THE HIGH COURT

COMMERCIAL

[2023] IEHC 25

[No. 2021/447 P.]

BETWEEN

RGRE GRAFTON LIMITED

PLAINTIFF

AND

BEWLEY'S CAFÉ GRAFTON STREET LIMITED AND BEWLEY'S LIMITED

DEFENDANTS

JUDGMENT of Mr. Justice Denis McDonald delivered on 20th January 2023

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Introduction

1. These proceedings concern a landlord and tenant dispute in relation to the ownership of stained-glass works by the renowned illustrator and stained-glass artist, Harry Clarke. The works in question are situated in a long-established café operated by the tenant. The landlord claims that the works comprise windows which form part of the leased premises. On that basis, it is contended that the works are, as a matter of law, the property of the landlord. It is also claimed by the landlord that the works were commissioned in the late 1920s by Millar & Symes, architects, on behalf of the original landlord of the premises, Mr. Ernest Bewley, to perform the function of windows at the premises.

2. The tenant disputes the characterisation of the works as windows. The tenant characterises the works as *"artworks"* or *"stained glass panels"*. The tenant maintains that the

works are decorative and ornamental and are not part of the premises. It is claimed that, at all material times, the works have been in the ownership of the tenant and that they are tenant's fixtures and that, accordingly, they cannot be said to be the property of the landlord. It is also claimed that the available evidence suggests that it was the tenant who paid Harry Clarke for the works. The tenant contends that the works are moveable and that they constitute removable fixtures of an ornamental or decorative nature intended to enhance the café in furtherance of the tenant's café trade. The tenant also maintains that the works never functioned as windows but were installed inside and parallel to clear glass windows of the same dimensions and that it was solely the latter that functioned as windows in the external skin of the building. Against that backdrop, a counterclaim has been advanced in response to the landlord's claim claiming that the works are now owned by the second named defendant in whose favour the tenant has assigned its interest in the works. As noted below, the validity of that assignment is challenged by the landlord.

3. The premises in question comprise the well-known Bewley's Café on Grafton Street, Dublin 2 (*"the café"*). The plaintiff is the current landlord of the café. The first named defendant is the tenant. The second named defendant is its subsidiary. By an asset transfer and licence agreement dated 12th December 2020, the first named defendant sought to transfer its interest in the works (and certain other material) to the second named defendant. In turn, the second named defendant licensed the first named defendant to continue to use the works in the café.

4. The works were commissioned in 1927 in the context of the development of a new café to be occupied by Bewley's Oriental Cafés Ltd, a company then owned by members of the Bewley family. After a name change and also a change of ownership, that company is now known as Bewley's Café Grafton Street Ltd., the first named defendant in these proceedings. The first landlord was Mr. Ernest Bewley who was also, at that time a director and the chairman

of Bewley's Oriental Cafés Ltd. It was he who acquired the premises on Grafton St. and Johnson's Court and who commissioned the construction of the building of the café, the elaborate front façade of which remains such a familiar sight on Grafton Street today. It appears to have always been his intention to let the café to Bewley's Oriental Cafés Ltd. which was very much a Bewley family company at that time. According to research undertaken by Ms. Lucy Costigan (who gave evidence on behalf of the plaintiff), Bewley's Oriental Cafés Ltd was the successor to Charles Bewley & Company which had operated from premises in South Great George's Street since 1876. In turn, this was the successor to a much older company. In her very helpful report, Ms. Costigan explained that the business dates back to a trade undertaken by:-

> *"Samuel Bewley (1764-1837) who was a silk and tea merchant. His sons, Charles and Joshua worked with Samuel in the business. In 1835, Samuel Bewley and his eldest son, Charles, made history as the first people to import tea directly from Canton, China to Dublin, Ireland. Samuel's son, Joshua (1819-1900) opened the China Tea Company in 1845. Joshua had two sons, Charles, born in 1858, and Ernest (1860-1932) both of whom worked with their father as tea merchants.*
>
> *Ernest went into the business when he left school in 1876. The business relocated to South Great George's Street and began trading under the name of Charles Bewley & Company, named after Joshua's eldest son, Charles.*
>
> *Ernest left the business for a while but returned when Charles, his elder brother, emigrated… for health reasons in the 1890s…*

After Charles' departure, Ernest became a coffee merchant and, in 1894, began organising coffee-making demonstrations in his cafes. He opened Westmoreland Street café in 1896 and Fleet Street café in 1900.

The firm continued to trade as Charles Bewley & Co. until, in 1926, it became Bewley's Oriental Cafes Ltd. In 1927, Ernest Bewley purchased 78-79 Grafton Street in his own name for the purposes of developing the premises as a new café to be operated by the company.

…The opening of the Grafton Street café took its toll on Ernest. He became very ill with dropsy at Christmas, 1931. He died in August 1932. Ernest's son, Victor (1912-1999), succeeded his father as managing director at the age of 21."

5. The café building was completed in 1927 and the café opened for business in November of that year. The defendants have drawn attention to the fact that the Harry Clarke works were not installed by the time the café opened for business. They were not installed in the café until March 1928. As discussed in more detail below, the defendants make the case that this undermines the plaintiff's case that the works form part and parcel of the premises. They say that the premises must have been fully completed and watertight by the time the café opened in November 1927.That said, to anyone entering the café today (or to anyone who entered in 1928) the works would undoubtedly be perceived as windows. They look like windows. They appear to admit light and they also appear to be capable of ventilating the café insofar as they are fitted with catches which would allow the individual hopper sashes within the windows to be opened. However, even if that was the case at the time of their original installation, it is no longer so today. They are now artificially backlit and, although this was disputed by the plaintiff's counsel in submissions, they currently provide no ventilation to the café.

The Four Orders works

6. Four of the works are known as *"the Four Orders"*. This refers to four of the orders used in classical architecture depicted in Harry Clarke's design. These were identified by Dr. Nicola Gordon Bowe in her authoritative text, *"The Life & Work of Harry Clarke",* as the Corinthian, Doric, Ionic and Composite orders. In the course of her evidence, Ms. Costigan characterised them in the same way. However, in his report on behalf of the defendant (as clarified in the course of his evidence on Day 4 of the hearing), Mr. Brian O'Connell, architect, characterised the four orders depicted in the works as Corinthian, Doric, Ionic and Tuscan. Mr. O'Connell explained that, according to Vitruvius, each order represented a personality type:-

> *"…the dominant traits of which … public buildings should reflect according to their public use within any urban scheme, thus reflecting the appropriate civic trait or virtue. The Harry Clarke expression of each Order, while proportionally accurate, is not presented in a classical canon, but transposed to the romantic vision of the Arts and Crafts ethos in which sentiment challenges reason."*

Each work features a column capped in the style of one of these four orders. Each of these four works also feature vases, flowers, exotic parrots, butterflies, moths, anemones and sea urchins and less identifiable creatures. According to Dr. Nicola Gordon Bowe (in her text on Harry Clarke), the flowers:-

> *"grow from a black leafy tendril which ungulates around the window, to frame the column and disguise the leadlines, a device Harry had already used effectively in the two lunettes above the Eve of St. Agnes window and would repeat in the Geneva Window. The amount of work which each of these little creatures necessitated, none of which is drawn to scale, is deceptive; each piece of what looks like tier glass is, in fact, a piece of flashed antique ruby, blue, green, gold-pink or mauve, acided, painted and sometimes stained, so that only the bird (or whatever) depicted is left and an echo of*

the colour acided away. The windows are four decorative masterpieces; the leadlines and geometric design of the double row of tiny black beaded grids, set at each junction with turquoise, ruby and gold, strengthen the design of each window in an intricate and masterly resolution of what could have been exceedingly dull."

7. Each of the Four Orders works are divided into four sashes. In turn, each sash is divided into three panels, to be read vertically. Together, these panels depict the overall design comprising an image of a classical column surrounded by the additional decorative images described by Dr. Gordon Bowe together with the geometric design described by her incorporating clearly delineated horizontal and vertical lines marked out in black beads. The panels also display the tendrils described by Dr. Gordon Bowe. The way in which the tendrils interact with the geometric design of the double row of black beaded horizontal and vertical lines creates an impression of triangles along the border (albeit that they are not perfectly triangular in shape). The four sashes are housed in window frames. In their current condition, each of the four sashes is capable of being opened by the use of a modern catch. These are in the nature of *"hopper"* sashes in that they open inward with hinges on the bottom of the sash which allow the sash to be opened at an angle. The modern catches are a relatively recent change. Previously, the works were fitted with a brass hopper mechanism which allowed the top three sashes to be opened by manipulating a brass rod which ran down the length of one side of each of the works. This appears to have been quite a sophisticated mechanism. It comprised a vertical brass rod to the side (which was used to control the mechanism) which was, in turn, connected to the hinged rods on each side of the window frame by means of a slender horizontal brass rod. By manipulating the handle on the side rod, the three sashes would open inwards in tandem.

8. When the hopper mechanism was in place originally, the horizontal brass rods of the mechanism extended across the face of the top three sashes (both when the hopper mechanism

was engaged to open the sashes and when the sashes were closed). However, it is important to note that the horizontal bar was not significantly thicker than the black beaded horizontal and vertical lines incorporated into the design. It also appears to have been no thicker than the vertical glazing bars or mullions used. It was significantly less conspicuous than the horizontal glazing bars or transoms used. As noted by Brian O'Connell (the architect who gave evidence on behalf of the defendants), in designing the Four Orders works, Harry Clarke took the transoms into account in calculating the ratio of height to diameter of each column depicted in the works (in order to accord with the Vitruvian canon). In addition, the hinged rods of the hopper mechanism located to the side of each sash created triangular shapes which echoed the form of the triangles created in the artist's design by the interaction of the tendrils with the black beaded geometric lines forming the border surrounding each of the classical columns. According to the plaintiff's experts, the mechanism must have been taken into account by Harry Clarke in his design of the works. Ms. Costigan stressed that Harry Clarke was always very concerned to ensure that nothing should be placed in front of his windows which would alter their appearance to the viewer. It is therefore unlikely that Harry Clarke would have agreed to the installation of the mechanism unless he was satisfied that it did not interfere with the aesthetic appearance of his works.

9. In its original form, the hopper mechanism did not open the bottom of the four sashes of these windows. That sash was within easy reach of the employees of the café and could be opened manually. For completeness, it should be noted that, at a later point, the positioning of the hopper mechanism was moved such that it was used to open the bottom three sashes of the works but not the top sash. Later still, the hopper mechanism was entirely removed. Dr. David Caron (the stained-glass expert who gave evidence on behalf of the plaintiff) expressed the view that it is a shame that the hopper mechanism was removed. In his opinion, the hopper mechanism was part of the fabric of the works.

The Swan Yard works

10. The remaining two works (which, for reasons which will become obvious, were described in the evidence as the *"Swan Yard"* windows or works) are of a different design. They are divided into eight sashes of two panels each. The sashes are again mounted in a frame that has the appearance of a window frame. Similar to the Four Orders works, these sashes are in the nature of hopper sashes opening inward into the café. The Swan Yard works were described by Dr. Nicola Gordon Bowe as follows:-

> *"The two side windows have similar borders, only in small squares rather than triangles, with the same restrained grid-like divisions… punctuated by tiny green and mauve chequers. These two windows could be described as grisaille, as they are purely decorative with no themes, and make use of silver stains of different intensities, of uncoloured glasses, of iron oxide painting medium and ingenious leading, which becomes a feature in itself. The only colours are tiny beads of amber, mauve, blue, green and gold-pink, set within the centre panel of painted feathery fronds, like flowers in a formal garden. Again, the linear design is surprisingly complex."*

11. As described further below, the two Swan Yard works have been moved from their original position on or adjoining the south facing wall of the café overlooking an alley called Swan Yard. The plaintiff contends that they were originally installed within that wall and that they formed part of the external skin of the building. In contrast, the defendants contend that they were installed immediately inside and parallel to clear glass windows overlooking Swan Yard. One of the window openings facing on to Swan Yard was subsequently blocked up at some time between 1928 and 1986. At the trial, it was suggested that this was done to protect against damage from sacks of flour which were hoisted up from Swan Yard to the café bakery which was situated immediately above this point on the second floor above the café. While there is no first-hand evidence to substantiate this suggestion, it nonetheless appears to be a

plausible explanation. Subsequently, both works were moved to a new internal wall within the café. This was necessitated by the installation of a fire escape staircase in the south-western corner of the premises in 1987. They are now both artificially lit from behind to give the appearance of windows to patrons of the café. As described in more detail below, the evidence at trial also confirms that backlighting was a feature of the Swan Yard works even before the 1987 work was undertaken.

The photograph of the interior showing the hopper mechanism in place

12. The Four Orders works have also been artificially lit from behind for many years. The evidence is that, when the first named defendant was acquired by its current owners in 1987, the area behind the Four Orders works was boxed in and the Four Orders works were artificially lit from behind. Evidence was also presented that, by 1987 at the latest and 1972 at the earliest, the works were no longer serving as a means of ventilating the café. However, there is a photograph of the interior of the café which, from the hairstyles and style of dress of the patrons, would appear to date from the 1970s or early 1980s which shows the top three sashes of the Four Orders works open as though they were providing ventilation to the café. All the witnesses agreed that ventilation was a significant requirement in a café given the fact that (as the photograph I have just described shows) smoking was permitted for most of the lifetime of the café. Smoking was not the only activity that called for ventilation. In addition, in the original configuration of the café, there was a fireplace at either end of the wall in which the Four Orders works are situated. The evidence also suggested that there was a Burco boiler in operation quite proximate to the Four Orders works for the purposes of providing boiling water for making tea. For completeness, it should be noted that the photograph described above plainly pre-dates the re-positioning of the Swan Yard works. One can see the more extensive distance between the Four Orders works and the Swan Yard works than currently exists following the installation of the fire escape staircase and the repositioning of the latter in the

new internal wall now separating the café from the staircase. In the current configuration of the café, the fireplace is immediately next to the new internal wall. In contrast, the photograph shows that there was enough space for the seating of patrons between the fireplace and the wall where the Swan Yard windows can be seen. One can also see from the photograph that the Swan Yard works are fitted with a hopper mechanism which appears to be similar to that formerly installed on the Four Orders works.

Overview of the respective contentions of the parties

13. In order to understand the basis for the respective positions of the parties, it is necessary, at this point, to identify a number of relevant legal principles applicable in the context of landlord and tenant law in relation to items which are either incorporated in the fabric of leased premises or which are brought on to such premises. As very helpfully described in the defendants' written legal submissions, an object which is brought on to land or premises may be classified under one of three headings: (a) a chattel (i.e. an item of tangible moveable property); (b) a fixture (a chattel that is affixed to land or premises); or (c) an item that, because of its role, is properly classified not as a chattel or as a fixture but as part and parcel of the land. In the context of a landlord and tenant relationship, no dispute will ordinarily arise in relation to the ownership of a chattel which is never affixed to the premises. Thus, for example, if a tenant brings loose furniture onto leased property, the furniture will remain the tenant's property. Conversely, if the property is let on a fully furnished basis, the furniture remains the property of the landlord. The works in issue here do not fall within that category. At trial, notwithstanding the terms of the counterclaim as pleaded, the defendants did not go so far as to argue that the works constitute unfixed chattels. In his oral submissions on Day 6 of the hearing, counsel for the defendants submitted that the works were installed and remain to this day as tenant's fixtures.

14. In contrast to a loose chattel, a fixture involves an element of attachment or annexation of a chattel to land or premises. Depending on the circumstances, the fixture can be the property of either the landlord or the tenant. The position is well explained by *Wylie* in his *"Landlord and Tenant Law"*, 3rd Ed., 2014, at para. 9.02, where it is stated that:-

> *"The terminology in this subject is often confusing and this should be borne in mind in reading the authorities. In particular, the word 'fixture' is often used in different senses. In its most general sense a fixture refers to some chattel which has been affixed or attached to land. As Holmes J put it in Earl of Antrim v Dobbs:*
>
> *'It is essential to the legal idea of a fixture that it should be let into the lands, or firmly fixed to some fabric having its foundation in the ground.' So far as a landlord and tenant are concerned the question obviously arises as to the ownership of a chattel so affixed, but it is crucial to distinguish between different situations to all of which the term 'fixture' may be applied. One is where the landlord, before granting the lease, at the time of granting it or during the lease's currency, installs on the demised premises chattels or fitments. These remain the landlord's property and, in so far as they are fixed to the premises, they may be referred to as 'landlord's fixtures'. The converse situation is where the tenant installs chattels or fitments on the demised premises. In so far as these become so attached or annexed to the premises as to constitute 'fixtures', they may become the property of the landlord, in which case again they may be referred to as "landlord's fixtures", or be caught by a clause which deals with landlord's fixtures. On the other hand, despite becoming 'fixtures,' the items in question may remain the property of the tenant, in which case they are usually referred to as 'tenant's fixtures.' The source of much confusion is that, in the context of the relation of landlord and tenant, the word 'fixtures' on its own is often taken to mean the last category only."*

15. This extract from *Wylie* demonstrates that, depending on the particular circumstances of an individual case, a fixture (i.e. a chattel which is affixed to leased premises) may be the property of the landlord or the property of the tenant. Thus, in order to determine on which side of the line, the fixture falls, it is necessary to understand the circumstances in which the chattel was affixed to the premises in question. It is also important to keep in mind that *Wylie's* observations are concerned with chattels that are affixed to land or premises. They are not relevant to circumstances where an item is an integral element of the fabric of the leased premises. As identified in para. 13 above, an object of that nature is treated as part and parcel of the premises.

16. As noted above, it is part of the defendants' case that the Harry Clarke works are of an ornamental or decorative nature which were installed for the benefit of the café trade of the tenant and that they, accordingly, fall within the ambit of tenants' fixtures which are removable by them. They rely in this context on s. 17 of what is colloquially known as Deasy's Act (considered in more detail below) which, subject to certain exceptions, allows tenants to retain fixtures of that nature even where they are very firmly annexed to the property of the landlord.

17. On the other hand, if the works are, in truth, windows, they would ordinarily be characterised not as fixtures but as part and parcel of the premises. This is what the plaintiff contends has occurred here. According to the plaintiff, the works have always functioned as windows. The legal position is well illustrated by the observations of Willes J. in *Climie v. Wood* (1869) LR 4 Exch 328 and by the findings made by the Court of Appeal of England & Wales in *Boswell v. Crucible Steel* [1925] 1 KB 119. In both cases, the court stressed that anything which is essential to land or to a building should be regarded as part of the land or building concerned and should not be treated as a fixture.

18. In *Climie v. Wood*, Willes J. expressly instanced windows as an example of an element that should be regarded as part of the fabric of a building. At pp. 329-330, he said:-

"There is no doubt that sometimes things annexed to land remain chattels as much after they have been annexed as they were before. The case of pictures hung on a wall for the purpose of being more conveniently seen may be mentioned by way of illustration. ***On the other hand, things may be made so completely a part of the land, as being essential to its convenient use, that even a tenant could not remove them. An example of this class of chattel may be found in doors or windows****. Lastly, things may be annexed to land, for the purposes of trade or of domestic convenience or ornament, in so permanent a manner as really to form a part of the land; and yet the tenant who has erected them is entitled to remove them during his term, or, it may be, within a reasonable time after its expiration."* (emphasis added)

19. Subsequently, in *Boswell v Crucible Steel*, the Court of Appeal of England and Wales had to consider whether plate glass which formed part of the external walls of a building constituted a landlord's fixture within the meaning of a repairing covenant in the relevant lease. Practically the whole of the side of the building facing the street was taken up with the plate glass which could not be opened. On the basis that the plate glass formed part of the original structure of the building, the Court of Appeal rejected the suggestion that the glass could be treated as a fixture. In coming to that view, the members of the court stressed that the plate glass formed part of the original fabric of the building. Scrutton L.J. stated that landlord's fixtures:-

"...cannot include a thing which forms part of the original structure of the building. It must be regarded as confined to things which have been brought into the house and affixed to the freehold after the structure is completed."

20. In the same case, Atkins L.J. (as he then was) also concluded that the plate glass was part of the premises and, accordingly, not properly characterised as a fixture by way of an addition to the original fabric of the building. At p. 123, he said:-

"...I am quite satisfied that they are not landlord's fixtures, and for the simple reason that they are not fixtures at all in the sense in which that term is generally understood. A fixture, as that term is used in connection with a house, means something which has been affixed to the freehold as accessory to the house. ***It does not include things which were made part of the house itself in the course of its construction****. And the expression 'landlord's fixtures,' as I understand it, covers all those chattels which have been so affixed by way of addition to the original structure, and were so affixed either by the landlord, or, if by the tenant, under circumstances in which they were not removable by him.* ***As these windows were part of the original structure, representing the walls of the house, so that without them there would be nothing that could be described as a warehouse at all, they cannot come under the head of landlord's fixtures****.* ***If they could, every brick used in the building would be a landlord's fixture.****"* (emphasis added)

21. The defendants rely on the emphasis placed by Scrutton and Atkins LJJ. on the fact that the plate glass windows formed part of the *"original structure"* of the premises and they draw attention to the fact that, here, it is clear from the contemporaneous records that the Harry Clarke works were not installed until some months after the building was completed and the café had opened. However, I do not believe that the observations in *Boswell v. Crucible Steel* should be taken too far. In particular, I do not believe that it would be correct to suggest that an item incorporated in a building after its completion can never be considered to be part and parcel of the building. For example, I do not believe that the result in *Boswell v. Crucible Steel* would have been any different if the original plate glass installed as part of the original construction of the building had been destroyed in a gas explosion some time after its construction and had to be replaced. In my view, the replacement glass would, in such

circumstances, be as much a part of the fabric of the building as the original glass and would fulfil precisely the same function as the original glass.

22. The defendants also seek to differentiate between windows intrinsic to a building (such as those in issue in *Boswell v. Crucible Steel*) and the *"artwork panels"* in issue which the defendants contend have no intrinsic or constructional/structural significance to the café. As previously outlined, the defendants maintain that the Harry Clarke works constitute tenant's fixtures which are capable of being removed from the premises without substantial damage either to the premises or to the works themselves. They argue that it is clear that the works were installed for the purposes of the café trade operated by the first named defendant or, alternatively, that they constitute ornamental fixtures which can be removed without substantial damage. In this context, as noted in para. 16 above, they rely on the provisions of s. 17 of the Landlord and Tenant Law Amendment Act, Ireland 1860 (known as *"Deasy's Act"* after its promoter, Rickard Deasy M.P., the then Attorney General of Ireland) which expressly permits tenant's fixtures of this nature to be removed from the premises save where the contract of tenancy provides otherwise. Section 17 of Deasy's Act provides that:-

> *"Personal chattels… erected and affixed to the freehold by the tenant at his sole expense, for any purpose of trade…, or for ornament… in his occupation of the demised premises, and so attached to the freehold that they can be removed without substantial damage to the freehold or to the fixture itself, and which shall not have been so erected or affixed in pursuance of an obligation or in violation of any agreement in that behalf, may be removed by the tenant… during the tenancy…, except so far as may be otherwise specifically provided by the contract of tenancy…"*

Wylie suggests that s. 17 is largely declaratory of the common law. The decision of Gibson J. in *Lombard & Ulster Banking v. Kennedy* [1974] NI 20 suggests that similar rights exist under the common law.

23. It is clear from the terms of s. 17 of Deasy's Act that a number of conditions must be satisfied before a tenant can rely on its provisions. First, the items in question must have been affixed by the tenant to the premises at the tenant's expense. Second, the items must be for the purposes of the tenant's trade or for ornament in relation to the tenant's occupation of the premises. Third, the items must be capable of being removed without substantial damage either to themselves or the premises in which they have been installed. Fourth, the items must not have been installed pursuant to an obligation to do so owed to the landlord. Fifth, the objects must not have been installed in breach of the tenant's agreement with the landlord. In addition, it should be noted that the language of the section plainly envisages that the parties are free to reach a contrary agreement in which case, the section will not apply.

24. The defendants maintain that each of the five s. 17 conditions are satisfied in this case and that there is nothing in the terms of the contract of tenancy to displace the application of s. 17. As discussed further below, in so far as the first and second conditions are concerned, the defendants seek to rely on a 1928 board minute of Bewley's Oriental Cafés Ltd. to establish that it is probable that the works were paid for by the tenant and installed on its behalf and they also argue that it is obvious that they were installed as an attractive feature to ornament the café for the purposes of the café trade. In so far as the third condition is concerned, the defendants draw attention to the fact that the works have been successfully moved in the past. As described further below, they were moved to a place of safety during the course of the Second World War. As noted in para. 11 above, the Swan Yard works were moved to their present position in 1987. In addition, the Swan Yard and the Four Orders works were removed during the course of refurbishment works to the café in 1998. The 1998 works are addressed in more detail below. A video was taken on that occasion of the removal of the sashes holding the works. On each occasion that the works were moved, the defendants maintain that the works were removed without any damage either to the café premises or to the works themselves and without any

objection from the landlord of the day. The defendants also draw attention to the fact that there is nothing in the terms of the contract of tenancy which in any way obliged the tenant to install the works or which prohibited the tenant from doing so. On that basis, they argue that the fourth and fifth conditions are also satisfied here.

25. The plaintiff argues that s. 17 of Deasy's Act is of no application here. In the first place, on the basis of the principles discussed in paras. 17 to 21 above, the plaintiff maintains that the Harry Clarke works are not properly classified as fixtures. The plaintiff contends that the works constitute windows which form part of the fabric of the building in which the café is housed and that, consequently, in accordance with the decision in the *Boswell* case, they form an intrinsic part of the building and cannot be said to be fixtures. It will accordingly be necessary to determine whether the works constitute windows which form part of the fabric of the building or whether they should properly be classified as fixtures which are removeable from the premises. If they are, in truth, fixtures, it will then be necessary to determine whether they are landlord's fixtures or tenant's fixtures. In this regard, the plaintiff argues that, even if the works constitute fixtures, they are, nonetheless, the property of the plaintiff, as landlord. The plaintiff contends that the works were installed by the landlord, Ernest Bewley and at his expense. In the further alternative, the plaintiff contends that, even if the works might otherwise be classifiable as tenant's fixtures, the tenant, under the terms of the original 1928 lease, gave up any right to them.

26. In considering whether the works constitute fixtures of the landlord or of the tenant, it will be important to keep in mind that s. 17 of Deasy's Act (and the parallel exception that arises under the common law) represent exceptions to the general rule that whatever is attached to the soil becomes part of it. This is often expressed in terms of the Latin maxim *quicquid plantatur solo, solo cedit*. Thus, even a fixture bought and installed by a tenant may become the property of the landlord unless the tenant can show that s. 17 of Deasy's Act (or the

equivalent common law exception) applies. That said, the law has evolved over the years to increasingly protect the position of tenants in respect of such fixtures. As Gibson J. observed in *Lombard & Ulster Banking v. Kennedy* [1974] NI 20, at p. 24, *"with each succeeding generation, the rights of tenants have been increasingly recognised and the often unfair accretion to landlords of fittings attached to the land by the work and expenditure of tenants have been progressively mitigated."* Similar comments have been made by Kenny J. in *Whelan v. Madigan* [1978] ILRM 136 at p. 146 and by Arnold L.J. in *Marlborough Knightsbridge Management Ltd. v. Fivaz* [2021] EWCA Civ 989 at para. 14.

27. In due course, if the works are properly characterised as fixtures, it will be necessary, in so far as it is possible to do so, to make findings as to whether they were installed by the tenant or by the landlord. As outlined in para. 37 below, there are significant gaps in the evidence as a consequence of the passage of time. This creates obvious difficulties in making findings of fact today as to the identity of the party who paid for or installed the works in 1928. However, it may be possible to objectively identify the probable purpose of the installation of the works and this may, in turn, assist in determining who, as a matter of probability, installed them. In this context, it is well settled that, in determining whether a chattel has become a fixture, two factors are relevant, namely (a) the degree of annexation and (b) the object of the annexation. This principle goes back to the decision of Blackburn J. in *Holland v. Hodgson* (1872) L.R. 7 C.B. 328 at p. 334. It has since been held that the object of annexation is the more important of these two factors. This is clear from the decision of Andrews L.J. in *Re Ross & Boal Ltd* [1924] 1 I.R. 129 at p. 136. It is accepted by both sides that the latter factor is to be assessed objectively, i.e. not by reference to the subjective intention of one of the parties. According to *Wylie*, at para. 9.07, *"It is the purpose which the object is serving which has to be regarded, not the purpose of the person who put it there"*. That test may also assist in determining whether the Harry Clarke works are tenant's fixtures or landlord's fixtures. For

example, if it can be determined that the probable object of the works was to further the café trade of the tenant, that may support a finding that they should, on the balance of probabilities, be considered to constitute tenant's fixtures.

28. At the trial, the plaintiff submitted that there is no merit in the defendants' contention that the works formed part of, or were necessary to, the trade of Bewley's from the café premises. The plaintiff argued that there is no relationship between the nature of the works and the café trade undertaken by the tenant. The plaintiff maintained that this is to be contrasted with other cases where installed fixtures clearly related to a tenant's trade. Among the examples cited by the plaintiff were cases involving a car washing machine where the tenant was engaged in the business of car washing, fixtures relating to milling machines where the tenant operated a flour mill, or power-driven sewing machines where the tenant was a linen merchant. The plaintiff also made the case that the works were intended to be a permanent feature of the premises in which the café is housed. They argued that the works were bespoke designed for that purpose and that, as the contemporaneous correspondence discussed below makes clear, Harry Clarke was commissioned not only to make and supply the works but also to *"fix"* the works. The plaintiff further submitted that it was clear that Harry Clarke did not design and install the works with a view to their being situated anywhere other than in the specific openings for which they were designed.

29. In contrast, the defendants submitted that the object or purpose of the works was to enhance the business interests of Bewley's Café operated by the tenant. As noted in para. 21 above, the defendants placed significant emphasis upon the fact that the premises were completed in 1927 prior to the installation of the Harry Clarke works in 1928. The defendants argued that it cannot reasonably be suggested that the building did not contain windows when the café opened in November 1927 several months before the works were installed. The defendants submitted that this is crucial in objectively assessing the intention of Bewley's

Oriental Cafés Ltd in bringing the works onto the premises. They argued that a reasonable person in the position of the parties would not conclude that the intention underlying the installation of the works was to weather the building for a second superfluous time; rather, an objective person in such a position would conclude that the acquisition of the works from a leading artist and their display in Bewley's Café was designed to establish and promote the café alongside other European coffee houses. The commissioning of Harry Clarke to design works for display elevated the status of the Grafton Street café and symbolised its association with classic European coffee houses on the continent. On that basis, the defendants contended that the works should be characterised either as trade fixtures or as works which were installed exclusively for ornamenting and beautifying Bewley's Café. In either event, the defendants submitted that s. 17 of Deasy's Act applied.

30. In response, the plaintiffs maintained that, even if the defendants could establish that the tenant had commissioned and purchased the Harry Clarke works such that they at one time might have been understood to constitute tenant fixtures, the tenant contracted out of any right it might otherwise have had to remove any tenant fixtures from the premises under the original lease of 1928 entered into between Ernest Bewley, as landlord, and Bewley's Oriental Cafés Ltd, as tenant. The plaintiff drew attention to the fact that the term of the 1928 Lease was 21 years, which commenced on 1st April 1927 and that, pursuant to the terms of the 1928 lease, the tenant contracted to deliver up the premises and *"all fixtures"* therein upon expiration or determination of that lease. There was no exclusion in respect of tenant's fixtures. On that basis, the plaintiff claimed that, even if the Harry Clarke works constituted tenant fixtures at that time, the tenant covenanted to deliver up the works with the premises upon expiration of the 1928 Lease. The plaintiff argued that, in so doing, the tenant acknowledged and agreed that the Harry Clarke works fell into the ownership of the landlord as owner of the premises. Had the tenant intended to retain ownership of the Harry Clarke works then the tenant would not

have agreed to deliver up *"all fixtures"* with the premises upon the expiration of the 1928 Lease, and instead would have carved out the Harry Clarke works from that clause. The plaintiff contended that this provision of the 1928 Lease displaces the application of s. 17 of Deasy's Act.

31. In response, the defendants argued that this provision of the 1928 lease could be of no assistance to the plaintiff. In the first place, the defendants highlighted that the tenant has never parted with possession of the property since the grant of the 1928 lease. Furthermore, on expiration of the 1928 lease in 1948, the premises were further leased to the tenant by the successors to Ernest Bewley by a lease dated 20 May 1949 for a term of 100 years from 14 August 1948. Subsequently, the first named defendant, as tenant, acquired the landlord's interest by virtue of two assignments, the first dated 10 April 1981 (by which 50% of the landlord's interest was acquired) and the second dated 27 January 1987 (by which the remaining 50% was acquired).

32. The defendants also relied on the fact that no mention was made of the Harry Clarke works in the sale and leaseback transaction documents (under which the first named defendant as vendor sold its interest in the premises to Royal Insurance plc (the plaintiff's predecessor in title) which in turn leased back the premises to the first named defendant. The defendants highlighted that none of the documents evidencing the sale and leaseback transaction make any mention of ownership of the works. In contrast, the 1987 Lease (entered into between Royal Insurance plc as landlord and the first named defendant as tenant) expressly makes reference to plate glass. The defendants submitted that the express enumeration of plate glass and the silence as to stained-glass suggested that the latter was not intended to pass to Royal Insurance plc. The defendants also relied on clause 3.36.1(B) of the 1987 Lease which recognises the right of the first named defendant to remove tenant's fixtures. The defendants, therefore, submitted that the 1987 Lease does not displace the application of s. 17 of Deasy's Act.

33. In response, the plaintiff made the case that the lack of any mention of stained-glass in the sale and leaseback transaction documents should lead to the opposite conclusion. It was submitted that, had it been intended to exclude the Harry Clarke works from the sale of the premises to Royal Insurance plc, this would have been expressly provided for in the contract for sale or in a side agreement. In making that case, the plaintiff again relied very much on their contention that the works constitute windows. It was suggested that it would be absurd to think that Royal Insurance plc would have paid IR£2,350,000 for the premises in 1987 *"without a full complement of windows".* The plaintiff also relied on the contention that, when the tenant acquired the landlord's interest by the assignments of 1981 and 1987, the tenant's interest merged with that of the landlord. The plaintiff argued that, as a consequence of the merger, it no longer mattered whether the works constituted landlord's fixtures or tenant's fixtures; everything was owned at that point by the same person namely the first named defendant. The plaintiff submitted that, moreover, under the sale and lease back transaction in 1987, the first named defendant sold everything to Royal Insurance plc (in whose shoes the plaintiff now stands). The plaintiff contended that there was nothing in the terms of that transaction (or in the terms of the lease granted to the first named defendant by Royal Insurance plc) that suggested that ownership of the works was to remain in the first named defendant. The works were not excluded from the sale and the plaintiff claimed that they thus fell into the ownership of Royal Insurance plc the predecessor in title to the plaintiff.

34. In reply to that argument, the defendants submitted that there was no merger of the tenant's leasehold interest under the 1949 lease with the landlord's interest formerly held by Ernest Bewley. They argued that the relevant transaction documents envisaged the continuation of the 1949 lease. The defendants maintained that this had the effect of negativing any suggestion of merger. The plaintiff made a two-pronged response to that argument. In the first place, it was submitted that the defendants had failed to address the primary argument made by

the plaintiff that, under the sale and lease back contract, the first named defendant had sold everything to Royal Insurance plc and that there was a gap in time before Royal Insurance plc leased the premises back to the first named defendant during which the latter was no more than a bare licensee. On that basis, it was submitted that the distinction between the landlord's and tenant's interests was extinguished prior to the grant of the 1987 lease. Secondly, the plaintiff argued that the 1987 transaction documents expressly provided for the cessation of the 1949 lease and the plaintiff contended that the defendants were thus mistaken in suggesting the contrary.

35. This led the defendants to make two further arguments. First, the defendants relied on what is known as the Rule in *Walsh v. Lonsdale* (1881) 21 Ch.D. 9 the effect of which, in broad terms, is to give a party to an enforceable agreement for a lease, the same rights in equity as that party would have in the event that the lease had actually been executed. On that basis, the defendants maintained that the first named defendant had all of the rights of the tenant from the moment the sale and lease back agreement was executed and that it therefore did not matter if there had been any gap in time between the date of the assignment to Royal Insurance plc and the date of execution of the 1987 lease. In this context, under special condition 11 of the sale and lease back agreement, Royal Insurance plc agreed to execute a lease (in the terms of what subsequently became the 1987 lease) in favour of the first named defendant. Second, the defendants emphasised that the 1987 lease provided for a commencement date of 6 August 1987 (which was also the date of the assignment of the first named defendant's interests to Royal Insurance plc) and that, pending delivery of the 1987 lease, Royal Insurance plc had executed the 1987 lease and held it in escrow. On that basis, it was argued that there was no gap in time between the date of the assignment and the commencement of the 1987 lease.

The questions that require to be determined

36. Having summarised the respective positions of the parties and identified the main legal principles that arise, it seems to me that the following issues arise for determination in this judgment:

(a) First, it will be necessary to determine whether the plaintiff is correct in its contention that the Harry Clarke works are part of the fabric of the café premises. In my view, it is important to first consider this issue by reference to the position at the time of installation of the works in 1928. It seems to me that the plaintiff bears the burden of proof in relation to this issue. While the plaintiff has drawn attention to the counterclaim advanced by the second named defendant, the fact remains that it is the plaintiff which has brought this claim and it is the plaintiff who asserts that the works constitute windows forming part of the fabric of the café premises;

(b) If all or some of the works, at the date of their installation in 1928, formed part of the fabric of the café premises, the next question that arises is whether there is nonetheless a basis for the court to conclude that the works are the property of the tenant. For example, did something occur in the years after their installation which would affect the legal characterisation of the works? In my view, the burden of proof plainly rests on the defendants in relation to this question;

(c) If, on the other hand, some or all of the works do not form part of the fabric of the café premises, it will be necessary to consider whether they constitute fixtures and, if so, whether they are landlord's fixtures or tenant's fixtures. I am of the view that the defendants bear the burden of proof in so far as they contend that the works constitute tenant's fixtures while the plaintiff bears the burden in relation to the case it makes (as an alternative to that at (a) above) that they constitute landlord's fixtures. In addressing

these issues, it will also be necessary to objectively assess the purpose for which the works were installed in the café premises;

(d) In addressing the issue as to whether the works constitute tenant's fixtures, I must also consider whether the conditions of s. 17 of Deasy's Act are satisfied in this case or whether there is a basis at common law to hold that they are tenant's fixtures. The defendants plainly bear the burden of proof in relation to that issue;

(e) Depending on the decision reached in relation to the issues identified at (a) to (d) above, it may also be necessary to consider the effect of the provisions of the 1928 and the 1987 leases. As discussed in paras. 30 and 32 above, both parties seek to rely on certain of the provisions of those leases in support of their respective positions. The parties each bear the burden of proof in respect of the case they seek to advance based on those provisions;

(f) Again, depending on the decision reached in respect of the issues identified at (a) to (e) above, it may be necessary to consider the legal effect of the sale and lease back transaction of 1987. As discussed in paras. 32 to 35 above, there has been a variety of arguments deployed by both sides in relation to this transaction and each side bears the burden of proof in respect of the arguments respectively advanced by them.

Gaps in the evidence

37. Before addressing the questions outlined in para. 36 above, it will be necessary to consider the evidence available to the court and to make findings of fact based on that evidence. In this context, the passage of time has created a very obvious problem. There is no longer anyone alive who can give first hand evidence as to what transpired at the time the works were commissioned in 1927 or when they were first installed in the café in 1928. Other than the evidence of Mr. Larry Ebbs (commencing with his first visit to the premises in 1972), no one is in a position to give any first-hand evidence about what happened in the years between 1928

and 1986 (when the tenant and its business was acquired by Campbell Catering). Fortunately, some of the correspondence written by Harry Clarke in relation to the project survives. Both sides have sought to rely on this correspondence and neither side has raised any technical objection to its admissibility in evidence in court proceedings. However, the correspondence is incomplete in that it comprises solely of material that emanated from Harry Clarke and the firm of Joshua Clarke & Sons. The responses from the two firms of architects acting in the project no longer survive. The architects' instructions to Harry Clarke and the correspondence from their client (or clients) to them are also missing. A number of drawings and plans of the café premises dating from its relatively early years still exist as does the photograph of the café interior described in para. 12 above. As noted in para. 24 above, a minute of one board meeting of Bewley's Oriental Cafés Ltd. in 1928 was also produced by the first named defendant as was an article from the Irish Times in 1941 which refers to the removal of the works for safe keeping during the course of the Second World War. No objection was raised in relation to the latter but, as discussed further below, the plaintiff has objected to the admissibility of the minute in so far as the defendants seek to rely on it as evidence of the truth of its contents. The court also had the benefit of some expert evidence from the architects called by each side which may assist in drawing conclusions from the state and condition of the works and of the parts of the premises in which they are now sited. In addition, there was evidence from Dr. Caron, a stained-glass expert, and from Ms. Costigan who has conducted extensive research into Harry Clarke and his works. However, the only first-hand evidence that has been tendered in relation to the works commences in 1972 in the form of the witness statement from Mr. Larry Ebbs (described in para. 88 below). Further evidence is available in relation to the condition and situation of the works in 1986 when Campbell Catering acquired the first named defendant and also in 1998 when further work was carried out. The lack of first hand evidence means that I face a difficult task in seeking to make findings of fact. There may be issues in respect of which

there is simply no sufficient evidence available to allow a reliable finding of fact to be made. In the event that this occurs, the question as to who bears the burden of proof is likely to become critically important.

38. Notwithstanding the concern noted in para. 37, it is important to keep in mind that the works themselves constitute physical evidence (what lawyers call *"real evidence"*) which can be inspected and viewed. Their position in the café building, their condition and the function that they perform are all aspects of the evidence which the court can take into account. Prior to the hearing, a viewing of the works was arranged which I attended along with the registrar and the solicitors and counsel for both sides. Having seen the works *in situ,* I can confirm that, as noted in para. 5 above, the works, when viewed from the interior of the ground floor café, have all the appearance of windows. They are a striking, if not dominant, feature of the interior and assist, and always appear to have assisted, the creation of a particular *"aesthetic"* and atmosphere within the café. While the interior of the café has undergone significant changes in recent years, the photograph (described in para. 12 above) displays many of the original features of the café including the bentwood chairs, the marble table tops, the velvet covered banquettes along the walls and the distinctive Bewley's tableware (albeit not the three-tier cake stands which were once such a unique feature of the café).

The café building and its situation

39. At the time of construction of the café, the site comprised 78 and 79 Grafton Street and 3 and 4 Johnson's Court. These properties were acquired by Ernest Bewley for the purposes of developing the café and letting it to the family company. Broadly speaking, the café sits on an east-west axis. It is bounded by Grafton Street to the east and the narrow pedestrian street known as Johnson's Court to the north. To the rear – and to the west of the café, there are commercial premises which open onto Johnson's Court. To the south, there are commercial premises which open eastward onto Grafton Street. In addition, there is a small part of the

south-western corner of the premises which overlooks Swan Yard, a blind alley leading off Harry Street to the south. While the construction of the Westbury Hotel and Westbury Mall in the 1980s has altered the appearance of the streetscape to the west and south of the premises, it is clear from the 1935 Fire Insurance Plan of Dublin by Charles Goad that there were extensive commercial premises to the south and west of the café at that time. The plan also shows that there was a small yard which does not appear to have been built upon at that time which was located along the western perimeter of the premises. This yard would therefore have provided some light to the Four Orders works at the time of their installation in 1928, albeit that the light would have been limited having regard to the fact that, even then, this small yard was surrounded by buildings on all sides. Any windows opening on to the small yard would also have been a source of ventilation for the café. Similarly, insofar as the Swan Yard works are concerned, they appear to have been originally sited at or parallel to the perimeter of the café premises overlooking Swan Yard itself. Again, the amount of light passing through these works would have been limited by the extent of the buildings on either side of Swan Yard but any windows opening onto this alley nonetheless had a southerly or south-westerly aspect which may have assisted in lighting the premises at particular points of the day. In addition, windows at this point of the premises could have been used as a source of ventilation of the café.

40. There is an issue in the case as to whether the Swan Yard works ever faced directly onto Swan Yard. It is the defendants' case that there were always clear glass windows (with similar hopper sashes to the stained-glass works) in the exterior wall of the premises with the stained-glass works occupying a parallel space to the inside of the clear glass windows. In this context, there is today a clear glass window overlooking Swan Yard (in what is now the stairwell of the fire escape staircase) while the other opening has been bricked up. According to the evidence of Mr. Tony Horan (who was the architect retained in respect of works to the

premises in 1987), the clear glass window was in place in the external wall overlooking Swan Yard in 1987 and the other opening was already blocked up at that stage. Mr. Horan's evidence was that the frame holding one of the Swan Yard works was mounted to the wall to the inside of the surviving external clear glass window. There was a space between the window and the artwork. However, Mr. Horan was not certain whether natural light was visible through that work at the time. His evidence was that *"I think that all six of the artworks were backlit with artificial light …"*. This is consistent with the evidence of Mr. Campbell (addressed in greater detail below). As further explained below, Mr. Brian O'Connell, the expert architect who gave evidence on behalf of the defendants, is of the view that the surviving clear glass window overlooking Swan Yard which existed in 1987 (and continues to exist today) is the original window installed in the course of the building works in 1927. On the basis of his conclusion to this effect and on the basis of Mr. Horan's evidence, Mr. O'Connell has also put forward a theory (which is addressed in more detail below) that there was a similar double fenestration arrangement in place originally in respect of the Four Orders works.

41. The main entrance to the café is on Grafton Street. If one enters the café at that point, one first crosses what was formerly the shop (which, on one side, sold cakes and bread and, on the other, sold different types of tea and ground coffee, (much of it roasted in an open coffee roaster in the shop window). Having passed through this area, one heads directly west into the main café area where the Four Orders works are immediately visible while the Swan Yard works become visible as one passes deeper into the café. As previously noted, the works have all of the appearance of windows and, despite the changes which have taken place in recent years, they continue to give a flavour of the original aesthetic of the café.

42. It will be necessary, in due course, to consider some of the changes which have been made to the premises over the years. However, before doing so, I believe that it is essential to consider the surviving evidence that exists in relation to the commissioning and execution of

the works by Harry Clarke in the period between 1926 and 1928. This evidence can be gleaned from the correspondence which survives in the Clarke Collection in Trinity College Dublin which has been very carefully and comprehensively reviewed by Ms. Lucy Costigan who is the author of a book about Harry Clarke and who holds a master's degree in research from the National College of Ireland. For the most part, I found Ms. Costigan's evidence to be extremely helpful and authoritative.

The contemporaneous correspondence of Harry Clarke

43. The correspondence should be seen against the backdrop of the development of the café premises by Ernest Bewley. As noted previously, he assembled the necessary premises himself by purchasing a number of individual properties on Grafton Street and Johnson's Court with the intention that he would then develop them into a single café building to be let to Bewley's Oriental Cafés Ltd, of which he was a director and the chairman. Such a lease was in fact granted on 9th March 1928 with a commencement date as of April 1927. The firms of McDonnell & Dixon, architects, of 20 Ely Place and Messrs Millar & Symes, architects, of 39 Kildare Street were both retained in relation to the carrying out of the necessary works to the premises. It is unclear to me what were the respective roles of McDonnell & Dixon, on the one hand, and Millar & Symes, on the other. The latter firm is generally credited with the Grafton Street façade of the café which is decorated in the Egyptian Revival style. It was either McDonnell & Dixon or Millar & Symes who commissioned Joshua Clarke & Sons of North Fredrick Street to provide certain of the glass required for the premises including stained-glass. Ms. Costigan expressed the view, by reference to the entry in the order book of Joshua Clarke & Sons for 7th June 1927, that Millar & Symes commissioned the six windows and that McDonnell & Dixon were involved in the commissioning of the remainder of the glass ordered from Joshua Clarke & Sons. However, Mr. O'Connell on behalf of the defendants has expressed the view that it was McDonnell & Dixon who were involved in the commissioning

of the artwork and, more generally, in the development of the interior of the new café while Millar & Symes were primarily involved in the design of the building itself. In his report, he drew attention to a number of issues of *"The Irish Builder and Engineer"* published in the course of 1926 which addressed the development of the café. The following is an extract from his report:-

> *"6.1 The Irish Builder and Engineer, on 20th March 1926, notes that: 'Mr. Ernest Bewley of Bewley's Oriental Cafes Ltd. has acquired the premises at 78-79 Grafton Street to use as a Restaurant, Mr. A G C Millar 39 Kildare Street is architect. The basement is being converted into a smoking room, with kitchen and store at the rear. On the ground floor shop premises will be fitted with a new lift, stairs and ladies coffee room, on the third floor kitchen still room and staff rooms will be provided. The builder was J and P Good of Great Brunswick Street Dublin.'*
>
> *6.2 Again on 21st August 1926, the Irish Builder and Engineer reported: 'in connection with the reconstruction of the premises at 78/79 Grafton Street from Messrs Bewley's Oriental Cafes Ltd. Messrs. Millar and Symes 39 Kildare Street have proposed plans for a balcony and thrust out lavatory at the premises, the balcony front is to be formed with Biancola with Granolithic concrete backing, and the balustrade is to be bronze.'*
>
> *6.3 On 4th September 1926, the Irish Builder and Engineer reported: '78/79 Grafton Street and 2 Johnstons* (sic) *Court for Bewley's Oriental Cafes Ltd. Plans approved by the City Architect during two weeks ended August 21st.'*

6.4 It is evident from the record that works to form a single entity were undertaken to Nos. 78/79 Grafton Street and 2 Johnstons (sic) *Court to a site assembled from those properties as a single composite development opening on three fronts, to Grafton Street to the east, to Johnson's Court to the north, and to Swan Yard to the south with access to the light well formed by a nominal set-back above basement level of the west boundary wall of the composite site to form the triangular shaped shallow lightwell in plan above basement level: see McDonnell and Dixon Survey – Ground Floor at Appendix No. 2 hereto.*

6.5 The record establishes that works by J and P Good General Contractors, proceeded during 1926 under the direction of HV Millar of Millar and Symes architects, and, given the scope of works, in my view, in the normal course, the building shell would have been substantially complete and weathered by early 1927."

44. I do not believe that it is possible to form any reliable view as to whether the stained-glass works were commissioned by Millar & Symes or by McDonnell & Dixon. In truth, as the correspondence analysed below very clearly illustrates, Joshua Clarke & Sons dealt both with Millar & Symes and McDonnell & Dixon in relation to the stained-glass. The defendants also illustrated that there was confusion on the part of Harry Clarke as to the identity of his client. As discussed in para. 63 below, some of the correspondence was addressed to *"Charles Bewley"* and some to *" Bewley Esq"* with the forename omitted. Furthermore, there is nothing in the correspondence which identifies the client on whose behalf Millar & Symes and McDonnell & Dixon were respectively acting.

45. I should explain that Joshua Clarke & Sons was founded by Harry Clarke's father, Joshua Clarke, in 1887. After his death in September 1921, his sons began managing the

business. At the time of the Bewley's development, Harry Clarke was in charge of the stained-glass commissions of the firm. The earliest relevant correspondence from that firm is dated 7th January 1927 to McDonnell & Dixon in which proposals for *"Stained glass and leaded work"* were enclosed. Unfortunately, those plans and proposals are no longer available. They are thought to have been destroyed in a fire of the Ely Place premises of McDonnell & Dixon. There is also an entry in the firm's order book of 26th January 1927 described as *"Proposal No. 1"* for 49 panels in the front shop of Bewley's Café, Grafton Street with sheet glass borders, antique and cathedral (both of which are forms of clear glass) and also opalescent glass. Thus, it will be seen, that the firm was providing glass other than stained-glass in connection with the development of the premises. However, there is no evidence to suggest that the firm provided all of the glass used in the premises. Further evidence of the supply of glass other than stained-glass is found in the entry in the order book of the firm for 7th February 1927 which describes the supply of leadlights for a *"lantern"* which appears to refer to a rooflight to be installed in the café. The order book for 7th February 1927 also records £70 due in respect of *"Make supply & fix Lantern light back of shop Large Café Bewley's"*. While this is marked *"paid"* in the order book, it is clear from a subsequent statement of account dated 27th April 1927 that it was still due and unpaid at that time. The first record of any payment that I can identify is Harry Clarke's letter of 13th May 1927 acknowledging receipt of a cheque for £200.

46. The order book of the firm for 30th March 1927 also refers to the supply of glazing to the premises. It refers to the glazing of a sash under the stairs and to the supply of white cathedral glass and two large side windows. In a letter of 4th April 1927, the firm wrote to McDonell & Dixon sending *"suggestions for dealing with the large openings at back of Café"* and proposing that the details *"would not be the same in any of the six windows"*. It appears to be clear that the *"large openings"* in question were the openings where the six works the subject of these proceedings were intended to be sited (either in the openings themselves, as

the plaintiff contends, or placed parallel to the openings in question, as the defendants suggest). The reference both to *"openings"* and *"windows"* should be noted. As will be described in more detail below, it is part of the defendants' case that it is likely that there were outer windows of clear glass installed immediately behind the stained-glass works and that it is these clear glass windows that fulfilled the ordinary function of windows in the external walls of the café premises. At first sight, it is difficult to understand why Harry Clarke would have described his works as *"suggestions to deal with the large openings"* at the back of the café if the intention was that there should be clear glazed windows permanently installed in these *"openings"* and that his works would be installed parallel to and to the inside of such windows. That said, this letter was sent at a relatively early stage in the process and it would be unwise to draw any conclusion solely on the basis of what is said in the letter. It also has to be kept in mind that Harry Clarke visited the site while the construction work was still underway. He refers in a later letter of 9th February 1928 (addressed in para. 58 below) to having visited the site *"when in the process of erection".* It may therefore have been the case that the window openings were still bare at the time Harry Clarke visited the site some time prior to his letter of 4th April 1927.

47. Regrettably, the *"suggestions"* enclosed with the letter of 4th April 1927 no longer survive. There appears to have been some discussion thereafter between Harry Clarke and McDonnell & Dixon because, on 13th April 1927, Harry Clarke wrote in person to McDonnell & Dixon in the following terms:-

> *"I enclose herewith amended design for stained glass at above.*
>
> *Regarding the filling of the windows looking on Swan Lane with a different scheme of glass, I am convinced that this would not be successful, and think that if you and Mr.*

Bewley decide, that the expenditure would be too great with this present suggestion, that a simple scheme might be evolved for the six windows in question."

48. The reference to *"Swan Lane"* should clearly be understood as a reference to Swan Yard. The reference to the works as *"windows"* should be noted. In addition, it is noteworthy that Harry Clarke refers to the *"windows"* as *"looking on Swan Lane"*. Again, this suggests that, at this point, Harry Clarke understood that the works would function as windows overlooking Swan Yard. In addition, the reference to Mr. Bewley should be noted. As noted above, Mr. Ernest Bewley was to be the landlord of the café but, as discussed further below, there was confusion on Harry Clarke's part as to the identity of the Bewley family member involved in the project and it is also the case that he may have understood that he was dealing with the Bewley company.

49. It is plain from the terms of the letters written by Joshua Clarke & Sons that Harry Clarke's suggestion of a single scheme for the six windows was not accepted by McDonnell & Dixon or possibly it was their client who rejected the scheme. As previously noted, it is unclear whether McDonnell & Dixon were acting on behalf of Mr. Ernest Bewley in his personal capacity as landlord or on behalf of the tenant, Bewley's Oriental Cafés Ltd. (as it was then known) as tenant. The position is further complicated by the fact that Ernest Bewley was a director and chairman of the tenant company. In any event, someone made the decision to reject Harry Clarke's suggestion of a single scheme for all six works and thus, today, there are two distinct suites of work in place namely the Four Orders and the Swan Yard works.

50. Joshua Clarke & Sons wrote again to McDonnell & Dixon on 20th April 1927 enclosing *"our designs with alterations in accordance with your suggestion"*. Unfortunately, not all of those designs are available. However, two designs remain in the Bewley's Archive, namely the design for the Ionic Order work and also for the Swan Yard works. These drawings are largely consistent with what can be seen today in the finished stained-glass works. They do not portray

the opening mechanism or the hopper mechanism but they do show a division of the works into sashes or panels consistent with what can be seen in the café today. The letter of 20th April 1927 was followed by a letter of 6th May 1927 addressed to Messrs. Millar & Symes, architects, of 39 Kildare Street which is headed *"Mr. Bewley's New Café Grafton St"* and is in the following terms:-

> *"In accordance with the verbal instructions received we are about to proceed with the stained glass windows at the café for the above account in the sum of... £390...*
>
> *As the full sized drawing will entail considerable work it will be some time before it will be ready for inspection. We would be greatly obliged if you will kindly confirm this commission."*

51. The letter of 6th May 1927 to Millar & Symes well illustrates the lack of any clear dividing line between the role of that firm and the role of McDonnell & Dixon. It will be recalled that, as identified in paras. 45 to 47 above, Harry Clarke had, less than one month before, been communicating with McDonnell & Dixon in respect of his plans for the works. It is also clear from para. 56 below that Harry Clarke wrote again to McDonnell & Dixon in October 1927. There is nothing in the terms of these letters which give any clue as to why, on some occasions, he addressed correspondence to that firm and, on other occasions, addressed himself to Millar & Symes. There are further references to Millar & Symes, in an entry in the order book of Joshua Clarke & Sons for 7th June 1927 and in a letter of the same date to Millar & Symes asking them to confirm their instructions. The entry in the order book is in the following terms:-

> *"Messrs Millar & Symes... Make, supply and fix three windows to the back of the café Stained glass for Bewley's Café...*
>
> *2 windows of side of café no. 4 proposal in the same manner as ...3."*

52. The reference to *"Make, supply and fix"* should be noted. It is consistent with the language used in connection with the supply of the cathedral glass and other clear glass supplied by the firm. The plaintiff submitted that the reference to *"fixing"* of the *"windows"* envisages more than just supplying stained-glass screens or panels. In contrast, the defendants maintained that Harry Clarke and his firm would not have been involved in the installation of the window frames. The defendants contended that it is more likely that the stained-glass panels or sashes were simply fixed to *"window"* frames manufactured by another supplier. In this context, the defendants highlighted that there is no evidence that Joshua Clarke & Sons had any joinery expertise. This was acknowledged by Dr. Caron (the plaintiff's stained-glass expert). For completeness, it should also be noted that, as will become clear from later correspondence sent in February 1928, the reference to *"three windows to the back of the café"* represents an error on the part of Harry Clarke. As outlined above, there are in fact four works or windows at the back (i.e. the western side) of the café.

53. The next letter in the chain of correspondence is a letter of 6th September 1927 from Harry Clarke to *"Bewley Esq."* with the space for the forename left blank. Harry Clarke may not have known the forename of the addressee but it is clear from the terms of the letter that he had met or corresponded with the addressee on a previous occasion when, it appears, the addressee gave consent to the distribution of information cards in the cafe about the ongoing work on the project. For the reasons discussed in para. 63 below, it appears likely that the addressee was Ernest Bewley given that, by the time this letter was written, his brother Charles Bewley had emigrated. This view is also supported by an earlier letter of 13th May 1927 (discussed in more detail in para. 78 below) which was, in fact addressed to *"E. Bewley"* albeit that it did not relate to the stained-glass work. But that does not, of itself, suggest that Ernest Bewley had commissioned the works in his capacity as landlord. Given that he was also a director and chairman of the tenant, Bewley's Oriental Cafés Ltd., he could just as readily have

commissioned the works in that capacity on behalf of the company. This emerges also from a consideration of the minute of a board meeting of Bewley's Oriental Cafes Ltd. on 9th March 1928 quoted in para. 68 below.

54. In the letter of 6th September 1927, Harry Clarke said:-

> *"I beg to send herewith a copy of the matter I proposed using with your kind permission small show cards, which you were kind enough to consent to hand in your café"*

Attached to the letter was a copy of the proposed notice which was in the following terms:-

> *"The stained glass windows for our new premises in Grafton Street are being designed and made by J Clarke & Sons, at whose studios, 6/7 North Frederick Street,*
>
> *these and other works of art may be seen in the process of being made.*
>
> *Civic Week 17th to 25th September, 1927."*

55. This again refers to the works as windows and also suggests that Harry Clarke was very proud of the work being done by him; so much so that he was keen that the public would see the works in the course of their execution. The defendants place some emphasis upon the use of the words *"other works of art"* which they submit indicates that their current description of the works as *"artworks"* is valid. I am not sure that this advances matters much in that it is perfectly feasible for a stained-glass work to function both as art and as a window. The reference in the draft notice to the Civic Week of 1927 is a reference to the Dublin Civic Week 1927 which was intended to draw attention to the artistic, literary, cultural, industrial and municipal life of Dublin and to engender a sense of civic pride amongst Dubliners. My understanding is that, in addition to Harry Clarke, a large number of Dublin-based artists were involved in the Civic Week of 1927 including Harry Kernoff and Flora Mitchell.

56. Harry Clarke wrote again to McDonnell & Dixon on 7th October 1927 providing an update on his progress on the works. In that letter, he said:-

"We are working on the stained glass windows for the above and beg to report the conditions as follows:

All glass save two windows is cut, and portion acided out, we may say the latter is a very lengthy process and is the most important as on this depends the success of the finished window.

We may say the work on these windows is of as high a standard as if they were for an important cathedral and we are taking particular care with them."

57. Again, the reference to *"windows"* should be noted. The reference to the quality of the windows as being of the same standard *"as if they were for an important cathedral"* is also noteworthy. In this context, it should be noted that Dr. David Caron, a stained-glass expert, gave evidence on behalf of the plaintiff. In the course of his evidence, Dr. Caron observed that stained-glass windows have performed the function of windows for cathedrals for many centuries. While the decoration of such windows is extremely important, they also fulfil the function of windows in such a setting insofar as weathering and lighting of ecclesiastical buildings is concerned.

58. Harry Clarke wrote once more to Mr. Dixon of McDonnell & Dixon on 9th February 1928. In this letter, he explained that he had made an error in the calculation of his price based on an inspection he had made of the premises at the time they were under construction. He had estimated the price for the Four Orders works based on three works rather than four. This reference to the inspection of the premises at that time is potentially important. In the course of their evidence, Ms. Costigan and Dr. Caron both emphasised that Harry Clarke was always very keen to view and understand the premises in which his works were to be placed. In the letter, he said:-

"I send herewith amended drawing for the new windows at Messrs. Bewley's Cafe and I hope you will agree with me that the treatment of the inner panel and the additional amber square at the corner makes an incomparable arrangement.

I shall be glad to have this back per bearer with whatever remarks you wish to make about it.

On looking over the cost of the four windows which are now practically completed I find that I made an error in my estimates of 20th April '27. In these Proposals I estimated for three (3) windows at £210, whereas there are in all four windows, the mistake happened through my going to the building in person when in process of erection, and I think you will agree with me, and I hope Mr. Bewley also, that this work at £70 per window which I have done is reasonable, in the cost to date the work on the four windows is £233. So that even if you and Mr. Bewley consent to allowing me additional £70 the margin of profit will be very narrow indeed."

59. This letter very clearly indicates that Harry Clarke had visited the premises while in the course of construction and it demonstrates Harry Clarke's involvement in the process at a relatively early stage. In addition to visiting the premises at the outset (while still under construction) he was also personally involved in the fixing of the works, although the precise ambit of what was involved in fixing the works is not spelt out in the correspondence. His involvement is evident from his letter of 2nd March 1928 to Mr. Dixon of McDonnell & Dixon in which he noted the installation of the Four Orders works in the following terms:-

"I visited the above on last Wednesday and saw the final window of the first set erected into position and it seemed to me, and I hope you and Mr. Bewley will

agree, the work is satisfactory.

Further to my letter of 9th February, I wonder if you will be kind enough to go into the matter with Mr. Bewley regarding payment of £70, for the additional fourth window erected into position. If this can be settled I would ask you to kindly issue certificate for the four windows and the balance due £66.15.0 on the leaded work."

60. The reference in that letter to the *"leaded work"* appears to relate to the leadlights for the *"lantern"* which is mentioned in the earlier correspondence of April 1927. This is reflected in the statement of account subsequently issued on 13th March 1928. In that statement of account, the stained-glass work and the leadlights are itemised separately. In so far as the stained-glass work is concerned, the statement of account is in the following terms:-

"To designing, making, supplying and fixing stained glass for 3 windows at the back of the ground floor Café... as per EST 20th April '27 £210

To making, supplying and fixing one extra window for the above, not included the EST. £70."

61. The language used in the first paragraph of the statement of account might suggest that the fixing work was confined to the fixing of the stained-glass to an existing window frame but the language used in the second paragraph would suggest that what was fixed was the entire window. On the same statement of account, the leadlights were separately billed at £66.15s. This statement of account clearly dealt with the Four Orders works (and also addressed the error in billing which Harry Clarke had previously made). The Swan Yard works were addressed in a subsequent statement of account dated 30th April 1928. That statement of account included the items previously billed in the statement of account of 13th March 1928 but also now included reference to the Swan Yard works which Harry Clarke described as

"windows" albeit that he also spoke in terms of fixing stained glass for windows (which, arguably, is consistent with the view advanced by the defendants that he did not supply the window frames themselves). The work done in relation to Swan Yard was described as follows:-

> *"To Designing, making, supplying and fixing stained glass for two windows at the side of the Café as per Est 20th April 1927 180."*

62. A further reminder letter was sent on 30th April 1928 enclosing a statement of account in respect of both the Four Orders works and the Swan Yard works. It refers again to *"fixing"* of the works. An issue arises as to whether the fixing of the works involved the insertion of the stained-glass into the sashes or whether it involved the fixing of the sashes into the window frame or whether it comprised the fixing of the window frame itself incorporating both the sashes and the stained-glass within the sashes. The statement of account refers in two places to *"Designing making supplying and fixing stained glass for … windows"* and in one place to *"Designing making supplying & fixing one extra stained glass window".* The former language would support the view (put forward by the defendants) that the fixing was solely of the stained glass while the latter would support the view (advanced by the plaintiff) that the fixing work involved the fixing of the entire window. In his covering letter to Mr. Dixon of McDonnell & Dixon, Harry Clarke also used language which was consistent with the fitting of a window rather than the fitting of stained-glass to an existing window. He said:-

> *"You will kindly notice that item no. 4 £70 is for one particular window done which was not estimated for in the first instance. I would be obliged if you will be kind enough to issue certificate for full amount at your earliest convenience."*

63. This was followed by a letter dated 7th June 1928 addressed to *"Charles Bewley"*. As previously noted, Charles Bewley had emigrated for health reasons in the 1890s. According to research undertaken by Ms. Costigan, there were three different accounts of where he settled,

namely Australia, New Zealand and Tanzania. The addressee is therefore unlikely to have been Mr. Charles Bewley. However, it should be noted that the name of the trading company had been Charles Bewley & Co. until 1926 when it became Bewley's Oriental Cafés Ltd. Ms. Costigan has suggested that there may have been some uncertainty on the part of Harry Clarke as to the name of the party to whom correspondence should be addressed. She noted, in this context, that the letter of 6th September 1927 had been addressed simply to *"Bewley, Esq, Westmoreland Street, Dublin"*. As highlighted in para. 53 above, the first name or initial of the recipient is missing. Ms. Costigan also suggested that, in addressing correspondence to Charles Bewley, Harry Clarke may have had in mind the name of the company up to 1926, namely Charles Bewley & Co. This makes it difficult to determine from the correspondence whether the windows were commissioned by the trading company as tenant or by Mr. Ernest Bewley as landlord.

64. Similar to that furnished with the letter of 30th April 1928, the statement of account enclosed with the letter of 7th June 1928 again refers in two places to the commission as *"Designing making supplying & fixing stained glass for ... windows"* and in one place to *"Designing making supplying & fixing one extra stained glass window"*. Ultimately, the account was paid in two tranches, the first (a payment of £200 in cash) was made in June 1928 and the second (a cheque for £326.15) was made in September 1928. The latter was acknowledged by Harry Clarke in a letter again addressed to *"Charles Bewley Esq."* of 21st September 1928. The correspondence does not identify whether the payment was made by Ernest Bewley on his own behalf as landlord or whether it was made on behalf of Bewley's Oriental Cafés Ltd. The cheque no longer exists. The correspondence concludes with a letter dated 5th October 1928 from Harry Clarke again addressed to Charles Bewley in which he said:-

"I hope you will accept these two designs for your window as a souvenir of our pleasant business relations."

It appears likely that these are the two surviving drawings mentioned in para. **[50]** above namely the design for the Swan Yard works and the design for one of the Four Orders works depicting the Ionic order.

The conclusions to be drawn from the correspondence and related materials

65. As noted above, none of the correspondence which was sent to Harry Clarke or his firm in response to the letters and statements of account described above has been located. Regrettably, it is unclear from the surviving correspondence whether the works were commissioned by the landlord or by the tenant. It is true that the text of the card enclosed with Harry Clarke's letter of 6th September 1927 (quoted in para. 54 above) suggests that the stained glass was commissioned for the tenant's use of the café. This follows from the reference to *"stained glass windows for **our new premises** in Grafton Street"* (emphasis added) and the request to hand the card to the patrons of the café which was, of course, to be operated by the tenant. However, the difficulty is that this card was prepared by Harry Clarke himself and there is nothing in the extant correspondence to show that the terms of the card were agreed by his client (whether that was Ernest Bewley himself or Bewley's Oriental Cafés Ltd.). Equally, it is not known whether Harry Clarke was aware of the fact that there were two separate interests involved in the project – namely Ernest Bewley as landlord and his family's company as tenant.

66. Nonetheless, the correspondence is useful because it shows that, after Harry Clarke's initial proposal for the works was rejected, the works were commissioned at some point between Harry Clarke's letter of 20th April 2027 (discussed in para. 50 above) and 7th June 1927 when, as described in para. 51 above, the commission was entered in the order book of Joshua Clarke & Sons (albeit that the number of Orders works was misstated). The

correspondence also shows that, by 2nd March 1928, the last of the Four Orders works had been *"erected into position"* and that the Swan Yard works soon followed. As described in paras. 60 to 61 above, the statement of account in respect of the Four Orders works was issued on 13th March 1928 while the statement in respect of the Swan Yard works was issued on 30th April 1928. Thus, it is reasonable to conclude that all of the works had been installed by the latter date. As noted in para. 64 above, the account was not paid in full until September 1928 although a payment on account of £200 in cash was made in June 1928. As noted previously, the correspondence does not assist in identifying whether the account was paid by Ernest Bewley on his own behalf or on behalf of Bewley's Oriental Cafés Ltd. or whether it was paid by the latter directly. The defendants submit that the board minute discussed in para. 68 below assists in identifying the payer. However, this is disputed by the plaintiff.

67. The correspondence also suggests that Harry Clarke saw himself as the designer and creator of stained-glass windows rather than stained-glass panels to be inserted into sashes or window frames. While the labels a person uses for an object are not determinative as to its true legal nature or status, it is, nonetheless, striking that Harry Clarke repeatedly refers to the works as *"windows"*. This suggests that he had the entire window in mind – i.e. including both sashes and frame. It is also striking to contrast, on the one hand, the way he describes the stained-glass works and, on the other hand, the way in which other work is described. For example, the order book of 26th January 1927 dealing with *"Proposal no. 1"* refers to 49 *"panels"* ordered for the front shop of the café. Had it been the case that Harry Clarke's commission in respect of the stained-glass work was confined to the making of the individual stained-glass panels, one would expect that he would naturally have described them in the same way. Equally, in a subsequent letter of 1st March 1927, Harry Clarke's firm wrote to Millar & Symes acknowledging the order for the 49 panels. Yet, when it came to the stained-glass works, Harry Clarke, in his letter of 9th February 1928 (quoted in para. 58 above), described the works as

windows which were then *"nearly practically completed".* When it came to the fixing of the Four Orders works in March 1928, Harry Clarke did not describe the fixing of panels or sashes but, in his letter of 2nd March 1928 described how, on his visit on the preceding Wednesday, he had seen the *"final **window** of the first set **erected** into position"* (emphasis added). That language is not consistent with the mere insertion of stained-glass panels into an existing window frame already in existence in the café. On the other hand, as noted in paras. 60 to 62 and 64 above, the statements of account of March, April and September 1928 speak of *"making supplying & fixing stained glass for … windows"* which may suggest that the window frames themselves were not the work of Joshua Clarke & Sons. But the statements of account of April and September also use language that suggests the contrary. Both also refer to *"making supplying and fixing one extra **window**"* (emphasis added). That language is consistent the letter of 2nd March 1928 (quoted above). It is also consistent with the repeated description of the works as *"windows"* in all of Harry Clarke's correspondence. That is also how they were described in the cards (described in para. 54 above) which Harry Clarke hoped would be distributed to patrons of the café during Dublin Civic Week 1927 inviting them to view the work in progress at Harry Clarke's studio in North Frederick St. Similar language was also used in the letter of 6 May 1927 where Harry Clarke said that he was *"about to proceed with the stained glass windows".* All of this strongly suggests that what was supplied to the café premises in the spring of 1928 were new window frames housing the sashes containing the stained glass. This view is also supported by the way in which Harry Clarke, as noted in para. 46 above, spoke of his proposal to deal with *"the large openings".* This suggests that he was to address the entire openings rather than individual panels to be slotted into window frames. A further important factor to bear in mind is the evidence of both Dr. Caron and Ms. Costigan of the extent to which Harry Clarke exercised very careful control over the way in which his works were displayed. It would therefore not be surprising, on the basis of their evidence, that

Harry Clarke would wish to keep control over the window frames and also the sashes. Furthermore, as noted in para. 8 above, Mr. Brian O'Connell has highlighted that Harry Clarke, in order to comply with the Vitruvian canon, took the depth of the transoms of the sashes into account in calculating the ratio of height to diameter of each of the four classical columns depicted in the Four Orders works. Taking all of these considerations into account, it seems to me that, on the basis of the materials before the court and on the balance of probabilities, Harry Clarke supplied not only the stained-glass but also the sashes in which it is housed. That said, I am not convinced that he also supplied the window frames themselves. As will be discussed in more detail later, there is no evidence in the window surrounds at the location of either the Four Orders works or the Swan Yard works that the window frames at those locations were ever replaced. Given that there must have been window frames in place when the café opened in November 1927, it seems likely that, when it came to the installation of the stained-glass works in 1928, those frames were retained in place and fitted with the sashes containing the stained glass. The 1998 video discussed below demonstrates that the sashes are capable of being removed from the frames and it is likely that they can just as readily be fitted to an existing frame. While it seems probable that the frames were dealt with in that way, I remain of the view, for the reasons explained above, that Harry Clarke is likely to have supplied the stained-glass in the sashes rather than attempting to fix stained glass to the sashes of the existing windows. I do not believe that this conclusion is undermined by the lack of evidence that Joshua Clarke & Sons had any joinery expertise of their own. As a maker of stained-glass, it seems to me to be unlikely that the firm would not have had dealings from time to time with joiners and even if it did not, there was nothing to prevent it commissioning any necessary joinery work for the purposes of is contract in relation to the café. By proceeding in that way, Harry Clarke would have been able to exercise tight control over the making of the sashes. I appreciate that, under cross-examination, Dr. Caron agreed with counsel for the defendants that it is likely that

the timber for the windows was organised by the architects albeit that he also suggested that Harry Clarke was likely to have been *"very much engaged in the discussion."* But, in all of the correspondence from Harry Clarke to both firms of architects involved, there is no evidence of any discussion about joinery or about Harry Clarke's requirements in relation to joinery. If it were the case that the architects were responsible for the design and production of the timber joinery, it is remarkable that Harry Clarke, given his well-known desire to control the way in which his works were presented, would have said nothing at all about the joinery in his correspondence with them. In my view, it is more likely that Harry Clarke himself would have taken control of the commissioning and making of the sashes. That would explain why his correspondence with the architects does not address the issue.

The minute of the board meeting of Bewley's Oriental Cafés Ltd. of 9th March 1928

68. The next piece of potential evidence dating from the time of installation of the works is a minute of a board meeting of Bewley's Oriental Cafés Ltd of 9th March 1928 at which the directors approved the lease of the café to be taken by the company from Ernest Bewley. That minute records that Ernest Bewley was present *"in the chair"*. The meeting was also attended by Mr. T.W. Bewley and Mr. G.A. Overend, solicitor, in his capacity as company secretary. The minutes record that a letter was received from Ernest Bewley to his fellow directors referring to expenditure on 78-79 Grafton Street. The minutes then continues in the following terms:-

> *"Mr. G.A. Overend, Solicitor, attended, and went through the proposed lease of the Grafton Street and Johnson's Court premises, with the Directors, and explained the various provisions therein. The question was then raised as to the date from which the lease should run, and as to the rent which should be paid, and Mr. Overend explained that in as far as the Landlord was concerned, the premises were finished before April*

1927, and that the work done thereafter consisted of fittings necessary to adapt the premises for use as a café, and which expenditure would in due course appear in the Company's accounts, as a Liability of its own. He further explained that Mr. A.W. Shea of Messrs. Dockrells, had reported that the true basis on which the rent should be calculated was 7% on the total cost to the Landlord, plus such ground rent as the Landlord is liable for. Mr. Ernest Bewley then stated that having gone into the figures, he had ascertained that the total cost to him as landlord was about £45,000.0.0 made up of purchase prices paid by him for the various buildings, and the contractors' accounts, and that over and above this figure, he had spent, or authorised the expenditure on the company's behalf, of a sum of £14,900.0.0 largely comprising the cost of ovens, tables, chairs, counters and other café fixtures and fittings. The Board then resolved, in view of this explanation, that the rent of £3,500.0.0, and the date of commencement of same, namely 1st April 1927, seemed reasonable, and approved of the lease and counterpart, and authorised the seal of the company to be affixed thereon."

69. The minute is potentially important insofar as it differentiates the expenditure of the landlord from the expenditure of the tenant. The language of the minute also suggests that, by April 1927, the premises were finished insofar as the landlord was concerned and that, thereafter, the work done consisted of fittings necessary to adapt the premises for use as a café which was for the tenant's account (albeit that the minute also suggests that Ernest Bewley may have paid some of the £14,900 mentioned in the minute on behalf of the company). As also outlined in the minute, the rent under the lease was to be calculated at 7% of the landlord's capital expenditure plus the ground rents payable. In the course of his evidence, Mr. John Cahill, the chief executive officer of the first named defendant, explained that 7% of £45,000 amounts to £3,150. Mr. Cahill also gave evidence that the ground rents for the various parts of

the premises were £140, £200, £16.18.6 and £10. This left a total of £3,519.18.6. While this does not equate precisely to £3,150, it is relatively close to it. This suggests that the landlord's primary concern in determining the rent payable under the lease was to obtain a yield on the capital investment in the premises and that the rent payable took little or no account of the fit-out of the premises by the tenant. Indeed, Mr. Cahill purported to give evidence to that effect. I do not believe that Mr. Cahill was entitled to go that far. While he was entitled to give evidence of the arithmetical calculations made by him and of the ground rents, he plainly was in no position to give evidence as to the concern of the landlord. That was not a matter within his personal knowledge. That said, subject to giving further consideration to the plaintiff's objection to the admissibility of the minute as to the truth of its contents, there is nothing to prevent me from drawing an inference from the material in the minute and from Mr. Cahill's evidence as to the ground rents (to which there was no objection). It seems to me that, taken together, the evidence as to ground rents and the contents of the minute (if admissible) provide an entirely plausible basis to draw an inference that the landlord's concern was to obtain a yield on his capital investment in the premises. The defendants also seek to rely on the minute as evidence of the date of completion of the landlord's works and as evidence that payments made to Harry Clarke after April 1927 were made on the tenant's behalf and for the tenant's account. The defendants accordingly suggest that it is probable that the payments for the Harry Clarke works in June and September 1928 were made from the sum of £14,900 which the minute describes as having been spent or authorised on the company's behalf and which would *"in due course appear in the Company's accounts as a Liability of its own"*.

70. There is, however, a dispute between the parties as to the admissibility of the minute as evidence of the truth of its contents. The defendants relied on s. 71 of the Companies (Consolidation) Act 1908 (*"the 1908 Act"*) under which a minute of this kind signed by the chairman of the meeting *"at which the proceedings were held… shall be evidence of the*

proceedings". At the time of the board meeting, s. 71 of the 1908 Act was in force. However, as counsel for the plaintiff observed, s. 71 does not go so far as to deem the minute to be evidence of the truth of its contents. That said, the minute was among the documents which the parties agreed to admit in evidence on the *Bula/Fyffes* basis. The effect of being admitted on the *Bula/Fyffes* basis is that the minute is to be treated as *prima facie* evidence of the truth of its contents as against the first named defendant as the party who created the minute.

71. In addition to its objection to the admissibility of the minute as evidence of the truth of its contents, the plaintiff also relied on the defendants' answer to a written interrogatory delivered on behalf of the plaintiff in the course of the pre-trial phase of these proceedings. The plaintiff maintained that, by their answer to this interrogatory, the defendants had accepted that Ernest Bewley paid Joshua Clarke & Sons for the Harry Clarke works. On that basis, it was argued that the defendants are not now entitled to contend that the payment was made by the tenant. However, it is important to note that the response given by the defendants to the interrogatory in question was not unqualified. At para. 6 of the interrogatories raised by the plaintiff, the defendants were asked:-

> *"Did Ernest Bewley pay J. Clarke & Sons for the Harry Clarke Windows/Artworks?"*

The response given by the defendants was as follows:-

> *"Yes. However, that payment was made on behalf of and for the account of Bewley's Oriental Cafés Limited, the then named the first named defendant."*

72. On the assumption that the payment to Joshua Clarke & Sons was included in the sum of £14,900 mentioned in the minute, that answer is consistent with the minute described above. However, that begs the question whether the minute is admissible as to the truth of its contents and, if so, whether there is a sufficient basis to find, on the balance of probability, that the payment for the Harry Clarke works was included in that sum. In addition, it was submitted on behalf of the plaintiff that, if it could be said to be included in the sum of £14,900, the

defendants had, nonetheless, failed to prove that Bewley's Oriental Cafés Ltd had in fact reimbursed Mr. Bewley in respect of the payment made on its behalf. The plaintiff highlighted that no relevant accounts of the first named defendant recording the payment had been adduced in evidence. In response to the challenge to its admissibility, the defendants relied upon the fact that the minute was deployed in evidence by Ms. Costigan purportedly as evidence of the truth of its contents. As a consequence, they argued that it was not open to the plaintiff to object to the admissibility of the minute. They also argued that, having regard to the fact recorded in the minute that the landlord's works were complete as of April 1927, it must follow that the Harry Clarke works installed subsequently were for the tenant's account. In this context, it should be kept in mind that, although the meeting of 9th March 1928 predated the statements of account issued by Joshua Clarke & Sons on 13th March and 30th April 1928, estimates had been given in advance and Harry Clarke had written to McDonnell & Dixon as recently as 9th February 1928 in which he had again referred to these estimates and explained that he proposed to charge an additional £70 for the Four Orders work that he had mistakenly omitted from the original estimate.

73. In order to address the issue of admissibility of the minute as to the truth of its contents, it is necessary to consider how the minute was first introduced into evidence at the hearing. It was the plaintiff who first sought to deploy it in the course of the evidence of Ms. Costigan. Having regard to the agreement that the documents would be admissible on the *Bula/Fyffes* basis, the plaintiff was clearly entitled to deploy the minute in evidence against the first named defendant as the creator of the minute. That is the effect of applying the *Bula/Fyffes* approach (which was first developed in the *Bula* and *Fyffes* cases to assist the efficient presentation of evidence and the orderly conduct of hearings in complex commercial cases).

74. In her report (which she adopted as part of her evidence), Ms. Costigan said the following in relation to the minute:-

"The minutes of Bewley's Committee Meeting of 9 March 1928 provides conclusive proof that Ernest Bewley was the mastermind behind Bewley's Grafton Street Café, being the driving force behind the commissioning and purchasing of every aspect of the café. It is more than reasonable to conjecture that payment for the six Harry Clarke windows were included in the overall cost of £59,900, the amount that Ernest Bewley paid for acquiring, renovating and fitting out the Grafton Street building. Furthermore, E. Bewley was the recipient of Clarke's letter/receipt, dated 13 May 1927, for the amount of £200, that Ernest had paid to the Clarke's as part payment for their stained-glass windows. Taking all of the documentation and research into account, it is my considered opinion that Ernest Bewley commissioned and purchased the windows from Joshua Clarke and Sons and was therefore both Landlord of the café and owner of the windows."

It is clear from this extract that Ms. Costigan was purporting to rely on the document as evidence of the truth of her understanding of its contents. As the extract shows, she relied on the minute, as providing *"conclusive proof"* of her thesis that Ernest Bewley was the driving force behind the commissioning and purchase of every aspect of the café. During the course of her direct evidence, Ms. Costigan retreated somewhat from the force of the opinion expressed in her report. On Day 4, she was asked by the plaintiff's counsel as to whether she wished to say anything else in relation to the conclusion expressed in her report. Her response was:-

"Well, we know that Ernest Bewley paid for the premises and he also paid the contractors with regard to the premises. He paid on behalf of the company then for the fixtures and fittings. So, I suppose we haven't been given a list, or maybe no one has a list of exactly what that fixtures and fittings comprised of. Since the windows are very much part of the fabric of the building and they were contracted by his architects, it's probably an assumption that could be made that Ernest Bewley paid for the windows,

because more than likely they wouldn't be listed with ovens and chairs and tables, as we said, with fixtures and fittings, but there isn't absolute proof of that."

75. Notwithstanding this qualification in the course of her evidence, it is clear from Ms. Costigan's report and from her direct evidence that, in expressing the views set out above, she was relying on the minute as evidence of the truth of its contents. Having deployed the minute in that way as part of its case, I do not believe that the plaintiff is now entitled to argue that the minute is not admissible against the plaintiff as evidence of the truth of its contents including the acknowledgement recorded therein by Ernest Bewley that he had spent or authorised the expenditure on the company's behalf of a sum of £14,900 on café fixtures and fittings. I therefore reject the plaintiff's objection to the admissibility of the minute as to the truth of its contents. That said, the contents of the minute provide no more than a snapshot of the position as of 9th March 1928. The minute does not assist in understanding what took place subsequently.

76. Significantly, Ms. Costigan, in transcribing the minute in her report, omitted the very important words *"on the company's behalf"*. She accepted that this was an omission. The result was that she could no longer stand over the statement made in her report that £59,900 (i.e. the aggregate of the sums of £45,000 and £14,900) had been spent by Ernest Bewley for acquiring, renovating and fitting out the Grafton Street building. At least £14,900 had been spent by him (or had been authorised by him to be spent) on behalf of Bewley's Oriental Cafes Ltd.

77. Ms. Costigan also made a number of additional concessions, in the course of her cross-examination. Given that the stained-glass had not been paid for by the time of the board meeting of 9th March 1928, Ms. Costigan accepted, under cross-examination, that it was unlikely that any of the sum of £45,000 spent by Ernest Bewley (as recorded in the minute) was paid in respect of the Harry Clarke works. Having regard to the chronology, it seems to me that this concession on the part of Ms. Costigan was entirely correct. As the text of the minute (quoted

in para. 68 above) makes clear, the premises were finished *"before April 1927"* in so far as the landlord's works were concerned. The minute also records that *"the work done thereafter consisted of fittings necessary to adapt the premises for use as a café… which expenditure would in due course appear in the Company's accounts, as a Liability of its own"*. It is clear from the correspondence between J. Clarke & Sons and Messrs McDonnell & Dixon and Messrs Millar & Symes that the work done by Harry Clarke on the stained-glass works was undertaken in the period after April 1927.

78. In addition, Ms. Costigan was mistaken in her suggestion (quoted in para. 74 above) that the payment of £200 made in May 1927 was a part payment in respect of the stained-glass work. This is clear from a letter of 13th May 1927 from Joshua Clarke & Sons addressed to Ernest Bewley. The letter acknowledges a payment *"on account of **work done** at 78/79 Grafton St."* (emphasis added). By May 1927, a considerable amount of work had been done and billed by Joshua Clarke & Sons in relation to the supply of a range of other types of glass. The statement of account for this work had been billed on 27th April 1927 in the sum of £266.15s. The payment of £200 was plainly in relation to that bill. This is confirmed by the fact that the unpaid balance of £66.15s was included in the subsequent statements of account issued by Harry Clarke on 13th March and 30th April 1928.

79. Ms. Costigan also accepted, under cross-examination, that it is likely that the cost of the stained-glass was included in the sum of £14,900 mentioned in the minute as having been spent on the company's behalf or as expenditure authorised on the company's behalf. But it must be kept in mind that there is no breakdown of the figure of £14,900. Given that the amount ultimately claimed by Joshua Clarke & Sons was known in advance of the board meeting (having been the subject of correspondence in June 1927 and again in February 1928), it is conceivable that the amount claimed by Joshua Clarke & Sons was included in the sum of £14,900 paid by or to be paid by Ernest Bewley on behalf of the tenant. However, as Ms.

Costigan observed, there is no list of the individual items making up the total tenant spend of £14,900. It is also noteworthy that the fees due to Joshua Clarke & Sons were not paid until three to six months after this meeting. As noted in para. 64 above, one payment of £200 was made in cash in June 1928 with the balance being paid by cheque in September 1928. There is a dearth of information as to what happened in the intervening period and there is no evidence specifically identifying the ultimate payer. For all we know, the attendees of the meeting may have overlooked the stained-glass entirely. It may also be the case that the issue of the stained glass was the subject of a later board meeting or it may have been the subject of subsequent correspondence or discussions between Ernest Bewley and the company. Equally, the bill for the stained glass may have been settled by Ernest Bewley personally. In my view, it would be unsafe to take this one minute of the board of the tenant company, on its own, as sufficient evidence to ground a finding that, on the balance of probabilities, the tenant paid for the Harry Clarke works. But, if there is other material available which supports the view that the works constitute tenant's fixtures, that may change the position. At this point in the judgment, it would be premature to make any finding. I will revisit the question after I have considered the issue as to whether some or all of the stained-glass works constitute fixtures.

The 1928 Lease

80. Although I propose to defer my consideration of the terms of the documents governing the legal transactions between the landlord and tenant until a later point in this judgment, it is important to keep in mind that, under the 1928 Lease (which was executed on the same day as the board meeting described above), the tenant acquired a leasehold interest in the café premises for a term of 21 years from 1st April 1927. Some of the terms of that lease are potentially relevant to the issues in dispute. There was no express covenant in the lease restricting the tenant in respect of the user of the premises but the lease contained covenants requiring the tenant to insure the premises and to keep both the exterior and interior of the

premises *"and all structures drains and sewers now erected or hereafter to be erected or placed"* in good and substantial repair. As noted previously, the lease also provided that, on the determination of the lease, the tenant should deliver up possession to the landlord *"together with all fixtures".* This is the provision on which the plaintiff seeks to rely in support of its case that, even if the works constitute tenant's fixtures, the terms of the lease nevertheless require the tenant to deliver them up to the landlord at the end of the lease. In response, the defendants argue that, in circumstances where possession was never delivered up to the landlord, this provision of the 1928 lease is irrelevant.

81. In terms of the chronology, it should be noted that the term of the 1928 lease commenced 11-12 months before the installation of the Harry Clarke works in the premises. However, as Harry Clarke's letter of 2nd March 1928 makes clear, the Four Orders works had already been *"erected"* before the lease was executed albeit that this was after the tenant had gone into possession in November 1927. Given that the Swan Yard works were not billed in the statement of account of 13th March 1928, it appears probable that they were not installed until after the execution of the lease. As noted above, they were included in the statement of account of 30th April 1928. Thus, the probability is that they were installed at some point between 13th March 1928 and 30th April 1928.

Subsequent events affecting the Harry Clarke works

82. It was accepted by both sides that the Harry Clarke works were removed from the premises for safekeeping during the Second World War. The works were removed to the home of Victor Bewley (the son of Ernest Bewley) in Zion Road, Rathgar. It should be noted that Victor Bewley took over the café business from his father on the latter's death not long after the Grafton Street premises were completed. There is a contemporary report of the removal of the works in the Quidnunc Column in the Irish Times published on 11th January 1941 in which the writer says:-

"The other day, while having a cup of coffee in one of Dublin's well-known cafés, I noticed that a series of very beautiful stained glass windows was being removed and replaced by the ordinary embossed glass.

At first I thought it was being done to admit more light and I deeply regretted the breaking of the almost dim religious light that had prevailed for so long.

However, an inquiry revealed the fact that the original windows were designed and made by Harry Clarke. They were being removed to a place of absolute safety, and will be restored to their proper places when all risk of damage through aerial activity is past; so once again they may be there to restore the atmosphere of peace and quiet while I take "mine ease at mine inn."

But it is far more important that they should go on reflecting the light of Harry Clarke's genius."

83. It should be noted that the author of the piece in the Irish Times records that the stained-glass was replaced by *"ordinary embossed glass"*. This is a reference to the type of patterned glass that one often sees in bathroom windows with a view to screening what lies behind the glass. On one view, this suggests that the glass had to be replaced in order to ensure that the window openings were made weathertight. However, I do not believe that it is possible to conclude that this necessarily means that there was no second layer of windows of the kind suggested by the defendants' expert, Mr. Brian O'Connell. If there had been clear glass windows to the exterior of the premises immediately behind the stained-glass works, it may well have been considered appropriate to replace the stained glass works with embossed glass

in order to screen the unsightly yard behind the Four Orders works and the rather unattractive Swan Yard behind the works of the same name.

84. In the course of the cross-examination of a number of the plaintiff's witnesses, it was suggested by counsel for the defendants that the works were not restored to the premises until sometime in 1946. However, it was acknowledged in closing submissions on behalf of the defendants that there is no material available to substantiate this suggestion. All that can be said is that it is unlikely that the works were restored to the café premises until some time after VE Day on 8th May 1945. The defendants nonetheless place significant emphasis upon the fact that the works were capable of being moved for the purposes of safekeeping during the Second World War.

The 1946 plan of the premises by McDonnell & Dixon

85. Both sides drew attention to plans and drawings of the premises by McDonnell & Dixon in 1946 which shows the layout of the café at that date. In light of the acknowledgement made by counsel for the defendant (noted in para. 84 above, there is no reason to suppose that the Harry Clarke works had not been restored to the café premises by the time these drawings were undertaken. Among the drawings made by McDonnell & Dixon at that time is a drawing of the ground floor plan of the café premises. This shows the location of two window openings in the external wall of the premises overlooking Swan Yard and also four window openings at the location of the Four Orders works. There is nothing in the plan which suggests that there was a double window arrangement with external windows flanked by internal windows of the kind suggested by Mr. O'Connell. This was highlighted by Mr. Slattery, the expert architect who gave evidence on behalf of the plaintiff.

86. However, when it came to the cross-examination of Mr. O'Connell by counsel for the plaintiff, Mr. O'Connell explained that the drawing by McDonnell & Dixon is *"an arrangement drawing, and not a survey"*. He highlighted that the plan was drawn on a scale of

eight feet to one inch, i.e. 1:96. He explained that, at that scale, the designation of the window on the plan is an indication of the presence of a window as a component but that the component could be a complex or a simple component and that such a plan would not give any indication of the complexity of the arrangement. On that basis, he said that the McDonnell & Dixon drawing did not preclude the existence of a double fenestration system of the kind postulated by him. For completeness, it should be noted that this level of detail was not contained in Mr. O'Connell's report (which referred to the McDonnell & Dixon drawings as a *"survey"*) and these details were never put to Mr. Slattery in cross-examination. Nonetheless, since this evidence emerged in the course of cross-examination of Mr. O'Connell, there is no reason to exclude it and I have not been asked to exclude it. Moreover, Mr. Slattery was recalled on the following day and he was not asked to address this issue further. In the circumstances, there is no reason to reject this aspect of Mr. O'Connell's evidence. It therefore seems to me that the 1946 plan of the premises is of limited utility save to identify that, as of 1946, there appear to have been windows in the relevant two openings overlooking Swan Yard and the four openings where the Four Orders windows are now to be found. The bricking up of one of the Swan Yard windows must accordingly have occurred at some stage after 1946.

The 1949 lease

87. While it did not address the Harry Clarke works, it should be noted, in terms of the chronology, that the 1928 Lease expired in 1948 at the end of its 21-year term (which commenced in 1927). On 20th May 1949, a new lease was granted by Ernest Bewley's successors to the tenant for a term of 100 years commencing on 14th August 1948. Neither side has placed any significant emphasis on this lease save to the extent that, as noted in para. 31 above, the defendants argued that, by reason of the fact that the tenant's possession continued under the 1941 lease, the plaintiff is mistaken in seeking to rely on the obligation imposed by the 1928 lease to deliver up possession of the fixtures on the determination of that lease.

The 1970s

88. According to the witness statement of Mr. Larry Ebbs (which was admitted into evidence by agreement of the parties without Mr. Ebbs' attendance as a witness), the Harry Clarke works have not been exposed to the weather or a source of natural light since he started work on maintaining the stained-glass at some point in the 1970s. From 1972 until 1998, Mr. Ebbs worked for a firm known as Irish Stained Glass which had a contract with the tenant for the ongoing maintenance of the stained-glass. Mr. Ebbs said that, in all of his time dealing with the glass, *"there was always something behind all six stained glass works protecting them from the elements. They were always boxed in either with blockwork or some other panelling, and backlit. I do not recall ever having been able to see through them to the exterior".* Mr. Ebbs also explained that it was a simple process to remove the individual sashes from the frame by using a screwdriver to unscrew the hinges that connect the *"sub-frame"* (which I infer is the individual sash) from the *"larger frame"* (which I infer is the window frame). He said that, while great care must be taken in doing so, it is possible to remove the sash without damage to the sash or the frame. He also suggested that there is no visible signs of weathering on the panels. However, contrary evidence has been given on that issue by the plaintiff's expert, Mr. Slattery and it has to be said that, on viewing the 1998 video (discussed below) the exterior side of the Four Orders works appear to show some element of weathering.

The acquisition by the tenant of the landlord's interest

89. In terms of the chronology, it should also be noted that, in the 1980s, the tenant acquired the landlord's interest in the café premises by virtue of two assignments, the first executed on 10th April 1981 and the second on 27th January 1987. Two assignments were necessary because, by the time of the first assignment, the landlord's interest had been split in two. For completeness, it should be noted that, in each case, the assignment was expressly stated to be subject to the 1949 lease (described in each assignment as *"the Sublease"*).

The state of the café premises in 1986/1987 following the acquisition of the tenant by the Campbell Catering interests

90. While Mr. O'Connell has espoused the theory that the Harry Clarke works were housed in internal windows or screens situated parallel to external windows of the same dimensions and overall window design, he accepted, in the course of his evidence, that the six window openings shown on the McDonnell & Dixon plan of 1946 were operating as sources of daylight to the café at that time. However, the position appears to have changed at some point between 1946 and 1972 and this state of affairs then continued into the 1980s and beyond. This emerges from the witness statement of Mr. Ebbs (addressed in para. 88 above) and the evidence of Mr. Patrick Campbell and Mr. Tony Horan on behalf of the defendants. In particular, they were in a position to address the position as of 1986 and 1987.

91. Mr. Campbell is the majority shareholder of the second named defendant. Until his retirement in late 2020, he was also a director of both defendants. Mr. Campbell became involved in the business of the first named defendant when his family company, Campbell Catering, acquired the business of the tenant in October 1986. By that time, the Bewley's Community had become the beneficial owner of the Bewley's business. The Bewley's Community had been established by Victor Bewley as a charitable organisation with the intention that the Community would take ownership of Bewley's Oriental Cafés Ltd. (or Bewley's Cafés Ltd. as it was then known) from the Bewley family and would share any profits the Community made with underprivileged people. Unfortunately, the operation of the business by the Bewley's Community was not a financial success and this left the Community with no alternative but to dispose of the business. Against that backdrop, the business was acquired by the Campbell interests who had, for a long time, been trading in the catering industry through their company Campbell Catering. At a later point, they changed the name of the tenant to its current name Bewley's Café Grafton Street Ltd. In the meantime, in 1987, the first named defendant sold its interest in the café premises to the plaintiff's predecessor in title, Royal

Insurance plc under a sale and lease back transaction and now holds the premises under the lease granted by the latter under that transaction. The terms of that transaction are potentially relevant to the issues in dispute between the parties and it will be necessary, in due course, to consider that transaction in more detail. At this point, I propose to concentrate on the evidence that exists in relation to the physical condition and position of the works at the time of the Campbell Catering acquisition.

92. Mr. Campbell explained that, following the acquisition of the business by Campbell Catering, he played a very active role in the day-to-day management of all of the affairs of the Bewley's business and that, as a consequence, he spent significant time in both the Grafton Street and Westmoreland Street cafés. In his witness statement, Mr. Campbell described how the Harry Clarke works were boxed-in at the time of acquisition of the business such that the works were no longer capable of providing a source of natural light or ventilation to the café.

93. In his witness statement, Mr. Campbell described the then-existing arrangements as follows:-

> *"26. Due to lack of funds prior to our acquisition of the business in October 1986, maintenance and renewal of electrical wiring and light fittings in the Café had been neglected to the extent that they were potential fire hazards. For this reason, in the weeks and months following the acquisition in October 1986, we were obliged to remove some of the Harry Clarke Artworks panels to carryout urgent remedial work to defective wiring and lighting installed behind the stained glass.* ***The presence of panelling behind the Harry Clarke Artworks was there for all to see, behind the four orders of architecture Harry Clarke Artworks on the Westbury side wall, and blockwork behind the Artwork closest to the fireplace on the Swan Yard wall. Behind all of the Artworks you could see a grimy light grey/ off white surface****.*

27. *By operating the original brass fittings (which were rarely used when customers were in the Café) to open the individual panels of the four west wall orders of architecture Harry Clarke Artworks, one could clearly see that the opes behind each Artwork had been completely closed off and boxed in by a hard surface or panelling, set back from the Harry Clarke Artworks frames. There was a turning mechanism whereby you could open the sashes by rotating a handle. Fluorescent lighting tubes had been installed in the cavity behind each panel to illuminate the stained glass. That external weather shield was in place when we acquired the Bewley's business in 1986. The existing panelling was removed for a short period in 1998 to facilitate works and the weather shield was then reinstated in blockwork. The blockwork weather shield was removed and replaced with a clear Perspex screen in 2016 which performed the same weather shielding function but permitted entry of a limited amount of natural light.*

28. ***It was at all times apparent to me that the two Swan Yard Harry Clarke Artworks, were also artificially lit from behind by florescent lights. Natural light was excluded by blockwork or panelling which covered the window opes from behind, prevented daylight from entering, and prevented people in the Café from seeing out**.*

29. *In 1986, (as is the case now) looking at the external face of the Swan Yard wall it was only possible to see one window ope in the wall, to the right hand side. There was no sign of a second window ope in the wall (to the left under the*

bakery hoist). However, it was possible to discern that there may have once been a window ope there in previous years, and that this may have been blocked up. Although I cannot say for certain, I surmise that this may have been done to protect against damage from sacks of flour being hoisted up from Swan Yard to the bakery on the second floor above…

30. In 1986, the second Swan Yard Artwork had not been blocked up by concrete blocks. Instead it was behind some form of panelling which prevented natural light from entering from outside. ***From the outside, I recall that I could see only one window ope (to the right) and that this was protected on the outside by a wire grill. Through the wire grill I could see some kind of opaque panel which may have been timber or painted material. From the interior of the Café it was clear to me that the second Swan Yard Artwork was positioned to the inside of that panelling****.*

31. ***It was not possible to see out through either of the Swan Yard Harry Clarke Artworks because of the blockwork or panelling. It was also apparent to me that, by virtue of being blocked up or boxed in from the outside, there was no possibility of access to outside air, or ventilation for the Café…****"*

(emphasis added)

94. While Mr. Campbell was challenged, in the course of cross-examination, in respect of his description of the works as *"Harry Clarke Artworks"*, Mr. Campbell's evidence as to the physical state of the premises in 1987 was not challenged. There is accordingly no reason to doubt that, at the time of the Campbell Catering takeover, the works were no longer a source of natural light or ventilation albeit that the hopper sashes of the Four Orders works were

capable of being opened in the manner described by Mr. Campbell through the use of the brass hopper mechanism (previously described in this judgment). Mr. Campbell did not say whether the hopper mechanism was still in place on the Swan Yard works at the time of acquisition of the business in 1987. However, the mechanism is visible on those works in the photograph described in para. 12 above.

95. One further aspect of Mr. Campbell's evidence should be noted at this point. As outlined in para. 30 of his witness statement, Mr. Campbell described the remaining clear glass window at Swan Yard as being protected by a *"wire grille"*. As will become clear, this is relevant in the context of Mr. O'Connell's evidence in relation to the clear glass window at Swan Yard (as described further in paras. 125 to 126 below). In this regard, Mr. O'Connell attached a photograph of the exterior of this window in appendix 9 to his report which was taken on 6th April 2021. That photograph does not show a wire grille but shows a grid of 11 metal bars protecting the exterior of the clear glass window overlooking Swan Yard. One would not describe what is depicted in this photograph as a wire grille.

96. Turning next to the evidence of Mr. Tony Horan, he confirmed that he was retained by Mr. Campbell in 1987 as architect in relation to certain works of improvement to the café premises. Mr. Horan explained that it was necessary to install a new fire-escape stairs in the southwest corner of the café and that this necessitated the removal of the Swan Yard works from their then-existing location and their relocation to a newly constructed internal wall behind which the emergency staircase previously described was to be installed. In his witness statement, Mr. Horan stated:-

> *"8. The works commenced in the latter half of 1987. Liam Kelly was project manager. The Harry Clarke artworks were not a significant feature of the overall works at the time. I do not recall very much consideration being given to the four "orders of architecture" Harry Clarke artworks on the Westbury wall*

during the works I was involved in. They may have been cleaned as part of the overall project. I recall that they were boxed in and did not admit natural light or perform any building function in 1987.

9. *The two Swan Yard Harry Clarke artworks needed to be repositioned to allow for the construction of the new fire escape stairs. I remember that before the works, only one opening was visible from the exterior of the Swan Yard side. The other opening had been blocked in over prior to the 1987 works. Save for removing the Harry Clarke artwork, we did not do any works relating to that blocked up opening in 1987. We did not remove the sill or install the blockwork which covers that opening.*

10. *In respect of the remaining opening, in 1987 this housed a separately glazed window to the exterior of the building. The panels of the Harry Clarke artwork were held in wooden sub-frames, which were in turn attached by screwed bottom mounted hinges to an independent frame. That frame was mounted to the wall to the inside of the external window. There was a space between the window and the artwork. The artwork did not perform any structural or other building function - that was done by the independent existing window to the exterior. I do not recall whether natural light was visible through that Swan Yard artwork at the time. I think that all six of the artworks were backlit with artificial light prior to the works.*

...

13. *When it came to moving the Harry Clarke artworks, this was not a particularly significant job. The panels that make up the artworks sat into wooden*

subframes. Those sub-frame were mounted by a hinge and it was possible to remove them by unscrewing them. The panels were not glazed into the masonry. No damage was done to the building in removing the artworks. To my mind, the Harry Clarke artworks were not of any structural importance."

97. For completeness, it should be noted that Mr. Horan also purported to provide evidence as to what constitutes a window. However, Mr. Horan was not proffered as an expert witness and could not properly function as such in circumstances where he was providing factual evidence to the court as to the state of the premises when he examined the building in 1987. In the circumstances, I do not believe that it would be appropriate to have regard to Mr. Horan's evidence as to what he believes constitutes a window. Moreover, the question of what constitutes a window is a matter of law or a mixed question of law and fact which, to the extent that it is relevant, is a matter for me to determine. It is not the role of an expert to express views as to how the court should determine that issue.

98. Under cross-examination, Mr. Horan confirmed that, when the Swan Yard works were removed for the purposes of reinsertion in the new internal wall between the emergency staircase and the café, there was a clear glass window immediately behind one of the works and a bricked-up window opening behind the other (both of which were in the external wall of the premises). Mr. Horan confirmed that there was a space between the clear glass window and the Harry Clarke work. At one point, he suggested that the clear glass window in the external wall and the Harry Clarke work were *"linked"* and that this was done by means of rods connecting the two layers of fenestration. However, when it was put to him that this information was not contained in his witness statement, he responded:-

"No, because I wasn't absolutely certain of that. I did see such rods in the other windows. In that particular one, I couldn't give an absolutely clear recollection as to whether there were rods there or not."

99. Mr. Horan confirmed under cross-examination that, at the time of his involvement in 1987, there were no clear glass windows behind the Four Orders works. He also gave evidence that he saw the hopper mechanism *in situ* on those works. Insofar as the Swan Yard works are concerned, Mr. Horan was initially unsure as to whether the individual sashes were removed separately or whether the sashes were left within the frame and the entire frame was moved to the new internal wall. At one point, he suggested that the whole frame including the sashes was *"moved bodily"* but, almost immediately after, he suggested that it was *"probably just the sashes"*. When he was pressed on this issue, he maintained that it was unreasonable to ask him such a question *"at that distance in time"*. In the course of cross-examination, he was asked whether the frame in which the sashes now hang in the Swan Yard opening is the original frame or a new frame and his first answer was that *"I honestly can't recall"* but then, almost immediately, he gave a further answer to the effect that *"Well, my memory is that that was renewed"*. However, he later suggested that:-

> *"There was no redundant frame on the inner side of the opening after the Harry Clarke inner windows were removed."*

He ultimately confirmed that the frame housing the Harry Clarke glass in the Swan Yard work, when moved to its new location, was the original frame. On re-examination, counsel for the defendants sought to clarify Mr. Horan's evidence as to whether the frame was moved as opposed to the individual sashes. When it was pointed out to Mr. Horan that, at points in the cross-examination, he said that he could not recall what happened, he responded *"I believe that I could recall… Yes, because my clear memory is that when the Harry Clarke artworks were moved to its new position to accommodate the staircase, I can definitively say that there was not an old redundant frame as opposed to sashes left on the inner side of the space between the outer window and that frame"*. Thus, notwithstanding the contradictory answers previously given by Mr. Horan, the ultimate position adopted by him (both to counsel for the plaintiff in

cross-examination and to counsel for the defendants in re-examination) is that both the sashes and the frame of the Swan Yard windows were moved to the new internal wall dividing the new emergency staircase from the café.

100. Furthermore, taking the evidence of both Mr. Campbell and Mr. Horan together, it is clear that, by 1987, there was a double fenestration arrangement in the case of one of the Swan Yard windows with a clear glass window in the external wall and a space between it and the Swan Yard work created by Harry Clarke. It is the defendants' case that this was also the position at the time the Swan Yard works were originally installed in 1928. In support of this proposition, the defendants rely on the evidence of Mr. O'Connell. I will address Mr. O'Connell's evidence in more detail later. At this point, it is sufficient to note that, following two physical examinations of the clear glass window that remains in place at Swan Yard, Mr. O'Connell has expressed the view that this window has been in place since the development works carried out by Ernest Bewley in 1927. Mr. O'Connell is of the view that there is no evidence of disturbance in the mortar or other materials surrounding the window to suggest that it is anything other than the original window dating back to 1927. His evidence is contested by Mr. Slattery and it will be necessary, below, to address the respective positions of the experts on both sides.

The 1998 works

101. According to Mr. Campbell, no work was done in 1987 to the Four Orders works other than some element of cleaning. However, subsequently, in early 1998, the sashes of both the Four Orders works and the Swan Yard works were removed from their frames in order to facilitate refurbishment work to the café. Fortuitously, a video was made of this work at the time and the video was admitted into evidence without objection. The video shows the workmen removing the sashes. It also shows that elements of the hopper mechanism were still attached to some of the sashes. As the sashes are removed, one can clearly see in the video the

external bullnose (i.e. rounded) brick of the western façade of the premises abutting the small yard. In the course of his evidence, Mr. Slattery has highlighted that the frames of the windows are tight against the bullnose brick. In addition, the mortar in the brick joints has the same level of soiling as the mortar in the vertical joint between the window frame and the brick. Mr. Slattery's evidence was that this is indicative that the window frames had been in that location since the bricks were first pointed. On viewing the video, it is difficult to see where a second layer of fenestration could ever have been located on the external side of the window frames housing the Four Orders works. There was simply no space available to accommodate it.

102. The video also shows that there was a semi-translucent screen situated on the exterior of the windows which remained in place following the removal of the sashes. There is no evidence to suggest that this shield was in place at the time of construction of the café premises or at the time when the Harry Clarke works were installed. According to Mr. Campbell, the screen or shield was reinstated in blockwork in the course of the 1998 works. In turn, this blockwork was removed and replaced with a Perspex screen in 2016 which Mr. Campbell says has performed a weather shielding function while, at the same time, permitting entry of a limited amount of natural light. The Perspex screen in question is shown in a photograph contained in Mr. Slattery's report where it is described as modern storm glazing.

103. Mr. Slattery also refers in his report to the fact that the 2016 works were the subject of a planning permission (reference no. 0187/16) issued by Dublin City Council which described the works in the following way:-

> *"Harry Clarke Stained Glass Windows: All block work to the rear of the windows on the west wall will be removed, to reintroduce natural light (albeit limited by the size of the external yard). New wall-washer type metal halide asymmetrical light fittings will be placed at the head and base of the windows to avoid the flatness of the fluorescent*

light source and to augment the luminosity and vibrancy of the colours within the decorative glass."

Conclusions to be drawn from the evidence in relation to the state of the premises as observed in the 1970s, 1980s and 1998

104. A number of conclusions can be drawn from the evidence described in paras. 88 to 103 above. In the first place, whatever may have been the position in 1928 when the Harry Clarke works were first installed in the café, by 1986, the Swan Yard works were no longer sited within the original window openings of the external walls of the premises. In this context, despite the uncertainty shown by Mr. Horan in relation to whether the window frame was moved at that time, there is no reason to doubt his evidence that the Harry Clarke works were mounted in the interior of the café, one next to the surviving window opening now containing a clear glass window and the other next to the spot where a second window opening was formerly to be found. Mr. Horan's evidence is supported by the evidence of Mr. Campbell and there is no contrary evidence on the plaintiff's side to refute it.

105. Secondly, there is nothing to undermine or call into question the evidence of Mr. Campbell or Mr. Ebbs that all of the Harry Clarke works were artificially lit from behind and that, from the 1970s, they were no longer operating either as a source of natural light or ventilation. As noted previously, Mr. Campbell's evidence to that effect was not challenged on cross-examination and Mr. Ebbs' witness statement was admitted into evidence by agreement of the parties.

106. Thirdly, it also emerges from the evidence of Mr. Ebbs, Mr. Campbell and Mr. Horan that all of the Harry Clarke works had some form of boxing or panelling behind them in the period between 1972 and 1998. There is no clear evidence as to the precise nature of this boxing or panelling but there is nothing to suggest that it was of a very substantial nature. It was replaced with some form of blockwork outside the Four Orders works in 1998 (which was

replaced, in turn, with a Perspex screen in 2016). The nature and depth of the blockwork installed in 1998 was not described in any detail. The lack of detail provided in respect of the panelling or blockwork is a matter of concern and I will return to this issue at a later point in this judgment. Mr. Campbell has characterised both the blockwork and the more recent Perspex screen as providing a weather screening function. However, there is no evidence that, absent such boxing, blockwork or screen, the Four Orders works could not themselves have provided a weather screening function for the café. In this context, Dr. Caron, the stained-glass expert who gave evidence on behalf of the plaintiff, drew attention to the way in which stained-glass has, for many centuries, performed a weathering function in ecclesiastical buildings. His evidence in this respect was not controverted. That said, I accept that the blockwork or screen described by Mr. Campbell and Mr. Ebbs would provide a form of weather protection for the very valuable Harry Clarke works. But that does not mean that the works themselves were not always capable of weathering the building. As noted in para. 144 below, Mr. O'Connell, the expert architect proffered by the defendants, accepted that they were capable of preforming that function.

107. Fourthly, to the extent that the issue is relevant, it emerges from Mr. Horan's evidence that, when the Swan Yard works were moved in 1987, they were not moved sash by sash but, instead, were moved within the existing window frames. While Mr. Horan was, at times, quite confused in his evidence on this issue, the ultimate evidence given by him (and, importantly, this was confirmed on re-examination) was that the frames themselves were moved. In my view, that evidence should be accepted notwithstanding the confusion on Mr. Horan's part. As outlined in more detail in para. 99 above, Mr. Horan, on re-examination by the defendants' counsel, was given an opportunity to clarify the position and, at that point, he was quite definite in his response that the frames were moved at that time.

The ways in which the first named defendant has characterised the works prior to the outbreak of the current dispute

108. One other aspect of the history or chronology that requires consideration is the way in which the first named defendant has characterised the works in the past (i.e. prior to the emergence of the present dispute). In particular, the plaintiff has drawn attention to the way in which the works were described as windows in a number of documents including insurance policies and valuations. I do not propose to list every instance identified by the plaintiff. A number of examples will suffice. In an analysis of capital expenditure carried out in November 1987, reference is made to *"restoring stained-glass windows"*. In a schedule attached to a 1991 Irish National policy of insurance in respect of glass, the works are described as *"Harry Clarke stained windows"*. In an architect's report of May 1997, they are described both as *"Harry Clarke windows"* and as *"Stained Glass Windows"*. In a valuation by Alexander Antiques of 6 June 1997 (addressed to the Campbell Bewley Group), they are described as *"Stained Glass Windows"* and, in the covering letter, the valuer notes that the *"windows are rare, unique and purpose made by Harry Clarke for Bewley's"*. In the 1998 consolidated financial statements for the Campbell Bewley Group, the works are described in note 12(ii) as *"artworks owned by the Group, primarily comprising stained glass windows by Harry Clarke…"*. A brass plaque was also erected beside the works in the café with an inscription that refers to stained-glass windows by Harry Clarke.

109. The plaintiff places considerable emphasis on the matters outlined in para. 108 above and the issue therefore loomed large in the cross-examination of the defendants' witnesses. The plaintiff also stressed the way in which Harry Clarke himself described them in his correspondence as *"windows"*. However, it is well settled law that labels of this kind are not determinative. As Carroll J. observed in *Waterford Glass v. The Revenue Commissioners* [1990] 1 I.R. 334 at p. 337: *"The court is entitled to look at the reality of what has been done. Just because the parties put a particular label on a transaction, the court is not obliged to*

accept that label blindly." That approach was subsequently approved by the Supreme Court in *McCabe v. South City & County Investment Co. Ltd.* [1997] 3 I.R. 300 at p. 305. While the approach refers to transactions rather than things, I believe that the same approach must apply here. It is for the court to determine whether the works constitute windows and whether the works should be treated as an inherent part of the fabric of the café building or as a fixture. In my view, the key issue to be determined in this context is whether it can be said that the Harry Clarke works form part and parcel of the café premises demised by the landlord to the tenant under the relevant lease.

110. It has to be said that it is perfectly understandable that, in ordinary parlance. the Harry Clarke works would be described by many people as windows. As I have already observed, to anyone entering the café, they have all the appearance of windows. They are made from glass. They appear to admit light. They are housed in very recognisable window frames and their individual hopper sashes are capable of being opened inwards just like any other hopper sash. But the defendants rely on the fact that, unlike most windows, they are no longer a source of natural light or ventilation and the defendants also claim that they do not perform a weathering function. In reliance on the views expressed by Mr. O'Connell, they also maintain that the works never formed part of the *"skin"* of the café building (as Mr. Slattery has suggested) but, instead, were installed inside the café parallel to external clear glass windows of the same dimensions and layout. If these contentions on the part of the defendants are correct, this would call into question whether the works could truly be said to be part and parcel of the fabric of the café premises such as to attract the application of the approach taken in in *Boswell v. Crucible Steel* (discussed in paras. 19 to 21 above). It is therefore necessary to consider the evidence of Mr. Slattery and Mr. O'Connell in some detail and to attempt to resolve the dispute between them.

The conflicting positions taken by Mr. Slattery and Mr. O'Connell

111. Conflicting positions have been taken by Mr. Slattery and by Mr. O'Connell both in relation to the Four Orders works and in relation to the Swan Yard works. In broad terms, Mr. Slattery has expressed the view that all of the works are an intrinsic part of the fabric of the café. In his report, Mr. Slattery drew attention to the Dublin City Fire Insurance Plan 1935 by Charles Goad which shows the location of four windows at the position in which the Four Orders works are found today. The same plan also shows two windows overlooking Swan Yard. Mr. Slattery expressed the view that it is clear from this plan that all six of the Harry Clarke works functioned as windows and were part of the external envelope of the building and were able to admit natural light into the café. Mr. Slattery also drew attention to the McDonnell & Dixon survey of 1946 which again shows windows in the same position. In para. 1.13 of his report, Mr. Slattery highlighted that the sectional drawing produced by McDonnell & Dixon shows that the opening for the *"windows"* extended through the full depth of the external wall and was able to admit light. As noted in para. 86 above, Mr. O'Connell took the view that the 1946 plan is simply indicative of the existence of windows (where shown) and does not demonstrate that the stained-glass works functioned as windows at the locations shown. His evidence was that the drawing cannot be interpreted as indicating that the openings shown were occupied solely by the stained-glass works.

112. Subsequent to the delivery of Mr. Slattery's report, Mr. Brian O'Connell provided his report on behalf of the defendants. Mr. O'Connell did not refer to the Harry Clarke works as *"windows"*. Instead, he described them as *"stained glass window screens"* or as *"stained glass panels"*. In para. 5.2 of his report, Mr. O'Connell drew attention to the evidence to be given by Mr. Horan to the effect that, in 1987, the surviving external window overlooking Swan Yard was a clear glass window inside which the Harry Clarke work was to be found. As Mr. O'Connell subsequently confirmed in the course of his oral evidence, this was the seed of his

idea that a double fenestration arrangement existed in respect of each of the six Harry Clarke works. His idea was developed and explained in paras. 9.1 to 9.6 of his report. In order to fully understand the case made by the defendants, it is necessary to quote extensively from those paragraphs as follows:-

> *"9.1 The window opes behind the stained glass Orders screens were built up at some time between 1946 and 2016… A survey of the structure in the vicinity of the Harry Clarke Orders window screens demonstrates a window frame rebate in the external reveals consistent with the removal of an original windows, similar to the surviving Swan Yard easternmost window, prior to the opes being built up, where the brick panels to the Orders opes acted as a weathering of the building in lieu of these outer windows. It is clear that at the date of the 1987 lease these outer opes were built up, as the works which included the final reopening of these window opes were not undertaken until 2016 when this was approved by DCC… The original window system in the present case is taken in consequence, together with the evidence of T Horan, architect for the 1987 works, to have been based on a double fenestration in which, by reference to the surviving Swan Yard external window, the inner and outer configuration corresponded as fac-similes, with the Clarke stained glass panels, designed to correspond with this configuration in which no external shadow line crossed the plane of the stained glass panels. This arrangement ensured that the inner stained glass panels were not compromised by any occluding lines and could be read into their integrity. As set out above, the surviving rebate points to original weathering windows in the case of the four Orders window screens which were removed and bricked up some time after 1946 when daylight was replaced with artificial back lighting… The closing abutment of the reflective*

glazed brick is consistent with the external frame detail. The configuration of the rebates is such that the current inner frame is set too deep in the reveal to allow parallel action of the inner and outer fenestration planes. On the assumption of a parallel external inward opening hopper window configuration, as advised and confirmed by the history of the Swan Yard east fenestration referred to above, and by the surviving rebate, taken with the external unweathered condition of the stained glass assembly, the current inner fenestration in the case of the Orders windows would have been closer to the inner face of the wall with an internal reveal of some 150-175mm. On this basis the Orders inner screens are seen having been adjusted in the post 1946 works, possibly in order to use the original outer window rebate to facilitate an artificial back lighting system in lieu of daylight. An examination of the reveals to the Orders Windows (Ionic) demonstrates that the inner reveals were never rendered, but lined, and remain exposed Dolphins Barn brick, to the face of which the inner frame extends…

…

9.3 As set above, the record confirms that in 1927, Harry Clarke, in consultation with McDonnell and Dixon, agreed to provide bespoke stained glass composite panels in the form of inner window screens, to enhance the interior of Bewley's Café Grafton Street, in particular the provision of the Orders and the two complementary Swan Yard panels. The evidence points to the incorporation of external sashes of similar dimensions and profile to the current Orders screens, which were set in parallel to the outside as corresponding fenestration in the case of the Orders. This arrangement is confirmed by surviving frame rebates, and by the outer return reveal of the glazed brick, which clearly abutted the

outer frame. It is confirmed by the architect for the 1987 works, Tony Horan, in the context of the 1987 works , that the Harry Clarke Swan Yard stained glass window screens were moved to their present internal location to facilitate a fire escape stairs and lift installation in the course of these works.

9.4 It is evident from a comparison of dimensions, that the easternmost of the Swan Yard Clarke window screens, now moved back to a light box location on the inner wall of the stairwell, was located parallel as an inner window to this surviving easternmost Swan Yard window: the dimensions on review are consistent with this.

9.5 The use of a series of ventilating hopper sashes, within the context of which the whole composition as conceived, meets the essential requirement of managed natural ventilation as an essential function within the use. It is evident from the photographic record, and from the surviving brass mechanisms preserved on site, that a system of coordinated control, by means of lever arms and pivots, was used to manage the coordinated opening and closing of the upper inner window screen hopper sashes which form an integral part of the Harry Clarke stained glass inner window screens… This would have allowed control of the internal screens to the degree required. As the outer fenestration was removed, except one window to Swan Yard, in respect of which window the stained glass inner window screen was relocated as set out above, it is not possible to say how the corresponding outer hoppers were controlled. This may have been by independent linking arms whereby the hopper sashes operated in parallel, given adequate interstitial space, or these may have been manually controlled on the

basis that, by their configuration, they are rain-proof, and could be left in restricted open positions, in which case draughts could be managed by the coordinated control of the inner (stained glass) hopper sashes. In my view, either system would have worked to manage ventilation in this system of fenestration.

9.6 In summary I conclude that the Harry Clarke stained glass composite fenestration was a double screen coordinated system in which each stained glass panel was incorporated into a hopper sash, each such sash forming a subdivision within the composition, which installation was protected as an inner hopper sash system, paralleled by a co-related outer weathering hopper framing system, which could have been either synchronised, or the outer hoppers manually set, the overall installation competently achieving the aesthetic and functional requirements of the designated café use."

113. In this way, the idea of a double layer of fenestration was introduced into the proceedings. It should be noted that it became evident in the course of Mr. O'Connell's oral testimony that, in arriving at this view, Mr. O'Connell was significantly influenced by what he described as one piece of *"hard evidence"* namely the discovery in 1987 by Mr. Horan of a double layer of fenestration next to the surviving clear glass window overlooking Swan Yard.

114. It is important to keep in mind that Mr. O'Connell's report was delivered subsequent to Mr. Slattery's report. The double fenestration theory was therefore not addressed in Mr. Slattery's report. For that reason, when Mr. Slattery came to give oral evidence at the trial, he sought to address the issue. In his direct evidence, Mr. Slattery expressed the view that he did not think that the clear glass window currently *in situ* overlooking Swan Yard is an *"original window"*. I infer from this that Mr. Slattery's view was that the plain glass window currently

found overlooking Swan Yard replaced a pre-existing stained-glass window of the same proportions in that place. Mr. Slattery also confirmed that he found no evidence of the clear glass window being capable of moving in harmony with a *"close-fitting stained glass window"* as postulated by Mr. O'Connell. He also confirmed that he had never come across an arrangement of windows of the sort *"that's hypothesised by Mr. O'Connell"*. He reiterated his view (previously expressed in his report) that the stained-glass windows were not mere decorative screens but were an integral element of the fabric of the café premises. Mr. Slattery explained that windows do not perform a structural function within a building. The window opening would have a structural value but the windows themselves do not have any structural value. They perform a building function within the window opening. When asked by the plaintiff's counsel to explain how he had come to the conclusion that the stained-glass works were part of the fabric of the café premises, he responded that the works (which he characterised as windows) have a functional role in relation to the building in that *"they provide it with ventilation, they're openable and they allow light into the building"*. He also stressed that windows will *"weather a building"*.

115. In the course of his direct evidence, Mr. Slattery also drew attention to a number of features of the Four Orders works evident from the 1998 video (described above) which he suggested support the conclusion that there was insufficient space available to operate a double layer of fenestration as claimed by Mr. O'Connell. As noted in para. 101 above, he highlighted, in particular, that the outer edge of the window frame was tight against the bullnose brick of the western façade of the café building and he suggested that the mortar in the brick joints is the same mortar and has the same level of soiling on it as the mortar in the vertical joint between the frame and the brick which led him to believe that the window had been in that location since the bricks were first pointed. Mr. Slattery also stressed that the current arrangement of the Four Orders works is different to that shown in the 1998 videos and he suggested that this

may have misled Mr. O'Connell in the view expressed by him in para. 9.1 of his report (quoted in para. 112 above). In particular, he explained that, in contrast to the position shown in the 1998 video, there is now a gap visible behind the works which is now occupied by a wooden baton and LED lighting. In contrast, the 1998 video shows that the stained-glass works were tight against the bullnose brick forming the external envelope of the building.

116. In addition, Mr. Slattery suggested that the outer side of the frame holding the sashes in place in the Four Orders works was painted and carved in a manner that suggested that it was intended to act as part of the exterior of the premises. He also suggested that the video shows a lot of deterioration to the outside of the frames of the sashes. He suggested that the video demonstrated that the mullions were damaged and that there was some weathering on the stained-glass and breakage as well. As a consequence, Mr. Slattery suggested that the works were not as *"pristine* [as] *you might expect if there were a secondary layer protecting them for their entire life…"*.

117. Under cross-examination, it became clear that the photographs taken in Mr. Slattery's report were in fact taken by a colleague and that Mr. Slattery had not been personally present when his colleague's inspection of the premises had taken place. However, Mr. Slattery confirmed that he had been present in the café premises on a number of occasions (albeit unofficially) and had participated in the inspection of the premises that took place (in the presence of the court) in the week before the trial commenced. It was put to Mr. Slattery that, insofar as his evidence as to weathering of the windows is concerned, the condition of the windows as shown in the 1998 video may have been caused by other factors such as the steam and smoke from the café itself. On Day 3, Mr. Slattery conceded that:-

> *"…I think -- the weathering that has occurred in the windows may have occurred for different reasons. I don't know that you can be certain why it was caused. I think one of the statements that was made was that there was no weathering to the windows at all,*

but it's clear from the video that was there was, in fact, weathering, and how that occurred, I suppose we don't know for sure."

118. Mr. Slattery also accepted that there must have been windows in the six openings in question at the time the café opened in November 1927 and that those windows predated the installation of the Harry Clarke works in February 1928. However, Mr. Slattery rejected the suggestion that this supported the existence of a double fenestration arrangement. Mr. Slattery stated that:-

"...the point that I am making to you is that that doesn't mean that they weren't taken out and that the Harry Clarke Windows weren't put in in their place."

119. It appears that Mr. Slattery was correct in suggesting that Mr. O'Connell must have been misled by the current arrangement of the Four Orders works. Thus, when Mr. O'Connell came to give his evidence on Day 4 of the hearing, he made an important correction to one aspect of his report in relation to the Four Orders works in the following terms:-

"This video, it was presented to me after I had completed my report, albeit before I submitted it. Looking at the video, I hadn't picked up the point made by Mr. Slattery that the frame of the window was against the bullnose brick, it was pointed to the bullnose brick, in 1998. I had made an assumption -- or sorry, I had made an assumption that in fact the current position, which shows that frame moved back by about a hundred millimetres, and which is illustrated in my report, I believed that be the position in 1987. So, I'd like to correct it, that in fact, that was the position, I accept that it was not the position in 1987 and that what I put forward in my report in the appendix in fact reflects the position as it was after 1998"

120. Notwithstanding this correction on the part of Mr. O'Connell, he continued to maintain his theory that, even in the case of the Four Orders works, there was a double layer of fenestration with the stained-glass panels situated inside and parallel to the adjoining external

windows. He was asked by the defendants' counsel whether the video changed his opinion and his response was as follows:-

> *"I don't believe it does, Judge, on the basis that when I'm looking at the orders window, I am merely looking at, if you like, a hypothetical position as to whether*
>
> *or not they could have reflected what I will be proposing was the evidence of the original arrangement, and I was -- wished to see whether or not one could argue that it was probable that they did follow that arrangement. Now, in coming -- in dealing with that, I had assumed that it was the secondary frame, or what I would call the inner frame screen or the inner window screen, that in fact had been moved back. I think in the circumstances, with regard to just the plausibility of what could have happened, I think that rather than having moved the original screen back or in, I should say, that what happened was, that the sashes, the hopper sashes being identical on both of the window frames, were transferred from the inner frame to the*
>
> *outer frame. That would make more sense. And I'm not offering that as an attempt to state a fact; I am merely putting it forward as an indication of what could have happened to show the practicability of what I will be putting forward as being the fenestration arrangement."*

121. Mr. O'Connell was extensively cross-examined on this issue. It was suggested to him that there was no evidence to support this theory. In response, Mr. O'Connell referred to the witness statement of Mr. Horan which he suggested constituted *"a piece of hard evidence that defines the original 1927 arrangement by reference to what Mr. Horan found there in 1987…"*. This is a reference to the Swan Yard works and what was found by Mr. Horan in 1987. Insofar as the Four Orders works are concerned, Mr. O'Connell suggested that the window frames seen in the 1998 video were the original outer frames to which the hopper sashes containing the

stained-glass works were moved from their original position in an inner frame (which he suggested must have been removed at some unknown point). His evidence was that:-

> *"…then what I'm suggesting now, just as another way of seeing it, is that the outer frame remained in the outer position and that because the hopper sashes were identical on inside and outside, we know that, they were made exactly the same, the simple thing to do, if the frame was there and you wanted to remove the inner frame to create a deeper ledge, or for whatever reason, you didn't need it any more, so you took it away and you put the hopper sashes into the outer frame."*

122. Mr. O'Connell said that what he was trying to do was to test the only *"real fact"*, i.e. the double fenestration found by Mr. Horan in 1987 to see whether or not *"a reasonable and plausible proposal can be made to demonstrate that in fact what I expect to be the case, that all six windows were made in this double fenestration in the same way, that in fact the other five… follow the Swan Yard model, that's what I am trying to do"*.

123. Mr. O'Connell was also cross-examined extensively on the method by which the double fenestration system would work in practice and, in particular, as to whether the hopper mechanism extended to the exterior layer of fenestration. He suggested that the double fenestration system could have worked in at least two ways. First, he suggested that there may have been connecting rods between the hopper mechanism operating the opening and closing of the inner layer and the equivalent mechanism operating the opening and closing of the hopper sashes of the outer or exterior layer. However, Mr. O'Connell had no firm evidence to support this theory. In response to a question from me, Mr. O'Connell frankly accepted that he could not find any evidence of any surviving vestige of any interconnecting mechanism. He also acknowledged that *"it's only my surmise that there were interconnectors or could have been interconnectors between them"*. Mr. O'Connell also noted that any such interconnecting system (which he surmised might have existed) must have been discontinued at some point

prior to the works undertaken under Mr. Horan's direction in 1987. As noted in para. 93 above, Mr. Campbell gave evidence that, at the time of the acquisition of the Bewley's business by the Campbell interests in 1986, there was a screen or panelling behind the Swan Yard work adjoining the clear glass window overlooking Swan Yard. Any such screen would obviously have operated as a barrier to any interconnecting rods of the kind suggested by Mr. O'Connell. As an alternative to the interconnector theory, Mr. O'Connell suggested that the ventilation system could have worked by opening the bottom sash of the inner layer (i.e. the layer containing the stained-glass works) allowing the bottom sash of the outer or exterior layer to be opened manually. Thereafter, the bottom sash of the inner layer could have been closed and the upper layers opened with the assistance of the hopper mechanism. In that way, the café could have been ventilated. However, this would have required a sufficiently wide gap between the outer window and the inner stained-glass work to enable the bottom sash of the outer window to remain open while the bottom sash of the inner stained-glass work remained closed. There is no evidence as to the extent of the gap that existed between the outer clear glass window and the Swan Yard work witnessed by Mr. Horan in 1987. Mr. Horan described the Swan Yard work next to the clear glass window as having been mounted on the wall next to that window. However, he gave no evidence as to the extent of the gap and Mr. Campbell's evidence did not assist on this issue.

124. Mr. O'Connell was also extensively cross-examined about the terminology used in his report where the works were described as *"stained glass window **screens**"* or *"stained-glass window **panels**"* (emphasis added). It was suggested to him that no opportunity was missed to describe the works in issue in these proceedings as *"anything other than windows"*. Mr. O'Connell responded that he was *"...quite happy to accept them as windows as long as it's understood that they are part of, I think, as I see it, a double fenestration system"*.

125. It became clear in the course of Mr. O'Connell's evidence on Day 4 of the hearing that, subsequent to the delivery of his written report, he had undertaken further work in relation to the Swan Yard windows. In particular, he had caused some opening up of the wall adjoining the surviving clear glass window overlooking Swan Yard. He had made an incision into the external and internal reveals around that window (i.e. the external and internal surrounds of the window) and had taken photographs of the result (although those photographs were not put in evidence on Day 4). Based on this work, he expressed the view that the original skim plaster dating from 1927 is still in place around the clear glass window and that, behind the plaster, there appeared to be undisturbed pointing that had been there for a substantial period of time. His view was that there was no indication that the window had been moved at any stage since it was first installed. In support of his conclusion that the clear glass window is the original window, Mr. O'Connell also drew attention to the iron bars on the outside of the window providing security for the stained-glass. In the course of his direct evidence, he said that there was nothing to suggest that the bars had been disturbed since the window was installed and he suggested that this confirmed his view that what is seen today is the original window installed in 1927. He was cross-examined on the basis that it was highly unlikely that the security bars were installed in 1927. It was suggested to him that the metal bars would have created an intrusive shadow on the stained-glass (when viewed from within the café) which would have been of great concern to Harry Clarke. As noted previously, the evidence of other experts was that Harry Clarke was very concerned about anything that would affect the quality of light passing through his stained-glass works. In response, Mr. O'Connell said that this would not alter his view. He said that the window at Swan Yard was always a weak point in entry to the building and he said that he had:-

> *"...no doubt that that would have been a major concern for the occupiers of the building, and it makes eminent sense that they would put a grille because this*

was the standard way of dealing with it. Now I see no evidence of there having been any kind of a mesh or grating on that window. I don't see any fixings or lugs or anything that would suggest to me, in what I can see, but that's not to say there's nothing there. No, of course I can't be certain."

126. In my view, it is unlikely that the metal security bars were an original feature. Quite apart from the point made by counsel for the plaintiff, the evidence given by Mr. Campbell undermines the suggestion made by Mr. O'Connell that the bars are an original feature dating back to 1927. As outlined in para. 95 above, Mr. Campbell's evidence was that the clear glass window overlooking Swan Yard was protected in 1986 by a *"wire grille".* As I have already observed in para. 95 above, one would not describe the metal bars currently in place in that way. The bars are too substantial to be characterised as *"wire".* It therefore appears likely that the bars are a more modern addition. However, it is important to note that, even if the bars were not part of the original 1927 arrangement, Mr. O'Connell said that he remained of the view that the clear glass window overlooking Swan Yard had been there since 1927. In the course of his cross-examination on Day 4, he said: *"... if, in fact, those bars had not been there, there is still no evidence that that window was put in from the outside. I am merely raising it as a peripheral statement, that in fact the bars show no evidence of having been removed* (sic). *I accept that they may not have been there, it doesn't change the position in relation to the disturbance of the reveals and the permanence or original nature of the windows."* In response, it was put to him that, just as he had failed to notice that the Four Orders works were shown in the 1998 video to be flush against the external western wall of the café, he could be wrong in his conclusion that there was no damage to the reveals of the clear glass window overlooking Swan Yard. Mr. O'Connell rejected the suggestion that there was any logical connection between the two issues and continued to maintain the view that there was no evidence of damage to the reveals.

127. Additional evidence was given in respect of the Swan Yard windows on Day 5 of the hearing. This arose in circumstances where, as outlined above, Mr. O'Connell had carried out further work in relation to the Swan Yard windows since the delivery of his report. In circumstances where Mr. O'Connell had referred to photographs of the uncovering works during the course of his evidence, I indicated at the end of Day 4 that, subject to the view of counsel on both sides, I was keen to see those photographs. Following interaction between both sides, it was subsequently agreed that both Mr. O'Connell and Mr. Slattery should be recalled to deal with the photographs taken by Mr. O'Connell. On Day 5, Mr. O'Connell put five photographs of his investigation into evidence. The first of those photographs (*"photograph 1"*) showed the uncovering of the reveal of the surviving clear glass window next to the exterior face of the window on its eastern side. In his evidence, Mr. O'Connell identified a green coloured area on this photograph as evidence of the original plaster. It should be kept in mind in this context that, previously, on Day 4, Mr. O'Connell had given evidence that the original skim plaster or render on the external wall of Swan Yard still existed in the area around the clear glass window while the area around the blocked-up window opening had been overlaid and re-rendered and he explained that this re-rendering had been continued on to the reveals of the western side of the clear glass window (i.e. the side closest to the bricked up window opening). As noted in para. 125 above, he also said that, behind the plaster, he found *"what looks to me like undisturbed pointing".* On Day 5, he also drew attention to the mortar in the brickwork as shown in the same photograph. The mortar joints between the brickwork form horizontal lines. In turn, these horizontal lines meet a vertical mortar line which Mr. O'Connell identified as the bedding mortar of the window frame. Based on his experience, he expressed the view that the photograph shows the original construction. He emphasised that he could see no sign of anything having been disturbed. However, photograph 1 shows that there is a crack which runs along the vertical line of the mortar of the window frame. This line runs between

that mortar and the adjoining bricks and the mortar joints in the brickwork, all of which are at right angles to the vertical mortar lines. This joint between the vertical mortar line and the brickwork is shown in closeup in the second photograph (*"photograph 2"*). Mr. O'Connell characterised the crack as normal settlement. He explained that it is normal to get a certain amount of movement, even behind plaster, because the plaster itself is porous and this allows the movement of air behind it. In his view, this *"is a typical joint; it's exactly what I would expect to find if the brick was old"*. His view was that, if the frame had been replaced, he would expect to see the mortar cut back and he would also expect to see a new mortar joint.

128. It should be noted that four of the five photographs had been taken after delivery of Mr. O'Connell's report and before he attended court to give evidence. In the course of the hearing, he also took a further photograph (*"photograph 5"*) of the joint on the inside of the window frame where the plaster reveal meets the timber window frame. He then introduced this photograph into evidence on Day 5. Mr. O'Connell gave evidence that there was no indication that the plaster reveal had ever been replaced. His evidence was that it looked like the original plaster reveal and that the amount of soiling and dust suggested age. He also explained that soiling of the joints is usually the method by which age is assessed in this context. His view of the importance of soiling was not challenged on cross-examination. Mr. O'Connell expressed the view that there was no indication that there had been any alteration to the original plaster reveal over its lifetime.

129. Mr. O'Connell also uncovered a section of the timber window frame. This is shown in his photographs 3 and 4. Photograph 4 illustrates the joint between the transom rail of the timber window frame and the hopper sash at the bottom of the window. He identified a number of layers of paint indicating how often it had been painted in the past. He also emphasised that the timber had a patina which he contended is *"quite significant in determining age; in other words, in the degree to which the timber has seasoned and has patinated"*. His evidence in

relation to the patina and its importance in determining age was not challenged on cross-examination.

130. Mr. O'Connell was cross-examined on Day 5 in relation to the crack described in para. 127 above as shown on photographs 1 and 2. Counsel for the plaintiff, in his questioning, made clear that he was not suggesting *"as a matter of certainty"* that the presence of such a crack indicates that there was *"definitely movement"* but he asked Mr. O'Connell whether it was possible that *"what we're looking at there is some re-pointing work which would indicate that there might have been movement?"*. Mr. O'Connell responded that this was possible but that he did not see any evidence of it in this case. He reiterated that the photographs appeared to show original work. He explained that the frame would have been installed after the brickwork had been built and finished and that it would be normal to see a shrinkage joint in those circumstances. He said that he would expect to find a crack of this kind. Nonetheless, Mr. O'Connell accepted that it was possible that the crack was indicative of movement or disturbance. In the context of photograph 5, it was also put to him by counsel for the plaintiffs that, in circumstances where *"there's so much mortar missing"*, one would not be able to say *"with a high degree of probability"* that there had been no disturbance. Mr. O'Connell's response was that, while he took counsel's point, if one looked at the aging and soiling of the plaster, one could not see signs of disturbance to it and he expressed the view that *"whenever it went in, it went in as one operation"*. It should be noted that cross-examination focused on the possibility that there had been movement of the entire window; it was not suggested to Mr. O'Connell that the stained-glass sashes might, at some point, have been moved from within the window frame in the external wall to a new position next to the external wall without any movement of the window frame itself.

131. Mr. Slattery was also recalled to address these photographs. It was strongly put to him by counsel for the defendants that he had not carried out a physical inspection of the clear glass

window overlooking Swan Yard or of the areas around the window which had been uncovered by Mr. O'Connell. His response was that, earlier that morning, he had stood below the window in Swan Yard (which is approximately six feet above ground level) and that he had used the telescopic lens on his camera to view the exterior. Mr. Slattery was asked to consider photograph 1 and the evidence of Mr. O'Connell to the effect that the plaster surrounding the surviving window at Swan Yard is the original plaster installed in 1927. Although this aspect of Mr. O'Connell's evidence had not been challenged on cross-examination, Mr. Slattery disputed this element of Mr. O'Connell's evidence. In his view, the plaster was not part of the *"original construction"* by which I understood him to mean the 1927 construction. According to Mr. Slattery, the render that is seen today was *"brought across the entire elevation"* at the time the second Swan Yard window was blocked up and that the *"plaster is not part of the original construction"*. However, it is difficult to see how Mr. Slattery could have come to that view in the absence of any investigation by him. When pressed on the issue by counsel for the defendants, he appeared to rely on the photograph and he said that: *"We know, not from inspecting this but from the fact of the window having been blocked in, that the render in that area was carried out at a later date. It's not original".* Notably, that response does not address the evidence given by Mr. O'Connell that his investigation revealed two layers of plaster or render on the western side of the clear glass window (i.e. on the side closest to the now bricked up window opening) and that the layer of green plaster or render on the eastern side of clear glass window (as shown to in photograph 1) is likely to be the original plaster.

132. Again, although Mr. O'Connell had not been cross-examined in relation to the evidence of the patina, Mr. Slattery also disputed his evidence in relation to the patina. Mr. Slattery said that if one was trying *"to determine absolutely that this window is in its original location, we could have done paint analysis to determine that patina"*. While this answer may have been intended as a criticism of the investigation undertaken on behalf of the defendants, it also

underlines the fact that no formal inspection or investigation of the Swan Yard works was carried out by Mr. Slattery on behalf of the plaintiff.

133. Mr. Slattery was also cross-examined about photograph 5. Mr. Slattery suggested that, had a second window been located parallel to the external window, one would expect that the plaster had to be re-made in the area shown in this photograph. Mr. Horan's evidence was then put to him that the frame of the Harry Clarke Swan Yard work was mounted to the wall on the inside of the external window. It was suggested to him that this meant that it was not fixed to the reveal. However, Mr. Slattery responded that Mr. Horan did not go so far as to say that it was not attached to the reveal.

134. Mr. Slattery was also cross-examined by reference to the questions which had previously been put, on cross-examination, to Mr. O'Connell in respect of the crack shown in photographs 1 and 2. Mr. Slattery was asked whether he agreed with the proposition put to Mr. O'Connell that the crack *"could be consistent with the window having been either original or some disturbance ... having taken place at that location…?"*. Mr. Slattery responded as follows:-

> *"I think what I would say is, there's been a level of disturbance that's occurred in the rendering of that area and the cracking that's visible may have been caused by that and may have been caused for other reasons. I don't know that it's an expansion crack. I think if you're to -- if you thought that the crack that's running along there was an expansion crack, you would expect to see it maybe against the frame. But certainly, I think it would be hard, looking at that, to say it's evidence, conclusive evidence that there's been no movement and no relocation and nothing has happened in this area. There's a crack there which suggests that, in fact, there might have been."*

135. Mr. Slattery was then asked whether he accepted that the crack might be consistent with no disturbance and might equally be consistent with disturbance. He answered *"yes"* to that

question. Mr. Slattery was then re-examined by counsel for the plaintiff. In the course of his re-examination, he was asked whether *"...if one wanted to say, with a high degree of certainty, there hadn't been movement here, what would you expect to see?"*. His response was:-

> *"Again, you might expect to see the plaster tight up against the frame, but again, that wouldn't always be the case. I mean, in plastering, that area, there'd be a knowledge that there's bead to go on, so it wouldn't necessarily be tight against it, but certainly there is a level of disturbance there, and I wouldn't say that this is in any way conclusive evidence that the window hasn't been moved."*

136. It is necessary to observe at this point that the standard of proof in civil proceedings of this kind is not *"a matter of certainty"* or *"a high degree of probability"* or *"a high degree of certainty"* (to repeat the turns of phrase deployed by counsel for the plaintiff in his questioning of the experts). Nor is it based upon a need *"to determine absolutely"* or on the existence of *"conclusive evidence"* (to repeat some of the language used by Mr. Slattery). Instead, as is well established, the standard of proof is based on the balance of probabilities. That is the standard that I am required to apply in this case both in relation to my assessment of the evidence of the architectural experts and the evidence more generally.

137. In considering the evidence of Messrs. Slattery and Mr. O'Connell, I am urged by the plaintiff to prefer the evidence of the former over that of the latter. It was highlighted that, unlike Mr. Slattery, Mr. O'Connell had failed to note from the 1998 video that the frames of the Four Orders works were tight against the bullnose brick on the western façade of the café building. It was submitted that this demonstrated that, in matters of conservation architecture, *"the powers of observation and deductive reasoning"* of Mr. Slattery were plainly superior to those of Mr. O'Connell. On the other hand, it was argued on behalf of the defendants that Mr. Slattery's evidence should be given less weight than that of Mr. O'Connell. This argument was advanced on the basis that Mr. Slattery had failed to carry out any detailed physical examination

of the Harry Clarke works *in situ* and that he had been unduly combative and unhelpful in the approach he had taken in the course of his cross-examination.

138. There is some substance to the criticisms made on both sides in relation to the expert architectural evidence. It is true that Mr. O'Connell did not identify a very important feature of the physical arrangement of the Four Orders works evident from the 1998 video. As discussed previously, this showed that, contrary to Mr. O'Connell's view expressed in para. 9.1 of his report, the Four Orders works in 1998 were flush against the bullnose brick of the western façade of the café. This aspect of the video evidence has the very important consequence that, based on such an arrangement, there would be no sufficient space for an external layer of fenestration between the Four Orders works and the façade (as had been suggested by Mr. O'Connell in his report). However, I do not believe that this, of itself, means that I should treat the balance of Mr. O'Connell's evidence as unreliable. At the outset of his oral evidence, Mr. O'Connell, very properly, acknowledged his error although he did not abandon his double layer of fenestration theory; instead he adapted it in the manner described in para. 120 above. I also bear in mind that Mr. O'Connell was the only independent architectural expert to conduct any level of detailed physical examination of the works albeit that this was concentrated on the Swan Yard works. Mr. O'Connell is therefore a source of potentially relevant evidence.

139. It is also true that, on several occasions in the course of his evidence on Days 2 and 5, Mr. Slattery was unduly combative in his responses to questions put to him on cross-examination. I do not believe that it is necessary to repeat here the relevant exchanges between him and counsel. It is sufficient to note that, at times, his tone and his responses were combative. On occasion, he gave the impression that he found some of the questions offensive or imbecilic. It is important that experts should give their evidence dispassionately. Their duty is to assist the court. Experts should be aware that it does not assist the process by reacting indignantly to questions. Rather than taking umbrage at the questions, they should attempt to

answer questions posed on cross-examination as fully and helpfully as they can. Cross-examination of experts assists in testing their theories and, very often, in narrowing the areas of dispute that may exist between them.

140. While I must deprecate the combative approach taken by Mr. Slattery from time to time, it would be quite wrong to exclude all of his evidence on that basis. The reality is that, as illustrated by the important evidence derived from his careful consideration of the 1998 video, Mr. Slattery gave some very relevant and helpful evidence which may assist in resolving some of the issues in the case. On the other hand, his evidence in relation to the Swan Yard works is less helpful in circumstances where he did not undertake an inspection and investigation of the kind that would normally be done by an architectural expert in advance of giving evidence.

Conclusions to be drawn from the evidence of the expert architects

141. In assessing the evidence of the expert architects, it seems to me that I should first consider the position in relation to the Four Orders works and then address the position in relation to the Swan Yard works. I take that approach in circumstances where there are significant differences in the physical evidence available in relation to them. As noted above, the evidence in relation to the Four Orders works is that they are sited directly in the window openings in the external western wall of the café premises while, in contrast, the evidence of Mr. Horan in relation to the Swan Yard works is that, in 1987, those works were not sited in the external southern wall of the premises. As previously explained, one of the Swan Yard window openings was observed to be bricked up in 1987 (and remains so today) while the other opening was in 1987 (and currently is) occupied by a clear glass window of similar dimensions and layout as the Swan Yard works. In my view, this is potentially a significant point of distinction between the Four Orders works and the Swan Yard works.

142. Turning first to the Four Orders works, there is no dispute that they were installed in March 1928 some months after the café had opened for business in 1927. It therefore follows

that, prior to their installation in the window openings of the western façade of the café, there must have been some other form of windows in place. As outlined above, Mr. O'Connell has put forward the theory that, when the Harry Clarke works were installed in 1928, they were placed to the inside of clear glass windows which had previously been erected in the window openings and that, in order to ventilate the café, both were then operated in some way together. However, in so far as the Four Orders works are concerned, that theory is speculative. There is no physical evidence to support it. As correctly noted by Mr. Slattery, the 1998 video shows that the Four Orders works were, at that time, flush against the bullnose brick façade. There was no space between the façade and the window frame to accommodate a second layer of fenestration. Furthermore, there is nothing to suggest that the window frames (in which the individual sashes of the Four Orders works sit) were ever moved. They appear to be in their original position. In response to Mr. Slattery's evidence in relation to the 1998 video, Mr. O'Connell had to make the concession recorded in para. 119 above. However, he then constructed a new theory (namely that described in paras. 120 and 121 above) to the effect that, at some unknown point, a decision must have been made to remove what he described as an inner layer of fenestration and to move the sashes containing Harry Clarke's stained-glass from that inner layer to the exterior window frame where they can be seen today. In my view, there is no sufficient basis to support this new theory. It heaps a new layer of speculation on his existing theory as to the existence of a double layer of fenestration in this location. It has all the hallmarks of an attempt to construct facts to fit a theory. That is patently not the approach which should be taken. The view of an expert should be based on known or provable facts.

143. In expressing the view outlined in para. 142 above, I have not lost sight of the reliance by Mr. O'Connell on the fact that, in 1987, Mr. Horan had observed a double layer of fenestration involving one of the Swan Yard works. Mr. O'Connell relied on this fact to suggest that the likelihood was that a similar arrangement was also adopted in the case of the Four

Orders works. To that extent, it might be said that his theory had some factual basis to support it. However, I do not believe that this withstands scrutiny. As noted in para. 125 above, Mr. O'Connell stressed that the windows overlooking Swan Yard represented a weak point of entry to the café. Swan Yard is a rather dark blind alley which, although open to the public, is unlikely to be a place which is much frequented. Quite apart from constituting a weak point of entry, windows in that location in such an alley make it more likely that a vandal could quite easily cause damage to the stained-glass without danger of being observed by a passer-by. A stone thrower could cause irreparable damage to the Harry Clarke works. There may also have been a concern that the works could be at risk from the hoisting of sacks of flour and other supplies to the bakery on an upper floor. Accordingly, one can identify a reason to potentially explain why, at some point, a decision may have been made to adopt a double layer of fenestration at the Swan Yard façade. I will return to this issue in the context of the Swan Yard works but, for now, it is sufficient to note that there is at least a plausible reason why such an approach might have been taken at that location.

144. In contrast, no plausible reason has been advanced as to why a similar approach was required to be taken in the case of the Four Orders works. They face onto a fully enclosed yard to which the public has no access. They therefore were not at the same risk as windows overlooking Swan Yard. It is noteworthy that, when Mr. O'Connell advanced his revised theory in the wake of Mr. Slattery's evidence on the implications of the 1998 video, he surmised (as quoted more fully in para. 121 above) that the original double fenestration arrangement was replaced by what we see in the 1998 video (i.e. a one-layer arrangement) when *"for whatever reason, you didn't **need** it anymore"* (emphasis added). But that begs the question: why was it ever needed? The answer, in my view, is obvious. It was not needed. Given that the window openings looked onto a fully enclosed yard, there could not have been a concern about security or vandalism. In addition, there is no evidence that the Four Orders works were not capable of

operating as windows in order to weather the interior of the café and to permit both light and ventilation to enter the café. There is nothing to suggest that they are not as watertight as the clear glass window that survives overlooking Swan Yard. As previously noted. Dr. Caron has highlighted how, in ecclesiastical settings, stained glass windows have, for centuries, provided both weathering and light. Furthermore, on Day 4, it was put to Mr. O'Connell in the course of cross-examination that the second layer of fenestration was an *"unnecessary barrier between windows* ***which are perfectly capable of weathering the building****"* (emphasis added) to which he responded: *"I don't disagree with any of that…".*

145. In so far as ventilation is concerned, the Four Orders works were plainly designed with that function in mind. They were not designed to be purely ornamental. That is readily apparent from the physical evidence that continues to exist. They are made up of hopper sashes designed to open inwards to admit the air. They were also fitted with a sophisticated hopper mechanism which enabled the top three sashes to be opened with ease by any member of staff of the café and without having to stand on a ladder or a chair to do so. Their design therefore suggests that they were intended to connect with the outside of the café in the same way as many clear glass or embossed glass windows that are commonly seen in the built environment.

146. Moreover, any double layer of fenestration of the kind postulated by Mr. O'Connell would complicate the use of the Four Orders works as a source of ventilation. Mr. O'Connell struggled to explain how the system would work. As previously noted, he speculated that there were two possible ways in which that might have been achieved. But there is no supporting evidence to suggest that either of these theories has any credible basis. Mr. O'Connell did not say that he had ever encountered such systems or even that he had read about them in any relevant literature. It is true that Dr. Caron, in his evidence, had acknowledged that, in the last 40 years or so, stained glass has sometimes been given an additional layer of protection by adding a sheet of sheet of storm glazing on the external surface of the stained glass. However,

that is quite a different arrangement to that suggested by Mr. O'Connell. He has not suggested that there was an additional layer of glazing but an additional layer of windows similar to that observed by Mr. Horan on the Swan Yard side of the café. Tellingly, there is no equivalent evidence in relation to the western façade. There are no photographs depicting external clear glass windows in the western façade. Likewise, as noted in para. 123 above, there is no surviving evidence of any connecting rod system notwithstanding that, according to Mr. O'Connell the surviving clear glass window at Swan Yard, is the original installed in 1927. Had such a connecting mechanism existed, one would expect some evidence (such as nail or screw marks) to survive in the timber frames or sashes of the clear glass Swan Yard window and its internal equivalent containing the Harry Clarke stained-glass work. In this context, it appears from the evidence of Mr. Horan that it is probable that the frame of the latter is the original frame. The lack of any evidence of screw or nail marks in either of these frames is therefore very striking.

147. Given their artistic value, one could speculate that the second layer of windows postulated by Mr. O'Connell in this location might have been considered necessary in order to protect the Four Orders works themselves from the weather. In this context, on the basis of the evidence of Mr. Ebbs and Mr. Campbell, it is true that the works have not been exposed to the weather since, at least, the 1970s. Their unchallenged evidence was that from 1972 (in the case of Mr. Ebbs) and from 1986 (in the case of Mr. Campbell) up to 1998, the works were enclosed in some form of external boxing or sheeting albeit that neither of them provided any great level of detail as to the nature of that arrangement. However, there is no evidence that any such arrangement was in place in 1928 when the Four Orders works were first installed. No external boxing of any kind is shown on the McDonnell & Dixon drawings of 1946 which continue to show unimpeded window openings at the location of the Four Orders works. Moreover, there is evidence which suggests that they were, in fact, exposed to the elements for some time. Mr.

Slattery has given evidence to this effect. While the defendants have, as outlined in paras. 117 to 118 above, challenged this evidence, I do not believe that the evidence can be dismissed. Mr. Slattery's evidence was that the outer side of the frames of the Four Orders works had been painted and carved in a manner that suggested that they were intended to act as part of the exterior of the premises. That element of his evidence was not seriously contested by the defendants. What was challenged, on cross-examination, was his view that the 1998 video showed evidence of weathering on the exterior facing side of the frames and sashes of the Four Orders works. In circumstances where he had not inspected the works in question, he was also challenged on his ability to give evidence about their condition at all. However, in light of the existence of the 1998 video, it seems to me that Mr. Slattery was entitled to express a view based on the video. The video is 36 minutes long. While it is not all contiguous, it very helpfully shows the workmen removing many of the sashes making up all six of the Harry Clarke works. At various points during the course of the video, one can see the external sides of some of the Four Orders sashes in relatively *"close-up"* shots. Examples are to be found at 7 minutes 35 seconds in, 17 minutes 35 seconds in, 18 minutes 20 seconds in and 24 minutes 58 seconds in. In my view, the video provides a very tenable basis on which an expert could express a view as to the condition of the Four Orders works in 1998. One can see from the video that there are marks on the external side of the frames of the sashes which Mr. Slattery said were consistent with weathering. It is true that he, very properly, conceded that the signs of weathering could have been caused by other factors such as the steam and smoke from the café itself and that *"we don't know for sure"* how the weathering occurred. Nevertheless, on the balance of probabilities, it seems to me that the existence of this weathering on the external side of the Four Orders works supports the view that the works were exposed to the elements for some time. This aspect of Mr. Slattery's evidence was not addressed in any detail by Mr. O'Connell (who said surprisingly little about the video). There is thus no contrary evidence before the

court. On the basis of the video, the condition of the external side of the sashes appears more *"weathered"* than the internal side notwithstanding that the internal side would likely have been more exposed to the smoke and steam generated within the café. Given that the exterior of the frame is shown in the video to be flush to the bull-nosed brick of the exterior of the western wall of the café, it seems that the most plausible explanation of the weathering seen in the video is that the Four Orders works formed part of the external skin of the building. Thus, while other causes may have contributed to the weathering, there is no sufficient basis to suggest that external weathering from the elements did not occur.

148. Moreover, an elaborate additional layer of external windows of the kind postulated by Mr. O'Connell would hardly have been necessary to provide weather protection for the stained glass works. Had there been a concern about such weathering (and there is no evidence that there was such a concern) a much simpler solution would have been to put in place the kind of boxing or screening that was subsequently put in place at some point before Mr. Ebbs' arrival on the scene in 1972. That would have been a much simpler and less complex arrangement. Admittedly, it would very likely have interfered with the ability of the works to continue their ventilation function but the importance of that function appears to have dissipated over time given the installation of the boxing/screening described both by Mr. Ebbs and by Mr. Campbell.

149. For completeness, I should make clear that there is no evidence that the boxing/screening observed by Mr. Ebbs and Mr. Campbell was, in fact, erected to provide weathering for the stained-glass works. Any such suggestion is no more than speculation. The boxing/screening may have equally been prompted by the decision made at some unknown point to provide backlighting for the works. It may well have been considered necessary or desirable to install the boxing to protect the electrical connections from the elements or to reflect the light back into the interior of the café.

150. In light of the matters considered in paras. 142 to 149 above, I have come to the conclusion that, on the balance of probabilities, the Four Orders works were installed in 1928 in the position shown in the 1998 video and that they operated as windows at that time admitting light and ventilation to the café and also weathering the café from the elements. On that basis, they formed part of the external skin of the café building at that time. I can see no plausible basis upon which a conclusion could safely be reached that, on the balance of probabilities, there was a double layer of windows at the location of the Four Orders works. I therefore reject Mr. O'Connell's theory in so far as these four works are concerned.

151. I now turn to the Swan Yard works. As noted in para. 141 above, the evidence available in relation to them is different. In contrast to the Four Orders works, there is no physical or other evidence that they were ever sited in the external wall of the café building overlooking Swan Yard. That said, it appears that the original intention was that the Swan Yard works would be placed in the window openings overlooking Swan Yard. This emerges from the reference in Harry Clarke's letter of 13 April 1927 (addressed in para. 47 above) to the *"filling of the windows* ***looking on Swan Lane****"* (emphasis added). However, that letter was written at a relatively early stage in the process of engaging Harry Clarke and before the stained-glass works were actually commissioned. As noted in para. 81 above, the probability is that the Swan Yard works were not installed until some point between 13th March 1928 and 30th April 1928. There is no record of the detail of the installation of the Swan Yard works or photograph of them in place following their installation. Two openings in the Swan Yard wall are shown in the McDonnell & Dixon drawings of 1946 but, as Mr. O'Connell stressed in the course of his evidence, those drawings merely demonstrate that there are window openings in that wall; they do not demonstrate that the openings were occupied by the Swan Yard stained-glass works and they do not preclude the existence of a double fenestration system as postulated by him. Conversely, the drawings do not establish that such a system was, in fact, in place. But there is

evidence which establishes that such a double fenestration system was in place in 1987. Both Mr. Horan and Mr. Campbell were able to give first-evidence that, at that time, one of the window openings previously situated in that wall had been bricked up and the other opening was occupied by a clear glass window of the same dimensions and layout as the stained-glass Swan Yard works. Their evidence was that one of the Swan Yard works was mounted to that wall on the interior side of the clear glass window while the other was mounted in a similar position alongside the bricked-up window opening. While it is clear that the bricking up of one of the windows must have occurred after the 1946 drawings were made by McDonnell & Dixon, there is, in truth, no physical or other evidence to demonstrate that the double fenestration arrangement in relation to the second window does not date back to its installation in 1928. No one gave evidence in relation to the physical position or condition of the Swan Yard works prior to 1987.

152. While two architects have given evidence in relation to the Swan Yard works, only one of them (namely Mr. O'Connell) has undertaken any physical investigation at the location of the window openings overlooking Swan Yard. Mr. O'Connell carried out the investigation discussed in paras. 125 to 130 above at the location of the window opening in which the clear glass window is housed (and was observed to be housed in 1987). Based on that investigation, he concluded that the clear glass window that can currently be seen in the external wall of the café overlooking Swan Yard is the original window in that location and that there is nothing to indicate that there was movement of a window at that location.

153. While Mr. O'Connell's evidence in relation to the clear glass window was contested by Mr. Slattery and while it was challenged on cross-examination, I do not believe that there is any sufficient basis to reject Mr. O'Connell's evidence at least in so far as the frame of the clear glass window is concerned. One of the difficulties with Mr. Slattery's evidence in relation to the Swan Yard works is that he has conducted no opening up works himself and his only

inspection of the opening up works conducted by Mr. O'Connell was that described in para. 131 above. It will be recalled that, on the morning of Day 5, he had merely stood in Swan Yard approximately six feet below the window and used the telescopic lens on his camera to view the exterior. Other than considering Mr. O'Connell's photographs, he never carried out any inspection of the opening up works on the interior side of the window. The fact that he did not carry out any proper inspection undermines the weight of his evidence in response to Mr. O'Connell on this issue. Quite apart from that consideration, Mr. Slattery's evidence on Day 5 was lacking in any sufficient level of detail to undermine the evidence of Mr. O'Connell. As outlined in para. 131 above, he did not explain why he was of the view that the render that is seen today was brought across the entire elevation when one of the window openings was bricked up. He did not address Mr. O'Connell's evidence in relation to the green layer of render or plaster shown in photograph 1. He also did not address Mr. O'Connell's evidence in relation to the importance of soiling and dust as indicia of age. That is, perhaps, unsurprising given that he had previously on Day 2 of the hearing relied on soiling in the context of his evidence in relation to the conclusions to be drawn from the 1998 video with regard to the Four Orders works. It is true that, as recorded in paras. 127 and 130 above, photograph 1 shows a crack in the mortar surrounding the clear glass window which Mr. O'Connell acknowledged might possibly have been caused by movement. But Mr. O'Connell stressed that he did not see any evidence of movement in the location of the window. In my view, nothing was put to him which undermined the explanation given by him in his evidence (as summarised in paras. 127 and 130 above) that the likely cause of the crack was natural settlement. He provided a perfectly rational and plausible explanation for the existence of the crack and expressed the professional view that the joint was exactly what he would expect to find if the brick was old. In this regard, he explained that the window frame would have been installed after the brickwork had been put in place and that it would be normal to see a shrinkage joint in those circumstances. That

view must also be seen in light of his other evidence (which again is both rational and plausible) that, had the window frame been moved, he would have expected to see the mortar cut back and to see evidence of a new mortar joint. I accept Mr. O'Connell's evidence to that effect. Contrary to the submission made by counsel for the plaintiff, I do not believe that Mr. O'Connell should be regarded as an unreliable witness merely because he failed to notice the position of the Four Orders works shown in the 1998 video to be flush against the bullnose brick of the external side of the western wall of the café. There is nothing to suggest that Mr. O'Connell overlooked any aspect of the condition of the mortar or render/plaster in the reveals or surrounds of the clear glass window at Swan Yard. His evidence in relation to that issue was measured, authoritative and very helpful. In these circumstances, I believe that Mr. O'Connell's evidence in relation to the outcome of his physical investigations at this location is to be preferred over that of Mr. Slattery.

154. However, I am not sure that Mr. O'Connell's evidence is sufficient to establish that there was no movement of the stained-glass works at Swan Yard at some point after their installation in 1928. Although Mr. O'Connell gave his evidence and was cross-examined by reference to the issue as whether there was movement of the window itself, it seems to me that the evidence can only establish that there was no movement of the window frame. It is clear from the evidence that it would be movement of the window frame that would likely require a cutting of the surrounding mortar and the render/plaster which should be observable today. There is no basis to think that movement of the individual sashes sitting in such window frames would require any intrusion into the surrounding mortar or render. Having seen the 1998 video showing the way in which the stained-glass sashes of the Harry Clarke works could be removed from the frames without any damage to the window reveals or surrounds, one could not exclude the possibility that the Swan Yard works were originally installed in the window frames overlooking Swan Yard and that, at some, unknown point thereafter, the sashes containing the

stained glass were removed from the window frames and transferred to mock windows in the locations observed by Mr. Horan and Mr. Campbell in 1987.

155. Thus, if the burden of proof in relation to this issue lay on the defendants, the evidence of Mr. O'Connell might not be sufficient to prove that the stained-glass work never formed part of the external skin of the café building. I do not, however, believe that the defendants bear the burden of proof on this issue. While the second named defendant has counterclaimed that it is the owner of the works, it is the plaintiff who has alleged that the Swan Yard works constitute windows that form part and parcel of the café building. As part of that case, the plaintiff has contended that the Swan Yard stained glass works were installed in 1928 in the window openings overlooking Swan Yard. Thus, for example, Mr. Slattery has expressed the view in para. 2.5 of his report that: *"I conclude that the Harry Clarke stained glass windows were not designed as decorative screens or ornaments but as integral parts of the fabric of the structure. The windows are* (sic) *integrated into the walls of the original structure… "*. The plaintiff must therefore prove that case. Just as the evidence of the 1998 video was inconsistent with the double fenestration theory advanced by the defendants, the physical evidence of the existence of a clear glass window at Swan Yard as seen in 1987 is plainly inconsistent with the case that the plaintiff seeks to make that, in 1928, the stained-glass work was placed in the widow opening now containing the clear glass window. Thus, it seems to me that the plaintiff bears the burden of proving on the balance of probabilities that the clear glass window found in 1987 was not part of the original installation and that the Swan Yard works were in fact fitted in the window openings in the Swan Yard wall in 1928.

156. The difficulty facing the plaintiff is that, as I have previously sought to explain in paras. 37 and 38 above, there are significant gaps in the evidence, having regard to the fact that almost a century has passed since the works were commissioned, created and installed. There is no one available to give first hand evidence about what occurred when Harry Clarke finally

confirmed to his client that the works were completed and when the works of installation subsequently took place. Other than referring to the last of the Four Orders works being *"erected"* into position in his letter of 2nd March 1928, the contemporaneous correspondence of Harry Clarke throws no light on the detail of what was involved in installing the works. The problem is compounded by the lack of any records of the landlord or the tenant (or the then architects involved in the development of the café building) relating to the detail of the work carried out on the floor or in the walls of the café when the stained-glass works arrived on site. There are no site minutes or work records of any kind still extant. Nor is there any correspondence or other written record of any interaction between the landlord and the tenant at that time other than the board minutes described in para. 68.

157. The plaintiff nonetheless seeks to rely on a combination of factors to suggest that the stained-glass works must have been installed in the window opening in Swan Yard. Among the factors highlighted by the plaintiff is the fact that there is no hint in any of the Harry Clarke correspondence that the Swan Yard works were to be installed parallel to clear glass windows. That is certainly true. But, as I have already outlined, the correspondence provides no detail in relation to what was involved in the installation of any of the stained-glass works. While the correspondence does speak of the works as *"windows",* that does not necessarily mean that the parties to the correspondence always had external windows in mind. As I have said at the outset of this judgment, even today (when the works are no longer providing a source of natural light or ventilation) it is perfectly understandable that they would be referred to as windows. They have all the appearance of windows. Another factor highlighted by the plaintiff is the way in which the McDonnell & Dixon drawings of 1946 show window openings at this location. However, as I have previously observed, that does not demonstrate that the stained glass works occupied those openings in 1946. The openings overlooking Swan Yard could equally have been occupied by clear glass windows.

158. The plaintiff also stresses that the Swan Yard works were designed to open inwards and provide ventilation and that they were fitted with the hopper mechanism described earlier to assist with that process. That seems to me to be a potentially significant factor. The question arises as to whether it is plausible to think that a different approach might have been taken by the parties in 1928 in respect of the Swan Yard works, on the one hand, and the Four Orders works, on the other. After all, both of them were designed to function in the same way. If the Four Orders works were installed in the window openings of the western wall of the café, why would a different approach have been taken in respect of the Swan Yard works?

159. At first sight, it might appear to be implausible that a different approach would have been taken in 1928 in the case of the Swan Yard works to that taken in relation to the Four Orders works. Indeed, that is the consideration that underlies Mr. O'Connell's thesis that a double layer of fenestration was adopted in both cases. For the reasons which I have outlined in paras. 142 to 149 above, I have come to the conclusion that the Four Orders works were installed directly in the four window openings in the western wall. The question arises as to why the parties might have decided to install the Harry Clarke works directly in openings on that side of the café but to take a different approach in relation to the Swan Yard windows. This question is particularly relevant given the obvious difficulty that may have arisen with ventilation in the event that a double layer of windows had been employed. The difficulty in trying to co-ordinate the operation of the two window layers has already been outlined in para. 123 above. At minimum, the existence of those practical difficulties suggest that such a system would have been seen as an unattractive solution.

160. So, why then might the parties have decided to put a double layer of windows in place at Swan Yard but not in the western wall? If there is no possible reason why they might have decided to do so, that would support the plaintiff's case that it is implausible to think that the double layer of windows observed in 1987 was adopted in 1928. But, in my view, there is at

least one possible reason why the parties may have decided to take such a course. In para. 143 above, I have already drawn attention to the fact that the Swan Yard window openings overlook a rather dark blind alley which is unlikely to be much frequented by the public. In those circumstances, stained-glass windows in those openings would not only be at risk from a security perspective but would also be at risk from vandalism. As I have previously mentioned, a stone thrower could cause irreparable damage to the stained glass without much risk of the act of vandalism being seen by any passer-by. In addition, there may have been a concern about the risk of damage to the stained glass from the sacks of flour being hoisted to the bakery on the upper floor. There may even have been a concern about the ingress of flour dust from the sacks of flour. There was certainly time for any concerns of that nature to have manifested themselves before the Swan Yard works were installed. It should be recalled in this context that, by the time the Swan Yard works came to be installed in March or April 1928, the café had already been operating for a number of months. For the reasons previously explained, these considerations were wholly absent in the case of the Four Orders works but they could have existed in the case of the Swan Yard works. The retention of the existing glass windows at the Swan Yard side of the building may have been perceived to provide some measure of protection to the stained-glass works. Of course, that purpose might also have been secured by putting a security grille or security bars in place. However, such a solution may have been more likely than the retention of the clear glass window to cause the type of intrusive shadow highlighted by counsel for the plaintiff in the course of his cross-examination of Mr. O'Connell (as discussed in para. 125 above).

161. As I have already noted, such a double fenestration system would likely have created practical difficulties for the ventilation function of the Swan Yard works if not wholly impeded that function. On one view, that supports the plaintiff's case that it is implausible to think that such a system was employed in 1928. However, the fact remains that, in 1987, the Swan Yard

works were not providing any ventilation function to the café at that time. If the ventilation function was not considered necessary at that time, why would the position have been any different in 1928? Again, the fact that there was a gap of almost a year between the opening of the café and the installation of the Swan Yard works in 1928 may be relevant. That gap in time would have given some opportunity to assess whether ventilation was important at this location of the café or whether there were other factors potentially in play that outweighed the need for it there (such as the issue of security previously discussed or indeed the ingress of flour dust from the haulage of the sacks of flour to the bakery above). As discussed in para. 144 above, such considerations were entirely absent in the case of the Four Orders works and provide a plausible explanation for why different approaches may have been taken at the two locations in issue.

162. I have not lost sight of the fact that, in the photograph discussed in para. 12 above, the hopper mechanism can be seen to be fitted to the Swan Yard works at that time. I have previously observed that the photograph would appear to have been taken in the 1970s or early 1980s. It might be thought that this would suggest that the Swan Yard works may have been functioning as conventional windows at that time admitting ventilation to the café. It may well have been the case that they did provide some level of ventilation prior to being boxed in (as described by Mr. Campbell). However, I do not believe that the presence of the hopper mechanism is sufficient to infer that the Swan Yard works functioned as a direct source of ventilation either at the time of the photograph or in 1928. As the 1998 video demonstrates, the hopper mechanism was still fixed to the Four Orders works in 1998 notwithstanding that, as the evidence of Mr. Campbell makes clear, they were no longer functioning as a source of ventilation at that time. Moreover, based on the opinion of Dr. Caron and Ms. Costigan, the hopper mechanism was likely taken into account by Harry Clarke in his design of the stained-glass works. Dr. Caron went so far as to express the view that the mechanism is part of the

fabric of the works and that it is a shame that it has been removed. It is hardly surprising in those circumstances that the mechanism would not be removed even in circumstances where the Swan Yard works provided either no ventilation at all or only provided limited or compromised ventilation.

163. I appreciate that the factors discussed in paras. 160 to 162 above involve speculation. However, the problem from the plaintiff's perspective is that the case it makes that the Swan Yard works were installed in 1928 in the window openings of the external wall also involves a significant level of speculation. Moreover, the factors which I have identified take account of the particular features of the Swan Yard location and, very importantly, they also take into account what was observed in 1987. The evidence as to what was observed in 1987 involves no element of speculation. The reality is that there is no evidence before the court which provides a reliable basis on which to conclude, on the balance of probabilities, that the double window arrangement observed in 1987 was not also in place in 1928 when the Swan Yard works were installed. It is possible, as the plaintiff has urged, that the double fenestration system observed in 1987 was not installed until some time after 1928. But there is no evidence which confirms this. It is, at least, equally possible that the system was installed at the time of the original installation of the Swan Yard works in 1928. While I have been able to conclude that it is implausible that such a system was used in the context of the Four Orders works, the factors discussed in paras. 160 to 161 suggest that the employment of such a system on the Swan Yard wall cannot be dismissed as implausible. In those circumstances, I do not believe that it is possible to hold that the plaintiff's postulated version of events is the more probable. There is no sufficient basis in the evidence to do so. It follows that the plaintiff has failed to establish on the balance of probabilities that, in 1928, the Swan Yard works were installed in the window openings in the wall overlooking Swan Yard.

Determination of the issues

164. In light of the matters discussed and conclusions reached in paras. 142 to 150 above, I next turn to consider the answers to the questions posed in para. 36 above on the basis that, at the time of their installation in 1928, the Four Orders works were installed in the position shown in the 1998 video and that they operated as conventional windows at that time admitting light and providing ventilation to the café and also weathering the café. They were therefore part of the external skin of the café at that time. In contrast, having regard to the matters considered and findings made in paras. 151to 163 above, I will, in the case of the Swan Yard works, proceed to address those questions on the basis that the works were installed as part of a double layer of windows of the kind observed by Mr. Horan and Mr. Campbell in 1987. While they also provided light to the café, and while, in 1928, they may have provided some level of ventilation (given that they were capable of being opened), they could not be said to be part of the external skin of the café and they would appear to have made no contribution to the weathering of the café.

At the time of their installation in 1928, did the Harry Clarke works become part and parcel of the café premises?

165. I turn first to the Four Orders works. What I say now in relation to them must be read in conjunction with the assessment previously made by me in paras. 142 to 150 above and the other findings made by me at earlier points of this judgment. As noted in para. 164 above, the Four Orders works operated in the same way as conventional windows and must, in my view, be considered, on their installation in the western façade, to have constituted windows. In this context, I do not believe that I need to refer, in any detail to the case law which was cited to me as to what constitutes a window. It is clear that there is no standard definition of a window. Each case must be decided on its own facts. In *Holiday Fellowship Ltd. v. Hereford* [1959] 1 W.L.R. 211, Lord Evershed M.R., at p. 215, indicated that, on a question of this kind, a court

should apply the ordinary standards of common sense. The Four Orders works, at the time of their installation, had all of the usual indicia of what would commonly be accepted as a window. They were made of glass. They were housed in a frame that is readily recognisable as a window frame. They were installed in openings in an external wall which had been created by the removal of earlier windows which they replaced. They were capable of passing light from the exterior to the interior of the café and they were capable of being opened to allow the external air to enter the café and to permit smoke and odours within the café to dissipate to the exterior. When closed fully or even partially, they also provided protection to the café from the elements. I do not go so far as to suggest that all these indicia must always be present before a finding can be made that an object is a window. But the existence of these indicia very strongly supports the conclusion that the Four Orders works constituted windows at the time of their installation.

166. Crucially, once they were installed in 1928, the Four Orders works formed part of the external shell of the building along with the walls and any doors to the exterior. Had there not been windows in the four openings in question, the café would have been left with gaping holes in the walls. Without windows in that location, the premises leased to the tenant would have been incomplete. To paraphrase Willes J. in *Climie v. Wood,* the windows were essential to the convenient use of the leased premises. On that basis, it appears to me that the Four Orders works, once installed, became part and parcel of the premises. However, as noted in para. 21 above, the defendants have highlighted that the Four Orders works were not part of the original construction of the café and they submit that the Four Orders works therefore cannot be said to fall within the parameters of the *Boswell v. Crucible Steel* principle addressed in paras. 19 to 20 above. It will be recalled that, in that case, both Scrutton and Atkin L.J.J. placed emphasis on the fact that the glass walls in issue were part of the original construction of the warehouse. The defendants rely in particular upon the explanation given by Scrutton L.J., at p. 122, of the meaning of a fixture namely that it *"cannot include a thing which forms part of the original*

structure of the building. It must be regarded as confined to ***things which have been brought into the house and affixed to the freehold after the structure is completed****"* (emphasis added). The defendants submit that the Four Orders works were brought onto the café premises in March 1928 after the building works were completed in April 1927 and that they must accordingly be characterised as fixtures. On that basis, the defendants argue that they cannot be considered to be part and parcel of the premises.

167. In my view, the language used by the members of the court in *Boswell v. Crucible Steel* must be seen in light of the facts of that particular case. On the facts, the plate glass walls in issue had been installed as part of the original structure of the house and it is entirely understandable that the court emphasised that element of the facts. It provided a readily identifiable means of distinguishing the plate glass walls from items which were brought on site and fixed to the premises subsequently. Thus, there could be no doubt, for example, in the present case, that the original windows installed in the course of the construction works in 1927 would likewise have been treated in the same way. Crucially, the court in *Boswell* was not concerned with a situation where some essential element of the original premises was replaced at a later time. Such an element is therefore not brought onto the premises as an addition to the original structure but in substitution for the original element. It seems to me that such an element is as much a part of the original structure as the element which it replaced and cannot logically be classified any differently. As I observed in para. 21 above, I do not believe that *Boswell v. Crucible Steel* would have been decided any differently if the original plate glass walls installed as part of the construction of the warehouse had been destroyed in a gas explosion and had subsequently been replaced. In my view, the replacement glass should be considered to be as much a part of the fabric of the warehouse building as the original glass and would fulfil precisely the same function.

168. I take the same view in relation to the Four Orders works. They were installed in the café premises not as additions to the original structure but in substitution for what had previously been an inherent element of the fabric of the building – namely the windows in the western wall. On that basis, it seems to me that they must be treated in the same way as the windows they replaced. In this context, I do not believe that it makes any difference that the Four Orders works were not only windows but also works of art. The fact is that they were installed as windows with all of the characteristics described in para. 165 above. The case law cited to me does not suggest that any exception arises merely because windows are of an unusually high quality. The case law makes no distinction between windows or doors which have artistic merit and those which have none. Thus, once they were installed, the Four Orders works became part and parcel of the premises in the same way as any other window which functions as a part of the external shell of those premises.

169. That does not dispose of all of the defendants' arguments. The defendants also submit that the fact that the sashes containing the stained-glass were removed for safe keeping during the Second World War and again in 1998 demonstrates that they were both removable and movable without causing any damage to the café premises. On that basis, the defendants contend that they cannot be regarded as part and parcel of the café and that they are properly classified as fixtures. I do not accept this argument. I do not believe that the issue as to whether an element is part and parcel of the café necessarily depends on whether it is capable of being moved without damage to the café. We know from everyday life that an external door can usually be taken off its hinges without any significant damage being done. Yet, it is clear from *Climie v. Wood,* that a door will be considered as part and parcel of leased premises. Likewise, we know from experience that a typical window sash of the kind found in many houses in the inner suburbs of Dublin can usually be removed without damage once appropriate care is taken. Yet, in the words of Willes J. in *Climie v. Wood*, a door or a window is considered *"so*

completely a part of the land as being essential to its convenient use, that even a tenant could not remove it." In my view, the same applies to the Four Orders works. In substance, the removal of the sashes would amount to a removal of the windows. Without the sashes, there would, in effect, be no windows, only an empty window frame. An empty window frame gives rise to a similar interference with the convenient use of a leased premises as the removal of a window or door. The premises would plainly be incomplete without the sashes. The fact that the sashes could be replaced with new sashes containing clear glass or embossed glass is not an answer. In the absence of a clause to the contrary in the lease or contract of tenancy or the consent of the landlord, a tenant has no right to remove a part of the leased premises even where it is possible to replace it.

170. In light of the considerations discussed in paras. 165 to 169 above, I have come to the conclusion that, upon their installation in 1928, the Four Orders works became part and parcel of the café building and that they would not, therefore, be considered to be fixtures. I will examine later whether anything occurred after 1928 which might affect this conclusion.

171. I now turn to the Swan Yard works. As noted in para. 164 above, I will address the question as to their status by reference to the matters considered and findings made in paras. 151 to 163 above. In particular, I do so on the basis that those works were installed in 1928 as part of a double layer of windows of the kind observed by Mr. Horan and Mr. Campbell in 1987. The plaintiff has argued that, even on the basis that they formed the inner layer of the double fenestration arrangement, they were, nonetheless, windows and that, accordingly, they must be considered to be part and parcel of the café premises. Counsel for the plaintiff emphasised that, based on Mr. O'Connell's evidence, the Swan Yard works, when operated in conjunction with the clear glass windows in the external wall, were capable of admitting both light and air and that they thus functioned as windows.

172. I do not accept the plaintiff's argument. Unlike the Four Orders works discussed above, the removal of the Swan yard works would not have interfered in any real way with the convenient use of the café premises. In such circumstances, having regard to the fact that clear glass windows occupied the external window openings, the café would still have been weathertight. The building would still have been complete. No gap would be left in its external shell. The clear glass windows would still have admitted light and air to the café and provided cover against the elements. While the removal of the Swan Yard works as an inner layer of fenestration might have exposed the patrons of the café to a view of the rather unattractive alley that is Swan Yard, that drawback seems to me to fall far short of the kind of inconvenience which Willes J. had in mind in *Climie v. Wood*. The fact is that the café could continue to be used quite effectively once the clear glass windows stayed in place.

173. Accordingly, it seems to me that, in circumstances where the Swan Yard works were installed parallel to existing windows, they are properly classified as additions to the structure or fabric of the café. They fall within the ambit of things which, in the words of Scrutton L.J. in *Boswell v. Crucible Steel, "... have been brought into the house and affixed ... after the structure has been completed."* On that basis, they are classically in the nature of fixtures. In contrast to the Four Orders works (which replaced the existing windows) they cannot be considered to be part and parcel of the fabric of the café.

Has anything occurred in the years since 1928 which affects the status of the stained-glass works?

174. At a later point in this judgment, I will consider in more detail the impact, if any, of the subsequent leases and other contractual arrangements (including the sale and lease back transaction) that were put in place in relation to the café premises. In this section of the judgment, I will confine myself to a consideration of physical changes to the café which are potentially relevant to the Harry Clarke stained-glass works. While many changes have been

made to the café over the years, not all of them are relevant to the stained-glass works. I must also confine myself to a consideration of those physical changes that were the subject of evidence. As will be seen from the discussion below, the evidence that is available in relation to these changes is quite scant.

175. I have already addressed one aspect of the physical changes, namely the temporary removal of the works during the Second World War and later in 1998. For the reasons previously explained, I do not believe that those events affected the status of the Four Orders works. Subject to what I say in paras. 177 to 183 below, once the Four Orders works were reinstated, they formed part and parcel of the café premises in substitution for the windows that were put in place during the period of their absence. I therefore do not believe that it is necessary to say anything further in relation to that issue. It also seems to me that the two periods of temporary removal make no difference in so far as the Swan Yard works are concerned. As discussed in paras. 172 and 173 above, they formed an inner layer of fenestration which was not an inherent part of the fabric of the building. Their removal for safe keeping did not alter their status as fixtures. When they were returned to the café, they were fixed back in place.

176. Furthermore, in the case of the Swan Yard works, although some of the physical changes had a physical impact on the works, they could not be said to have affected their status as fixtures. For example, the creation of the fire escape staircase in 1987 resulted in the movement of the Swan Yard works to a new internal wall separating the café from the fire escape. No argument has been made to me that this change in location changed their status. It seems to me that they continued as fixtures. Their installation in the internal wall is best described as a form of decoration. They were purely mock windows mimicking the appearance of windows. In reality, they had become light boxes fitted within the new internal wall.

Notwithstanding their appearance, they had no weathering function. They were not a source of natural light or ventilation and they plainly did not function in any real sense as windows.

177. However, there were a number of potentially important physical changes to the café premises that require to be considered in the context of the Four Orders works. At some unknown point after the McDonnell & Dixon drawings were made in 1946, the boxing or panelling mentioned by Mr. Ebbs and Mr. Campbell was added on the external side of the works and they ceased to be either a source of natural light or ventilation to the café. That boxing was evident by 1972 when Mr. Ebbs commenced his work maintaining the stained-glass. It was also evident to Mr. Campbell after Campbell Catering took over the first named defendant in 1986 and also when Mr. Horan attended in the following year. That boxing was replaced in 1998 by blockwork of some kind and this, in turn, was replaced in 2016 by a Perspex screen which is still in place today. With the exception the Perspex screen (which I was able to see myself at the site visit prior to the hearing), I have been given surprisingly little information in respect of either the boxing or the subsequent blockwork. The most relevant evidence is that given by Mr. Campbell in his witness statement, the relevant section of which is quoted in para. 93 above. That statement describes the arrangement in very general – and I have to say uninformative – terms. No detail was given by any of the defendants' witnesses as to the nature of the panelling or blockwork. That said, it is clear from the evidence of Mr. Campbell that the boxing or panelling which he observed in place in 1986 and 1987 had the result that the Four Orders works were no longer a source of either natural light or ventilation. Thus, a question arises as to whether, once this boxing or other material was put in place, the Four Orders works could continue to qualify as an inherent element of the café building or whether it converted their status to fixtures. As noted in para. 36(b) above, the burden of proof in relation to this issue rests on the defendants.

178. In considering the question posed in para. 177 above, I believe that it is useful to first consider the pre-2016 position and, thereafter, to consider the effect of the Perspex screen put in place in 2016. In this context, it should be noted that, unless the changes were expressly authorised by the lease, there would normally be correspondence or discussions between a landlord and tenant before any physical changes are made to leased premises. In this case, no evidence was given of such discussions or correspondence although the defendants did make the case that any changes made by the first named defendant were made without objection by the landlord. It may also be the case that the panelling and other measures put in place are properly characterised as attempts by the tenant to comply with the repairing covenant in the 1928 Lease under which, as noted in para. 80 above, the tenant was obliged to keep both the exterior and interior of the premises *"and all structures ... now erected or hereafter to be erected"* in good and substantial repair. That language covers not only the existing premises at the time of the grant of the lease but anything which was subsequently added. It would therefore appear to extend to the stained-glass works even if they were not installed until after the execution of the 1928 Lease. There is also a repairing covenant in clause 3.7 of the 1987 Lease under which the tenant is required to *"put and keep the demised premises in good and substantial repair and condition."* However, there was no real debate at the trial in relation to the issue of landlord's consent or in relation to the repairing covenants and I therefore do not believe that it is a matter on which I can make any ruling. The discussion which follows is therefore confined to the potential impact of the physical changes on the status of the Four Orders works as an integral part of the external shell of the café premises.

179. In so far as the pre-2016 position is concerned, there is, in my view, insufficient detail available to satisfy me, on the balance of probabilities, that the various measures which were put in place had the effect of converting the status of the Four Orders works to fixtures. In the first place, all of the defendants' witnesses on this issue were far too vague in their evidence to

allow me to form a view as to the extent and nature of the boxing observable in the 1970s and 1980s and as to the extent and nature of the blockwork put in place in 1998. Secondly, while I accept their evidence that the boxing or blockwork had the effect that the Four Orders works could no longer function as a source of natural light or ventilation, I cannot form any view as to whether it was sufficiently significant in nature to render redundant the former role of the Four Orders works as an inherent element of the external shell of the café building (as described in para. 166 above). It seems to me that the Four Orders works would only lose their status as part of the external shell or skin of the building if something was constructed on their external side which could plausibly be regarded as replacement shell or skin. It would not be sufficient, in my view, for some relatively flimsy or impermanent arrangement to be put in place. In my opinion, the arrangement would have to be sufficiently significant that a reasonable person visiting the premises would regard the arrangement as the external shell rather than the stained-glass windows to the inside of it. To displace the status of the Four Orders works as part and parcel of the building, the boxing or other arrangement would have to be capable of functioning as the external shell of the building. If its purpose was simply to protect the stained-glass to the inside of it (or the electrical fittings behind the stained-glass), it is doubtful that it could plausibly be considered to constitute part of the external shell of the building. One obvious way to test it would be to consider whether, if one took away the Four Orders works to the inside of it, the external arrangement would still make the building complete. If it did not, then it would follow that the Four Orders works would continue to constitute part and parcel of the building. This illustrates why it was so important that detail should be provided in relation to the nature of the boxing and blockwork arrangements put in place prior to 2016. Without such detail, it is impossible to form a view as to whether those arrangements could be said to have been sufficient to replace the role of the Four Orders works as an element of the external shell of the café building.

180. In this context, if the Four Orders works continued to form part of that external shell of the building, then it does not matter, in my view, that they no longer functioned as a source of light or ventilation. In so far as ventilation is concerned, it must be kept in mind that a glass window is still capable of constituting part of the external shell of a building even where it is not capable of ventilating the building. This is confirmed by the decision in *Boswell v. Crucible Steel* where the windows in issue formed solid plate glass walls which were not capable of being opened. In my view, it is also not essential that the window should admit light. In this context, it is possible to entirely black out a window thus blocking the passage of light. This might arise, for example, for reasons of privacy in the event that the window was overlooked by the public street or a neighbouring property. The blacked-out window would still constitute part of the external shell or skin of the building. Unless a new external shell is fitted in its place, a window which is no longer a source of light does not lose its character as an inherent element of the exterior of the building in which it is housed. It may be that it no longer performs some of the classic functions of a window but it is still capable of functioning as an element of the exterior shell of the building. Without every element of its shell, the building in question could not function.

181. Having regard to the considerations outlined in paras. 179 to 180 above, I must reject the case made by the defendants in respect of the installation of the boxing and blockwork in place prior to 2016. In my view, the defendants have not provided sufficient detail as to the nature and extent of the boxing or blockwork in place from time to time to demonstrate that, on the balance of probabilities, such boxing or blockwork was sufficient to replace the Four Orders works as the outer shell of the café building. As previously noted, the defendants bore the burden of proof in relation to this element of the case.

182. There is more detail available in relation to the 2016 works. I have the benefit of the photograph in Mr. Slattery's report which shows the current arrangement very clearly. There

is also the brief description of the intended works given in the Dublin City Council planning permission (quoted in para. 103 above) but that does not describe the nature of the material used. Mr. Campbell has described it as Perspex. During the course of the pre-trial site visit, I also had an opportunity to observe the current arrangement lying behind the Four Orders works albeit that no evidence was given by any witness about it on that occasion. I would not disagree with Mr. Campbell's description of the material as Perspex. As noted in para. 102 above, Mr. Slattery characterised the material, in his report, as storm glazing. I can see why he would say that. It appears to be designed to protect the stained-glass works themselves and also, as the planning permission confirms, to permit some natural light to filter through (although this is supplemented by extensive artificial lighting).

183. To test whether the Perspex sheeting should now be regarded as forming the external shell or skin of the café premises in place of the Four Orders works, I believe it is necessary to imagine what would happen if one removed the Four Orders works but left the Perspex sheeting in place. If one does that, the café would be left with four bare window openings in the western wall with the Perspex sheeting behind. That sheeting would be the only material shielding the interior from the outside. It may well be weatherproof but I do not believe that Perspex sheeting on its own could reasonably be considered to be an appropriate or acceptable outer shell for a substantial urban building such as the café. That is plainly not the position with both the Perspex sheeting and the Four Orders works in place. When both are in place, the Western wall is very clearly complete and able to function as an integral element of the external shell of the building. Accordingly, I am of opinion that, notwithstanding the presence of the Perspex sheeting, the Four Orders works continue to form part and parcel of the external skin or shell of the café premises. As such, they are part and parcel of the leased premises. It follows that they do not constitute fixtures.

Are the Swan Yard works tenant's fixtures or landlord's fixtures?

184. In light of the conclusion that I have reached that the Four Orders works continue to form part and parcel of the café premises, the question posed in para. 36(b) above is not relevant to them. For that reason, the question whether the works constitute tenant's fixtures or landlord's fixtures arises solely in relation to the Swan Yard works.

185. As noted in para. 27 above, two factors are relevant in considering whether an object has become a fixture namely (a) the degree to which it has been annexed to the premises and (b) the purpose of annexing it to the premises, the latter being the more important factor. In so far as the degree of annexation, it is clear that the Four Orders works have been annexed to the premises, having been incorporated into the internal wall between the ground floor café and the emergency staircase. Previously, based on Mr. Horan's evidence, they were annexed to the western wall of the premises. In so far as the purpose of annexation is concerned, this is to be assessed not by reference to the subjective intention of the person who fixed the object in place but, instead, by reference to the purpose which the object is serving. It is an objective test. As also noted in para. 27 above, that test may also throw light on whether the fixture was intended to serve the purpose of the landlord or the tenant.

186. For the reasons discussed in paras. 151 to 163 above, I have come to the conclusion, on the basis of the evidence available, that the plaintiff has failed to prove that, when the Swan Yard works were first fitted in 1928, they were installed in the window openings in the western wall overlooking Swan Yard. As a consequence, it follows that I must proceed on the basis that the 1928 arrangement was the same as that observed in 1987. Thus, I will proceed to consider this issue on the basis that the Swan Yard works were installed as part of a double fenestration arrangement parallel to – and to the inside of – the existing clear glass windows on the Swan Yard side of the café. Unlike the clear glass windows, they were not a necessary element of the external shell of the café building. That finding seems to me to be highly relevant in objectively

identifying the purpose for which they were installed. Why would stained-glass windows be installed parallel to existing external windows? They did not improve the ventilation function. If anything, they may have impeded the passage of air. They were not required to weather the building or to complete its external shell. They were not required in order to serve any purpose of the landlord. His purposes were served by the existing clear glass windows which were a source of ventilation and also completed the shell of the building making sure that it was protected from the elements at that location. In those circumstances, it is difficult to see that the Swan Yard works could be said to have been installed with a view to improving the landlord's interest in the café premises. That being the case, there must have been some other purpose for the installation of an internal layer of windows at Swan Yard. Given their ornamental and artistic attributes and the fact that they were mounted on the inside of the café, their purpose would appear to have been to be enjoyed by those within the café, both patrons and staff and to create a pleasing aesthetic within the café. In turn, given that the café business was to be owned and operated by the tenant, it seems to me to follow that the purpose of the Swan Yard works must have been to further the interests of the tenant in the operation of its café business.

187. The same also holds good after the Swan Yard works were moved to the internal wall created in 1987 between the café and the (then) new emergency staircase constructed in the south western corner of the café. They continued to have an ornamental purpose at that time which could only be said to assist the tenant's café business. I cannot identify any purpose they might have served in the interests of the landlord. Unlike the Four Orders works, they are not an integral element of the café premises. They function as mock windows only.

188. The considerations outlined in paras. 186 to 187 above strongly support the conclusion that the Swan Yard works should be considered to constitute tenant's fixtures. However, as noted in para. 23 above, there are five conditions which must be satisfied under s. 17 of Deasy's

Act (on which the defendants seek to rely) before a conclusion could be reached that they are tenant's fixtures capable of being removed from the premises. These conditions are identified in para. 23 and it is therefore unnecessary to repeat them here. It seems to me that a conclusion can readily be reached that four of them are satisfied. For the reasons identified in paras. 186 to 187 above, it can be concluded that they were installed as ornamentation in relation to the tenant's occupation of the building and for the purposes of the café trade operated by it. There is no evidence that the tenant was obliged by Ernest Bewley as landlord to install them. There was nothing in the 1928 Lease which prohibited their installation, Furthermore, having regard to the 1998 video, it is clear that the sashes containing the stained-glass can be removed without substantial damage either to themselves or to the premises. That deals with four of the five conditions that must be satisfied. It will also be necessary to consider whether the parties contracted out of s. 17 but that is an issue that I will address in the next section of this judgment when I deal with the various arguments made on both sides in relation to the contractual documents.

189. That leaves only one s.17 condition that remains to be considered, namely whether the Swan Yard works were affixed to the premises at the tenant's expense. There is no direct evidence that the tenant paid for the Swan Yard works. But there is evidence that the tenant was to be responsible for defraying the cost of the café fixtures and fittings. This emerges from the minutes of the meeting of the board of the first named defendant of 9th March 1928 (quoted in para. 68 above). The board minutes record that Ernest Bewley had either spent or authorised the spending of a total of £14,900 on behalf of the first named defendant in respect of ovens, tables and chairs, counters and other café fixtures and fittings. It should be recalled in this context that Ernest Bewley was not only the landlord but he was also the chairman and a director of the tenant. It appears to be clear, that, in authorising spending on behalf of the tenant, he was doing so in his capacity as a director of the first named defendant. But, given that he

was also the landlord, the minutes can be read as recording the agreement or arrangement between the landlord and tenant as to who should be responsible for the cost of the fixtures and fittings. The figure of £14,900 was undoubtedly a sizeable sum in 1928. It dwarfs the price of £180 charged by Harry Clarke for the Swan Yard works or the £280 charged for the Four Orders works.

190. The minutes of the board meeting further suggest that the expenditure on the café fittings *"would in due course appear in the Company's accounts as a Liability of its own."* Counsel for the plaintiff has argued that the first named defendant has produced no accounts or other evidence which records that anything was ever paid by the tenant in respect of the stained-glass works. In addition, in para. 79 above, I have drawn attention to the time which elapsed between the board meeting of 9th March 1928 and the date when Harry Clarke was eventually paid in full in September 1928 and the dearth of evidence as to what happened in the intervening period. In the same paragraph, I expressed the view (in the context of the case made by the defendants that it was the tenant who commissioned the works) that it would be unsafe to take the board minute, on its own, as sufficient evidence to ground a finding that, on the balance of probabilities, the tenant paid for the Harry Clarke works. However, I also expressed the view that, if there is other material available which supports the view that the works constitute tenant's fixtures, this might change the position. Having regard to the considerations outlined in paras. 186 to 188 above, I am now of the view that the Swan Yard works were installed solely for the benefit of the tenant and that they are tenant's fixtures. That seems to me to alter the position addressed in para. 79. In the first place, while the minute did not mention stained-glass, it dealt expressly with café fixtures and made clear that these were for the tenant's account. There is no reason to suppose that the stained-glass fixtures comprising the Swan Yard works would be treated as an exception to the arrangement recorded in the minute. Secondly, although there is no inventory of what was included in the sum of £14,900

(which was for the tenant's account), there is no reason to suppose that such a large sum (in 1928 values) did not include the sum of £180 due to Harry Clarke for the Swan Yard works. Thirdly, given that the works are fixtures for the benefit of the café trade carried on by the tenant, it would make no sense that Ernest Bewley would pay for them on his own behalf rather than on behalf of the tenant.

191. Fourthly, although, I would not consider this element, on its own, to be probative, it is remarkable that the statement of account furnished with Harry Clarke's letter of 7th August 1928 addressed to *"C. Bewley Esq. Messrs. Bewley's Café* shows that he was paid £200 in cash on 22nd June 1928. In so far as I can see from the contemporaneous correspondence, that is the only payment that was made in cash, the other payments in May 1927 (for non-stained-glass work) and September 1928 being made by cheque. While, of course, one could not be certain about this, the fact that the payment was made in cash and the fact that it is very close to the amount due in respect of the Swan Yard works both suggest that the café business may have been the source. In the days before debit and credit cards, a business such as Bewley's would have been almost exclusively a cash business. While the payment of £200 is £20 more than was due in respect of the Swan Yard works, that is not, in itself, surprising in circumstances where Ernest Bewley (who the defendants accepted, in their answers to interrogatories, was the person who made the payment on the tenant's behalf) still owed money to Harry Clarke in respect of some of the non-stained-glass work supplied in the course of 1927 and he also owed £280 in respect of the Four Orders works. At the time the payment in June 1928 was made, there was still a sum of £66.15s due in respect of the 1927 supplies of other forms of glass.

192. Having regard to the terms of the minute (which clearly identifies that the tenant was to be responsible for the payment of amounts due for fixtures) and the fact that the Swan Yard works constitute fixtures, I have, on balance, come to the conclusion that the bill for the Swan Yard works was for the account of the tenant and that it was therefore an expense of the tenant.

In addition, while there is no direct evidence that it was definitely paid by the tenant, the cash payment in June 1928 is suggestive that the tenant was the source. Alternatively, if it were the case that the bill was paid by Ernest Bewley out of his own resources (and there is no evidence of that), the terms of the minute clearly suggest that any such payment by him for a fixture was, nonetheless, to be for the tenant's account. The minute records that Ernest Bewley had either spent or authorised the expenditure on fixtures and fittings *"on the Company's behalf"*. Such expenditure was not therefore to be treated as personal expenditure of Mr. Bewley on his own behalf but as an expense of the tenant. Had the cost been paid by Mr. Bewley, the tenant would, of course, have been under an obligation to repay him the cost of the fixture but, in the absence of some agreement to the contrary between them (of which there is no evidence) that would not affect the fact that the purchase was made on the tenant's behalf. If Ernest Bewley paid it out of his own resources and did not thereafter recoup the payment from the tenant, that would suggest that he must have forgiven the debt owed by the tenant to him. But that would not appear to me to alter the conclusion that, as the minute plainly records, payment for a fixture (such as the Swan Yard works) was to be on behalf of the tenant. As a matter of law, any such payment would accordingly be a payment made by the tenant and should not be characterised as a payment made by Ernest Bewley personally.

193. In light of the discussion in paras.190 to 192 above, I have, on balance, come to the conclusion that there is a sufficient basis in this case to conclude that the Swan Yard works were installed at the expense of tenant. In those circumstances, I am of opinion that the final condition of s. 17 of Deasy's Act has been satisfied in this case. It therefore follows that, subject to the discussion below in relation to the terms of the 1928 Lease and the other contractual documents, the defendants are entitled to rely on s. 17 to maintain their claim to ownership of the Swan Yard works and the right to remove them from the premises should they so choose.

The potential impact of the 1928 Lease on the application of s. 17 of Deasy's Act

194. As noted previously, the provisions of s. 17 of Deasy's Act can be displaced by a contrary provision in a lease. The section concludes with the words: *"except so far as may be otherwise specifically provided by the contract of tenancy."* As outlined in para. 30 above, the plaintiff relied on the agreement by the tenant in the 1928 lease to deliver up possession at the end of the 21-year term not only of the premises but also *"all fixtures".* The obligation is not confined to landlord's fixtures. However, the defendants argued that this obligation only arose in the event of the tenant handing back possession of the premises to the landlord. Possession has never been handed back. The 1928 lease was renewed in 1949 for a term of 100 years and thereafter the first named defendant acquired the landlord's interest in the premises. In turn, those arrangements have been superseded by the 1987 lease considered below which, in clause 3.36.1(B) expressly recognises that the tenant is not required to deliver up tenant's fixtures at the end of the term.

195. In my view, the defendants are correct in their argument. The 1928 lease did not go so far as to declare that all tenant's fixtures should become the property of the landlord from the moment of their installation. It simply imposed an obligation to deliver them up at the end of the 21-year term. The tenant was not required to deliver up possession of the premises at the end of that term and, so, the fixtures were never delivered up to the landlord. Thus, the obligation to give possession of the fixtures to the landlord was never triggered. In circumstances where that obligation was never triggered and where the landlord and tenant relationship is now governed by the 1987 lease, I cannot see any basis on which this provision of the 1928 lease could be said to affect the entitlement of the first named defendant, as tenant, to rely on s. 17 of Deasy's Act.

The potential impact of the 1987 lease on the application of s. 17 of Deasy's Act

196. In my view, the terms of the 1987 lease very clearly do not exclude the application of s. 17 of Deasy's Act. As noted in para. 194 above, clause 3.36.1(B) expressly recognises that the tenant may remove tenant's fixtures at the end of the term of that lease. However, as discussed in paras. 32 to 35 above, a variety of other arguments have been raised by the parties in relation to the impact of the 1987 transactions and it is to those arguments to which I now turn.

The potential impact of the 1987 transactions more generally

197. At this point, it is necessary to describe the relevant aspects of the 1987 transactions in more detail. On 31st July 1987, the first named defendant (then called Bewley's Cafes Ltd.) entered into a contract with Royal Insurance Staff Pension Scheme to sell its interest in the café premises to the latter for £2,350,000. As outlined in para. 89 above, the first named defendant had, by this stage, acquired the landlord's interest in the premises. At a later point, it appears to have been agreed that the sale would be closed with Royal Insurance plc in lieu of the named purchaser. Under special condition 11, the purchaser agreed that, on the completion date (which the contract fixed at 6th August 1987), it would deliver in escrow, a lease duly executed by it in the form annexed to the contract. That took the form of what is now the 1987 lease. The reason why it was to be delivered in escrow is explained by special condition 12 which, with a view to providing an uncluttered title to the purchaser, required the first named defendant to take certain steps under sub-paras. 12.1 and 12.2 to acquire the outstanding interests held by a third party in No. 2 Johnson's Court.

198. Special condition 12.3 provided that, pending delivery of the new lease, the first named defendant would, on completion of the sale, occupy the premises as *"a bare licensee only but upon and subject to all the same terms, covenants and conditions as are contained in the new*

Lease as if the same had been granted and delivered". Thus, although the first named defendant would not have the status of lessee until the new lease was delivered (after compliance with special condition 12.1 and 12.2), its occupation as bare licensee was nonetheless subject to all the terms of the lease to be executed by Royal Insurance plc and held in escrow. Nonetheless, as recorded in para. 33 above, the plaintiff has sought to rely on the fact that, for a period between the date of the assignment to Royal Insurance plc of 6th August 1987 and the date of execution of the of the new lease on 22nd September 1987, the first named defendant had lost its status as a tenant and occupied the café premises as a bare licensee.

199. General condition 46 of the contract dealt with chattels in standard terms, warranting that all the *"purchased chattels"* were not subject to any lease or hire purchase arrangement. The term *"purchased chattels"* was defined as meaning *"such chattels,* ***fittings****,* ***tenant's fixtures*** *and other items as are included in the sale"* (emphasis added). Thus, the definition went beyond the common meaning of chattels and expressly extended it to fittings and fixtures. However, the contract contained no inventory or list of fittings fixtures or chattels to be included in the sale. On the face of it, this would suggest that it was not intended that the sale was to include the Swan Yard works. However, given my finding that the Four Orders works are part and parcel of the café premises, there would have been no need to specifically mention them. They would pass under the sale as an inherent part of the premises sold.

200. The sale duly closed on 6th August 1987 but with Royal Insurance plc as purchaser in place of the staff pension fund. As noted above, there was a gap in time before the lease was put in place. It is dated 22nd September 1987 but it should be noted that the 35-year term is expressed to run from 6th August 1987 (which was the completion date of the contract for sale and is also the date of the assignment). For present purposes, the definition of the *"demised premises"* is relevant. The definition provides that the demised premises means *"the land and the premises described in the First Schedule … and each and every part thereof together with*

*the appurtenances thereto belonging and together also with any buildings and erections and each and every part thereof (**including the plate glass in the windows**) …"* (emphasis added). The specific enumeration of plate glass and the lack of any reference to stained-glass should be noted.

201. The defendants relied on the fact that none of the sale and lease back transactions made any reference to stained-glass and they argued that this meant that the first named defendant had never sold the stained-glass to Royal Insurance plc. In my view, that argument could only hold good in so far as the Swan Yard works are concerned. There is nothing to show that they were included in the sale. As noted in para. 199 above, the contract for sale did not identify any fittings or fixtures to be included in the sale. For that reason, I reject the argument made on behalf of the plaintiff (as summarised in para. 33 above) that the first named defendant sold everything to the purchaser under the 1987 transaction. In the absence of an identification of any *"purchased chattels"* within the particular meaning of that term as defined in the contract, I cannot see any basis to suggest that Royal Insurance plc acquired any right to any of the café fittings under the sale. The definition of the term *"purchased chattels"* in the contract clearly suggests that any such items would have to be identified. The Swan Yard works are not identified in the contract or in any contemporaneous document as one of the subjects of the sale. In this context, I do not believe that it makes any difference that, at the time of the sale, the first named defendant had acquired the landlord's interest in the premises. Whether or not it had acquired that interest seems to me to be irrelevant to the issues between the parties here. In either case, the first named defendant owned the Swan Yard works but, for the reasons previously outlined, those works were not part and parcel of the premises. They therefore did not pass to a purchaser of the premises unless the contract for sale either expressly or by implication extended to them. The plaintiff has not demonstrated any sufficient basis to substantiate a case that the contract included everything including fittings and fixtures such as

the Swan Yard works. In my view, the burden of proof in relation to this element of the plaintiff's case falls on the plaintiff.

202. However, in the case of the Four Orders works, it would not have been necessary to expressly include those works in the contract for sale. As part and parcel of the premises, they would be included in any sale of the premises unless they were expressly or impliedly excluded. There is nothing in the terms of the contract for sale or in the subsequent assignment in this case to exclude them. Accordingly, it follows that they passed to Royal Insurance plc as part of the premises and they are now owned by the plaintiff as its successor in title albeit that they are held by the plaintiff subject to the 1987 lease in the same way as any other element of the leased premises. In this context, I reject the defendants' argument based on the express reference to plate glass in the definition of *"the demised premises"* in the 1987 lease. That reference does not seem to me to assist the defendants in any way. On the contrary, if the reference to *"including the plate glass in the windows"* meant that the Four Orders works did not constitute part of the premises, it would mean that the first named defendant would have no right under the lease to enjoy those works as an integral element of the premises held by it under the 1987 lease and the plaintiff would arguably be free to remove the Four Orders works from the café. For completeness, I should make clear that, in my view, the inclusion of the reference to plate glass in the definition of *"the demised premises"* does not have the effect that the Four Orders works are not part of the premises leased to the first named defendant. While there are circumstances where the express reference to one matter or thing will be interpreted as excluding other matters or things, I do not believe that such an approach should be taken in construing the definition of *"the demised premises".* The definition makes clear that the term *"the demised premises"* includes each and every part of the premises described in the First Schedule to the lease. Having regard to my finding that the Four Orders works are part and parcel of the premises, those words *"each and every part"* underscore the conclusion

that the Four Orders works are included. I do not read the words that follow *"including the plate glass in the windows"* as cutting down or confining the reference to *"each and every part thereof"*. The use of the word *"including"* shows that the reference to plate glass in the windows is not intended to be exhaustive. Had the intention been to exclude other forms of glass, it would have been very easy for the lease to so provide. Accordingly, I can see nothing in the definition to justify the exclusion of the Four Orders works from the understanding of what is comprised within the premises leased to the first named defendant under the 1987 lease.

203. In light of the conclusions I have reached in paras. 201 to 202 above, I do not believe that it is necessary to address, in any detail, the plaintiff's argument based on merger or its argument based on the first named defendant's status as a bare licensee in the period between 6th August 1987 and 22nd September 1987. Given my view that the sale to Royal Insurance plc did not include the fittings and fixtures, the argument on merger of interests falls away. While the first named defendant was, at the time of the sale, the owner of both the landlord's and the tenant's interest in the premises, the sale did not include the Swan Yard works. Therefore, the first named defendant retained ownership of them.

204. For the same reason, the argument based on the first named defendant's temporary status as a bare licensee also falls away. It may have been a bare licensee of the premises but, since it retained ownership of the Swan Yard works, its status as a bare licensee of the premises made no difference. A fine legal point might have arisen in the event that it sought to remove the Swan Yard works from the premises while it was no more than a bare licensee but, given the terms of special condition 12.3 of the contract for sale, it appears to be clear that it could still have relied, during that period, on clause 3.36.1(B) of the lease held in escrow. But that point is entirely academic in circumstances where the issue never arose during that period.

205. In the circumstances, it is unnecessary to address the defendant's argument based on the Rule in *Walsh v. Lonsdale* (as summarised in para. 35 above). However, were it necessary

to do so, it seems to me that the Rule provides an answer to this part of the plaintiff's case in so far as the Swan Yard works are concerned. It does not matter, in this context, that, under the contract for sale, it was a bare licensee pending the delivery of the lease. Crucially, it seems to me that, from the moment the contract of sale was executed, the first named defendant had an enforceable contract for the grant of a lease in the terms of the 1987 lease. Once it performed its side of the bargain, it knew that it would be entitled to enforce the obligation of the purchaser to grant the lease on those terms with a commencement date which coincided with the date of the assignment to Royal Insurance plc. While special condition 12.1 and 12.2 of the contract for sale required it to take steps to try to acquire the outstanding third-party interest in No. 2 Johnson's Court, special condition 12.4 made clear that the failure to acquire that interest did not result in the loss of the lease; instead, the terms of the lease would have been adjusted in accordance with the terms of special condition 12.4.

206. In my view, the Rule in *Walsh v. Lonsdale* would therefore have applied. The Rule gave the first named defendant the same rights in equity as it would have had if the lease had actually been executed. Thus, even if special condition 12.3 did not exist, the first named defendant would have had the right, from the moment the contract for sale was executed, to enforce clause 3.36.1(B) of the lease in relation to any tenant's fixtures. It therefore had the expectation that, at the end of the term of the intended lease, it would be entitled to rely on s. 17 of Deasy's Act.

207. For all of the reasons discussed in paras. 197 to 206 above, I take the view that the 1987 transactions do not alter my conclusions that the Swan Yard works are fixtures owned by the first named defendant. Nor do those transactions affect my conclusion that the Four Orders works comprise part and parcel of the café premises leased to the first named defendant under the 1987 lease.

Things to which I can have no regard

208. I should make clear that, in considering the issues discussed in this judgment, there are a number of matters to which I can have no regard and which I cannot allow to influence the conclusions that I have reached. First, I must disregard the evidence of Mr. Campbell of the defendants' intention to donate the Harry Clarke works to the Dublin City Council. This is recorded in a letter dated 18th January 2022 from the City Council to Mr. John Cahill of the defendants in which the chief executive of the City Council confirms that, subject to the court confirming the defendants' title to the works and to the completion of negotiations and of legal documentation, the Council will accept the donation. While such an arrangement may be highly desirable at a civic level and of great benefit to both citizens and visitors, those advantages can play no part in the decision of a court. I must base my decision on evidence relevant to the issues in dispute. I cannot allow my decision to be influenced by what might be perceived to be in the interest of the city or of the State.

209. Nor can I allow my decision to be influenced by concern that my decision may eventually result in the break-up of these two suites of Harry Clarke's works which can currently be viewed together in their original setting. As a resident of Dublin, I fully understand that many people may have that concern but it is not something that I can take into account as a judge required to decide the case on the evidence before me. For the reasons which I have sought to explain in this judgment, the evidence available to me leads to different conclusions being reached in respect of the Swan Yard works, on the one hand, and the Four Orders works, on the other.

The orders to be made on foot of this judgment

210. In light of the findings made by me, the plaintiff is entitled to succeed in relation to the Four Orders works. Subject to hearing the parties, I believe that I should make a declaration

that the Harry Clarke stained glass works mounted in the window openings of the western wall of the premises known as Bewley's Café situated at 78 and 79 Grafton St and 2, 3 and 4 Johnson's Court, Dublin 2 form part and parcel of those premises. The declaration sought in para. 1 of the indorsement of claim on the plenary summons goes somewhat further and seeks a declaration that they constitute landlord's fixtures. In my view, that element of the claim is misconceived. It is clear from the decision in *Boswell v. Crucible Steel* that something which is part of leased premises cannot also be a landlord's fixture. Moreover, if something is part and parcel of leased premises, the lessee or tenant has the benefit of it for the duration of any lease of those premises. The landlord has no entitlement to remove any part of the premises the subject of the lease.

211. It also seems to me that the plaintiff is entitled to an order setting aside the purported transfer of the Four Orders works from the first named defendant to the second named defendant. In light of my findings, the first named defendant had no title to the said works save that, as mentioned in para. 210 above, the first named defendant, as lessee of the premises under the 1987 lease is entitled to enjoy the works as part of the premises for as long as its leasehold rights continue.

212. However, the plaintiff has failed to prove its case in relation to the Swan Yard works and that element of its claim must be dismissed. The defendants have succeeded in establishing that the Swan Yard works constitute tenant's fixtures. The transfer of ownership of those works from the first named defendant to the second named defendant cannot be impugned by the plaintiff and the second named defendant is therefore entitled, on foot of its counterclaim to a declaration that it is the owner of the Swan Yard works. The form of the declaration as pleaded in the defence and counterclaim is framed in much too general terms. A more precise form of that declaration will accordingly have to be drafted by counsel for the defendants and submitted

to counsel for the plaintiff and can later be settled by me. The balance of the counterclaim relating to the Four Orders works must be dismissed.

213. I will list the matter before me for mention on Thursday 9th February 2023 at 10.30 a.m. to deal with the form of the orders to be made and costs. In the meantime, the legal representatives for the parties should seek to reach agreement between them in relation to the form of the orders to be made and in relation to costs. If they are unable to agree and if the dispute between them is extensive, I will on 9th February 2023 fix a date for the hearing of that dispute. However, I very much hope that the parties will be able to reach agreement on these issues.

Practice direction HC 101

214. Finally, in accordance with the above practice direction, I direct the parties to file all of their written submissions in this case (subject to any redactions that may be permitted or required by the practice direction) in the Central Office within 28 days from the date of electronic delivery of this judgment.