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Case Nos: PT-2022-000626
PT-2023-000525

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
PROPERTY, TRUSTS AND PROBATE LIST (ChD)

Royal Courts of Justice
The Rolls Building
Fetter Lane
LONDON
EC4A 1NL

Tuesday, 8 July 2025

Before :

MR JUSTICE FANCOURT

- -

BETWEEN:

KEVIN COOPER

Claimant

- and –

LUDGATE HOUSE LIMITED

Defendant

AND BETWEEN:

(1) STEPHEN POWELL
(2) JENNIFER POWELL

Claimants

- and –

LUDGATE HOUSE LIMITED

Defendant

- -
- -

Mr Timothy Calland and Mr Timothy Foot (instructed by **Estate Legal Ltd**) for the **Claimants**
Mr John McGhee KC and Mr Kester Lees KC (instructed by **Pinsent Masons LLP**) for the **Defendants**

Hearing dates: 13, 14 March (pre-reading), 17-21, 24, 25 March, 9, 10 April 2025

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APPROVED JUDGMENT

(draft provided on 27 June 2025)

Contents

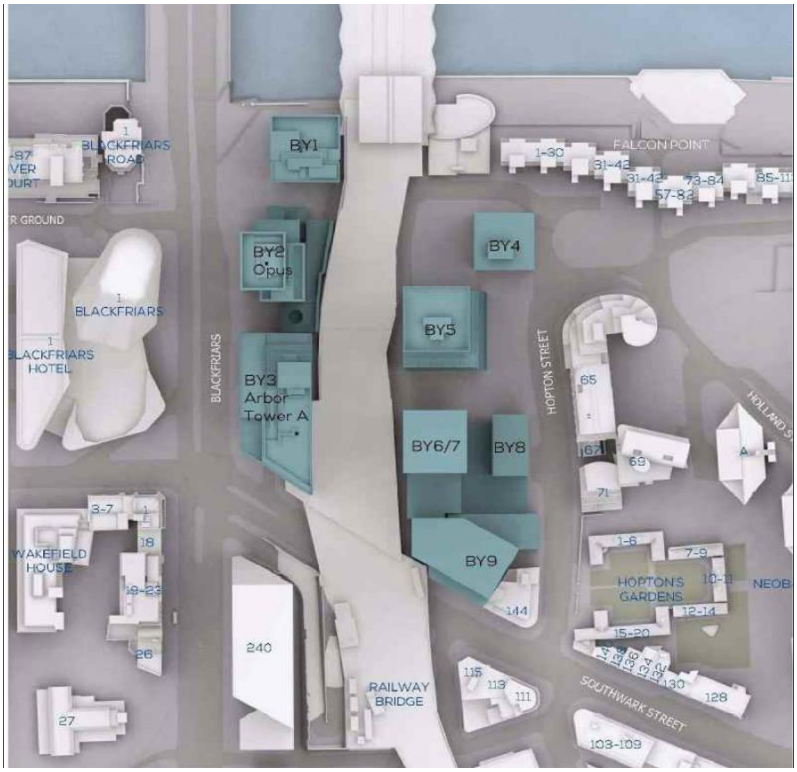
Mr Justice Fancourt:

I. Introduction

1. This is a claim by the owners of two leasehold flats in a building known as Bankside Lofts, at 65 Hopton Street, London SE1, for an injunction requiring the Defendant to demolish substantial parts of a new office building called "Arbor", built recently at the junction of Southwark Street and Blackfriars Road, in London SE1. The Claimants allege that Arbor causes a nuisance by interfering with the rights of light that it is now admitted that they enjoy, appurtenant to their flats. In the alternative, the Claimants claim damages in lieu of injunctive relief, assessed on a negotiating damages basis, or alternatively damages for diminution in value of their flats caused by the nuisance.

2. Bankside Lofts, which was built by the Manhattan Loft Company between 1996 and 1998, stands on the east side of Hopton Street, which runs north from Southwark Street towards the River Thames and then curves round the end of Bankside Lofts towards the Tate Modern Museum on Bankside. The façade of Bankside Lofts faces west, towards a large development site created by the demolition of a building called Sampson House, which formerly stood on the west side of Hopton Street for most of its length ("the Sampson House site"). The Sampson House site adjoins on its west side the busy railway lines running south from Blackfriars Railway Station.

3. On the other side of the railway lines is another part of the development site, of a similar size, created in part by the demolition of Ludgate House on Blackfriars Road ("the Ludgate House site"). The two parts of the development site (which are linked by the arches and other land lying beneath the railway lines) are together known as Bankside Yards, and are being developed by Native Land. A plan of the development site is below:



4. The buildings to be built are marked on the plan as "BY1" to "BY9", between Blackfriars Road and Hopton Street. Bankside Lofts is the building shown to the east of Hopton Street, and the Claimants' flats in that building sit just to the north of the number "65" marked on the plan.

5. Planning permission for Bankside Yards was first granted to the previous owners, Carlyle Group, in 2014, and there have been further permissions granted and non-material amendments made since then. There are planned to be 8 large buildings in total, but it is expected that it may be 15 years before the development as a whole is completed, if indeed it is.

6. It is on the southern part of the Ludgate House site, next to Blackfriars Road, that Arbor has been built. The massing was completed in November 2021 and practical completion was in December 2022. It stands 19 storeys high. Next to it, a second tower, known as "Opus", intended for residential use, is in course of construction. It will be 48 storeys high when it is topped out later this year and is scheduled for completion in 2027. At present, the remaining parts of both sites are undeveloped, save in part at basement level.

7. Each half of the development site is owned by a different special purpose vehicle: the Ludgate House site by the Defendant (which I refer to as "the Defendant" or "LHL"), and the Sampson House site by Sampson House Limited ("SHL"). LHL and SHL are each wholly owned by a company called Bankside Yards (Jersey) Limited ("BY Jersey"). Native Land is a minority shareholder of BY Jersey and is the appointed development manager for Bankside Yards. I refer to Native Land hereafter as "the developer", though BY Jersey is the beneficial owner of the development site.

8. Mr Cooper's flat, which he bought in about March 2021, is flat 705, on the seventh floor of Bankside Lofts. It comprises 3 bedrooms, two bathrooms (one ensuite) and a large living/kitchen/dining room ("LKD"). The LKD is very much a feature of the flat, as it is relatively large and has a triple aspect, facing east, south and west, and enjoys a large, mainly south-facing terrace. It is common ground that this room enjoys and will continue to enjoy particularly good light.

9. Two of the bedrooms in flat 705, including the principal bedroom, face west only. It is the principal bedroom that it is claimed will suffer an actionable reduction in its light.

10. Mr and Mrs Powell's flat, which they bought in 2001, is flat 605, on the sixth floor of Bankside Lofts. It comprises two bedrooms, two bathrooms (one ensuite) and an LKD. All the rooms (except for an internal bathroom) face west. Flat 605 is smaller than flat 705, and, although it has a smaller terrace outside its LKD, it is not as strikingly well-lit as the equivalent room in flat 705, partly because it has no southerly aspect, and partly because the floor to ceiling height is rather low by modern standards (and not what one would expect in this kind of development). It is claimed that the LKD and the principal bedroom in flat 605 will suffer an actionable loss of light.

11. It is an oddity of this case that, although Arbor deprives the Claimants of some light, neither flat currently suffers from insufficient light in any of its rooms. That is because Sampson House, which originally stood 2-3 storeys higher than Bankside Lofts and was in place for much of the period of 20 years during which the rights of light were acquired, was demolished in 2019, and nothing currently stands in its place. The light enjoyed by the flats was thereby temporarily substantially improved by additional light, to which the

Claimants have acquired no right; though that improvement may prove temporary, and is now being reduced as a result of the construction of Opus.

12. The greatest impact on the light currently enjoyed in flats 605 and 705 will be felt if the new buildings planned for the Sampson House site are built, in future years. The developer has planning permission for towers of 32 and 30 storeys on the part of the Sampson House site nearest to Bankside Lofts (buildings BY5 and BY6).

13. As a result of a resolution made by the Council of the London Borough of Southwark ("the Council") on 18 January 2022 pursuant to section 203 of the Housing and Planning Act 2016 ("the s.203 resolution"), and following transfers of title to the two parts of the development site thereafter (to the Council and back again to LHL and SHL), Native Land became entitled to build the remainder of the development (excluding Arbor) notwithstanding the admitted interference that that will cause with adjoining owners' rights to light. The Claimants will not be able to rely on their rights of light to prevent that development taking place. Under section 204 of the 2016 Act, the affected owners, including the Claimants, will be able to claim compensation, on a diminution in value basis only, for the loss of their light caused by the construction of the protected development. I will refer to that protected development hereafter as "the 203 development", as the parties did, but it is important to remember that it excludes Arbor.

14. Although the Claimants' rights of light over the 203 development have not been abrogated, their ability to enforce them to protect the access and use of light to their flats has been removed in relation to any development carried out on the 203 development site pursuant to the planning permission, or any variant of it (and probably any replacement permission for a Bankside Yards scheme too). Prior to May 2022, when the transfers of title were completed, the Claimants would have been entitled to assert their rights against Opus, or BY5 and BY6, even if they had not objected to the construction of Arbor; but as from that time, they are only able to seek to enforce their rights against Arbor.

15. There is a lively dispute about the appropriate basis for assessing the impact that Arbor has had (or will be seen in due course to have had) in these circumstances. The issue has never previously had to be addressed in a case where s.203 or its statutory predecessor, s.237 of the Town and Country Planning Act 1990, has been invoked, or (as far as is known) in other cases where works that contribute to an obstruction of light were authorised by an Act of Parliament and so immune from restraint for that reason.

16. The Claimants' primary case is that the light that will be lost in due course when the 203 development is built must be left out of account in assessing whether the erection of Arbor is an actionable nuisance. That is because the effect of the s.203 resolution is that the Claimants can no longer protect the light passing over the 203 development site, even though they have rights of light; and accordingly that light should be ignored in the same way that light to which an objector has no right is ignored for this purpose. The appropriate comparison (the Claimants say), when assessing whether Arbor causes a nuisance, is between the amount of protectable light coming into the flats before Arbor was built (the "Before" assessment) and the volume of protectable light after Arbor is built (the "After" assessment). Since the light that would be blocked by the 203 development cannot be protected, it is to be left out of account in both assessments. This scenario was referred to by the parties as "CS1". For the purposes of calculation, it assumes that the other towers on the 203 development site have been built, but only as a means of eliminating from the assessment the light that they will block.

17. The Claimants also have a secondary case, which involves an attempt to equalise the burden of the Claimants' rights of light across the different parts of the Sampson House site and the Ludgate House site (scenario "CS2"), so that no one part of the site can be built up beyond a level that allows each other part to be built to the same level without causing a nuisance to the Claimants. There is a dispute, first, about whether this is a correct approach in principle; second, if it is, whether the principle should be applied on the facts of this case; and third, if it should, whether the Claimants and their expert light surveyor have gone about it in the right way.

18. The Defendant's case, on the other hand, is that light coming over the 203 development site at present should be taken into account, because it is there and because the s.203 resolution does nothing to deprive the Claimants of their rights of light: it just changes the remedy to which they will be entitled if and when the remaining parts of the 203 development cause a reduction in their light. The Defendant contends that the appropriate comparison is therefore between – as the "Before" assessment – the volume of light that was enjoyed when Sampson House and Ludgate House existed (since the Claimants cannot have acquired rights in relation to light passing over those parts of the airspace on the two sites) and – as the "After" assessment – the volume of that light that remains with Arbor additionally in place (scenario "DS1").

19. Unsurprisingly, these three different comparisons produce significantly different results. On scenario DS1, Mr and Mrs Powell eventually accepted that they could not establish an actionable loss of light. Whether the reduction in light caused to Mr Cooper on scenario DS1 is actionable is disputed on the expert evidence.

20. It can therefore be seen that a very important question is whether, in view of the s.203 resolution, the Claimants should be treated as having effectively lost the long term benefit of light from the 203 development site, or whether they should be treated as still able to enjoy it, on the basis that they will be compensated for its loss separately in future. It is the first time that this issue has arisen in a case, as far as is known.

21. Apart from the debate about the appropriate scenario to use as the basis of Before and After comparison, there is an equally lively dispute about the appropriate way to measure the loss of light, in each of the scenarios contended for, for the purpose of determining whether there has been an actionable interference. The traditional method in rights of light cases is the Waldram method, named after the chartered surveyor who created it, Percy Waldram. This remains the standard method of assessment, used by the whole of the industry. It uses visibility - at working plane level in a room - of a small proportion of the sky as a proxy for identifying the proportion of the room that is well lit, with a proportion below 50% indicating that the room as a whole is poorly lit. The Claimants rely exclusively on that method, as their expert light surveyor contends that alternative methods are not appropriate or reliable as a means of assessing whether there has been an actionable loss of light.

22. The Defendants contend that the Waldram methodology is outmoded and liable to produce incorrect results, and does so in these cases. They rely instead – ultimately exclusively – on a different approach to measuring levels of illuminance in a room, called the Radiance methods, after the proprietary software that is used. This is based on various sunlight and daylight assessments and determines whether, in average conditions of external brightness, at least half the room will be lit to a minimum standard of illuminance. These methods, which are based on a British Standard that is in turn based

on a European Standard, are regularly used in a planning context, as an aid both to design of buildings and achievement of minimum standards. Guidance issued by the British Research Establishment explains these methods further and also includes different assessments that can be used to indicate whether the construction of a new building is likely to cause a significant impact on the use of existing property, again for planning purposes. These methods were not designed or calibrated to measure whether the light remaining after an obstruction is sufficient for the ordinary purposes of occupiers of the property affected. They have only once previously been used to attempt to answer the specific questions arising in a rights of light context: in a recent case called Beaumont Business Centres Ltd v Florala Properties Ltd [2020] EWHC 550 (Ch).

23. Again, the various methodologies produce some different results (though not entirely different), which in this case enable the Claimants to assert that there is a substantial interference with their lights and the Defendant to deny that the remaining light is insufficient or that any reduction in light is noticeable or substantial.

24. If the Claimants establish a nuisance but injunctive relief is refused, for one or more of a number of reasons advanced by LHL, they seek negotiating damages. LHL denies that negotiating damages are appropriate in any right of light case, and say that the Claimants should only be compensated by an award that reflects the diminution in value of their flats caused by any actionable interference by Arbor.

25. If the Claimants are entitled to negotiating damages, it is common ground that the hypothetical negotiation should be assumed to have taken place in August 2019, just before the start of the works to build Arbor above ground level.

26. One important component of the assessment may be the reduction in value of the Arbor site attributable to the inability of LHL to build above a certain level – i.e. a scaled back version of Arbor could have been designed and built without infringing the rights of light, but that would have made the development and so the land less valuable.

27. On that basis, the parties' development valuation expert witnesses have addressed the question of how much more the site of Arbor was worth, in August 2019, if Arbor could be built in full, rather than a reduced version of it or a different non-infringing building. That difference in value is not, of course, the measure of the negotiating damages: it is one component in the hypothetical negotiations between the Claimants and LHL for a payment to allow Arbor to proceed. As will become clear, there are also other significant factors that each side relied on.

28. Finally, the parties have adduced expert evidence on the value of the flats, for the purposes of assessing diminution in value (as at the date of trial) in the event that it is decided that only diminution in value damages are to be awarded.

29. The case raises many difficult and important questions, which I have attempted to answer as fully as is necessary to decide the cases.

II. The Issues

30. The parties have helpfully agreed the issues and sub-issues that I need to address. They are the following:

    i) Has the construction of Arbor caused an actionable interference with the Claimants' rights of light? Relevant to that are the following questions:

        a) Is CS1, CS2 or DS1 the correct basis of comparison, as a matter of law?

        b) How should light be measured for the purpose of informing the Court's assessment of whether an interference has occurred?

        c) Whether any impact on the Claimants' light is such as to constitute an actionable nuisance, and in particular whether –

            (i) the Claimants are left with sufficient light for the ordinary use and enjoyment of the flats;

            (ii) the impact on the Claimants' light is noticeable; and

            (iii) it results in a substantial adverse effect on the use and enjoyment of the flats.

        The Claimants do not accept that sub-issues (ii) and (iii) are legally relevant as separate tests from sub-issue (i), if the Waldram method of assessment is used.

    ii) If there is an actionable interference caused by the erection of Arbor, should the Court in the exercise of its discretion grant an injunction? In particular:

        a) Would an injunction be an unjustified waste of resources and/or cause oppressive losses to LHL and/or the tenants of the development and neighbouring owners?

        b) Would LHL be able to secure planning permission and then rebuild Arbor with the protection of s.203 if it had to demolish it, and should the court refuse an injunction on that basis?

        c) Should the Court refuse an injunction on the basis of the public benefit from the Bankside Yards development?

        d) Have the Claimants unreasonably delayed in bringing their claims?

        e) Are the Claimants only interested in securing a monetary payment for the release of their rights?

        f) Are the Claimants really concerned with protecting the view from their flats against the 203 development rather than their light?

g) Is the reduction in the Claimants' light a minor one, so as not to be noticeable or so as not to cause a substantial interference with the enjoyment of their flats or not such as to cause a significant loss in value?

iii) If an injunction is refused, should damages be awarded in lieu of an injunction?

iv) If so, what damages should be awarded?

a) What measure of damages ought to be awarded: diminution in value or negotiating damages?

b) If negotiating damages, should these be calculated by reference to enhanced "book value" of the rights or a percentage of the uplift (if any) of development value?

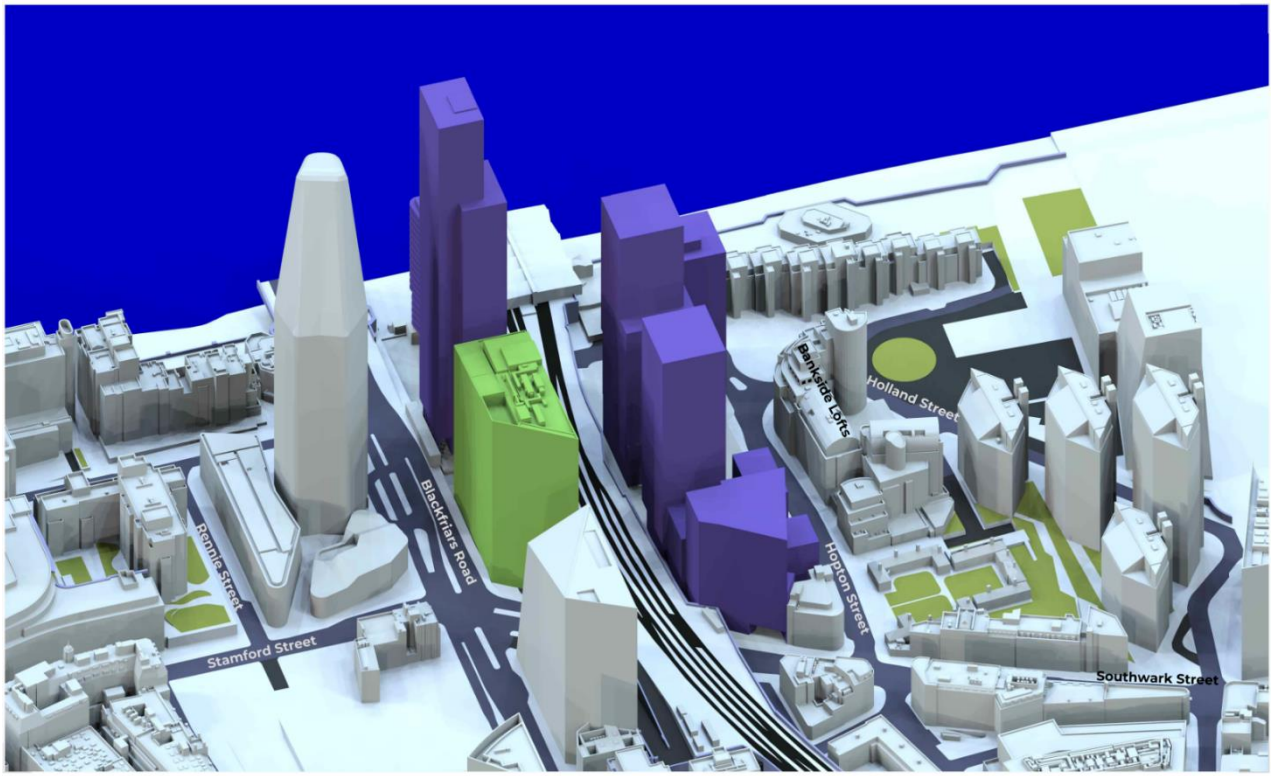
c) If the latter, what (if any) apportionment ought to be undertaken as between neighbouring owners who share in the same cutback?

d) On either measure, what is the correct quantum of damages?

III. Bankside Yards

31. Bankside Yards was originally assembled by Carlyle Group, who then obtained planning permission in 2014 for its development for mixed residential, office, hotel and retail uses.

32. The land was acquired by BY Jersey in 2015. A public consultation was carried out on its behalf between October 2017 and April 2018, following which an application for a revised planning permission was made in 2018. This was finally granted on 22 December 2020 and currently exists for 8 buildings above ground level, including Arbor and Opus. The location and scale of Arbor and the proposed other buildings to be built on Bankside Yards is shown on the image below. (Existing buildings are grey; Arbor is the green building; Opus is the indigo coloured building between Arbor and the river.) To date, nothing has been built above ground level on the Sampson House site.



33. The evidence from Mr Locke was that the next stages of the development will need to be funded (at least in part) by the proceeds of sale of the flats in Opus, so the next stage will not begin until after practical completion of Opus. Thereafter, the further buildings will be built in sequence, with the result that the last may not be completed within 15 years from today.

34. Opus (BY2) is close to being topped out. It is already having and will continue to have an impact on the light enjoyed by flats 605 and 705, though whether it and Arbor in combination will be an actionable infringement (triggering the Claimants' rights to claim compensation under s.204) was not established. It will, however, be buildings BY5 and BY6, much closer to the façade of Bankside Lofts, that cause the greatest impact on the flats' light.

IV. Nature of rights of light

35. A right of light is a negative easement appurtenant to a property (the dominant tenement) that benefits from the access of light over an adjoining or neighbouring property (the servient tenement). It is generally acquired by 20 years' continuous actual enjoyment of light passing over the servient land and through windows (or other apertures) of the dominant property (s.3 Prescription Act 1832). The period of continuous enjoyment must

be the period before the enjoyment of the light becomes contentious, leading to the proceedings brought to establish or enforce the rights claimed.

36. Alternatively, where use without interruption during that 20-year period cannot be established, proof of any period of 20 years' enjoyment *as of right* without interruption will usually be sufficient to establish rights under the doctrine of lost modern grant, provided that the circumstances relating to the dominant and servient tenements justify a conclusion that the enjoyment must be attributable to an express grant made at some past time. The subtleties of the way in which rights are acquired need not be further discussed here, save for one point, since the acquisition of rights of light over the LHL site and the SHL site appurtenant to flats 605 and 705 is now not disputed in this case.

37. The one point to elaborate is that rights over particular parts of a servient tenement cannot be acquired by long enjoyment in this way unless there has been 20 years' enjoyment of light over those parts. It is not sufficient to give rise to a right over the servient tenement as a whole that light has been enjoyed over some of it (Part A) for more than 20 years, if light over the rest (Part B) has only been enjoyed for less than 20 years. In those circumstances, a right of light exists over Part A only, and does not entitle the dominant owner to assert rights to the extent that sufficient light is attributable to Part B. Thus, the Claimants in this case have no right to the light from that part of the SHL site up to the height where Sampson House previously stood, as it was only demolished in about 2019. The Claimants have rights over that part of the SHL site at higher level only. That is why the Defendant's DS1 scenario excludes from the assessment model light that the Claimants now enjoy over the Sampson House site at lower levels. And, similarly, in relation to any additional light released from the demolition of Ludgate House.

38. The fact that rights of light are negative easements means that, in an infringement claim, the focus is on whether the use and enjoyment of the dominant tenement has been adversely impacted. In particular, the question is not whether a substantial amount of light has been obstructed by the servient owner, but whether the light that remains to the dominant property is sufficient for the ordinary purposes of its occupiers. Since the cause of action for interference with the enjoyment of an easement is nuisance, not trespass, a claimant must prove that their enjoyment or use has been substantially harmed, as in law not every interference with enjoyment or use of property is actionable. An owner of property is expected to put up with a certain amount of disturbance and not sue for a small, temporary or inconsequential infringement: Fearn v Board of Trustees of the Tate Gallery [2023] UKSC 14; [2024] A.C. 1 ("*Fearn v Tate Gallery*"), at [22], [23].

39. I agree with the Defendant's submission that, in considering whether there has been an actionable interference with the Claimants' rights of light, it is necessary to start with a consideration of the nature of a right to light. That is relevant both to the issue of what is the correct "Before" and "After" comparison, when assessing the impact of Arbor, and to the issue of how light should be measured in order to inform the assessment of whether a substantial interference has occurred.

40. In the leading House of Lords decision of Colls v Home and Colonial Stores [1904] A.C. 179 ("*Colls*"), the Lord Chancellor, the Earl of Halsbury, explained that it was a misapprehension to say that a dominant owner was entitled after 20 years to all the light that he had enjoyed, and that any appreciable diminution in that light was actionable. He said, at p. 182:

> "I do not think that is the law. The argument seems to me to rest upon a false analogy, as though the access to and enjoyment of light constituted a sort of proprietary right in the light itself. Light, like air, is the common property of all, or, to speak more accurately, it is the common right of all to enjoy it, but it is the exclusive property of none."

And at pp. 184-185:

> "The test of the right, I think, is whether the obstruction complained of is a nuisance, and, as it appears to me, the value of the test makes the amount of right acquired depend upon the surroundings and circumstances of light coming from other sources, as well as the question of the proximity of the premises complained of."

For these reasons, it is fallacious to consider that a right to the enjoyment of a particular quantity of light through a defined aperture has been acquired by long use, or that any reduction of light is actionable.

41. In the same case, Lord Lindley said, at 212:

> "The general principle deducible from [the authorities] appears to be that the right to light is in truth no more than a right to be protected against a particular form of nuisance, and that an action for the obstruction of light that has in fact been used and enjoyed for twenty years without interruption or written consent cannot be sustained unless the obstruction amounts to an actionable nuisance; and this often depends on considerations wider than the facts applicable to the complainant himself."

42. In Kine v Jolly [1905] 1 Ch 480 at 487, Vaughan Williams LJ explained that in *Colls* the House of Lords had settled the question whether a right of light was a right to property or a right to prevent a landowner from using his land so as to constitute a nuisance to the owner or occupier of adjoining land in favour of the latter interpretation, and added, at 489 :

> "… in all these cases of nuisance which involve a limitation of a man's right to use his own land, the Courts will not enforce the alleged rights of the plaintiff, unless that which has occurred is a substantial interference with his comfortable or profitable occupation of his dwelling-house, or warehouse, or house of business, as the case may be. [….] [T]here can be no doubt that such a rule, whether logical or not, is a rule that owes its existence to the convenience and comfort of the people at large. It is convenient that no man should be allowed to enforce rights to such an extent as to interfere with the good and the progress of the community. That I understand to be the meaning of the decision of the House of Lords …."

43. The philosophical underpinning of the decision in *Colls* can therefore be seen to be the substantial public interest in progress and development, which must, at times, override the protection of individual rights, provided that progress and development does not cause substantial harm to the use and enjoyment of private property. It is the law of nuisance that maintains this balance, as it has always done, by focusing on the degree of harm done to the utility and amenity value of the claimant's land: see *Fearn v Tate*

Gallery at [11], per Lord Leggatt. The interest protected by the law of nuisance is the utility of land, and whether there is or is no substantial interference is to be assessed objectively on that basis: *ibid*., at [22]-[23]. The focus is therefore on the use and occupation of land, not on the interests of an individual occupier. It is not every interference with use and occupation that is actionable.

44. The basis of the decision in *Colls*, and later authoritative decisions such as *Kine v Jolly*, which stress the need for substantial interference with comfortable occupation of a dominant dwelling-house, would of course have been understood by Percy Waldram when, in the 1920s, he set about devising his method for assessing whether or not there was an actionable interference with light. It is evident from other cases, where Waldram was an expert witness, that he did.

45. The focus where the question of infringement of light is in issue is not on what light has been taken away, however noticeable the change may be, but on what light remains. In his speech in *Colls*, Lord Macnaghten cited with approval the direction of Best C.J. to the jury in the case of Back v Stacey (1826) 2 C.& P. 265:

> "It was not sufficient to constitute an illegal obstruction, that the plaintiff had, in fact, less light than before; nor that his warehouse, the part of his house principally affected, could not be used for all the purposes to which it might otherwise have been applied. In order to give a right of action, and sustain the issue, there must be a substantial privation of light, sufficient to render the occupation of the house uncomfortable, and to prevent the plaintiff from carrying on his accustomed business … on the premises as beneficially as he had formerly done. His Lordship added that it might be difficult to draw the line, but the jury must distinguish between a partial inconvenience and a real injury to the plaintiff in the enjoyment of the premises."

The direction was also approved by Lord Lindley, at p.208, who said that it was a mistake to consider actionable any interference with the quantity of light that had been enjoyed before the obstruction, and that the correct position was that:

> " … generally speaking an owner of ancient lights is entitled to sufficient light according to the ordinary notions of mankind for the comfortable use and enjoyment of his home as a dwelling-house, if it is a dwelling-house, or for the comfortable use and enjoyment of the house if it is a warehouse, a shop, or other place of business. The expressions "the ordinary notions of mankind," "comfortable use and occupation," and "beneficial use and occupation" introduce elements of uncertainty; but similar uncertainty has always existed and exists still in all cases of nuisance…"

46. It is therefore a jury question – a question of fact and judgement – whether, applying the legal test in *Colls*, an actionable interference exists. The focus is on the comfortable use and enjoyment of the dominant tenement – the property itself – not on the comfortable use and enjoyment of a particular room: per Millett J in Carr-Saunders v Dick McNeil Associates Ltd [1986] 1 WLR 922.

47. It was, probably, the degree of uncertainty to which Lord Lindley refers that was the reason Waldram set about establishing a proxy for that judgement. Rights of light are rights acquired in fee simple, even when appurtenant to leasehold flats, and so the court

is concerned with the comfortable use of the property for an unlimited time, not only for a defined period. As a result, it should take into account how a property may reasonably be enjoyed by others in future, and not solely with its current layout or mode of enjoyment.

48. Whether a particular activity constitutes a nuisance may depend on an assessment of the locality in which the activity is carried out. Belgrave Square and Bermondsey are, even today, locations with a different character and different expectations. However, an activity can still constitute a nuisance even though it conforms to the character of the locality: per Lord Neuberger of Abbotsbury PSC in Lawrence v Fen Tigers Ltd [2014] UKSC 13; [2014] A.C. 1 ("*Fen Tigers*"), at [4], [71]. Locality is only one factor.

49. The fact that the activity in dispute has planning permission may be relevant to an assessment of the character of the locality, though the thing permitted cannot itself determine that character, to the extent that it constitutes a nuisance; and the existence of planning permission is not a major determinant of liability, even where the grant relates to a major strategic development: *Fen Tigers* at [94]-[96] (per Lord Neuberger), [156] (per Lord Sumption), and [162] (per Lord Mance), Lord Carnwath dissenting on this point at [222]-[224].

Statutory provisions

50. The unusual factor in this case is the interplay between the established principles of rights of light, summarised above, and planning legislation, which authorises a local planning authority to agree to acquire land for the purpose of facilitating development.

51. Section 203 of the Housing and Planning Act 2016 (the successor to section 237 of the Town and Country Planning Act 1990 in similar terms) provides, so far as material:

> "(1) A person may carry out building or maintenance works to which this subsection applies even if it involves –
> (a) interfering with a relevant right or interest, or
> (b) breaching
> (i) a restriction as to the user of land arising by virtue of a contract, or
> (ii) an obligation under a conservation covenant.
>
> (2) Subsection (1) applies to building or maintenance work where --
> (a) there is planning consent for the building or maintenance work,
> (b) the work is carried out on land that has at any time on or after the relevant day –
> (i) become vested in or acquired by a specified authority or a specified company acting on behalf of a specified authority, or
> (ii) been appropriated by a local authority for planning purposes as defined by section 246(1) of the Town and Country Planning Act 1990,
> (c) the authority could acquire the land compulsorily for the purposes of the building or maintenance work, and
> (d) the building or maintenance work is for purposes related to purposes for which the land was vested, acquired or appropriate as mentioned in paragraph (b)."

A relevant right or interest includes any easement annexed to land and adversely affecting other land, and a specified authority includes a local authority (s.205(1)).

52. The section therefore authorises interference with a right to light if the conditions in subsection (2) are satisfied, in particular that the building work is for purposes related to purposes for which the land was acquired by the local authority.

53. Section 204(1) and (2) of the 2016 Act provide:

> "(1) A person is liable to pay compensation for any interference with a relevant right or interest or breach of a restriction that is authorised by section 203(1)(a) or (b)(i) …….
>
> (2) The compensation is to be calculated on the same basis as compensation payable under sections 7 and 10 of the Compulsory Purchase Act 1965."

54. The resolutions made by the Council, dated 18 January 2022, are to enter into agreements with LHL and SHL to acquire the freeholds and grant 999-year leases back:

> "… for the purpose of facilitating the carrying out of development, redevelopment or improvement on or in relation to that land".

They were therefore, deliberately, in broad terms, and would have effect in relation to the carrying out of any development, provided that it was related to the purposes for which the land was acquired by the Council, which is stated on the published public record of the meeting as being "to facilitate the delivery of the Bankside Yards Project".

55. Generally speaking, the s.203 power is not used unless the authority is satisfied that, without it, beneficial development would be prevented. The Council had adopted a policy that the exercise of the statutory powers should be a last resort, when genuine negotiations with affected persons had failed. That position had not been reached in January 2022 and the Council determined to depart from it, having consulted local owners and occupiers. No judicial review challenge was made to the s.203 resolution.

56. The Act also contemplates that the authority will acquire the land – but nothing in the legislation prevents a subsequent sale of the land to a developer. Indeed, in most cases, one would not expect the local authority to be the ultimate developer. In this case, the transfer to the Council, the grant of long leases to LHL and SHL, the re-transfer of the freehold subject to the leases, and the immediate merger of the leasehold titles were all pre-arranged steps, and so only a means to enable the developer to proceed with the 203 development without having to worry about rights of light. However, there was and is no legal challenge to its validity.

57. The clear consequence is that, if and when the s.203 development proceeds to such a stage where there is actionable interference with the Claimants' light, the Claimants will be entitled to claim statutory compensation for the diminution in value caused by the 203 development (but not by Arbor, which was built out before the s.203 resolution of the Council).

Instructions to the expert light surveyors

58. It is convenient at this point to refer to the instructions given to the expert light surveyors on the questions that they should address. These were:

    i) whether any, and if so which, of the After scenarios would result in there being insufficient light left for the ordinary use and enjoyment of [each] flat;

    ii) whether any, and if so which, of the After scenarios would result in a noticeable loss of light, when compared with the corresponding Before scenario;

    iii) whether any, and if so which, of the After scenarios would result in a substantial adverse effect on the use and enjoyment of [each] flat.

    The reference to Before and After scenarios are to what buildings should be assumed to be in place, affecting the light enjoyed by each flat, before the construction of Arbor (of which there were three Before scenarios, CS1, CS2 and DS1, as explained above), to which the impact on light of the construction of Arbor was then added as the After scenario in each case, for each flat separately.

59. The Defendant contends that questions (i) and (iii) are necessary questions before it is possible to conclude that the construction of Arbor is in law a nuisance to either flat. It accepts that question (ii) is only a 'threshold' question, the answer to which may assist in answering question (iii). It contends that if a loss of light is not noticeable, it cannot on any basis have a substantial adverse effect on the use and enjoyment of a flat. The Claimant's position is that if the correct analysis of reduction of light in each flat is applied (sc. the Waldram method), questions (ii) and (iii) are otiose: if there is insufficient light left for ordinary use and enjoyment, then there is for that reason a substantial adverse effect on use and enjoyment, and in law a nuisance. They contend that the Waldram method is calibrated to determine this point, since any property that becomes insufficiently lit for ordinary use has been substantially adversely affected by the obstruction, by definition. (The position may be more subtle when considering the impact of an obstruction on a property that is already insufficiently lit.)

60. The Defendant sought to argue that it was common ground that the three questions (or at least questions (i) and (iii)) were legally relevant questions, on the basis that the questions for the surveyors had been agreed. I do not accept that, though it is common ground that question (i) is legally relevant. I agree with the Claimants that the questions derive from the pleaded cases, and were agreed to be relevant questions to be addressed by the expert light surveyors, given the parties' pleaded cases. The Claimant is not thereby precluded from arguing that either or both of questions (ii) and (iii) are irrelevant; and even if they were, that would not preclude the court from considering whether question (iii) is an independent test that must be separately answered, and whether question (ii) has any bearing on question (iii).

61. I turn now to the first of the main questions that I have to decide: whether CS1, CS2 or DS1 is the appropriate basis for the Before and After comparison for each flat.

V. Which of CS1, CS2 and DS1 is the correct scenario for comparison, as a matter of

law?

62. Given that the issue of infringement is determined by what light remains to the dominant owner, not what light has been taken away, it is necessary first to identify whether sufficient light remains in each flat for the ordinary purposes of the occupier, and then where that light comes from – whether from other parts of the servient tenement, or from elsewhere, or both. The next question is whether all or any of that light is to be taken into account in assessing whether sufficient light remains for ordinary purposes.

63. There is no doubt that, in general, all remaining light from other parts of the servient tenement can be taken into account if the dominant tenement has a right to that light, or if, although there is no right to it, in practice that light will assuredly remain available to the dominant tenement in perpetuity. That is established by *Colls* itself, by the later cases of Sheffield Masonic Hall Co v Sheffield Corporation [1932] 2 Ch 17 ("*Sheffield Masonic*") and Smith v Evangelization Society (Incorporated) Trust [1933] 1 Ch 515 ("*Smith*"), and it was the subject of an earlier case called Dyer's Company v King (1870) LR 9 Eq 438 ("*Dyer's* case"). More difficult questions arise if the light comes from land in other ownership, or enters through different apertures, but that is not this case.

64. It is convenient to start with *Dyer's* case, because that decision was the origin of *dicta* of Lord Lindley in *Colls* that the parties agree are fundamental to deciding whether CS1 is the correct scenario.

65. In *Dyer's* case, the company's property benefited from light over King's adjoining property, some light passing over part of its own property that had been cleared, and also other light from property adjoining King's that had been partially cleared 12 years or so previously. King proposed to raise the height of his building and the company objected. The works were restrained by the Court.

66. The decision is a little unsatisfactory for two reasons. First, despite James V-C indicating that he considered that only a question of law fell to be decided, he appears to have decided the case on the basis that King was wrong to say that there would be sufficient light remaining to the company for its use. It is not entirely clear whether that was because there was in fact insufficient light left or because in law it was not protectable light. Second, the argument about the light to which the company was entitled was affected by the heresy about property in certain quantities of light that was only laid to rest in *Colls*, 34 years later.

67. However, it appears that the judge had in mind the question whether in law the additional light provided by the clearances was protectable light, having not been enjoyed for 20 years, and that is reflected in the law reporter's headnote. It also appears to be the understanding of Lord Lindley, who in *Colls* said that where an angle of 45 degrees is left to the dominant owner, there ought to be no infringement "especially if there is good light from other directions as well", and then continued, at pp.210-211:

> "As regards light from other quarters, such light cannot be disregarded; for as pointed out by James V.-C. in the *Dyers Co v King*, the light from other quarters, and the light the obstruction of which is complained of, may be so much in excess of what is protected by law as to render the interference complained of non-actionable. **I apprehend, however, that light to which a right has not been acquired by grant or prescription, and of which the**

> **plaintiff may be deprived at any time, ought not to be taken into account**.
> (See the case just cited.)" (*emphasis added*)

The critical question to which this principle gives rise is: is light of which a claimant may be deprived at any time, despite having a right to it, light that similarly ought not to be taken into account?

68. It is clear, in context, that Lord Lindley was referring to light coming to the dominant tenement from land other than the defendant's servient tenement, which, as in *Dyer's* case, gave rise to the question whether that was light that the plaintiff was assured of being able to continue to enjoy. The first sentence of the passage that I have quoted in [67] affirms the principle, decided in *Colls*, that the right of the dominant owner is to protect sufficient light, not all the light that has been enjoyed for 20 years. Light enjoyed from elsewhere ("other quarters") could be a reason why there is no infringement of light caused by the obstruction, just a diminution in the amount of light. The second sentence qualifies the first, and the principle is clear, namely that light to which there is no right, which cannot be protected, should not be taken into account.

69. The Defendant submits that Lord Lindley specifies two conditions for leaving light out of account: the absence of a right to light, and the risk of losing the light. The Claimant submits that the key consideration was whether the light might in practice be lost, which would generally be the case if no right to it existed.

70. In *Sheffield Masonic*, the plaintiff's house was on a corner plot and received light from separate windows facing north and facing east. It had rights to light from both directions. To the north, the Corporation built a large library and gallery. To the east, stood only a 2-storey building. The issue was whether the reduction in light from the north was sufficiently compensated by the remaining light from the east. Maugham J held that, although the remaining light from the east was sufficient, the Corporation was not entitled to build as high as it pleased, thereby throwing all the burden of the rights of light onto the land to the east in different ownership. The Corporation had created a nuisance because it potentially left the plaintiff with insufficient light, even though the adjoining owner was not about to build, and in the meantime the house enjoyed sufficient light. This decision therefore establishes that even where a claimant has a right to light from other quarters in different ownership, and the aggregate remaining light is sufficient, there may nevertheless be an infringement by the defendant if the right to other light cannot be enforced.

71. *Sheffield Masonic* turns on the fact that there were different windows facing servient tenements in different ownership. Had the Corporation owned both tenements, the outcome would have been different. It is common ground that there can be no complaint about the same servient owner choosing to transfer all the burden to one part of its land by building on one part of it (see Davis v Marrable [1913] 2 Ch 421). The outcome also depended on an assumed principle that different servient owners are entitled to build equally, so sharing the burden of rights of light affecting them all, rather than the first in time to build transferring the full burden to the others.

72. The decision has been subject to academic criticism. The Defendant argued that it was wrongly decided, and that the correct analysis should be that the Corporation's building was not actionable unless and until the adjoining servient owner also built. At that time, both buildings would be actionable interferences with the dominant owner's rights of

light because they amount jointly to a substantial interference with light, even though one building individually was not. This principle of cumulative joint infringement is said to be established by the decision in Thorpe v Brumfitt (1873) LR 8 Ch App 650, per James LJ at 656-7, a decision on obstruction of a right of way. The Claimant contends that *Sheffield Masonic* was correctly decided, and that, importantly, it illustrates that even when a right of light exists, the necessary amount of light may not be able to be protected.

73. In *Smith*, the issue was whether a right to sufficient light had been acquired over land to the west of the dominant tenement. The proposed building of the neighbouring owner would make the remaining light insufficient unless the light from skylights that the dominant owner had recently removed from his property were taken into account. Maugham J held that the jury should be directed to take the light from the skylights into account. On appeal, the respondent argued that the court should not take into account other light that can be interfered with, and Romer LJ is recorded at p.288 as suggesting that "[i]t can make no difference whether the light to be taken into account is an ancient light or in fact a light which cannot be obstructed". That suggests that light that would in fact remain available, whether there was a right to it or not, should be taken into account.

74. As Mr Calland pointed out, the same point is made in Romer LJ's judgment (at pp.539-540), commenting on the passage from Lord Lindley's judgment at [67] above, where he says: "… it is not all light to which a right has not been acquired by grant or prescription that is left out of account, but only the light of which the plaintiff may be deprived at any time". These words can be said to cut both ways: on the one hand, Romer LJ was addressing light to which a right had not been acquired, not a case where there was a right of light; on the other hand, he did not consider that what should be left out of account was determined solely be asking whether there was or was not a right to the light. Lawrence LJ, in his judgment in *Smith*, similarly focused on the practical consequences. He stated the principle established by *Colls* and recognised by Maugham J as being that the court "must have regard to other sources of light which the room possesses, disregarding, however, any access of light of which the plaintiff may be deprived at any time" (p.535). These observations, and the decision that light formerly entering through the skylight should be taken into account, support an argument that the question of whether light from other quarters should be taken into account is a question of mixed fact and law: is the dominant owner assured of the continued benefit of the light?

Is there more than one servient tenement here?

75. An issue arose in the course of argument as to whether the 203 development site and Arbor should be treated as a single servient tenement, or as two or more tenements.

76. But for the s.203 resolution and the subsequent property transfers, the Claimants would have been able to rely on their rights of light as against LHL and SHL to protect much of the light that they continued to enjoy notwithstanding the construction of Arbor. The land on which Arbor is built is in the same ownership as the rest of the Ludgate House site. There was therefore no difficulty with the Claimants asserting their rights of light in full over the rest of the LHL site. Or, putting the matter in a different way, LHL, as servient owner, was entitled to shift the burden of the rights of light onto the rest of that site by building Arbor as it did.

77. SHL is a different legal person from LHL, and for that reason, and on account of the apparent separation of the Ludgate House site from the Sampson House site, it would be

possible to regard it as being a different servient tenement, over which the Claimants have also acquired rights of light. If that is correct, and if *Sheffield Masonic* and other cases at first instance decided subsequently were correctly decided, nothing done by LHL, by building on the Ludgate House site, would impact on the burden borne by the Sampson House site. SHL was then not bound to take the whole burden of the rights of light, and the Claimants could not require it to do so.

78. The Claimants did not really pursue the point that LHL and SHL as owners of the LHL site and the SHL site respectively were two different servient owners. In advancing scenario CS1, the Claimants' case is that the entirety of the light that will be lost to the 203 development should be left out of the assessment, such that the burden of their rights falls on Arbor alone. They argued, rather, that by seeking and obtaining a s.203 resolution from the local planning authority, SHL and LHL had chosen to treat the Bankside Yards development site as two parcels of land: one, on which Arbor was built, and the other, the 203 development site (part of which is owned by LHL and the other part by SHL). That was justified, they said, because different legal incidents attached to those two parcels from the date of the s.203 transfers.

79. In my judgment, it is unrealistic, and wrong on the facts of this case, to treat the Bankside Yards development site as if it were two servient tenements in separate ownership. In reality, it is one development site, under single control and ownership. The following points are material:

    i) LHL and SHL are, it is accepted, special purpose vehicles (SPVs), whose purpose is to hold title to the land on behalf of BY Jersey.

    ii) BY Jersey is the sole shareholder and controls the boards of LHL and SHL, and as such is the single ultimate beneficial owner of both LHL and SHL. The SPVs are not rival owners and developers, whose conflicting ambitions are to be constrained by a principle of sharing the burden of the rights of light.

    iii) The two parts of the site, though separated above ground level by the railway lines, are connected at ground and basement level and form a site in the control of a single developer.

    iv) Bankside Yards is a single, integrated, mixed use development project, for which a single composite planning permission was obtained.

    v) It was LHL and SHL who jointly applied to the Council for the s.203 resolution. The decision to seek protection for the remainder of the development site as a whole, after construction of Arbor, was a consensual venture in furtherance of a common design.

    vi) The consequence of treating the sites as two or more different servient tenements, would be potentially to inhibit the development of each parcel (on the basis that each would have to bear a fair share of the burden of the lights), without any corresponding benefit for the Claimants.

    vii) The construction of Arbor followed by the s.203 resolution do not mean that Arbor and the s.203 development site become distinct servient tenements. It is true that, following those events, the rights of LHL and SHL as owners of the s.203

development site have changed, but the Claimants still have rights of light over the entire site: it is only the remedy for infringement of their rights that has changed in relation to the s.203 development site.

80. There being only one servient tenement owned and controlled by BY Jersey, there is no equalisation of the burden of the rights of light (on a *Sheffield Masonic* basis) required. Scenario CS2 is therefore the wrong basis of comparison to take.

Scenario CS1 or DS1?

81. The Powells now accept that there is no actionable infringement of their light in scenario DS1. That means that they have no cause of action unless scenario CS1, which excludes the light from the 203 development site, is the correct scenario to use as the basis of comparison. It is not disputed that the light from where Sampson House and Ludgate House were (although the Powells currently enjoy it) has to be excluded, as the Powells have no right to that light, nor can they expect to continue to enjoy it. The question I have to decide is whether the same approach applies to light from the 203 development site, to which the Powells do have a right and which they are currently enjoying, but which it is very likely that they will lose in the relatively near future.

82. Mr Cooper claims to be in a different position: he alleges that with Arbor in place and excluding the light coming from where Sampson House and Ludgate House were (scenario DS1), the light to his principal bedroom is actionably infringed. I will decide whether that is correct – it is disputed by the Defendant. If Mr Cooper is right, he has a cause of action regardless of whether CS1 is in principle the right comparison to make. If he is wrong, he stands in the same position as the Powells.

83. As Mr McGhee emphasised, it is not the case that the Claimants' rights over the 203 development site have been taken away. They retain them; when a development that falls within the description in the s.203 resolution is built that actionably interferes with their light, their only remedy is damages. They cannot protect their light, which will be lost. But if the s.203 development (or some variant of it) does not proceed as expected, the light will not be lost; the Claimants will then be able to rely on their rights. In those circumstances, the Defendants argue, the light in question should be taken into account.

84. The Claimants argue that, in view of the reasoning in *Smith*, the answer is provided by considering the foreseeable practical effect of the s.203 resolution. Although they have rights of light over the 203 development site, there is nothing that they can do to protect the light, which could be taken away by the developer whenever it wishes to build BY5 or BY6, and will be taken away in part by Opus. So – by analogy with light to which they have no right and which cannot be protected – the light to which they have a right but nonetheless cannot protect should not be taken into account.

85. The Claimants say that that is consistent with the true understanding of the reasons given by Lord Lindley in *Colls*, and by Romer and Lawrence LJJ in *Smith*, for considering whether in practice the plaintiff could be deprived of the light in question. They say that LHL and SHL chose to seek a s.203 resolution, and that they should have to live with the consequences of it, which is that the light in question can no longer be protected, and so should be left out of account when assessing the injury caused by Arbor.

86. The Defendant's argument is also straightforward. They contend that the way in which the principle in *Colls* is expressed, as to whether sufficient light remains, does not encompass a case where a claimant has a right of light in relation to light coming in from "other quarters". There are two conditions for disregarding light that is enjoyed: first, that the claimant has no right to it; and second, that the claimant has not the ability to continue to enjoy it. The question of whether, practically, light from other quarters can be relied upon only arises in a case where the claimant does not have a right to that light. If there is a right to the light, it must be taken into account, until it is lost. Whether the right can be enforced or not, in order to preserve the light, is irrelevant.

87. The Defendant further argues that if light from the 203 development site is not taken into account, the loss of light resulting from the 203 development will be remedied twice: once by the Court granting an injunction or damages in relation to Arbor (on the basis that the light from the s.203 development site is disregarded), and then again when statutory compensation is triggered by obstruction by the 203 development. The Defendant says that this would be unjust and so the law should not favour such an outcome.

88. I have not found this an easy point to decide. The particular issue – of an unenforceable right to light – is not addressed in any of the authorities. There is something to be said, in logic or sense, for each side's approach. The likelihood is (I find) that the light in question will before very long (probably 5-10 years) be lost to the Claimants, despite their rights. (It is not established whether Opus alone will have that effect, and I assume that it will not.) There is no reason to believe that the further stages of the Bankside Yards development will not proceed in due course. On the contrary, it is very likely that they will. In practical terms, therefore, the Claimants are unable to protect their light, any more than they could protect light to which they have no right. Indeed, the loss of the Claimants' light over the 203 development site is more likely, because of the purpose behind the s.203 resolution. In both cases, others have it in their power to obstruct the light at any time. On the other hand, if there is currently sufficient light because of light from elsewhere to which the Claimants have rights, it can be argued that that light should be taken into account, and that there is no infringement now on the basis of what is likely to happen in 5-10 years' time.

89. For the reasons that follow, despite the attractive simplicity of the Defendant's argument, which was skilfully argued by Mr McGhee, I am ultimately unable to accept it. I consider that the true reason, on the authorities, why light has been left out of account is that the claimant cannot protect it, not simply that the claimant has no right to it.

90. When determining whether a right to light has been actionably infringed, it is right to take into account other light that the dominant owner enjoys (light "from other quarters"), not just the remaining light from a defendant's land. There is no infringement if, in fact, the dominant owner will continue to be able to enjoy light from other quarters, in perpetuity, and the light is sufficient – even if the owner has no right to it. But other light that the dominant land actually enjoys will not be taken into account if the owner has no effective means of protecting it, regardless of when the light may be obstructed. In such circumstances, the infringement is actionable when the obstruction is made, or threatened, and not only when the other light is lost. More detailed reasons for this conclusion are set out in the following paragraphs.

91. First, although Lord Lindley's words in *Colls* (at [67] above) are directed to a case where no right to light exists, so that the light could be taken away at any time, the House of Lords was not addressing the much more unusual case where a right to light exists but cannot be enforced. It is, self-evidently, an unusual case where a dominant owner has a right of light but nevertheless is unable to protect it. There had been no such case before 1904, as far as the researches of Counsel have established (though it could theoretically have arisen, e.g. if an Act of Parliament had authorised works that would interfere with light from another quarter, to which the dominant owner had acquired a right). The fact that Lord Lindley considered only the paradigm case in which light could not be protected does not mean that the principled basis for the decision should not apply to a case such as this.

92. Second, the principle underlying Lord Lindley's rule, which was applied by Romer and Lawrence LJJ and Maugham J subsequently, namely that light that cannot be legally protected should be left out of account, is more consistent with treating light to which there is a right but which cannot be protected in the same way, rather than taking light that will be lost into account. Whether or not Lord Lindley meant his words "and of which the plaintiff may be deprived at any time" to emphasise the consequences of the preceding words ("light to which a right has not been acquired by grant or prescription") or be to a second condition, it is clear that they identify, as the relevant concern, the practical consequence of the absence of rights of light.

93. It is notable that, in addressing the issue of reflected light in its closing submissions, the Defendant summarises the position as follows:

> "As a matter of law in assessing whether a reduction of light amounts to an actionable interference, light from other sources is taken into account whether or not there is a right to such light provided only that in practice the dominant owner will not be deprived of that light: *Smith v Evangelization Society (Incorporated) Trust* [1932] 1 Ch 515 at 539-540 per Romer LJ".

I agree that that is a fair way of summarising the basis for the decisions in *Colls* and *Smith*. The principled basis for assessing whether an interference is actionable should not be different, depending only on the answer to the question whether a right to the other light exists.

94. If the issue were determined by the answer to that question, *Smith* would have been decided differently (although an owner can ensure that light passing over his own land is not obstructed, they have not acquired a right to it, by grant or prescription). If it is accepted that the issue is not resolved by asking whether there is a right to the light, there is no reason of principle to treat differently a case where a right to light does exist but the light cannot be protected. The touchstone of the *Colls* test is whether, despite the loss of light, sufficient light will in fact remain available, on an enduring basis.

95. Third, as *Sheffield Masonic* illustrates, having a right to light "from other quarters" does not necessarily mean that all that light can be protected. If the existence of a right to light from elsewhere were a simple answer to the question, that case would have been decided differently. Even if the Defendant is right to argue that *Sheffield Masonic* was wrongly decided, the approach that the Defendant advocates for such a case (the *Thorpe v Brumfitt* approach) would lead to the same result, namely that the dominant owner could not

expect to protect all the light from the other quarter. It is therefore not a simple answer that a right to light exists.

96. Fourth, the argument that there is no infringement yet – because there is a right in law to enjoy light from the 203 development site – does not provide a satisfactory result. It seems artificial to take light into account, on the basis that it can be protected by enforcing the right, when the opposite is the case. The Claimants could not obtain an injunction against the developer to restrain interference with that light. Although the Defendant suggested that it is unprecedented to contend that there is a serious infringement of the Claimants' rights when no building has yet been built on the 203 development site and the light is currently good, the same approach is taken in its DS1 scenario, in relation to light from the former Sampson House and Ludgate House, i.e. it is left out of account, even though it is enjoyed. Positing the presence of the 203 development site buildings in the assessment, when they are not there, is not a subversion of reality, but only a means of leaving out of account light coming from that site when assessing the impact of the loss of light from elsewhere. It is, indeed, commonplace for infringement to be alleged on the basis that light from other quarters, which is currently enjoyed, is at risk of being lost and so should be ignored in the assessment.

97. Fifth, the approach advocated by the Defendant could leave a dominant owner like the Claimants without an effective remedy for the injury caused by the first obstruction. When the 203 development is built, the dominant owner is entitled to statutory compensation for any diminution in the value of their property caused by the protected development, but not for the contribution to the loss made by the first obstruction. Although, in principle, the dominant owner can, at the later time, allege infringement by the first servient owner to build, by analogy with the reasoning in *Thorpe v Brumfitt* (see at [72] above), at that time the dominant owner is likely to be unable to assert prescriptive rights of light against that servient owner (unless they have already established those rights by court decision or agreement). A claim under the Prescription Act cannot be made once the actual enjoyment of light over the servient tenement has been interrupted for at least a year.

98. The *Thorpe v Brumfitt* analysis works well when various obstructions that together amount to a nuisance occur at about the same time (as on the facts in that case), but much less well when there are years between the events in question. To be sure of protecting a future claim, the dominant owner would have to issue proceedings at a time when there is *ex hypothesi* no infringement, to protect against the possibility of a later development elsewhere. This would be a strange thing for the law to encourage, as the means of protecting a possible future claim. (Whether an alternative claim based on lost modern grant would be available, at the later time, would depend on other factors, namely whether enjoyment of light had been "as of right" for a period of 20 years, and whether the court was willing to draw an inference that a lost grant must have been made at or before the start of that period.)

99. Sixth, the countervailing objection to CS1 made by the Defendant, namely that if the first obstruction (Arbor) is actionable compensation will be paid to the Claimants twice over, taking account of the same loss of light, is not sustainable. Even if it did lead to an element of double recovery, that would not necessarily be an objection. Statutory compensation is payable pursuant to a separate statutory code, voluntarily invoked by the Defendant, which can be regarded as the price payable by a developer who seeks its help to override rights that could prevent the development. In any event, it is not apparent that double

compensation will be paid to the Claimants, because, as Mr Calland submitted, it is a different injury that is being compensated, namely the interference with the rights of light caused by the 203 development, not the interference caused by Arbor.

100. The principal remedy sought by the Claimants for the construction of Arbor is an injunction to cut it back, to protect their light. If, as a matter of discretion, an injunction is refused, the Claimants will be awarded either negotiating damages, if appropriate, or damages reflecting the diminution in the value of their property.

101. If negotiating damages are awarded, in lieu of an injunction, the monetary compensation is for loss of the benefit of being able to enforce their rights. Such damages are not compensation for the same thing as the statutory compensation. There is no objectionable double recovery. The fact that further monetary compensation will come, for the further losses caused by the 203 development, will be one among many arguments raised in the hypothetical negotiations, used to assess negotiating damages. Even so, it does not compensate loss caused by Arbor.

102. If diminution in value damages are awarded instead, they should reflect only the diminution in value of the flats caused by Arbor, not by the 203 development. The loss of light caused by the 203 development is built into the Before assessment, and it is only the difference between the Before and the After assessments that is compensated in damages, if that additional loss of light is actionable. Further, the damages awarded should take into account that: (a) for the time being, possibly for some years, the light will remain good, so the further injury caused by Arbor will not be felt for some time; and (b) when the remaining good light is actionably infringed, the owner of the flats will be entitled to statutory compensation, which will compensate for loss caused by the 203 development, but not by Arbor. There is therefore no double counting in principle, because the two sets of damages awarded are for different losses.

103. In response to my questions about the right way to identify the loss and calculate the damages, the Defendant suggested that once the diminution in value at current values has been identified, an appropriate deferment rate should be applied, to reflect the fact that the impact of the infringement will not be suffered until a later time. This was supported by Mr Ingram in his evidence in chief, though it was not a matter that either expert had considered before I raised it during the trial.

104. Although deferment is a means of quantifying the value today of a sum to be received at a future time, it is an appropriate way of reflecting the fact that the additional adverse effect of the loss of light from Arbor will not be felt for some time. Mr Calland argued that deferment was wrong: that damages awarded as a proportion of current values of the flats will be based on lower figures than the value of the flats when the impact of the 203 development is felt, and so there should be no additional discount. However, it is not possible to speculate about whether, and to what extent, the increase in value of the flats (if any) will exceed the discount rate. Provided only that the current values assume an immediate reduction in light, it is appropriate to determine the diminution in value at current values and then make an allowance for the fact that there are likely to be years of good light before BY5 and BY6 are built. The fact that the discount is not being applied to value a deferred receipt might, however, be a reason for adopting a lower discount rate than the rate than would conventionally be applied for that purpose.

105. However the calculation is done, the key point is that diminution in value damages payable by the Defendant today are for the harm caused by the additional loss of light attributable to Arbor, not for the loss of light caused by the 203 development. There is therefore no double counting of court-awarded damages and future statutory compensation.

106. Seventh, if the protected 203 development had been built first and statutory compensation paid, and Arbor (unprotected) then followed, the Before and After analysis for any additional loss of light caused by Arbor would clearly be CS1. This would result in an assessment of the additional impact of the loss of light caused by the building of Arbor alone. It is difficult to see why a different comparison should apply because Arbor is built first and the developer has the right to build out the 203 development later. It is important to note that the Defendant does not argue that the light from the 203 development site should be taken into account because the s.203 resolution came after Arbor was built. Indeed, by advancing the *Thorpe v Brumfitt* principle as part of its argument, the Defendant implicitly accepts that what is not a nuisance at the time when it is built may become one, when light from other quarters is obstructed later.

107. Eighth, the Defendant's argument that scenario DS1 is the right Before and After comparison would enable it to pass the entire burden of the rights of light to the 203 development site, without protection for those rights. The decision in Davis v Marrable is inconsistent with that approach. It illustrates that a servient owner can indeed move the burden to a different part of the servient tenement, but only if the light from that part will be protected. That would not be the case here.

108. Ninth, although there is no certainty that the 203 development (or a variant of it) will be built, there is equally no certainty that the owner of adjoining land, over which the dominant owner has no rights, will build (and I was told that the adjoining owner in *Sheffield Masonic* never did raise his house). But in such a case the court acts on the basis that the light is likely to be obstructed at some stage, because it can be. If the court is satisfied, at least, that the protected development is likely to be built (which I am), the same approach should be taken, and the light will be left out of account.

109. Tenth, the question is not whether the light from the 203 development site can be taken away, as Parliament has decided that it can be, upon payment of compensation: it is whether that light should be taken into account in determining whether *other* development causes an actionable loss of light.

110. For these reasons, scenario DS1 is the wrong comparison.

111. In my judgment, scenario CS2 is also the wrong comparison, first because CS1 is the right analysis, and second because the LHL site and the SHL site fall to be treated as a single servient tenement, not as separate tenements over which different rights of light exist. There is therefore no need to equalise the burden of the rights between tenements in different ownership, in the way that scenario CS2 assumes.

112. In any event, the Opus site and the rest of the LHL site clearly are a single tenement, in single ownership. It would therefore be inappropriate to equalise the burden as between Arbor and Opus and building BY1.

113. Further, and in any event, if there was an equalisation called for between Arbor and the 203 development site, or between the LHL site and the SHL site, the Claimants have not gone about it the right way by seeking to equalise the height of all the buildings. In such a scenario, it is the burden that should be equalised, by each of the putative servient tenements contributing an equal part of the necessary light. That will inevitably mean that buildings closer to the Claimants' flats will have to be lower than buildings further away, as one can readily understand by taking a notional 45 degree angle from the floor levels of the flats extending over the Bankside Yards site. To equalise the height of the buildings on the site means that buildings such as Arbor are bearing a greater share of the burden than buildings BY5 and BY6.

114. Accordingly, were CS2 in principle the right approach, I would have held that the Before and After assessments were not the right ones in any event, and so do not establish an actionable infringement.

115. Since the decision that I have reached on the applicability of scenario CS1 is new law, which may well be the subject of an appeal, I will set out (briefly) my conclusions on whether the evidence applied to scenario DS1 shows an actionable infringement in relation to flat 705, after I have done the same exercise on scenario CS1.

VI. How should light be measured for the purpose of informing the Court's assessment of whether an interference has occurred?

116. As previously stated, the Claimants' expert light surveyor, Mr Ian Absolon FRICS, provides his opinion that there has been an actionable interference with the Claimants' light on the basis of the traditional Waldram method of analysis, and he rejects as inapposite and unreliable the assessments produced by the "Radiance" methods and other assessments, on which the Defendant relies.

117. The Defendant's expert light surveyor, Mr Gordon Ingram FRICS, ultimately rejects the Waldram method as being inaccurate and outmoded, in favour of an analysis based on other methods, primarily the median daylight illuminance method ("MDI") but also the median daylight factor ("MDF"). Both of these are contained in a British Standard giving effect to a 2018 European Standard (BS EN 17037:2018), called "Daylight in Buildings" ("the 2018 BS"), which provides standards for the design of new buildings. These assessments are carried out using a computer software package called "Radiance". The methods do not purport to be a standard for assessing whether interference with rights of light is actionable, but there is obviously considerable overlap between the process of designing buildings to maximise the ingress of daylight and sunlight and the assessment of whether sufficient light exists within a property for ordinary purposes.

118. In addition, Mr Ingram relies on a report produced in 2022 (3rd ed.) by the Building Research Establishment, called "Site layout planning for daylight and sunlight" ("the BRE Guidance"), which gives guidance on achieving good daylighting and sunlighting within buildings and in the open spaces around them. It is intended for building designers, owners, consultants and planning officials, and was written to complement the 2018 BS. It is concerned with achieving good daylighting in new buildings and with preserving it in existing buildings nearby, and with optimum site layout.

119. The BRE Guidance refers to the 2018 BS and contains three additional methods that can be used to inform a (planning) assessment of the impact of new buildings on existing buildings, as well as the design of new buildings: the vertical sky component ("VSC"), which measures the proportion of the total sky illuminance that falls on the mid-point of the exterior of given window of a property; the no sky line ("NSL"), which determines what proportion of a room at a working plane has or will have no direct sky visibility; and the annual probable sunlight hours ("APSL"), which is that proportion of the total number of hours in a year where the sun is expected to shine on cleared ground in the locality that the sun will reach a given window in a building.

120. Mr Ingram's conclusion that, even on scenario CS1, Arbor does not amount to a substantial interference with the Claimants' rights of light, is, he says, the result of taking account of the results produced by all the methods of analysis that are available to him, though he considers that MDI and MDF (in that order) are the ones to be accorded most weight.

121. This is the first time that detailed evidence and argument on the respective merits of these different methods of assessment have been presented to a court.

122. There is some common ground on the question of sufficiency of light. The parties agree that:

    i) Only the main bedroom and the LKD in flat 605, and only the main bedroom in flat 705, arguably have insufficient light, on the basis of the "After" assessment in scenario CS1.

    ii) The appropriate form of the 203 development to take for the purpose of the CS1 Before and After assessments is what was referred to as the 2025 variant of the planning permission, taking into account two applications for non-material amendments under s.96A of the 1990 Planning Act, one of which was in fact granted during the course of the trial and the other of which will probably be granted shortly, if it has not already been. These make a marginally adverse difference to the available light under the Before and After assessments, compared with the 2023 variant.

    iii) With the Waldram analysis, if light is assessed to be insufficient in a room in the Before scenario, any further loss is in principle actionable; but there is some leeway, of up to a 2% reduction, because the *further* limited loss of light, below what is already an inadequate level, would generally be imperceptible, and so not a substantial interference.

123. Furthermore, despite their differences as to the best method of assessment to use, there is substantial common ground between the experts on the results that their analysis has provided, including that:

    i) For flat 705, on the CS1 Before assessment, the light in the principal bedroom is insufficient on the Waldram method of analysis, and falls short of the minimum target for a bedroom when applying the MDF analysis. On the CS1 After assessment, the light in the principal bedroom is significantly worse, on the Waldram method, worse on the MDF analysis, and also fails to achieve the minimum target when applying the MDI analysis.

ii) For flat 605, on the CS1 Before assessment, the light in the LKD (assessed as a single room) is sufficient on the Waldram method but fails to achieve the minimum MDF targets for such a room. On the CS1 After assessment, the light in the LKD becomes markedly insufficient on the Waldram method, performs worse on the MDF assessment, and fails to achieve the MDI minimum target.

iii) For the principal bedroom in flat 605, on the CS1 Before assessment, the light is sufficient on the Waldram method and meets the minimum targets for MDF and MDI. On the CS1 After assessment, light in the bedroom it is markedly insufficient on the Waldram analysis and fails to achieve the MDI and MDF minimum targets.

iv) Results produced by a Waldram analysis should not be taken to produce a clear answer to the question of whether there is an actionable infringement without some element of judgement being applied to the results, by reference to the shape of the room and the contour lines produced by the analysis, and where these fall within the room.

v) If one is concerned with what reduction is noticeable and whether the impact is substantial, the relevant comparison is between the impact of the largest building that the developer could have built on the site of Arbor which does not make the light insufficient (which is taken to be a cut back version of Arbor – "cut back Arbor") and the impact of Arbor itself – on the basis that the Claimants could have no objection to a building that left sufficient light, so it is only the incremental reduction in light that should be assessed for this purpose.

124. This degree of common ground is in my view significant. Although the experts differ slightly in the way that they apply the Waldram method and so produce slightly different percentage results, the differences are immaterial to the results, on the CS1 comparison. The Waldram method shows the light to be insufficient by a substantial margin for all three rooms in the After assessment – which is what matters on the question of sufficiency. Further, on the MDF and MDI methods, the principal bedrooms of both flats and the LKD in flat 605 fail to meet the minimum targets in the After assessments.

125. One might wonder, therefore, how the two experts came to opposite conclusions on the question of whether, on CS1, Arbor makes the light insufficient and is a substantial interference, given that the method favoured by Mr Absolon and the methods favoured by Mr Ingram seem to produce the same results, namely that the remaining light in the three rooms is insufficient (in Waldram parlance) and substandard (in 2018 BS parlance). It is important to recognise that both experts consider that an element of judgement should still be applied to any results, rather than applying them arithmetically to produce the conclusion; and Mr Ingram said that his opinion was an overall evaluative conclusion based on his interpretation of the graphical representations of the results. Nevertheless, given the consistency of the results, there is inevitably a question raised as to whether (and if so on what basis) an evaluative judgement applied to the results can reliably support a conclusion at variance with them all.

126. Before considering that broad question by reference to Mr Ingram's evidence, there are some particular issues that can be addressed at the outset, because they are of significance for Mr Ingram's ultimate conclusion. They are:

i) Should the LKD in flat 605 be assessed as a single room, or can it notionally be split up, as Mr Ingram contends, so that the living and dining area are treated as one room (LD) and the kitchen as another?

If the LD is treated as the relevant unit, which is Mr Ingram's approach, it means that there is sufficiency of light on the Waldram analysis, and that the MDI minimum target (though not the MDF minimum target) is achieved. If Mr Ingram is justified in this approach to the LKD then, if I accept his evidence, the right conclusion may be that there is no substantial interference with the light to this room.

ii) Is the failure of the bedroom in each flat to meet the MDI minimum target in the After assessment fairly characterised as only marginal (which is what Mr Ingram's approach to measurement shows) or more significant (according to Mr Absolon's approach)?

Mr Ingram ultimately relies on his MDI assessment to justify his conclusion that there has been no substantial interference with the light to those rooms, even though his MDI, MDF and Waldram results indicate a deficiency of light.

iii) Do the failures to meet the MDF and MDI targets in the After assessments matter, if the reduction from the Before assessment is less than 20%?

127. In identifying these particular questions, I have not ignored the rest of the (voluminous) expert evidence that the parties have adduced. I have carefully considered all the evidence of Mr Ingram and Mr Absolon, but it is not possible, within the confines of a judgment of reasonable length, to address and try to answer every point that is made.

128. Subject to the answers to the above 3 initial questions, the following higher level questions will then also be of importance:

i) On what basis does Mr Ingram reach his conclusions that, on the CS1 scenario, the remaining light in each of the three rooms is sufficient, and alternatively that, if it is insufficient, the reduction will nevertheless not be noticeable and therefore cannot be a substantial interference?

ii) If Waldram produces a "sufficient" (50% or above) result in the Before assessment and an "insufficient" (below 50%) result in the After assessment, is there an additional test of whether the difference is noticeable and substantial, or is that already comprehended in the "insufficient" result?

iii) Is the Waldram method reliable?

iv) Are any of the new methods of assessment relevant, useful or more appropriate than the Waldram method, and if so how is the noticeability/substantiality question to be assessed?

129. Before addressing the 3 initial questions in [126], I should say something more about the expert witnesses on the light issues and about the methods of assessment that they have used.

The expert light surveyors

130. Both light surveyors are highly experienced and expert, without question. Mr Absolon came to this dispute relatively late, when a previous expert instructed on behalf of the Claimants was forced to withdraw, owing to a perceived conflict. Mr Ingram and his firm, GIA Associates, on the other hand, have been involved with the proposed Bankside Yards development since before the time when Native Land bought the site. He has worked, with another partner of GIA, as the head of a substantial team of surveyors and technicians, advising the developer on strategy and the development, and on how to deal with potential rights of light objections. GIA was also involved in placing evidence before the Council in support of the s.203 application. Mr Ingram told me that he had been in charge of the overall strategy, at high level, but that his partner, Mr Kevin Francis, was the principal surveyor heading the team on the day-to-day work on the project.

131. Mr Ingram clearly did not feel that his ability to give objective and honest opinions on the question of whether the Defendant has infringed the Claimants' rights to light was compromised, and Mr Calland did not suggest to him that he was conflicted. Mr Calland did suggest that, when it came to the basis on which Mr Ingram had carried out his assessments, he had made adjustments to measurements, or excluded certain areas of the rooms, in "an attempt to push every variable you can push in order to change the results to make them look better for your client". Mr Ingram denied that absolutely.

132. Both light surveyors assisted me to understand the matters in dispute, though, perhaps inevitably, each ultimately contended for a conclusion that was in favour of the party who had appointed him. There were areas in relation to the evidence of each where I was concerned that a fair approach to the evidence might not have been taken. I accept that, within the confines of the exercise, each believed what he told me. That does not mean that I agree with the judgements that they made.

133. Mr Absolon, it can be said, was more of an "old school" surveyor, sticking to traditional methods and having a sceptical view of other methods that were not designed to assess whether the light in a room was "sufficient … according to the ordinary notions of mankind for the comfortable use and enjoyment of [the] home as a dwelling-house", which is the relevant legal test. He accepted that there was scope for methods like MDI and MDF to be used in future to provide a better assessment than the traditional Waldram assessment, because of the more sophisticated computerised data that they can use, but considered that further testing and calibration was needed before they could provide a more reliable indication of sufficiency of light than the Waldram method. He accepted that an expert eye was needed to make the final determination, in a borderline case, based on where the 2% sky factor contour lies within the room in the Before and After assessments, and taking into account any peculiarities in the shape or size of the room or unusually large windows.

134. He accepted that this would normally require a consideration of the contour lines, particularly to address a question of whether any change would be noticeable or amount to a substantial interference. It emerged that, in fact, Mr Absolon had not produced the necessary diagrams with contour lines to demonstrate the change from the 203

development with cut back Arbor (Before) to the 203 development with Arbor as built (After) (the parties referred to this as the CS1.B1 v CS1.A analysis, but I will refer to it as the "cut back Arbor analysis"), only the diagrams that showed the movement in the contour from the 203 development without Arbor (Before) to the 203 development with Arbor as built (After). While this does not affect the position of the After contour line, it does affect the position of the Before contour line and therefore the degree of movement and the impact on the room resulting from the obstruction.

135. Mr Absolon, when challenged about this, said that with years of experience he could do the same exercise satisfactorily from the arithmetical results. I was not persuaded by that in any marginal case, though I accept that he has great experience. Such changing contour lines are regularly produced in diagrammatic form, rather than just as results, because they aid understanding of the impact of the change. Mr Absolon's appreciation of the impact of the change in the cut back Arbor analysis was therefore likely to have been coloured by the difference between no Arbor and Arbor as built, which would show a greater change. Accordingly, where there is doubt about the result, I will exercise some caution in placing reliance on what Mr Absolon said about the noticeability of the change in light.

136. Ultimately, however, I felt that Mr Absolon was simply advocating the use of the traditional Waldram method, on the basis that no better method had been proved to be reliable, and that the answer to the question of sufficiency or insufficiency was produced by the results themselves, subject only to a few additional considerations (which did not apply in this case), and with the answer to the question of substantial effect on use and enjoyment being self-evident from the figures.

137. Mr Ingram had a more modern approach, which was based on a combination of concern at the limitations of the Waldram analysis and wishing to embrace the more sophisticated analysis that the MDI and MDF offered. He said that this provided a more informed conclusion on the effect of any light loss. He could see no reason why these analyses could not be applied directly to the question of sufficiency of the remaining light, though he agreed that none of them is intended to replace, or prove satisfaction of, the legal requirement for sufficient light for ordinary uses. He said that, for him, "the right question to ask is: does this method actually tell me the real effect of the light in [the] space such that I can understand how this space can be used and enjoyed". That seemed to me to conflate the two separate questions (as the Defendant identified them) of sufficiency of the remaining light, on the one hand, and whether the injury had a substantial effect on enjoyment, on the other.

138. Mr Ingram accepted that Waldram was a good starting point, and continued to be used by the industry as the standard approach, but that ultimately, once a case was disputed and a detailed MDF or MDI analysis had been undertaken, that would provide a more reliable assessment of whether light within a room was sufficient for ordinary purposes. He accepted that the results produced do not simply speak for themselves, not least because there are different tests that he used, the results of which did not fully align; and that expert judgement was required in order to make the final evaluation about sufficiency of the remaining light, and noticeability of the change, and so whether there was a substantial impact.

139. Mr Ingram's knowledge of his subject and understanding of the complexities of the science were very impressive. He was a very fluent witness who was able to explain his

answers to questions at length, and persuasively. My impression was that he used the various methods of assessment as providing pieces of information, and rejected the Waldram results in favour of some of the information (but not all) provided by the Radiance results and the assessments from the BRE Guidance. His conclusion was that the reduction in light did not leave the rooms in question with insufficient light for their ordinary use, because of where the main losses of light were experienced within the rooms, and that the reductions would either not be noticeable, or fell in areas where the loss did not matter, so that they did not have a substantial impact. For these conclusions, he relied substantially on falsecolour images produced by the Radiance software, which show, in different shades of colour, the different proportions of unobstructed external illumination (in the MDF method) and the different levels of actual illumination in lux (for the MDI method). He said that these images could only be interpreted by an expert, and that with his expertise the results were tolerably clear.

140. Ultimately, despite Mr Ingram's evidence that he looked at all the methods and they all helped to inform his overall judgment "by understanding as many elements around the light as I can", I consider that his conclusions are based on: a rejection of the Waldram method and results; use of selected results from other methods of analysis; and, most significantly, a subjective interpretation of the falsecolour images produced by Radiance from the MDF and MDI results, which he said justified his views. So, as one illustration only, he accepted that his MDF result for the principal bedroom in flat 605 was a "fail" but said that, bearing in mind the falsecolour images, the impact was not substantially adverse.

The methods of assessment

141. The Waldram method is not a measurement of light as such, but a measurement of the degree of exposure of a room to the sky. It takes exposure to at least 0.2% of the notionally unobstructed sky dome in half of the internal area of the room at a working plane (85 cm) as a proxy for sufficiency of light within the room as a whole. Waldram decided on the 0.2% sky factor at working plane based on his assessment of the amount of light on a uniformly overcast day that would be needed for ordinary use of the room, and referred to the 0.2% sky factor line as a "grumble line", beyond which an ordinary person would be liable to complain about the inadequacy of the light. The judgment was that a room that was at least half lit to that modest level on a uniformly grey day would be adequately lit overall. Of course, the 0.2% sky factor line may mean that there are parts of a room that are very well lit (closest to the windows), where much more than 0.2% sky is visible, and parts that are very poorly lit. Subsequent studies indicate that the level of light from the sky that Waldram identified is likely to be exceeded in fact on more than 80% of the days in the year, so, as is now accepted, Waldram's measure was very low. It was not an attempt to capture an average measurement of light, but rather a low measure that, if achieved on a uniformly overcast day, would mean that in overall terms the room would be sufficiently lit.

142. The method is applied to each aperture through which the sky is visible, but any partial blockages of light caused by the window frames, glazing bars and furniture are disregarded. Waldram considered that the loss of light through the glass and frame and the benefit of reflected light coming into the room other than directly from the sky were likely approximately to cancel each other out, and so he was content to take the sky visibility factor as the sole proxy for the level of illumination in the room.

143. The method calls for a 0.2% sky factor line to be plotted on a plan of the room (representing the working plane), both in the Before and the After scenarios. If 50% or more of the room is on the window side of the line (in a simple case where only one wall has windows), the room is sufficiently lit. If less than 50%, it is insufficiently lit. The Before and After lines enable one to see exactly where the relatively "good" light will be lost in the After scenario, and how much is lost, which is used both as an indication of how the impact of the loss of light will be felt and as a basis for valuing the well-lit area that will be lost, if the obstruction remains. Where infringement is established by this method, by reverse engineering it is possible to identify the cut backs that would be needed to the obstruction to leave exactly half of the room exposed to 0.2% sky factor.

144. The results of the Waldram method are expressed as a percentage, with anything 50.00% or over indicating that the room as a whole is "well lit", so that, if all that remaining light can be protected, there is no actionable interference with light.

145. The VSC (vertical sky component), referred to at [119] above, measures the proportion of the entire visible sky dome falling on the centre point of the exterior of a window. It is not a measure of light within the room, but rather a measure of the degree to which a primary source of light falls on the exterior of the building. The BRE Guide says that 40% is a maximum, in reality, for a window in an unobstructed vertical wall, and that any proportion in excess of 27% is likely to be sufficient, subject to other parameters. It recommends that a reduction to below 27% be avoided:

> "If the VSC, with the new development in place, is both less than 27% and less than 0.80 times its former value, occupants of the existing building will notice the reduction in the amount of skylight."

The implication is therefore that if the reduction is less than 20%, the occupants may not notice it.

146. The NSL (no sky line) speaks for itself and is the equivalent (at 0.0%) of the Waldram 0.2% sky factor. The BRE Guide advises that if more than 20% of the room lies beyond the NSL, supplementary electric lighting will be needed. If, following new development, the area of the existing room with sky visibility is reduced to less than 0.80 times its former area:

> "this will be noticeable to the occupants, and more of the room will appear poorly lit. This is also true if beyond the no sky line encroaches on key areas like kitchen sinks and worktops".

147. The APSL is a measure of the proportion of expected sunlight that will fall on a window. It is a measure of exposure to the sun, not daylight or light from the sky. The BRE Guide advises that one quarter of all sunlit hours is likely to be sufficient, if it includes at least 5% of the hours between 21 September and 21 March in each year. If the overall annual loss resulting from new development is less than 4%, this is said to be a small reduction.

> "Any reduction in sunlight access below these levels should be kept to a minimum. If the available sunlight hours are both less than the amount above and less than 0.80 times their former value, either over the whole year or just in the winter months..., and the overall annual loss is greater than 4% of

> APSH, then the occupants of the existing building will notice the loss of sunlight..."

Again, the implication is that a reduction of less than 20% may not be noticed.

148. MDF is the proportion of the applicable total illuminance from the unobstructed CIE overcast model of the sky dome that is exceeded for more than half of all the daylight hours in the year in more than half of the defined area of a room at the reference plane (a working plane equivalent to the Waldram working plane). It therefore involves taking a median figure for illuminance at a median point in a room and expressing that as a proportion of the available total illuminance. 0.7% of the total available is considered to be the minimum for a bedroom in the UK (equating to 100 lux), 1.1% for a living room, and 1.4% for a kitchen. Unlike the Waldram method, MDF takes into account indirect illuminance from external and internal reflectance.

149. MDI adds to the MDF analysis climate-based daylight modelling, in place of the CIE overcast sky model, and takes into account predicted weather for each daylight hour for the location from computerised weather files, so that MDI uses the predicted average actual illumination in the room. The measurement is taken at the median hour in terms of level of illumination and is the level that will be achieved at half the grid points in the room. As with MDF, not all the internal area of the room is taken into account. This is a "highly accurate and reality-based daylight assessment, based on orientation [of the room]", as described by Mr Ingram. The target set by the 2018 BS is 100 lux for a bedroom, 150 lux for a living room and 200 lux for a kitchen. Mr Ingram accepted that those targets, even if achieved, may not give a predominantly daylit appearance in a room, as they are below the minimum standard specified in the EU standard.

150. Both MDF and MDI require assumptions to be made about the levels of reflectance that should be taken into account, depending on the external environment and the internal finishes of the dwelling. In the event, the expert witnesses were able to agree most of these factors for reflectance, except for the surface of the external terrace and parapet wall. Mr Ingram adopted a reflectance factor of 0.4 for the wall and 0.3 for the terrace, whereas Mr Absolon used the default factor of 0.2 for both. The methods also require allowances for the loss of light through glazing and window frames, which may differ depending on the angle at which the light primarily strikes the external window and the nature of the glazing: single, double or secondary.

Issue 1: treatment of the LKD in flat 605

151. The Waldram method has accumulated no particular guidance about how a room such as an LKD should be treated, or whether it should be analysed differently. The right approach is therefore to apply the Waldram method to it, but then, in considering as an expert the pattern of results produced, consider whether, by virtue of the unusual shape or depth of the room or for other distinct reasons, the result should not lead to the conclusion about sufficiency or insufficiency of light that it appears to indicate.

152. So far as the Radiance and BRE Guidance methods are concerned, the National (UK) Annex to the 2018 BS states as follows, in relation to the MDI method:

> "Where one room in a UK dwelling serves more than a single purpose, the UK committee recommends that the target illuminance is that for the room

> type with the highest value – for example, in a space that combines a living room with a kitchen the target illuminance is recommended to be 200 lx."

That figure is based on the table NA.1 of values of target illuminance for room types in UK dwellings, which specifies 100 lux for a bedroom, 150 lux for a living room and 200 lux for a kitchen – the targets that are used in the MDI method.

153. The BRE Guidance states, at paras 2.1.14 and 2.1.15:

> "Living rooms and kitchens need more daylight than bedrooms, so where there is the choice it is best to site the living room or kitchen away from obstructions.
> …..
> Non-daylit internal kitchens should be avoided wherever possible, especially if the kitchen is used as a dining area too. Daylight levels in kitchen areas should be checked. If the layout means that a small internal kitchen is inevitable, it should be directly linked to a well daylit room. Further guidance for assessment of this situation is given in Appendix C.

Appendix C at C.17 relevantly provides:

> "Where a room has a shared use, the highest target should apply. For example in a bed sitting room in student accommodation, the value for a living room should be used if students would often spend time in their rooms during the day. Local authorities could use discretion here. For example, the target for a living room could be used for a combined living/dining/kitchen if the kitchens are not treated as habitable spaces, as it may avoid small separate kitchens in a design. The kitchen space would still need to be included in the assessment area (Figures C4 and C5).

Figure C4 shows a combined LKD area and has the following commentary:

> "for a combined living/dining/kitchen area, the kitchen should always be included as part of the room area in the calculations, even in cases where the kitchen is deemed non-habitable and the living room criterion is applied to the whole space."

154. It follows that the guidance is firmly against excluding the kitchen space of an LKD, or treating it as a separate room, but with discretion to apply the living room lighting target rather than the kitchen target, if the kitchen area is non-habitable.

155. Mr Ingram has treated not just the non-habitable kitchen worktop spaces but also the floorspace in between them, and the space leading up to the fridge/freezer – amounting in aggregate to about a quarter of the total area of the LKD – as a notionally separate kitchen area, attracting the highest 200 lux requirement.

156. His evidence in his expert report about this was as follows:

> "4.13 … Urban flats are often designed to position the kitchen in the darkest part of the room (i.e at the rear). This configuration, unsurprisingly, exists in both flats. ….

> 4.14 The expectation of natural light for a kitchen in this configuration will clearly be significantly lower and will not meet national industry guidance which places a higher requirement of natural light. This guidance is applicable to cases where a kitchen is a separate and main habitable room. It does not apply to the configuration common in flats such as these where the kitchen is placed at the back of and in the darkest part of a room which includes a living and dining area. Given that the kitchen is a separate and distinct area of the living/dining/kitchen space and this area will be confined to food preparation and the like, I consider that it is appropriate to consider the kitchen area separate from the living/dining area when assessing the reduction in and sufficiency of light within these spaces."

157. Mr Absolon stated in his supplementary report, at para 3.54, that he does not agree with Mr Ingram's treatment of the kitchen. He was asked in cross-examination if the kitchen arrangement was the only realistic way of placing the kitchen in the room and he disagreed and said that he had seen lots of different versions of how LKDs were arranged. The LKD might not have an island unit and the units might be on the adjacent wall, so the room had to be assessed on its full potential for use. He said "you can't just lob out a piece of the room and decide that it doesn't count. It just skews the figures" (at this point, Mr Absolon had been asked about excluding circulation and wardrobe space from the bedrooms, but his point was a general one).

158. In the first and each subsequent joint statement of the experts, there is recorded a view of Mr Ingram that the flat 605 kitchen is at the rear of what is in overall terms a deep room, and that he believes that kitchens in modern flats were designed primarily to rely upon artificial lighting compared with natural daylight. The last joint statement also contains a plan that illustrates the different approach taken by the experts when assessing the LKD as a whole – which raises different questions.

159. Asked about the BRE Guidance about bedsits and LKDs, Mr Ingram said that the guidance was intended to give local planning authorities sufficient discretion so that dwellings were not poorly designed, just so that minimum targets of illuminance could be achieved. He said that most local authorities recognise that with LKDs it is the living space that is predominantly the most relevant use, and are prepared to work with a target of 150 lux for such a room. Mr Ingram also acknowledged that, today, there is a possibility of adults sharing flats and using bedrooms as working space as well as sleeping space.

160. Mr Ingram explained that he took the height of the working plane for the kitchen worktops and island unit as 93 cm rather than the standard 85 cm, to reflect reality, but accepted that the effect of that was that less of the island unit would fall within the 0.2% sky line than would be the case if he had taken 85 cm.

161. As to the LKD, based on the Waldram analysis results alone, Mr Ingram accepted that they showed that the LKD was less suitable for the purposes to which it would be put, and not as beneficial an environment for carrying out the ordinary activities of everyday living – subject to the qualification that he did not accept that Waldram correctly reflected the position. He was willing to say that, based on the 45% to 46% result on Waldram (depending on which expert's approach was used) in relation to the LKD:

> "… you would be in a scenario saying: that's interesting, that's getting to a debatable point, if Waldram was right."

162. I reject Mr Ingram's case that it is appropriate, when considering whether a reduction of light to an LKD leaves insufficient light or causes a substantial interference, to treat the kitchen as a separate room. None of the BRE guidance suggests that that is appropriate, and there is no precedent for it when applying the Waldram method. What may be justified, as the BRE Guidance describes, is to use the lower target of 150 lux for the whole room, rather than a target of 200 lux driven by the presence of the kitchen. However, Mr Ingram did not do that: he applied the lower target of 150 lux but only after excluding the kitchen altogether from the LKD, leaving only the best lit three-quarters of the room to be assessed as an LD. Assessed as a separate room, the kitchen is already a conspicuous fail in the Before assessment, and the After assessment only makes a bad position slightly worse. The fact that it may be appropriate when designing new flats to leave a kitchen area out of the analysis, by designating it as non-living space, to avoid distorting the design for a living room, does not mean that, when answering the question whether there has been an actionable interference with light to an existing room, that room should notionally be treated as excluding part of the space.

163. If the LKD is treated as a single room, it falls significantly below the minimum standard for both MDI and MDF. At that point, Mr Ingram sought to rely on the fact that the reduction in light would not be noticeable, as it is a reduction of less than 20% of the former value. I deal with this issue separately, below.

164. Applying the analysis of the LKD as a single room, there was a significant failure to achieve the 50% measure on the Waldram analysis and a failure on the MDF/MDI analysis.

Issue 2: Failure of bedrooms to meet the MDI target

165. The bedroom in flat 605 will have insufficient light, according to both expert light surveyors. On the Waldram method, Mr Absolon measures a reduction from 53.53% to 33.73% and Mr Ingram from 55.89% to 35.25%. The differences result from the different treatment of small areas of the bedroom currently used for a dressing table and a wardrobe, but they do not matter for this purpose.

166. On the MDF method applied by Mr Ingram, the bedroom reduces from 0.7% of the full sky illuminance to 0.5%, which is below the 0.7% minimum target for bedrooms. Mr Absolon also carried out an MDF assessment, in his supplementary report, and his results are somewhat different and differently expressed (as a percentage of the room that does achieve 0.7% - namely 28.5% rather than the target of 50%) but the conclusion is the same, namely that the MDF target minimum illuminance level will not be achieved.

167. On the MDI method applied by Mr Ingram, the bedroom in flat 605 achieved a healthy 149 lux in the Before scenario, well ahead of the minimum standard of 100 lux, but in the After scenario only achieved 97 lux, being a narrow "fail". On Mr Absolon's measurements, the Before result was 135.4 lux and the After result 85.9 lux: a more significant fail.

168. The bedroom in flat 705 will have insufficient light according to both experts. On the Waldram method, Mr Absolon measures a reduction from 38.29% to 28.85% and Mr

Ingram from 47.77% to 35.44%. In both cases, the light was insufficient to start with and has become significantly worse. The differences in their results are attributable to quite significant areas of the bedroom that Mr Ingram excludes, namely the built-in wardrobe space and area around the door and leading to the en-suite bathroom (which are the areas of the room with the least good light), but these differences do not affect the Waldram results other than the extent of the failure.

169. On the MDF method, applied by Mr Ingram, the bedroom reduces from 0.6% of the full sky illuminance to 0.5%, which is below the 0.7% minimum target for bedrooms. Mr Absolon's MDF After assessment records 16.9% of the room rather than the target of 50% as achieving the minimum level of 100 lux, down from only 18.8% in the Before assessment, but the overall conclusion is the same.

170. On the MDI method, applied by Mr Ingram, the bedroom achieved a "pass" at 125 lux in the Before scenario, above the minimum standard of 100 lux, but in the After scenario only achieved 95 lux, being a narrow "fail". On Mr Absolon's measurements, the Before result was 70.2 lux and the After result 52.2 lux: a much more significant fail (which I explain below, in [178]).

171. Considered simply as results, the Waldram method, the MDF method and the MDI method all suggest that the two bedrooms will have insufficient light. The Defendant's position is that some of Radiance method failures are marginal and so of much less significance. Mr Ingram said that one would not notice at all the difference between 100 lux and 97 lux. In particular, Mr Ingram notes and the Defendant asserts that on the (preferred) MDI method, the After assessment is only just below the minimum of 100 lux in both cases. Further, he said, the reduction in light is in some instances less than 20%, which is the threshold for noticeability referred to in the BRE guidance on the separate VSC, NSL and APSL tests. Mr Ingram said that he accepted that the 0.5% was a fail –

> "[b]ut against where it was, the 0.7%, and that's why I used the false colour images as well, my view is that I do not consider that to be substantially adverse to use and enjoyment."

172. Mr McGhee took Mr Absolon through the relevant figures at the end of his cross-examination, and for this purpose he asked Mr Absolon to look at a different Before assessment, the "cut back Arbor" assessment (on a Waldram analysis), and to compare that with the Arbor as built After assessment. As previously explained, this was because, if one is considering what infringement would be noticeable to the Claimants, it was agreed that the starting point had to be what the developer could lawfully build without infringing the Claimants' rights, not what the Claimants had actually enjoyed previously.

173. The right comparison established that, on Mr Ingram's measurements:

    a) The MDF result for the bedroom in flat 605 reduces from 0.6% to 0.5%, a reduction of about 17%;

    b) The MDI result for that bedroom reduced from 130 to 97 – a reduction of about 25%;

    c) The MDF result for the bedroom in flat 705 also reduces from 0.6% to 0.5%;

d) The MDI result for that bedroom reduced from 123 to 95 – a reduction of about 23%.

174. Mr McGhee did the same exercise with Mr Ingram's MDF and MDI measurements for the LKD in flat 605, which showed a 12.5% reduction on the MDF analysis and a 12% reduction on the MDI analysis.

175. The Defendant accordingly argued, first, that the MDI assessment failures of each bedroom are marginal in absolute terms, in that they are only a little below the target of 100 lux; and second, that on the MDF results, the reduction in light from the amount that the developer of Arbor could lawfully leave them with is at a level – applying the BRE Guidance on separate methods of assessment – that would not be noticeable, and so cannot be a substantial interference with their light. It is notable, however, that the same arguments cannot be applied the other way round: the MDF failure is not marginal and the reduction in light on an MDI analysis is greater than 20%, in each case for both flats.

176. As for the margin of failure, the answer to this, so far as sufficiency of illuminance is concerned, is in my judgment that the minimum target level approved in the British Standard version of the EU standard does not allow this kind of marginal failure. In the EU version, the level of 100 lux is a minimum level of illuminance for a bedroom that is required to be achieved for 95% of the assessed space in the room – i.e. only 5% of the assessed area can fall below it. The target for 50% of the space in the EU standard is 300 lux, with the minimum level of 100 lux being deemed acceptable for the remaining, darker 45% of the room. But the 2018 BS version has significantly watered down the EU standard, by requiring the best lit 50% of the room to achieve only the minimum level of 100 lux. There is therefore, in principle, no scope for an argument that something less than the minimum level for 50% of the room is sufficient. The BRE Guidance itself notes that even achieving the minimum standard may not make the room suitable for the elderly. Mr Ingram thought that the "ordinary notions of mankind" were not to be equated with the elderly; but unsuitability for the elderly is an indication that the minimum target does not have leeway built into it.

177. Another reason why the targets should be regarded as minima, in this case at least, is that the assessment is traditionally done by excluding certain areas of the room that are less likely to be used. This is a border of 300mm around the extremity of the room, so that the assessment grid for MDF and MDI does not take account of the illuminance of this area. The borders on 3 of the 4 sides of a room are generally likely to be less well lit by daylight, as all the examples in evidence demonstrate. The border on the fourth side, where the windows are, is likely to be better lit. Fixing the assessment grid in this way is standard practice, for the MDI and MDF methods, but its consequences for smaller rooms are stark. Omitting a band of 300mm around a room that is 3m by 3m, the size of a small double bedroom, means that only 64% of the room constitutes the assessment grid. This in turn means that the minimum target of 100 lux only has to be satisfied by 32% of the room, rather than 50% (in the 2018 BS) or 95% (in the EU Standard). In a room 4m by 4m, the equivalent figure is 36%. Mr Ingram agreed that the bedrooms in flats 605 and 705 were of these approximate sizes, but felt that this was just one factor among many that was considered when devising the methodology, and so it could not be considered in isolation.

178. I bear in mind also that Mr Absolon's measurement was 85.9 lux for flat 605, which was measured on a slightly different basis from Mr Ingram, but which suggests that Mr

Ingram's result of 97 lux might be seen as a maximum achievable result, depending on judgments about what areas of the room it was appropriate to exclude from the assessment, and on whether standard values or bespoke values should be used for some of the reflectances that need to be taken into account. There was also the question of an additional allowance for the secondary glazing that Mr and Mrs Powell had recently installed in flat 605 to attenuate the noise from the railway – which is illustrative of the way that the flat might reasonably be used by an occupier, even though the works were done too late for the experts to take the extra loss of light into account in their results. The difference between the two experts in these respects applied to the configuration of flat 705 produced a much greater divergence of results, 95 lux as against 52.2 lux, and if an area behind the door is included, which Mr Ingram eventually conceded was probably correct, Mr Ingram's own MDI score goes down to 90 lux, which is certainly not a narrow failure.

179. In short, given the way that the 2018 BS is calibrated, I do not accept that there is scope for saying that a shortfall of 3-5 lux is of no significance, and that results of 97 and 95 lux are to be treated as being as good as achieving the minimum standard. Or, put another way, they are not a sound foundation for arguing that the results produced by the Waldram method are clearly wrong, or that the light left in the rooms is sufficient – especially when the MDF method results clearly show that it is not.

180. The MDI method is, in principle, Mr Ingram's preferred method. I can understand why, and accept his reasons: it is by far the most sophisticated method, and it purports to measure the actual levels of diffuse illumination in a room, using complex data and technology. It is odd, in those circumstances, therefore, for Mr Ingram, faced with his own MDI results that show that a median assessment of the light is substandard, readily to divert from the conclusion to which those results point, and prefer the results of a relatively less sophisticated method, or a subjective appraisal of what is shown on falsecolour images. If it is the sophisticated technology and modern methodology that justifies saying that Waldram is outmoded, more weight should be given to the results produced by MDI; otherwise, an established, widely-used objective standard (Waldram) is being supplanted by subjective interpretation of falsecolour graphics.

Issue 3: Do the failures to meet the MDF and MDI targets in the After assessments matter if the reduction from the Before assessment is less than 20%?

181. As noted above, this question does not arise in respect of the MDI assessments for each bedroom, which both exceed a reduction of 20%. So according to Mr Ingram's application of the MDI method and BRE tests, the reduction of light in both bedrooms would be noticeable. It is only in relation to the MDF results where the 20% criterion enables Mr Ingram to say that the reduction would not be noticeable.

182. The criterion of 20% is taken from the BRE Guidance relating to the application of the VSC, NSL and APSH assessments, as explained above ([145]-[147]). The MDF and MDI assessments do not themselves include any such test or qualification, in the way that these other assessments do. Neither does the Appendix to the BRE Guidance that deals with interior daylighting recommendations include such a reference. The EU Standard and the 2018 BS do not include any reference to a margin of non-noticeability: this is unsurprising, as they are concerned with the designs of new buildings optimising the use

of light, to ensure that certain minimum standards are always achieved. In the Criteria for Daylight Provision section of the EU Standard, para 5.1.2 states:

> "A space is considered to provide adequate daylight if a target illuminance level is achieved across a fraction of the reference plane within a space for at least half the daylight hours. In addition, for spaces with vertical or inclined daylight openings, a minimum target illuminance level is also to be achieved across the reference plane."

183. The relevant targets in the ES are 300 lux across 50% of the space and 100 lux across 95% of the space. These are absolute levels, and the latter a minimum target. The 2018 BS significantly reduced the target to 100 lux across 50% of the space.

184. The Defendant's case is nevertheless that a reduction in light to a level where it is substandard cannot be a substantial interference unless it is noticeable, and Mr Ingram seeks to rely in this regard on the criterion of 20% reduction in the BRE Guidance.

185. The VSC, NSL and APSH tests have their limitations, as Mr Ingram acknowledged. He said that the VSC test was "not no help but of limited help", because it was not picking up what is happening internally in the room. It was a bit of common sense, he said, but useful as a test of noticeability. As for NSL, He accepted that this was essentially the same as the Waldram test, except that it was identifying a simple line rather than a standard: a rough and ready common sense approach, but the 20% noticeability test could not, he accepted, be read across to percentage reductions in results produced by the Waldram method. APSH is a measure of sunlight availability on the outside of the room, not an internal measure of illuminance.

186. If, as Mr Ingram accepts, the 20% reduction cannot be read across to the Waldram analysis to import an assessment of noticeability, I am not clear why it can be superimposed on the Radiance assessments, as Mr Ingram sought to do. These assessments are a measure of the sufficiency of light in a room, not of whether a reduction in light is noticeable. Whether a reduction of exposure of the exterior of a window to the sky or the amount of sunlight is noticeable is not the same question as whether a reduction of internal illumination is substantial.

187. Mr Absolon said that the 20% "rule" derived from the BRE Guidance is a blunt instrument, because it depends on what the starting point is; it does not really reflect what happens in rights of light matters, but that it was a useful test in a planning context. He did not agree that it was a useful test in the context of the MDF and MDI methods, and considered that the absolute figures produced by the results were more important.

188. While accepting, therefore, Mr Ingram's view that these three BRE assessments provide further information which is of some interest and use to an expert, they do not provide information which is directly applicable to an attempt to answer the question whether internal illuminance is sufficient, or whether a reduction in levels of internal illuminance would be a substantial interference with a person's ordinary use and enjoyment of property. Given that the measure of 20% is not explained or justified in the BRE Guidance, it cannot be transposed and applied when seeking to answer a different question, in my judgment.

189. In any event, I am not persuaded that a reduction of the proportion of a room with at least 2% sky factor from 55% to 45%, or a reduction in the median level of illuminance from 110 lux to 90 lux will not be noticeable, though the reduction is less than 20%. If the light is insufficient (or substandard) to that extent, it will very likely have a substantial impact on the use and enjoyment of the room for ordinary purposes.

190. What is accepted is that where the amount of light is already insufficient and is then further reduced, there is a rule of thumb that a further reduction of up to 2% may not be noticeable. There is no authority that suggests that there is otherwise a test of noticeability when using the Waldram method.

191. Mr McGhee accepted that in law there was no separate test of noticeability, and that the only two questions were the sufficiency of the remaining light and whether there is a substantial impact on use and enjoyment.

192. I am unpersuaded by Mr Ingram that the results for the bedrooms in flats 605 and 705 can be said to demonstrate that there is no substantial impact on the basis either that the reduction in the MDF scores is less than 20% or that the MDI scores are almost a "pass". There is a significant element of cherry picking of results here that is unconvincing. Nowhere does Mr Ingram grapple with the fact that neither the MDI results nor the Waldram results, which show a greater than 20% reduction of light, support the interpretation he seeks to place on the MDF results; nor are the MDI near misses supported by the MDF results or the Waldram results, which show that the targets are missed by a considerable margin (28%, using Mr McGhee's approach).

193. The MDI results obtained by Mr Ingram do not justify a conclusion that the light is sufficient or that there has been no substantial impact on the use and enjoyment, on the basis that they are nearly "passes". For the conclusion that there is no substantial impact, Mr Ingram ultimately relies on his reading of the false colour images.

The basis of Mr Ingram's opinion

194. Having established that Mr Ingram's conclusions are not supported by the results obtained from the MDI and MDF methods that he has used, nor from his Waldram analysis, there is an overall assessment needed of whether the evidence establishes that the remaining light in the Claimants' flats will be insufficient or substandard, and if so whether the reduced light amounts to a substantial interference, so as to be actionable.

195. Mr Absolon's position is that the Waldram results speak for themselves, so far as insufficiency of light is concerned, and that by using his expert judgement obtained from many years in practice, it is clear that the reductions in light will have a substantial effect on the use and enjoyment of each flat. Mr Absolon does not rely on the Radiance methods or the VSC, NSL or APSH tests in the BRE Guidance, on the basis that they are not directed at assessing the impact of reduction of light on rights of light and do not therefore assist him. In particular, he contends that the false colour images on which Mr Ingram relies are too imprecise, and on the wrong scale, to be able to support a reliable judgment.

196. Mr Ingram's approach is, he says, to take all the information produced by the various methods (including Waldram) into account and form a fully-informed judgment as to sufficiency of light and substantial impact on use and enjoyment. He said that each of the methods or tests contributes something to his assessment, and that the MDF and MDI results are the most relevant, both the numerical results and the false colour images of the way that the light falls within the room (expert report, paras 3.107-3.110).

197. Mr McGhee commended as "exemplary" Mr Ingram's approach in his summary of technical assessments (which he does as a separate section in his expert report for each scenario for each flat). Mr McGhee suggested that I could take paras 6.4 – 6.46 of the report as a working example of the approach, even though it addresses a comparison for flat 605 between the simple Before and After models, rather than between cut back Arbor Before and Arbor as built After

198. Each such section in Mr Ingram's expert report is set out after several pages of results of applying the various methods to the particular scenario, including Waldram diagrams and false colour images accompanying the Radiance results. Mr Ingram provides commentary on each room, but with the LK and kitchen as separate rooms, rather than the LKD as a single room. For each room considered, he summarises what he says the MDF and MDI results show, expressing his view on whether, in light of the false colour images, the reduction in light will be noticeable. He then states, briefly, whether under the VSL, NSL and APSH tests the reductions would be considered noticeable or material. Where one or more test result suggests non-noticeability, Mr Ingram says that it supports his assessment of the false colour images. If one does not, he rejects its result and prefers the Radiance methods:

> "Against the BRE Guidelines tests (VSC/PSH) the reductions would be considered non-material and not noticeable, with the exception of the NSL test which indicates there may be a noticeable reduction in daylight. However in my opinion, the more complex methodologies mentioned above actually demonstrate that even this reduction will not be noticeable."

199. Mr Ingram then summarises the result of the Waldram analysis, describing it in all cases as "far less accurate", and where the result is adverse, he comments in terms such as the following:

> "… the assessment suggests that the light remaining will be insufficient on the basis that the room has been reduced to less than 50% well lit. There are numerous deficiencies with the Waldram analysis, as detailed above, and in view of the results of the other methodologies considered above, I am clear that the level of light, nevertheless, remained sufficient."

200. Each section of commentary on a room in flat 605 ends with a summary. For example, the principal bedroom is summarised as follows:

> "I am clear that this room will not only retain sufficient daylight but also there will be no noticeable reduction to it. When sunlight is considered, there may be a noticeable reduction, but the APSH test referenced in the BRE Guidelines, indicates that this reduction would not be materially adverse. Given the use of this room as a bedroom, it is my view that no substantial

> interference on the use and enjoyment will occur between the "before" and "after" condition."

At that stage of Mr Ingram's analysis, the bedroom did "pass" the MDF test, though it failed the other tests – but by the time of the final joint statement, to which the parties' analysis based on the 2025 consent was annexed, the bedroom was also a "fail", so that it "failed" the Waldram, MDF and MDI assessments. Mr Ingram did not, however, qualify his overall conclusion, which was that the light was sufficient and that there was no noticeable reduction.

201. In effect, therefore, Mr Ingram starts with his assessment of the false colour images, and even in a case where the MDF or MDI assessments (or both) show substandard results, gives his opinion that they show that there is sufficient light, or that any reduction is not noticeable or not substantial, then points out any results from the BRE Guidance that support that conclusion, and rejects the Waldram analysis as being wrong, or deficient. This leads to an overall conclusion that there is sufficient light, or no noticeable or substantial reduction in light, or in some cases both.

202. Taking the principal bedroom in flat 705 as another example, which as shown above is deficient on the results of a Waldram, MDF and MDI analysis, Mr Ingram's report says, in relation to MDF, that:

> "… the remaining light that will be enjoyed, is similar at this level (0.56%) as well as the recommended level (0.7%), despite falling marginally short of the guidance. I therefore consider it sufficient against this room's use and location."

The false colour images are said to "remain similar". The room use (as a bedroom) is, however, taken into account in the target proportion (0.7%).

203. For MDI, Mr Ingram's results at that stage showed a narrow "pass", and he says that:

> "… the numerical results indicate that the remaining light will be sufficient against this room use and location. The retained MDI value meets the 100 lux recommended value for bedrooms retaining 107 lux demonstrating this is the case"

despite a reduction from 141 lux in the Before assessment. So, where the numerical results support the Defendant's case, Mr Ingram is content to take them as proving sufficiency, without (it appears from the words of the report) further analysis of the false colour images.

204. The BRE Guidelines are referred to and exactly the same statement as in [198] above is then made. The conclusion on the Waldram method, suggesting that the remaining light is insufficient, is dismissed on the basis that "I am already clear that this is an incorrect conclusion". A conclusion for this room, which on the 2025 analysis also fails to meet the MDI standard, is expressed as:

> "I am clear that this room will not only retain sufficient daylight but also there will be no noticeable reduction to it."

205. Mr Calland criticised Mr Ingram's approach to assessing insufficiency of light, for the following reasons:

    i) he rejects the Waldram method as "far less accurate" and makes no further attempt to consider why the Waldram results are so out of line with his assessments of the other methods;

    ii) he uses the BS as an indication of sufficiency when they are design standards and does not take into account that they are based on the median hour of daylight illuminance;

    iii) he ignores that bedrooms in a Central London flat may be used as private recreation spaces and for study, as well as rooms for sleeping in;

    iv) he departs from the BRE Guidance and 2018 BS in ways that alter the impression given by the Radiance results: by dividing the LKD into two and by using the living room MDI target rather than the kitchen target;

    v) he says that he uses the BRE tests as tests of the noticeability of change of diffuse light within a room, but none of those three tests measures diffuse light within a room;

    vi) he cherry picks the results of the BRE tests: when a result supports a conclusion of sufficiency or non-substantiality, he relies on it; when it does not support that conclusion, he rejects it in favour of the Radiance assessments;

    vii) he rejects the only established objective standard of sufficiency of light – the Waldram method – and picks whichever of the other tests supports his intuition about the right result;

    viii) in every assessment, he concludes that the false colour images indicate that there is no noticeable change to the light in the room, but this is no more than subjective interpretation of unclear images and a cherry-picking of results.

206. I find most of these criticisms to be justified, either wholly or to some extent. I agree that Mr Ingram's analysis of the various results leaves a lot unexamined. There is no attempt to analyse the results on which Mr Ingram chooses to rely, so, for example, the false colour images are not further interrogated to analyse how much of each room falls into each colour band or what the proportionate changes are, Before and After. Where different methods of assessment produce the same result, that is not acknowledged; where they produce apparently different results, there is no attempt to explain why they do so, or reconcile them, nor does Mr Ingram take into account the Waldram results or attempt to analyse them.

207. Mr Ingram said in cross-examination that "you cannot rely on the Waldram basis" and "I don't accept Waldram is telling the truth". So he has rejected the Waldram method (on the basis of its methodological shortcomings) and considered only the results produced by the different BRE and Radiance methods. However, the Radiance method and some of the BRE tests do not support his conclusions either, when fairly analysed. The most that can be said is that one or more (but not all) of the BRE tests is passed, sometimes only because there is a reduction of less than 20% in the result. That reduction of 20% is

then made to do double work, in explaining why a substandard MDI or MDF result does not demonstrate insufficiency or a substantial impact.

208. So, as one example, for the bedroom of flat 705 the narrow failure on MDI was said not to be noticeable and a reduction of 14.1 lux (a reduction from 0.6% to 0.5% MDF, where the minimum standard is 0.7%) was "not perceptible" in view of what the false colour images showed, where the Before and After images were "almost identical". In any event, the loss was not important because the room is a bedroom and any reading in bed would be done with the aid of artificial light.

209. The false colour images on which Mr Ingram ultimately relied for his judgements about insufficiency and noticeability are produced by the computer programme in standard format, for each MDI and MDF assessment. For MDF, the bands range from 0.0 to 0.5% (blue) to 5.0% (a rich yellow colour), with bands increasing by 0.5% in between (colours ranging from indigo to a slightly lighter shade of yellow). For MDI, the same coloured bands are used but this time on a scale in which each band increases by 50 lux. For both sets of images, the most important bands are 0.5-1.0% (50 lux to 100 lux), 1.0-1.5% (100 lux to 150 lux), and 1.5% to 2.0% (150 lux to 200 lux), which are coloured indigo, magenta and burgundy. These 3 colours and the scarlet colour of the next band above them appear as quite similar shades on the false colour images. Given that it may be material to know which parts of a bedroom are below and which exceed 0.7%, which parts of a living room exceed and which are below 1.1% and which parts of a kitchen exceed and which are below 1.4%, the scale is obviously unhelpful.

210. Mr Ingram's view is that to a trained eye the distinctions are clear. He did not explain how he could distinguish on an MDF false colour image between areas of the room that fell below or above the specified minimum standard for the room, but appeared to me to rely on something of a more impressionistic, global assessment.

211. Mr Ingram's evidence was, in essence, that by considering the false colour representation of the MDI or MDF results, he (with a trained eye) could understand where within the room the various levels of light fell, in the Before and After analysis, and so was able to discern whether the light in the room was sufficient, in the After analysis, and whether the difference between the Before and After representations would be noticeable, or not.

212. In the case of the bedroom to flat 605, the difference as shown on the false colour images is just about discernible to an inexpert eye – no doubt as a consequence of the result clearly moving from a "pass" to a "fail" on both MDI and MDF. The principal area of difference is a strip in passing from the window to the head of the bed, where what was burgundy or borderline magenta becomes magenta and indigo. So, in relation to the bedroom, Mr Ingram was able to identify that the areas of loss of light were concentrated over the obvious position for the bed, which meant that loss would not be substantial, as that light could not be used for reading there. On the equivalent images for the LKD, the difference is less easy to perceive, and may be more subtle, but an area of the kitchen where the island unit is located is one noticeable change.

213. For flat 705, the colour change again appears quite subtle, but the main area of change appears to be the area over the top half of the bed, against the side wall of the bedroom, in the most obvious position for a large bed.

214. A single colour change on the false colour images can represent a change of up to 1.0% or 100 lux (from the bottom of one band to the top of the next), however, so a broader appreciation of the changing areas of colour is needed to understand the extent and implications of the change, described at one point as a "ripple effect". A comparison with the Waldram diagrams for the same scenario may assist in identifying areas where the change is most noticeable.

215. Ultimately, Mr Ingram's view was that the false colour images reveal not much of a change and that they do not indicate an insufficiency of light overall, but if they do, the change would not be noticeable, given the areas in which it principally occurs.

216. Mr Absolon said that the false colour images could not be read by a non-expert, and that even for an expert, they were difficult to read because of the scale at which they were produced and the way in which different bands of illumination were similar colours and merged into each other, without clear boundaries. In his own report, he produced a different version of readings, on a different scale with strikingly different colours for adjoining bands of illuminance, for the purpose of demonstrating how false colour images could be made more readable. I agree that his version of the images produces a much clearer representation of the effect of the change. He accepted, however, that an expert could interpret the standard images to inform an understanding of how the light changes within a room.

217. I am not persuaded by Mr Ingram that the false colour images demonstrate that, despite the results produced by the MDI and MDF assessments (and the Waldram results), the light in the rooms in question is sufficient or that the change would not be noticeable. There was really nothing more to go on than Mr Ingram's assertion that that is what he considered that the false colour images revealed. There was no explanation of why it is that, despite the results from the highly sophisticated methods that Mr Ingram preferred to rely on, there was in fact no insufficiency of light. The Waldram results and the Radiance results, properly interpreted, tell the same story, though some of the Radiance results are more marginal. I was not persuaded that, on the basis of Mr Ingram's subjective interpretation of the false colour images, I should reject those results and find that the light remains sufficient.

218. As to noticeability of the reduction in light, Mr Ingram relies on the same material for saying that the change from cut back Arbor to Arbor as built would be imperceptible, namely the false colour images. The Waldram results (which he rejects) show a very substantial reduction in all cases, and the MDI and MDF results, properly analysed, broadly accord with them. The results show that, whichever method is used, the light in the room either becomes substandard or, in the case of the MDF results, being already substandard becomes materially worse. They give no obvious support for the proposition that the reduction would not be noticeable.

219. As for the inconsequentiality of the location of the "missing" light, namely over the bed, I do not accept Mr Ingram's opinion that losses do not matter because bedrooms are for sleeping in and, if one were to wish to read in bed, this would have to be done with the use of artificial light in any event. In the bedroom in flat 705, the main area of "missing" light is the middle and side of the room. As arranged by Mr Cooper, this is over the top half of the bed, but it need not be so. A reasonable use of the space in the room would be to have a bed head where the built in wardrobe is and a desk in or immediately next to the area of "missing" light, with a standalone wardrobe on the opposite side wall. I accept

Mr Absolon's opinion that in this type of flat in London, one should bear in mind that bedrooms may well be used as live/work units by students or young professionals sharing the flat. Even if Mr Cooper's layout is kept, a person lying on the bed during the day would be able to benefit from the natural light, for reading or otherwise.

220. In the bedroom in flat 605, the missing light falls over the middle part of the bed, not at the very top, and a smaller area by the doorway into the corridor. Having the bed in its current location is the only reasonable way to make use of a bedroom with an ensuite bathroom.

221. In both cases, it is a central area of the room where the "good" light is principally lost. It should also be borne in mind that the impact of the insufficiency of light overall in the room will be felt in those areas immediately adjoining the contour line, as the degree of light is a gradient, and those areas closer to the contour line will be relatively less well lit, and on the verge of being insufficient, whereas they were previously well lit.

Is there a further test of perceptibility on the Waldram analysis?

222. Mr Absolon's opinion was that where the proportion of the room that is "well lit" (i.e. on the "window side" of the 0.2% sky factor line) falls below 50%, that denotes a substantially adverse effect on the use and enjoyment of the room, for that is the very thing that the Waldram method attempts to assess. If there is insufficient light for the comfortable enjoyment of premises, that will be a noticeable deficiency, and it is bound to have a substantially adverse effect on the ordinary use and enjoyment of them. He accepted that if premises already have insufficient light, it is then appropriate to ask whether a worsening of the light would be noticeable, and that a 2% margin for imperceptibility was generally allowed, in such a case.

223. Mr Ingram accepted that although the human eye is very good at adjusting to different levels of light, insufficient light is the point where the eye cannot properly adjust. Once past that point, the light is insufficient, with the result that the impact on use of the room is substantial.

224. In my judgment, insufficiency of light on the Waldram method of analysis denotes the level at which ordinary use and enjoyment of the room is adversely affected to a substantial extent, subject only to whether the shape of the room or other such factors have produced a distorted result. At a level just above 50%, use and enjoyment may be affected, in that the light is relatively poor, or barely sufficient, but if light is obstructed to that extent only, it does not have a substantial impact. Nor is it deemed insufficient, on the Waldram method of analysis. There is, however, no further margin below 50% within which the effect of the change from sufficient to insufficient is insubstantial, assuming that the Waldram analysis is correctly calibrated. Indeed, one of the criticisms of the Waldram method is that 1 lumen per square foot is unrealistically low, as a measure of the light required for ordinary use of a room.

225. While it may be true that a *change* in the degree of diffuse illuminance represented by a reduction from 51.1% to 49.9% on the Waldram method, if it could be experienced in reality, would not be noticeable as a difference, nevertheless, whether such a change were perceptible or not, a proportion of 49.9% is insufficient and, at that level, has a substantially adverse effect on use and enjoyment, whether the occupier is conscious of

the change or not. What the occupier will be conscious of, at that level, is that the light is insufficient for comfortable use.

226. In short, in my judgment, the Waldram method does not require a separate exercise of asking whether the effect of the obstruction is perceptible as a change if the result shows that the light in the room is insufficient. Substantial interference with ordinary use and enjoyment is built into the measurement, if the obstruction causes the level to fall below 50%. I accept, however, that if the Waldram method is adjudged unreliable, the conclusion may not follow, particularly in marginal cases, but that is a different question (see below).

227. If the light is already at a level where it is insufficient, and the occupier already grumbles because they cannot comfortably make ordinary use of the room, an obstruction that further reduces the level of light to an imperceptible degree may not have any effect at all, let alone a substantial effect on use and enjoyment. A more significant reduction will have an effect because the light will be not just insufficient but perceptibly poorer than that.

Is the Waldram method reliable?

Are any of the new methods of assessment relevant, useful or more appropriate than the Waldram method, and if so how is the noticeability/substantiality question to be assessed?

228. It is convenient to take these two questions together.

229. A good deal has been written recently, by lawyers and academics, about the shortcomings or otherwise of the Waldram method, and these were cited in the expert evidence. In particular, Waldram is said unrealistically to have assumed a uniformly overcast sky model, when even on an overcast day there is much more light at the zenith than at the horizon, and to have taken an unrealistically low measure of light (1 lumen per square foot, or 10.76 lux) as a measure of an acceptable level of light for ordinary use, which it is agreed is inadequate in modern times. It is said that the method does not take account of external or internal reflectance, or of the loss of light through glazing, window frames and window furniture. In comparison with the Radiance methods, it is unsophisticated: it does not make any allowance for exposure to the sun, through orientation of the room, or the expected hours of daylight and actual levels of brightness for the locality.

230. There is validity in some of these observations. The CIE non-uniform overcast sky model is a more accurate model of illuminance from the sky; 25 lux rather than 10.75 lux (1 lumen) is a more realistic assessment of modern needs. The Waldram method is undoubtedly less sophisticated than MDI or MDF.

231. However, it is common ground that the Waldram method is the industry standard and is used by everyone. It was used by Mr Ingram's firm to assess the likely impact of Arbor and other buildings to be built on Bankside Yards on local residents and business occupiers, and to identify those properties where there was likely to be rights of light issues. It was then used as the basis of settlement offers made by GIA. It has been used in that way for about 100 years without much demur to the reliability of its results. The

RICS Professional Standard, Rights of Light (3rd ed. 2024), endorses it, while stating that experts should be aware of other methods of measurement and may wish to use them, as an alternative. Mr Ingram accepted that it would only be in a case where there was a real dispute that might go to court that his firm would consider using other methods, such as Radiance.

232. A useful illustration of the difference that adjustments for various factors described in [229] above can make is contained in Appendix A to Jonathan Karas KC's book, *The Law of Rights to Light* (2nd ed). This shows that an area of a room that is only 44.7% "well lit" could be up to 99.8% "well lit" once all the adjustments that Mr Ingram advocates (and which the expert surveyors who wrote Appendix A have addressed) are made. However, this is an illustration only.

233. Some of the challenges to the Waldram method are in my judgment mistaken. The method is not a measurement of light, but only a proxy for when a room may be considered as a whole to be sufficiently well-lit. Thus, it is not really a valid criticism that 1 lumen per square foot is much too low, because 1 lumen per square foot is only being used as a proxy for establishing whether the room overall, in variable conditions throughout the year, is adequately lit by natural light. Dr Defoe, an academic, has established that the measure used by Waldram is probably exceeded for about 80% of the days of the year. But that does not mean that the proxy is "incorrect". While maintaining that Waldram was wrong in his research methods and reasoning, Dr Peter Defoe has said[1]:

> "It is my belief that Waldram has used the jury results where all the factors such as internal and external reflectance were in play and related this to the amount of sky visible from each point in order to deduce that any room would be adequately daylit when the sky visibility exceeded a threshold value over more than half the room area. In other words, the average illuminance would be much higher than the minimum acceptable level not simply through direct sky visibility but through internal and external reflectance….
>
> With the benefit of historical hindsight, it is possible to see that Waldram was aware of the complexity of daylight assessment and created his methodology as a means of simplifying the whole process such that it would be possible to achieve a consistent result."

234. The strength of the method is that it has been calibrated and shown to work over decades, and is accepted as the appropriate standard across the industry. There is no rival test for the sufficiency of light in a room as a whole that has been calibrated by testing and experience in the same way. Part of Mr Absolon's criticism of the other methods deployed by the Defendant, through Mr Ingram, was that there has been no proper calibration of the measurements to ascertain whether in practice the 2018 BS standards provide a sufficiently lit room. To the extent that the 2018 BS has significantly reduced the minimum standard set by the EU, this must be doubtful.

235. So far as external reflectance is concerned, it is incorrect that the Waldram method does not take it into account at all. Waldram considered that, in practice, the loss of light

[1] *Waldram Misunderstood* (2023)

through the glazing of the aperture probably roughly equalled the benefit of standard reflectance from outside, and so did not make adjustments for them for that reason. Whether in modern conditions that equivalence exists, where reflective surfaces and window glass are undoubtedly cleaner than they were in most of the 20th Century, is unclear. It is true that Waldram did not take into account internal reflectance as a specific value. With the modern penchant for light coloured interiors, it may be true that internal reflectance contributes in a way that is not fully allowed for by the Waldram method. Dr Defoe comments:

> "In ignoring the separate measurement of internal reflectance and losses through windows, he was effectively assessing these as constants when measuring relative movement of a notional contour of acceptability (the grumble line) and, in legal terms, was avoiding the issue of burden on the servient owner where the dominant owner had, for example, non-reflective surfaces internally and heavy window frames and/or obstructed glazing."

236. In considering whether alleged inadequacies of the Waldram method produce a wrong result, it is important to note that not all the alleged inadequacies point to an under-reporting of the light in the room. The use of the CIE overcast sky model, use of an inadequate measure of sufficiency of light, failure to take account of window frames and failure to adjust specifically for loss of light through glazing will result in an over-reporting of the level of illuminance; failure to adjust specifically for external and internal reflectance and the orientation of the room will generally point in the opposite direction.

237. Further, if one is considering the noticeability of loss of light and whether the impact is substantial, rather than the sufficiency of the light, the criticisms of the Waldram method are not directly in point: the focus is then on the difference between the results when using the same method. This is illustrated by the results shown in the table, which compares a no Arbor Before measurement (B) with a full Arbor After measurement (A):

	605 bedroom	605 LKD	705 bedroom
Mr Absolon	B:53.53 – A:33.73	B:54.45 – A:37.83	B:38.29 – A:28.85
Mr Ingram	B:55.89 – A:35.25	B:56.07 – A:40.30	B:47.77 – A:35.44

When considering noticeability and substantiality, it is of course the cut back Arbor percentage that is taken as the Before, so a figure of about 50 can be substituted for each of the B figures that are above 50 in the table. Even so, the extent of change remains substantial.

238. It is not, in my judgment, credible that reductions of these amounts in the proportion of the room that is barely adequately lit by natural light would not be noticeable. I agree with Mr Absolon's view that, subject only to oddities produced by a strangely shaped room or unusual fenestration, the results themselves indicate that there is likely to be a noticeable and substantial impact. As is common ground, the 0.2% sky factor on a consistently overcast day is a very low level of light, and has been described in Deakins v Hooking [1994] 1 EGLR 190 at 192, by reference to the earlier Court of Appeal decision of Ough v King [1967] 1 WLR 1547 at 1552-3, as being a "bare minimum". A

reduction to significantly below the bare minimum of light in a room cannot sensibly be described as of no substantial effect on ordinary use and enjoyment.

239. Mr Absolon did nevertheless accept that it is still appropriate to exercise an overall judgement, preferably using the contour lines marked and identifying the areas where there is loss of good light. However, he did not do that exercise with the cut back Arbor Before and as built Arbor After comparison, which is the relevant comparison for considering whether loss of light would be noticeable. Mr Absolon's evidence was therefore flawed in that respect. Were the results marginal, and were noticeability a criterion in law, that would be a serious flaw in the formation of his opinion. However, what matters is whether the Waldram results are sufficiently reliable and, if so, whether the After results indicate that the light will be insufficient and the impact of that poor level of illuminance substantial. The results show a considerable shortfall in sufficiency of light. In those circumstances, subject only to a consideration of whether an unusual room configuration or fenestration distorts the results (which it is common ground is not the case here), the impact on ordinary enjoyment and use will be substantial, since it falls far below the "bare minimum", and I so find in relation to each of the rooms in issue. Where the level of light was already insufficient, the reduction is so significant that this too will have a substantial impact.

240. Were it the case that the Radiance methods produced results on one side of the insufficient/substandard line and the Waldram method produced results on the other, there might have been a more difficult question about whether the Waldram results can be considered sufficiently robust, in view of the other available data. Similarly, if the Waldram results were only marginal. I accept that there are legitimate questions about the absolute accuracy and reliability of the Waldram method, which may in due course be revealed by further research. But Waldram remains used and broadly respected by the whole light surveying industry. It has stood the test of time and has the confidence of the industry. It is not really plausible to suggest that the calibration is hopelessly awry in all cases. In this case, it would be wrong to conclude that the results are unreliable or inaccurate, in view of their consistency with the results (properly analysed) produced by the Radiance methods. These results are not mixed, but all (to a greater or lesser degree) corroborate the Waldram results.

241. I agree with Mr Ingram that the Radiance results in particular (less so the BRE tests) provide more useful information about the nature of the impact on light of obstructions. In a marginal case, I would accept Mr Ingram's approach that regard should be had to other methods of assessment, even though they are not specifically designed or calibrated to measure the insufficiency of diffuse light within a room, in order to obtain other potentially useful information with which to form a final judgment. That is not, however, to say that the Radiance methods, much less the BRE Guidance methods, should now be assumed to supplant the Waldram method. Nor does it suggest that a light surveyor will be failing to do their duty if they only use the Waldram method, particularly in a straightforward case.

242. If reliance on the Radiance methods ultimately comes down to a subjective and impressionistic assessment of false colour graphical representations of results, rather than the results themselves (as was the case here), then I question the value of that. It amounts to replacing an established, universally applied, agreed standard with the subjective opinion of an expert light surveyor – which was the opposite of what Percy Waldram attempted to do over 100 years ago.

Conclusion on Section VI

243. I conclude that the light remaining in the principal bedroom and the LKD of flat 605, and in the principal bedroom of flat 705, in scenario CS1 will be insufficient for the ordinary use and enjoyment of those rooms.

244. I also conclude that there will, as a result, be a substantial adverse impact on the ordinary use and enjoyment of those flats. That conclusion is self-evident in the case of flat 605, where the main living accommodation and the principal bedroom are both affected.

245. Although it was not a point specifically taken by the Defendant, I have considered, in the case of flat 705, whether the fact that only the principal bedroom of a 3-bedroom flat is affected may mean that the flat as a whole is not substantially adversely affected. The LKD, which is a feature of the flat, remains very well lit, and the other two bedrooms will retain sufficient light. Nevertheless, the room affected is the principal bedroom, and the further deterioration in light is very significant. For reasons that I have already given, such rooms cannot be assumed always to be used only for sleeping in.

246. Accordingly, despite the fact that only one room is (significantly) affected, I would, on balance, conclude that there is a substantial adverse effect on the use and occupation of flat 705. The extent of the adverse effect overall will be relevant to the assessment of damages.

Alternative findings on DS1 scenario

247. In case it is later decided that I am wrong to hold that CS1 is the appropriate scenario with which to compare the Before and After light, I make the following findings in relation to flat 705 using the DS1 scenario.

248. The agreed results for DS1 are the following:

	Waldram	MDI	MDF
Mr Ingram	B:66.68 – A:52.01	B:246 – A:195	B:1.2% - A:0.9%
Mr Absolon	B:54.16 – A:43.48	-	-

249. Thus, on Mr Ingram's results, the room is a comfortable pass on both Radiance methods and a narrow pass on the Waldram method. Mr Absolon's Waldram results are markedly different. The reasons for this are that Mr Ingram excluded from his Waldram assessment the built-in wardrobe space and an area of space behind and in front of the door to the bedroom, which he considered not to be "habitable space".

250. I prefer Mr Absolon's opinion on both these points. The built-in wardrobe is not the only reasonable way of making use of that part of the room, as I have already described; it is therefore potentially "habitable" space. The area behind the door is also "habitable", and the fact that there are plug sockets in that area is an indication that it was intended to be used, as Mr Ingram eventually accepted. The area of the room in front of the door and next to the bathroom door will obviously be a circulation route, but the Waldram method

does not generally exclude such areas from habitable rooms that are measured, and Mr Ingram did not do so in his assessed room area for the bedroom in flat 605, where there is, equally, an area in front of the door that would necessarily have to be kept clear for circulation. Mr Ingram's approach was neither persuasive nor consistent. It was not consistent with what Ms Hannon, one of the team of surveyors who actually worked on the assessment of possible infringement for Native Land, did when she carried out her measurements and assessments.

251. That leaves me with different results based on the Waldram and Radiance methods. How it was that the bedroom "passed" the MDI assessment so comprehensively and the MDF assessment reasonably comfortably and yet failed the Waldram assessment to a non-marginal degree is unclear. That was not explored in cross-examination. The shift in the Waldram contour line shows that it is a significant area in the middle of the room on one side where the "good" light is lost, which is confirmed in particular in the false colour image for the MDI assessment, suggesting that loss of sunlight may be a contributing factor, if not the whole explanation.

252. I therefore have to consider whether the margin of insufficiency, on the Waldram method, is thrown into sufficient doubt by the Radiance results that I should not accept Mr Absolon's conclusion that the light is insufficient. There was no attempt to explain the divergent results in this scenario, beyond Mr Ingram's assertion that Waldram does not tell the truth. I accept that the Radiance results do have some value, particularly in a case where the margins are closer than on the CS1 scenario.

253. On balance, I consider that there probably is insufficiency of light, but that the impact of that on use of the room may not be as marked as it is on the CS1 analysis. In view of the extremely well-lit, feature LKD in flat 705 and the fact that the two other bedrooms are unaffected, I conclude that, even though the light may just be insufficient in the principal bedroom, there will be no substantial adverse effect on use and enjoyment of the flat overall, and so no nuisance.

VII. If there is an actionable interference caused by the erection of Arbor, should the Court in the exercise of its discretion grant an injunction?

254. As indicated in [30(ii)] above, there is a significant number of different factors at play in deciding the answer to this question. I will address each of them in the course of explaining my findings and my reasoning.

255. The starting point is that the natural remedy where a nuisance is continuing is an injunction to restrain it; to reflect that, the legal burden rests on the defendant to show why an injunction should not be granted: *Fen Tigers* at [101], [121].

256. I will return to the question of whether that case marks a new approach to the grant or withholding of injunctive relief in a case of nuisance, as the Defendant submits, or whether the approach of AL Smith LJ in Shelfer v City of London Electric Lighting Co [1895] 1 Ch 287 ("*Shelfer*") should still be applied, as the Claimants submit, and if so whether that assists in determining this case.

257. The first consideration, however, is the nature of the injunction that the Claimants seek. The pleaded claim was for "an injunction restraining the Defendant from retaining Tower A in such a manner as to commit a nuisance by interfering with the access of light to [his/there] windows". The oddly prohibitory language for an injunction that in substance seeks removal of an obstruction to light was, however, explained in the Claimants' skeleton argument. The Claimants say that they do not object to Arbor remaining in place, as built, if cut backs are made in the other buildings intended to be built on Bankside Yards, so that the Claimants will retain sufficient light.

258. It emerged that the Claimants accept that they should only be granted an injunction that would not become enforceable for a period of time, so that the Defendant can consider how else varied plans for other buildings might avoid the need for demolition, if they so wish, and can then apply for the injunction to be discharged on the basis of undertakings. The Defendant in evidence made clear, however, that it has no intention of doing that, so it is unnecessary to consider that further, because it will not eventuate.

259. Another difficulty emerged in the course of the openings, which is that Arbor is now approximately two-thirds occupied by commercial tenants, but none is joined to these claims. The Claimants said that that was deliberate, because they recognised the tenants were likely to be affected but wanted to avoid the considerable additional costs from joining numerous additional defendants. They accept that the consequence is that an injunction could not be immediately effective in any event, without giving the tenants the opportunity to apply to have it set aside or varied.

260. I accept that a decision not to join the tenants was made in good faith, for the reason given, rather than because the Claimants had no real intention of pursuing an injunction but only claimed one for the purpose of extracting a large ransom payment from the Defendant, as it alleged. The non-joinder of the tenants (or a representative of them) does however have the consequence that an injunction, if granted, would have to be stayed – possibly until after the tenants' rights against the Claimants had been tried.

261. That is not on its own a reason to refuse an injunction, if it is otherwise the appropriate remedy to grant. But the possibility of further proceedings lasting a considerable time, and the risk of the injunction ultimately not being effective, is a factor in considering whether an alternative remedy is more appropriate, in all the circumstances.

Test for grant or refusal of an injunction

262. The leading authority is now the *Fen Tigers* case: it is a decision of the Supreme Court, recently made, and it reviews comprehensively the previous decisions, including *Shelfer*. In *Fen Tigers*, the principal issue was the extent to which a planning permission for a noisy use can be taken to have changed the character of the local area, and whether it precludes an allegation of nuisance. A secondary question was whether an injunction should be granted to stop the permitted use. The judge had found a nuisance and granted an injunction, but the Court of Appeal reversed him.

263. The headnote gives a concise summary of the Court's approach to relief:

> "…where a claimant had established that the defendant's activities constituted a nuisance, prima facie the remedy, in addition to damages for past nuisance, was an injunction to restrain the defendant from committing

> such nuisance in the future, the precise form of any injunction depending on the facts of the particular case; that the court had power, however, to award damages instead of an injunction and, in considering whether to do so, was free to take account of the existence, and terms and conditions, of any planning permission for the land in question, as well as other matters of public interest, such as the effect of any injunction on the viability of the defendant's business and on the public's enjoyment of the activities carried on by that business; that, by contrast, the court could also take account of the effect on persons other than the claimant who would remain badly affected by the nuisance if an injunction were not granted; but that in all cases it was for the court to weigh up all competing factors in the exercise of its unfettered discretion."

264. The leading judgment was given by Lord Neuberger of Abbotsbury PSC. The Defendant submits that the following propositions, as they apply to this type of claim, emerge from the President's judgment (with paragraph references given):

i) The Court should adopt a flexible approach to whether or not to grant or refuse injunctive relief. It is not only in an exceptional case that injunctive relief should be refused. [117], [119]

ii) Subject only to the legal burden of proof remaining with the defendant, there should be no inclination either way whether or not to award injunctive relief, which should depend on all the evidence and arguments. [121], [122]

iii) A relevant factor is if there is a question as to whether the obstruction is legal or not, and if the defendant has acted fairly and not in an unneighbourly spirit. [121], [122]

iv) The court should be careful not to allow an action for an injunction to be used as a means of extorting money. [121]

v) The public interest is a relevant factor. [124]

vi) The existence of planning permission can be a factor and has real force where the planning authority has been influenced by the public benefit. [125]

vii) The fact that the grant of an injunction would involve a loss to the public or a waste of resource is a factor. [126]

viii) It is a factor if the financial implications of an injunction for the defendant would be disproportionate to the damage done to the claimant if it was left to a claim in damages. [126].

I accept that this is an accurate distillation of the main principles established (in this regard), though proposition (iii) is clearer if the second "if" is read as "was" (though I accept that "if" appears in the quotation from *Colls* in [121]).

265. In the course of his judgment, the President referred to *Shelfer* and explained that it was not to be treated mechanically, as the basis for deciding whether an injunction should be

granted or refused, or as establishing that damages should only be awarded in a nuisance claim instead of an injunction in an exceptional case. The principles in *Shelfer* are:

> "it may be stated as a good working rule that –
> (1) if the injury to the plaintiff's legal rights is small,
> (2) and is one which is capable of being estimated in money,
> (3) and is one which can be adequately compensated by a small money payment,
> (4) and the case is one in which it would be oppressive to the defendant to grant an injunction:
> then damages in substitution for an injunction may be given".

266. Cases such as Regan v Paul Properties DPF No.1 Ltd [2007] Ch 135, which applied the *Shelfer* principles mechanically, and as if the corollary was that if the rule was not satisfied an injunction should be granted, were "wrong in principle, and give rise to a serious risk of going wrong in practice". The right approach was that the principles were not a fetter on the court's discretion, but that, absent other countervailing material factors, it would normally be right to refuse an injunction where the rule applied, but there was no corollary for granting an injunction where it did not apply. Lords Neuberger, Sumption and Clarke all agreed that slavish application of *Shelfer* was wrong and out of date.

267. I therefore agree with the Defendant that *Fen Tigers* is to be taken as establishing a new approach, in which the court has a broad discretion whether to grant an injunction or award damages for nuisance, taking account of all relevant factors, but with the legal burden of persuasion to award damages lying on a defendant.

The Arguments

268. The Claimants say that an injunction is the right remedy to grant because the Defendant has deliberately proceeded with its development in the face of the Claimants' rights, knowing that there was probably an infringement, and taking the chance that it would be able to buy off the Claimants and all those in an equivalent position. In fact, all but the Claimants have settled their potential claims for a monetary payment, and the Defendant relies on those settlements as a precedent to establish that modest damages are the appropriate remedy for infringement.

269. However, the Claimants are people who say that they have a particular and strong attraction to the benefits of natural light directly from the sky, and are unwilling to see that light taken away from them, as a *fait accompli*. The position was, I am sure, exacerbated by Native Land's advertising the new development as having "exceptional levels of natural light" that promote productivity and wellbeing, which Mr Cooper pointed out amounted to Native Land helping itself to his light and offering a modest payment while intending to sell it to others for a high price.

270. I also accept that Mr Cooper was incensed by the way that the Council acceded to LHL's and SHL's s.203 application. He considered it to be an affront to local democracy, on the basis that the Council had not gone through the proper processes. These required it to be satisfied that Native Land had conducted appropriate negotiations with those claiming rights of light, and that those negotiations had failed. Mr Cooper is critical that Native

Land did not get beyond offering various multiples of book value and did not engage in assessing damages on a negotiating basis.

271. The s.203 resolution was of great significance. It changed the dynamic of the discussions that had taken place, and it altered the legal position for the future. From May 2022, by which time Arbor had been fully built, the Claimants could no longer seek to restrain the 203 development later to protect their light; their only remedy was against Arbor. Until the s.203 resolution in January 2022 (or, strictly, May 2022 when the transfer, leaseback and re-transfers were completed), the Claimants had rights that they could enforce against the rest of the development, to protect their light. There was therefore no reason for the Claimants to seek an injunction in respect of Arbor before January 2022. But after May 2022 they could only object to Arbor.

272. The second thing that changed as a result of the s.203 resolution was that the only remedy that the Claimants could obtain for the significant loss of light that would ensue from the 203 development was compensation assessed on a diminution in value basis.

273. There is no doubt in my mind that the Claimants were evaluating their options throughout – the Powells from as early as 2018, when they received GIA's letter, and the Claimant from the time that he bought flat 705, in 2021. It cannot, however, be said that there was substantial delay by any of the Claimants that should disentitle them to injunctive relief, for two reasons. First, until May 2022, there was no occasion for them to proceed with a claim for injunctive relief, as their light could be protected, when necessary, by restraining later development. Second, Mr Locke, an executive director of Native Land, who gave evidence openly and frankly, made it clear that even if any of the Claimants had threatened an injunction well before the proceedings were issued, it would have made no difference to what Native Land did in proceeding to build Arbor. The Defendant was therefore not prejudiced in any way by any delay in issuing proceedings, nor did the Claimants gain an advantage from delay. Laches is not established.

274. I similarly reject the argument that Mr Cooper and Mr and Mrs Powell were only interested in turning the opportunity to object to Arbor to financial account, and so should be limited to a remedy in damages for that reason. Having heard Mr Cooper and Mr Powell cross-examined at some length about their motives, I am satisfied that, although they were aware that they might be left with monetary compensation only, that was not the purpose of their claims. I accept that they genuinely wanted to protect the light that their flats enjoyed, as they said.

275. In Mr Cooper's case, he bought flat 705 knowing of the proposed development. As a professional in the sphere of funding property developments, Mr Cooper knew how things worked, and he had come across rights of light previously. He backed himself to have the ability to deal with the threat of the development if and when it happened. He realised that it might not be for some years, if at all. He loved the light in the flat and bought it for that reason, and for personal convenience for his main residence in Surrey and his place of work, near Ludgate Circus. If Mr Cooper had bought the flat as a financial opportunity to hold Native Land to ransom, he would have obtained specific advice about the existence and enforceability of rights of light appurtenant to the flat before completing the purchase of it. He did not do so. He was, however, sufficiently aware of what might happen to obtain some initial advice after he had purchased. I find that he wanted to put himself in the best position to deal with the threat if and when it happened, and that he believed he could do so.

276. Mr Powell had been at flat 605 for much longer, though it is only one of four homes that he and his wife have. The flat is in the nature of a pied-a-terre and convenient for use when visiting London. He and his wife were strongly attracted to the good light that the flat enjoyed (though, in 2001 when the Powells purchased, Sampson House was standing, so the light was not as outstanding as when Mr Cooper bought in 2021. Mr Powell realised from any early stage in the preparation of the development that his light would be affected and that there was a possibility of compensation.

277. He took advice, and he understood that seeking to restrain the development was an option but that this was a very expensive and arduous process. He was persuaded by Delva Patman Redler ("DPR") to allow them to negotiate on his behalf, to see what settlement could be obtained. I accept Mr Powell's evidence that he did not do this because he wanted to settle for a modest amount of monetary compensation for loss of light. Although he tended to suggest that this negotiation was DPR on a frolic of their own, I consider that he was sufficiently interested to know how much Native Land was prepared to pay to buy his rights. He did consider settling for money but ultimately was not willing to do so at the sum that DPR had been able to negotiate. He had been careful to establish that all negotiations were on a without prejudice basis.

278. In about April 2022 there was confusion about Mr Powell's dealings with DPR and a firm of solicitors (Mishcon de Reya) that he had instructed to give some limited advice. A deed of settlement had been prepared by Native Land's solicitors and sent to Mishcon de Reya - Mr Powell said that this was a mistake – to give effect to settlement at the sum that DPR had negotiated. I find that the mistake was caused by Mr Powell being unclear with DPR and Mishcon de Reya about what he wanted, partly because he was not wholly clear himself at that time and partly because he did not want to be led by solicitors. In the event, no settlement was achieved. It was the s.203 resolution that caused Mr Powell to focus on seeking an injunction in relation to Arbor. At that stage, he took advice from Waldrams rather than DPR and sought legal advice from Estate Legal instead of Mishcon de Reya in about May 2022.

279. By 2023, Mr Powell was set on seeking an injunction to protect his light. The only chance of doing so was to seek cut backs of Arbor. Mr Powell eventually understood that it was possible to get an injunction on this basis, and that this was the only way in practice that his light could be preserved once the 203 development began. That does not mean that Mr Powell was unaware of the ability of the court to award negotiating damages instead of granting such an injunction. I find that he did know that, but I accept that his primary interest was in seeking to preserve good light in flat 605. It is material that his living space, not just his bedroom, was at threat of having poor light.

280. I do not therefore consider that an injunction should be refused on the basis that the Claimants are really only interested in money.

281. The Defendant also pleaded and pursued the allegation that the Claimants were seeking injunctive relief not to protect their light but to protect the views from their flats over the River Thames. The Claimants do have some view of the Thames (directly north, from the balconies, which view will largely remain) and west, towards the Houses of Parliament, which is only a partial view and which will be lost once the 203 development is built. These are not panoramic waterfront views that would in themselves provide a motive for seeking relief. In any event, it is not Arbor that obstructs the views. Suffice to say that, although one can understand that the Claimants would like to preserve some

limited view of the Thames, if possible, I do not find that such views were their main motivation. I accept that this was to protect the good light that their flats enjoyed.

Balancing oppression to the Defendant and harm to the Claimants

282. The real problem for the Claimants in seeking an order for injunctive relief is that demolition of Arbor, in whole or in part, will lead to one of two consequences. One possibility is that planning permission will be sought and granted for a new building, as large as Arbor or possibly even larger, but this time protected by the s.203 resolution. If that were to happen, an order to demolish Arbor would be futile, and a huge waste of scarce resources, as well as causing unnecessary disruption and harm to the local area. The other possibility is that Arbor will be demolished, in whole or in part, and not replaced, in which case there will be a waste of a high quality, valuable resource, in the form of a modern, net zero office building that brings considerable public and economic benefits to the area.

283. The Claimants' suggestion that an injunction should only take effect if Native Land does not re-design the 203 development recognises the strength of this argument. The partial demolition of Arbor that would be required, on the basis of the identified cut backs, might require demolition to 10th floor level, so that it is possible that up to half the building would be lost. Demolishing only half the building would be a more complex exercise in engineering terms, and therefore more expensive than entire demolition. Mr Locke considered that demolition could cost £15 million to £20 million, and re-building of the whole would cost around £225 million.

284. There are strong arguments, in modern times, why over £200 million of development costs should not be wasted. There would also be substantial harm done by a further, complex demolition contract and considerable environmental damage as a result. Apart from the financial interest of the developer, to which an order for demolition could be said to be oppressive in comparison with the degree of harm done to the Claimants, there is a significant public interest that needs to be taken into account.

285. The Claimants however did not agree that Native Land would be able to obtain planning permission to rebuild Arbor, if it had been demolished. They do not dispute that, if that happened, a rebuilt Arbor would be protected by the s.203 resolution and so they would not be able to restrain it. They say that, on the assumption that the court had ordered demolition (in whole or in part) in order to protect their rights, the planning committee of the Council would not consider that granting permission to re-build Arbor was appropriate.

286. The Claimants' case on this point was based on the opinion of David Churchill MRTPI, an expert town planner, who gave evidence to that effect. He considered that, despite the development plan for the area supporting tall buildings on Bankside Yards, the elected members of the Council on the planning committee would be concerned about making a decision contrary to the court's decision, because of local political ramifications. This was so even though private rights were not relevant to the planning merits. The members would also be aware that the "missing" offices from Arbor (which was part of the originally consented uses mix) could be made up somewhere else on the development, though he did not identify where.

287. Mr Churchill considered that the members of the committee would not be willing to grant permission for a scheme that resulted in a higher degree of harm (sc. to the Claimants' rights of light) than an alternative scheme would have. He felt that the committee would scrutinise more fully the sunlight/daylight assessments in the Environmental Statement (ES) that would have to be submitted in support of a new planning application, though he recognised that the development as a whole had been considered to produce only a "minor adverse" impact to Bankside Lofts previously, and that a revised planning permission was granted for the Sampson House site in 2020 even though the ES identified major adverse impacts to 45 out of 280 windows in Bankside Lofts. Ultimately, he considered that the planning committee would consider that exceptional circumstances justified the refusal of planning permission notwithstanding that the application was consistent with planning policy and that other material considerations supported it.

288. Luke Emmerton MRTPI, who gave evidence as an expert planner on behalf of the Defendant, did not agree with Mr Churchill. He emphasised that a new Arbor building, or a different building of a similar height, would be consistent with the relevant policies in the development plan and all material planning considerations, and would be seen as an important component part of the larger Bankside Yards development. He said that the planning application would have to be addressed by the planning officers and considered by the planning committee according to its planning merits, without regard to alternatives that were not before them; and that a decision of the court to give effect to the private rights of the Claimants would be irrelevant to the public law merits of the proposal.

289. Since Arbor was considered acceptable before, in public law terms, Mr Emmerton said that it was difficult to see why it would not be seen as acceptable again. It was in any event impossible to see where 10 large storeys of office accommodation could be provided elsewhere at Bankside Yards, as the whole site had been optimised in terms of its potential for development. It was not possible to do without the office space, as the 2014 planning permission required 45,000m^2 of office space, and there were planning policies against losing office space in the Southwark area which would be applicable.

290. I have no hesitation in preferring the opinion of Mr Emmerton, for the following reasons:

    i) Mr Churchill seemed to me to have placed too much reliance on possible political considerations (which were not established by any other evidence) in suggesting that the committee would be reluctant to grant planning permission because of the impact on the Claimants' rights following the grant of an injunction.

    ii) The planning committee's responsibility is not to further any order made by the court enforcing private rights but to consider any planning application on its planning merits. I do not therefore consider that Mr Churchill is right to say that the injunction, if granted, would have fundamentally changed the narrative, as he put it. He accepted that the grant of an injunction was not a material consideration.

    iii) The relevant planning policies strongly support the grant of planning permission for a tall building for office use in that location, which was considered to be an essential component of the mixed use scheme. Mr Churchill was unable to explain persuasively how the missing offices could be accommodated elsewhere on the development, when the Council's officers had previously considered that they could not be when they considered the viability of the proposed development of Arbor.

iv) Private rights are irrelevant to the planning merits, and though impact on amenity is a relevant consideration, the Council had previously considered sunlight and daylight assessments and granted planning permission for the Sampson House site despite some major adverse impacts, whereas the impact of the whole development on Bankside Lofts was only minor adverse. Arbor in isolation can be expected to be less than that. Now that the amenity of only two residents is in issue, as the others have settled with the developer, the extent of the harm to amenity has decreased.

v) The grant of planning permission previously and the officers' report to Cabinet on the exercise of s.203 powers show that although substantial adverse impact of the development on private rights would result, the officers and Cabinet considered that these adverse impacts were significantly outweighed by the public benefit of the proposed development. Public benefit will be a strong material consideration in the hypothetical application for planning permission.

vi) Mr Churchill did not persuade me that there was any plausible reason why, against that background, the planning committee would reach an opposite conclusion and refuse planning permission. The policy (P30) against loss of office space would be an additional material consideration favouring grant of planning permission. Mr Churchill accepted that the Council would have had to be satisfied that it would be provided somewhere else, but he had not considered where that might be. I prefer Mr Emmerton's opinion that Native Land could not have delivered it elsewhere on Bankside Yards.

291. Accordingly, it is probable that if Arbor were demolished, planning permission for a development as part of the Bankside Yards scheme, protected by the s.203 resolution, would be granted for it or something like it to be re-built. Mr Locke said that Native Land would look to replace the development value of Arbor, either by re-building it or by building something larger, to seek to recover the loss that it would have suffered. A building only 10 storeys high was not considered viable. Native Land would compare the value of what was left with the cost and value of what it might be able to build. I accept that it is probable that the developer would have sought to build an equivalent sized or larger building, rather than accept a cut back version of Arbor remaining on the site.

292. This means that an injunction to demolish part of Arbor, if it could take effect as against the tenants, would be futile. It would result in an unjustified waste of valuable resources, as well as a source of harm caused by a further long period of demolition and construction, harm to the economic interests of the area, and harm to employees of the tenants and the building staff, and to the public.

293. If Arbor were demolished, or partly demolished, and not re-built, there would still be a significant waste of top quality office accommodation with strong sustainability credentials, contrary to local planning policies, with consequential environmental, economic and public harm.

294. Arguments of waste of money and harm – which to a greater or lesser extent can be made in any case in which a mandatory injunction to pull down a building is sought – are not an automatic defence to the grant of an injunction, regardless of the facts. They cannot be deployed by a developer as a trump card to excuse wrongful conduct that causes serious harm. A defendant who has cynically sought to steal a march, without being open

about what it intended to build, or who has sought to evade the jurisdiction of the court, is unlikely to receive much sympathy from the court.

295. It is sometimes said that a defendant should not be sheltered by the court from their decision voluntarily to take on the risk of an injunction being granted. However I consider that this overstates the matter. Risk-taking is a necessary part of commercial life and should not be regarded as synonymous with recklessness. The authorities suggest instead that "acting in a high-handed manner", "attempting to steal a march", "acting with reckless disregard" or "acting wantonly and quite unreasonably" are the hallmarks of a case where the court might not be receptive to a disproportionate harm argument. In any event, as *Fen Tigers* establishes, what is required is a balancing of all relevant considerations, with no presumption either way.

296. I do not find that Native Land did seek to steal a march on persons such as the Claimants, or otherwise acted wrongly in starting to build Arbor when it did, though I do find that the Defendant's description of the "neighbourly manner" and "extensive consultation" that Native Land engaged in is rather overstated in its closing submissions. Native Land had a commercial strategy, on which Mr Ingram advised from an early stage, which was calculated to enable it to avoid the assertion of rights of light, and to buy off those who might have adverse rights at an early stage. Failure to buy off all potential objectors would not prevent the start of development above ground, which, as Mr Locke confirmed, would proceed anyway, on the basis of other imperatives. It is right to bear in mind, as Mr Locke said, that rights of light was only one aspect of the timing and sequencing of the development that he had to consider: there were many complex site issues, for example, that had to be brought into line at the same time. He said that rights of light were not at the forefront of Native Land's thinking. I accept that evidence.

297. Nevertheless, in furtherance of its rights of light strategy, and with the benefit of the best advice, Native Land would have identified the best time at which to send initial letters to identified local residents who might have adverse rights, seeking access in order to conduct a survey, and then (with the benefit of the survey results and a Waldram analysis) make offers (at so many times the estimated book value of the weighted area that had lost "good" light) in the hope of obtaining a quick settlement. The initial letters were sent out by GIA in November 2017, but offers of settlement not until November 2019, shortly after the start of construction of Arbor above ground. This was not accidental. Once started, there was no way in which construction would be stopped, short of a court injunction. Residents who were made offers therefore had very little opportunity to take advice and react before the concrete cores were built. The timing was meant to give Native Land the best chance of reaching settlements before later buildings were built. Mr Locke said that the strategy was to conclude negotiations within 12-24 months after the offers were sent.

298. The strategy that Native Land applied is not deserving of especial criticism for three reasons. First, there had been consultation with the local residents and others from 2017. Second, there was nothing unusual or overtly exploitative in what Native Land did. In the interests of carrying out an expensive and valuable development, it needed to put itself in the best position that it could to counteract any attempt to stall the development, and to buy off adverse claims. That is what developers in cities have to do. Third, the construction of Arbor was not seen as being in itself an actionable interference with the rights of residents. Mr Locke confirmed that this was the case: "Arbor was not injuring anyone"; "As I knew that Arbor didn't cause any injury, there was no risk". Native Land's

view, even at a later stage when letters before claim were written, was that this was premature. Arbor was one only of eight large buildings intended for Bankside Yards. GIA was pursuing settlement on the developer's behalf not in relation to Arbor but in relation to the whole Bankside Yards development.

299. Further, in relation to the only two residents who have pursued their rights in court, it was accepted, or in the case of Mr Cooper I have found, that there was no infringement by reason of the construction of Arbor alone. It was only as a result of the s.203 resolution, in January 2022, and the transfers and re-transfers in May 2022, that the Claimants (and other residents) lost their ability to protect the light that they continued to enjoy over the 203 development site, with the consequence that Arbor is a nuisance. Mr Locke said that it was only in April 2021 (following Mr Powell's indication in April 2020 that he would not settle, MLC's threat of injunctive relief in June 2020 and Mr Cooper's letter before claim of January 2021) that use of s.203 was considered, and Native Land decided to open discussion within the Council about using its statutory powers. It decided to apply for a s.203 resolution in October 2021. The massing of Arbor was complete in September 2021. It was not suggested to Mr Locke that this sequence was planned from the outset; indeed it would make no sense to aim to proceed in that way, leaving Arbor out of s.203 protection.

300. This is therefore not a case in which it can be said that Native Land acted unfairly, exploitatively or covertly. The Defendant is entitled to advance the points of futility, waste of resources, oppression and public harm as reasons for refusing injunctive relief.

301. As to whether the damage caused by granting an injunction is disproportionate to the harm caused to the Claimants by the interference with their light, the harm caused to them is not trivial. It will (when the impact is suffered, which may not be for some years) cause most of the Powells' flat and one main room in Mr Cooper's flat to be insufficiently lit for the ordinary use of those rooms, without artificial lighting. While artificial lighting can make the rooms sufficiently lit for ordinary use, the quality of artificial light is not the same as natural light. I am satisfied that the difference in the light enjoyed in those rooms would be noticeably worse than the level of notionally reduced light that could not be objected to (i.e. the level at which the light is just sufficient, or compliant with the BS).

302. The harm that the Claimants will suffer is not financial harm. The damage is principally to the use and enjoyment of the flats, not to their exchange value; though the reduced use and enjoyment value may have some impact on the market value. Mr Cooper and Mr Powell both stressed that they did not want money, they wanted their light, so that they could enjoy fully the advantages that their flats offered. Despite the loss of light, the flats remain useable, attractive and valuable, but less enjoyable in terms of their good light. Mr Cooper bought flat 705 in early 2021 knowing of the threat of an overbearing development that would reduce the light on the west side, so loss of light cannot (in his case) be considered as a major detraction from the advantages of occupying the flat.

303. I would therefore characterise the level of harm done as neither low nor higher end, but "substantial" in the case of the Powells, as their main living space and their main bedroom will be affected, and "moderate" in the case of Mr Cooper, whose main bedroom only will be affected. The impact will not make the flats unsuitable for use, just less attractive and enjoyable.

304. In either case, the damage done by the grant of an injunction, both to the Defendant, the tenants and to the public interest, would be entirely disproportionate to the harm done to the Claimants, since – at one extreme, which is where the Claimants' cases ended up in closing submissions – the Claimants could be awarded sufficient damages to enable them to sell up and buy equivalent flats elsewhere in the locality, with good light, rights of light and some river views, at a total cost of (perhaps) £2 million each, in comparison with the financial impact on the Defendant alone of nearly £250 million if Arbor is demolished.

305. The Claimants accept that the public interest should be taken into account when deciding whether to grant an injunction. The starting point is that planning permission was granted for Arbor, after considering sunlight and daylight issues and harm caused, as one part of a large mixed use development on a very large scale, which would be expected to bring considerable economic and other public benefits to this part of Southwark. In granting planning permission, the Council had to assess whether the harm to neighbours, in terms of noise and light impact and overlooking, among other issues, was outweighed by the benefits of the scheme. It reached the conclusion that it was significantly outweighed by those public benefits.

306. To remove the principal office component from the scheme would adversely alter the consented balance of uses in the scheme, and the shortfall in office space could not be made up elsewhere on Bankside Yards. The development as a whole brings substantial benefits to the area, in terms of employment, improvement of the tone of the area and better public realm, connectivity beneath the railway lines, s.106 and CIL contributions. It is true that not all the benefits of the Bankside Yards development would be lost, but a substantial part of the employment benefits would be, and the delivery of the remainder of the development (other than Opus, presumably) would be delayed, by about 2-3 years, Mr Locke estimated. In those circumstances, weight should be given to the considerable benefits of the planning permission and the desirable mix of uses that there is intended to be at Bankside Yards.

307. There is also a substantial and obvious public interest in valuable resources not being wasted, particularly where what has been built is of such environmental merit, and in avoiding the harmful environmental consequences of demolition.

Summary of reasons for declining to grant an injunction

308. In short, an injunction requiring the Defendant to cut back Arbor to prevent an actionable interference with light will be refused in this case, in my discretion, because:

    i) The enforcement of an injunction is problematic to start with, as none of the tenants of Arbor have been joined – there would be at least a substantial delay before enforcement, and an injunction against the will of the tenants might be refused in any event;

    ii) An injunction is likely to be futile, in that there is a good prospect that Native Land will apply for and obtain planning permission (either before or after the injunction takes effect) to re-build Arbor, or erect an equally large building in its place, which building would be protected by the s.203 resolution and similarly infringe the Claimants' rights of light;

iii) The harm to the Defendant's legitimate interests, the tenant occupiers and the public in terms of the benefits of retaining Arbor would, if an injunction were granted, be disproportionate to the harm caused to the Claimants by the interference with their light;

iv) The public benefit in retaining Arbor is a strong factor, as reflected in the terms of the grant of planning permission for the Bankside Yards development as a whole and the decision of the Council on the s.203 application, in both of which the adverse impact on all persons affected was considered to be strongly outweighed by the public benefits delivered;

v) The developer, by its conduct, has not disentitled itself to assert that granting an injunction would be oppressive in the circumstances – in particular, it was entitled to take the view, until January 2022, that Arbor itself would not infringe the Claimants' rights;

vi) The Claimants themselves have accepted that they do not want to see Arbor demolished;

vii) All other persons in the position of the Claimants have settled with the developer for money, which supports the argument that damages are an adequate remedy;

viii) Damages can be awarded to the Claimants that will be an adequate compensation for their loss.

309. The Claimants should be awarded damages in lieu of an injunction.

VIII. What damages should be awarded: negotiating damages or damages for diminution in value?

310. The Defendant contends that the damages awarded in lieu of an injunction should be for diminution in value of the flats caused by the actionable interference with the rights of light.

311. Whereas, until recently, the withholding of an injunction to enforce an easement or a restrictive covenant would automatically have led to damages in lieu under Lord Cairns's Act in the form of negotiating damages, or *Wrotham Park* damages (from Wrotham Park Estate Co Ltd v Parkside Homes Ltd [1974] 1 WLR 798), as they were previously called, the Defendant contends that that the court has to decide, on a principled basis, whether negotiating damages are appropriate, or whether a claimant who has been refused an injunction is limited to common law damages. It contends that the correct decision here is that the Claimants are limited to damages at common law.

312. That change in approach is said to have come about in the decision of the Supreme Court in One Step (Support) Ltd v Morris-Garner [2018] UKSC 20; [2019] AC 649 ("*One Step*").

313. *One Step* was a claim by a company against a former director for breach of a non-competition restrictive covenant in a share buy-out agreement. The company sought an account of profits wrongly made, or "restitutionary" damages in the amount that would

reasonably have been agreed to release the director from the covenant, alternatively "compensatory" damages. The judge had determined that negotiating damages were appropriate, and that was upheld by the Court of Appeal, which held that a judge had a discretion to determine the form of damages that were the most just basis on which to compensate a claimant.

314. The Supreme Court allowed the director's appeal and held that the company was limited to damages for lost profits and/or goodwill caused by the breaches. Lord Reed JSC gave the leading judgment, with whom Baroness Hale PSC, Lord Wilson and Lord Carnwath agreed. He held that negotiating damages were only available where there was an invasion of a property right or where what had been lost was a valuable asset, created or protected by the right infringed. While these were compensatory damages, negotiating damages were only the appropriate measure of compensation in such cases. An imaginary negotiation in good faith is merely a tool to arrive at the economic value of the right that has been infringed, considered as an asset [91].

315. The question is therefore whether, in a given case, what has been lost or damaged by the breach or unlawful conduct alleged is properly to be regarded as an asset, not merely a contractual right to performance (the issue was addressed by the Court in the context of a contractual claim.) Restrictive covenants over land, intellectual property agreements or confidentiality agreements were examples of such cases [92]. The key criterion (in a contractual context) was said to be whether the right:

> "… is of such a kind that breach can give rise to a loss equivalent to the economic value of the right, considered as an asset, even in the absence of any pecuniary losses which are measurable in the ordinary way" [93]

316. At [95], Lord Reed summarised his conclusions on a principled basis in a long paragraph, of which it is necessary to set out the major part:

> "(1) Damages assessed by reference to the value of the use wrongfully made of property (sometimes termed 'user damages') are readily awarded at common law for the invasion of rights to tangible movable or immovable property (by detinue, conversion or trespass). The rationale of such awards is that the person who makes wrongful use of property, where its use is commercially valuable, prevents the owner from exercising a valuable right to control its use, and should therefore compensate him for the loss of the value of the exercise of that right. He takes something for nothing, for which the owner was entitled to require payment.
>
> (2) Damages are also available on a similar basis for patent infringement and breaches of other intellectual property rights.
>
> (3) Damages can be awarded under Lord Cairns's Act in substitution for specific performance or an injunction, where the court had jurisdiction to entertain an application for such relief at the time when the proceedings were commenced. Such damages are a monetary substitute for what is lost by the withholding of such relief.
>
> (4) One possible method of quantifying damages under this head is on the basis of the economic value of the right which the court has declined to enforce, and which it has consequently rendered worthless. Such a valuation can be arrived at by reference to the amount which the claimant might reasonably have demanded as a quid pro quo for the relaxation of the

> obligation in question. The rationale is that, since the withholding of specific relief has the same practical effect as requiring the claimant to permit the infringement of his rights, his loss can be measured by reference to the economic value of such permission.
>
> (5) That is not, however, the only approach to assessing damages under Lord Cairns's Act. It is for the court to judge what method of quantification, in the circumstances of the case before it, will give a fair equivalent for what is lost by the refusal of the injunction.
>
> (6) Common law damages for breach of contract are intended to compensate the claimant for loss or damage resulting from the non-performance of the obligation in question. They are therefore normally based on the difference between the effect of performance and non-performance on the claimant's situation.
>
> ….
>
> (9) Where the claimant's interest in the performance of a contract is purely economic, and he cannot establish that any economic loss has resulted from its breach, the normal inference is that he has not suffered any loss. In that event, he cannot be awarded more than nominal damages.
>
> (10) Negotiating damages can be awarded for breach of contract where the loss suffered by the claimant is appropriately measured by reference to the economic value of the right which has been breached, considered as an asset. That may be the position where the breach of contract results in the loss of a valuable asset created or protected by the right which was infringed. The rationale is that the claimant has in substance been deprived of a valuable asset, and his loss can therefore be measured by determining the economic value of the right in question, considered as an asset. The defendant has taken something for nothing, for which the claimant was entitled to require payment…."

317. The Defendant submits that the effect is to create three categories of cases that require separate consideration:

    i) cases where there is an invasion of rights to tangible movable or immovable property, and cognate cases - here, negotiating damages are readily available, under principles (1) and (2);

    ii) cases where damages are awarded under Lord Cairns's Act in substitution for specific performance or an injunction - here, the court has to judge what method of quantification will give a fair equivalent for what has been lost by refusing equitable relief: see principles (3) to (5)

    iii) cases of breach of contract, where negotiating damages are only available if the loss suffered is appropriately measured by reference to the economic value of the right that has been breached, considered as an asset: see principles (6) and (10).

318. The Defendant submits that this case falls within category 2, and negotiating damages are inappropriate. That was said to be because of two matters. First, it is an accident of timing that the Claimants can claim damages at all: had Arbor been built after the s.203 resolution, they would have been restricted to statutory compensation. Second, the interest that a right to light is designed to protect is use and occupation of the dominant tenement. The purpose of enforcement of it is to protect that use and enjoyment, not the

ability of the owner to negotiate it away for money. Damages should be limited to injury to use and enjoyment, not the profit that might be made from releasing the right.

319. I agree with the Defendant that *One-Step* creates a new principled basis for determining whether negotiating damages are available, and that it is possible to identify three different categories of case. I also agree that this case falls within the second category, as it is a claim to enforce an easement, where an injunction is refused as a matter of discretion in favour of damages under Lord Cairns's Act.

320. I disagree that either of the reasons that the Defendant gives justify a conclusion that negotiating damages are not available for the loss of the right to enforce an easement. The first reason given is true, but irrelevant. It is not a reason for withholding any kind of remedy, including negotiating damages. As the Claimants point out, s.203 does not operate retrospectively, and it was the developer's choice to proceed with Arbor prior to resolving rights of light issues or seeking s.203 protection.

321. As for the second reason, loss of the right to enforce a property right, such as an easement, is a typical case where what has been lost by the withholding of equitable relief is the economic value of the right itself – as it is lost forever – and the effect is otherwise to require the Claimants to permit infringement of their rights. That falls squarely within the examples that Lord Reed gave of where negotiating damages are appropriate, and the law has consistently approached such matters in that way, in rights of light cases as well as other easement and restrictive covenant cases. On the facts of this case, negotiating damages are plainly the appropriate basis on which to award damages in lieu of equitable enforcement of the Claimants' rights. Negotiating damages are not awarded to compensate for a lost profit but for the loss of a valuable right that the owner wanted to use and enjoy with their property, in perpetuity.

322. Moreover, if it is correct that the purpose of a right to light is to protect use and enjoyment of property, as the Defendant submits, common law damages measured by diminution in the value of the flats would be inadequate to compensate for the loss that has been suffered. Difference in value is a measure of the exchange value of the flat, not its use value. To compensate the loss of use value, it would be necessary to find some way of measuring the additional enjoyment value of the good light that the Claimants desire to protect. Negotiating damages is a good proxy for that, as it asks for what sum the Claimants would, reasonably, be willing to give up that enjoyment. Diminution in market value is not.

323. Had the Defendants been right in their submission on what measure of damages were available in a rights of light case, there would have been a strong argument in favour of granting injunctive relief, notwithstanding the reasons summarised in [308] above why an injunction should be refused, simply on the basis that damages would not be an adequate remedy and the Claimants would otherwise have been left without just relief.

IX. The assessment of negotiating damages

324. The Defendant's case is that if negotiating damages are awarded, these should be assessed on the basis of market evidence of the value of the rights constituted by the settlements with other residents, made after November 2019, rather than by reference to

a share of the additional profit that the developer could expect to make from being unconstrained in the construction of Arbor.

325. The Claimants' case is that the damages should be assessed on the basis of a hypothetical reasonable negotiation conducted in August 2019 (the date is agreed), just before the construction of Arbor began, on the basis that they are assumed to be willing to give up and the developer to be willing to acquire the rights of light for a reasonable sum, against the background that the Claimants were otherwise entitled to enforce their rights by obtaining an injunction. The conventional way in which that is assessed is to allocate a fair proportion of the uplift in profits resulting from the lack of constraint on the development.

The rival arguments and authorities

326. The Claimants suggest that the approach of the Deputy Judge in Tamares (Vincent Square) Ltd v Fairport (Vincent Square) Ltd (No.2) [2007] EWHC 212 (Ch); [2007] 1 WLR 2167 ("*Tamares*") is the right approach. I prefer to start with an analysis of the negotiating dynamic made by Anthony Mann QC, sitting as a Deputy Judge in Amec Developments Ltd v Jury's Hotel Management (UK) Ltd (2001) 82 P & CR 22 ("*Amec*"). In *Amec*, the defendant had built its hotel in breach of the terms of a restrictive covenant owned by the claimant, exceeding an agreed construction line, and as a result had obtained the benefit of up to 25 extra rooms. It was common ground that the damages would be "such a sum of money as might reasonably have been demanded by Amec as a quid pro quo for permitting the encroachment", which would have "been arrived at in negotiations between the parties had each been making reasonable use of their respective bargaining positions without holding out for unreasonable amounts".

327. The Deputy Judge decided that the date immediately before construction started was the right date for the hypothetical negotiation. He then described the negotiation as follows:

> "(a) On the one side, Amec is a willing seller, but only at a proper price.
> (b) On the other side, Jury is a willing buyer wanting to acquire the right to cross the A/B line and prepared to pay a proper price but not a large ransom.
> (c) In such a negotiation the parties would proceed on common ground, put forward their best points and take into account the other side's best points.
> ….
> (e) The basis of the negotiation would be a split of the perceived gain to Jury. That gain would not be obvious, and would be the subject of debate within the sort of variables that I have described above.
> (f) The parties are to be taken to know the hotel's actual figures for the purposes of assessing gain.
> (g) In this case, the extent to which Jury would have been able to build more than 240 rooms if they had to confine their hotel to the proper footprint is not clear.... This factor is one of the irresolvable points that would be canvassed in the negotiation with no final conclusion being reached on it in terms of deciding an actual number...
> (h) The numbers arising from these calculations are also debateable because of a genuine difference of view as to discount factors and yields.
> ….

> (j) The additional land which Jury were seeking was not just a few inches - it was almost 4 metres wide, and the area was 11% of the area of the hotel. That is a significant amount of extra building.
> (k) Whilst militating against any sort of de minimis figure (at least), the preceding factor also imposes a restraint on very high figures. …. As a matter of common sense Jury would never pay a sum approaching £2.3 million for the right to build on a 4 metre strip of land when they had only paid £2.65 million for the whole plot in the first place.
> ….
> (m) Jury would be fairly keen, though not overwhelmingly anxious, to have the right to build over the A/B line.
> (n) As important as any of the above factors is this. In any negotiation science and rationality gets one only so far. At the end of the day the deal has to feel right. Some of the numbers that have been suggested by Amec in the course of this litigation, while perhaps intellectually justifiable, seemed to me to be way over the top of what Jury would be prepared to pay, when set in the context of the rest of the cost of this hotel."

While, self-evidently, some of these points relate to factors specific to that case (and I have omitted others that are of no general significance), the parts of the paragraph that I have quoted are, in my view, a very helpful indication of the basis on which the negotiations are assumed to take place, and of their limits.

328. *Tamares* was a right of light case, in which the claimant had three windows on a stairwell that would be obstructed by the defendant's development. The court refused an injunction but awarded negotiating damages, based on a one-third share of the additional profit to the defendant. Having referred to *Amec* and other cases, the Deputy Judge set out the applicable principles for quantifying the damages as follows:

> "(1) The overall principle is that the court must attempt to find what would be a 'fair' result of a hypothetical negotiation between the parties.
> (2) The context, including the nature and seriousness of the breach, must be kept in mind.
> (3) The right to prevent a development (or part) gives the owner of the right a significant bargaining position.
> (4) The owner of the right with such a bargaining position will normally be expected to receive some part of the likely profit from the development (or relevant part).
> (5) If there is no evidence of the likely size of the profit, the court can do its best by awarding a suitable multiple of the damages for loss of amenity.
> (6) If there is evidence of the likely size of the profit, the court should normally award a sum which takes into account a fair percentage of the profit.
> (7) The size of the award should not in any event be so large that the development or relevant part would not have taken place had such a sum been payable.
> (8) After arriving at a figure which takes into consideration all the above and any other relevant factors, the court needs to consider whether the 'deal feels right'."

The one-third share, which was the Deputy Judge's starting point, is a conventional share of value in ransom strip-type valuation cases: see Stokes v Cambridge Corpn (1961) 13 P & CR 77.

329. In each of *Amec* and *Tamares*, there was only one party with the relevant rights to sell, who was in a position to object to the development. That is not the case here. In August 2019, the date of the hypothetical negotiation, none of the 40 residents who had been identified as having a realistic claim to infringement of their rights of light, to whom GIA would send offers of settlement in November 2019, had settled with the developer. This is a very significant point. The claimants cannot expect, in the hypothetical negotiation, to extract from the developer the best price that it is willing to pay in order to proceed to build Arbor, when another 38 residents might be in a position to negotiate for a similar payment or try to restrain the development.

330. In *One Step*, Lord Sumption JSC referred to the judgment of Neuberger LJ in Lunn Poly Ltd v Liverpool & Lancashire Properties Ltd [2006] 2 EGLR 29 at [29] where he said:

> "Given that negotiating damages under [Lord Cairns's Act] are meant to be compensatory, and are normally to be assessed or valued at the date of breach, principle and consistency indicates that post-valuation events are normally irrelevant. However, given the quasi-equitable nature of such damages, the judge may, where there are good reasons, direct a departure from the norm, either by selecting a different valuation date or by directing that a specific post-valuation date event be taken into account."

Lord Sumption then commented that:

> "For this reason, the object of the exercise is to arrive at a money sum such as would hypothetically have been agreed between reasonable parties at the relevant time. It is not (as, unfortunately, the claimant's expert appears to have thought in the present case) to arrive at a formula dependent on future events."

331. Lord Carnwath considered that, where negotiating damages are awarded on an equitable basis, in lieu of injunctive relief, "there is no reason in principle to exclude information available to the parties up to the time of the judge's decision".

332. Lord Reed was inclined to agree, though he pointed out that the issue had not been argued before the court and he did not express a final view. He emphasised that:

> "… since the damages are awarded in the exercise of an equitable jurisdiction, and the courts objective is, in Viscount Finlay's words, to give an equivalent for what is lost by the refusal of an injunction, it follows that the approach adopted should reflect those characteristics".

Are the settlements with other residents the best evidence of value?

333. The Defendant contends that ascertainment of an amount which the Claimants might reasonably have demanded as a quid pro quo for the relaxation of their rights is akin to the analysis required when a market rent is determined on a rent review, postulating a

hypothetical negotiation between landlord and tenant and relying, where possible, on market evidence of comparable transactions. The Defendant contends that this is the best evidence of what rights equivalent to the Claimants' rights are worth, which were the subject of negotiation as the price for release of any such rights. On that basis, the Defendant suggests that the offers in fact made to the Claimants - £23,000 to Mr Cooper and £36,000 to the Powells, at four times the approximate book value of the lost light – are the appropriate sums, or at most increased sums based on 6.86 times book value, being the average multiplier agreed in all achieved settlements at Bankside Yards.

334. I accept that the prices agreed are generally informative and of some use in seeking to identify the likely range of figures, but I do not agree that this is direct evidence of what would have been agreed in the hypothetical reasonable negotiations to release rights rather than restrain the construction of Arbor.

335. In the first place, the settlements were the product of conventional negotiations between light surveyors, on an industry-standard basis, based on multiples of book value of the good light lost. There is no indication that the value of the rights to the developer was considered or assessed, or that each side's negotiating points were discussed and considered. A single, conventional valuation approach (which does not refer to true values) was adopted, and the negotiation was effectively limited to one about the appropriate multiple to take, using that industry-standard approach. From the evidence of Ms Hannon, it is more akin to a ritual dance between professionals:

> "following offers being made [at four times book value] I would agree the technical analysis with the appointed rights of light surveyor and then invite a counter offer. The counter offer would be the upper end of the amount the neighbour would be willing to settle at and if they offered, by way of example, a multiplier of 12 times the book value, I would counter with a multiplier of five times the book value and follow up with a without prejudice phone call to find out where we could reasonably settle that. Some neighbours appointed the same rights of light surveyor and generally the same multiplier would be agreed for each neighbour or slightly higher if there were greater first or front zone losses within the room."

336. Ms Hannon said that the average multiplier for all the settlements was 6.86 times book value. No indication had been given by any of the represented parties that their rights would be asserted as the basis of court proceedings, nor was there evidence that any of them had taken advice about whether they had rights of light. In one case, there was a particular concern on the developer's part that an owner might join forces with Manhattan Lofts Corporation to issue injunctive proceedings, and in that case the multiple was 30 rather than between 4 and 10. That led to a settlement of £37,500, so it can be inferred that the book value, and hence the extent of the reduction in light, was small (*cf*. the £36,000 offered to the Powells on a multiple of 4). Save (possibly) in that one case, these negotiations were not carried out with a view to compensating for the absence of an injunction preserving rights of light. What Ms Hannon described is the kind of negotiation that is conducted on behalf of people who have no real intention of asserting their rights and have not sought to do so.

337. Second, all the settlements post-dated August 2019, the date of the hypothetical negotiation with which I am concerned. Indeed, letters from GIA making a first offer had not even been sent by that time. At the relevant date, there was no market evidence of

settlements that the negotiating parties would take into account. In a rent review context, post-review date comparable evidence is not generally admissible because the rents agreed would not have been known and so could not have influenced the hypothetical landlord and tenant in their negotiations. In a damages in lieu context, however, I accept that it is possible to have regard to what subsequently happened, if it is informative of what reasonable parties conducting such a negotiation would have been likely to agree. For the reasons given above, however, the later negotiations conducted by GIA were very different in character.

Is a ransom approach right in principle?

338. The Claimants' approach to determining negotiating damages is to focus on the negotiation and argue that it takes place on the basis that the Claimants were able to obtain an injunction in 2019 to protect their rights, and that both sides were fully informed about the options that they had. They argued that the approach summarised by the Deputy Judge in *Tamares* is the right approach, and that the negotiation will be about what is a "fair" proportion of the uplift in value to pay to them, but acknowledging that other factors will play a part.

339. I consider that the Claimants go too far in positing (as they appeared to do) that the developer would be held to ransom in the negotiations. The negotiations are not a ransom exercise because the Claimants are deemed to be willing to sell at a reasonable price and the developer is deemed to be willing to buy at a reasonable price. It is also notable that this is not a case in which agreement has to be reached before any development is possible: it is about releasing extra development value in a profitable development.

340. It is therefore wrong to start the assessment with a traditional ransom proportion of the extra value or profit. Nor, in my judgment, is it appropriate to deem the parties to assume that if a deal is not done an injunction will be granted, as that is to leave the negotiating parties in effectively a ransom negotiation. Grant or refusal of an injunction sought prior to any construction above ground, and initially on an interim basis, would have required a very different evaluation from the decision whether to grant a mandatory injunction to pull down a completed and occupied building. It would have turned, initially, on whether damages would be an adequate remedy for the Claimants. What it is appropriate to assume is that the parties know that the Claimants could apply for an injunction, based on their rights, and that they might well obtain one, if willing to give an undertaking in damages; but since both parties are deemed to be willing to do a deal at a reasonable price, that threat is better seen as part of the context rather than as a principal driver of the negotiations.

341. There is, in this case, as contended by the Defendant, an equal and opposite risk for the Claimants, which similarly sits in the background but can influence the negotiations, namely the ability of the developer to seek a s.203 resolution from the Council in the event that injunctive relief is sought or threatened. The consequence of seeking and obtaining a s.203 resolution would be that the Claimants would only receive statutory compensation based on diminution in value of their flats. Given that the developer is assumed to be about to start the development, that approach would come at a significant cost to the developer, in terms of delay – because the developer would first have to try to negotiate with those who may assert rights of light, and that process had not even started by August 2019 – but, as the parties are taken to be fully informed of each other's options,

the Claimants must be taken to be aware of that possibility, just as the Defendant must be taken to be aware of the real risk of injunctive proceedings.

342. Although, as at August 2019, it can be said that there was in fact no risk of a final injunction, because until after the s.203 resolution in 2022 Arbor was not going to be an actionable interference with light, that should not be taken into account (and the Defendant did not argue that it should be). If it were, it would undermine the attempt to identify the equivalent value of the benefit of injunctive relief that has been refused as a matter of discretion. The valuation date of August 2019 was agreed as a convenient date for the assessment, because it would enable a valuation of the land on which Arbor was to be built to be done before value was added to it by the construction works. It is no more than a convenient date to use to seek to establish the added value of the ability to infringe the Claimants rights.

343. On that basis, both development valuers carried out a residual valuation, using industry standard computer programmes, to identify the value of the land as at August 2019 if a non-infringing development (a cut back Arbor) was to be built, and the value for the as built Arbor. This was considered to be an appropriate way in which to identify the additional value that the Defendant would obtain from buying out the rights of light, and hence to help to identify what a developer might reasonably pay to acquire those rights. I summarise the main points of this evidence starting at [349] below.

The right analysis of the negotiation

344. In principle, the components of the hypothetical negotiation between willing seller and willing buyer, with the above risks as the background but not in the foreground, will be the value of the benefit of the rights of light to each side. First, to the Claimants, not just in terms of the difference in market value of their flats with and without the light that will be actionably obstructed, but in terms of the additional value attributable to more beneficial enjoyment and use of the space in them, in perpetuity. Second, to the Defendant, in terms of the additional development value that is able to be released by acquiring the rights of the Claimants and those with equivalent rights.

345. It should be assumed that the parties to the hypothetical negotiation had access to such information, but not that they would have had precise valuation figures. It is more appropriate, and more realistic in such circumstances, to consider a range of possible values rather than an exact figure – as it is only upon a court determination (or equivalent) after the event that valuation issues are pinned down in a more precise way.

346. There are in fact no valuations of the flats as at August 2019 before the court, but in September 2021 flat 605 was considered by the Defendant's valuer, Mr Godfrey to be worth £960,000 and by the Claimant's valuer, Mr Cook, to be worth £1,100,000. Flat 705 was considered by Mr Godfrey to be worth £1,150,000 and by Mr Cook to be worth £1,629,000 at that time. For reasons that I will give later, I preferred Mr Godfrey's opinions of market value to Mr Cook's, and for the purposes of this exercise it can therefore be taken that, at the relevant time, flat 605 was worth between £900,000 and £950,000 and that flat 705 was worth between £1,050,000 and £1,100,000.

347. As to the impact of scenario CS1 on market value, Mr Godfrey considered, surprisingly, that there would be no impact on value at all; and Mr Cook considered that there would be a reduction in value of £210,000 for flat 605 and a reduction in value of £310,000 for

flat 705. I explain later why I do not accept either valuer's opinion on the impact on market value. I consider that there would be some impact, though much less than Mr Cook says, of around £60,000 for flat 605 and around £20,000 for flat 705.

348. The value of the impact on use and enjoyment is of course what the exercise of negotiating damages is designed to identify, but it will be more than the difference in market value. That is because there will be some persons in the market who are not greatly troubled by lack of natural light in some rooms of flats such as these, and they will not discount their bids as significantly as others would. A reasonable person in the position of the Claimants negotiating a release would nevertheless attribute significant value to the benefit of good light throughout their flats.

The development valuation evidence

349. As for value to the Defendant, this depends on the residual valuations done by the development valuers, Mr Gillington on behalf of the Defendant and Mr Holme-Turner on behalf of the Claimants. They agreed values on various scenarios as at August 2019, but reflecting different construction costs as an input provided by others on each side, who did not give evidence about their assessments of costs. This somewhat hampers the ability to evaluate the residual valuations, but as I have indicated, it is more realistic to consider a range of values. It was agreed that the valuers should assume that planning permission existed for a cut back version of Arbor.

350. Land value for Arbor as built was agreed by the development valuers at £73.7 million, if construction costs provided by Carter Jonas were used and £37.45 million if construction costs provided by Core Five were used. On the basis of cut backs needed to protect the light of each flat in scenario CS1, the agreed land value was £33,550,000 if the light of flat 605 is preserved, and £54.5 million if the light of flat 705 is preserved, based on the construction costs from Carter Jonas, and £8.1 million (flat 605) and £18,365,000 (flat 705), based on the construction costs from Core Five.

351. On any basis, there is a huge difference in value, of approximately £30 million to 40 million if flat 605's rights are to be respected, and of approximately £20 million if flat 705's rights are to be respected. It is unnecessary, for the purpose of evaluating the hypothetical negotiation, to go further than this. The different values based on different construction costs are variables that would not be resolved in the parties' negotiations: see *Amec* at [324] (e) and (g), above. The same applies to slightly different cut backs based on slightly different Waldram analyses produced by the light surveyors. There is, on any analysis, very considerably greater land value, reflecting a more valuable development, if Arbor does not have to be cut back.

352. The valuers were also instructed to value the land based on an alternative residential 38-storey residential development that the Defendant contended that it would have carried out, if necessary, that (somehow) would not have infringed the Claimants' rights. If that development were realistic and planning permission could have been obtained, the land would have been more, not less valuable, than with Arbor being built, assuming Carter Jonas's cost estimates, and between £11 million and £23 million less valuable, assuming Core Five's costs, and further depending on the degree of planning risk that was assumed.

353. In the end, no real weight was placed on that possibility by the Defendant in their closing submissions. I consider that it was right to do so. The scheme is highly speculative and

would have been seen as such, if the Defendant had sought to advance it in negotiations as a realistic alternative. The prospects of getting planning permission for it must have been very slim, for all the reasons given by Mr Emmerton in explaining why the Council would have wanted to see offices built on the Arbor site. In addition, the negotiating stance would strain credibility, as if there was a reasonable prospect of doing a more valuable development that did not risk infringing the Claimants' rights, one would expect the developer to have pursued it in the first place.

The Claimants' approach to quantum

354. The Claimants' case by the end of the trial was that damages should be awarded in the sum of not less than £3 million in the case of the Powells and not less than £3.37 million for Mr Cooper. That is said to be mainly driven by the requirement for the figure to "feel right". However, that figure is more than three times the value of each flat and requires justification.

355. The Claimants arrived at their figures by an oddly circuitous route. It comprises the following

i) They contend that the perceived gain for the developer, of which the negotiating parties are deemed to be aware, is the increase in land value shown by the outputs of the residual valuations plus the increase in the profit, which is an input in the residual valuations.

ii) They therefore seek to identify first a "centre of gravity" for land value uplift, derived from the various permutations of additional land value calculations, which they assert is £33 million in the case of flat 605 and £26 million in the case of flat 705.

iii) They then identify the increases in the profit allowance (at 15%) used as an input in the residual valuations for the full Arbor scheme as compared with the cut back Arbor scheme, which amount to £26.4 million in the case of flat 605 and £13.5 million in the case of flat 705.

iv) The increase in land value figure is then added to the increase in profit allowance figure in each case, to give the following totals: £59.4 million in the case of flat 605 and £39.5 million in the case of flat 705.

v) One-third of the highest of those figures (£19.8 million, in respect of flat 605) is then taken as the share that the developer would agree to pay to all those with adverse rights, in order to release the extra value. One-third is taken on the basis that the Claimants would negotiate hard, since they will only be satisfied with a sum that prevents them from feeling regret at losing their light.

vi) The one-third figure is then apportioned between flat 605 and 705 (using Mr Ingram's methodology (in part) to identify the correct proportionate benefit from the same cut backs) after deducting the aggregate amount of the settlements actually reached with all others who might have had rights of light (£422,500, rounded down to £400,000), which gives figures of £9.41 million for flat 605 and £6.59 million for flat 705.

vii) The Claimants then ask themselves whether figures of £9.41 million in damages for the Powells and £6.59 million for Mr Cooper "feel right" and concede that they do not feel right.

viii) Instead, the Claimants then ask what basis of settlement would feel right, and answer that by saying that it is a sum of such an amount that if the Claimants decide to stay living in their existing flats, they are doing it of their free choice and not because they were driven to move out. Accordingly, the correct measure of damages would be the sum that would pay for them each to acquire another comparable flat elsewhere, together with the costs of moving. The costs are calculated as including Capital Gains Tax (CGT) payable on the release fee, the cost of a new flat of the same size and attributes in the Bankside area, Stamp Duty Land Tax (SDLT) on the purchase, costs and fees of selling, buying and moving, and CGT on sale of the existing flats.

ix) These figures are, approximately, those set out in [354] above.

356. This approach to quantifying negotiating damages was raised for the first time in the Claimants' written closing submissions, and some of the detail provided only in oral closing submissions. It is unnecessary to address further the basis on which these figures were calculated.

357. If, alternatively, book value is the right approach, the Claimants say that a multiplier of 90 should be applied to Mr Ingram's book values for the lost light, viz £9,000 for flat 605 and £5,750 for flat 705, to give damages of £810,000 for flat 605 and £517,500 for flat 705. That is justified, they submit, because if a multiplier of 30 is appropriate for a case in which there was perceived to be a risk of litigation, three times that multiplier is appropriate where the Claimants have established their rights of light and would obtain an injunction. The Claimants contend that "a calculation based on a multiplier of 90 still looks like a startlingly low sum to be agreed".

358. If a share of the increased development value is the right approach, the Defendant submits that the Claimants' approach is wrong in principle, and that the extra value released is not to be measured by adding the increase in the land value to the increased allowance for profit, but that it is reflected by the increase in the land value alone. The profit allowance is a notional cost input in the residual model, designed to identify the maximum value of the land (alternatively, the model can be run with a land price as a fixed input, to identify the profit that can reasonably be expected). But it is wrong in principle to add increase in land value to increase in profit allowance.

359. The Defendant submits that, if the settlements are not to be the basis of the notional agreement, a small share of the increase in development value (represented by the increase in land value) should be taken, for 5 reasons:

i) the possibility that the Council might be persuaded to use its s.203 powers at an earlier stage;

ii) the possibility of an alternative, more profitable development;

iii) the development of Arbor was high risk, such that the developer would not be willing to give up much of the increase in value;

iv) it would be unreasonable for the Claimants to hold out for more than a small proportion of the value of their flats, and not more than 25% at most;

v) allowance needs to be made for the rights of other owners to make similar claims, and as there are six other properties in respect of which apportionment of the same cut backs is required, any sum that the developer would be willing to pay would be apportioned as to 33% of the flat 605 sum to the Powells and as to 35% of the flat 705 sum to Mr Cooper.

The errors in the Claimants' approach

360. I am satisfied that the Claimants' approach is wrong in principle, at various stages.

361. First, one-third is not an assumed end point for a negotiation: it is a (large) share of the (very substantial) added value that would need to be properly justified, taking into account all the circumstances, not just what the Claimants would say that they want to be paid.

362. Second, the addition of the increase in land value and the profit allowance is double-counting, and is based on a mistaken understanding of the way that residual valuation calculations work (and was not supported by Mr Holme-Turner, the Claimants' development valuer, in his evidence). Profit is an allowance put in to the programme, among many other inputs, to enable it to produce the value of the land, or vice versa – but it is wrong to say that the increase in the profit allowance and the increase in the land value are the extra value that are released by the ability to build out Arbor. In reality, the developer has paid for the land and is only obtaining a profit if the gross development value exceeds all the costs of the development, including the cost of the land. However, it is increase in land value that is being taken to represent the added value.

363. In any event, the Claimants effectively abandoned a one-third share of the extra value and profit as the basis of their quantification.

364. Third, to allocate to the Claimants all but a small fraction of an appropriate share of added value (which I will call "the available share") is something that could not have emerged from reasonable negotiations in August 2019. The Claimants are taking into account events that happened a considerable time after the date of the negotiation. While taking account of facts subsequently established may be appropriate, in some cases, to avoid speculating about something unpredictable that has since been ascertained, it is certain that the Defendant, in the negotiations, would have raised the need to allow for payments from the available share to others with similar rights to the Claimants. In such circumstances, the Defendant would not be willing to pay the entire available share to the Claimants.

365. By August 2019, Native Land had identified that there were 40 properties in total that might have a valid claim of infringement by the whole proposed development. As Mr Ingram has established, by using a standard analysis of the Waldram results, and the Developer would have sought to establish at the time of the negotiations, there are six other properties that will "share" the cut backs that are necessary to avoid Arbor alone infringing the Claimants' rights (that is to say, the cut backs that would be needed to protect the rights of the owners of those six properties overlap the cut backs for the Claimants' rights). In those circumstances, the developer would seek to allocate some of

the available share to those other properties. The Claimants would not be able to persuade the Defendant that those owners would settle for book value payments in much lower amounts, as in fact they did at a later time.

366. Although it is now known that settlements were achieved for most of the 40 properties at a modest cost, it would be wrong in my view to use that information in hindsight in the way that the Claimants seek to do. It would not be using hindsight to assist the court to identify a fair sum to award, but would enable the Claimants to recover a manifestly unfair proportion of the available share, whereas in August 2019 they would not have been able to persuade the developer to give them all but a tiny proportion of the available share. Based on the Claimants' figures, it would give the Claimants together 98% of the one-third share of the uplift, based on flat 605 cut backs, and 97% based on flat 705 cut backs. Mr Ingram's analysis (which in principle Mr Absolon did not dispute) shows that 33% of the flat 605 cut backs is fairly allocated to flat 605, and 35% of the flat 705 cut backs is fairly allocated to flat 705. Another, much coarser analysis, is that each of flats 605 and 705 was only one out of eight possible claims in relation to Arbor. Whichever of these approaches was taken by the Defendant in negotiations, it would be far short of the proportion that the Claimants' assessment assumes that it would agree to pay them. In my view, the Claimants arguments for 97% or more of the share of the uplift would be unreasonable arguments.

367. Fourth, the sums initially identified by the Claimants as the damages figures (£9.41 million for flat 605 and £6.59 million for flat 705), before the sense check part of the *Amec* approach, are so obviously disproportionate to the value of the Claimants' properties, the extent of the Claimants' loss and the possible value of the light that they will lose, that the Claimants should have realised that the method they used to quantify the damages was wrong or wrongly applied.

368. The hypothetical negotiation would have focused instead on the extent and nature of the injury to the Claimants, the value of their flats, the extent and likely value of the benefit to the developer, and the number of others who would potentially be in the same position as the Claimants in relation to the construction of Arbor.

My assessment of the result of the negotiations

369. The right approach is that it is to be assumed that the Claimants were willing to sell their rights but only at a proper price, not unwilling, nor needing to be persuaded grudgingly to sell. It is to be assumed that the Defendant was willing to pay a proper price, but not a large ransom. It would have been keen, but not desperate, to be able to build the full building. Both parties are assumed to be reasonable in their approach, and to be receptive to reasonable points made in opposition. Accordingly, it would be acknowledged by the Defendant that the Claimants were offering to give up something of substantial value to them, and that the loss of light did moderate harm to the enjoyment of flat 705 and substantial harm to the enjoyment of flat 605, all in the context of flats worth a little more or less than £1 million.

370. A main focus (though not the only basis of discussion) would obviously be the perceived gain to the developer. This would be uncertain as to its calculation, for the reasons previously discussed, but in broad terms it might have been seen as being in the region of £30 million. The developer would have acknowledged a substantial benefit of buying the rights, but that benefit would only be assured if all adverse rights could be neutralised,

in one way or another. This would not be assured by buying the Claimants' rights alone, as exactly the same stance might be taken by six other property owners.

371. Further considerations would be the risk of an interim injunction and the possibility (no more than that) that LHL (and SHL) could seek to enlist the help of the Council, under s.203, to enable the development to proceed regardless of the Claimants' rights. If that were achieved (which would be uncertain), it would come at the cost to LHL of paying statutory compensation and, quite possibly and much more significantly, a lengthy delay before being able to proceed with Arbor. That would be a significant disadvantage to LHL. I do not therefore consider that it would be a very weighty argument significantly impacting the negotiation, but it would be used to counter the threat of an injunction.

372. As for the other potential objectors, the possible approaches in the negotiations would be to leave them out, bearing in mind that this would give the Defendant no assurance that it could build Arbor in full; or to assess a global settlement sum for buying all adverse rights and then apportion a part of that to the Claimants.

373. Given the size of the development and the sophistication of the developer, I consider that the second of these alternatives would have been the focus of the discussion, and that the Defendant would have been cautious about paying too great a proportion of its "settlement fund" to only two of those who could prevent Arbor being built.

374. In view of the size and complexity of the development, the high risk to the Defendant (which is not fully compensated by the profit allowance in the residual valuations, at only 15%), and the nature of the injury suffered by the Claimants (which would not in fact be suffered by them for up to 10 years after August 2019), I consider that a relatively modest share of the potential gain would have been agreed. The Defendant would have been advised of a reasonable chance (as indeed came to pass) of buying off others with a conventional book value derived sum, and so of that being the norm for settling potential rights of light claims.

375. In my judgment, the discussions would have settled at somewhere between 10% and 15% of the increase in value, i.e. between about £3 million and £4.5 million, based on the difference in value derived from the cut backs for flat 605, and in the end the parties would have agreed to split the difference at 12.5%, thereby identifying £3.75 million as the amount that the developer would pay to remove the risk to the full building out of Arbor.

376. The next stage would be to consider what share of that should be paid to the Claimants. If the Claimants were only 2 out of 8 with rights that could prevent the building of Arbor, on a rough and ready analysis one quarter of that sum should be allocated to the Claimants; however the analysis of Mr Ingram suggests that a higher proportion of the cut backs is attributable to the Claimants' rights, in the region of one-third rather than one-quarter of the whole. Further, there is the prospect that the Defendant will be able to buy off other potential objectors more cheaply.

377. I do not consider that the Claimants' belated argument for the cost of being re-housed is an entirely unreasonable argument to raise in negotiations (such that it should be disregarded at the outset as one that a reasonable person would not raise). It has a principled basis to it, even if it leads (when using the Claimants' figures) to an amount that is excessive, as I consider that it does. One reason it is excessive is that the rough

and ready assessment starts with a price of a replacement 3-bedroom flat (for Mr Cooper) of £3 million, whereas flat 705 is worth at most about £1.2 million at the time. There is therefore, self-evidently, a significant element of upgrading, for which the Defendant cannot reasonably expect to have to pay.

378. Further, the assessment, as explained by Mr Calland, involves the Defendant indemnifying the Claimants against all tax liability and other costs. I do not consider that the capital gains tax payable on the disposal of the claim or on gains made on sale should notionally be paid by the developer. The Claimants are not bound to move on receipt of the settlement monies, and if they do not, as they might well not do, given that actual interference with light would be years off, they would be greatly overcompensated. A generous sum that, when added to the net proceeds of sale of flats 605 and 705, would enable the Claimants to consider moving to a different flat of similar value, though not necessarily at zero cost to them, is a reasonable alternative approach.

379. Taking the pot of £3.75 million, and allocating one-third of it to the Claimants and two-thirds to others who might assert rights of light, there is a sum of £1.25 million to be shared between them. The cut backs for flat 605 are greater than those for flat 705 and so the share of the increased value in the development should reflect the proportions put in evidence by Mr Ingram (roughly 58:42), leading to a sum of £725,000 for the Powells and £525,000 for Mr Cooper.

380. I then stand back, as the authorities require me to do, and consider in the round whether these are the kinds of sums that one can reasonably expect to have been negotiated and agreed, given the context, the nature of the rights being sold, and the impact on each party of not having those rights.

381. My immediate reaction is that these sums, particularly in the case of the Powells, are a substantial proportion of the values of their flats. The value of the flats has not been diminished by anything approaching those sums, as I explain in the next section of this judgment. But that does not mean that the sums are necessarily wrong: the difference in market value reflects the exchange value of the flats, not the impact on use and enjoyment of them by reasonable occupiers who have enjoyed the light that the flats offer. Nevertheless, sums of £725,000 for the substantial impact (as I have judged it to be) of loss of some good light does seem high, as compared with the value of flat 605 at that time of between £900,000 and £950,000. The figure of £525,000 for flat 705 (value: £1.05 to £1.1 million) is a smaller proportion of its value, but since the impact on that flat is only moderate, and restricted to one room, it too strikes me too as high.

382. Reverting to the alternative basis of negotiation, by way of cross-check of these figures, if the Claimants were to move to a different flat, they would incur expenses of sale and purchase, CGT on the sale of their existing flats (at 24%) and SDLT at second home rates (15%) on the purchase of the new flats, so that a substantial sum would be needed just to cover the costs of moving, as well as the extra cost of buying a flat with better light. On the other hand, if the Claimants decide not to move, the kind of sums that I have indicated will enable them to make very extensive and attractive improvements to their flats, to counteract, to some extent, the impact (when it is felt) of the loss of light. I also bear in mind that, in the longer term, property values in the Bankside area are likely to be significantly raised by the effect that the Bankside Yards development will have in raising the tone of the neighbourhood. A neighbourhood with a Mandarin Oriental hotel

and other retail and leisure outlets is very different from a neighbourhood with Sampson House.

383. There is then one further factor that I consider would have been raised in the hypothetical negotiations, and that is the fact that the Claimants will receive statutory compensation when the remainder of Bankside Yards, in particular buildings BY5 and BY6, is built. While that compensation is for something different in principle from the asset that is being valued by the negotiating damages, it is nevertheless a fact that, when the impact of the loss of light is felt, the Claimants will be paid further sums to compensate them for the impact of the aggregate loss of light.

384. Taking all these matters into account, I consider that sums that would reasonably have been negotiated and agreed in 2019 to compensate the Claimants for their rights of light are £500,000 for the Powells and £350,000 for Mr Cooper. These are the damages that I will award in lieu of granting injunctive relief.

X. Diminution in value damages

385. Although it does not arise, in view of my decision to award negotiating damages, I have alluded above to the diminution in value of flats 605 and 705 caused by the interference with their light in reaching my decision on the amount of negotiating damages. The question of diminution in value was fully argued, with the assistance of expert evidence from Mr Alan Cook FRICS, a development and investment consultant and valuer, who practises in Central London (and who, by a remarkable coincidence, used to live in flat 705 well before Mr Cooper bought it), and Mr Jonathan Godfrey MRICS, a chartered surveyor and partner in Gerald Eve LLP (now called 'Newmark').

386. Each of the valuers provided their values of the flats in Before and After scenarios (of which I need refer only to CS1) at various dates. I will refer only to September 2021, which is the closest date to the August 2019 hypothetical negotiation, and January 2025, taken as the current value.

387. Mr Cook considered that the market value of flat 605 was £1.1 million in the Before scenario in September 2021 and £880,000 in the After scenario; and £1,046,000 in the Before scenario in January 2025 and £837,000 in the After scenario.

388. He considered that the market value of flat 705 was £1,629,000 in the Before scenario in September 2021 (even though Mr Cooper had bought it in March 2021 for £1,060,000), and £1.3 million in the After scenario; and £1,547,000 in the Before scenario in January 2025 and £1,238,000 in the After scenario.

389. Mr Godfrey considered that the market value of flat 605 was £1,050,000 in the Before and After scenarios in September 2021 and £1,070,000 in the Before and After scenarios in January 2025, i.e. in both cases unchanged by the reduction in light, even if Mr Absolon's evaluation of the reduction in light using the Waldram method was correct.

390. He considered that the market value of flat 705 was £1,250,000 in the Before and After scenarios in September 2021 and £1,270,000 in the Before and After scenarios in January 2025, similarly unchanged, on the same basis.

391. It transpired that Mr Cook had taken as his Before scenario the light before Arbor was built, rather than the cut-back Arbor. Overnight, he looked again at his valuations in the Before scenarios and, a little surprisingly, decided that they were unchanged. So according to Mr Cook, the reduction in light from pre-Arbor to a level where the light was only just sufficient had no impact on value, but the reduction in light from just sufficient to markedly insufficient had a very significant effect.

392. Mr Cook had arrived at his valuations by seeking to derive a value per square foot from selected comparable transactions, other than the purchase of flat 705 by Mr Cooper in March 2021, and using general market trends. In cross-examination, he effectively conceded that his comparables were not good comparables, for various reasons.

393. Mr Godfrey arrived at his valuations by relying on the prices realised on comparable transactions, including flat 705 and other flats in Bankside Lofts, and making small adjustments where appropriate.

394. I prefer Mr Godfrey's approach to ascertaining the Before values and accept his valuations for both dates. However, I am not persuaded that there would be no impact at all on value of the diminution in good light from cut back Arbor Before scenario to Arbor as built After scenario. It transpired in cross-examination that, in considering the After scenarios, Mr Godfrey believed that even though the light was insufficient, to the extent shown in the Waldram results, a purchaser would not notice the insufficiency of the light. He considered that to be so even assuming that Mr Absolon's results were correct.

395. I am unable to accept that, and Mr Godfrey could not explain persuasively why that would be so. I find that a purchaser would notice that the natural light was poor in the rooms in question. I have found that the impact will be moderate (flat 705) and substantial (flat 605).

396. If there were two flats side by side, identical save as to the quality of the light, a hypothetical purchaser would certainly prefer the flat with the better light. Even without an opportunity directly to compare the Before and After light, a flat that has poor natural light in an LKD is very likely to attract fewer interested purchasers, and so will probably sell for a lower price than a flat with adequate lighting. A flat that has poor natural light in a bedroom may suffer the same fate, though a single bedroom is likely to be considered less significant, and therefore have a lesser impact on value. The difficulty in Mr Cooper's case is that although one of three bedrooms (the principal bedroom) will have poor light, the rest of his (larger) flat is unaffected, and the main attractive feature of the flat (the large LKD and terrace), which is likely to be the principal attraction to a purchaser, will continue to have unusually good light.

397. I accordingly find that the diminution in value for flat 605 would be £60,000, and for flat 705 £20,000.