on at this appeal. In any

event, it is clearly not a pure point of law, raising a question of whether the structural integrity reason would have been relied on if the defendant had been advised (and Mr Levy accepted) that it would be unreasonable to rely on the fire safety ground of refusal. The defendant can therefore object to permission being given for this issue to be raised now without the ability for it to address it in evidence, in the same way that Mr Jacobs complains about the structural integrity issue.

Disposal

93. For these reasons, I refuse Mr Jacobs permission to appeal on Ground 3 but allow his appeal on Grounds 1 and 5. I will set aside the relevant paragraphs of the Judge's order and make the declaration that I have indicated in favour of Mr Jacobs.