Neutral Citation Number: [2009] EWHC 599 (Ch)

Case No: HCO7C02430

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Manchester Civil Justice Centre
1 Bridge Street North
ManchesterM60 9DJ

Date: 20th April 2009

Before :

HIS HONOUR JUDGE PELLING QC
SITTING AS A JUDGE OF THE HIGH COURT

- -

Between :

WILLIAM OLD INTERNATIONAL LIMITED	**Claimant**
- and -	
(1)DHIREN ARYA	
(2) SANGITA ARYA	**Defendants**

- -
- -

Mr Isaac Jacob (instructed by Barrea & Co) for the Claimant
Mr Stephen Boyd (instructed by Needleman Treon) for the Defendants

Hearing dates: 16-18 March 2009 (RCJ)

- -

Judgment

HH Judge Pelling QC:

Introduction

1. These proceedings concern two adjoining plots of land. Annexed to this judgment marked "Appendix" is a coloured plan ("the plan"). The Claimant's land is shown on the plan outlined and shaded pink and is referred to in these proceedings as the land adjoining Park Farm, Ducks Hill Road, Northwood HA6 2NP. The Defendants' land is shown on the plan outlined and shaded in blue and is known as Park Farm House, Ducks Hill Road, Northwood HA6 2NP. I refer to these parcels of land hereafter respectively as the "Claimant's land" and the "Defendants' land".

2. Originally the Claimant's land and the Defendants' land was owned (together with the land shown outlined and shaded in yellow on the plan) by Northwood Developments Limited who sold the land which was to become respectively the Claimant's and the Defendants' land to Park Farm (Northwood) Limited ("PFNL") in January 2005.

3. By a transfer dated 17th June 2005 ("the Transfer") PFNL transferred the Claimant's land to the Claimant. It will be necessary to refer to the terms of the Transfer in detail hereafter. It is sufficient for present purposes to record that the Transfer contained an express grant by PFNL on behalf of itself and its successors in title of an easement securing the free and uninterrupted passage of various utilities (described in the Transfer as "Services") through pipes and cables (referred to in the Transfer as "Service Media") that had been or were to be laid within a defined period on the land retained by PFNL. The Claimant's land came with planning permission for the construction of an office building and it was contemplated at the time of the sale by PFNL to the Claimant (whose business is development) that the Claimant would construct an office building on the Claimant's land in accordance with the planning permission that had been granted. On 24th January 2006, PFNL completed the transfer of the Defendants' land to the Defendants. The Defendants are brother and sister, they are solicitors and they practise in partnership as "ZSA Law" from the building that is and was at all material times on the Defendants' land.

4. After what can only be described as long drawn out and hostile negotiations, the Claimant in exercise of the rights conferred by the express easement referred to above, entered upon the Defendant's land and dug a trench in an agreed position across the Defendant's land in which gas and water pipes and conduits for phone and electricity cables were laid. The location of each is shown on the plan. The electricity cable conduit is shown as a broken red line. For reasons that will become apparent when I consider the statutory framework for the supply of electricity, the only organisation that can lay cables through the conduit in order to provide a connection for the Claimant's Building is EDF Energy Networks Plc ("EDF"). EDF is not obliged to provide a connection to the Claimant's building (the construction of which has been substantially completed) if that requires cables to be laid over or under land owned by a party other than EDF or the party seeking the connection. However EDF has a power and is willing to do so if but only if the Defendants grant EDF a separate easement in its favour by a Deed of Grant. In the event that the Defendants continue to refuse to sign the deed, there is a statutory procedure which can be invoked by EDF by which an appropriate way leave can be obtained from the Secretary of State. I refer to these provisions later.

5. The Defendants' position is that they are not under any obligation to execute such a Deed of Grant but are willing to do so as part of an overall settlement with the Claimant of a claim in damages which the Claimant has made against the Defendants. It is accepted that if the Defendants are entitled to refuse to execute the Deed of Grant then they are entitled to adopt the position that they have adopted. Equally however, if (as the Claimant contends) the Defendants are not entitled to refuse to sign the Deed of Grant then the Defendants' position is untenable and the Claimant would be entitled to succeed.

6. The juridical basis of the Claimant's case altered in the course of the trial. As the case was opened by Mr Jacob, it was contended that the Defendants were obliged to execute a Deed of Grant in a form satisfactory to EDF either because that obligation arose as a right ancillary to the express easement to which I have referred in outline above as being reasonably necessary for its use and enjoyment or alternatively by implication and/or by operation of Section 62 of the Law of Property Act 1925. Whilst it was true to say that Mr Jacob referred to non derogation from grant, he did

so only as a basis for the implication of an easement the effect of which he maintained was to require the Defendants to execute the Deed of Grant in favour of EDF. Mr Boyd's response to this was to maintain that an easement could not be implied where an express easement had been granted and/or that it was heretical to suggest that the owner of a servient tenement could be required to do anything positive by the or the successor in title of the owner of the dominant tenement by reference to an express easement which was by its very nature negative in character. Even if that was wrong, Mr Boyd contended that any obligation to perform a positive act such as that contended for by the Claimant could only take effect in contract and as such could not survive the transfer to a successor of the servient tenement.

7. When closing submissions came to be made, Mr Jacob acknowledged that he had difficulties in relation to his case based on easement, but contended that he was entitled to succeed by reference to non derogation from grant on the basis that (1) the Claimant's land had been sold to the Claimant on the basis that the Claimant was to build an office building on it (2) it would have been an impermissible derogation from grant in those circumstances for PFNL to have refused to execute the Deed of Grant and (3) the Defendants (as successors in title to PFNL) were in no better position than PFNL.

8. Mr Boyd had no prior notice of this submission and was minded initially to argue that it was one that was not open to the Claimant on the pleadings as they stood. However, Mr Boyd in the end accepted that all the relevant primary facts had been pleaded, that there was no additional evidence that he could have adduced that was relevant specifically to what by now had become the Claimant's primary case and that the prejudice caused by the lack of notice could be catered for by me giving him permission to file supplemental written submissions addressing this point. I gave Mr Jacob permission to respond limited to anything new contained in Mr Boyd's supplemental submissions. Mr Jacob's supplemental submissions suggested that the Defendants had derogated from the transfer of the claimant's land to the claimant by alerting EDF to the fact that the Defendants land was not owned by the claimant and/or by suggesting that there was a dispute between the claimant and the defendant. Without this, it was submitted, EDF would by now have been provided with the connection it seeks and in those circumstances, even if the Defendants were not under an obligation to execute the deed, they came under such an obligation by reason of their conduct in relation to EDF which was in the circumstances a derogation from grant. It is to be noted that this formulation was not one which had been adopted by Mr Jacobs either in his opening or, indeed, in his closing submissions (written or oral) and thus appeared for the first time in his written supplemental closing submissions.

The Trial

9. The trial took place between 16 and 18 March 2009. I heard oral evidence from Mr Hussain, a director of and shareholder in the Claimant, Mr Shelton, a director of General Construction Limited, a company which has the same shareholders as the Claimant and was the contractor that carried out the construction of the office building on the Claimant's land as the Claimant's contractor, and I read the statement of Mr McAvoy the Claimant's solicitor who the Defendants did not require to be called. I also heard oral evidence from both Defendants and read a statement from Mr Levy, a chartered building surveyor who was engaged by the Defendants to assist them in the negotiations with the Claimant concerning the route to be followed by the pipes and conduits laid on the

Defendants' land as described above. Aside from oral submissions made by counsel at the close of the trial (with Mr Boyd going first by agreement) I have received and read supplemental written submissions from Mr Boyd dated 20th March 2009 and from Mr Jacob dated 24th March 2009.

10. The trial was of all issues relating to liability. The Master directed that a list of issues be agreed between the parties. In the event no list of issues was agreed between the parties until after the trial had started. As agreed the issues to be determined were:

    i) Upon its true construction, and in all the circumstances including considering whether EDF is legally entitled to insist that the Defendants execute the Deed of Grant, whether the Transfer required the Defendants to execute the Deed as originally proffered by EDF, the revised Deed agreed between EDF and the Defendants or any other form of the Deed acceptable to EDF;

    ii) If the answer to (ii) was yes:

        a) Have the Defendants acted unreasonably in refusing to execute the Deed or amended Deed; and

        b) If so has such conduct prevented the Claimant from obtaining a permanent supply of electricity;

    iii) If the answer to (i) is no, was it communications between the Defendants and EDF in November 2006 which caused or entitled EDF to require them to execute the Deed of Grant;

    iv) If the answer to (iii) is yes, did the conduct of the Defendant amount to a substantial interference with the Claimant's easement;

    v) Is the Claimant entitled to an injunction as sought;

    vi) If the answer to 2 or 3 and 4 is yes, whether the Claimant is entitled to damages to be assessed.

    This Judgment was ready for delivery in draft on 30th March 2009 but in the end a hand down hearing as requested by both parties at the end of the trial could not be arranged before 20th April due to the commitments of counsel.

Issues 1 and 3

11. Issue 1 as the case was closed encompassed not merely the effect of the express easement contained in the Transfer but also the effect of the obligation not to derogate from grant as it was developed in the closing submissions.

12. It is necessary to start by identifying the statutory frame work relevant to the supply of electricity. I do so because this statutory framework was in force at the time when the Transfer was executed.

13. The supply of electricity is governed by the Electricity Act 1989. Electricity suppliers to premises have to be licensed – see s.4 of the 1989 Act – and EDF is the sole licensed electricity supplier for the area in which the Claimant's (and Defendants')

property is located. By s.16 of the 1989 Act, an electricity distributor such as EDF is under a duty to make a connection between a distribution system of his and any premises if required to do so by the owner of those premises for the purpose of enabling electricity to be conveyed to and from those premises. However that duty is subject to an exception contained in s.17(2) of the 1989 Act whereby a distributor is not required to make a connection where making a connection involves the distributor doing something which without the consent of another person would require the exercise of a power conferred by either Schedule 3 or 4 of the 1989 Act. Schedule 3 empowers the Secretary of State to authorise a distributor to purchase compulsorily land required for any purpose connected with the carrying on of licensed activities. Schedule 4 contains sundry ancillary powers conferred on distributors including, at Paragraph 6, the acquisition of wayleaves. Paragraph 6(1) provides that:

> *"(1) This Paragraph applies where:*
>
> *(a) For any purpose connected with the carrying on of the activities which he is authorised by his licence to carry on, it is necessary or expedient for a licence holder to install and keep installed an electric line on under or over any land; and*
>
> *(b) The owner or occupier of the land, having been given a notice requiring him to give the necessary wayleave within a period (not being less than 21 days) specified in the notice:*
>
> *(i) has failed to give the wayleave before the end of that period; or*
>
> *(ii) has given the wayleave subject to terms and conditions to which the licence holder objects*
>
> *and … "the necessary wayleave" means consent for the licence holder to install and keep installed the electric line on under or over the land and to have access to the land for the purpose of inspecting maintaining adjusting repairing altering replacing or removing the electric line"*

14. By Paragraph 6(3) of Schedule 4 the Secretary of State may grant a wayleave on the application of the distributor. However, before such a wayleave is granted, the owner of the land in question must be given an opportunity to make representations (Paragraph 6(5)), such a wayleave is not to be registered but nonetheless is binding upon the owner of the land in question and his successors in title (Paragraph 6(6)) and the owner of the land may recover compensation from the distributor in respect of the grant and for any damage caused by the exercise of the wayleave granted (Paragraph 7).

15. I now turn to the terms of the Transfer. The consideration for the transfer of the Claimant's land from PFNL to the Claimant was £325,000. Under Paragraph 13 of the Transfer, "*Services*" were defined as meaning "*… all or any of the following services or supplies: water drainage … soil gas electricity telephone …*" and "*Service Media*" were defined as meaning "*… all pipes cables wires ducts drains sewers gutters and conduits for the supply and removal of the Services to and from the* [Claimant's] *property and shall include any equipment or apparatus installed for the purpose of such Services*". "*Transferor*" and "*Transferee*" were defined as including the

successors in title of each. By Clause 13.3.2 of the Transfer, it was provided that the rights granted for the benefit of the Claimant's property included:

> *"The right for the transferee … [o]f free and uninterrupted passage and running of Services through the Service Media respectively now laid or to be laid in the Perpetuity Period in on or under any other part of the Estate and further during the construction period to lay further Services in or on any other part of the Estate that may be necessary to connect into any existing Services or to obtain a new supply to the Property causing as little damage or disturbance as possible and making good as soon as reasonably possible any damage so occasioned to the reasonable satisfaction of the Transferor."*

It is common ground that the phrase "… *to lay further Services*…" in the fourth line of the express easement re-produced above is erroneous and that it should have been drafted as saying and is to be construed as meaning "…*to lay further Service Media* …". Save in that respect there is no dispute as to the true construction of the express easement – The "*Estate"* includes the Defendants' land which was at that stage retained by PFNL; and the Easement confers two rights being (a) a right to free and uninterrupted passage and running of the Services through the Service Media and (b) a right to lay further Service Media during the construction of the office building on the Claimant's land subject to the obligation to cause as little damage or disturbance as possible and to make good any damage caused as soon as reasonably possible to the reasonable satisfaction of the Transferor or its successor in title which in context means to the reasonable satisfaction of the Defendants.

16. Some reliance was placed by the Defendants on Clause 13.5.1.4 of the Transfer. It provides that the "*Transferor shall be entitled to develop or dispose of all or any part of the remainder of the Estate in any manner or for such purpose as the Transferor shall think fit*." Clearly this permissive provision applies to the Defendant's land and thus, subject to obtaining planning permission, it is open to the Defendants to develop their land as they think fit. However there was a suggestion at one point that this in some way qualified the scope of the express easement referred to above. If and to the extent that it is suggested that this provision qualifies either of the rights conferred by the express easement then I disagree. Had that been intended then the draftsman could with ease have made it clear that the easement was to be read subject to clause 13.5.1.4. That step was not taken. The natural meaning of the words contained in the later clause is that the Defendants are entitled to develop their land as they think and subject to obtaining planning permission but subject also to the obligations under the express easement. If a particular route of a new service medium is necessary for the purpose of effecting a connection then it is not open to the Defendants to object to that route on the ground that it will adversely affect their ability to develop their land. Likewise if any route would have an equally adverse effect on the Defendants' ability to develop then it is not open to the Defendants to refuse to allow new Media to be laid at all.

17. However, if there are two alternatives one which will and one which will not adversely affect the development potential of the Defendants' land or will not do so as severely as the first then the less disruptive route has to be adopted. However this is as much the effect of the general principle that rights under an easement must be exercised reasonably and without undue interference with the servient owners enjoyment of his own land (as to which see Moncrieff v. Jamieson [2007] 1 WLR

2620) as the effect of the inclusion within the Transfer of clause 13.5.1.4. For these reasons, I reject the obviously unattractive submission made by Mr Jacob that the claimant would have been within his rights to go "*… onto the Defendants' land and dug its trench [and] there is nothing the Defendants could have done"* – see Paragraph 8 of the Claimant's supplemental closing submissions. That is not a correct analysis either as a matter of general law or of the effect of the words of the express grant and I regret to say reflects the rather highhanded approach of the Claimant to the Defendants and their rights which has been a feature of their relationship from the outset.

18. It is now necessary that I rehearse the relevant facts. On 14 August 2006, the claimant applied to EDF for connection. EDF responded ultimately on 28 October 2006. It would appear that a drawing was attached to EDF's response showing the cable route across what in fact was the middle of the defendants' back garden. By a letter dated 31 October 2006, the Claimants sent a copy of EDF's plan to the Defendants. Prior to the sending of that letter, in correspondence passing between the parties and their respective solicitors, the Defendants had requested the Claimant to provide written confirmation of their intentions concerning the laying of Service Media on their land. The Defendants had asserted that their consent was required. I do not accept that this proposition was correct in the general way it was expressed or for the reasons that were given at that stage. However I reject the suggestion that the Claimant was able to proceed without consultation for the reasons set out above. The Defendants were in my judgment entitled to insist that any new Service Media were laid so as cause as little damage disturbance and inconvenience as possible. That required consultation and preferably agreement as to the route to be adopted subject to the limitations on the capacity of the Defendants to object that I have mentioned above.

19. In fact it is clear from the correspondence and from the oral evidence of the Defendants that relations between the parties had become strained by this time and the Defendants feared that Service Media would be laid on their land in a manner and in a location that was highly intrusive and without regard to the obligation of the Claimant to carry out the exercise causing as little damage and disturbance as possible -- see by way of example the letter to General Construction of 27 October 2006 (3/39). It is not necessary that I burden this judgment with a litany of the difficulties that had occurred between the parties prior to this time. It is sufficient to say that I am not satisfied that the Claimant conducted itself in relation to the Defendants in all respects as a considerate neighbour would and that the Defendants had legitimate grounds for having the fear they expressed.

20. On 31 October 2006, General Construction wrote to the Defendants in these terms:

> "*As advised in our previous meetings, we have very little control over the utility suppliers. They decide where they wish to lay their cables and mains. As you can see from the enclosed plan (received this morning) EDF … have decided to lay their cables almost across the middle of your back garden. We are still waiting to hear back from gas water and telephone companies. We have no idea what they might decide as regards access points as it it largely depends upon existing junctions outside of our boundaries*."

The claimant's solicitors wrote to the Defendants on 2 November 2006 in the following terms:

"*EDF have provided a plan showing the route of the proposed new supply and we understand that a copy of that plan was provided to you on 31 October 2006. As our clients have previously explained to you, the route of the new service is determined by EDF who have regard to the existing services owned by them.*"

Although the Claimant and its counsel are highly critical of the fact that thereafter the Defendants made contact with EDF, I do not see how that complaint can be maintained given the terms of the letters of 31st October and 2nd November 2006 referred to above. At the very least the Defendants were entitled to see whether EDF could be persuaded to adopt a route which would cause less disturbance and were also entitled to test whether the work proposed was to be carried out as contemplated by the express easement that is by causing as little damage and disruption as possible. No doubt if EDF had said originally and then confirmed to the Defendants that the route shown on its plan was the only route that could be accommodated then that would have been the end of the matter. However, that was not in truth EDF's position at any stage as became apparent from the subsequent correspondence. In my judgment, the Defendants were entitled to ask the question of EDF because the clear implication of these letters was that the only route possible was that identified in the EDF drawing. There was no hint of a suggestion that the Claimant was prepared to seek an alternative route if that is what the Defendants required. That is not a surprise for the Claimant was of the view that it was entitled to lay new Service Media anywhere on the Defendants' land without qualification.

21. Accordingly, on the same day - that is 2 November 2006 – the First Defendant made contact with EDF by telephone. The First Defendant kept an attendance note of the conversation which I accept to be accurate. The note records the First Defendant as informing EDF that the Defendants had been informed by General Construction that EDF had decided to lay cables in the Defendants' garden area and the First Defendant expressed concern that they had not been consulted about the proposed cabling. The note then records " *I was informed that EDF will normally be very particular to ensure that easement/way leave issues relating to land owned by third parties are resolved at an early stage. I was asked to write in."* The Defendants then wrote a letter dated 2 November 2006 to EDF. That letter referred to the telephone conversation referred to in the attendance note of 2nd November, repeated that the Defendants had been advised that EDF were to lay cables across the middle of their back garden and then said "*we have informed General Construction that we will not allow any cables to be laid on our land without specific consent. That being the case we would ask you to note our position and would invite you to let us have specific details of your intentions with regard to the supply and cabling."*

22. On 15 November 2006 there was a conversation between the First Defendant and Mr Currie of EDF which again was the subject of an attendance note kept by the First Defendant which again I accept to be accurate. Mr Currie is recorded in the attendance note as saying that if he had known that the route was to cross third-party land he would have referred the matter to the relevant EDF Department (implicitly, EDF's way leave officer as referred to in subsequent correspondence).

23. By March 2007, a trench had been dug and pipes and conduits had been laid as shown on the plan across the boundary of the Defendants' land in a position that had ultimately been agreed between the parties. In relation to electricity, a conduit had been laid along which a connecting cable could be run by EDF. Once that had been

done, the cable could be connected to EDF's network at one end and the Claimant's building at the other. However, as I have already explained, EDF could not be required by the Claimant to make such a connection because in order to make a connection EDF would be required to run a cable in on or under land belonging to the Defendants. On 12th February 2007, EDF's Mr Currie wrote to the Claimant enclosing what he described as EDF's standard wayleave agreement "… *which [it] has been agreed that you will approach the 3rd party for signature. This will enable EDF … to progress with the cable laying pending the full legal arrangement …"*. The document enclosed is at TB/2, p.562 and following. This approach follows the scheme set out in EDF's standard terms that had been sent to the Claimant which impose on an applicant for connection the obligation to obtain all necessary third party consents including those required by EDF in its favour. The document was sent to the Defendants for signature but it was not signed.

24. On 14th March 2007, EDF's solicitors, Denton Wilde Sapte (DWS), wrote to the Claimant's solicitors informing the Claimant's solicitors (a) that they acted for EDF, (b) that a Deed of Grant, a copy of which was enclosed, was required if connection was to be made and (c) requiring evidence of the Claimant's title. The Deed enclosed is at TB Vol 2, page 438 and following. It assumes that it will be the Claimant who is the grantor. This was erroneous because as EDF knew by then not all the relevant land was in the ownership of the Claimant. However, the document is significant because it shows that EDF was anxious to establish a direct legal relationship with the owner of all land over or under which its equipment was to be laid. The reasons for this are obvious – a directly enforceable legal relationship with the landowner concerned would enable EDF to obtain access to its equipment as and when necessary without having to rely on the support of others. The Claimant's solicitor forwarded the draft Deed to the Defendants under cover of a letter of the 29th March. The reference to the grantor being the Claimant was explained as being the result of DWS being "… *unaware that there were two separate titles that had to be dealt with"*. Why this was so is not explained. However, on 1st June 2007, the solicitors who had by then been instructed on behalf of the Defendants wrote to EDF (TB/2, p.429). Those solicitors pointed out the existence of the express easement and enquired whether in the light of that EDF required the Defendants to enter into a wayleave agreement. That letter also pointed out that the Defendants were the owners of the Defendants' land.

25. There then followed what appears to be a total absence of substantive communication from DWS despite a number of chasing letters from the solicitors acting from the Defendants. However by 13th July the Claimant's solicitors were writing to the Defendants' then solicitors referring to the letter of 14th March from EDF and repeating that the Deed of Grant had to be executed by the Defendants if electricity was to be provided to the Claimant's building. It was in this letter that the Claimant's solicitors first asserted that the refusal of the Defendants to sign the Deed of Grant constituted an actionable interference with the Claimant's rights under the express easement contained in the Transfer. It was alleged that the Deed in practical terms would not further encumber the Defendants' land. Following a threat of proceedings from the Claimant's solicitors, DWS made contact on 17th July 2007 by fax. That letter pointed out that the Claimant had not deduced title as requested on 14th March, that EDF did not wish to become involved in the dispute between the Claimant and the Defendants and requested sight of a copy of the Transfer. By a letter of the same date DWS sought early approval by the Claimants of the Deed of Grant together with

evidence of title. Thus it would appear that DWS still did not fully appreciate the nature of the issue that had arisen. This was followed by a further letter from DWS to the Claimant's solicitors dated 24th July in which they again referred to the letter of 14th March and drew attention to EDF's requirement that the Claimant procure "… *any necessary third party consents* …".

26. By 1st August 2007, the Defendants had changed solicitors and their new solicitors asserted in correspondence with the Claimant's solicitors that there was no obligation on the Defendants to take positive steps to bring electricity onto their land for onward transmission to the Claimant. It was indicated on behalf of the Defendants that they were prepared to execute a suitably amended Deed of Grant but only on stipulated conditions. Those conditions were set out in a letter of 20th August 2007 which were then the subject of further discussion between the parties. However, I need not further dwell on those points because as I said at the outset of this judgment the question whether the Defendants' demands were reasonable ones does not arise – the issue is whether or not the Defendants could be required to sign the documents that EDF were requiring to be signed. However, by the end of August 2007 the position of the various parties was clear – EDF would not run a cable or connect the Claimant to its network unless the Defendants signed a Deed of Grant of easement in their favour in terms acceptable to them. The Defendants were declining to execute the Deed.

27. The only other points I need make at this stage is this – first, Mr Hussain accepted in the course of his evidence that the Claimant is able to purchase some land from a neighbour that will permit EDF to provide a connection otherwise than over the Defendants' land. However he maintains that the total cost of so doing will be of the order of £90,000 although he accepts the value of the land to be acquired is about £5,000. Secondly, it is accepted that it is open to the Claimant to request EDF to invoke the statutory procedure outlined above whereby the Secretary of State can be asked to grant the appropriate wayleave. However, the Claimant is reluctant to adopt this course because (a) it may take a long time and (b) it may expose the Claimant to having to agree to indemnify EDF in respect of any compensation that it comes under an obligation to pay the Defendants. I have not been addressed as to how compensation is to be calculated. However assuming without deciding that it would be reasonable for EDF to demand such an indemnity as the price of invoking the statutory procedure, I doubt whether the sums involved would be significant given the existence of the easement and I am bound to observe that had this course been adopted in August 2007, it is likely that the Claimant's building would by now be connected to EDF's network.

28. It is now necessary for me to consider the Claimant's case based on the express easement. As originally put, it was the Claimant's case that the express easement carried with it an implied positive obligation to execute a Deed in terms satisfactory to EDF because such was necessary for the use and enjoyment of the express easement granted by the Transfer.

29. I am not able to accept that submission. An easement is essentially negative in character. An easement cannot impose a positive obligation on a servient owner except in certain very limited circumstances not on any view applicable here – see Megarry & Wade, 7th Ed., Paragraph 27-014 and Moncrieff v. Jamieson (ante) *per* Lord Scott at 2636D-E (there being no relevant difference between English and Scottish law in this area of the law – see Lord Scott at 2634E). The servient owner's

only obligation is to refrain from doing anything that impedes enjoyment of the easement by the dominant owner – see Rance v. Elvin (1985) 50 P&CR 9, Duffy v. Lamb (1997) 75 P&CR 364, and Cardwell v. Walker [2004] 2 P&CR 122.

30. Positive obligations can be imposed only by contract or covenant but such will not generally bind a successor in title because to enforce a positive covenant would be to enforce a personal obligation against a person who has not covenanted – see Rance v. Elvin (ante) *per* Sir George Waller at 17-18, Rhone v. Stephens [1994] 2 AC 310 *per* Lord Templeman at 321 and Cardwell v. Walker (ante) where Neuberger J (as he then was) acknowledged that an easement was binding on a successor in title but described as correct the proposition that "*… subject to one or two anomalies (such as those relating to fencing) an obligation cannot be binding on a successor if and in so far as it is positive in nature*".

31. The rights conferred by the express easement granted by the Transfer are not in dispute and are as I have described it above – that is they consist of a right to enter onto the Defendants' land to lay Service Media during the construction period and a right to free and uninterrupted user of the Service Media laid or to be laid in the servient tenement. Any right ancillary to an express easement must itself be capable of being an easement. Moncrieff (ante) provides an illustration of this point because the ancillary right there was a right to park on a servient tenement over which there was an express grant of a right of access. If the position was otherwise then the second necessary qualification identified by Lord Scott in Moncrieff at 2636D-E referred to above could not be right or at any rate would be devoid of all substance. Ancillary rights are those which are reasonably necessary for the enjoyment of the express rights granted – see Pwllbach Colliary Co Ltd v. Woodman [1915] AC 634 *per* Lord Parker at 646. The ancillary right claimed in this case – the right to require the Defendants to enter into an express grant in favour of EDF in terms satisfactory to EDF - is not necessary for the enjoyment of either the right to enter on the Defendant's land for the purpose of laying Service Media or for the purpose of enjoying free and uninterrupted passage of Services via the Service Media laid or to be laid on the Defendants' land.

32. The alternative way in which the Claimant's case was put was that an easement was to be implied in favour of the claimant by which the Defendants were obliged to enter into an express grant in favour of EDF in terms satisfactory to EDF. However it seems to me that this has no basis any more than the case advanced by reference to an ancillary right and essentially for the same reasons. In my judgment an implied easement must satisfy the requirements of an easement. Thus, subject to the limited exceptions not applicable here, it is not possible to imply an easement which imposes positive obligations. Even if the circumstances were such as to permit the implication of a positive obligation as between the original owners of the dominant and servient tenements, the positive obligation could not pass to the successor in title of the servient tenement.

33. I have taken these issues relatively shortly because as Mr Jacob closed his case, the points considered above were for all practical purposes no longer relied on as is apparent from Paragraph 2 of his closing submissions, where he says that the Claimant "*… puts its main case entitling it to require the Defendants to execute the Deed of Grant in favour of EDF so that it can achieve the object of its purchase upon the principle that a grantor – or his successor – may not act or fail to act - so as to*

frustrate the purpose of the grant.". The point now taken in essence is this – it was within the contemplation of the Claimant and PFNL at the time when the Claimant's land was sold to the Claimant that the Claimant intended to construct an office building on the Claimant's land. It follows, so it is submitted, that PFNL came under a positive obligation to enter into a Deed of Grant in favour of EDF in terms satisfactory to EDF since to refuse to do so would be to derogate from PFNL's grant and that obligation was one that the Defendants came under as successors in title to PFNL. This was refined in Mr Jacob's supplemental closing submissions by him asserting that the correspondence and conversations that took place between the First Defendant and the various representatives of EDF in the Autumn of 2006 constituted derogation.

34. I reject the first of these submissions for the following reasons. The principle relied on – non-derogation from grant - is one which prohibits the vendor of land who knows that the purchaser is going to use it for a specific purpose from doing anything which hampers the use of the purchaser's land for the purpose which both parties contemplated at the time of the transaction. In its classic form therefore it is essentially negative in character. There are however limits to this doctrine as Parker J demonstrated in his analysis of the law as it then stood in Brown v. Flower [1911] 1 Ch 219 at 225-227. Having recognised that the doctrine permitted obligations to be implied that were analogous to easements in circumstances where an easement could not be created, Parker J observed

> "*It is to be observed that in the several cases to which I have referred the lessor has done or proposed to be done something which rendered or would render the demised premises unfit or materially less fit to be used for the particular purpose for which the demised was made. I can find no case which extended the implied obligations of a grantor or lessor beyond this. Indeed, if the implied obligations of a grantor or lessor with regard to land retained by him were extended beyond this, it is difficult to see how they could be limited at all." … It is quite reasonable for a purchaser to assume that a vendor who sells land for a particular purpose will not do anything to prevent it being used for that purpose but it would be utterly unreasonable to assume that the vendor was undertaking restrictive obligations which would prevent his using land retained by him for any lawful purpose whatsoever merely because his so doing might affect the amenities of the property he has sold. After all, a purchaser can always bargain for those rights which he deems indispensable to his comfort."*

35. In my judgment much of what was said by Parker J has a salutary effect on what is being contended for by the Claimant in this case. What is being contended for by the Claimant could not be achieved by easement for the reasons identified earlier in this judgment. However, what is contended for by the Claimant steps well outside the scope of the non-derogation doctrine as Parker J understood it – that is outside an implied restriction which would prevent or restrict conduct which if permitted would render the transferred premises unfit or materially less fit for the particular purpose for which the land was transferred. Had the complaint been that the Defendants were refusing EDF access to the Defendants' land for the purpose of running its cable along the conduit then in the absence of the express easement no doubt reliance could have been place on the non derogation doctrine. However that is not the issue here – the issue is whether the doctrine can be used to compel a grantor to enter into contractual

or proprietary relations with a third party on terms satisfactory to that third party. That plainly goes well outside the essentially restrictive nature of the doctrine identified by Parker J. As Parker J observed, if the limitation is not as he formulated it, it is difficult to see how the doctrine could be limited at all. Great uncertainty could thereby be created for land owners contemplating the sale of part of their land and that in turn could have unintended consequences in relation to the availability of land for sale. Finally, as Parker J observed, if wider rights than those falling within the scope of the doctrine as he defined it were required the grant of such rights could be negotiated for. To the extent that such rights were positive in nature they could be combined with an obligation on the part of the original grantor to procure the grant of similar rights to the grantee or his successors by any party acquiring the land retained by him.

36. Although Mr Jacob submitted that the law has been developed incrementally following the judgment of Parker J, and in some respects I accept that this is so, the essentially negative nature of the doctrine was re-stated by the Court of Appeal in 1975 - in Moulton Buildings Ltd v. City of Westminster [1975] 30 P&CR 182 where the relevant principle was stated by Lord Denning MR at 186 as being that: "… *if one man agrees to confer a particular benefit on another he must not do anything which substantially deprives the other of the enjoyment of that benefit …"* – and again in 1988 - in Johnson & Sons Ltd v. Holland [1988] 1 EGLR 264 where Nicholls LJ (as he then was) described the doctrine at page 265 as being one that "… *operates to restrict the future activities of the grantor …*".

37. It is necessary now to consider the effect of Chartered Trust Plc v. Davies [1997] 2 EGLR 83 because it is this decision of the Court of Appeal that is relied on by Mr Jacob for the proposition that the doctrine of non derogation as it is now understood is not the subject of the constraints to which I refer above and in appropriate circumstances permits the court to hold that a Defendant has derogated from grant by refusing to enter into contractual or proprietary relations with a third party. I am bound to say immediately that I do not read the decision of the Court of Appeal has having the radical effect for which Mr Jacob contends.

38. That case was concerned with a shopping mall. The landlord let a shop to the Defendant for the purpose of running a high class boutique operation. Subsequently, the landlord let a neighbouring shop to a pawn broker. The pawn broker conducted his business in a manner that constituted a nuisance to the Defendant. The Defendant contended that the landlord had derogated from grant by failing to control the nuisance. The Plaintiff (a mortgagee in possession) claimed arrears of rent and an order that the Defendant comply with a "keep open" covenant. The claim failed at first instance and failed in the Court of Appeal on the basis that the failure of the landlord to prevent the nuisance made the premises materially less fit for the purpose for which they were let. It was open to the landlord to prevent the nuisance either directly under the lease by enforcing the covenant against nuisance against the pawnbroker tenant or by making rules. Mr Boyd contends that this case was one decided on its own special facts and that in so far as there is any general principle to be distilled from it that principle is to be confined to cases concerning shopping malls and closely analogous situations, where there is a relationship of landlord and tenant between the grantor and the grantee and where the complaint relates to the conduct of another tenant of the grantor in relation to whom the grantor has reserved rights that

enable him to control such conduct. I accept that submission, but consider that in any event the case does not have the effect for which Mr Jacob contends.

39. In the course of his judgment, Henry LJ identified the submission being made in that case on behalf of the Claimant appellants (Page 85) as being that the question of derogation only arose where "*… the landlords were responsible for some act which made it either physically or legally impossible to use the premises for the uses permitted"*. This involves two distinct points – (a) there must be conduct which made it physically or legally impossible to use the premises for the purpose intended and (b) that conduct had to be that of the landlord. Henry LJ then proceeded to consider the leading authorities on the doctrine. He referred in terms to the judgment of Sterling J in Aldin v. Latimer Clark Muirhead & Co [1894] 2 Ch 437 where he said that a landlord was "*… bound to abstain from doing anything on the remaining portion which would render the demised premises unfit …"*. Having referred to Parker J's judgment in Brown v. Flower (ante) for the purpose of demonstrating that the doctrine did not stop short with implied easements, Henry LJ then referred to Harmer v. Jumbil (Nigeria) Tin Areas Limited [1921] 1 Ch 200 for the purpose of demonstrating the extension of the doctrine from cases where land was made physically less fit to cases where land was made legally less fit for the intended purpose. However the quotations from that case emphasise the essentially negative effect of the doctrine. The final case cited by Henry LJ is Moulton Buildings Ltd v. City of Westminster (ante), the relevant part of which is set out above.

40. I have set out this material at some length because it shows that the Court of Appeal in Chartered Trust Plc v. Davies did not consider that it was doing anything other than applying the general principle established by the cases referred to, all of which emphasised the essentially negative nature of the doctrine. Henry LJ identified the critical factual finding as being one that the conduct of the pawn broking business was such as to cause a nuisance to the Defendant. He then identified what he called the real issue as being whether the landlords were liable for the misconduct of the pawnbroker and as an important subsidiary point whether a landlord could be required to intervene to put a stop to such conduct by a tenant. In my judgment it is clear that if it had been the landlord who had conducted himself as the pawn broker tenant had conducted himself, the landlord would have been liable for derogating from grant. That would have been so on an entirely conventional approach adopting the essentially negative nature of the doctrine identified by Lord Denning in Moulton Buildings Ltd v. City of Westminster (ante) and by Nicholls LJ in Johnson & Sons Ltd v. Holland (ante).

41. In my judgment the key point that underlies and delimits the effect of the decision of the Court of Appeal in Chartered Trust Plc v. Davies is that identified by Henry LJ at page 88. There he said that "*I accept that in order to succeed (whether on derogation from grant or quiet enjoyment or nuisance) on the basis of a landlord's failure to act, the tenant must show that the landlord has a duty to act."*. The court concluded that such a duty was owed on the facts of that case because the landlord was granting leases in a shopping mall and charging service charges and it offended the fair dealing principle if a landlord could not be required to take action if the result of the landlord failing to act was that his tenant's seemingly built in business protection would be valueless. Further in my judgment Henry LJ's judgment makes clear that the decision is one where a key component was the fact that the landlord had maintained control

over the activities of other tenants by reserving rights to do so in the lease and/or making rules.

42. All of this leads me to conclude that:

i) Chartered Trust Plc v. Davies does not alter the essentially negative effect of the derogation doctrine – the issue that arose in that case was the extent to which if at all a landlord of a shopping mall or similar premises, who had reserved rights to control nuisance could be vicariously liable for the nuisance caused by one tenant to another tenant;

ii) The Court of Appeal in that case held that a landlord could breach the duty not to derogate by permitting nuisance caused by one tenant to another to continue when he had the powers to control what was occurring. In essence the only difference between the facts of that case and all the others that had gone before was that whereas in the earlier cases the derogating conduct was that of the grantor, in that case it was conduct by a tenant of the grantor whose conduct the grantor could but had failed to control;

iii) Chartered Trust Plc v. Davies is a case that is confined in its effect to the facts there under consideration. It has no applicability outside the relationship of landlord and tenant and is confined in its effect even in respect of such relationships; and

iv) There is nothing within it which supports the proposition on which the Claimant must succeed namely that the non derogation doctrine extends beyond obliging a grantor "… *not to do anything which substantially deprives the other of the enjoyment of that benefit*".

In Paragraph 7 of his closing submissions, Mr Jacob submitted that this case was on all fours with the present case. In my judgment that is not so for the reasons given above. He submitted that the case was authority for the proposition that the landlords derogated from their grant because they failed to take positive steps. In my judgment this misstates the effect of the decision which is much more limited and is that where a landlord of a shopping mall or similar building with the right to control the relevant conduct of its tenants fails to use those powers to prevent a nuisance being caused by one tenant to another then the landlord thereby derogated from his grant to the other tenant. Nothing in that case supports the proposition that outside this, the doctrine requires a grantor to take positive steps other than to discontinue and/or remove the result of his derogating conduct. That is the limiting factor identified by Parker J in Brown v. Flower (ante) being that the Defendants have " … *done or proposed to do* … [that] *which would render the demised premises unfit or materially less fit to be used for the particular purpose for which the demise was made"*. Nothing in any subsequent case has sought to qualify this requirement, there is nothing in the analysis of the Court of Appeal in Chartered Trust that suggests this qualification no longer applies and indeed there is nothing in the facts of that case that required the Court of Appeal to depart from that principle once it is understood as being in reality a case concerning the circumstances in which a landlord can be vicariously liable for the acts of his tenant. That this is so is supported by the unqualified adoption of Lord Denning's statement of principle ("… *he must not do anything which substantially deprives the other …"*) by the Court of Appeal.

43. Mr Jacob accepted at least impliedly in his initial written and oral closing submissions that his case could not succeed unless Chartered Trust Plc v. Davies was held to have the effect for which he contends. As I have said and for the reasons I have given, I do not think the case has the effect for which he contends. It was no doubt this factor which led him to refine the argument in his supplemental closing submissions. I address this refinement further below

44. Even if I am wrong in what I have so far said, and it is in principle open to the court to construe the effect of the non derogation doctrine as extending beyond the scope identified by Parker J in Brown v. Flower by Lord Denning in Moulton Buildings Ltd v. City of Westminster and Nicholls LJ in Johnson & Son Ltd v. Holland – that is limiting its effect to restricting the grantor from acting in a manner that deprives the grantee or the or substantially all of the benefit of the transaction - so as to be capable of imposing on a grantor an obligation to take positive steps (other than for the purpose of rectifying derogating conduct), in my judgment any such imposition would have to be approached cautiously and by reference to the strict application of the presumed common intention test that is the foundation of the non derogation doctrine. There is no dispute that this test is one that has to be applied – the applicability of that test was acknowledged in Canon v. Green Cartridge Company (Hong Kong) Limited [1997] 3 WLR 13 (as to which see further below) and is accepted by Mr Jacob in Paragraph 9 of his closing submissions, where he says that the question that has to be answered is what was in the reasonable contemplation of the parties at the time the transaction was entered into. .

45. I see no basis on which what is contended for could be said to be the result of a presumed common intention. It could not be said that it was in the presumed contemplation of both PFNL and the Claimant that PFNL would enter into a Deed of Grant in a form proffered by EDF if EDF was to demand one. I cannot accept that anyone in the position of PFNL would have agreed with such a proposition with the traditional "*of course*" in circumstances where (a) it had not had sight of the Deed proposed at the time when the Transfer has been entered into and (b) the most that could be demanded from PFNL absent agreement with EDF was a wayleave which satisfied the requirements of Schedule 4 of the 1989 Act in respect of which PFNL would be entitled to compensation. That is all the more the case when it is clear from Clause 13.5.1.4 of the Transfer that the right to develop the retained land was expressly preserved and thus the possibility of the development of the retained land was within the contemplation of the parties at the time when the Transfer was entered into.

46. Finally before turning to the Claimant's most recent refinement, I mention that Mr Jacob referred me to the decision of the House of Lords in British Leyland Motor Corporation Limited v. Armstrong Patents Company Limited [1986] AC 577. Mr Jacob relied on this decision though quite what its relevance was to the issues I have to determine was never entirely clear to me. That case was concerned with or rather is the source of what is sometimes called the spare part exception in copyright law. It is clear from a perusal of Lord Templeman's speech in that case that he proceeded by analogy with the non derogation principle with which this case is concerned. However, as Lord Hoffman observed in the later (Privy Council) case of Canon v. Green Cartridge Company (Hong Kong) Limited [1997] 3 WLR 13 at 20A-B, the principle to be derived from the British Leyland case is something quite different from non derogation from grant as understood in the law of property and that the principle to be derived from that case could not be said to be founded on any principle of the law of contract or property.

Thus with respect to all concerned, there is little or nothing to be gained from the decisions in either British Leyland or Canon that assists in the resolution of this case other than an acknowledgement by Lord Hoffmann in Canon that the principle of non derogation is based on the presumed intention of the parties.

47. I now turn to the point that is made in Mr Jacob's supplemental closing submissions namely that the Defendants have derogated from grant and thus the positive step now required (the signing of the Deed of Grant in favour of EDF) is simply the result of a need to correct the derogation from grant by the Defendants.

48. Mr Jacobs submits that the November 2006 correspondence and the conversations recorded in the November 2006 attendance notes (all of which are reviewed as necessary above) demonstrate a derogation on the part of the Defendants from the grant constituted by the transfer of the Claimant's land to the Claimant. Mr Jacobs submits that (a) his client was not under a duty to tell EDF that the land to be crossed did not belong to the Claimant and (b) that by telling EDF that they owned the land, or doing so without also acknowledging the existence of the express easement, the Defendants derogated from their (or rather their predecessor's) grant because otherwise there would not have been a difficulty.

49. In my judgment this proposition is to be rejected and not merely on the ground that it was not pleaded, although in fact it was not. On a fair reading of the correspondence it does not constitute an outright refusal to permit access. It was a request for information with a refusal of access pending the provision of relevant information that the Defendants were entitled to ask for and a refusal of consent pending the provision of such information. The Claimant's adopted position was that the route of the cable had to follow that shown on the EDF plan because EDF so required. The Defendants were entitled to test whether that was so. That necessarily involved contacting EDF given the position adopted by the Claimant and its solicitors. In any event, as the correspondence passing between EDF's solicitors and the Claimant's solicitors shows, EDF required title to be proved for all the land over which its cables were to be run. In those circumstances, the fact that the Defendants' land was owned by the Defendants was bound to come to the attention of EDF prior to the connection of the Claimant's building to the grid.

50. Once that occurred what little evidence there is suggests that EDF was always going to adopt the position that it adopted -- that is it would not proceed unless a deed of grant was entered into by the Defendants on terms acceptable to EDF. It may be as the Claimant submits that EDF was not entitled to adopt that position -- that is something which is not before me and I express no view on the point -- but if that is so then it was for the Claimant to take the point up with EDF and if appropriate to commence proceedings seeking redress against EDF. However there is nothing which supports the proposition that EDF's position would have been different depending on how it had discovered the nature of the Defendant's interest in the Defendants' land. Its declared position was that it sought an express easement in its favour wherever it was necessary to cross third-party land. If the Claimant wished to challenge this proposition, or to establish that EDF would not have adopted this position but for its perception that there was a dispute between the Claimant and Defendants, it was open to it to produce evidence from EDF (if necessary by witness summons) to address the issue but in the event it did not.

51. The attendance note of 2 November 2006 shows that from a very early stage EDF adopted the position that it was very particular concerning easements and way leaves in relation to third-party land. This is not at all surprising since the equipment to be laid is and was always intended to remain the property of EDF and might in the future be used to supply not only the Claimant but others. It was no doubt for that reason that EDF wanted to have the benefit of a direct and legally binding arrangement with the Defendants, as is recognised to be a necessity by the statutory framework referred to above. Although Mr Jacob points out that the Claimant had the benefit of the express easement contained in the Transfer that was irrelevant so far as EDF were concerned for what EDF was concerned to do was to regulate its relationship with the third-party landowner (in this case the Defendants) rather than establishing that the applicant for connection (in this case the Claimant) had itself obtained rights over the third-party land. It is clear from the attendance note of 15 November 2006 that EDF had a special department that dealt with third-party issues. Again, in context, that can only mean third-party issues between EDF and the third-party.

52. EDF was simply not prepared to rely upon rights that might be claimed through the express easement granted to the Claimant by the Transfer. This point was first made in an e-mail dated 14 March 2007 from EDF to the Claimant in which EDF had said that "*... the most pressing matter to resolve is that of obtaining the appropriate legal consents from the owner of the land with respect to our cable installation. This as you know is being managed by our way leave officer, Debbie Richards. We have instructed our solicitors to deal with this matter as a priority. However I'm sure you will appreciate that dealings with third-party solicitors are matters beyond our control."* In a letter to EDF dated 28 June 2007, the claimant's solicitor had identified the nature of the problem precisely -- the letter enclosed a copy of the Transfer, drew attention specifically to the grant of the express easement contained therein and then said at the end of the third paragraph " *it appears ZSA Law do not in principle object to the laying of the cables by EDF but object to creating any further rights to a third party"*. The letter contained a request directed to EDF to lay the relevant cable and make the relevant connection across the Defendants' land without seeking a deed of grant in its favour from the Defendants. By fax of 17 July 2007, EDF's solicitors claimed not to have received that letter. A copy was forwarded to EDF's solicitors on 26 July 2007. No response was received from EDF's solicitors. However they continued to demand a deed of grant from the Defendants and thus by implication rejected the proposal contained in the 28 June letter. Ultimately this issue was addressed by a letter from EDF's solicitors to the Defendants' current solicitors dated 4 February 2009. Although the question asked by the Defendants' solicitors suggest that the Defendants' current solicitors did not fully understand the nature of the problem, it is clear that EDF's solicitors did. They said:

> " *(a) the provisions in the rights reserved by the transfer do not meet our clients requirements. ... our client requires these issues to be resolved before it will enter into/as part of entering into a deed of grant. ...*
>
> *(b) ... our client is obliged under the Electricity Act 1989 to ensure that all necessary landowner consents have been granted before it enters onto land to undertake any works. Further our client was aware in January 2007 that there was a dispute between your clients and those represented by Barrea & Co. Therefore in circumstances where the relevant landowners are in dispute and*

where our client has not been provided with a covenant that it has reasonably requested, it will not undertake requested works as to do so would breach the requirements of statute.

(c) it is our client's normal practice to request that third parties enter into a deed of grant. However, it is the customer's obligation to ensure that the third-party agrees to enter into the deed of grant not our clients."

52. It is the last sentence of paragraph (c) of the letter that in my judgment shows the relevance of EDF's perception of the existence of a dispute between the Claimant and the Defendants – EDF's preferred course was to require the party seeking connection to procure all necessary third party consents. This is apparent from EDF's standard terms and from the 2006 and 2007 correspondence referred to above. It is why originally the necessary documentation was sent to the Claimant for onward transmission to the Defendants. It explains why EDF's solicitors said that EDF could not get involved in the dispute. The existence of the dispute was not as far as I can see from the limited material available the cause of the request by EDF to the Defendants that they sign the Deed of Grant proffered by them. It explains simply why it is EDF who made the request directly to the Defendants rather than via the Claimant latterly. The existence of the dispute had no effect on the need for a direct express easement or wayleave in favour of EDF which was and is required by them in all cases where its equipment is required to cross third party land.

53. In those circumstances, I am not able to accept that the conduct of which the Claimant makes complaint is capable of constituting derogation from grant.

Disposal

54. Accordingly, I dismiss the Claim. In so far as it is necessary for me to provide specific answers to each of the issues identified by the parties I do so as follows::

i) Issue 1: No;

ii) Issue 3: No; and

iii) Issues 2 and 4 to 6: do not arise.

I will hear counsel as to the appropriate consequential orders that follow from this conclusion.

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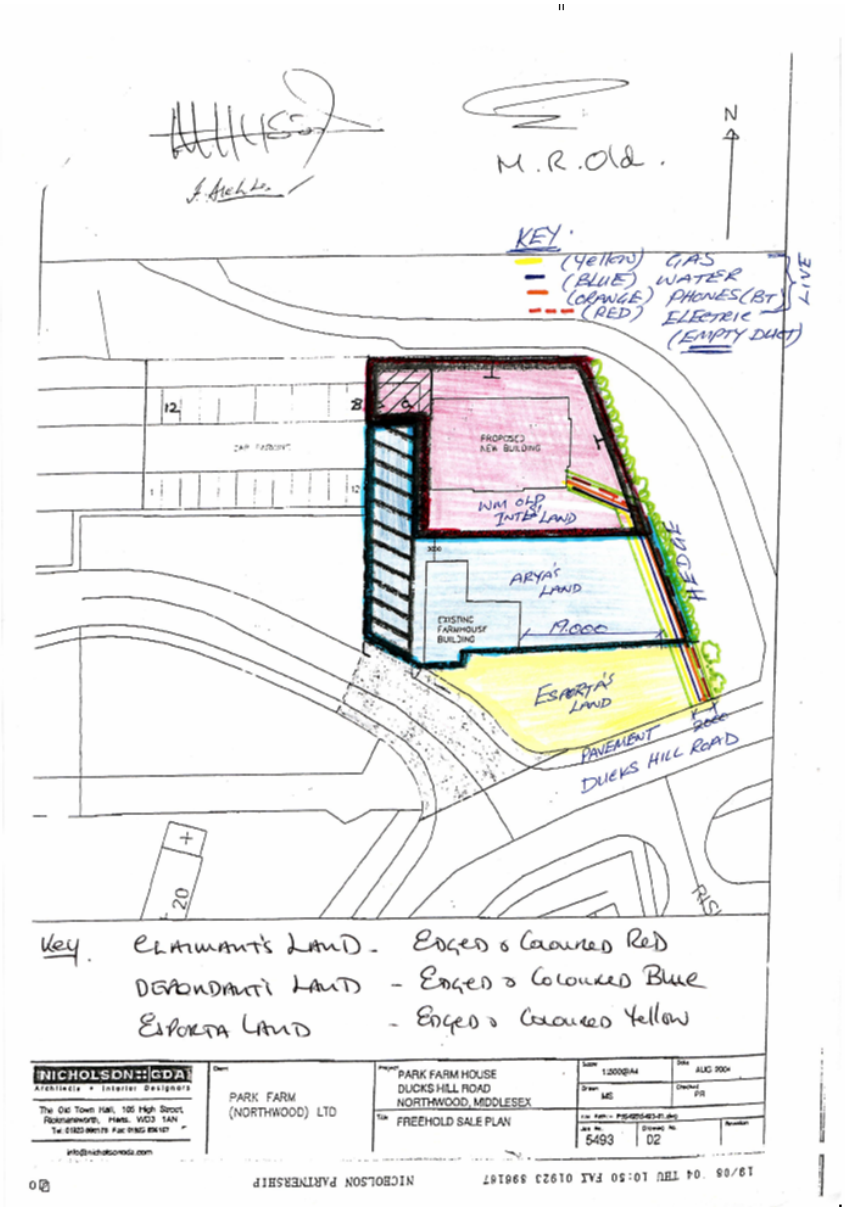
APPENDIX


M.R.Old.
N
KEY:
(YELLOW) GAS
(BLUE) WATER
(ORANGE) PHONES(BT)
(RED) ELECTRIC
(EMPTY DUCT)
LIVE
PROPOSED NEW BUILDING
INN OLD INTER LAND
ARYA'S LAND
EXISTING FARMHOUSE BUILDING
HEDGE
ESPORTA LAND
PAVEMENT
DUCKS HILL ROAD
Key. CLAIMANT'S LAND - EDGED & COLOURED RED
DEFENDANTS LAND - EDGED & COLOURED BLUE
ESPORTA LAND - EDGED & COLOURED YELLOW
NICHOLSON::GDA
Architects • Interior Designers
PARK FARM (NORTHWOOD) LTD
PARK FARM HOUSE
DUCKS HILL ROAD
NORTHWOOD, MIDDLESEX
FREEHOLD SALE PLAN
5493
02
NICHOLSON PARTNERSHIP
19/08 '04 THU 10:50 FAX 01923 896187