Claim No. CHY09544

IN THE CENTRAL LONDON COUNTY COURT

Sitting at Central London Civil Justice Centre,

26 Park Crescent, London, W1B 4HT

Before Her Honour Judge Hazel Marshall QC

December, 2010

TOBIAS ALEXANDER CAMPBELL ANSTRUTHER

Claimant

- and -

VIDAS PROPERTIES LTD

Defendant

JUDGMENT

Mr Andrew Walker, Counsel for the Claimant
Mr Anthony Radevsky, Counsel for the Defendant.

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic

HER HONOUR JUDGE MARSHALL QC

Overview

1. This is a claim by a lessor, Mr Tobias Anstruther ("Mr Anstruther") against his lessee, Vidas Properties Limited ("Vidas"), in respect of the latter's repairing and decorating covenants in an extant lease of a property comprising a substantial Listed Victorian stucco-fronted terraced house and associated mews garages with living accommodation above, at No 4 Cromwell Place and Nos 4 and 5 Thurloe Road Mews, South Kensington. It is presently used for flats on the third (top) floor and basement and above the garages, but otherwise, insofar as it is not currently vacant, for small office suites on the ground, first and second floors.

2. It is admitted that the property is in some degree of disrepair according to the terms of the lease. After discussions between the parties' respective building surveyors, both the extent of the relevant disrepair and the costs of remedial works are largely agreed. The areas of dispute are (i) whether, on the evidence, the property has been decorated in accordance with the cyclical decorating covenants, (ii) how much scaffolding would be needed to do the necessary external repairs/decoration, (iii) whether the appropriate level of professional fees would be 10% or 11% of the costs of the works and (iv) how much of the works required to remedy proven disrepair would in fact survive the likely building works which a landlord would be likely to do to the property once in control of it (an argument known as "supersession" for short).

3. Unusually, Mr Anstruther claims specific performance of the lessee's covenants. Alternatively he claims – as would be more usual – damages for breach of covenant.

4. In such a case it is trite law that the measure of the damages to which he is entitled is the diminution in the value of his own interest occasioned by the proven breaches of covenant, assessed at the time of the trial.

5. In the simple case, in particular at the end of a lease, such a calculation is not complicated once breaches of covenant and the costs of remedial works have been determined. The measure of damage to the landlord will normally be the costs of doing the repairs together with any appropriate allowance for lost income or irrecoverable expenditure whilst such works are being done. This is because the landlord will either have done, or have to do, such works himself, or he will have to give an equivalent monetary allowance off the price he will get on disposing of his interest or re-letting the premises.

6. However, the cost of the repairs will not be the measure of damage if it is more than the loss the landlord will actually suffer to the value of his interest. In this case, the latter is the limit. This will occur, if, for example it is clear that the relevant works will never in practice be done because the building is destined for some fate or use which will obviate any need for them, such as complete redevelopment. This is a principle enshrined, as to terminal dilapidations, in the second limb of s18(1) of the Landlord and Tenant Act 1927, but it still applies as a matter of general principle in other cases. The reason is that in such a case the want of repair makes no difference to the value, ie the market value, of the landlord's interest at all.

7. However, this case is not simple. The assessment of the measure of damage in this case, ie a calculation of the diminution in the value of the landlord's interest caused by the largely admitted wants of repair, is made complicated by the following factors.

8. **First**: This is not a claim for terminal dilapidations, but interim dilapidations. The same approach to the measure of damage still applies, ie it is the consequent diminution in the value of the landlord's interest. However, the interest to be valued is reversionary rather than in possession. However again, the lease is due to expire very shortly, namely on 25th March 2011.

9. **Second**: The property itself is "tired", not having been refurbished since at least 1965 and possibly 1955 It is suggested that there is therefore huge profit (on the calculations I have seen, said to be several £M) to be made by now completely refurbishing the building to convert it to high class residential flats, or possibly high class single office use - and this is what anyone with a sufficiently lengthy interest in the property would now grasp the opportunity to do.

10. **Third**: However, Mr Anstruther's interest is not the freehold, but a head leasehold interest, itself on full repairing terms, with only about 21 years' reversion on the subject lease. It expires on 15th April 2032.

11. **Fourth**: On the other hand, the freehold owner is not at arm's length from Mr Anstruther. The freehold is held beneficially by two companies, of which Mr Anstruther is a director, forming part of the Anstruther Estate (which is a large estate land-owner in the area) and held a discretionary trust of which Mr Anstruther is a potential beneficiary,

12. **Fifth**: Vidas is not in occupation of the property, but is an associated company of its own lessee, Adlergrove Limited, ("Adlergrove"), which has a sub-sub-underlease of the property, also on full repairing terms, which expires 10 days before the contractual expiry date of Vidas' lease.

13. **Sixth**, although neither Vidas nor Adlergrove has defaulted on any of its payment obligations under its own lease neither of them has what might be called a "solid" balance sheet. On the other hand, the subject lease is an "old" lease for the purpose of the Landlord and Tenant Covenants Act 1995, so that Mr Anstruther still has a claim in privity of contract against the original lessee - who was ICI.

14. **Seventh**: Adlergrove is not in occupation of the property either, but has sub-let it for a mixture of uses. The residential accommodation in the basement and third floors and above the garages is partly occupied on several assured shorthold tenancies. The ground, first and second floors are laid out as small office suites, although the upper floors at least are currently vacant. The garages are let on short tenancies. Adlergrove has served dilapidations notices on at least some of the tenants, but their repairing obligations are limited.

15. **Eighth**: Finally, Adlergrove has served notice on all the superior interests (ie Vidas, Mr Anstruther and the Anstruther Estate companies) claiming to exercise the right to purchase those interests under the Leasehold Reform Act 1967, as amended. This adds the following dimensions to the case

(i) The relevant notices were served on 11th January 2010, separately in respect of the main house and the mews premises. However, their validity is in dispute, in particular, in respect of the house on the currently familiar grounds relating to whether this building in Adlergrove's hands qualifies for enfranchisement, having regard to the use(s) being made of it and the requirement that it be "a house reasonably so called" (see eg *Hosebay Ltd v Day* [2010] 1 WLR 317)

(ii) The question whether the enfranchisement claims will therefore proceed at all, will not be decided before Vidas' underlease term comes to an end in March 2011; the first instance hearing of the dispute about the validity of Adlergrove's claim is scheduled for a date in April 2011, and could well, current experience suggests, go to appeal, whichever way it is decided.

(iii) If the enfranchisement claims do proceed, the terms and price of the transaction will not then be determined for a further period of several months, or even a year or so, and even then Adlergrove could simply walk away if it does not find the finally determined purchase price acceptable.

(iv) In the meantime, Adlergrove's own interest is preserved from termination by forfeiture under the terms of the Act, although the terms of this continuation may not be perfectly clear.

(v) If, on the other hand, the enfranchisement does go ahead, then the valuation date for the purpose of fixing the price of acquisition of the various interests will be the date of the Notice, ie 11th January 2010.

(vi) The property is then valued in whatever state of (dis)repair it was then actually in. However the Act directs it to be made on *(inter alia)* the counter-factual assumption that Adlergrove's *own* lease does *not* contain any obligation as to repair (see Leasehold Reform Act 1967 s 9 (1A) (C)) whereas the actual terms of all <u>other</u> interests in the property apply.

(vi) The effect of the above "quirk" (as it has been described) is that Vidas' own interest will be down valued, because Vidas had a full repairing obligation to Mr Anstruther, but it is assumed that Aldergrove had no repairing obligation to Vidas, so that Vidas has a liability with no ability to pass on the cost. This will reduce, and even render negative, the value of Vidas' interest for LRA 1967 purposes. However, the effect on valuation does not stop there, because, under the Act, the shares of marriage value paid by the enfranchising tenant to the owners of superior interests is divided in proportion to the individual values of those interests. Thus, the reduction or extinction of the value of Vidas' interest means that this marriage value payment is redistributed *pro tanto* between Mr Anstruther and the Estate. The result (it is suggested by Vidas) is that Mr Anstruther will actually benefit; he would get ***<u>more</u>*** than the market value of his interest at present.

(vii) All the above applies, regardless of the <u>current</u> state of repair of the property.

16. If it comes to quantifying Mr Anstruther's damages, I will therefore need to consider the effect of each of the above factors. I will also then need to remind myself, constantly - because it is easy to lose sight of this - that the required exercise is to make a comparison of two things, namely (i) the market value of Mr Anstruther's interest in the property in all the current actual circumstances, ie in its admitted or determined deficient state of repair and condition according to the terms of Vidas' lease (which I will call the "deficient state" or the "non-compliant state" for short) and (ii) the market value of Mr Anstruther's interest in the above property in all the current actual circumstances except assuming that the property is in the current state of repair and condition demanded by the lease (which I will call the "complaint state" for short.)

17. Either exercise involves assessing what a hypothetical purchaser would pay for Mr Anstruther's interest, now. As such, it is a wholly artificial exercise on any basis, since in the real world Mr Anstruther is not selling, and does not wish to sell his interest at all.

18. I have given the above list of the factors which might affect the price to be attributed to the relevant transactions, to illustrate the extent of the hypothesising entailed in carrying out the exercise required in this case. Of course, it may be possible in any particular case to cut through the process of doing two valuations and comparing the results if it can be concluded that, whatever the hypothetical purchaser would pay for this property interest if the property were in repair, he would pay £x less for it because it is out of repair in the relevant respects. It is this approach which justifies the measure of damages in the simple case, referred to above.

19. However, and as the exceptions to that simple approach demonstrate, that measure can only be used if there is evidence to justify the conclusion that it would, in fact, be operative in that way in the relevant market. But to reach that conclusion, it is necessary to consider the effects on price of all the other circumstances in the case, and whether, or how far, they obscure or obliterate or simply overwhelm any effect on price which the deficient state of repair of the property might otherwise have. It is this aspect which causes the difficulties which attend this particular case.

20. I should add that the multiplicity of factors also makes it extremely difficult to consider matters in linear sequence, as I fear may be apparent from the remainder of this judgment.

The interests in more detail

(a) Subject lease

21. Central is the subject lease. This was granted on 8th September 1955 by the Claimant's father, Sir Ian Fife Campbell Anstruther, to ICI Ltd, for a term of 56 ¼ years from 25th December 1954, thus expiring on 25th March 2011, for a premium and a ground rent of £120 pa.

22. It contains slightly unusual repairing covenants. At clauses 2 (b)-(e) there is first, a covenant to keep the demised premises in good and substantial repair and condition during the term and so to deliver the premises up at the end of the term. There is then an elaborate cyclical decorating covenant, involving repainting the exterior

surfaces every three years with, alternately, one coat and two coats of suitable paint and also with two coats in the last year of the term, and to renovate and restore the fabric of the exterior whenever required at the same time as such repainting. In default, the landlord has a right to enter to carry out such exterior renovation work and recover the cost from the Lessee. At Clauses (2) (f) –(h) there is a less elaborate covenant to repaint and at the same time renovate, repair and repaper as appropriate the interior surfaces of the property every seven years and in the last year of the term, with no proviso for the lessor to do so in default. There is a covenant to repair all broken glass and maintain the lift at Clause 2 (i). There is a further covenant to comply with repair notices served by the lessor, in these latter respects, but there is no right of entry attached.

23. It is the above provisions which it is accepted that Vidas has breached, to some extent.

24. Vidas acquired the lease by an assignment made on 27 May 2006, but did not become registered as proprietor until 5th October 2007.

(b) Superior interests

25. As to the superior interests, Mr Anstruther's own lease is a headlease of this and other adjoining property granted to him by his father on 16th April 2002, for a term expiring on 15th April 2032, ie currently having 21 ¼ years to run. It is said that this was to enable Sir Ian to step back from management of the Estate's properties, but it does not matter whether it was this, or some other financial or fiscal reason for doing so.

26. This lease also contains repairing an decorating covenants, but in simpler terms, namely a covenant to keep the premises in good and substantial repair and condition (Clause 3.3), to redecorate during the last three months of the Term (ie in the first quarter of 2032) (Clause 3.5), and to yield up the premises accordingly (Clause 3.7) There is a landlord's right to enter, view, and give notice of wants of repair, and to enter and carry out repairs and charge the costs to the tenant upon default (Clause 3.6). There is a covenant by the tenant diligently to enforce the terms of any underlease (Clause 3.12)

27. Initially this lease provided that it was not to be alienable save, with the lessor's consent, to a member of the Anstruther family. It also provided for the rent to be a fixed rent of £80,000 per annum. However, in June 2006 the lease was "rectified" to provide for the rent to be £276,000. The reason for this is not clear but again does not matter.

28. The freehold was transferred to the current freeholders, Brompton Estates Limited and Brompton Estates Management Limited (whom I shall call "Brompton"). In July 2008, there was an apportionment of rents between this property and the remainder of the lease property. The current rent is therefore £102,000. In July 2009 the lease was made freely assignable subject to the landlord's consent not to be unreasonably withheld.

29. These latter transactions were all after an attempt to enfranchise made in the name of Adlergrove's predecessor in title to the sub-underlease on 25th July 2007. Owing to this not being registered, the transferee of the title took the property free of

the notice. Adlergrove later – and presumably consequently – withdrew its claim notice.

30. The freehold is held by Brompton on a discretionary trust, created, I believe, on Sir Ian Anstruther's death in July 2007. Mr Anstruther is both a director of each of the trustee companies, and within the class of beneficiaries of the trust, but his evidence is that the purpose of the discretionary trust was primarily that of charitable donations.

(c) Inferior interests

31. As to the inferior interests, the then tenant of the subject lease granted a sub-underlease of the whole of the subject property to certain individuals on 26th October 1965, for a term expiring on 14 March 2011. The present sub-underlessee, Adlergrove acquired this sub-underlease by an assignment made on 2nd August 2007, and became its registered proprietor on 6th September 2009. Adlergrove is an associated company of Vidas, both being within the Ackerman Group of companies.

32. The passing rent under this sub-underlease is presently £93,300 pa. It contains repairing and decorating covenants designed to reflect those of the subject underlease, except that external redecoration is always with two coats of paint (clauses 2 (b) – (i) and (m).)

33. For a long time, the building appears to have been let out in small parts. In 4 Cromwell Place, there are two residential flats in the basement and one on the top (4th) floor. There are three office suites on the ground floor an separate offices on each of the first, second, and third floors, the latter two being currently vacant, I think, but it is not important. In the mews, each of the garages is let separately, and there is a single flat above.

The relevant history

34. Although there is a good deal of "history" in the combative sense between the parties, not much of it needs to be recited in detail for present purposes.

35. Once the issue of potential enfranchisement arose in 2007, a surveyor for Mr Anstruther (Mr David Moon) sought to inspect the property to check the dilapidations position, but seems to have made little progress with regard to inspecting the interior. I think it is insinuated that there was deliberate non-co-operation and prevarication by Vidas and Adlergrove during this and the following periods, but I do not need to decide, nor, therefore, to investigate that.

36. Eventually s146 notices were served by Mr Anstruther on Vidas in respect of both the gaining of access and of some dilapidations, in November 2008. A further schedule of dilapidations was served in December 2008, after an interior inspection was eventually secured in November 2008.

37. This brought about the appointment of a building surveyor on behalf of Vidas, Mr Christopher Howe. It also eventually produced, in March 2009, an acceptance that some repair works needed to be done. Tuckermans were appointed as managing agents on behalf of Vidas to obtain tenders, to oversee the execution of such works as Vidas

considered it appropriate to do and to prevail upon the occupational tenants to carry out such works as were within their own responsibilities.

38. Throughout 2009 there was correspondence between the parties, with Mr Anstruther pressing about responses to his schedules, but apparently making no satisfactory progress. In the course of this correspondence, in May 2009, Vidas' lawyers took the point that Mr Anstruther's s 146 Notices had been bad, by reason of s 168 of the Commonhold and Leasehold Reform Act 2002, the property having a residential element, and there having been no prior determination or admission of breach. As far as forfeiture of the lease was concerned, this point was accepted at the time (it has since been overtaken by events), but Mr Anstruther's lawyers pointed out that this applied only to forfeiture proceedings against Vidas, and not to an action for specific performance or for damages.

39. On 2 July 2009 Adlergrove discontinued its claim for a declaration of is right to enfranchise.

40. On 17th August 2009, after a letter before action, this claim was launched by Mr Anstruther. Initially, relief was also sought in respect of gaining access, but this has subsequently been dealt with and is no longer pursued. A defence was served in October 2009.

41. I need not recite the history of the proceedings, which has followed the usual process of disclosure, witness statements and production of expert reports. The only noteworthy aspect has been the service of yet further schedules of dilapidations, and a significant number of requests for additional disclosure on both sides. The trial was eventually fixed to commence on 8th November 2010. It took place in two parts, over 5 days.

42. In the meantime, Adlergrove served its own Notice claiming the right to enfranchise the property, on 11th January 2010. More accurately, it served separate notices in respect of the main house and the rear mews properties, separately. However, in the interests of simplicity (a commodity in short supply in this case) the two notices have been and can be treated as one for present purposes.

The parties' respective cases

43. At this point, it is useful to outline the parties' two rival cases, so as to foreshadow how the various factors above are prayed in aid in the arguments.

44. Since Mr Anstruther's case is the relatively simple one that he either wants an order for specific performance of Vidas' covenants or judgment for the appropriate damages, it is convenient to look at Vidas' case first.

(a) Defendant's case

45. For Vidas, Mr Anthony Radevsky of counsel submits the following

46. There is no basis for ordering specific performance of the tenant's repairing covenants because this case is not sufficiently exceptional, within the principle of *Rainbow Estates v Tokenhold Ltd* [1999] Ch 64, to justify that course; damages are a perfectly

adequate remedy for Mr Anstruther, not least because there is (he submits) no loss to the value of his interest in practice anyway.

47. As to damages, there is no damage because, first, the property is so obviously ripe for complete refurbished and conversion to full high class residential use that it is in this prospect that the value of Mr Anstruther's interest lies (leaving aside the enfranchisement claim). Any such works would supersede repair works pursuant to the lease obligations, such that no, or very little, value from them would be expected to survive. The disrepair would therefore not affect the price which would be agreed for Mr Anstruther's interest on disposal in the market.

48. Second, even if the above were not the case, any concerns about the costs of remedying any outstanding disrepair would be completely allayed by the purchasers' knowledge of his rights of recovery at the end of the lease, against Vidas itself, against ICI – a covenant of obvious solidity – as original tenant, against Adlergrove under its continuing interest *pro tem*, and the fact that the occupation tenants have now been pressed to perform their own obligations. The combination of these fall back rights would give a purchaser sufficient comfort and confidence that it would not reduce its offer on account of any extant breaches of Vidas' obligations.

49. Third, the enfranchisement claim would in fact reinforce the absence of loss, because the enfranchisement price for Mr Anstruther's interest would not be affected by the present state of disrepair of the property, but, because of the previous state of disrepair as at 11th January 2010, would actually *increase*, to the advantage of the potential purchaser.

(b) Claimant's case

50. For Mr Anstruther, Mr Andrew Walker of counsel responds to the above as follows:

51. First, he submits that this is a sufficiently exceptional case that specific performance should be ordered; damages are not an adequate remedy for Mr Anstruther.

52. As to damages, however, he submits that, on the evidence, it cannot be assumed that the property will be refurbished so as to supersede the remedial works which ought to be done to comply with the lease. This is because, first, there is no evidence that such a scheme would be undertaken in fact; the evidence supports the view that the property would simply be let out as it has been. There would be no, or no significant supersession of the works by any lesser "spruce up" type scheme by the landlord, and in any event the building surveyors have agreed that at least some £33,000 of remedial works are external repairs to the building structure which would not even be superseded by a major refurbishment.

53. He challenges the suggestion that a purchaser would pay the same sum for the building out of repair as it would if it were in repair because of the availability of rights against third parties, even a third party as solid as ICI.

54. Lastly, he suggests that Mr Radevsky's submissions as to the enhanced price on enfranchisement are incorrect, that no such "benefit" is reliably established at all – in fact the opposite is more likely – but it would at best be minimal (around £12,000, say). This

would not, therefore, give the purchaser any comfort about paying a price for Mr Anstruther's interest which did not reflect the potential costs of remedying the wants of repair under Vidas' lease.

Specific performance

55. It is convenient to deal here with the claim for specific performance, even though this will refer forward to some findings made later. This is because I decline to give such a remedy, and the main argument in this case will therefore concentrate on the claim for damages.

56. Mr Radevsky argues, first, there is no basis for an order for specific performance of the tenant's repairing covenants. *Rainbow Estates v Tokenhold Ltd* [1999] Ch 64 shows that such an order can be made, but only in exceptional cases. He submits that "exceptional" means: very exceptional - that particular case concerned a large Grade II listed mansion, in serious and rapidly deteriorating disrepair, with no real disagreement about the works required to be done, and a lease with no forfeiture clause nor any right of access for the landlord to carry out the works itself. In this case the works are not particularly pressing, the lease is shortly going to come to an end, and in any event, there is a forfeiture clause and a right of access. He submits that damages would in principle be an adequate remedy for Mr Anstruther (although he goes on to submit that there is in fact no loss), particularly because, if the enfranchisement claim by Adlergrove proceeds, doing the works now will have no bearing on the price that Mr Anstruther will obtain for his interest. For that reason it would be wrong to order specific performance.

57. For Mr Anstruther, Mr Andrew Walker of Counsel accepts that since the claim for specific performance was launched, three things have changed. First, some at least of the more urgent works have been or are being carried out, (although as against that, they are small in value – about £12,000 all told) but there is a flat refusal to carry out more, second, the history suggests that specific performance could well spawn more disputes, and, third, there is now only a very short period of the lease left.

58. However, he still submits that this is such an exceptional case as would fall within the *Rainbow v Tokenhold* principle, at least to some extent. He points out that it is within the period in which the Leasehold Property (Repairs) Act 1938 recognises that it is prima facie reasonable for a landlord to enforce the repairing covenants by action; that Vidas accepts, through its own expert, that around £167,000 worth of repair works (apart from decorative works) are outstanding, that about £40,000 worth of such works were advised by Vidas' own surveyor to be pressing, but that they have not done all these, and that some £33,000 of the outstanding dilapidations relates to external repair works which the building surveyors agree would never be wasted. He submits that Mr Howe, Vidas' own expert had not been "impressed" that his clients had not done the works which he advised should be done, and it is also remarkable that Vidas is refusing to do works which were agreed to be necessary, even "urgent", and would never be wasted. He pointed out that the landlord's right of access to do repairs only related to the exterior of the premises (see Clause 2(e)) and that the pressure of the right of forfeiture was somewhat illusory in the context of the overhanging enfranchisement claim by Vidas' associated company. Whilst the original claim as pleaded had been made in respect of all outstanding works, at the trial Mr Walker limited this claim and made it in respect only of the works which Vidas was now saying it was doing, and the works of damp-proofing to the basement, which were idas had refused to do.

59. In my judgment this is not an appropriate case for an order for specific performance. It is insufficiently exceptional. In the *Rainbow* case, if the landlord was not able to obtain specific performance from the tenant, then it could do nothing but watch a valuable and important building, which it would ultimately recover, deteriorating so that the actual cost of repairs would escalate hugely before the landlord would be in a position itself to do anything about it.

60. It is always tempting to feel that a party who does not comply with solemn covenants undertaken by it should be made to do so, especially where that party's attitude is one of defiant breach, as here. However, the policy of the law in the context of repairing covenants is not to enforce them simply because they are covenants, but only to do so where there is a real and proper benefit to the covenantee which is not capable of being delivered in money terms, according to the proper assessment of damages for breach of covenant.

61. I can see no such sufficient benefit in this case. The essence of whether a case is "exceptional" seems to me to lie in whether Mr Anstruther's interests are still reasonably protected if he is left to his common law remedies and in particular, in this kind of case, his remedy at the termination of the lease, where the parties' relations are severed. In the *Rainbow v Tokenhold* situation, the exceptional circumstance lay in the fact that continuing deterioration would result in the premises costing vastly more to repair, and possibly mean that the landlord could never in fact recover his due from the tenant, or that the premises would never be repaired. To take another hypothetical example, if a claimant landlord was impecunious and could not afford to repair the property, but genuinely and for good reason wished and intended to occupy it himself when the lease ended, whereas its objective market value would plainly then be as a development site, then I think that would be grounds for ordering specific performance of the tenant's covenants during the lease, before the ending of the lease would bring the second limb of section 18(1) of the Landlord and Tenant Act 1927 into play and prevent the landlord from obtaining the benefit of a tenant's covenant which he had a real but subjective need to have performed.

62. That, however, is not this case, and I do not see anything truly exceptional in this case. The particularly singular circumstance of this case, apart from the complexity of the hierarchy of property interests, is the overhanging enfranchisement claim. But neither, in my judgment creates an exceptional situation in which damages will be or become an inadequate remedy for Mr Anstruther in principle.

63. If the enfranchisement claim goes ahead, then Mr Anstruther suffers no loss as a result of the current breaches of covenant. If it does not go ahead, then Mr Anstruther retains his right to sue for damages at the end of the term. With the end of the term so near, this is not a case where deterioration will vastly increase the eventual costs of repair so as perhaps to prevent Mr Anstruther from making proper recovery at the end of the term. The only argument for specific performance now rather than damages would be if damages are unlikely to be recovered at all whereas an order for specific performance now is likely to be complied with. I can see no reason to think that this would be the case. Specific performance would involve expenditure of sums of the same order as the costs of repairs, as the highest potential measure of damage. There is no reason that I can see to suppose that Vidas would be more likely to make the expenditure in order to perform its covenants, than to pay an award of damages. The only issue which makes

payment by Vidas unlikely is its apparent insubstantial financial position. However that applies equally in both situations.

64. In addition, I find there may be some force in the point that specific performance would be inappropriate unless it were quite clear that the works would need to be done any way, and would not ultimately be wasted or "superseded". I am not satisfied that this is either as clear, or as extensive , as it would need to be, in this case. However, I regard that as a supporting point, rather than the main reason for refusing specific performance.

65. If follows that damages are, in my judgment, an adequate remedy for Mr Anstruther in principle in the present situation, compared with any benefits of an order for specific performance as a remedy. I therefore turn to the claim in damages.

The hearing and the witness evidence

66. At the five day hearing, I heard evidence from two witnesses of fact, Mr Anstruther himself on his own behalf, and Miss Samantha Bettinson MRICS on behalf of Vidas.

67. Mr Anstruther's evidence was generally to set the scene, but there is one important aspect of it which is contentious.

68. A central plank of Vidas' case has been the proposition that the property is so obviously ripe for redevelopment that works which would supersede any works to remedy wants of repair etc under the lease would be carried out, thus eliminating any loss in value of Mr Anstruther's interest on that account. In the course of the case, it was agreed between the building surveyors that works to the value of £33,620.84 would not be so superseded, but Mr Radevsky's argument still applies to remedial works in excess of that relatively modest amount, limiting Mr Anstruther's claim (he submits) to this sum as an absolute maximum. However, it is common ground that such a major refurbishment would only take place in the hands of a party with a sufficient interest to make it worthwhile spending the very large sums needed to do so, and to release the even higher value of the refurbished building. It is also common ground that Mr Anstruther's 21 year reversion would not be such a sufficient interest.

69. Vidas' case, based on the views of its valuer, Mr Richard Kay, has been that in this situation, the most likely purchaser of Mr Anstruther's interest, in the market, would in fact be the freeholder, Brompton, so as to combine their interests and make such a refurbishment worthwhile.

70. Mr Anstruther therefore gave evidence that this would not in practice be the case. First, it was not the Estate's policy - as to which he could speak with authority as a director of the relevant companies – to buy in such interests in the market. The Estate was large and had plenty of other commercial opportunities to which it could put its resources. The headlease had only 21 years to run, and the Estate would therefore be content to wait for the lease to fall in and then assess the opportunities; it would not be interested in paying out a premium to buy in the headlease at present. It would therefore not be a bidder in the market at the moment. Therefore, in practice, when Vidas' headlease fell in, assuming it came back into his hands, the property would simply be prepared for continued occupation letting as hitherto (a "spruce up" as I called it), as

to which the carrying out of the works required to comply with Vidas' lease would have to be done.

71. Mr Radevsky, in the end invites me to reject this, and regard it, I think, as a proposition of which Mr Anstruther may genuinely have convinced himself at the moment, but which defies all rationality. The figures, he says, show such a huge profit to be made by a refurbishment (doubtless, I observe, the reason why Adlergrove is so keen to exercise the newly commercialised right to enfranchise under the 1967 Act) that it is inconceivable that the estate, with a "tame" tenant like Mr Anstruther, would not eagerly grasp the opportunity to get on with such a redevelopment.

72. It was pointed out that despite Mr Anstruther's protestations about estate policy, that was exactly what the Estate appeared to have done with the adjacent property at No 5 Cromwell Place spending money converting that to single occupation. However, the response was that this was a property of a different kind, with a particularly unusual configuration of floor space, and was in effect a gallery. Mr Anstruther was also able, I think, to point out another property where what had happened was exactly as he said, with the estate not rushing in to effect a total refurbishment, but being content to re-let for income.

73. I will give my conclusions on this point later.

74. Miss Bettinson was an estate manager, who worked in house for the Ackerman Group of companies. Her evidence was adduced to show that some instructions had been given for repairs to the property, that the occupation tenants had also been given notices to enforce their own obligations and finally (and probably foremost) to support the alleged solidity of Vidas and Adlergrove, and to produce recent – and hastily and specially prepared – further accounts for those companies. This haste was apparent, because the latest set of accounts was only for nine months up to 30th September 2010, whereas previously produced accounts had been annually, to 30th December.

75. I accept Miss Bettinson as a sincere, witness, but she was also quite plainly loyal to her employers, and in the end I did not find her oral evidence of great weight or materiality. She was involved in day to day management of the properties, and plainly had to refer higher for any authoritative statement. Her statements of Adlergrove's intentions, that they were not yet fully formulated, seemed to me to indicate mainly that decisions or ideas had not percolated down to her level.

76. I also heard evidence from four expert witnesses, namely Mr David Moon DipBS FRICS and Mr Christopher Howe MCIoB, as building surveyors, and Mr Richard Kay BSc, MRICS and Mr Justin Bennett BSc, MRICS, ACIArb as Valuation experts, instructed on behalf of Mr Anstruther and Vidass respectively.

77. I will refer to the valuers' evidence later, but I record immediately that credit must go to the two, very experienced, Building Surveyors who worked during the trial to seek to narrow the issues, and to provide supplementary statements of matters of agreement and disagreement, which were extremely helpful. I found each of them to be a reasonably good witness, and their differences, to my mind were really the result of reasonable differences of professional opinion, as the small ultimate range of dispute between them shows.

78. I will therefore consider the building evidence first.

The wants of repair etc

79. Four schedules of dilapidations have been served in the course of this matter. The surveyors' respective positions at the time of the trial were as follows.

80. Mr Moon, for Mr Anstruther puts the total value of the outstanding wants of repair and decoration under the lease at £252,938.03. This comprises £193,933.70 cost of works (including preliminaries at 15%), with professional fees at 10%, (£19,393,37), fees of a CDM co-ordinator at an additional 1% (£1,939.34) and VAT at 17.5% (£37,671.62).

81. Mr Howe, for Vidas, is of the view that the total value of the outstanding works is £167,125.03. This comprises £129,303.70 cost of actual works, (including preliminaries at 15%), professional fees at 10% (£12,930.37) and VAT at 17.5% (£24,890.96). He does not consider that a CDM co-ordinator is needed.

82. The most important reason for the difference between the surveyors is the inclusion by Mr Moon, but not by Mr Howe, of a basic £56,200 worth of exterior and interior decorations, primarily interior decorations. This has a "knock on" effect on the ultimate difference between them, magnifying it to some £85,000, because of the application of percentages for professional fees, etc.

83. From this point, I shall use rounded figures for the above and other figures once mentioned, since the degree of precision suggested by use of the precise figures is neither realistic nor necessary.

84. Mr Howe for Vidas therefore accepts that building works (on his figures, worth £167,000) are requirements falling within the terms of the subject lease. He is of the view that decorations are not properly included, first, because he does not consider that there is any proven breach of the decorating obligations (currently only the *cyclical* decorating obligations) - or at any rate none causing any diminution in value of the property. This is on the basis of his own inspection, and some documents, including invoices etc, for decorating works at earlier times obtained from previous managing agents. It is therefore his view that it is not proved that the building was not decorated in accordance with the timetable, – or so near as would make no practical difference with regard to their state and condition.

85. Second, and even if this were wrong, he expressed the view that no owner would carry out full scale decoration except as part of a general refurbishment or sprucing up of the building for subsequent letting. This was because decorations would have to be done for the latter purpose anyway, and to do it now would potentially incur the significant cost of scaffolding twice. In any event decorating would be otiose and remedy no financial damage, because new decorations would not satisfactorily survive whatever works would inevitably be done at the end of the lease, even if less than a major refurbishment.

86. There is a dispute about the necessary costs of scaffolding for carrying out works to the exterior of the premises including the disputed decorations. Mr Moon estimates

this at about £20,000 whereas Mr Howe puts it at about £9,000, on the basis that much of the work could and should be done from towers and ladders.

87. Mr Moon, for Mr Anstruther, is of the view that decorations should be included, first, because he does not accept that the evidence suggests that the decoration covenant in the lease has been complied with, but rather the contrary. Second, he says that decoration would be necessary in any event to complete the other repair works to the structure which it is accepted need to be done on any basis. Third he disputes the argument for virtually total supersession, if, as he understands to be the case, the property will simply be prepared for re-letting on a similar mixed use basis to before.

88. Very possibly because of their disagreement as to the works involved, I think the surveyors also disagree about the additional time which would be required to carry out the necessary works, and which would result in a loss to the landlord of rent rates and service charge payments from prospective new tenants for the relevant period, with Mr Moon suggesting 26 weeks and Mr Howe, I think, 20.

89. The surveyors have, though, agreed the following

90. First, since January 2010 certain relevant repair works have been done which are therefore not included within the latest figures above. They are relatively modest, totally about £5,500 in value.

91. Second, Vidas is carrying out some works to the property which Mr Howe had advised should be done before the expiration of its lease. The sums for these works remain within the figures above, because their completion had not yet been proved to Mr Moon's satisfaction, but if that takes place, they will be deducted from the £167,000 of repairs. However, their value totals only about £7,100 odd. The total cost of the works which Mr Howe recommended be done is around £42,000.

92. Third, within the works above are works to the value of £33,500 odd including VAT and fees assuming current works are completed (about £36,000 if not) which the surveyors agree would not be superseded, even by a major refurbishment of the property to convert it to residential flats or high class office use.

93. Fourth, Vidas has indicated that it will not carry out any of the other works, even those that would survive anyrefurbishment, or are classified as "urgent" (such as remedying damp in the basement) because there is no urgency to do them before the end of its lease, and/or because doing so would require vacant possession of the premises.

Conclusions as to the state of the property

94. I remind myself of the exercise which I have to perform here. It is ascertaining how much less, if anything, a purchaser of Mr Anstruther's interest in the property will currently be prepared to pay for that interest because of the existing disrepair etc in non-compliance with Vidas' lease than he would be if there were compliance with those covenants.

95. It seems to me that the assessment of that element within a purchaser's offer will depend on the value he attributes to the *risk* of incurring expenditure or loss because of the culpable state of repair of the property, as compared with purchasing with no such

risk. That evaluation will be made in all the circumstances and on the basis of the advice which the purchaser would receive about the potential effects on his financial position which the deficient state of the property could have.

96. The only difference between the parties' two building surveyors as to the existence of a breach concerns the decorations covenants. Those required the exterior of the premises to be decorated in 2007 with two coats of paint (and one in 2010), and the interior in 2004. Mr Moon says, from inspection, that this was not done although he has not specified exactly in what way he says it was not done (although obviously nothing has been done in 2010). He concludes that the cost of now fully decorating the premises is the measure of damage attributable to this alleged breach.

97. Mr Howe says, from inspection, that he believes he can tell that the cyclical decorating was duly done, – or at least probably was done, – as there are invoices showing the commissioning of decoration works to at least the major part of the exterior of the premises in 2006/7. He also says that in any event any past breach of the decorating covenant does not affect the value of the landlord's interest because a purchaser is either not going redecorate at all if a major refurbishment scheme is carried out, or if the property is re-let, he would have to do so himself in any event, because the decorating works would not satisfactorily survive the works necessary to do even this..

98. In general, I prefer Mr Howe's approach and evidence to that of Mr Moon on this topic, although not entirely.

99. If necessary I would find, on balance of probability, that the earlier cyclical repairing covenants have not been perfectly complied with, but have been substantially complied with. I am not satisfied by the evidence that I can safely conclude that there was complete compliance with the covenants, but it is for the Claimant to identify any particular breach and really Mr Moon does no more than make a general assertion.

100. More importantly, however, (and even if I were wrong as to the above) I find that any such past breaches will have no effect on the value of Mr Anstruther's interest at the present. This is because the purchaser is really only going to be concerned with the covenant to decorate in the final year of the term, ie just before he takes over. As yet there is no breach of that covenant, albeit the circumstances suggest that it will not in practice be complied with. I am satisfied that it is that factor, and not any currently subsisting breach, which might affect the purchaser's attitude to price.

101. If findings as to the potential supersession of complete external and internal redecoration now were material, I would tend somewhat towards Mr Howe's view rather than Mr Moon's. It is common ground that if the property were to be totally refurbished, all decoration works pursuant to the lease would be otiose for supersession. Mr Howe says that would be the case even if the property were merely being prepared for re-letting. Mr Moon denies this and says that the majority of such decorations would survive and be of value.

102. I am not convinced by Mr Moon. I take the view that a purchaser would reckon that less than half of any such decorations would usefully survive even such lesser works as it would wish to carry out for re-letting purposes - which works would not necessarily be confined to the works which would remedy dilapidations under Vidas' lease. A main point of decorations in this context is to give the building a fresh and

smart appearance, and for that purpose I do not think a purchaser would assume he could rely to any great degree on decorations done before any such other works were carried out. He would expect to have to re-do the majority, even if only by a single coat of paint.

103. As regards the other differences between the surveyors, these come down to a different view as to the likely costs of scaffolding required to do external works (about £10,000) and a difference of 1% in the percentage addition for professional fees. If I had to choose a particular figure, I would conclude that an allowance of £15,000 was the appropriate allowance for scaffolding costs, but on the issue of fees, I would prefer Mr Howe's evidence, as it appears to be marginal whether a CDM co-ordinator is really required.

104. However, in my judgment I really do not have to determine the above to any degree of precision. This is because I think that the importance of the building evidence is not to enable a single precise figure for the costs of carrying out necessary remedial works for breach of covenant to be calculated, but what it shows about the advice which a potential purchaser of Mr Anstruther's interest would be given. I find the differences between the two surveyors to be indicative of the range of costs which a purchaser would be given by his advisers, and based on which he would make his decisions about what price to offer and ultimately agree.

105. I find that, on this evidence, the purchaser would be told that there were currently breaches of repairing covenant by Vidas which, on their own, would cost around £160,000 - £180,000 to remedy (VAT is rising from 17.5% to 20% on 4th January 2011, although it is of course quite possible that the purchaser would be an entity able to recover it), and these would most likely still subsist at the termination of Vidas' lease, so that they would be likely to become a claim for dilapidations. He would also be told that the further cost of total redecoration of the building would be about £75,000- £90,000 (depending on scaffolding requirements), that it appears clear that this is not going to be done by Vidas before its lease expires, and that whilst it might be arguable that this would be part of dilapidations, the cost of such works might well not be recoverable, certainly not in total. He would also be told that amongst the outstanding works of repair would be about £35,000 worth of works required to the fabric of the building, which were relatively urgent, and which would be required whatever use the property was subsequently put to, and that this would have associated costs of redecoration.

106. However, he would be taking this advice as part of general advice about the works which would be necessary or desirable to achieve his intentions for the building. If this were total refurbishment, he would be told that all but the last category of works would be superseded by his own works. If he were planning on re-letting, there would be discussions of what works he wanted to do generally to the building in order to gain best value from the 21 year interest. These would not be confined to works which were necessary merely to put the property into a state of compliance with Vidas' lease, but would almost certainly include further works to modernise or "spruce up" this "tired" building to maximise potential rentals, the extent or quality of which would be very individual to the particular purchaser. Examples of matters which might well be considered may perhaps be found in those items which Mr Moon initially placed on his Schedules but has subsequently accepted not to pursue, eg modernisation of services or refurbishing ancient lifts.

107. It is this advice, in context, which would produce any consequent reduction in the purchaser's bid as against what he might have bid in the absence of the dilapidations.

The valuation evidence

108. It is appropriate therefore now to turn to the valuation evidence. This has been elaborate, and although I have considered it carefully, and am grateful for the detail in which counsel took both the witnesses and myself through it, I am not going to lengthen this judgment by providing more than an outline of it, and some general flavour, to explain my consequent treatment of it.

109. Mr Justin Bennett, for Mr Anstruther, provided an elaborate report dated 20 September 2010. After describing the individual flats and units in the building in detail, he recorded Mr Moon's initial assessment of the cost of remedying the deficient state of the property as £335,645.76, including VAT and fees, and that Mr Howe's was of the order of £200,000 excluding VAT and fees. He stated that he would then consider the impact of the cost of repairs on value.

110. However, he did not do that. What he did was to take the property in its individual component letting parts, and attribute to each three levels of rent which it would be expected to achieve according to what he termed "best rent", "existing state" and "in repair". He explained the first as being a state totally compliant with the terms of Vidas' lease, ie being in repair, redecorated, and statutorily compliant. The second, "existing state", was described as "largely being subject to the agreed breaches of repairing and decoration covenants" (although the state of agreement at that time was less than by the time of trial). The third, "in repair", was "where the works required by the repair breaches under the lease are completed but not the other works required".

111. He calculated his rent levels by applying the current passing rents in the building to achieve "existing state" rental income values, and adjusting these by reference to his information as to rents outside the property to achieve rental income values for his "best rent" and "in repair" states. By applying suitable yields, he calculated the capital values of each of these, as £1,568,000, £740,000 and £1,135,000. He therefore gave his opinion that the diminution in value of Mr Anstruther's interest was £828,000 as between the former two, and £395,000 as between the latter two, this last being in respect of diminution occasioned by "disrepair alone", and which I think he saw as the calculation required under s 18(1) of the Landlord and Tenant Act 1927.

112. He also gave his view that the diminution in value would be the same, or as near as made no difference, whether the interest was valued under ordinary landlord and tenant law, or on the basis of the LRA 1967 formulae. I understood this to be because he thought that the value of Mr Anstruther's interest would there be the same (or at least similar to) the value of his interest in the market, or else it would be higher due to marriage value (although that value might itself be reduced because of the disrepair). He did not, therefore, carry out a full leasehold enfranchisement valuation, although he did explain the application of the enfranchisement process, as he saw it, in an appendix. He was aware that the enfranchisement calculation would be made as at 11th January 2010, and that the interests would be valued with the property in its actual state, but he did not attribute any effect to the "quirk" that Adlergrove's lease would be taken to

contain no repairing covenant, adverting only to the general point that all property interests would be valued as if the property were in disrepair.

113. After cross examination, and in the light of further information, Mr Bennett modified his comparative figures to £1,359,153 "best rent", £628,729 "existing condition", and £978,440 "in repair", but made it clear that the correct comparison was between the first (which he now explained as "in repair and decorated") and the second, ie £730,425. He accepted that the third of his valuation scenarios was not relevant.

114. Mr Richard Kay provided a rather simpler report, but adopted a rather different approach. He recited that the cost of any works would be the starting point, but noted that in principle the actual loss occasioned to the reversion would be a cap on this. He therefore explained that one must consider what view the hypothetical purchaser would take of the property's state of repair as a starting point. He then considered and assessed the estimated rental value of the property, taking passing rents and concluded that this provided a comparative capital value of £2.6M - £3.6M in perpetuity, compared with a freehold vacant possession value of £10M as a property ready for conversion to residential use.

115. He concluded, in the light of this, that the conversion to high class residential use or office use was the "apparent future" of the property, in which case only the works to remedy external items of disrepair, worth about £30,000-£40,000, would survive this exercise, and would therefore constitute the only viable claim for dilapidations at the end of the lease. He further concluded that there was no reason to believe that either Vidas, or eventually Adlergrove itself, would not be good for such a claim, and that accordingly the purchaser would make no adjustment to his bid to take account of any concern over the current wants of repair in this regard.

116. Unfortunately, Mr Kay was not aware at the time of writing his initial report, that Vidas' lease had been varied to make it freely assignable. Initially, therefore, he assumed that the hypothetical purchaser would have to be a member of the Anstruther family or one of their companies and he concluded that the most likely purchaser would be the freeholder itself. He concluded, therefore, that in this situation, the deficient state of repair of the property would have no effect at all on the value of Mr Anstruther's interest.

117. When he later learned about the assignability of the lease, Mr Kay did not significantly change his position. He concluded that the likely purchaser would still be either the freeholder, or a person *who would purchase the freehold interest at the same time as the headlease ,* thus in effect bringing about the same situation and accordingly making no difference to his conclusion that the wants of repair etc caused no diminution in the value of Mr Anstruther's interest.

118. With regard to the enfranchisement claim, he was fully aware of the "quirk" effect of the 1967 Act valuation provisions, concluding that the only effect of this was to render the premium which Mr Anstruther would obtain on enfranchisement higher than it otherwise would be on an existing use type evaluation. Since, however, his assumed purchaser remained someone who would also have control of the freehold and would intend to redevelop, this did not cause him to change his approach to valuation, either.

119. He did give consideration to what attitude the purchaser would take to the possible success of the enfranchisement claim. He said that this was difficult and he would therefore assume it would be regarded as 50:50. However, "whilst that might alter the amount they are prepared to pay for the Claimant's interest, it would not involve any downward adjustment relating to dilapidations."

120. The valuers also both considered various aspects relating to the availability of planning permissions for various uses, appropriate yields and so forth. These gave rise to detailed and intricate calculations, but in the end I do not think it necessary to go into these or to choose between them.

121. Each expert was squarely criticised by the other side for alleged obvious flaws in either his approach, his reasoning, his methodology or his attitude to evidence, and I have to say that many such criticisms were, to my mind justified, in both cases. I shall not go through all of the criticisms levelled at each valuer here, but I will give examples.

122. Both of the valuers were open to the same criticism that the evidence of values derived from "comparables" which they used was based unquestioningly on raw particulars , drawn mainly off the internet, and relying even mere asking figures, and not actual transactions, and with no critical examination of these, or investigation or consideration of, for example, the state of repair of the relevant alleged comparable properties.

123. This criticism is more telling in the case of Mr Bennett, but perhaps only because he had laid much greater stress on individual rental values in the course of providing his unnecessarily elaborate scheme of three valuations.

124. He was criticised by Mr Radevsky for the above, for his lack of rigour in considering comparable evidence, for valuing on the basis that Mr Anstruther would recover possession at the end of the lease and not considering the fact that he undoubtedly would not, for failing to take account of the possibility that works might be done by the occupational lessees or that Mr Anstruther would have a terminal dilapidations claim which could be made against Vidas, ICI and later Aldergrove, and for failing to consider other aspects of the defendant's scenario, such as whether the freeholder would be the likely purchaser of the interest. He was also criticised for failing to perceive the true effect of s 9(1A)(c), and 5¢ a share to go in and say to them as a whole set of some of the one I saw the same as soon as the star of the western U.S. Allies and yes to 3ft. from one town the sound you can see from 196 18 of the LRA 1967.

125. Mr Bennett had, to my mind, got very much carried away with intricacy of his valuation processes, and the beauty of constructing his many refined letting value scenarios, in an ever more elaborate way and this seemed to me to cause him to lose touch with the practical object of the exercise. In fact, he never looked back to the estimated costs of the repairs in giving his opinion of diminution in value, even though they were lower than the figures he ultimately calculated. I found many though not all of Mr Radevsky's criticisms to be justified, and to show a lack of rigour that causes me to feel I can place little reliance on Mr Bennett's opinions.

126. I preferred Mr Kay's general approach to that of Mr Bennett, as it seemed far more focussed, and realistic, and I found him to be the more impressive witness.

However, his evidence suffered from what, to my mind, was the enormous flaw that he had approached the whole exercise blinkered by the idea that the property must be redeveloped for high class residential use, and that therefore the purchaser of Mr Anstruther's interest would have to be the freeholder, or, at a later juncture, would be someone who would buy both Mr Anstruther's and the freeholder's interest at the same time. Alternatively he had approached the exercise on the basis that the purchaser would be the freeholder, and that therefore there would be a total residential conversion, without later reconsidering his premise. In other words, his approach entirely begged the question who the purchaser would be, and having assumed the answer at the outset, he never stood back from this and considered any other possibility (until forced to do so in cross examination) or whether the evidence actually justified his assumption. He rather made his report fit the hypothesis of which he was convinced.

127. To my mind this lack of critique of his own assumption casts some doubt on the reliability of his other expressions of opinion. This was particularly obvious in his assumption that a purchaser would also buy the freehold, without ever asking himself whether there was any reason to treat it as a given that the freeholder would be willing to sell at all (as contrasted with Mr Anstruther, where that assumption is mandatory). I was also unimpressed with the fact that in his comparative enfranchisement valuations he had applied the state of repair of the property to the value of Vidas' interest so as to render it negative and increase the marriage value share to Mr Anstruther, but had seemingly not carried the disrepair supposition through to its effects on the value of Mr Anstruther's own interest, which Mr Andrew Walker's adjusted examples seemed to me to show would have a significant depreciatory effect on the sums involved.

128. Having said that, he did, in cross-examination, accept that his argument about "massive supersession" would have to be more limited if the purchaser were someone other than the freeholder (although he had not considered the extent of any such limited supersession). Even then, though, his conclusion was that it would have only a minimal impact on the price a purchaser might pay for the property. He expressed the opinion that the additional comforts of the occupational tenant's potentially doing works before their individual leases expired, and the dilapidations claims available against Vidas and ICI and also eventually Adlergrove, would be sufficient to mean that the purchaser would discount any exposure to loss through cost of repairs by only 25%. He emphasised that it was not just what a hypothetical purchaser would offer, but also the fact that the seller of Mr Anstruther's interest would not grant a bigger discount because of these factors.

129. As between the two valuers, I found Mr Kay the more impressive, first because he had considered more factors relating to the hypothetical transaction and had done so in a far more realistic and less theoretical way than Mr Bennett, and second because there was some degree of willingness to make concessions when possible errors in his reasoning were pointed out to him. However, the reliance I feel I can place on his evidence is limited because of the fact that it all started on an unquestioned assumption, and I have doubts as to how far Mr Kay was able to break away from that with objectivity. As an example, he seemed remarkably reluctant to accept what seems to be perfectly obvious, namely the weakness of Vidas' covenant

130. Each valuer was of similar seniority and with a similar range of "professional" surveying experience, although Mr Bennett appeared to me to have more experience in property management matters, and Mr Kay to have more emphasis on Leasehold

enfranchisement matters. Neither of them appeared to me , though, to have any significant experience, or even close acquaintance with transactional work, ie letting or selling commercial property, and hence acquaintance with the thinking of the market. Their evidence was therefore necessarily dependent on logic and reasoning rather than experiential instinct.

131. Indeed Mr Kay appeared to regard this as a qualification stressing in his evidence that he "was often asked to value upon an observation of the market rather than on an instinctive basis". This kind of approach may well work well where there is a market to observe and analyse. However, it appears to me to be less useful where there is no actual market and where, as here, the transactions being notionally valued are not everyday transactions and the valuer is required to use his expertise to imagine what a market transaction would actually be.

132. As I have said, I found Mr Kay the more impressive witness in general terms, because he was more focussed and logically attuned to the objective of the exercise than was Mr Bennett, but I have noted my major concern about his evidence. In the end, therefore, I take what I can from the valuers' evidence, but approach this with great caution.

Damages – discussion

133. I will deal here with the further individual issues which have been debated, before pulling the strands together into my decision.

(a) Effects of this being interim claim

134. I remind myself first that this is an interim, and not a terminal, dilapidations claim. Mr Walker submits that, assuming (as he submits) the starting point and the correct basis for assessing damages is the cost of repairs, then that approach applies even during the term, especially where the term is nearly at an end; see *Ebbetts v Conquest* 1896 AC 490 and *Crewe Services & Investments v Silk* [1998] 2 EGLR 1 at 5B. I do not understand Mr Radevsky to dissent from this in principle. This seems to me to be right.

135. At the end of the term, the measure of damage in the simple case is based on the proposition that if the works are not done by the tenant covenantor, the covenantee is either going to have to do them himself or compensate someone else for doing them. Near the end of the term, the diminution in the value of the reversion lies in the prospect that the landlord will be in that position in the not-too-distant future. It might be discounted for the possibility that the tenant might do the works before the end of the term and yield them up appropriately, but that would depend on the evidence. It might also be appropriate to take the current cost of repairs but to discount that to allow for accelerated payment, but that would again depend on evidence, particularly of interest rates.

136. At one time in the development of the law, I think it was suggested that the fact that the landlord had an inchoate right to recover damages for breach of the covenant to yield up at the end of the term meant that he suffered no loss for a breach of the covenant during the term, but eventually the law became settled on the alternative basis, namely that a landlord is entitled to substantial damages, according to the evidence, during the term for breach of the continuing repairing covenant at the time, but if he

then sues at the end of the term for breach of the covenant to yield up, the damages recovered at the second stage would take appropriate account of the earlier recovery.

137. In the present case, in my judgment the shortness of time to the end of the lease, and the evidence of Vidas' conduct in this claim already, makes it so unlikely that it can be ignored, that Vidas will in fact comply with the terms of the yielding up covenant at the end of its contractual term. Furthermore, the shortness of time and current low interest rates means that no discounting exercise is necessary and the actual cost of repairs now can be treated as the same as the prospective cost of repairs at the end of the term. No adjustment to figures therefore needs to be made on this account.

(b) Figures

138. Mr Walker submits that the appropriate measure of damage is therefore the costs of the agreed works of at least £167,000 (perhaps £160,000 if Vidas finishes the works it is currently doing) plus £84,000 in addition if decorations are included), but these VAT inclusive figures will need increase to account for VAT rising from 17.5% - 20% on 1st January 2011, and also additional costs to take account of loss of rent rates and service charges whilst the works are done, (it appears to be common ground that the works cannot be done with the property occupied) a period of 20 – 26 weeks. I observe, though, that this assumes that the only works needing or going to be done would be those required to remedy these dilapidations, and would reduce or disappear if other works, also needing time, were being done. I have no submissions on figures for these amounts, but looking at the levels of rent and council tax and business rates figures given, I would estimate this to be between £50 and £100,000. I infer that Mr Walker is apparently arguing for damages of up to about £300,000.

139. Mr Radevsky submits that Mr Anstruther has failed to prove any diminution in value of his interest at all, because Mr Bennett's evidence was effectively worthless, and Mr Kay's evidence, and general common sense, suggest that there is no diminution in value because the overwhelming likelihood is that the freeholder would be the purchaser and the property would be redeveloped. Only the structural repairs worth above £33,000 might be said to survive this, but given the covenants against which this can be recovered (including ICI), Mr Kay's evidence that there would be no more than a 25% allowance for this should be accepted, and £8,200 is *de minimis* in the context of the value of this interest. Even if the amount of non-supersession were held to be greater the same discount only, would be appropriate. He therefore submits that the damages should either be nil or, a minimal figure of around £8,000-£10,000 (because the only impact would be the exterior repairs to the fabric), or a similar 25% of any higher figure.

140. I need to examine other elements before reaching a final conclusion.

(c) Identity of hypothetical purchaser

141. It is agreed that the exercise here is to try to determine who (in the sense of profile, not individual identity) would be the most likely purchaser or, in times of recession, "the least unlikely purchaser "(Neuberger J in *Craven (Builders) v Health Secretary* [2000] 1 EGLR 128) of the property.

142. As already mentioned, Mr Radevsky submits, relying on Mr Kay and general commercial common sense, that the overwhelming likelihood is that the hypothetical

purchaser would be the freeholder. Mr Walker submits that any finding that a particular person would be the likely purchaser must be based on evidence: *Walton v IRC* 1996 STC 68. Mr Walker submits, based on the evidence of Mr Anstruther and the plausibility of this, that no such assumption can be made and the hypothetical purchaser must be taken to be a third party bidder in the real open market.

143. I prefer Mr Walker's submission. I reject the contention that the purchaser of Mr Anstruther's interest, it if were on the market, would be likely to be the Estate – or, perhaps more accurately, I reject the contention that the Estate would pay a notably higher price than any other bidder in the market.

144. My reasons are this. First, I accept that to found the proposition that the Estate would be the likely purchaser there must be some evidential foundation. However, I found Mr Anstruther to be a sincere and convincing witness and I accept his evidence as being indicative of the likely attitude of the Estate. Mr Radevsky's argument is, in effect, that either I should disbelieve him, or I should conclude that the Estate would in the event have a change of heart and buy in this interest after all. I do not accept that.

145. The only fact relied on in support of this is the apparent availability of massive profit (Mr Kay's "£7 million!" answer to this question). This is said to make the conclusion that the Estate would buy in this interest self-evident, But, however compelling such a reason may appear to the commercial property developer or speculator, I am satisfied that the Estate does not have the same kind of motivation, and I find it perfectly plausible that the Estate would not feel under any compulsion to buy in this interest, and would be willing to bide its time to await the natural expiration of Mr Anstruther's lease.

146. That said, I can accept that if the interest were currently on the market in the hands of a third party, the Estate might be prepared to step in and purchase it, but even then, I accept that it would not do so at a "premium" rate. In any event, though, that is not this situation. The fact that the interest is in Mr Anstruther's hands makes it unnecessary for it to do so at present, and I do not think that the prospect of it passing to a third party would cause the Estate to be willing to spend significant sums to prevent this.

147. But even if the estate were willing to step in to outbid such a party, it would only do so at a minimal overbid, and, most importantly, I am satisfied that the state of disrepair (or not) of the property would play no part in the calculation of any such overbid.

148. Thus, I find that the hypothetical purchaser cannot be assumed to be the freeholder, and by the same token, still less can it be assumed to be a person who will also be buying the freehold interest. There is simply no basis for any such supposition. I conclude, therefore, that this valuation exercise can and should be approached on the basis that the purchaser of this interest will be a third party in the open market.

149. I am therefore looking for the effects which the non-compliant state of the property would have on a bid in the market by a party who would, it is common ground, be seeking to exploit the value only of Mr Anstruther's leasehold interest with 21 years remaining, and this would most likely be for similar mixed use purposes as currently.

(d) Supersession

150. It follows that, in my judgment, the hypothetical purchaser is not going to be carrying out a major refurbishment which would cause Mr Kay's "massive supersession" of almost all potential dilapidations work. Therefore, the non-compliant state of the building might have an effect on the price for the premises. I have already indicated my views of the kind of advice such a purchaser would receive about the figures involved, and that he would be viewing the effects of Vidas' breach of covenant as a dilapidations claim capable of providing a contribution to his costs of sprucing up and modernising the property for mixed use lettings, insofar as such a claim could be justified and sustained.

151. I can infer, I think, the "ball park" figures that a hypothetical purchaser would be given. He would be advised that there would be a very good claim in respect of about £35,000 worth of work, and, subject to the usual arguments and negotiation, a reasonably worthwhile claim up to say about £100,000 (ie the exterior repair work and perhaps half the value of the remaining works of admitted disrepair), but a claim of decreasing strength beyond that - with possibly a bit to gain by arguments about time etc.

(e) Value of parallel claims against others

152. These are the potential parallel claims at the end of Vidas'lease, first against Vidas itself, second against ICI as original tenant under this "old" lease, and third potentially against Adlergrove, as well as the possibility of the occupation tenants now doing some of the works themselves, as notices had been served on them.

153. Mr Radevsky's initial submission was that the comfort of those rights and prospects would so far reassure the hypothetical purchaser that he would expect no discount for the existence of the relevant disrepair.

154. He submitted that since Vidas had never defaulted on a payment obligation, the purchaser would have no real fear of not being able to recover damages against it at the end of the term. More importantly, ICI Ltd had been the original tenant under the lease, and its covenant would be regarded as copper-bottomed. Similarly, Adlergrove is a respectable company, and would step into a direct relationship with the Claimant after termination of Vidas' lease, such that the purchaser would have the comfort of a direct claim against it to carry out repairs or pay damages. He cited *Family Management v Gray* [1980] 1 ELR 46 by analogy in the context of the continuing interest of a sub-tenant on termination of an intermediate headlease under the Landlord and Tenant Act 1954 Part II. The occupation sub-tenants' obligations could not be ignored either.

155. After Mr Kay's evidence, Mr Radevsky submitted that at worst a purchaser would make only a 25%, allowance on whatever figure for a potential dilapidations claim might survive "supersession" and he suggested that in context this would be *de minims* for only applying to the external repair works (£33,000).

156. Mr Radevsky also submitted that it would be "grossly unfair" if as a result of these further rights of recourse Mr Anstruther could gain double recovery. However, it seems to me that that submission is moving away from principle. The point is, if Mr Anstruther has a claim, what is the correct measure of damage? and that is to be assessed

by finding the present value of his interest with and without the disbenefit of the property being in the relevant state of disrepair, in all the other present circumstances.

157. Mr Walker challenged the proposition that these matters would allay the purchaser's fears at all, let alone sufficient to eliminate all, or even a significant part, of the reduction in price he would look for on account of the non-compliant state of the property

158. As to potential recovery from Vidas, he submitted that neither the prospect of Vidas performing its covenants, not the prospect of it being good for any subsequent claim for damages would carry any weight with the hypothetical potential purchaser, in the light of Vidas' conduct, its obvious resistance to carrying out its obligations so far and the obvious financial weakness shown in its accounts.

159. As to potential recovery from ICI, he submitted that even though ICI might be the most solid of prospects as regards ability to meet a damages claim once established, it would not necessarily do so without a contest, and it had ample resources to resist. The value of a claim over against ICI was entirely speculative, and certainly not trouble-free. Buying into litigation unattractive, and would not be accorded the same value as not having to do so.

160. As to potential recovery from Adlergrove, Mr Walker made the same points as to its weak balance sheet as in relation to Vidas, but also pointed out that it could not be assumed that under Adlergrove's extended interest under the LRA 1967, the owner of Mr Anstruther's interest would automatically be able to enforce obligations, even in Adlergrove's lease.

161. This argument rests on the fact that the 1967 Act does not specifically provide that where an intermediate lease comes to an end but the inferior interest is extended under the Act, the inferior tenant then comes into direct privity with the superior landlord, or that the relevant sections of the Law of Property Act 1925 which might bring about this effect are deemed to apply. This is in contradistinction to, for example, the Landlord and Tenant Act 1954 Part II, which expressly creates that position, and it might well consequently be argued that the 1967 Act did not intend to do have the same result. Mr Walker agreed that the proposition that the landlord could neither enforce, at least, the underlease covenants, nor remove the undertenant was not attractive and might ultimately not be upheld, but his point was that this situation created uncertainty, and therefore risk, and the hypothetical purchaser would not pay as much for a risky situation as for a risk-free one.

162. He submitted that the prospects of the occupation tenants in fact carrying out any material part of the outstanding repairs would be discounted as insignificant.

163. I prefer Mr Walker's arguments; I consider Mr Radevsky's to be wholly unrealistic, and I did not find Mr Kay's evidence convincing first, because of my doubts about his ability to pull back objectively from the original hypothesis of his case, and second, because his assessment of a 75% payment seemed to me to be guesswork, and contrary to natural common sense.

164. I record that I agree with Mr Walker's points as to the overt weakness of the covenants of both Vidas and Adlergrove. I will not rehearse the detail here, but in

essence it is clear that each of them is entirely reliant on external support from other group sources as regards any significant expenditure, and has no funds of its own. There is no comfort that either company would not be abandoned in straitened circumstances.

165. Lastly, I am not swayed by the argument that what the purchaser would offer is not the only governing factor, and the vendor would refuse to give any deep discount. citing the counter arguments. The interest for sale is not an attractive trouble-free investment. If I ask myself which party is going to have the stronger bargaining position, I am satisfied that that strength would lie with a prospective purchaser. It would only have to point out that it can go and look for other, simpler, opportunities.

166. I am therefore totally unconvinced that these rights, in this complicated situation which is already fraught with uncertainties, would have any ameliorating effect on what would otherwise be any depreciating effect on price of the extant breaches of covenant.

(f) The enfranchisement position

167. Finally, however, I come to the "elephant in the room" in this case which is the enfranchisement claim

168. The more I have considered this case, the more surprised I have felt that the interrelationship of this with the dilapidations claim in the mind of the hypothetical purchaser has not really been addressed. Each side has approached the assessment of damages by considering the usual dilapidations position, with a subsequent nod to the enfranchisement position, as if it were a "bolt on", which could be dismissed for having no discernible effect on the position. It was therefore stated to be common ground that I did not need to be concerned with enfranchisement calculations.

169. Mr Walker's primary submission seemed to be that the enfranchisement claims can – or should – simply be ignored; either "can" because the effects on value will simply be the same (as I think Mr Bennett says) or "should" because, if the effects of disrepair are such as to adversely affect the value of Mr Anstruther's interest on enfranchisement – the calculation of which would involve too many imponderables and second guessing of possible enfranchisement calculations – then it can only result in another head of prospective claim for damages by Mr Anstruther against Vidas at the end of its lease, a prospect which should be avoided if possible by the expedient of ignoring the enfranchisement claim and simply awarding damages without regard to it: see Paragraph 66 of his Skeleton Argument. As an alternative, he pointed out that the claim for damages could be adjourned for calculation until after the result of the enfranchisement claim was known, but stated that the Claimant's did not want this.

170. Mr Walker's only other submissions on this aspect were secondary ones, made in order to refute Mr Radevsky's submission that in practice the only effect of the enfranchisement claim would actually be to Mr Anstruther's benefit, (the "quirk" point).

171. Mr Radevsky submitted that the matter could and should go ahead on the basis that taking enfranchisement into account did <u>not</u> affect the measure of damage because, indeed the effects of the valuation formulae directed by the LRA 1967 worked to increase the value of Mr Anstruther's interest. However, he also submitted that if I

were not persuaded of this, I should indeed adjourn the calculation of damages until after the enfranchisement proceedings.

172. I feel I must reject Mr Radevsky's suggestion that there should be a postponement of the calculation of damages. Mr Anstruther has sought to pursue this claim for damages and it seems to me that it is the court's function, in that situation, to assess those damages and give a determination on usual principles. Those are that I should assess the present diminution in the value of Mr Anstruther's interest, caused by the existence of the relevant disrepair, in all the other actual circumstances.

173. I therefore still find the parties' approach to this aspect extraordinary, because it seems to me that the foremost obvious circumstance, and a major characteristic of this interest, at this moment, is that it is subject to a potential claim for compulsory purchase.

174. It is also accepted by the parties that the authorities show that, in valuing such an interest, the effect on value of any such blot on the title would have to be taken into account. Yet there has been no direct consideration of the effect this might have on the attitude of the "least unlikely purchaser" at this present time.

175. The result is that I seem to have very little material regarding the actual value of Mr Anstruther's interest. Mr Bennett provided three valuations of Mr Anstruther's interest with the building in various states of repair (castigated, with some justification, by Mr Radevsky as "guesswork") ranging from, eventually £1.35M (compliant) to £628,729 (non-compliant). He was instructed, however, not to provide calculations of the likely enfranchisement price - something Mr Radevsky made much of, suggesting that it was because Mr Bennett would inevitably support Mr Kay's figures.

176. Mr Kay, on the other hand, did not provide a valuation of Mr Anstruther's interest in general terms in the real world, and said only that the reduction in value caused by the state of disrepair would, in the enfranchisement world, be the same or as near as would make no difference to the "real world" calculation.

177. If so, the broad implications of that simplistic position would be that the purchaser would be buying an interest liable to be compulsorily purchased at a price reflecting its state in disrepair, (albeit with the addition of a share of marriage value) but that that is also what he would be getting upon purchasing the property, if enfranchisement did not take place. In those circumstances, the disrepair does not seem to cause any diminution in value at all, and the only question would be whether the purchaser would pay any more than he would pay having regard to the likely enfranchisement price, to reflect the possibility that enfranchisement might fail and he might then be in a position to make a successful claim for dilapidations arising out of the original leasehold structure.

178. To illustrate the "quirk" effect of the LRA 1967 valuation assumptions as to the covenants in the leases, Mr Kay did provide an example enfranchisement calculation, designed to show that with disrepair worth £239,965, as contrasted with £0, Mr Anstruther would get about £15,000 more on enfranchisement. This calculation was revised in the course of the proceedings, when Mr Kay increased the ERV of the building, apparently in proper repair, to £194,714 pa from £179,376 pa. This calculation then put the independent value of Mr Anstruther's interest at £610,137, and

the total receivable with marriage value at about £707,000 (the additional benefit now being £21,000).

179. However, in doing this calculation, it seems that Mr Kay had concentrated only on the effect on marriage value. Mr Walker pointed out that this was not the whole story, as Mr Kay had failed to adjust the gross value of Mr Anstruther's interest to take account of the factual state of disrepair of the property, treating it as worth the same in both calculations In his address, Mr Walker produced two re-workings of Mr Kay's example calculation, illustrating that with the full effect of the disrepair taken into account but otherwise using Mr Kay's values, disrepair valued at £239,652 would value Mr Anstruther's interest at only £370,712 (total receivable on enfranchisement, £458,997), and with disrepair valued at £150,000, the figures would be £460,137 (value) and £556,421 (enfranchisement price).

> 180. I bear in mind that these latter calculations were based on an example only, that enfranchisement calculations are notoriously technical, with many variables which are chosen by the expert valuers involved from their instinct or experience, that little changes in variables can have significant consequential effects, unpredictable to the uninitiated, and that Mr Radevsky had no opportunity to counter-comment on the re-worked examples. It follows, though, that I cannot accept Mr Radevsky's final proposition that the absence of diminution in value is plainly sealed by consideration of the effects of the enfranchisement claim, because if it succeeds, Mr Anstruther's interest will be bought out for a sum which would inevitably be greater than the open market value of his interest above.

181. However, I think I can and should derive some basic points from this exercise, doing the best I can on all the evidence generally which the parties have chosen to put before me.

182. The important matter I wish to derive is the rough level of the value of Mr Anstruther's interest. On the above evidence, and given my views of the valuers, I find that I am dealing with an interest which has an independent value absent any enfranchisement claim in the region of £600,000 to £1M. However, it is also the case that the effects of disrepair at January 2010 will have an effect in the enfranchisement claim, and could well have a major, but uncertain, effect on the amount of money a purchaser might be able to count on, if the claim succeeded.

183. On that basis, in my judgment, no purchaser is going to ignore, or treat quite so lightly as the parties seem to have done in their approach to this case, the prospect of being bought out on the basis of the enfranchisement claims being made. For the purpose of calculating damages, it is mandatory to assume that a sale is taking place at the time of trial. If a purchaser is to purchase in that uncertain situation, it is, in my judgment only going to purchase on the basis of a price which renders that ultimate prospect acceptable. That is going to cause a very deep discount in the purchaser's willing offer.

Conclusions

184. As mentioned at the outset, I remind myself of the exercise I am required to perform. This is the ascertainment of the extent of any diminution in value of Mr

Anstruther's leasehold interest attributable now to the existing state of disrepair or non-compliance with the repairing and decorating covenants in Vidas' lease, but otherwise in all the circumstances of the case.

185. To assess this, it is not necessary actually to determine any actual sale price for the interest, because the exercise is effectively carried out for present purposes if one can assess the effects of such culpable disrepair by concluding that whatever the actual sale price would be it would be depressed by some amount on account of that disrepair. I therefore only need to have a general idea of value, as mentioned above.

186. I must therefore ask myself what considerations would influence the offer which a purchaser, minded to buy Mr Anstruther's interest, would make, and how. Where a particular factor is certain, (eg a known liability to pay the head rent) or can be predicted with reasonable certainty (amount of rents achievable on lettings) then the purchaser may take that factor into account directly in calculating his offer. However, where it is uncertain, either as to quantum or as to whether it will occur at all, the purchaser will be "taking a view" and deciding on an adjustment - for hope value or for risk. Any such calculation will have three components, in effect multiplied together. The first is the value of the benefit or loss so far as can be predicted, the second is the likelihood of it coming to pass, and the third, is the importance to the purchaser of whether it does or not. This last will often be very subjective in the real world whilst in the hypothetical one it can only be generalised.

187. In a complex situation the purchaser will be making such assessments in relation to many such uncertainties, and the greater the number, the less easy it will be to isolate any one factor and the more conservative or cautious the assessment is likely to become. Also, in the real world, the purchaser is unlikely to do this on a minutely calculated pseudo-scientific basis, but more by finding a general overall figure which "feels" right in accordance with his own perceptions of opportunity value and appetite for (or aversion to) risk, and compared with other opportunities in the market.

188. The greatest difficulty in this case is that this valuation exercise is hugely imponderable. This is because it seems to me that in fact Mr Anstruther's interest is presently unsaleable. It is blighted by the enfranchisement claim. It might not in any event be sensibly marketable at this late stage of the term of Vidas' lease, but with the enfranchisement claim I cannot conceive that anyone would voluntarily seek to market it now. By "unsaleable", of course, I do not mean that one could not sell it at all, but rather that, because of its present problems, it would not be sellable at a price which would be within the range of the normal expectations of vendors/investors in this type of property.

189. In consequence, there are no comparables for the kind of transaction one is obliged to assume - certainly nothing was cited to me - whether or not with premises in repair. It also seemed to me that neither of the valuers could give any reliable assistance in this regard, because such a transaction and the factors which would influence a purchaser (or indeed a vendor) in effecting it, were very much outside the realms of their experience, neither being involved in transactional work. Even their experience in "professional" work, ie non-transactional analytical work, was not directly in point. Their views were therefore based inevitably on theoretical logic.

190. The best price one might get in such an unreal situation therefore seems to me to be a matter largely of speculation, because there is just no evidence of the kind of discount a purchaser might expect to be granted in a bargain involving taking on an interest with all the problems and uncertainties inherent in this one. However, I must do my best to decide, not what price this interest is likely to fetch in this imponderable range, but rather what, if any, difference to that price the existence of the culpable disrepair makes.

191. Trying to strip out the effects of the enfranchisement claim (ie taking into account all the factors above except for (f)) I would probably come to the conclusion that the effects of the culpable disrepair would be reflected in a reduction of about £100,000 in the offer which the hypothetical purchaser would make, and a vendor would accept as a best offer, for Mr Anstruther's interest, now. However, the fact that it is not only impractical but virtually impossible to strip out the effects of the enfranchisement claim like that is immediately obvious, when one considers that the question <u>when</u> any loss from the culpable disrepair would crystallise would be a factor even in that assessment, and that itself depends on the enfranchisement claim.

192. I therefore find that the pending enfranchisement claim simply cannot be left out of account. It is a hugely important aspect of the hypothetical transaction, and the purchaser would need to be sanguine about the possibility of having to re-sell the interest he is acquiring. I must therefore consider what effect this prospect would have on his bid, and how that might then leave the question of identification of any depressive effect on that bid of the existence of the culpable disrepair, alone.

193. The purchaser would undoubtedly take advice as to the likely enfranchisement price. On the evidence he would, I find, assume a likely price in the order of £500,000-£600,000, but the calculations suggest that it could vary more widely. As to the likelihood of having to resell at this price, I have heard no detailed submissions or evidence about the strength of Adlergrove's claim(s) to be entitled to enfranchise. (Mr Radevsky simply submits that the claim is "strong", but that is not surprising.) Mr Kay assumes 50/50 in consequence. On the present state of the authorities, the claim in respect of the house, at least, must be as good as that if not better.

194. The purchaser would factor that likelihood into his bid. It seems to me that he would discount the ultimate possibility of Adlergrove not proceeding with an enfranchisement because of the price being unacceptable. Given the history of the matter and Adlergrove's persistence, I think he would assume that Adlergrove had already done its calculations in this regard.

195. However, in addition to calculating what sum he might be obliged to accept, the purchaser would also take into account the costs and time likely to be involved. As to the latter, I find that he would reckon on receiving the price some time between one and two years hence, depending on the course of the court proceedings. He will therefore calculate that in that interim he will have to pay the apportioned rent of £102,000 to the Estate for that time. He receives only a nominal ground rent from Vidas. After 25th March 2010 he may receive rent presumptively at the rate in its lease (£93,000) from Adlergrove - but may be met, and have to deal with, an argument that he cannot enforce this against Adlergrove or during its continuation interest.

196. Bearing in mind that he would want a return on his payment for Mr Anstruther's interest even if eventual enfranchisement were a certainty, the purchaser would make a discount from the likely enfranchisement price to allow for this being a far from trouble-free investment on any basis, so as to make it a worthwhile investment, compared to other market opportunities.

197. It seems to me that this calculation would create a very deep discount in the purchaser's likely bid.

198. The purchaser would, of course, do a similar exercise with regard to the non-enfranchisement scenario, taking into account the delay before non-enfranchisement could be established (around a year), and what his best bid in that more certain situation would be. He would then form a view as to what his best offer would be for the combined situation, ie superimposing both possibilities.

199. I have asked myself whether, at the end of the day in that context, I think there would be any increase in the purchaser's likely offer for the premises now, if they were in compliant repair, as opposed to now, in their present state, given that the enfranchisement price would be calculated on the basis of the property in a state of disrepair very similar to the present state.

200. On the one hand, with all the imponderables which would influence the price at which the necessary bargain would be struck, there is force in the proposition that one could not identify any effect on such a price which was clearly attributable just to the present existence of the culpable state of repair of the property. All the uncertainties merge into one amorphous and indistinguishable mass.

201. I also bear in mind that it is for the Claimant to establish that there would, indeed, be any such difference. In the end, however, I have concluded that I am satisfied that there would be some small effect on the eventual price, if only for the reason that a purchaser assessing an offer for a building which was immediately and obviously in compliant repair would start from a somewhat more positive outlook on the transaction than if presented with a building in disrepair.

202. Taking into account all the factors I have mentioned, I am satisfied that that difference is fairly reflected in the sum of £25,000 as a likely increment in the best offer which might reasonably be obtained for Mr Anstruther's interest in the open market, if the property were in a compliant state but in all the other circumstances, at this time. I shall therefore award damages to the Claimant in this sum.

Hazel Marshall QC
22 December 2010