Neutral Citation Number: [2024] EWHC 1429 (Ch)

Case No: PT-2022-000280

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

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 14 June 2024

Before:

MASTER BRIGHTWELL

- -

Between :

RUTLAND LODGE (PETERSHAM) MANAGEMENT COMPANY LIMITED	**Claimant**
- and -	
(1) OLIVER JULIAN BENJAMIN **(2) TAMARA BENJAMIN**	**Defendants**

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Dr Ashley Bowes (instructed by **Dixon Ward Solicitors**) for the **Claimant**
The Defendants appeared in person

Hearing date: 5 April 2024

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Approved Judgment

This judgment will be handed down remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 10:00am on Friday 14 June 2024

Master Brightwell:

1. The present application concerns the construction and effect of the agreement scheduled to a Tomlin Order made by me on 1 February 2023 in compromise of a claim concerning the estate at Rutland Lodge, in Richmond, Surrey. The estate is comprised of Rutland Lodge, which is divided into flats, and four other dwellings, one of which (2 Rutland Drive) is owned by the defendants.

2. The underlying proceedings concerned alterations which the defendants had carried out to their property. Paragraph 1 of the schedule to the Tomlin Order provides as follows:

> 1. 'This claim concerns a freehold covenant binding the land of the Defendants at 2 Rutland Drive, Richmond, Surrey, TW10 7AQ (HMLR Reference: SGL182053) ("the Property") in favour of the land of the Claimant at Rutland Lodge, Richmond, Surrey (HMLR Reference: SGL41937 and SGL41938) ("the Estate"). The covenant requires the Defendants to seek the permission of the Claimant before undertaking any structural works or alterations to the elevations or external appearance of the building on their land. The Claimant claims the works which have been undertaken by the Defendant are in breach of the said covenant, either because the license granted by the Claimant for the works on 6 May 2016 was entered into upon a misrepresentation or unilateral mistake, or because the works were not covered by its express terms. The Defendants have defended the Claim and counterclaimed that the Claimant, in breach of the same covenant, unreasonably refused to consent to further planned works.'

3. The claimant company appears to have been particularly concerned by the addition of a sunroom by way of a first floor extension, from which it would be possible to look out over the rest of the estate, thus affecting the privacy of those occupying other properties on the estate. It was alleged that the licence granted in May 2016 was approved by the claimant on the mistaken basis that it included a previous and less extensive planning permission than that which had subsequently been granted to the defendants.

The compromise and Tomlin Order

4. The compromise reached between the parties followed a mediation, which took place on 13 September 2022. All parties were at that stage represented by solicitors and counsel. An agreement in principle was reached, but was the subject of correspondence over the following months, before the Tomlin Order was finally agreed in principle and submitted to the court. During that period, the defendants ceased to instruct solicitors and so acted as litigants in person when the compromise was signed, as they did at the hearing before me. In the usual way, the sealing of the Tomlin Order did not involve the court in

considering the terms of compromise or expressing any view on them. When the court approves a Tomlin Order, it undertakes no responsibility for the settlement terms and cannot be taken to have approved them: Chancery Guide 2022, 2nd update, paragraph 16.43.

5. It was confirmed to me at the hearing that some, but not all, of the correspondence passing between the parties was included in the hearing bundle. Neither party suggested that I should take account of any other correspondence other than that which was in the hearing bundle.

6. Paragraph 1 of the schedule to the Tomlin Order ("the Schedule") is set out above. The remainder of the Schedule provides as follows (without annexes):

'2. The parties having carefully considered their respective positions have agreed to settle their respective claims against one another, with no admission as to liability, on the following terms:

a. The Defendants shall pay to the Claimant the reasonable cost of supplying and installing a hedge, to run from the middle of the wall between the bedroom and living room windows on the northern elevation of the Property, to the yew tree part-way across the living room window on the northern elevation of the Property. The hedge shall be of a limited maximum height of 6 feet, measured from the ground level at the point of the paved area of the sunken garden and planted in the flower bed between the communal patio of the Estate garden and the boundary edge of the Property.

    i. Within 49 days of the date of this Order the Defendants shall put forward to the Claimant a species of hedgerow for the Claimant to approve.
    ii. Within a further 14 days, the Defendants shall put forward three costings to supply the hedge for the Claimant to approve.
    iii. Within a further 14 days, the Claimant shall put forward to the Defendant three quotations from landscape gardeners for installing the planting.
    iv. The parties shall have liberty to apply to the Court for a determination of the particular terms on which the provisions of paragraph 2(a) of this Order are executed.

b. No later than 9 months from the date of this Order, the Defendant shall install louvers on (a) the entirety of the upper northern window of the sun room on the roof of the Property ("the Sun Room") and (b) across at least a minimum of 806 mm of the ground floor west facing window of the Property. The louvers to be in keeping with the louvers proposed

in planning applications of 15/2134/HOT and 16/0232/HOT irrespective of their location and specific use. The Defendants may request an extension from the Claimant in writing, such application shall be accompanied by justification and a proposed revised timetable. A request for an extension by the Defendant shall not be unreasonably withheld by the Claimant.

c. The Defendants agree not to use (or permit to be used) that area of the roof of the Property north of the line and shown hatched on the attached plan, more particularly described as follows:

    i. on the western side: a line running west from the northern extent of the window glazing on the western side of the Sun Room, to the rooflight, then south down the eastern side of the rooflight, then west along the southern extent of the rooflight to the western balustrade.

    ii. on the eastern side: a line running east, from the eastern elevation of the Sun Room to the eastern balustrade, to run in line with the north elevation of 1 Rutland Drive.

    iii. the Defendants shall only be entitled to use the area north of the said line shown hatched on the attached plan in cases of maintenance or emergency.

d. The Defendants shall covenant to bind themselves and their successors in title to 2 Rutland Drive (SGL182053), for the benefit of the Claimant's land at Rutland Lodge (SGL41937 and SGL41938) and each and every party thereof, not to breach the undertakings at paragraph 2(c) above. The parties shall execute the same as a freehold restrictive covenant and register with HM Land Registry the benefit and burden of the same on their respective titles within a reasonable period, no greater than 6 months from the date of this Order. The parties shall bear their own conveyancing costs. The covenant shall be drafted so as to include a dispensing power, with a proviso that permission under the dispensing power shall not be unreasonably withheld.

e. The line (as shown on the attached plan and more particularly described at paragraph 2(c) above) shall, within 14 days, be marked with planters by the Defendants during their period of ownership and maintained in perpetuity as a barrier.

f. The Claimant shall consent to the Defendants' implementation of planning permission granted on 2 March 2022 under Planning Inspectorate reference APP/L5810/D/21/3277387, save that permission shall not be granted for the installation of pergolas as shown within the approved plans to that planning permission. In respect of the louvred external storage area on the Roof Terrace, the same not to be constructed on the area set out at paragraph C above. The parties to sign a licence in agreed form to be annexed to this Tomlin Order.

g. The Defendants shall not park, nor shall any resident or guest or visitor be permitted to park, vehicles in-front of the garage of the Property.

h. The Defendants shall pay into the Claimant's solicitor's client account the sum of £50,000 within 28 days of the date of this Order.

i. The Defendants shall pay into the Claimant's solicitor's client account or the Claimant's service charge account, the further sum of £10,000 within 12 months of the date of this Order.

j. The Claimant undertakes not to seek to recover from the Defendants any further costs incurred in these proceedings or in connection with these proceedings, save as in connection with any breach of the terms of this Order.'

The dispute

7. On 21 July 2023, the defendants issued an application seeking orders giving effect to the terms of the Schedule. It appears that the application was issued after a dispute had arisen between the parties with regard to the implementation of various provision in the Schedule, and the claimant itself through its directors suggested to the defendants that they might seek the assistance of the court in the resolution of that dispute. In particular, in the application notice they seek orders:

i) Declaring that the proposed louvers in the defendants' plans (dated October 2022) comply with paragraph 2(b) of the Tomlin Order,

ii) Declaring that the planters placed by the defendants on the line described at paragraph 2(c) of the Tomlin Order, and

iii) In the alternative, rectifying the Schedule so that it reflects the earlier Heads of Terms, such that the requirement to install louvers is only for the defendants to use their best endeavours to install them within 9 months, with permission to request an extension, and that paragraph

> 2(e) of the Tomlin Order be read as though it did not contain the word 'barrier'.

8. Pursuant to directions given at a directions hearing on 18 October 2023, the defendants have filed points of claim and the claimant has filed points of response (and the defendants have filed a response to that). The parties rely on their witness statements filed both before and after that directions hearing. The parties were expressly given permission to apply for cross-examination on the witness statements, but neither side elected to make such an application.

9. Even though not part of the application, the defendants have also sought a declaration that two trees which are kept on the part of the terrace that is, by virtue of the parties' agreement, only to be used 'in cases of maintenance or emergency' may remain in such position, notwithstanding paragraph 2(c)(iii) of the Tomlin Order.

10. The defendants rely in particular on two matters in the course of the negotiations between the parties, with reference to the agreement concerning the louvers to be placed on the upper northern window. First, they rely on the signed Heads of Terms dated 13 September 2022, i.e. signed at the conclusion of the mediation. This is, as would be conventional with such heads of terms which are not intended to be immediately legally binding, marked as being 'without prejudice save as to costs and subject to agreement'.

11. Secondly, the defendants rely on correspondence passing between the parties between the signing of the Heads of Terms and the conclusion of the agreement formalised in the Schedule to the Tomlin Order. In particular, on 16 November 2022, Mrs Benjamin wrote to the claimant's solicitors with reference to a plan dated October 2022, previously provided to the claimant, and showing the proposed louvers to the upper northern window extending across only three-quarters of the length of the window (and thus allowing emergency access to the private part of the terrace, from a door forming part of that window).

12. At that date, paragraph 2(b) of the Schedule was already in final form. Mrs Benjamin indicated that the words, 'The louvers to be in keeping with the louvers proposed in planning applications of 15/2134/HOT and 16/0232/HOT irrespective of their location and specific use', were agreed. She went on, however, to say:

> 'Please note that before entering the Tomlin Order, we will need confirmation that (a) your client approved the designs we have put forward and (b) that they will undertake to support any necessary planning application to implement the same.

> In the event that a planning permission (if required) is not given, then it is possible we cannot comply with this clause. Please confirm that in such a situation your client will accept that either an alternative will have to be agreed that does not required planning permission, or the clause will not be [e]ffective.'

13. On 9 December 2022, the claimant's solicitors replied, acknowledging the agreed reference to the two named planning applications, and continuing as follows:

> 'Our client agrees the plans provided in your email to us dated 31 October 2022 and will not object to any planning application for those plans, save that they do not depart from what has been agreed in the Tomlin Order and Licence of Works. Our client notes your concerns in connection with planning permission not being given by the local authority. In those circumstances, our client will consider alternative designs with consent not to be unreasonably withheld.'

Principles of contractual construction

14. My primary task in relation to the application before me is to construe the agreement reached by the parties and reflected in the Schedule, in order to determine whether the defendants are entitled to the relief sought. Unsurprisingly, in this case the claimant urges me to rely primarily on the face of the document and the defendants seek to rely on the background to the dispute and to the course of its resolution in support of their preferred interpretation. The approach of the court to the process of contractual construction was authoritatively described by Lord Hodge JSC in *Wood v Capita Insurance Services Ltd* [2017] AC 1173. He did so with particular reference to the question of the extent to which the court should determine the issue with regard to the written document itself, and to which the factual background and the commercial implications of each interpretations are relevant:

> '10 The court's task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement. It has long been accepted that this is not a literalist exercise focused solely on a parsing of the wording of the particular clause but that the court must consider the contract as a whole and, depending on the nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to that objective meaning. In *Prenn v Simmonds* [1971] 1 WLR 1381, 1383H–1385D and in *Reardon Smith Line Ltd v Yngvar Hansen-Tangen (trading as HE Hansen-Tangen)* [1976] 1 WLR 989, 997, Lord Wilberforce affirmed the potential relevance to the task of interpreting the parties' contract of the factual

background known to the parties at or before the date of the contract, excluding evidence of the prior negotiations. When in his celebrated judgment in *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896, 912–913 Lord Hoffmann reformulated the principles of contractual interpretation, some saw his second principle, which allowed consideration of the whole relevant factual background available to the parties at the time of the contract, as signalling a break with the past. But Lord Bingham of Cornhill in an extrajudicial writing, "A New Thing Under the Sun? The Interpretation of Contracts and the ICS decision" (2008) 12 Edin LR 374, persuasively demonstrated that the idea of the court putting itself in the shoes of the contracting parties had a long pedigree.

11 Lord Clarke of Stone-cum-Ebony JSC elegantly summarised the approach to construction in the *Rainy Sky* case [2011] 1 WLR 2900, para 21f. In the *Arnold* case [2015] AC1619 all of the judgments confirmed the approach in the *Rainy Sky* case: Lord Neuberger of Abbotsbury PSC, paras 13–14; Lord Hodge JSC, para 76 and Lord Carnwath JSC, para 108. Interpretation is, as Lord Clarke JSC stated in the *Rainy Sky* case (para 21), a unitary exercise; where there are rival meanings, the court can give weight to the implications of rival constructions by reaching a view as to which construction is more consistent with business common sense. But, in striking a balance between the indications given by the language and the implications of the competing constructions the court must consider the quality of drafting of the clause (the *Rainy Sky* case, para 26, citing Mance LJ in *Gan Insurance Co Ltd v Tai Ping Insurance Co Ltd (No 2)* [2001] 2 All ER (Comm) 299, paras 13, 16); and it must also be alive to the possibility that one side may have agreed to something which with hindsight did not serve his interest: the *Arnold* case, paras 20, 77. Similarly, the court must not lose sight of the possibility that a provision may be a negotiated compromise or that the negotiators were not able to agree more precise terms.

12 This unitary exercise involves an iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences are investigated: the *Arnold* case, para 77 citing *In re Sigma Finance Corpn* [2010] 1 All ER 571, para 12, per Lord Mance JSC. To my mind once one has read the language in dispute and the relevant parts of the contract that provide its context, it does not matter whether the more detailed analysis commences with the factual background and the implications of rival constructions or a close examination of the relevant language in the contract, so long as the court balances the indications given by each.

> 13 Textualism and contextualism are not conflicting paradigms in a battle for exclusive occupation of the field of contractual interpretation. Rather, the lawyer and the judge, when interpreting any contract, can use them as tools to ascertain the objective meaning of the language which the parties have chosen to express their agreement. The extent to which each tool will assist the court in its task will vary according to the circumstances of the particular agreement or agreements. Some agreements may be successfully interpreted principally by textual analysis, for example because of their sophistication and complexity and because they have been negotiated and prepared with the assistance of skilled professionals. The correct interpretation of other contracts may be achieved by a greater emphasis on the factual matrix, for example because of their informality, brevity or the absence of skilled professional assistance. But negotiators of complex formal contracts may often not achieve a logical and coherent text because of, for example, the conflicting aims of the parties, failures of communication, differing drafting practices, or deadlines which require the parties to compromise in order to reach agreement. There may often therefore be provisions in a detailed professionally drawn contract which lack clarity and the lawyer or judge in interpreting such provisions may be particularly helped by considering the factual matrix and the purpose of similar provisions in contracts of the same type. The iterative process, of which Lord Mance JSC spoke in *Sigma Finance Corpn* [2010] 1 All ER 571, para 12, assists the lawyer or judge to ascertain the objective meaning of disputed provisions.'

15. As Dr Bowes stressed, evidence of antecedent negotiations is not admissible as to the construction of a particular clause, but only to show the commercial or business object of a contract. Drawing a line between permissible and impermissible reliance on negotiations is often not straightforward. As Flaux J (as he then was) said in *Excelsior Group Productions Ltd v Yorkshire Television Ltd* [2009] EWHC 1751 (Comm) at [25]:

> 'It seems to me that there is a very fine line between looking at the negotiations to see if the parties have agreed on the general objective of a provision as part of the task of interpreting the provision and looking at the negotiations to draw an inference about what the contract meant (which is not permissible), a line so fine it almost vanishes.'

16. The claimant relies on the judgment of Leggatt LJ in *Merthyr (South Wales) Ltd v Merthyr Tydfil County Borough Council* [2019] EWCA Civ 526. At [50], he said this:

> '….What is not permissible, as the decision of the House of Lords in the *Chartbrook* case [*Chartbrook Ltd v Persimmon Homes Ltd* [2009] 1

> AC 1101] confirms, is to seek to rely on evidence of what was said during the course of pre-contractual negotiations for the purpose of drawing inferences about what the contract should be understood to mean. It is also clear from the *Chartbrook* case that it is not only statements reflecting one party's intentions or aspirations which are excluded for this purpose but also communications which are capable of showing that the parties reached a consensus on a particular point or used words in an agreed sense. The exclusion of such evidence was justified in the *Chartbrook* case, not on the ground that it will always or necessarily be irrelevant, but because of the costs and other practical disadvantages that would result from relaxing the rule and because the "safety devices" of rectification and estoppel will generally prevent the exclusionary rule from causing injustice.'

17. I note in particular the statement that communications are not admissible for the purpose of showing that a consensus on a point was reached, if that is relied on for the purposes of construction. It is clear that the estoppel which may arise in this context is estoppel by convention: *Chartbrook* at [47]; *Merthyr (South Wales) Ltd* at [48].

Construction of the Schedule

18. With these principles in mind, I turn to the three clauses which are in dispute. I have in mind in particular what Lord Hodge described in *Wood v Capita Insurance Services Ltd* as the unitary exercise of construction.

The louvers

19. The claimant suggests that the wording of the relevant part of paragraph 2(b) is unambiguous, and that it simply requires the louvers to extend across the 'entirety of the northern window of the sun room of the roof of the Property'. Those quoted words are taken directly from the Schedule itself. There is no issue raised with the words regarding the need for the louvers to be in keeping with the louvers proposed in the two named planning applications. The relevant dispute for present purposes is as to whether the louvers must extend across the entirety of the window.

20. Dr Bowes submits in particular that the building and development control regimes (which would include the requirement, where applicable, to obtain planning permission) cannot change the clear wording of the agreement. Furthermore, there is no evidence that the term, with the construction contended for by the claimant, cannot lawfully be complied with. Accordingly, even if the 'best endeavours' wording were to be inserted as contended for by the defendants, the defendants are in breach because they have not sought planning permission and(/or) building control approval or

provided evidence that approval for louvers extending across the entire window would not be given. He suggests that it is unlikely that consent would not be granted because there is an exit from the sun room on the opposite side of the building away from the area where privacy is an issue.

21. The claimant also contends that, even if the agreed placement of louvers (i.e. extending across the entire window) cannot be implemented without infringing the building or planning regimes, the defendants will still be held to their bargain and will be liable for damages accordingly. Dr Bowes referred to the decision of the Supreme Court in *MT Hojgaard A/S v E.ON Climate and Renewables UK Robin Rigg East Ltd* [207] Bus LR 1610 at [43]–[44] (Lord Neuberger PSC), saying that the risk of a specified design not being capable of being produced is on the party who has agreed to work to that design. The claimant thus appears to accept that the defendants cannot be required by an order for specific performance to do something which would be in breach of building or planning laws.

22. The defendants' position is that it was known at all material times that any changes to the design of the sun room would require planning permission, and that this was expressly envisaged when the Heads of Terms were prepared and signed. It was known by both sides that an architect would need to be instructed in order to provide a solution.

23. The defendants accept that, on its face, paragraph 2(b) of the Schedule provides for a louvers to be installed along the entirety of the window. It clearly does so provide, not least as it is juxtaposed with a statement that the similar louvers at ground floor level must cover a minimum of 806mm, i.e. less than the entirety of the relevant windows. The objection the defendants pursue is solely that this cannot lawfully be done. They accordingly submit that the Schedule should be construed so as to include a 'best endeavours' provisions, as was contained in the Heads of Terms, which were subject to contract. As to the claimant's argument that the defendants have not in fact used their best endeavours to install louvers to the northern window, the defendants submit that they have been unable to apply for planning permission because of the claimant's lack of consent to the plans provided in October 2022.

24. Dr Bowes points out that there is no evidence, either that the placing of louvers across the full length of the window would not obtain planning permission or that it would not obtain building control approval, these of course being separate regimes.

25. It is clear from the case law discussed above that each suggested interpretation must be checked against the provisions of the contract and its commercial consequences investigated. This can start either with the factual background

and the implications of the rival constructions, or with the language of the contract. I will start with the former.

26. The background to the contract involves a lengthy dispute about the extension to the defendants' property and the effect it has on the privacy of the neighbouring properties. The genesis of the legal dispute was the licence granted by the claimant to the defendants and the question whether there had been a misrepresentation or a misunderstanding as to the scope of the planning permission which had been granted to the defendants. The claimant's concern was one of privacy, and this issue of privacy has clearly informed the agreed basis of compromise.

27. As to the commercial consequences of the claimants' preferred construction, this would potentially leave the defendants contractually required to carry out steps which could not lawfully be done. The case law relied on by the claimant, including the *MT Jojgaard* decision, concerns designs to be implemented by those carrying on a relevant business with appropriate expertise: that case concerned the installation of offshore wind farms. *Cammell Laird and Co Ltd v The Manganese Bronze and Brass Co Ltd* [1934] AC 402, also cited by Dr Bowes, concerned the design for the manufacture of ships' propellors. One can see why a specialist agreeing to carry out such a design may be prepared to take the risk of it being in breach of a statutory regime. It may be thought to be somewhat improbable that property owners in the position of the defendants would objectively have agreed to take on the risk of it being impossible to implement the agreement, all the more so when the planning and building laws had been clearly in focus as part of the prior dispute. Furthermore, if the agreement were to do something that were not lawfully possible, the claimant would be left to its claim in damages without necessarily being entitled to require any part of the upper northern window to be louvred.

28. On the other hand, a requirement on the part of the defendants to install a window across the entirety of the upper northern window so far as lawfully permissible would place an obligation on the defendants to ascertain what the lawful limits were and to comply both with those limits and with the agreement, and would ensure that the claimant received as much of the intended benefit (to it and those whom it represents) of the louvers as possible.

29. When turning to consider the wording of the Schedule, it is apparent that compliance with the planning laws was anticipated in at least some respects. Paragraph 2(f) provided for the claimant to consent to work in accordance with a more recent planning permission dated 2 March 2022 in most respects. Further, paragraph 2(c) itself referred to two prior planning applications, with the new louvers to be 'in keeping with' those proposed in those applications. This is quite consistent with the background to the dispute, which turned on

the knowledge and understanding of the claimant as to planning applications which had been made by the defendants. Whilst the issue in the underlying dispute was the consent of the claimant in accordance with the freehold covenant binding the defendants' property, and not the question of compliance with statutory requirements, the scope of the planning consent was part of the background picture. Paragraph 1 of the Schedule records the need for the claimant's consent to structural works or alterations to the elevations or the external appearance of the building. The obtaining of planning permission (where required) is a necessary but not a sufficient condition for the claimant to grant a licence for works. While the point was not discussed in quite this way at the hearing, I doubt whether the covenant could be construed in such a way as to enable the claimant to give consent to works which could not lawfully be carried out. Whether or not that is right, it is most improbable that the claimant objectively would have agreed to works being carried out where they could not lawfully be so, likewise that it would have agreed to works without caring whether or not they could lawfully be carried out.

30. A further point is also relevant. Annexed to the Tomlin Order is a licence granted by the claimant to the defendant for works not directly concerning the points considered in this judgment, for which planning permission had been granted on 2 March 2022, save in respect of the installation of pergolas (see paragraph 2(f) of the Schedule). The schedule to that licence states that the parties agreed that if additional planning permission or planning amendments were required to implement those works or a similar scope of works, the claimant would consent if the scope of works was the same, and otherwise consent could not be unreasonably withheld. This is an indication, within the four corners of the Schedule, that the parties expressly anticipated compliance generally with planning laws and fortifies me in the view I have reached based on the considerations set out above.

31. For the reasons set out above, I therefore conclude first that paragraph 2(b) requires louvres to be placed by the defendants, as it says, across the entirety of the upper northern window of the sun room on the roof of the Property. For the avoidance of doubt, (and subject to the point in the following sentence), this requires the louvres to cover the entirety of the aperture of that elevation in the sunroom. Secondly, this obligation is to be carried out to the maximum extent possible in compliance with the planning and building regimes. To the extent that it could not be done within nine months (including the circumstances where it required amendment in order to be compliant with the relevant regimes), an extension of time could be sought from the claimant under the express provision in the paragraph. I consider this to be a better way of expressing the objective meaning of the provision than reference to the use by the defendants of 'best endeavours' which featured in the course of

negotiations, which are of course not admissible for the purpose of interpretation, although the practical effect is the same.

32. I appreciate the point that it is not presently established that louvers cannot lawfully be placed across the entirety of the upper northern window. Furthermore, the defendants have alleged that they have been unable to progress an application because of the lack of co-operation from the claimant. These are not matters I need to resolve on the present application, nor is the question whether there has been any breach of contract by either side leading to a right to damages. If louvers can lawfully be installed across the entire window (i.e., permitting no access to the terrace), then the Schedule requires such installation. If not, then they must be installed to the maximum extent lawfully possible.

The planters

33. The second issue concerns paragraph 2(e) of the Schedule. This requires lines to be marked with planters and 'maintained in perpetuity as a barrier'. The lines are those described in paragraph 2(c)(i) and (ii). The defendants seek a declaration that the way in which the lines are currently marked is in compliance with the Schedule. As matters stand, there are two rectangular metal pots containing a number of plants along each line, with the gaps filled in with smaller terracotta pots. On one line they are higher than the rectangular pots, and on the other they are shorter. It is unclear precisely how wide are the gaps between the pots (both round and rectangular) but it seems to me quite likely that a person could pass through some of the gaps, even if not easily.

34. The claimant contends that the current arrangement is not in compliance with the parties' agreement. There are not 'planters' across the entire line, as there are gaps between the pots, and there are only two long metal containers along each line. Dr Bowes submitted that a visitor would be able to pass through the gaps between the long planters and would not necessarily know that access was prohibited, i.e. that there is not a 'barrier' as the Schedule requires.

35. The relevant background to the dispute is the claimant's position that the upper sun room interfered unreasonably with the privacy of the neighbouring property owners. The agreement between the parties was reached in order to provide that privacy by ensuring that no use would be made of the area to the northern side of the lines to be demarcated. That is quite consistent with the agreement not to use the area north of the line only 'in cases of maintenance or emergency'. The commercial implications either way are not significant, at least in financial terms; some additional pots/planters may be required.

36. As to the Schedule itself, I consider that the key word is the word 'barrier', which did not feature in the Heads of Terms, a point about which the

defendants complain. As I have already explained, the negotiations, including the Heads of Terms, are not admissible save as to explain the basis of the dispute, which emerges clearly in any event without the need to have regard to those negotiations.

37. Neither party relied on a dictionary definition of the word 'planter(s)'. Dr Bowes submitted that a planter is something different from a mere plant pot, effectively inviting me to take judicial notice of that fact. I do not consider that I am able to do that. I would note that the Oxford English Dictionary provides the material definition of a 'planter' as: 'A pot, tub, or other container for growing or displaying plants'. It also defines a 'barrier' as: 'A fence or material obstruction of any kind erected (or serving) to bar the advance of persons or things, or to prevent access to a place' (which Dr Bowes did rely on in his skeleton argument). There is no evidence that the parties have a common understanding as to any special or particular meaning for the word 'planter'. Dr Bowes submitted that it must be something other than a pot, but did not put forward any positive definition. I consider that any container in which plants can be grown and which is capable of forming part of a barrier is capable of satisfying the contractual requirement.

38. It is clear to me, both from the background to the dispute and the intention behind the compromise, and from the use of the word 'barrier' which is to mark the relevant lines, that the planters must extend for the entirety of each line. It would be in the nature of a barrier that it extends along the full length of each relevant line, in order to prevent the line being crossed. The gaps between the planters/pots mean that this requirement is not currently satisfied.

39. I consider that what I have said above is sufficient to dispose of the question before the court, which is solely whether the present arrangement of planters/pots complies with paragraph 2(e) on its true construction. It is not the function of the court to dictate precisely how the barrier should be formed, but I do find that there should be an uninterrupted line across the length of the barrier. I can see that a question may arise whether a de minimis gap between planters, say measured in a small number of millimetres, is permissible. I consider that it arguably would be, as the Schedule envisages that there will be a series of planters, the placing of which may lead to small gaps, and which would nonetheless satisfy the object of barring the advance of persons across the line of the barrier. That is, however, not a question which requires to be determined on the present application.

40. Whilst I consider that the current arrangement does not comply with the Schedule, the defendants have in good faith sought to comply with it and the breach is not a significant one. There is no suggestion that they or their visitors have been impermissibly straying over the marked lines.

The plants in the prohibited area

41. The final issue concerns two trees which are present at the northern end of the terrace area on the sun roof, in an area which is to be used only 'in cases of maintenance or emergency'.

42. The background facts and the nature of the dispute and the compromise are as set out above. The agreement reached between the parties was that the area in question would not be used at all, except in case of maintenance or emergency. The defendants contend that they understood that the plants, which were in the prohibited area before the agreement, could stay and that watering them would represent 'maintenance', such as to justify entering the prohibited part of the terrace.

43. I consider that the central purpose of the parties' agreement was to ensure that the relevant area of terrace would be accessed as little as possible, and that access to it would be limited to truly essential matters. That is consistent with the requirement, discussed above, for barriers not only marking the agreed demarcation line, but also preventing it from being crossed. Furthermore, the whole of paragraphs 2(a), (b) and (c), i.e. the substantive parts of the Schedule, are concerned with the putting into place of steps in order to mark out the prohibited areas and to prevent access to them, or to block the visibility over neighbouring land from the defendants' property. There is no reference to any other permitted use of the prohibited area, and the defendants agreed not to use it or to permit it to be used. There is likewise no reference to the continuation of any prior use of that area.

44. I consider in light of these factors that the agreement is quite unequivocal. The relevant part of the roof of the defendants' property is not to be used at all, except for maintenance or in emergencies. I do not consider that the watering of plants can sensibly be said to be 'maintenance'. That word naturally refers to the maintenance of the building itself. I also consider that the retention of plants in the prohibited area constitutes the use of that area, and is in breach of the parties' agreement accordingly.

Rectification/estoppel

45. As indicated above, the defendants contend that, if I am against them on the construction of the Schedule, then it falls to be rectified on the footing that there is a unilateral mistake. I essentially agree with their construction on the issue concerning the installation of louvers, so no question of rectification arises on that issue. At the hearing, Dr Bowes suggested that there could be no question of rescission on the basis of unilateral mistake in relation to the louvers in any event, but he accepted that an estoppel might at least arguably have arisen because of the email correspondence mentioned above. He

submitted that an estoppel is a shield not a sword and the issue would therefore arise only if the claimant brought proceedings against the defendants. Again, in the event, this point does not require to be decided.

46. The defendants argue that the word 'barrier' should be removed from paragraph 2(e) of the Schedule by way of rectification, due to a unilateral mistake. Rectification on the basis of such a mistake is available only where the other, unmistaken, party unconscionably takes advantage of the mistake.

47. In this case, it is clear from the correspondence passing between the parties between the signature of the Heads of Terms (which did not contain the word, 'barrier') and the date of execution of the Tomlin Order that the defendants indicated that they were aware of the inclusion of the word in the draft Schedule, and that they did not object to it. The documents before the court do not disclose when the word was first added, but in an email from the claimant's solicitors to the defendants dated 9 December 2022, reference was made to the defendants' suggested wording of paragraph 2(e) and proposed some modification to it. Both forms of wording contained the reference to the line being 'maintained in perpetuity by the Defendant[s] as a barrier'. In the points of claim, the defendants contend that they were mistaken as they did not understand that there needed to be a physical barrier that could not be crossed, and that the claimant must have deliberately taken advantage of that misunderstanding.

48. Whilst I accept the defendants' evidence as to their subjective misunderstanding, I consider that the word 'barrier' commonly connotes a physical object (or objects) barring access, consistent with its dictionary definition. In any event, a subjective and unilateral misunderstanding about the meaning of a contractual obligation does not itself mean that the written agreement fails accurately to record the parties' agreement, when the wording itself is agreed. In this case, the communications passing between the parties during the negotiation stage show that the inclusion of the word 'barrier' was agreed and that the Schedule accurately records that agreement. There was thus no relevant mistake. There is also, in any event, nothing that has been brought to my attention that could constitute unconscionable conduct on the part of the claimant in this regard. On the assumption that the word was first included by the claimant, it is easily comprehensible and not inconsistent with the Heads of Terms, making clear that which might otherwise be ambiguous, that the entirety of the relevant lines had to be marked out by planters.

49. I did not understand the defendants to contend that any order for rectification might be available in respect of the plants presently situated in the prohibited area. They say that they would not have entered into the agreement if they had appreciated that plants would not be permitted in that area but, without more, that does not afford grounds to resile from the agreement. There is no

allegation that the claimant knew or had reason to believe that there was any misunderstanding in this regard. At its highest, it might be said that the defendants subjectively failed to appreciate that a restriction on use prevented the retention of plants in the relevant area. There was never an agreement (nor any representation) that any plants would be excluded from the prohibition on use of the relevant area, and the relevant words of paragraph 2(c)(iii) of the Schedule ('use', 'maintenance', and 'emergency') were all contained in the Heads of Terms, which on the defendants' case reflects the agreement between the parties.

50. There are accordingly no grounds to order the rectification of paragraphs 2(c)(iii) or 2(e) of the Schedule.

Conclusion

51. My conclusions as to the correct construction of the three clauses in dispute are set out above. Essentially, I accept the defendants' position that the installation of louvers is, as a matter of interpretation, subject to the requirement of compliance with the building and planning regimes. If louvers can be installed along the entirety of the upper northern window in accordance with those regimes, then that is the defendants' obligation. I am unable to determine whether or not that is possible, the issue before me being one solely of construction of the parties' agreement in compromise of the underlying proceedings. On the other points raised by the defendants, I accept the construction put forward by the claimant.

52. Dr Bowes was understandably at pains to point out with regard to the louvers that, if my decision was as it is, then the formulation of the relief to be granted would require careful consideration. I will hear further from both sides as to the content of the appropriate declarations on each point once they have had an opportunity to consider this judgment.