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Mason v **TotalFinaElf** UK Ltd

CHANCERY DIVISION

[2003] **EWHC 1604 (Ch)**, [2003] All ER (D) 191 (Jul), (Approved judgment)

HEARING-DATES:

10 JULY 2003

10 JULY 2003

CATCHWORDS:

Landlord and tenant - Covenant - Covenant to repair - Breach - Breach by tenant - Assessment of damages - Landlord and Tenant Act 1927, s 18(1).

HEADNOTE:

This judgment has been summarised by LexisNexis UK editors.

The claimant was the freehold owner of premises let to the defendant under a lease dated 31 July 1964. From the time of the claimant's acquisition of the freehold and so long as the tenancy continued, the claimant remained in occupation of the premises as a licensee, running the businesses conducted from them. A dispute arose between the parties regarding dilapidations at the premises and the claimant commenced proceedings in which he sought to recover damages for breach of the repairing covenants contained in cl 3(4), 3(5) and 3 (14) of the lease. Clauses 3(4) and (5) provided for repairs which were to be undertaken during the tenancy, while cl 3(14) stipulated the state in which the tenant was to deliver up the premises at the end of the lease. Under s 18(1) of the Landlord and Tenant Act 1927, the damages recoverable for breach of a tenant's repairing covenants were, in practice, the lower of the reasonable cost of remedying the breaches of the covenants and the diminution in value of the reversion resulting from such breaches. The issues for determination by the court were (i) the extent to which the defendant was in breach of its repairing covenants at the date of expiry of the lease; (ii) the reasonable cost of remedying the want of repair resulting from those breaches on the basis that the measure of damages at common law was the reasonable cost of the remedial work in question, and (ii) the extent to which the value of the claimant's freehold interest in premises had diminished owing to such breaches at the date of expiry of the lease.

The court ruled:

In order to determine the standard of repair in which the premises were required to be kept during the term of the lease, the court was to approach the issue by asking itself, doing the best that it could, what, given the age and character of the premises and their locality, a reasonably-minded tenant would reasonably require, at the time that the lease was granted, to render the premises reasonably fit for the commercial purpose for which they were let. As regards the diminution in value, the effect of s 18(1) of the Act was that the damages recoverable by the claimant for the breaches of cl 3(4) and 3(5) which he was able to establish could not exceed the diminution in the value of his freehold reversion resulting from those breaches. The diminution was to be assessed at the expiry date of the lease and involved two valuations of the landlord's interest. The first was on the assumption that the remises were then in the state that they would have been in if the tenant had performed his covenants; the second was of the premises in their actual state and condition at that date. The purpose was to isolate the effect on value of the tenant's failure to do the relevant

works, from which it followed that the only variable between the two valuations was the works. In the instant case, the overall cost of works needed to make good the breaches of the repairing covenants established by the claimant amounted to an overall figure of £ 134,738. However, since the diminution in value of the freehold was found to have been £ 73,500, calculated pursuant to s 18(1) of the 1927 Act, it followed that the claim for damages succeeded but was capped at that figure.

INTRODUCTION:

This is the first approved version handed down by the court. An edited official transcript or report will follow.

COUNSEL:

Hazel Williamson QC for the applicant.; Nicholas Dowding QC for the defendant.

PANEL:

BLACKBURNE J

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.

JUDGMENTBY-1:

BLACKBURNE J

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BLACKBURNE J:

Introduction

1. This is a claim for damages for terminal dilapidations. It is brought in respect of premises known as Woodside Service Station, Copthorne Road, Crawley in West Sussex. The claimant, Mr Mason, is and has since January 1996 been the freehold owner of the premises. The defendant, which I shall refer to simply as Total, was and remained throughout its term the tenant of the premises under a lease ("the lease") granted to it (as Total Oil Products (GB) Limited) on 31 July 1964. The lease was continued under Part II of the Landlord and Tenant Act 1954 at the end of the contractual 35 year term on 31 July 1999. It expired and Total's tenancy of the premises came to an end on 14 September 2000 in consequence of a three month notice served by it on 14 June 2000.

2. An unusual feature of this dispute is that, although from the time of his purchase of the freehold reversion in early 1996, Mr Mason became Total's landlord, in fact it was he who was and thereafter remained in occupation of the premises running the businesses conducted from them. He did so on the terms of a licence granted to him by Total. His occupation as a licensee pre-dated his purchase of the freehold. Thus from the time of his acquisition of the freehold and for so long as Total's tenancy continued he became and remained landlord and at the same time occupying licensee of the premises.

3. At one stage, there was a dispute over the extent to which Total's responsibility for dilapidations could be passed on to Mr Mason under the terms of the licence. This is no longer an issue and I am concerned only with the position as between Mr Mason as landlord and Total as tenant under the terms of the expired lease. But that does not mean that it is irrelevant that Mr Mason was in occupation of the premises running the business operations conducted from them in the years up to the lease expiry date and that he has since continued to do so. As will later appear, Total attaches significance to Mr Mason's continuing

occupation of the premises when it comes to quantifying under section 18(1) of the Landlord and Tenant Act 1927 any diminution in the value of the reversion resulting from breaches by it of its repairing obligations under the lease. Equally, because Mr Mason intends, as I accept, to continue to occupy the premises running his own business from them in the future (as he has done since the lease expired), the actual performance by Total of its repairing obligations at the end of the lease was and remains a matter of importance to him.

4. The dispute before me is concerned with essentially three matters: (1) the extent to which on the lease expiry date - 14 September 2000 - Total was in breach of its repairing covenants; (2) the reasonable cost of remedying the want of repair resulting from those breaches on the footing that the measure of damages at common law is the reasonable cost of the remedial work in question; and (3) the extent to which, measured at the lease expiry date, the value of Mr Mason's freehold interest in the premises has been diminished owing to such breaches. It is of course well recognised that under section 18(1) the damages recoverable for breach of a tenant's repairing covenant are in practice the lower of the reasonable cost of remedying the breaches of the repairing covenants and the diminution in value of the reversion resulting from such breaches.

5. In an attempt to keep down the cost of these proceedings the parties have reached agreement on a range of items of alleged disrepair, mostly fairly small in amount. In the same spirit, even where agreement could not be reached, the parties have agreed to split the difference between them in the case of items below a certain value. This has resulted in Total conceding liability (subject to the cap on recoverable damages under section 18(1)) amounting in all (at current prices) to £ 27,000 odd. It is also agreed that surveyor's fees at 12% must be added to that figure to cover the cost of supervising the works of repair. A large number of items nevertheless remain in dispute.

6. Although both sides have significantly moderated their positions in respect of items of disrepair and the reasonable cost of remedying them which have resulted in the £ 27,000 figure, they remain apart over the remainder. Mr Mason continues to assert a wide range of breaches and claims damages in an overall sum of approximately £ 279,000 while Total admits to very few breaches and concedes liability in an overall sum of only £ 7,700 odd. There is an even starker contrast between their respective positions on diminution in value of the freehold reversion. Mr Mason contends that in its actual state of repair as at the lease expiry date the premises were worth £ 133,000 odd whereas in the state that they should have been in if there had been no breaches they would have been worth £ 459,000. That represents a diminution in value of £ 326,000 odd. Total, by contrast, maintains that any diminution in value of the premises attributable to any want of repair resulting from non-compliance by it of its repairing obligations is nominal. It puts forward a valuation of the premises of £ 235,000. Its approach to valuation involves the proposition that any expenditure to make good breaches of its repairing obligations is irrelevant to the value of the premises.

The premises

7. The premises lie in the north side of a relatively isolated stretch of Copthorne Road, which is now the A2220. The site has a frontage of 41 metres to the road and an approximate depth of 47 metres. Copthorne Road, which runs roughly east/west and links Crawley with Copthorne, is a single carriageway road. The premises are therefore accessible by both westbound and eastbound traffic. There are crossovers from the road to either side of the filling station forecourt. The neighbourhood is of low-density residential properties within large plots to the north of Copthorne Road (ie the side on which the premises are situated) with open land to the south. Immediately adjoining the premises on the western side is an access road leading to separate commercial premises (unconnected with Mr Mason's business activities at Woodside Service Station) comprising an accident repair centre, a 24-hour vehicle recovery service and servicing and MOT facilities. About one third of a mile east of the premises Copthorne Road meets the A264 which provides access to the M23. At the time the lease was granted the M23 had not yet been opened. Copthorne Road itself has no direct access to the M23 but crosses over it into Crawley, which lies just west of the motorway. It joins roads, both to the east and to the west, that do have such access.

8. Mr Mason conducts four types of business at the premises: (1) a petrol filling service from a forecourt to the front (ie south) of the site; (2) a forecourt shop, where customers pay for their fuel purchases, occupying an area of approximate 350 square feet in the main building on the site (lying immediately behind the forecourt) from which drinks, a limited range of groceries, ice creams and the like and car-care products may be purchased; (3) a second-hand car sale business centred upon a showroom extension to the main building but with cars also on display on the areas around the filling station forecourt (eleven display places down the left (western) side of the site and a further five along the right (eastern) side of the site, in each case hard up against the site boundary); and (4) a car workshop and service bay centred upon two buildings situated at the rear of the site, with the service bay in a two story building on the north-eastern corner of the site and the workshop in a single storey building close to the northern boundary of the site.

9. In fact, the use of the premises as a petrol filling station goes back to the late 1940s. Before its conversion at ground-floor level to provide the shop and, at one stage I think, a café with, later, the car showroom extension, the main building was a dwelling house. It was constructed in the inter-war years. At the time, Copthorne Road, now the A2220, was the A264 which was a trunk road linking Crawley to the west with East Grinstead to the east. The motor vehicle repair facilities (the service bay and workshop) were built or renewed at or around the time that the lease was granted and the showroom extension constructed in the early 1970s. Further alterations were made in the late 1970s. The picture that I have is that the premises as one sees them today were in being by the late 1970s and that, with the exception of the main building (which has long since ceased to provide living accommodation although quite when that stopped is not apparent), all of the facilities were either new at the time the lease was granted or provided during the first 15 or so years of the term. The only alterations of any substance effected since the lease expiry date are that in the summer of 2002 patch-repairs have been carried out to areas of the concrete hardstanding to the side and rear of the main building and in the vicinity of the shop entrance, paintwork repairs have been carried out to the exterior of the buildings including, in particular, the sliding doors to the showroom, the kerbstones on the pump islands were painted, the showroom was decorated internally and the floor tiled, a new timber lean-to was erected at the back of the workshops to provide additional covered storage and new fencing erected along the western boundary of the site and also along the eastern boundary up to its junction with the showroom extension.

The repairing covenants

10. The relevant covenants are contained in clauses 3(4), 3(5) and 3(14) of the lease. Omitting irrelevant parts, those covenants are as follows:

"3(4) The Lessee will from time to time and at all times during the said term to the satisfaction of the Lessor's Surveyor well and substantially uphold support maintain amend repair decorate and keep in good condition the demised premises with the appurtenances and all additions which may at any time during the said term be made thereto and the boundary walls and fences thereof (including the slatted fence on the rear boundary of the demised premises) ...

3(5) The Lessee will to such satisfaction as aforesaid paint with two coats at least of good oil and white lead or other suitable paint and in a proper and workmanlike manner all parts of the demised premises previously or usually painted as to the outside in every third year and during the last three months of the said term and as to the inside in every seventh year and during the last three months of the said term and at the same time with every outside painting will restore and make good any ornamental work where necessary and at the same time with every inside painting will grain varnish whitewash and colour such parts of the inside of the demised premises as are usually grained varnished whitewashed and coloured and will paper with paper of suitable quality such parts thereof as are usually papered.

3(14) At the expiration or sooner determination of the said term the Lessee will peaceably

deliver up to the Lessor so repaired upheld supported maintained cleansed amended painted decorated whitewashed and kept in good condition as aforesaid the demised premises together with all additions and improvements made thereto and together with all fixtures (excepting trade or other fixtures which the Lessee might at law be entitled to remove) which now are or which at any time hereafter during the said term may be affixed or fastened to or upon the demised premises."

11. Where, as here, terminal dilapidations are in issue, the immediately relevant covenant is clause 3(14) stipulating in what state Total as tenant is to deliver up the premises at the end of the lease. The effective question however is the extent of Total's obligations under clauses 3(4) and 3(5) by reference to which its obligation to deliver up under clause 3(14) is cast. There is no issue arising out of clause 3(5) so far as it affects clause 3(14) since it is accepted by Total that this covenant was broken. The cost of the remedial decorative work is agreed and included in the figure of £ 27,000 referred to earlier. It is the extent to which Total was in breach at the lease expiry date of the obligations upon it imposed by clause 3(4) and the consequences of those breaches in terms of costs of remedial works together with the diminution in value of the freehold (resulting from all of the breaches) that constituted the focus of the evidence and argument before me.

12. Before coming to the evidence it is first necessary to refer to differences between the parties over the true meaning and effect of clause 3(4). The following questions arising out of that covenant have emerged: (1) does the tenant's obligation extend beyond matters of repair properly so called? (2) to what extent can the works required to comply with the covenant include a preventative element? (3) what is the required standard of repair? (4) to what extent is the obligation affected by the requirement that the required works must be "to the satisfaction of the Lessor's Surveyor"?

13. At the end of the day, given the limiting effect of section 18(1), it may not be necessary from a practical point of view to decide all of these matters since, even if I construe the covenant in the wide manner contended for by Miss Williamson QC appearing for Mr Mason, the capping effect of the section may render academic whether a particular item is within the scope of the covenant. And in other cases items claimed may clearly fall within (or without) the covenant whatever the precise scope of the obligation. I shall nevertheless state my views and, when I come to consider the items of claim, indicate whether my conclusion would have differed if I had taken a different view of the scope of the covenant. In setting out those views I have reminded myself that, although certain words or phrases when used in repairing covenants have come to have certain meanings, the question, at the end of the day, is what the particular words mean which appear in the particular lease with which the court is concerned when construed against the other obligations contained in the lease, having regard to the general nature of the premises and any other material circumstances as they existed at the time the lease was granted. I have also reminded myself that where, as here, the draftsman has employed a variety of closely related expressions ("... uphold support maintain amend repair decorate and keep in good condition") while I should not expect to give each word used a meaning distinct from the others, I should not assume that the draftsman was merely using different words to express the same concept. In short, I should endeavour, where the context allows, to give each word its proper meaning without striving to give each word a wholly distinct meaning. See Lurcott v Wakely& Wheeler [1911] 1 KB 905 at 915; Norwich Union Life Insurance Society v British Railways Board [1987] 2 EGLR 137 at 138 and Credit Suisse v Beegas Nominees Limited [1994] 1 EGLR 76 at 86.

Does the obligation contained in clause 3(4) extend beyond matters of repair properly so called?

14. The issue here is relevant to whether major items of plant were delivered up in a sufficiently good condition or whether they should have been replaced. I will come in due course to what those items are and the evidence which relates to them. Mr Dowding QC appearing for Total submitted that, to trigger a breach of the covenant, there must be a state of disrepair or physical damage or deterioration from some previous physical condition of the subject matter of the covenant. He submitted that it is insufficient simply to demonstrate a lack of amenity or efficiency (ie something which affects the ability to use or trade from the

subject premises but which does not itself constitute, or result from, relevant physical damage) or that the subject matter is old (even if it was new when let) or will or may become physically defective in the future or that spare parts cannot be obtained or that the subject matter would not be attractive in the market. He submitted that this threshold requirement - the presence of disrepair or deterioration from some previous physical condition - applies as much to the requirement "to keep in good condition" the premises as it does to the remainder of the covenant.

15. Subject to the second of the four points (to which I come next), Miss Williamson did not fundamentally disagree with this formulation of the position but submitted that "keeping" (and therefore, if necessary, "putting") in "good condition" is separate from and wider than simply "repairing". She pointed out that the tenant's obligation is to yield up the premises as a whole in good condition even though, as a matter of analysis, it is necessary to identify particular items which are not in that state if a breach of the covenant is to be established. This requires, she submitted, a somewhat broader approach than simply identifying items of disrepair.

16. Apart from the question to which I next turn, I was not conscious of any substantial difference of approach between counsel. In Fluor Daniel Properties Limited & ors v Shortlands Investments Limited [2001] 2 EGLR 103 where the covenant (affecting a modem office building) was "to uphold maintain repair amend renew cleanse and redecorate and otherwise keep in good repair and substantial condition and as the case may be in good working order and repair" various parts of the building in question and various adjoining areas such as forecourts and approach roads, I accepted the submission that:

"The obligations contained in the clause presuppose that the item in question suffers from some defect (ie some physical damage or deterioration or, in the case of plant, some malfunctioning), such that repair, amendment or renewal is reasonably necessary."

I also accepted Gust as Lindsay J had done in Credit Suisse v Beegas Nominees in relation to the similarly worded covenant in that case) that the clause extended to the doing of works that went beyond repair strictly so called. I am of the same view in relation to the covenant in this case.

To what extent can the required works include a preventative element?

17. Miss Williamson submitted that what she referred to as "mere preventative work" (ie work undertaken by way of anticipation to avoid the occurrence of damage from a future but reasonably anticipated disrepair) can be properly regarded as a "repair" and the reasonable cost of it recovered. A fortiori is the reasonable cost recoverable, she submitted, in so far as the work can be regarded as work necessary to keep the item in question in "good condition". She referred me to two decisions in support of her submission.

18. In Day v Harland & Wolff Limited [1953] 2AER 387 Pearson J held that the painting of a ship in dry dock with anti-fouling paint constituted the "repair" of a ship within the meaning of the Shipbuilding Regulations 1931. After observing that "the dividing line between work of repair and work of that kind of maintenance which is not repair is not easy to draw" and that "there is an element of degree in the matte?' and after referring to authority, the judge in that case said this (at 388):

"So, very broadly speaking, I think that to repair is to remedy defects, but it can also properly include an element of the 'stitch in time which saves nine'. Work does not cease to be repair work because it is done to a large extent in anticipation of forthcoming defects or in rectification of merely incipient defects, rather than the rectification of defects which have already become serious. Some element of anticipation is included."

Then, after observing that according to the expert evidence a ship was not "complete" without its anti-fouling paint which is "part of the ship" and that a ship owner does not find it necessary or consider it worthwhile to pay to have the anti-fouling paint on the bottom of his

ship renewed unless there is some reasonable need for it, he stated that the "proper inference" on the facts before him was that:

"...the anti-fouling paint has become defective, or has been in the process of becoming defective, and the object of the repainting is to renew the defective or incipiently defective paint. It is different in kind from oiling, brushing and cleaning, and even polishing. The paint is an important part of the ship and this work is the work of rectifying defects or incipient defects. For that reason it is work of repair."

19. Even allowing for the reference in that passage to "incipient defects" (as distinct from actual defects), I do not consider that the decision is authority for the broad proposition for which Miss Williamson cited it. It seems reasonably clear that, having concluded that anti-fouling paint is "part of the ship" and having found that to some extent the paint was already defective (ie that a part of the ship was out of repair), Pearson J was doing no more than saying that, as well as remedying the defective paintwork, it was permissible repair - the matter being one of fact and degree - to repaint those parts which were not yet defective. In the same way, repairing defective paintwork (where the repairing covenant extends to repainting those parts of a building which are ordinarily painted) does not cease to be repair merely because, in the process, the opportunity is taken to repaint those parts of the structure (for example a window frame) where the paintwork is not yet defective even though other parts of it are. I do not consider that that decision is authority for the proposition that work which is purely anticipatory - ie where no damage or deterioration in the condition of the subject matter of the covenant has occurred (or has yet occurred to an extent sufficient to constitute a breach of the covenant) - can be called for or the reasonable cost of doing it recovered.

20. The other decision to which Miss Williamson referred me was Sheldon v West Bromwich Corporation (1973) 25 P&CR 360. In that case the defendant landlord discovered on a visit of one of its plumbers to the tenanted house in question to investigate a hammering noise in the house water system that the cold water in the tank was discoloured although there was no sign of "weeping", ie droplets of water on the outside of the tank. Nothing was done by way of repair or replacement of the tank. Six weeks later the tank burst doing damage to the house. The tenant brought an action against the landlord alleging breach of its implied covenant under section 32(1) of the Housing Act 1961 to keep the installation for the supply of water in the house in repair. The question was whether the landlord had notice of a breach of its implied covenant to repair (or replace) the tank. The evidence before the court was to the effect that the discoloration of the tank was due to rusting and that to the landlord's knowledge the discoloration had been occurring for at least two and a half years (since that was when the first complaints of hammering were made). There was also expert evidence before the court to the effect that discoloration (ie rusting) may continue for up to 15 years but that it is only when the tank begins to weep, which is an indication that the tank is beginning to leak, that the tank must be changed without delay.

21. The county court judge held that discoloration, although a sign of corrosion, was not a symptom of a dangerous condition or of the likelihood of imminent collapse and that, in the absence of weeping, the tenant's claim must fail since there was no evidence that the landlord had actual knowledge of the condition of the tank- The Court of Appeal disagreed with that conclusion. It asked itself whether the condition of the tank as regards discoloration on the occasion of the plumber's visit was "such a condition of disrepair as to put the landlord upon enquiry as to whether works of repair were needed - in other words, as to require repair, not immediately, not the next day, but within a reasonable time, and within a reasonable time short of the six weeks which elapsed before this tank in fact burst". The court held that it was. Stephenson LJ (with whom the other members of the court agreed) observed (at 364) that "this was an old tank" that the evidence of the landlord's expert was that "it must have been as old as the house, which was nearly 40 years old" and that he (the expert) "would expect the life of one of the tanks to be 40 to 60 years but that some tanks started to corrode after 20 years". Then, after reviewing some of the evidence, he concluded (at 364):

"I have come to the conclusion that the absence of weeping is not fatal to the plaintiffs case.

In my judgment, the time for which discoloration had existed in this aging tank did mean that it required to be repaired by the landlords as soon as they had knowledge of the state of discoloration and, possibly, decay in the metal which it had reached by May 28.

It is, of course, extremely difficult to look at the position on May 28 without bearing in mind what happened on July 8. But in all the circumstances, it does not seem to me to be putting a strained construction upon the statutory covenant or too heavy a burden on the landlords, on the admitted facts of this case, to say that they were bound to take action although there was no weeping and to put this tank in repair, either by relining it or by replacing it..."

May 28 was the date of the plumber's visit and July 8 the date when the tank burst.

22. In some ways this was, I think, a generous, if entirely understandable, decision. What, to my mind, is crucial is that, through its plumber, the landlord had knowledge, because of the discoloration and therefore of the rusting, of deterioration in the condition of the tank, even though the tank still functioned properly as a tank. What is more, it had knowledge of a deterioration (through discoloration and therefore through rusting) in the tank going back two and a half years at least. It also knew that the tank was old. In short, the court found that there existed a breach of the landlord's implied covenant to repair of which the landlord had knowledge at the latest by the time of the plumber's visit six weeks before the tank burst.

23. But I do not consider that that decision is authority for the proposition that, merely because a piece of equipment is old and there must inevitably come a time when the equipment must be replaced, preventative works can be required to prevent the consequences of the equipment failing even though, in the meantime, it continues to perform its function.

The standard of repair

24. It was common ground that clause 3(4) with its reference to "well and substantially" does not require that the premises be kept in perfect repair. Equally, it was common ground that the standard to be applied should be such as, having regard to the age, character and locality of the premises at the start of the lease, would make the premises reasonably fit for a reasonably-minded tenant of a class who would be likely at that time to take the premises and that the appropriate standard does not alter during the term of the lease in the sense that changes in the character of the locality of the premises or of the class of person likely to take them do not elevate or depress what would otherwise be the standard. See, generally, Proudfoot v Hart (1890) 25 QBD 42 and Anstruther-Gough-Calthorpe v McOscar [1924] 1 KB 716. but allowance can be made for the effect of ageing.

25. It was in any event common ground that, for all practical purposes and notwithstanding the decreased importance relative to other roads in the immediate area of Copthorne Road following the opening of the M23, the character and locality of the premises had not materially altered since the lease was granted. It was also common ground, and if it was not I hold, that the covenant does not require that the tenant return the premises at the end of the lease in as good condition as they were at the start. The tenant's obligation is to keep the premises in a proper state having regard, among other matters, to their age at any particular time. Relevant to this, as Miss Williamson submitted and I accept, is that, while the main building was already 30 or so years old at the time the lease was granted, the remainder of the buildings, including in particular the showroom extension, the forecourt structures and, as I find (on the basis of the evidence of Mr Dutt, the building surveyor called by Mr Mason), the concrete hardstanding in and around the forecourt and main building with its extension were newly erected (or laid) either at the start of or during the term of the lease.

26. What, however, was a matter of dispute was the assumption to be made about the nature of the class of tenant likely to take the premises at the start of the lease in 1964. Miss Williamson submitted that the class of tenant was that of a major oil company, such as Total which actually took the lease, and, therefore, that the appropriate standard of repair is that

of a major oil company even though, because of the reduced importance of the Copthorne Road (it is no longer on a trunk road), a major oil company would not these days be interested in taking a lease of the premises.

27. Mr Dowding submitted that there is no relevant difference between the standards of Total which took the lease in 1964 and those of the sort of occupier who might take the premises as at the lease expiry date in September 2000. Both, he submitted, are taking the premises to carry on the business activities specified in the user covenant. Besides, he submitted, there is no satisfactory evidence of Total's standing or requirements in 1964, or of the condition of the premises at that time. He submitted that it is unsafe simply to assume that Total's requirements would necessarily have been any different to, or higher than, those of Mr Mason. For example, he said, the main part of the premises was a house, as opposed to something purpose-built for filling station use, and, moreover, was over 30 years old. For all the court knows to the contrary, he said, the main part of the premises may have been in a poor state of. repair at the time. None of these matters deterred Total from taking the lease. Nor, he submitted, is the fact that no major oil company would now be interested in the premises in their present condition of any relevance on the question of the standard of repair. This would be so even if the premises were in perfect repair since the premises, he submitted, are incapable of generating sufficient throughput. But, even if this were not the case, he submitted that the evidence of Mr Marshall, Total's real estate manager in the south of England who gave evidence and whose evidence on this point I accept, was that a major oil company such as Total would re-develop the premises rather than retain them in their existing form. He further submitted that, although Copthorne Road was no longer as important as it was at the start of the lease, it might equally be said that the surrounding area has since become more developed than in 1964 and that increases in the number of vehicles on the roads mean that more cars pass the premises now (or in September 2000) than they did when the lease was granted in 1964. For these reasons, he submitted, the court should not be drawn into a speculative and artificial enquiry into what a major oil company taking the premises would want. Instead, he said, the court should ask itself, applying a practical and commonsense approach, what standard of repair would be required by an occupier of filling station/motor-trade premises in this locality.

28. I agree with Miss Williamson that the class of reasonably-minded tenant likely at the commencement of the term to take the premises refers to the quality of reasonably-minded tenant that would have done so, having regard to the then age, character and locality of the premises and therefore that the standard of repair etc is what would make the premises reasonably fit for the occupation of such a tenant. On the face of it, since Total was the tenant that took the lease, the class of tenant was a person or organisation such as Total. But, as Mr Dowding pointed out, there is no satisfactory evidence of Total's standing or requirements at that time relative to those of other oil companies. In this connection I remind myself that, since 1964, Total has undergone many changes including, not least, two mergers with other oil companies. As was clear from Mr Marshall's evidence (he was not from Total but came into the organisation from Fina plc which merged with Total in 1999), the present day defendant is very different from the Total of 1964. Nor is there any evidence of the condition of the premises at the time the lease was granted. Beyond the fact that the premises comprised a converted inter-war dwellinghouse rather than a purpose-built facility practically nothing is known about them. There is much force therefore in Mr Dowding's observation that the court should not be drawn into a speculative enquiry into what a major oil company, assuming that Total was such a company, would then have expected of the premises in the way of standard of repair.

29. The result, in my judgment, is that the court must approach the question by asking itself, doing the best that it can, what, given the age and character of the premises (a converted inter-war dwelling house already 30 or so years old at the time) and their locality (a semi-rural position with a fairly small road frontage but on a trunk road leading from Crawley to East Grinstead) a reasonably-minded oil company would reasonably require, at the time the lease was granted, to render the premises reasonably fit for use as a place from which to run the businesses of a petrol filling station and attached shop together with car sales and, at the rear of the site, facilities for motor vehicle repairs.

To what extent is the tenant's obligation under clause 3(4) affected by the requirement that works to comply with it must be "to the satisfaction of the Lessor's Surveyor"?

30. The essential difference between the parties was whether this phrase entitled the landlord's surveyor to prescribe what work should be done or whether it was limited to entitling the surveyor to prescribe how the work should be done.

31. Mr Dowding, contending for the latter construction, submitted that the general principle is that if there is more than one method of repair which would achieve the standard required by the covenant, the choice between them is that of the tenant as covenantor, unless the covenant otherwise provides. (See Plough Investments v Manchester City Council [1989] 1 EGLR 244; see also Ultraworth v General Accident Fire & Life Assurance Co [2000] 2 EGLR 115.) It follows, he submitted, that where there are two ways of performing the covenant, one of which involves more extensive work than the other, damages for breach are to be assessed on the basis of the latter, since this is all that the landlord can lawfully require. He submitted that the words "to the satisfaction of the Lessor's Surveyor" do not alter that well-established principle. The purpose of those words, he submitted, is not to impose on the tenant a higher liability than would otherwise be the case but merely to give the landlord's surveyor a degree of control over the manner in which the repairs are carried out. Thus, for example, if the appropriate work is to replace a small number of slipped or missing roof tiles on a roof which is otherwise, given its age, in reasonable condition, that work must be carried out to the satisfaction of the landlord's surveyor. He would not be entitled to insist on, for example, a brand new roof even where this could be an alternative way of performing the covenant. He submitted that the distinction is comprehensible although, as he put it, there might be a degree of "blurring around the edges". For example the surveyor could require a missing floorboard to be replaced by one in oak as opposed to pine provided that the use of oak would not go beyond what was reasonably necessary to remedy the particular defect.

32. He submitted that the words are perfectly capable as a matter of language of referring only to the manner in which the work is undertaken as opposed to the work itself. He submitted that the meaning for which he contended accords with commercial common sense since it enables the landlord to ensure that the work is carried out to a proper standard using proper materials whereas the wider meaning for which the landlord was contending would confer on his surveyor a potentially far-reaching and onerous power with no express limits on his judgment in that he is not expressly required to act reasonably. The surveyor, he pointed out, is simply the landlord's agent and it is to be expected that if the wider meaning had been intended, some limitation on his power would have been inserted. Moreover, he submitted, the principle that it is for the tenant to decide how to perform his covenant has been well established for almost a century and if the parties had intended a departure from that principle, far clearer words would have been used. He also sought to draw support for the narrower meaning of those words by the use of identical words in clause 3(5) in which, as he pointed out, the work has been carefully prescribed and there is little or no scope for differences of judgment as to what must be done. The purpose of the words in that clause can only have been to oblige the tenant to do the work in question to the surveyor's satisfaction, for example, by insisting that surfaces to be painted must be first properly cleaned and prepared.

33. Miss Williamson, contending for the wider construction of the phrase, submitted that, although it could be confined to "manner" as opposed to "content" of the work done, there is no reason why it should be so confined. The phrase, she pointed out, precedes the operative words of obligation in the covenant and therefore more naturally applies to the whole of those words with the result, she submitted, that the whole of the content of the obligation must be to the satisfaction of the landlord's surveyor. Accepting the general principle that it is for the covenantor (here the tenant) to choose how to comply with the covenant, that principle, she said, is displaced by the phrase in issue. It would not therefore be open to the tenant to choose how to effect the repair if that would not be to the satisfaction of the landlord's surveyor. That would not constitute compliance with the covenant. It is irrelevant, she said, that the wider meaning confers on the landlord's surveyor a particularly far-

reaching and onerous power or that it might not accord with commercial commonsense (when viewed from the tenant's standpoint) to limit the power or that it represents a departure from the general principle. It is, she said, purely a matter of giving the words used their natural meaning. Besides, she said, even if the clause might appear onerous to the tenant, that may be no more than a reflection of the balance of bargaining power and perception of commercial advantage at the time the lease was negotiated. Nor is it apt, she said, to consider the phrase as used in clause 3(4) by reference to its use in the more tightly drafted clause 3(5). She accepted that the phrase would not entitle the surveyor to require works which went beyond what the operative words of the covenant required or to insist on an obviously unreasonably high standard of work. But that is a consideration which applies as much whether the phrase is construed narrowly (by confining it to the manner of performance) as it is if construed more widely (by applying it to the content of the work to be performed as well).

34. I have come to the view that Miss Williamson's approach to the construction of the phrase is to be preferred. I see no reason why it should be confined to manner of performance of the works to be undertaken and not apply to what the work is that is to be done. As Miss Williamson pointed out, the phrase qualifies the whole of the content of the tenant's obligation, not just a part of it. In any event, as Mr Dowding accepted, there is a point at which the manner in which work is to be done becomes, for all practical purposes, indistinguishable from what the work is that is to be done. Nor do I consider that Mr Dowding derives any comfort from the wording of clause 3(5). I see no reason why, although more tightly drawn as to the content of the work to be done, the phrase as used in that clause should not extend as much to the content of the work as to the manner in which the work is to be performed.

35. The fact that the phrase is unqualified does not give the surveyor carte blanche as to what he may require. The works to be undertaken must be to make good a want of repair or absence of good condition. In stipulating what must be done the surveyor must exercise his own judgment and come to an honest view of what is required. It is plainly implicit that he must act reasonably. He will be acting unreasonably if he seeks to require work which no reasonable surveyor could have required. On the other hand, provided he reaches a decision which a reasonable surveyor could reach, it matters not that the tenant's surveyor favours another cheaper but no less reasonable decision as to what should be done.

36. Mr Dowding submitted that, even if the wider construction is correct, there are important limitations on the surveyor's power of determination. Apart from the fact that the works required must properly fall within the words used (ie it must be work of repair etc), the surveyor must apply the correct test when forming his judgment and, what is more, must form and communicate his judgment to the tenant a reasonable time before or, at the latest, by the date on which the covenant to yield up falls to be performed, ie by the lease expiry date. The party's legal rights and obligations, he submitted, must on any view crystallise on that date since, once the lease has ended, the tenant loses the power to perform the covenant. It cannot possibly have been intended, he said, that the tenant should carry out perfectly acceptable remedial work prior to vacating only to find out later that the landlord's surveyor has decided that more work ought to have been done. The tenant's liability cannot vary retrospectively according to the judgment of whichever surveyor the landlord chooses to employ after the tenant has left the premises. It follows, he submitted, that the claimant can only rely on judgments formed by his surveyor (Mr Dutt) which were communicated to Total prior to 14 September 2000.

37. I do not accept that the surveyor's judgment must be communicated to the tenant before the lease expiry date. As Miss Williamson pointed out, there was, under the lease, a continuing obligation on Total to repair etc, to the lessor's surveyor's satisfaction and to deliver up the premises so repaired and it is for the covenantor to take the necessary steps to comply with his covenant. It was, she submitted, for Total to ascertain and take a view on what would or should have satisfied the lessor's surveyor, if necessary consulting Mr Mason as landlord to find out what his surveyor might require, before it vacated the premises and to carry out such works. If Total had done so but had received no response and had proceeded to carry out works which, in its judgment, were appropriate to comply with the covenant, it

might well be that Mr Mason would be in no position subsequently, through his surveyor, to require some other mode of compliance provided that what Total had done was fairly to be regarded as compliance with the covenant. Nor do I accept, if this indeed was what Mr Dowding contended, that it is not open to the landlord's surveyor to alter his view of what he thinks should be done in order to comply with the covenant. The fact, as Miss Williamson observed, that the surveyor might wrongly have insisted upon an unreasonably high standard at one time does not necessarily prevent him from altering his view and communicating that changed view at a later date. In any event, as Miss Williamson pointed out, since Total did not attempt to do any of the works, whether to the lessor's surveyor's satisfaction or at all, to comply with its covenant prior to the lease expiry date, it is not open to it to object to the fact that no judgment was reached by Mr Mason's surveyor prior to the lease expiry date or that in some respects he subsequently altered the judgment which he had initially reached.

The individual items

38. Before coming to the evidence and my conclusions in relation to the individual items which remain in dispute, there are certain general remarks which I should first make. The first is that I have had the advantage of visiting the premises and inspecting the various items in dispute, so far as it was possible to access them during the course of my two-hour visit. To some extent therefore my judgment is based upon what I saw, making allowance for the fact, first, that I was inspecting the premises in April 2003 whereas the judgment to be made is as to the state of the various items in September 2000 and, second, that during the summer of 2002 Mr Mason carried out a number of repairs, notably to the showroom, and replaced the fencing along the side boundaries of the site. I was also, of course, furnished with surveyors reports consisting, apart from some brief introductory comments, of a Scott Schedule produced by Martin Dutt on behalf of Mr Mason and, by way of response to that schedule, by Matthew Wilderspin on behalf of Total. Those two persons are each experienced building surveyors. Each gave evidence and was cross-examined at some length before me.

39. Mr Dutt is the senior partner of Martin & Lacey. He is a Fellow of the RICS having qualified in 1979. He has worked since 1980 in the general area of the premises. Although possessing considerable expertise in the matter of dilapidations, acting both for landlord and tenant, and although most of his experience in this field concerns shops, offices, warehouses and industrial units, he has (and claims) no particular expertise where petrol filling stations are concerned. That apart, he struck me as having approached his task with care and, so far as time and circumstances permitted, considerable thoroughness. Following an inspection he had prepared an interim schedule of dilapidations in February 1996. That was at the time of Mr Mason's purchase of the premises although no action was taken upon the schedule by Mr Mason. Following further inspections, in particular in November 1999, Mr Dutt prepared a schedule of terminal dilapidations which was served on Total in May 2000. It was subsequently costed and the costed schedule sent to Mr Wilderspin in July 2000. As costed the works alone came to a figure of just over £ 520,000. It was that schedule which formed the basis of Mr Mason's claim when these proceedings were launched on 22 December 2000. To the figure of £ 520,000 odd were added various professional fees of one kind or another and a loss of rent claim. The overall figure (inclusive of VAT) was £ 751,560.25. These proceedings followed Total's failure to respond in any substantive way to the schedule coupled with its assertion, through Mr Wilderspin's firm, that, having taken professional valuation advice, there was no diminution in value of Mr Mason's interest in the premises from the alleged dilapidations and therefore no recoverable loss having regard to section 18 (1). Since then there have been further inspections of the premises by the building surveyors including, on 2 August 2002 and again on 13 March 2003, joint inspections.

40. Mr Wilderspin is a partner in Fuller Peiser, a firm of property consultants based in the West End of London but operating nationwide. He qualified in 1992 and is a Member of the RICS. He is a partner in Fuller Peiser's construction services section.

41. Although his experience as a building surveyor has ranged widely, he seemed to have had rather less experience of dilapidation cases than Mr Dutt. Although he endeavoured at all times to be as helpful as possible when giving evidence before me in court, I nevertheless

formed the distinct impression that his inspections of the premises - there were essentially two, the first on 10 August 2000 and the other on 2 November 2001, before he produced his report to the court dated January 2002 following which there was the joint site visit with Mr Dutt on 2 August 2002 and the further (short) site visit on 13 March 2003 - were somewhat cursory.

42. The impression he left was that he had not paid particular attention to the terms of the lease when carrying out his inspections and making his report to the court and that, overall, he adopted a somewhat minimalist approach to his assessment of Mr Mason's claims. Time and again he accepted that he had had to alter, upwards, his view of what was needed to make good what plainly was a want of repair. A readiness to accept, when the facts justify it, that one has got it wrong is a virtue; but with Mr Wilderspin I had the impression that his change of view was inevitable as a result of the minimalist approach which he had initially adopted.

43. It cannot be emphasised too strongly that, although when acting for a client in negotiations with a third party, a professional person may seek to adopt an adversarial position, putting forward his client's case in the best light possible consistent with his general professional obligations, nevertheless when acting as an expert in court proceedings, the primary duty is to the court where the person must put forward his honest professional opinion. It involves, so far as possible, total objectivity of approach. The duty overrides any obligation to the client. This means that the expert must resist the temptation to act as an advocate in his client's cause. All this is commonplace: see CPR 35.3 and paragraph 1 of the Part 35 Practice Direction. It is precisely because matters of expertise are involved, which the court itself does not possess, that the court looks to the expert for dispassionate help and guidance. Honest differences between experts are inevitable in a matter as variable and, to some extent, subjective as standards of repair and the like. I had the impression however that, at any rate when preparing his report, Mr Wilderspin did not have these considerations fully in mind but rather saw his task as helping his client keep its liability for dilapidations to a minimum. It has caused me to have rather less confidence in Mr Wilderspin's assessment of the state of repair of the premises and the required remedial works than I might otherwise have had.

oops!

44. Mr Dutt, for all the care with which he has approached his task, faced a difficulty. Acknowledging entirely properly that he had no expertise in certain matters and that specialist advice was therefore desirable, he felt unable when drawing up the Scott Schedule to express a view on what was called for in the way of repair, let alone what it would cost, in respect of those matters. This is reflected in a number of the entries on the Scott Schedule. Thus, to take the example of the electrical installations at the premises, having observed that they are "old and considered dangerous and in disrepair... to be passed [their] useful life and not conforming to current regulations" he suggested by way of remedy: "obtain qualified electrician's report and as necessary repair, overhaul and upgrade and provide certificate of worthiness". But, with a few exceptions, no specialist reports were obtained. Whether that was Mr Dutt's or Mr Mason's responsibility or that of someone else on Mr Mason's side does not matter. It has left me in respect of those items with little evidence to go on by which to judge matters beyond Mr Dutt's guarded comments (guarded because of his admitted lack of expertise), Mr Wilderspin's mostly contrary view of what was appropriate, what I have seen on my site inspection and Mr Mason's own views (which, not surprisingly and without disrespect to him, favour renewal or replacement wherever possible).

45. Another related difficulty is the absence of reliable costings. To a large extent Mr Mason relies on costings produced very late in the day (14 January 2003) by a firm of maintenance contractors called JPL with whom Mr Dutt has dealt over the years. JPL were given the schedule of dilapidations and asked to produce a quotation. Since, at the time of approaching PI, for their estimates, Mr Dutt was asking for a "very high standard", some of the prices quoted are of questionable value; others were subsequently moderated to reflect a lesser standard. Mr Dutt himself accepted that in some respects he may have been calling for too high a standard. In yet other cases Mr Mason has relied on costings contained in a report produced by a Mr Allan Taylor in January 1999 in connection with a "redevelopment" (as it is described) of the filling station. Not the least of the difficulties concerned with that report is

that the figures are no more than very general estimates and they involve, for the most part, wholesale replacement of the item in question.

46. Not unnaturally, Mr Dowding reminded me that the burden of proof lies on Mr Mason as landlord to show on the balance of probabilities that the condition of the subject matter at the relevant date was such as to require work under the covenant, what that work was and what the reasonable cost of it was. He pointed out that the building surveyors agreed, at their site meeting in August 2002, that in a number of important instances specialist reports were needed and that it was agreed between them that Mr Dutt would obtain the necessary reports. After pointing out that with the exception of reports concerned with the underground storage tanks on the site, such reports were either not obtained or were in various respects inadequate, he submitted that the court should be cautious before holding that the burden of proof had been discharged by reference to other necessarily circumstantial or inferential evidence.

47. Miss Williamson, while accepting that the burden of proof lay with Mr Mason, submitted that there was no question of the court adopting a "more cautious" approach by reason of the absence of specialist reports if her client was otherwise able on a balance of probabilities to prove his case from other factors. In any event, she submitted, it was unfair to criticise Mr Mason in failing to incur considerable costs in obtaining expert reports not least when Total was claiming that the disrepair of the premises or other want of condition caused him no loss. She submitted that if the problem was an absence of precise figures, then the court could and should do its best on the available evidence but that, if the court was of the view that an item of disrepair was sufficiently proved but had insufficient evidence to quantify it, an enquiry could be ordered. She submitted that this would be a better course than allowing an injustice to be done and Total to escape liability.

48. Sympathetic though I am to Mr Mason's position, I must judge this matter on the basis of the evidence which has been laid before the court. There is no good reason why the evidence necessary to establish his claim should not have been available by the time this trial started. Of course, the court must seek to do the best it can on the evidence before it, even if, because of an absence of accurate figures, it is difficult, where a breach of covenant is proved, to quantify the precise measure of loss flowing from it. The court is well able to assess where, on the evidence, the balance of probability lies and to know at what point to conclude that the person on whom the burden lies has failed to discharge that burden. The fact that Mr Mason is a sole trader whereas Total is now a very substantial corporation does not mean that, out of a sympathy for his position, I should make allowances in his favour which would not be appropriate if he were in a more substantial way of business. That would give rise to an injustice to Total. In assessing the evidence, the scales must be held evenly whatever the relative commercial strengths and weaknesses of the disputants.

49. In recent months a radical redevelopment of the petrol filling station has been in contemplation. Exhibited to Mr Mason's fourth witness statement are details of the relevant planning application lodged last autumn. I was also shown various drawings of what was proposed. The proposal involves extensions and alterations to the existing building to increase the retail area at ground floor level and provide two additional rooms at first floor level. The proposal includes an extension of the existing service canopy and a new shop front. I was told that planning permission was obtained earlier in the year. The matter was explored in cross-examination of Mr Mason. He disclaimed any general intention of proceeding with this radical proposal. He said that it was beyond his means and that the architect had "got carried away". He said that someone else, a Mr Limbachia, had paid all the fees. The only item which he intends carrying out, he said, is an extension of the retail area involving construction of a new shop front. I accept Mr Mason's evidence about this matter. More generally, Mr Mason came across as an honest witness who was naturally concerned to obtain as much by way of damages for breaches of Total's repairing obligations as he is able but who, as he himself readily admitted, was rather let down by his own failure to give sufficient attention to preparing more fully for aspects of his claims.

Petrol pumps

50. There are four pumps, two on each "island" under the forecourt canopy. One pump contains a single diesel hose; each of the other three contains a hose on each side. This is one of those matters where Mr Dutt claims no expertise and where he recommended that further specialist advice was required to establish what work was needed.

51. Mr Mason's evidence was that each pump broke down on average once every four months (ie three times a year). He complained that by 1997/1998 (which was before the lease had expired) the frequency of pump breakdowns had increased and that repair time extended to up to two weeks. He said that he had complained to an engineer about this and asked why the pumps kept failing to which, he said, he received the reply that it was because the pumps were obsolete and that in order to fix them spare parts obtained from a petrol pump scrap yard were being used. On the other hand, the pumps do still function and, when they break down, are capable of repair in that they are restored to working order.

52. The question here is not whether the pumps are old or indeed obsolete or whether spares are difficult to obtain but whether, at the lease expiry date, each was breaking down so frequently that it could fairly be said that none was any longer in good condition. My difficulty about this aspect of Mr Mason's claims is that, having no evidence from anyone with expertise in these matters, I have no idea whether an average pump breakdown of once every four months is normal or whether a regime of regular maintenance, about which I have heard nothing, would prevent breakdowns. Mr Mason's evidence was that from the lease expiry date he had entered into a maintenance contract with an organisation called Wayne. What the maintenance contract involves was not stated. Apart from a letter dated 14 March 2003 from Wayne to Mr Mason warning of future difficulties in obtaining spares and another, earlier, letter dated 11 August 2000 indicating a cost of £ 25,219 to supply four new four-hose pumps (and involving considerable upgrading of the pumps beyond those currently installed) I have no evidence from that organisation about the ability of the present pumps to function efficiently and whether, in their professional view, replacement of all four is called for.

53. In the circumstances I feel unable to say that Mr Mason establishes his claim which was for the wholesale replacement of all of the pumps. Their ability to work efficiently is plainly fundamental to the operation of a petrol filling station. In reaching my conclusion on this item I take some comfort from the fact that, as Mr Dowding pointed out, if by September 2000 the pumps or any one of them needed replacing, it seems scarcely credible that this would not have happened by now. Thus far it has not.

The rear workshop and showroom roofs

54. I take these two items together since they are similar. In each case the roof is made of corrugated asbestos cement sheeting. The sheeting has been heavily patched in places. The evidence, which I accept, is that they have become fibrous and brittle and that some of the fixing bolts have become corroded. In places there are cracks. There are fibreglass skylights on the workshop roof. Such is their condition that they do not allow light to penetrate into the workshop. They have become fibrous and dirty with ingrained algae. In the case of the workshop, the ceiling immediately beneath comprises fibre board panelling and is in a defective state: in places it is sagging; in other places it has become damaged from roof leaks.

55. Mr Dutt recommended their replacement, also the asbestos rainwater goods and metal gutter brackets to that roof. He said that this could be achieved at an overall cost of £ 6,152.50 for the workshop roof and ceiling repairs and, £ 5960 for the repairs to the showroom roof and associated rainwater goods. He accepted in cross-examination that the first of these two figures, taken from costings provided by JPL, "could come down a bit".

56. Mr Wilderspin thought that it was sufficient to clean and patch repair the two roofs, that the workshop ceiling could be repaired and refixed and that the showroom roof and rainwater goods could similarly be repaired. His overall figure of the works was £ 500 for the workshop

roof and ceiling and £ 855 for the showroom roof repairs.

57. Having inspected the two roofs, it is clear to me, first, that both roofs are in serious need of repair, second, that it is unlikely that their condition would have been much if any different as at September 2000 and, third, that their replacement by single metal sheeting (as Mr Dutt recommended) is an entirely reasonable method of dealing with the matter. I consider that Mr Wilderspin's patch repairs to be inadequate but even if adequate I consider that these are items where, on the wording of clause 3(4), the landlord's surveyor's judgment should prevail. Segue.

58. Given Mr Dutt's acceptance that the figure of £ 6,152.50 for the workshop repairs "could come down a bit", I propose to allow an overall figure of £ 11,000 for the repairs covered by these items.

The service bay roof

59. This is a flat felted roof with a small parapet surround. It is common ground that it is in need of repair. That was amply apparent from my own inspection. The felt sheets have shrunk and become brittle and the joints have been pulled apart. Bubbling has occurred. Mr Dutt's opinion was that the existing covering is beyond economic repair, should be removed and recovered with similar materials. He relied on a 21, estimate of £ 3,087.50 for the job. Mr Wilderspin considered that the existing roof material can be easily repaired; he estimated that the job could be achieved at an overall cost, inclusive of materials, of £ 750.

60. I have no hesitation in preferring Mr Dutt's judgment. Segue. Replacing the existing roof covering in the way that Mr Dutt advised is, in my view, within the standard of repair contemplated by the lease. It is objectively reasonable and is work which would satisfy Mr Dutt as the landlord's surveyor. To this I would add that Mr Dutt inspected the roof in 1998 and it was his view then that renewal of the felt covering was called for. It is not without interest that in 1996 Total itself contemplated replacing the roof covering for which it envisaged a cost of £ 1440.

61. I propose therefore to allow this item at an overall cost of £ 3,000.

The front and rear doors to the showroom

62. The front doors consist of three pairs of heavy timber-framed glass-panelled sliding doors hung from a top rail. Originally all three pairs could be slid open laterally via the top rail and a runner at ground-floor level. At some stage during the lease the two outer pairs have been fixed so that they can no longer be slid open leaving only the inner pairs to function as doors. The top rail has sagged slightly. The runners are bent in places and there is some evidence of rusting. The rear doors consist of a single pair of sliding doors and are without glass panelling. They too are top hung via a rail with a ground level runner. In practice only one door of the pair can be operated: it is a little stiff in movement. The other door can be operated but only by exerting very considerable pressure. As with the front doors, the top rail has sagged. There is evidence, at any rate at the bottom of the front door frames, of rotting to the wood, especially at the corners. On any view, to render the doors - all of them in a proper state of repair, the doors must be lifted out, sliding mechanisms repaired, the top rails raised where sagging has occurred and the wood decay eradicated.

63. The front doors are an important feature of the showroom: they are what members of the public see when they first enter the premises. I am satisfied that their condition has not materially worsened since September 2000. By the time of my inspection the doors had been repainted but it is apparent from one of the photographs in evidence, taken before redecoration, that the doors were in an extremely shabby state by the time the lease expired.

64. Mr Dutt's opinion was that the doors should be completely replaced and the top runners renewed all at a cost (as per a PI, quotation) of £ 9,900. He had previously thought that

repairs alone might be possible. Mr Wilderspin considered that it would be sufficient to cut out the decayed areas of the doors by splicing in new wood or infilling with a proprietary substance at an overall cost of £ 500.

65. I am of the opinion that Mr Wilderspin's prescription is woefully inadequate. Removal of the doors and the repair of the two top rails and ground level runners alone would probably cost that amount.

66. This is an item where a building surveyor could reasonably have prescribed replacement of the decayed wooden parts of the door rather than their wholesale replacement coupled with repairs to the top rails and ground level runners. The realistic cost of such works, I have no doubt, would be considerably in excess of Mr Wilderspin's £ 500 estimate. But a surveyor could reasonably also come to the view that, given the condition of the doors and the need, if their original condition is to made good and their functionality restored so as to ensure that all four sets (the three sets in the front and the rear set) operate as they were obviously once intended, replacement is the sensible remedy. That was Mr Dutt's opinion. He is the landlord's surveyor. His opinion should therefore prevail. Allowing for the absence of any competitive estimates for what is an expensive item, I propose to allow an overall cost of £ 9,000 for this item. If I had thought that repairs to the existing doors alone constituted the appropriate remedy, I would have allowed a cost of £ 3000.

Warm air boilers

67. There were once two of these, one in the rear workshop and the other in the showroom. Mr Dutt's original opinion (in the schedule of dilapidations) was that the workshop boiler appeared "non-functional" and that the showroom boiler lacked proper maintenance and was "not seen working". He recommended their servicing, overhaul or renewal as necessary and the provision of a "certificate of worthiness". He said in evidence that he had not seen either of them working, that they merely appeared non-functional and that he had formed no judgment about them. He recommended at that stage that the specialist advice of a heating engineer be obtained.

68. Mr Wilderspin's stance was that he had seen no proof that the boilers were in disrepair. He told me in evidence that he regarded them as functional, saw nothing wrong with them but took no steps to see if his assumption was correct.

69. Before a specialist report could be obtained Mr Mason removed both boilers. Quite when this happened was not established. He had removed the showroom boiler by August 2002 and the workroom boiler subsequently. In his fifth witness statement he said this:

"In the winter of 1998 I was having problems with the heating in the showroom and one of the workshops. The large heating-oil burners in there were roughly five feet tall and about five feet long and three feet wide and have fixed flues venting to the outside of the building. They stopped working so I called the Total engineering department. They sent over a heating specialist from Epsom. He condemned both of the heaters as they were obsolete and parts were no longer available. Total failed to provide any replacements."

In cross-examination he said that he had had no problems with the two boilers up to 1998.

70. The only other piece of evidence is that in June 1996 Total budgeted £ 2,000 for repairs to the two boilers. An internal Total memorandum by a Mr Prescott said this of the matter (he referred to them as the "heating systems"):

"CP's report confirms the heating systems require some remedial work..."

The memorandum later refers to "work required to bring the heating systems back up to standard". The note then suggests the allowance of a budget cost of £ 2,000 for repairs. The report from C P Installations - it is dated 10 April 1996 - referred to the condition of the workshop boiler as "fair to poor. It has been working but does not give out much heat. They

have trouble firing it up" and to the showroom boiler as being "good to fair".

71. The claim for the complete renewal of the two boilers did not appear in the Scott Schedule even in its updated form in January 2003. As it now stands the claim is for renewal of the two boilers at £ 3,500 each, making an overall cost of £ 7,000.

72. On the basis of this unsatisfactory state of the evidence, I am not willing to find that neither boiler was beyond proper repair and could only sensibly be renewed by September 2000. I am willing to accept that repair work on them was desirable. I am willing to accept that the cost of so doing would have been greater than the £ 2000 budgeted for such work in June 1996. I propose therefore to allow a figure of £ 3,500 for these two items as representing, as best I can, the cost of putting them into a proper state of repair as at the lease termination date.

The roof of the main building

73. Mr Mason claims an overall sum of £ 4,733 to cover the cost of cleaning moss off the roof slopes, overhauling and replacing damaged tiles, rebedding hip and ridge tiles, cleaning down and repairing rusted hip irons including replacing one that is missing and carrying out brickwork repairs to the two chimney stacks and repairing the flashings to those stacks. The estimate includes the cost of providing scaffolding to access the roof. Mr Wilderspin, while acknowledging the need for works to make good some of these items (he disputed the need to clear moss off the roof or to carry out repairs to the flashings) estimated the overall sum involved to be no more than £ 700. It appeared from the evidence, however, that, whereas Mr Dutt had inspected the roof from a ladder at eaves level, Mr Wilderspin had not. He had merely looked up from ground level. Since the roof is above a two-storey building, it is obvious that he could not have examined the state of the roof with anything like as much care as Mr Dutt had done. On my own visit to the premises, I inspected parts of the roof from eaves level. It was clear that the repairs needed are extensive and certainly much more extensive than Mr Wilderspin supposed from his ground level position. Indeed given the size and colour of the roof tiles (there has been considerable discoloration to them over the years) it is difficult from ground floor level to obtain anything like a clear view of the position at roof level and, given the nature of the structure, difficult to see parts of the roof at all from ground level. I also accept that it is sensible when the works are carried out for a scaffold to be used.

74. I have therefore no reason to doubt the reasonableness either of Mr Dutt's opinion of the works needed or of the costs supplied to him for the work by JPL. I propose therefore to allow these items in the overall sum claimed rounded up to £ 4,750.

Crack in the kitchen wall

75. This concerns a crack in the brick wall separating a kitchen and lavatory at first floor level in the main building. The wall has no corresponding wall to support it directly beneath: the wall rests on the floor. There is evidence of past settlement. A letter dated 14 January 2003 from a firm of consulting civil and structural engineers, which was placed before the court, stated that:

"The kitchen walls have dropped historically, with distorted openings and slopes on the floor. The general condition of the property is relatively poor, with a backlog of maintenance, and these solid walls are obviously not well supported. As old cracks have not been repaired it is hard to be certain as to the extent of any ongoing movement."

76. Mr Dutt was of the opinion that the wall should be replaced by a stud-wall, Mr Wilderspin that it was sufficient merely to fill the existing crack. It was not suggested that any other works should be carried out to make good the distorted openings and floor slopes.

77. It seems fairly plain that the settlement of the wall must have occurred some time ago. I am not persuaded that the repair of this wall should involve its total removal and

replacement by something less substantial such as a stud-wall. In my judgment, small though this item is, it is unreasonable to require works which go beyond merely filling the offending crack. Removal of the wall would not eradicate the distorted openings and floor slopes referred to in the engineer's report. I do not therefore consider that more than £ 25 should be allowed for this item: this was Mr Wilderspin's estimate for filling the crack. Redecoration of the wall is already covered by agreement between the parties.

The hardstanding areas

78. This relates to the concrete surface areas of the site. The claim is for their complete renewal at an estimated cost of £ 42,500.

79. Mr Dowding pointed out, quite fairly, that in the Schedule of Dilapidations this item was concerned with the eradication of oil/petrol contamination at the site. It was linked to the replacement of the existing underground storage tanks on the supposition that, given the age of the tanks, petrol contamination of the surrounding soil was likely and that extensive work would be necessary to remove it. This resulted in an original estimate of £ 32,500 for the concrete works and £ 50,000 for eliminating the contamination. It included an element for the removal of two old oil tanks behind the workshop and the removal of the contaminated soil where the tanks had been located.

80. I will deal separately with the underground tanks and any associated ground contamination when I deal with that issue. For present purposes, Mr Dowding pointed out that the works to the concrete surfaces set out in the Schedule ("....concrete lifted and renewed as necessary ...") were not said to be necessary because of its condition but as part of the process of eliminating the contamination and that, in any event, Mr Dutt did not at that stage regard complete replacement as necessary. This explained, he said, why Mr Mason's pleaded case had not claimed that the whole of the hardstanding needed renewal as at 14 September 2000 and why Mr Wilderspin's initial response had been to dispute the presence of any (or any significant) contamination but, instead, to accept that minor repairs to the concrete surfacing itself were alone appropriate. It was only in January 2003, he said, when Mr Dutt produced his updated Scott Schedule that the claim for complete renewal - as an item discrete from any question of contamination - first appeared and, with it, the estimate of £ 42,500 for the works. He submitted that complete renewal of the concrete was unjustified and went beyond what was reasonably necessary to remedy the (admittedly) damaged areas of the hardstanding. The surface, he said, was perfectly useable, was not unsightly and, in any event, was, as to that part which was behind the main building, invisible from the road and was not used by petrol filling station customers. He submitted that the recoverable costs under this head should be limited to the sum of £ 4000 which, in cross-examination, Mr Wilderspin had estimated as the cost of making good the damaged surface areas. Wholesale replacement, he said, would go beyond what clause 3(4) required.

81. In cross-examination Mr Dutt accepted that the contamination he had originally expected was not present but explained that his original estimate of £ 32,500 for the concrete surfaces alone envisaged their replacement and that, in 1999 when he prepared the Schedule of Dilapidations, he would still have recommended renewal of the concrete surface even if he had known that there was no contamination beneath. He identified what he referred to as "possibly salvageable areas" as lying between the pump islands and to the left of the site behind the main building but said that, even excluding those two areas, there was still 85-90% of the overall hardstanding which required replacement. Although, when he had drawn up his interim schedule in February 1996, he had recommended all hard surfaced areas to the properly repaired/renewed as necessary and put into good presentable serviceable order rather than that there should be wholesale renewal, he explained that there had been further deterioration over the ensuking four and a half years which justified replacement. He was of the view that the class of tenant, like Total, taking a lease of the premises in 1964 would have expected a higher standard of hardstanding than could be achieved by the kind of patch repairs which Mr Wilderspin favoured and which, in part, had been undertaken over the years, notably since the lease expiry date.

82. Mr Wilderspin was of the view that patch repairs to the degraded parts of the surface

were all that was needed to comply with the covenant. He accepted that his original estimate of the amount of work needed was too low and therefore that his original figure of £ 5 00 should be revised upwards to £ 4,000. That represented, he said, 10 to 15% of the surface. He accepted that the estimate of £ 42,500 was about right if the whole surface was to be replaced and also accepted that, if 85-90% of the surface was to be replaced, one might as well replace the whole of it.

83. To my eye, the degraded and patched nature of the hardstanding in the forecourt area gives the premises a tired and rundown appearance. Closer inspection, to some extent apparent from the photographs in evidence, shows that there is unevenness in the existing surfaces and some cracking and that in part the surface is quite significantly pitted. I do not consider that further patch repairs would restore the surface to the standard of repair required by the lease. The only question to my mind is whether the replacement of the concrete should be limited to the area to the front and western side of the main building or should include the areas to the rear, up to the edge of the workshop and service bay, as well. Mr Dutt's view, admittedly reached at a late stage in these proceedings, that the whole area should be replaced is not unreasonable and therefore one which, as the landlord's surveyor, he can properly insist upon.

84. There is a further related claim for removal of contaminated soil behind the workshop where there is a narrow unsurfaced area separating the back of the workshop from the rear boundary. That was where an oil tank was once situated but has since been removed. There is contamination of the soil where the tank stood. The question is the cost of removing it. There was some uncertainty in the evidence over the cost involved. The area of contamination is small. I propose to allow a figure of £ 1,000.

85. I shall therefore allow the overall claim under this head in the sum of £ 43,500.

The compressor

86. Mr Mason claims £ 1,000 as the cost of a new compressor which is located in the service bay. In his Schedule of Dilapidations Mr Dutt expressed the view that it should be overhauled serviced and renewed if necessary so that it was left in proper working order and provided with a certificate of worthiness. He recommended that specialist further advice be obtained. In the Scott Schedule he reiterated the view that specialist advice was required. However none was obtained. The matter being outside his area of expertise, Mr Dutt said in cross-examination that he could not say whether repairs were what was needed or whether replacement by a new compressor was the only option.

87. In his witness statement Mr Mason said that the compressor leaks oil and is very noisy and that it struggles to reach its operating pressure. This suggested to him that the pistons are worn and are losing compression. He said that he had installed another at the premises to reduce the work required of the existing equipment. He thought that the compressor's big end had gone rendering it uneconomic to repair. He feared that the compressor would give out at any time.

88. Mr Wilderspin declined to express any view on the ground that, as with Mr Dutt, the matter was not within his expertise. His response to the Scott Schedule was to point out that Mr Dutt had not identified any breach or disrepair.

89. I accept that this equipment is in need of repair. I further accept from Mr Mason (who is, after all, a very experienced mechanic making daily use of the compressor) what he says about the likely causes. Repairs would involve dismantling the equipment and, in all likelihood, providing new parts. I strongly suspect that £ 1000 which, according to Mr Dutt, was Mr Mason's estimate of the cost of replacing it would be little different from the cost of dismantling it, identifying the problems and, assuming that they are available, obtaining and installing new parts. Taking what I hope is a pragmatic approach to the item and, notwithstanding the absence of a specialist's report, I consider that £ 1000 is about right as the cost of making good this item, whether by way of repair or by way of replacement.

Accordingly, I shall allow this item in the sum claimed.

Fencing

90. Mr Dutt's Schedule of Dilapidations required that the fence posts should be "refixed where necessary, repaired/renewed where spalled and 5 No. close boarded panels .... replaced". In fact, during the summer of 2002, Mr Mason replaced the whole of the fence on the western and eastern boundaries (in the case of the eastern boundary up to the corner of the showroom which is about one third of the length of that boundary) with stout new wooden fencing at a cost of £ 4,500. It is that sum which Mr Mason now claims. Mr Dutt accepted in cross-examination that the former fencing (since replaced) was capable of repair and that his opinion was that it should be repaired rather than replaced. He accepted that in replacing it Mr Mason had "gone beyond repairs which could have been done". Mr Wilderspin, agreeing that the fence needed repairs, considered that a cost of no more than £ 250 was involved. Mr Dutt disagreed with that figure and thought that £ 2,000 would have been the appropriate cost.

91. Total had itself budgeted £ 1,930 for fence repairs in June 1996. It is not suggested that those repairs were carried out. I propose to allow this item in the sum of £ 2000. I do not consider that the actual costs to Mr Mason of replacing the fencing is justified. That would go beyond Mr Dutt's view of what was appropriate.

Drains

92. These were inspected by C J Uden & Co (Drainage Consultants and Surveyors) on 2 January 2003 and a report prepared dated 14 January 2003. The report disclosed that most of the drainage runs were damaged in one respect or another. It recommended that four of the ten runs should be re-laid in modem materials and certain other minor repairs carried out to the inspection manholes. It provided an estimate of the cost of carrying out its recommendations in the sum of £ 5,100 together with VAT. This cost assumed the removal and replacement of the concrete surface immediately above.

93. Mr Wilderspin was at something of a disadvantage when commenting on these findings as he was only provided with a copy of them shortly after the second site meeting with Mr Dutt which had taken place on 13 March 2003. That was just before this trial started. He did not think that anything needed to be done. This was on the basis that nothing in the survey suggested that the drains were not still functional.

94. I take the view that the report discloses the presence of disrepair, that the fact that the drains still function does not mean that there is no breach of clause 3(4) and that it is reasonable to require, as the report suggested, that some of the drain runs be replaced. There was a dispute over whether replacement would be more or less expensive than relining. If, however, the concrete hardstanding on the surface above is to be replaced in any event, there is no reason why replacement rather than relining of the affected drain runs should not be the appropriate remedy and there is in any event scope for achieving a saving in Uden's estimate for the works. Taking all of these factors into account, I propose to allow this item in the amount of £ 3,000 inclusive of the cost of Uden's inspection and the production by it of its survey report.

Electrical installation

95. Mr Mason claims £ 30,000 for the complete replacement of the electrical installation at the premises. This is another of those items where Mr Dutt, accepting that electrical matters were not within his area of expertise, recommended that a qualified electrician's report be obtained so that, as necessary, the system could be the subject of "rewire, overhaul and upgrade" and a certificate of worthiness provided. But no specialist report was produced.

96. Mr Dutt's view, on inspection, was that the installation "throughout is old and considered dangerous and in disrepair". He said that it appeared to lack proper maintenance, to be past

its useful life and not conforming to current regulations. In cross-examination he explained that, although not within his area of expertise, his view was that a new installation was needed throughout the premises. Basing himself on estimates contained in the Allan Taylor schedule of works prepared in January 1999 (where there is an estimate for rewiring some but not all of the premises) he considered that £ 30,000 was what it would cost to replace the whole installation.

97. Mr Wilderspin's view was that "nothing was identified to me that needed repair" and that, according to his site notes, there was "no sign of any problem". He accepted that the wiring was old but stated that, for example in a dwellinghouse, wiring could be 50 years old. He accepted that a comprehensive rewiring would cost at least £ 15,000 but felt unable to say quite what it would cost overall.

98. Mr Mason said that when in occupation as Total's licensee, he would report electrical faults to Total which, in turn, would arrange for an electrical firm called Leggetts to deal with the matter. He said that during the Spring bank holiday of 1996 the site suffered a complete power failure. Unable to reach the relevant department in Total, he called upon an emergency repair service provided by Seeboard. Up to that time, he said, the system had been "tripping out" once every two to three weeks. He said that the Seeboard engineer was unable to locate the problem and that the only way to "get me up and running" was to bypass the main circuit-breakers (located in the service bay where, it seems, the mains supply enters the premises) and fit another device as a temporary measure. The Seeboard engineer's job sheet, dated 25 May 1996, stated that the installation was in poor condition and needed to be rewired. Mr Dowding described that note as "the high watermark" of the evidence supportive of Mr Mason's claim. Mr Mason went on to say that he called Total after the bank holiday and that Total then arranged for someone from Leggetts to call. He said that the Leggetts engineer thought that the problem lay with the use of the fuel pumps. Leggetts job sheet, dated 28 May 1996, noted that the fault had been repaired and ended by stating: "everything left OK". The "temporary" bypass of the circuit-breakers installed by Seeboard has since remained in place.

99. On 22 April 1996, a month before the bank holiday incident, Leggetts had reported to Total on the electrical installations at the site. This had occurred in response to the interim schedule of dilapidations served in February of that year in which Mr Dutt had noted that the "electrical wiring appears suspect in many areas, particularly to main building..." He called for a "full test of electrical installations to all buildings" and for Total to "rewire, overhaul and upgrade as found necessary". Leggetts' subsequent report identified a few minor faults, recommended the replacement of a number of fittings in the main building and workshop but otherwise found the installation to be in working order. Its tone was, as Mr Dowding observed, "generally positive". Total's response contained in an internal memorandum dated 7 June 1996 was to note that "there are no major problems" except for the replacement of a number of light fittings for which a budget cost of £ 450 was available. It went on to add:

"You should also note that the existing installation is many years out of date with only one RCD feeding the whole site. It is not however our responsibility to update the system, only maintain it in a serviceable condition."

100. I saw parts of the electrical installation on my site inspection, including the bypassed circuit breakers in the service bay. The system, both there and in those parts of the main building where it was exposed and visible to me on my inspection (principally in the upstairs "flat"), looked to be of some antiquity with some old-fashioned fittings. Although the system apparently functions and, to that extent, is not in obvious disrepair it is difficult to think that the system is in good condition as clause 3(4) requires. In so saying I note, but attach little weight to, Mr Dowding's point that the current state of the installation has not caused Mr Mason any difficulties when obtaining annual renewal of his petroleum licence.

101. I take the view that some works are needed to maintain the system in good condition. My difficulty has been to say quite what is needed and therefore what it would cost. I consider that the Allan Taylor costings, together with Mr Dutt's add-ons, are an unsatisfactory means of approaching so substantial an item. The Allan Taylor costings, as I

understand them, are based upon a complete refurbishment of the premises. In the absence of a proper report from someone competent to advise, it would not be fair to Total to assume that the system needed wholesale replacement as at September 2000. Equally it would not be fair to Mr Mason to dismiss this part of his claim for want of sufficient evidence. Miss Williamson suggested that, if I had any doubts, I should direct an enquiry as to the cost of a complete rewiring. If I were to do that, I might as well direct an enquiry as to the extent of the rewiring needed in order to clear up any doubt on that no less important aspect of the claim. Although it was I who raised this as a possibility during the evidence, I do not, on reflection, think that this would be a right course. These proceedings were started as long ago as December 1990. There has been ample time to prepare for trial which began in the second half of March 1993. Moreover, the precise extent of the costs involved may, when added to the others, fall foul of the cap imposed by section 18(1).

102. In these circumstances, I propose to fix the amount of this claim at £ 10,000. This is intended to cover the cost of carrying out works of rewiring in the main building, including the shop. It cannot be other than approximate. I was not aware of any particular problem in the showroom to which neither the evidence nor my attention on the site inspection was directed. Nor apart from the need to bypass the circuit breakers located in the service bay was any particular problem identified elsewhere on the premises.

The ground floor of the main building

103. The claim is for the whole of the timber ground floor to be replaced in concrete at an estimated cost of £ 10,000.

104. Mr Dutt's schedule of dilapidations noted that the floor was suspect and appeared affected by decay and woodworm. He required that it be opened up, that the extent of the woodworm attack and decay be investigated and that it be repaired as necessary. Mr Wilderspin was of the view that no disrepair had been identified. He had been unable, he said, to detect any evidence of active woodworm and, except for one area at the foot of the stairwell where the floor had been opened up and there was some evidence of decay, saw no sign of decay in or under the floor. He said that he would have expected the floor to feel springy or spongy underfoot if there had been any.

105. Following their joint site inspection in August 2002, Mr Dutt recommended that the floor be opened up to confirm its condition. A firm called Insitu Building Preservation Limited, described on their notepaper as specialists in the treatment of woodworm, dry rot and dampness in buildings, were duly instructed by Mr Dutt to inspect the premises "to determine the presence and extent of wood boring insect attack and decay" in the timber floors. On 29 January 2003 that firm reported its findings and recommendations. As regards timber decay affecting the ground floor (the report extended to the roof void and first floor as well) Insitu said this:

"Unfortunately, in this instance we were unable to inspect the sub-floor timbers. However, considering the poor standard of the chipboard flooring and bearing in mind the dampness and inadequate sub-floor ventilation we consider it likely that the flooring throughout the ground floor will be deteriorating through wet rot decay and attack by wood boring weevil.

In view of the above we recommend that sections of the chipboard flooring are cut out and lifted in several areas so that a further inspection can be carried out. We will be pleased to arrange to carry out this work with a sum of £ 200 + VAT. We would then provide a further report and quotation for any works found to be required.

With regards to this we would confirm that we consider it likely that this inspection will reveal that the floor is beyond economic repair, in which case it should be replaced with a new concrete floor."

In the course of his cross-examination, Mr Dutt agreed that the report was "useless". He nevertheless formed the view that wholesale replacement was necessary. He accepted that

this went rather further than his earlier view calling for investigation of the under floor condition and for the carrying out of any repairs found necessary. The figure of £ 10,000 for the cost of doing so was, it appears, a verbal quotation -described as a "budget price" - from Insitu.

106. The problem here is that, apart from a very small area at the foot of the stairs, no one has opened up the flooring to examine the state of the joists underneath. The case for replacement hinges, as Mr Dowding properly pointed out, on three matters: (1) the presence of rot in the small area actually opened up, (2) the number and location of airbricks providing ventilation to the under floor areas and (3) some very late evidence (contained in Mr Mason's fifth witness statement served only days before the trial started) about events in 1994 to 1995.

107. Accepting that, as to (1), the presence of rot in one area suggests the possibility of rot elsewhere, Mr Dowding submitted that this does not give rise to an inherent probability that there is rot anywhere else, let alone that the whole of the ground floor needs replacing. He pointed to Mr Wilderspin's evidence to the effect that, if any such rot existed, he would have expected to find sponginess in the floors whereas there was none. He cautioned against speculating on the presence of rot in other parts of the floor merely because it had been detected in one particular area.

108. As to (2), it was the case, as I saw on my own inspection, that there are two airbricks (one of which, given the surface level of the surrounding concrete hardstanding, is partially covered) to the front of the main building at ground level and that there are two on the western side. No others were evident. This may be because the laying of the concrete hardstanding covered any others that might once have existed. It was common ground that there should be more airbricks. Mr Wilderspin thought that there would still be sufficient air movement under the floor by means of the existing airbricks. But it was not evident to me how, since he had not examined the under floor areas (any more than Mr Dutt had), he could come to this view. On the other hand, even if there should be greater air movement to the underfloor areas, it does not follow that rot is likely to be present in any particular parts of the underfloor areas.

109. As to (3), Mr Mason's evidence was that in or around 1994 or 1995 the floor in the service reception area in the main building collapsed. He said that he called Total which sent out a contractor to deal with the matter and that he overheard the contractor telephone his employer to say that "all the joists are completely rotten". He went on to say that the contractor was later told to cover the areas with chipboard but not to replace the joists. Mr Mason said that the floor had not since been repaired and that "there are now other areas showing signs of rot and the chipboard area has some movement to it". The other areas to which he referred were not identified. It is odd, if the work then undertaken was simply to place a chipboard covering over a rotting and collapsed floor area, that no floor movement has since been detected in that area. It is also noteworthy, as Mr Dowding pointed out, that, although when he prepared the interim schedule of dilapidations in February 1996 (at most two years after the episode to which Mr Mason referred) Mr Dutt noted the need to upgrade sub-floor ventilation but did not identify any particular areas of the groundfloor needing replacement. Indeed, before giving evidence, Mr Dutt had not examined the areas under the chipboard covered surfaces. Nor had he detected any springiness in any of the floors. On my own inspection I saw the small area opened up at the foot of the stairs. My attention was not drawn to any other parts of the groundfloor. With the presence of many heavy items on the floors at ground floor level, it was not possible to detect any springiness in the other floor areas.

110. Miss Williamson pointed out that, although there had been no opening up of other areas of the floor and there was no expert report (beyond what Insitu had felt able to say), Mr Dutt's judgment, based on his very considerable experience of residential and similar surveys, was that the floor should be wholly replaced. She submitted that this was a judgment that the court should accept.

111. My note of Mr Dutt's evidence is that, in cross-examination, he was of the view, given

the presence of rot in the stair area, that "it is more than likely that decay and woodworm is in the other areas" and, in re-examination, that he considered he had found enough at the foot of the stairs "to indicate a more extensive problem".

112. In my judgment, the evidence falls far short of demonstrating a need for the wholesale replacement of all of the ground floor which would be both costly and disruptive. Mr Mason has had ample opportunity to lift up the existing floors, or get others to do so, to enable a more extensive investigation to be carried out. I do not consider it right to extend to him the benefit of the many evidential doubts that exist on the extent of the defective flooring. Accepting that there is some defective flooring around the stairwell and that this might extend beyond the immediate confines of this relatively confined area, I am willing to allow a sum of £ 2,500 to cover the overall cost of the remedial works reasonably required.

The underground storage tanks and associated ground contamination

113. This is much the largest item of claim. It comprises two elements: (1) £ 100,000 to replace the existing underground fuel storage tanks and fuel pipes ("lines") linking the tanks to the fuel dispensers and (2) £ 20,000 to cover the cost of eliminating ground contamination from hydrocarbons found on replacing the tanks and lines.

114. There are four tanks. They are located underground in the south eastern corner of the site. Three of them - in reality a single tank with three compartments - have a combined capacity of 27,300 litres and were installed in 1963. The fourth has a capacity of 27,000 litres and was installed in 1972. As at 14 September 2000 they were therefore 3 7 and 2 8 years old respectively.

115. I will deal with the two elements of this claim in reverse order.

(a) Ground contamination

116. The figure of £ 20,000 was in the nature of a contingency to cover the cost of eliminating ground contamination, should any be found. on replacing the tanks and lines. As Mr Dutt made clear in his evidence. the claim is based upon an expectation that contamination will be found to have occurred from tank leakage rather than from spillage. He said that until the tanks are removed it will not be possible to determine the amount of contamination.

117. The difficulty about this part of the claim is that, according to the joint statements of the two contamination experts (one representing Mr Mason and the other representing Total), neither expert identified any significant hydrocarbons in the soil underneath the fuel storage areas. Although both had identified low levels of hydrocarbons in the soil underneath the forecourt, they were agreed that the most likely source of this, given the depth of the lines (circa 0.5 metres to 0.75 metres below ground level) as against the depth at which and places where hydrocarbons had been detected (at 0.25 metres below ground level and at a point between the 1972 tank and the most southerly compartment of the 1963 tanks), was surface derived spillage.

118. The long and the short of it is that no hydrocarbons were detected at a depth which would indicate leaking from any of the tanks or lines. As a matter of evidence, therefore, Mr Mason, on whom the onus lies, has failed to establish the presence of any ground contamination from the tanks or lines. On that basis, Mr Dowding submitted that this element of the claim should be dismissed.

119. Miss Williamson, acknowledging the absence of any evidence indicating the presence of ground contamination from leaking tanks/lines and therefore that, as she put it, there is no need for an immediate and comprehensive clean-up operation, nevertheless submitted that, when works are done to the premises, it is likely that contamination will be found which will have to be cleaned up. She submitted that, given that likelihood, Mr Dutt's figure of £ 20,000, which was the only figure in evidence, was not unreasonable. It would not be right,

she said, that Total should escape the need to provide for this cost.

120. I am unable to accept Miss Williamson's submission. Although it is possible that ground contamination from a leaking tank or fuel line may yet be found and that the nature of the contamination may be evidence of a want of repair as at 14 September 2000, the evidence does not justify a finding that, on a balance of probability, this is likely to be so. In truth, the claim for £ 20,000 is based upon a speculation as to what may be found. This falls far short of what must be shown to allow the claim.

(b) The underground storage tanks

121. The claim, as I have mentioned, is for their replacement at an overall cost, inclusive of new lines, of £ 100,000. The case for renewal is based not on Mr Dutt's judgment -he disclaimed any expertise in the matter - but on a report ("the Corrpro Report") supplemented by the evidence of Mr Martin McTague. It is founded on the supposition that by 14 September 2000 the tanks were corroded to the point where, even though they were not yet leaking, they were no longer in a good and substantial condition as required by clause 3(4) and that the only reasonable option was to replace them or, in the alternative, line and provide them with what was referred to as "cathodic protection".

122. There is of course a problem about examining the condition of an underground storage tank which is that it is buried underground. The purpose of the examination is to look for any leaks or points where the effective thickness of the tank walls has been reduced by corrosion resulting in the risk, if not probability, of a future leak. According to the evidence there are a number of well recognised ways in which this can be undertaken: (1) by exposing and examining the tanks visually, (2) by emptying and cleaning out the interior of the tank, shot-blasting its interior surfaces and carrying out an ultrasonic thickness test, (3) by precision tank testing which is a comparative measurement of what goes into the tank and what comes out on the footing that if more goes in than comes out there must be a leak, (4) by examining the soil conditions around the tank at depths and in positions calculated so far as possible to detect the presence of hydrocarbons from any leaks in the tank, and (5) by examining wetstock records to see whether there is a loss of fuel from the tanks consistent with the presence of a leak.

123. No pressure or precision testing of the tanks has been carried out. Nor has there been any physical exposure of the tanks. Soil testing, as I have mentioned, has failed to demonstrate the presence of hydrocarbons which could be said to have come from any leaks in the tanks. Mr Mason's wetstock records have not disclosed any loss of stock consistent with the presence of a leak.

124. On the face of it therefore no evidence has been adduced which indicates that the tanks or the lines are defective either at all or to a degree such as to justify their replacement. To all appearances the tanks, which have all remained fully in use, continued as at 14 September 2000 (and have since continued) to function in all respects as they should.

125. The case for their replacement is based on a combination of two factors: (1) the ages of the tanks and (2) the application to the tanks of a concept known as Mean Time to Corrosion Failure (or MTCF) used in the marketing of systems and equipment for dealing with corrosion by Corrpro Companies Europe Limited, one of a group of companies based in this country and the United States. Mr McTague is Corrpro's agent in this country and mainland Europe.

126. MTCF is a statistics-based technique for predicting when an underground storage tank is likely to fail. Mr McTague who gave evidence about the technique and whose report headed "Underground Storage Tank Corrosion Evaluation Survey" was adduced by Mr Mason in support of this item of his claim told me that the technique was developed by an organisation called Warren Rogers Associates of Rhode Island, USA and was based upon an evaluation of data derived from a survey conducted in the mid to late 1970s of a large number of underground storage tanks (all of them in the USA) which were known to be defective and which were dug out and removed. The survey found that 77% of the tanks suffered from so-

called "pitting corrosion" and the remaining 23% from so-called "uniform corrosion". The Report, which sets out the MTCF methodology, describes uniform corrosion as what occurs when "no anomalies exist on the tank surface or in the backfill in immediate contact with the tank". It goes on to say that such corrosion occurs "uniformly over the tank, without pitting, until the corrosion cells are polarized resulting in very slow rates of corrosion". It says that "tanks with uniform corrosion will typically outlast the useful life of the facility at which they are installed". Pitting corrosion, by contrast, is said to occur "when anomalies such as abrasion or mill scale occur on the tank surface or exist in the backfill in direct contact with the tanks (for example cinders, lumps of clay, metallic debris and depolarising agents)". It goes on to say that "pitting corrosion differs from uniform corrosion in that points of concentrated corrosion occur on the tank surface". It then says that "pitting corrosion is not uniform and allows high rates of corrosion to continue until perforation of the tank ultimately results". The MTCF is described as "the average age at which a steel tank with no corrosion protection would be perforated from external corrosion in the particular environment at the tank site". On the basis of the survey conducted in the USA in the late 1970s, the technique therefore assumes an initial probability of 0.77 that the particular tank will be suffering from pitting corrosion. It also assumes, as Mr McTague made clear, that the environment around the tank is constant.

127. Application of the technique involves three stages: (1) the collection of soil samples from as near as possible to the tank in order to provide evidence of soil conditions in the environment surrounding it, (2) a laboratory analysis of the samples to determine the moisture content and compaction of that environment in order to assess its conductivity and (3) the evaluation of the resulting data by running them through a computer model with a view to ascertaining the MTCF point for the tank.

128. In the case of the tanks at the premises, soil samples from near them were taken, the samples analysed at a laboratory run by Corrpro in the north of England and the results sent to the United States for evaluation by Warren Rogers Associates (the precise method of evaluation of the data is, it seems, a commercial secret). The MTCF points for the tanks were found to be 9.9 years from installation in the case of the tank installed in 1972, ie 1982, and 10 years for the three (connected) tanks installed in 1963, ie 1973. Given that the MTCF point is no more that an average value, it follows that "unity" was reached ten years later ie by 1992 at the very latest for all four tanks.

129. The technique then goes on to provide that for tanks where the probability of corrosion failure is near unity, ie certain, a so-called "tightness test" is to be carried out. If on conducting the test the tanks are reported tight it is assumed that the tanks are subject to uniform rather than pitting corrosion and that the probability of failure is reduced.

130. The so-called "key finding" in the Corrpro Report was that "there is a very high probability (99.9%) that these tanks will fail if the corrosion process is pitting corrosion". (emphasis added). In order therefore to establish whether the corrosion process, assuming there was any, was pitting corrosion rather than uniform corrosion, it was necessary, if the technique was to be properly followed, for a tightness test to be carried out. A tightness test is a form of very high precision testing using a floating gauge in the tank, undertaken over two or more hours during a quiet period (when there is no movement of any kind in the tank contents), to determine if any fuel is leaking. No such test was carried out in the case of the four tanks. It follows, therefore, that Corrpro was in no position to say whether there was pitting corrosion present in the tanks.

131. Mr McTague sought to minimise the fact that no tightness test had been carried out. He said that the fact that it had not (notwithstanding that Corrpro's own MTCF methodology stated that it should) did not mean that the tanks were merely subject to uniform corrosion. That is true but, equally, the MTCF technique, because it has not been fully undertaken, cannot be relied upon to demonstrate that the tanks are subject to pitting corrosion.

132. It follows, as Mr Dowding submitted, that the Corrpro survey took the matter no further.

133. There are in any event good reasons for treating the MTCF technique with caution. It is based on a survey of USA tanks which, at any rate up to the 1970s, differed from UK tanks in two major respects. According to the evidence of James Thompson, a safety and environmental consultant to the retail petrol industry with many years experience as a petrol inspector in the London area and, for 14 years, principal petroleum inspector for the London Fire Brigade, who was called by Total and whose evidence in this respect I accept, concrete was not used as a protective barrier in the USA (ie the tanks there were in direct contact with the surrounding soil), whereas in the UK tanks and lines were normally surrounded with sulphate-resistant concrete to a minimum thickness of 150 min and sometimes more. He also said that tanks in the USA had walls thinner than those in the UK. Consistently with its source data, the Corrpro survey assumes that there is no corrosion protection afforded to the external surfaces of the tanks to which the methodology is to be applied. That assumption is contrary therefore to the experience of the UK. Moreover, it was agreed between Mr Thompson and Mr McTague that the tanks at the premises are likely to have been encased in concrete. Mr Thompson's evidence was that, subject to the quality of its installation, a concrete casing is capable of providing a good barrier to corrosion. Mr McTague, by contrast, said that, so far from concrete affording corrosion protection, the concrete casing, if breached in any place, can provide a focus for pitting corrosion. He said that the fact that US tanks were thinner than those in this country did not matter since his understanding was that the computer model used to assess the MTCF point had been amended to allow for the difference in thickness of such tanks and in any event the time that had elapsed since the MTCF points were reached for the tanks at the premises fully allows for any such difference. This debate served only to make me all the more wary about allowing a statistics-based approach to determine the otherwise untested condition of these tanks.

134. There were other difficulties about the Corrpro Report. Mr McTague himself took no part in any of the three stages of gathering and evaluating the data which led to the so-called key findings. Indeed his report to the court did little more than set out verbatim the contents of the separately prepared Corrpro Report in the writing of which he had no hand. Nor was anyone called from Con-pro to explain or elaborate on the data for the techniques used.

135. In any event, it was Mr McTague's evidence, contained in a supplementary report by him dated 28 November 2002, that "if I was advising a hypothetical purchaser [or the premises] on 14 September 2000 I would recommend that they should assume that within five years of purchase they would need to either replace the tanks or carry out internal lining of the existing tanks and fit cathodic protection". In cross-examination he said that he would not be advising the hypothetical purchaser that he has to do something straightaway. As Mr Dowding observed, this stance is not consistent with the tanks requiring replacement by the lease expiry date.

136. Miss Williamson submitted that Mr McTague's evidence, based upon the Corrpro Report, supports the view, and is consistent with commonsense, that on a balance of probabilities, the tanks at the premises have suffered corrosive deterioration after 37 years in the ground such that by the lease expiry date they were in imminent danger of failing and would be perceived as such in the marketplace. The result, she submitted, is that the court can and should find, on a balance of probabilities, that the tanks were not in the state and condition required by clause 3(4) when the premises were delivered up.

137. I am not able to accept that submission. The fact of the matter is that there is no evidence that these particular tanks were not in good and substantial condition as at 14 September 2000. Given the failure fully to carry through the MTCF methodology the notion that they were not is founded simply upon their age at that date coupled with an appeal to the indisputable view that there is likely to come a time when the tanks will fail although quite when nobody can say. In my judgment that is insufficient to establish a breach of clause 3(4).

138. Mr Dowding submitted that the fact that these days, when there is a greatly increased concern about environmental issues, someone wishing to acquire a petrol filling station may only be willing to do so if the underground storage tanks are new or are of an age which falls

far short of their statistical life expectancy, is not sufficient to constitute a breach of a covenant in the terms of clause 3(4) entered into in 1964, and to be understood therefore by reference to the standards of that time. I agree.

139. It is not altogether irrelevant to observe that almost three years after the lease expiry date, the tanks continue to function: there has been no suggestion before me that any of them had since sprung a leak. The explanation may simply be that, whatever the conductivity of the soil samples taken and analysed by Corrpro, the tanks themselves are, as the two experts thought likely, encased in concrete and that that concrete casing has provided the tanks with a wholly effective protection against the risk of pitting corrosion. If that is the position and, in consequence, the tanks are in good condition, there is no case for their replacement under clause 3(4). It is for Mr Mason as claimant to show on a balance of probability, that they are no longer in a condition which complies with clause 3(4). On the evidence before me he as failed to do so. it follows that Mr Mason fails to establish his claim for replacement of the underground storage tanks.

140. In any event, the figure of £ 100,000 was excessive. It was derived from the Allan Taylor Report and was based upon the installation of considerably larger tanks than those currently at the premises (90,000 litres overall as against 54,300 as at present) and double-skinned tanks as against the present single-skinned tanks. Moreover Mr McTague accepted in cross-examination that lining the existing tanks and providing them with cathodic protection would be adequate, the cost of achieving which would be £ 52,000 or so. If I had thought that Mr Mason had otherwise established his claim, I would not have allowed him more than £ 52,000 for it. That figure seemed to me to be rather more reliable than the lower figure of £ 30,000 favoured by Mr Thompson for the cost of replacing the existing tanks on a like for like basis. I had the impression that Mr Thompson somewhat understated the costs that would have been involved if replacement, albeit like for like, were to take place. As he himself pointed out, he had never personally been involved in costing the replacement of underground storage tanks and had done no more than speak briefly over the telephone to a contractor to obtain his views on the cost that would be involved.

Diminution in value

141. The effect of section 18(1) is that the damages recoverable by Mr Mason for the breaches of clauses 3(4) and 3(5) which he is able to establish cannot exceed the diminution in the value of his freehold reversion resulting from those breaches.

142. The diminution is to be assessed as at the lease expiry date. It involves two valuations of the landlord's interest. The first is on the assumption that the premises were then in the state that they would have been in if the tenant had performed his covenants. The second is of the premises in their actual state and condition at that date. As Mr Dowding submitted and I accept, the purpose of the exercise is to isolate the effect on value of the tenant's failure to do the relevant works, from which it follows that the only variable between the two valuations is the works. All other factors are constants.

143. How is diminution in value to be assessed? If the landlord has carried out the works or clearly intends to do so, the cost of the works is, or at least can be, prima facie evidence of the diminution in value. If, on the other hand he has not carried them out and there is no evidence that he intends to do so, the cost of the works is of no assistance. See Craven (Builders) Limited v Secretary of State for Health [2000] 1 EGLR 128 at 131k. But this is relevant only to the burden of proof. It is subject to any actual valuation evidence before the court. I had the benefit of expert valuation reports from two valuers.

144. Mr Mason relied on the report of Mr Adrian Camps, a Fellow of the Royal Institution of Chartered Surveyors, a corporate member of the Institute of Rating, Revenues and Valuation and a Member of the Institute of Petroleum, with over 24 years experience in all types of commercial and industrial properties and with particular experience going back almost twenty years of the oil industry and motor trade. Mr Camps' clients have included many of the major oil companies. In January 1998 he began his own practice, of which he is the

principal, called AMC Petroleum Consultants where he is involved in rent review, valuation and agency work, and in dilapidations and disposals. His practice extends throughout the United Kingdom. In that capacity he is concerned with, inter alia, petrol filling stations, both high and low volume, dealerships and motor trade premises, together with car parks and car sales sites. Ms Ella V Eccleston, also a Fellow of the Royal Institution of Chartered Surveyors and a member of the Institute of Petroleum, was called by Total. She joined Weatherall Green & Smith, now ATIS Real Weatheralls Limited, in 1989 after many years valuation experience in local government latterly with he ILEA. Since joining Weatheralls, Ms Eccleston has acquired a wide range of experience and her clients have included most of the larger oil companies and major motor vehicle manufactures. She became a partner in Weatheralls (when it was a firm) and is now a director of ATIS Real Weatheralls Limited, the company.

145. Both valuers suffered from a common difficulty: they were required to prepare their valuations before knowing the extent of the breaches of covenant. This resulted in Mr Camps assuming more extensive breaches than in fact I have found and therefore a state of condition of the premises when in repair rather better than, in the event, the assessment should assume. Ms Eccleston, on the other hand, based her valuation approach on the rather more modest assumptions about the extent of the breaches of covenant favoured by Mr Wilderspin with the matters of disrepair being very largely if not wholly decorative in nature. In any event she only valued the premises in their unrepaired state (and then only after a very cursory inspection). She took the view, expressed in paragraph 4.10 of her report, that in repair or out of repair the premises have a very similar value and that "if there is a diminution to the value of the reversion as a result of any failure by [Total] in complying with its repairing obligation as set out in the lease, it can only be nominal".

146. There were three main elements in each valuation: the petrol filling station (or fuel) element, the shop element and the motor trade (ie car sales and car repairs) element. Neither valuer treated the cost of the remedial works as the measure of any diminution in value or suggested that there was a direct relationship between cost of works and value.

147. As I have pointed out, it was Ms Eccleston's view that, given that the premises were (and remain) fully functional in each of its three elements, the carrying out of repairs would make no or no significant difference to the premises' overall value. Her fundamental point was that, having regard to (1) the location of the site (semi-rural on a fairly fast road used mainly by local traffic), (2) the changes in the market over the previous decade for the retail sale of fuel, with sales concentrated on fewer but larger petrol filling stations, and (3) the inherently obsolescent nature of the site (an outdated main building, consisting of a converted inter-war house, and the somewhat cramped forecourt with its limited road frontage), the petrol filling station was at the end of its "life" as a viable operational entity. She was of the view that the site did not benefit from the level of passing trade and immunity from competition that would justify expenditure on its redevelopment, which would in any event require the whole of the site to be viable. She was of the further view that the profitability of the shop was, given the location of the premises, almost entirely dependent upon customers to the petrol filling station and could only realistically be expanded at the expense of the motor trade element. She considered that there was little if any further potential to be realised from the motor trade element. In short her view was that, given its existing component parts (petrol filling station with shop, motor showroom for second-hand car sales and repair workshops at the rear of the site) the premises had realised their trading potential and putting them into a better state of repair would not make any difference.

148. Mr Camps considered that, being within 21/4 miles of Gatwick Airport and having regard to planning restrictions affecting the surrounding areas, the premises had what he referred to as an element of "premium value" owing to the lack of alternative sites. He was of the view that, owing to Total's pricing policy when Mr Mason was running the premises as its licensee and the poor appearance of the site resulting from Total's breaches of its repairing obligations, the fuel throughput achieved on the site had not attained its true potential by the lease expiry date. He was of the view that, by extending the shop into the service reception area, which he considered could be achieved at minimum expenditure, shop turnover could be substantially increased by refurbishment and re-fitting and re-stocking. He valued both elements by reference to turnover. He valued the motor trade element, both the

showroom and the motor repair side, by reference to the estimated rental values of the areas occupied by that element.

149. It is reasonably clear that, whatever the standard of repair under the lease and whatever the actual state of repair of the various parts of the premises, the site as a whole, given its size, location and uses, was only likely to be attractive to a small company or individual like Mr Mason rather than to a major oil company. The evidence was clear that major oil companies are not interested in acquiring relatively small sites in what is now, despite its proximity to Gatwick Airport and Crawley, a secondary location. I also consider that, provided the site is fully operational (as the premises were at the lease expiry date and have since continued), such a purchaser, whether a small company or an individual like Mr Mason, is unlikely to pay more for premises, merely because they are in repair, unless the works of repair make a real contribution to the trading potential of the premises, ie they attract additional customers and, therefore, a greater turnover or unless the repairs are needed to ensure that the premises can remain fully operational.

The fuel element.

150. Mr Camps proceeded on the premise that, having regard to the age of the underground storage tanks and the risk of contamination if a tank should burst, a buyer of the premises would stop selling fuel altogether if the underground tanks had not first been replaced with new ones. I do not accept the premise. The assumption must be that the buyer would be aware that, although old, there is nothing to indicate that the tanks have or are about to burst and that such tests as have been carried out do not provide any evidence of pitting corrosion. Moreover, Mr Camps' view is, in Mr Dowding's phrase, "counter-factual" in that Mr Mason has in fact continued since September 2000 to run the petrol filling station. The reality, I think, is that a buyer would continue to operate the filling station thereby preserving for the premises the benefit of having (and renewing) the annual petroleum licence.

151. Mr Camps assumed that, if the petrol filling station were closed down, there would be a cost of decommissioning that side of the business. This would involve removing any remaining fuel in the tanks, rendering them gas-free, breaking out the tank fillers, filling each tank with some authorised material, compacting that material and concreting them over, removing the tank lines and above-ground vents, disconnecting and removing the pumps and breaking out the pump islands, and so forth. As against the cost of all of that, for which he produced a figure of £ 40,000, there would be a gain from the availability of, he estimated, eight additional car display spaces which, assuming an annual rental value for them of £ 2,800 and a yield of 13% and discounting the resulting figure by 25% to reflect the risk of failing to obtain planning consent for the change of use, would result in an overall capital loss of just under £ 24,000.

152. I consider that Mr Camp's figures exaggerated the cost of decommissioning. The cost was based on no more than the estimate for a rather more substantial tank removal at a site in Cheltenham. The evidence suggested that a figure nearer £ 20,000 would be more realistic. Moreover, his 25% reduction to take account of planning uncertainties was excessive: the forecourt has an existing authorised use for car displays and it is difficult, therefore, to see on what basis planning consent to an increase in such use could be refused. The more especially is this so bearing in mind that, as the evidence indicated, the local planning authority was against a change of use of the site from its present commercial use to, for example, residential use. I also take the view that a greater number than eight additional car spaces could be provided on the space liberated by a closure of the petrol filling side of the business. Total's additional number was 15. A more reliable increase, in my view, would be ten.

153. All of this suggests that decommissioning the petrol filling side of the premises would produce a net benefit to be offset against the loss of value of the petrol filling station rather than, as Mr Camps thought, an additional capital cost. I need not come to any conclusion on what that benefit would be since, for the reasons already explained, I take the view that a purchaser would not cease the petrol filling side of the business on account of the ages of the

underground storage tanks.

154. What then was the value of the fuel element side as at the lease expiry date given the then state of repair of the premises and what would it have been if Total had performed its repairing obligations?

155. Both valuers approached this element of the valuation by reference to the volume of fuel sales. It follows therefore, as Mr Dowding submitted, that the existence and extent of any diminution in value from this element depends on whether the volume of sales would be higher for the premises in repair than it would be for the premises in their existing state.

156. The actual throughput achieved by Mr Mason in 2000 was 311,000 gallons. Averaged out over the previous two years, the figure was just under 303,000 gallons. Mr Camps was of the view that throughput would have increased by a further 200,000 gallons (ie a further two thirds) if the premises had been put in repair. Ms Eccleston was of the view that improving the appearance of the garage forecourt (and the shop and other areas visited by or visible to fuel purchasers) would make no difference to throughput, and that other items of repair (such as the drains, the state of the electrical installation, the floors of the main building and the roofs etc) would be irrelevant to throughput since fuel purchasers would be unaware of them.

157. There was debate over the effect on Mr Mason's throughput of the fact that, until the lease expiry date, he was subject to a tie whereas, after that date, he could source his fuel supplies without any contractual restraint. In my view, that fact is irrelevant to the diminution in value exercise since it has nothing to do with disrepair. But, in any event, I am not persuaded on the evidence that it made any difference to the sales he was able to achieve. The throughput figures showed that, so far from increasing, his fuel sales were lower after 14 September 2000 when Mr Mason became free of any tie than the levels achieved before that date. Nor do I consider that he could reasonably have achieved better than he has done. In short, I am of the view that, as at the lease expiry date, Mr Mason was achieving as good a level of fuel throughput as could reasonably be expected (ie another - hypothetical - operator on the site could not reasonably be expected to have achieved more) and that throughput was not depressed as a result of the tie to which, up to that time, he was subject.

158. Mr Camps' estimated increase in annual throughput to 505,000 gallons, on the assumption that the premises are in a proper state of repair, was based on a "turn-in" calculation. That calculation assumed that 2.75% of passing motorists during a sixteen hour day during 365 days a year would turn in to the premises and purchase an average of 5 gallons (22.7 litres) of petrol. The number of motorists was based on a sixteen hour traffic count undertaken during five days during roughly equivalent four month periods in the second halves of 1999 and 2000.

159. This rather theoretical approach was vulnerable on a number of points: Mr Mason's opening hours were less than sixteen hours a day and there is no reason to think that a hypothetical purchaser of this semi-rural site would remain open for a full sixteen hours a day every day of the year; there is no good reason for thinking that the turn-in rate is 2.75% of passing motorists; nor that, on average, each motorist in this area would purchase 22.7 litres on each visit. Curiously, Mr Camps' calculations assumed fewer customers calling (287 per day) than Mr Mason said in his evidence actually called (300 per day).

160. I strongly suspect that Mr Mason was mistaken about the number of his daily customers and that, in truth, they were rather fewer than he imagined. But, in any event, Mr Camps' whole hypothesis rather begs the question: why should improving the appearance of the petrol filling station have such a dramatic effect on sales given the levels actually and consistently achieved by Mr Mason over the years (both before and after the lease expiry date)? This seems to me to be a case where theory should yield to the reality of actual performance.

161. On the other hand, I do not consider that the appearance of the forecourt is irrelevant to throughput. Common sense suggests that members of the public are more likely to stop and make their fuel purchases (and incidental filling station shop purchases) if the premises are attractive in appearance than if, as these were at the lease expiry date, in a shabby, run-down state. It is not easy to put a figure on the increases in throughput if the forecourt had presented a spick and span appearance with well maintained fencing and a freshly painted showroom and shop elevation, a presentable shop interior and neatly surfaced hardstanding around the pump islands. Doing the best I can, I consider that, if this had been the state of repair of the premises, throughput would have increased by between 15 and 20%. I propose therefore to take a throughput figure of the petrol filling station in a repaired state as at the lease expiry date of 360,000 gallons, which represents an increase in throughput of just over 18%.

162. Having established the increase in throughput, it is necessary to express that difference as a capital value. Mr Camps estimated that each gallon of throughput, where the throughput is at the level of 300,000 or so gallons per year, could be capitalized at 10p and that that figure rises to 22p per gallon when the throughput is increased to an annual 500,000 gallons. Ms Eccleston seemed to consider that a uniform figure of 22p per gallon was appropriate although, when pressed on the point, conceded that the lower the throughput the lower the profit per gallon. This, she accepted, was because of the existence of fixed overheads: the higher the throughput the higher the profit per gallon because the fixed overheads would be spread over a larger gallonage.

163. I found Mr Camps' approach to this aspect of the valuation to be rather more persuasive than Ms Eccleston's. I propose therefore to take 10p per gallon as the appropriate figure for the annual gallonage actually achieved by the lease expiry date, namely 303,000 gallons and 14p at the assumed gallonage of 360,000. On the assumption of a sliding scale of values (10p at 300,000 gallons and 22p at 500,000 gallons) I have taken 14p to be appropriate where the gallonage has risen to 360,000 gallons. This means that the value of the fuel side of the business at the lease expiry date was £ 30,300 in the premises' actual state of repair as against £ 50,400 in a proper state of repair.

The shop

164. It was common ground that, by the lease expiry date, Mr Mason could have achieved a greater turnover at the shop. In the year to 31 May 2001 turnover was only £ 64,000. Over the previous seven years it had fluctuated between £ 61,700 odd and £ 70,000 odd. It was also common ground that the value of the shop was related to its turnover which in turn was related to the volume of fuel sales achieved on the forecourt.

165. Ms Eccleston valued the shop on alternative bases. Her first approach was to assume a £ 25 per square foot rental value making for a figure of £ 8750 for the area occupied by the shop Gust under 350 square feet) which she capitalized at a yield of 15% giving a value of £ 58,275 (only £ 8,000 or so less than her value of the fuel element applying her 22p per gallon valuation approach to the actual fuel throughput of around 300,000 gallons). I could see no good reason for what appeared to me to be an entirely arbitrary £ 25 per square foot assumed rental and no good reason for so poor a yield.

166. Her alternative approach was to assume a turnover of £ 100,00 per annum (as against the actual turnover of £ 64,000) on the basis of a relationship to fuel throughput of 33.3p of shop turnover for each gallon of fuel sold. She assumed a gross profit of 20% and annual outgoings equivalent to 6p per gallon (the outgoings consisting of staff employment costs, heating, lighting and the like) incurred in running both the shop and the petrol filling station. She applied a yield of 25%. This gave a valuation, assuming that her figure for overheads was shared rateably with the filling station, of £ 46,000.

167. I consider that her figure for overheads was too low (she assumed that it would cost no more than £ 18,000 per annum. to run both the shop and the filling station) and that the

yield was unreasonably poor. On the other hand, her assumption that for each gallon of fuel sold the shop could expect to sell goods to the value of 33.3p appeared to me to be rather more realistic. Her experience, based upon a number of filling stations, was that shop turnover was roughly 45p per gallon sold. She considered that that figure should be reduced in the case of these premises to 33.3p per gallon to reflect the out-of-date nature of the filling station, the small size of the shop (her experience was that shops are usually a minimum of 500 square feet in area) and the fact that fuel sales were well below the 500,000 gallon threshold at which, in her experience, the rate of 45p per gallon is ordinarily achievable.

168. Mr Camps valued the shop in terms of its capitalized rental value with the rental value reflecting its turnover and therefore its profitability. For no good reason as far as I could see, he assumed a rental value of only £ 3.75 per square foot when valuing the shop in its actual state at the lease expiry date. Since the shop occupies an area of 350 square feet this produced a notional rent of only £ 1300 which, when capitalized (for which he took a yield of 13%), resulted in a valuation of £ 10,000. He regarded the shop as "pretty marginal" at the lease expiry date and would have valued it at that figure whether or not fuel sales had continued.

169. In stark contrast to this, his valuation as at the lease expiry date on an assumed increase in fuel annual throughput to 500,000 gallons (on the footing that the premises were in a proper state of repair) assumed a shop turnover of £ 230,000. In reaching this figure he assumed an increase in the area of the shop from 350 square feet to 500 square feet - an improvement which he believed could be achieved within the existing building, at a cost of £ 5,000 and without affecting the car sales side of the business in the main building - and an increase in the range of goods on offer for sale. He also assumed, as he had done when reaching a gallonage of 500,000 for the filling station, an extension in the shop's opening hours. He capitalized the resulting estimated rental figure (expressed as 17% of 20% of the £ 230,000 turnover) by applying a yield of 11%.

170. Since he also assumed (through no fault of his own but as a result of a mistake in the information supplied to him) that the shop was actually achieving a turnover of £ 137,500 at the lease expiry date, it became evident that his estimated increase in turnover to £ 230,000 (roughly two-thirds more than the assumed actual turnover of £ 137,500) was, rather like his expectation of a two-thirds increase in fuel sales, somewhat divorced from reality. On any view, his figures require to be discounted to remove that element of his valuation which was attributable to an increase in the size of the shop: that element had nothing to do with the effect on value of the relevant disrepair.

171. On the other hand, his valuation approach of calculating the estimated rental value on the basis of achievable turnover (expressed as 17% of gross profits which in turn were expressed as 20% of turnover) capitalized by applying an appropriate yield, appealed to me as a sensible way of assessing the value of this element in the overall valuation exercise. In valuing the shop I propose therefore to adopt Mr Camps' valuation approach by applying to it the more realistic approach to achievable turnover favoured by Ms Eccleston. I assume therefore a turnover of £ 100,000 for the shop in its actual state as at the lease expiry date. This produces a gross profit of £ 20,000. Taking 17% of that figure as the appropriate estimated rental figure and applying a yield of 13% (the yield adopted by Mr Camps which I accept as appropriate) I reach a value of £ 26,153, say £ 26,150. Assuming a turnover of £ 120,000 (equivalent to one-third of the increased fuel turnover on the footing that the premises are in a proper state of repair) and applying the same calculation and a yield of 12% (which reflects the slightly more secure nature of the overall business operated at the premises on the assumed increase in turnover) I reach a value of £ 34,000.

The motor trade element

172. Both valuers approached the valuation of this element by capitalizing its estimated rental value. That approach appealed to me as an appropriate method to follow.

173. There was little difference between the two valuers over the rental value of this element given the actual state of repair of the premises as at the lease expiry date. They differed over whether, when valuing this element in repair, there should be any increase in the estimated rental value. They also differed over the appropriate yield to apply.

174. Ms Eccleston's rental value of this element in its existing state was £ 18,284. Mr Camps' figure was £ 19,163. I do not consider that it is sensible to discuss how they reached their respective figures. I propose simply to take a base rental value of £ 19,000 which is effectively Mr Camps' figure. I thought that his approach rather more realistic than Ms Eccleston's. For example, he attributed some, albeit not much, value to the upper floor of the main building; she, by contrast, attributed no value to that part of the building.

175. What is the rental value of the motor trade element in the assumed state of repair? Mr Dowding submitted, in line with Ms Eccleston's approach, that the income earned and therefore the rental value of these parts of the premises are wholly unaffected by their state of repair: a buyer, he said, would not be influenced in deciding how much to offer by the fact that the repairs had been carried out. There should therefore be no assumed increase.

176. I do not consider that this is realistic. Common sense suggests that a buyer would be prepared to offer more even though the level of turnover might not be greatly increased as a result. Mr Camps thought that the overall rental value would increase by just under 60% to £ 30,406. Applying his yield (13% for the premises in their existing state and 11% for the premises in repair) this produces very nearly a doubling of value from £ 147,390 to £ 276,418.

177. I regard this as quite unreal. It is not the least unreal given that this increase far exceeds the cost of carrying out all of the repairs to the premises for which I have found Total to be liable together with those where liability has been agreed. I propose to take an overall increase in rental value of £ 4,000 which is equivalent to a 21% increase. This is a slightly greater increase than the increase in gallonage assuming the premises were in a state of repair. I accept that there is no relationship between the turnover achieved in the one area with the turnover achieved in the other. But I accept Mr Camps' proposition that a buyer would be affected by the appearance and state of repair of the motor trade parts in deciding how much to pay. It therefore becomes very much a matter of judgment as to what the increase should be. Doing the best that I can, I consider that an increase of £ 4,000 is appropriate.

178. In reaching these figures I make clear that I found none of the so-called comparable evidence provided anything approaching a truly comparable property. There were so many points of difference between the subject property and the other properties - not surprising in an area of such diversity - that, after allowing as best one can for those points of difference, the exercise of comparing the one property with the other would cease to be of any utility.

179. That leaves the question of yield. Ms Eccleston's 16.5% was too pessimistic, Mr Camps' 11 % in repair too generous. I propose to take a yield of 13% (Mr Camps' figure) for the premises in their actual state of repair and 12% for the premises in their assumed state of repair. This again is very much a matter of judgment.

180. The result is that I value the motor trade element at £ 146,153, say £ 146,000, in their existing state and at £ 191,666, say £ 191,500, in an assumed state of proper repair. This represents a difference of £ 45,500.

The section 18(1) calculation

181. Taking the three elements together, I find that the value of the premises in their actual state of repair was £ 202,450, say £ 202,500 and in their assumed state of proper repair £ 275,900, say £ 276,000. This represents a diminution in value of £ 73,500. Mr Camps' valuation of the premises in their actual state of repair was £ 157,390, discounted to £

133,544 when taking into account the net cost of the decommissioning the forecourt and £ 458,814 in an assumed state of proper repair. Ms Eccleston's valuation was £ 235,000 whether in repair or out of repair.

Overall result

182. I accept that if and to the extent that he is put in funds Mr Mason intends to carryout the various items of repair which have been the subject of agreement between the parties or which I have found to be breaches of Total's repairing obligations. I find that, inclusive of the agreed items, the overall cost of the works needed to make good the breaches amounts to £ 120,302 to which, as was common ground, a further 12% falls to be added for surveyors' supervising fees. This produces an overall figure of £ 134,738. Since, however, the diminution in value of the freehold (Mr Mason's reversionary interest) was £ 73,500, it follows that his claim for damages succeeds but is capped at that figure. Interest falls to be added.

SOLICITORS:

Paul Davidson Taylor; Morgan Cole

[2003] EWHC 1604 (Ch), [2003] All ER (D) 191 (Jul), (Approved judgment)