Case No: HT -09-274

Neutral Citation Number: [2010] EWHC 1459 (TCC)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
TECHNOLOGY AND CONSTRUCTION COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13 July 2010

Before :

HIS HONOUR JUDGE TOULMIN CMG QC

- -

Between :

PGF II S.A **PGF II(LIME) S.A**	**Claimants**
- and -	
ROYAL & SUN ALLIANCE INSURANCE PLC	**1st Defendant**
LONDON & EDINBURGH INSURANCE COMPANY LIMITED	**2nd Defendant**

- -
- -

Jonathan Small QC and Edward Peters (instructed by **CKFT**) for the **Claimants**
Timothy Harry (instructed by **Maples Teesdale**) for the **1st Defendant**
Martin Hutchings (instructed by Iliffes Booth Bennett) for the 2nd Defendant

Hearing dates: 23,24,25 February 2010
1,2,3,4,15,16 March 2010

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JUDGMENT

HHJ Toulmin CMG QC

Introduction

1. In 2008 the Claimants were the landlords of a six storey office block at no 34-36 Lime Street London EC3 in the heart of London's financial centre. The building was constructed in about 1973 and was built to a high specification although construction techniques have advanced since then. On 31st August 1973 the landlords, City of London Real Property Company Ltd granted a lease to the then tenants, Kleinwort Benson Ltd, for a term of 35 years from 24th June 1973. The lease expired, therefore, on 24th June 2008.

2. By 1997 Land Securities PLC had become the landlords. Royal Insurance PLC had become the tenants of the building. They are now Royal & Sun Alliance Insurance PLC (the First Defendant).

3. On 25th September 1997, with the agreement of the then landlord, a sub-lease of the majority of the building was granted to London & Edinburgh Insurance Company Ltd, (the Second Defendant). The sub-lease expired on the 20th June 2008, four days before the expiry of the head lease.

4. A licence to alter the premises was granted on 25th September 1997 on the same day as the granting of the sub-lease. The licence to alter included a direct covenant by the Second Defendant with Land Securities, the Claimants' predecessor, to reinstate the underlet premises in accordance with clause 3.14.5 of the under lease.

5. The Claimants acquired the freehold of the property on the 30th October 2007.

6. The Claimants claim against the First Defendant for breaches of the First Defendant's repairing, redecoration and reinstatement covenants contained in the Head Lease. The Claimants claim against the Second Defendant in respect of reinstatement under the licence to alter and the direct effect of Clause 3.14.5 of the underlease.

7. The First Defendant claims against the Second Defendant for damages for disrepair and failure to reinstate the premises in breach of the covenants in the underlease and for an indemnity in respect of the First Defendant's liability (if any) to the Claimants.

8. Both Defendants admit that the premises were handed back in disrepair. Following discussions between surveyors, the Defendants accept that, when they handed back the premises in June 2008, repairs and reinstatement works were required to be carried out. However the Defendants dispute the claim on the grounds that they have various legal arguments relating to the correct interpretation of Section 18 of the Landlord and Tenant Act 1927 and to supercession.

9. There are separate issues between the First and Second Defendants which I must consider separately.

10. I should note that, as part of the hearing, I had a valuable opportunity to view the inside and outside of the building and also to see its relationship with other buildings in the area, including the Lloyds building.

11. The Scheme of the Judgment is as follows:

Paras	
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270-276	Partitions and Ceilings
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The Law

12. There are a number of legal issues to be considered:

(a) The Law of Damages under Section 18 (1) of the Landlord and Tenant Act 1927.

(b) The impact on the assessment of damages of the House of Lords decision in Ruxley Electronics Ltd v Forsyth [1996] 1AC344.

(c) The relevant date to assess reasonableness and intention.

(d) The standard of repair to be expected under the lease.

(e) Supercession.

13. The starting point in a consideration of damages under Section 18 (1) of The Landlord and Tenant Act 1927 is the case of Joyner v Weeks [1891] 2QB31 whose decision provided a precedent that the Act wished to overule.

14. At page 43 of the judgment, Lord Esher said that there was " a rule of law that when there is a lease with a covenant to leave the premises in repair at the end of the term, and such covenant is broken, the lessee must pay what the lessor proves to be a reasonable and proper amount for putting the premises in the state of repair in which they ought to have been left." He inclined to think that it was an absolute rule. Lord

Esher went on to say that the measure of damage was "the ordinary rule which must apply unless there be something which affects the condition of the property in such manner as to affect the relationship between the lessor and the lessee in respect of it."

15. In Joyner, immediately after expiration of the lease, the landlord demolished parts of the premises. The Official Referee, in finding the facts, was satisfied that the landlord had suffered no loss and awarded a farthing's damages. The case then went to the Divisional Court whose decision was in turn appealed to the Court of Appeal. The Court of Appeal applied the reasoning which I have set out.

16. In his judgment at page 46, Fry LJ, agreeing with Lord Esher, said that the measure of damages was "such a sum as will put the premises into the state of repair in which the tenant was bound to leave them." He said that such a measure was much simpler than that suggested by Wright J in the Divisional Court namely the amount in diminution of the value of the reversion not exceeding the cost of the repairs.

17. In his judgment at page 48, Fry LJ said that "as a general rule I conceive that where a cause of action exists, the damages must be estimated with regard to the time when the cause of action comes into existence." This would be the date of the termination of the lease.

18. At common law, therefore, the damages for breach of covenant to yield up in good repair were generally (a) the cost of putting the premises into repair with (b) a discount for betterment where appropriate. In addition, a landlord was entitled to claim for any provable loss of rent during the period during which the repairs had to be carried out.

19. S18 (1) of The Landlord and Tenant Act 1927 "(the 1927 Act)" sought to remedy potential injustice both in relation to the inflexibility of the rule and to the measure of damages.

20. The 1927 Act provided as follows:

"S18(1) Damages for a breach of a covenant or agreement to… leave or put in repair at the end of a lease…shall in no case exceed the amount (if any) by which the value of the reversion (whether immediate or not) is diminished owing to the breach of such covenant or agreement as aforesaid and in particular no damage shall be recovered for a breach of any such covenant or agreement to leave or put premises in repair at the termination of a lease if it is shown that the premises in whatever state of repair they might be would at or shortly after the termination of the tenancy have been or be pulled down or such structural alterations made therein as would have rendered valueless the repairs covered by the covenant or agreement."

21. This provided the method of valuing dilapidations. First, it was necessary to value the common law damages of putting the premises in repair. Secondly, the cap was to be applied limiting the damages to the diminution in the value of the reversion. Finally, although, in effect, part of the calculation of the common law damages, the courts have considered, as a second and separate limb, whether the landlord was entitled to any damages by reason of the fact that the building was to be pulled down or altered structurally so as to render the works of repair valueless.

22. It can be seen that under the Act, a)there was now no inflexible rule that the landlord was entitled to recover from the tenant the cost of putting the premises into repair. The ordinary common law rules were to apply. As an example of this, where the repairs would be rendered valueless by development by the landlord at or shortly after the tenancy, the landlord could not recover the cost of the repairs. b) As Wright J had held in Joyner v Weeks in the Divisional Court, the damages were to be capped at the sum by which the value of the reversion was diminished by the breach of the covenant. There was no diminution of value by reason of the disrepair where demolition or structural alterations done at or shortly after the termination of the lease would render those repairs valueless. The Act specified the time frame within which the work was to be done. It did not specify the date on which the decision to do the work was made. This remained to be determined according to common law principles.

23. The general law on damages to be applied in dilapidation cases has become an important issue in this case since it is argued by the Defendants that the law has changed since the decision of the House of Lords in Ruxley Electronics Ltd v Forsyth [1996] 1AC344.In a number of recent decisions the courts have indicated that Joyner v Weeks might have been decided differently if it had been decided after Ruxley.

24. The learned editors of Hill & Redman's Law of Landlord and Tenant say at paragraph A3604 "It is doubtful whether the common law approach to the measure of damages for breaches of a covenant to repair would be followed today as it does not coincide with established modern principle and indeed may allow the landlord a windfall beyond any loss he has sustained."

25. In Ruxley the House of Lords went back to first principles. At paragraph 365 Lord Lloyd of Berwick, who gave one of the two leading speeches, said that the starting point of common law damages was the case of Robinson v Harman 1Exch850 where Parke B said at page 855 "The rule of the common law is that where a party sustains a loss by reason of breach of contract, he is, so far as money can do it, to be placed in the same situation with respect to damages as if the contract had been performed."

26. Lord Lloyd went on to note at page 366 that:

"In building cases, the pecuniary loss is almost always measured in one of two ways; either the difference of value in the work done or the cost of reinstatement. Where the cost of reinstatement is less than the difference in value, the measure of damage will invariably be the cost of reinstatement. By claiming the difference in value the plaintiff would be failing to take reasonable steps to mitigate his loss. In many ordinary cases, too, where reinstatement presents no special problem, the cost of reinstatement will be the obvious measure of damages even where there is little or no difference in value, or where the difference in value is hard to assess. This is why it is often said that the cost of reinstatement is the ordinary measure of damages for defective performance under a building contract"

27. Lord Lloyd referred to the judgment of Cardozo J in Jacob's & Youngs v Kent 129NE889 in the Court of Appeals in New York to establish two further principles:

1) The cost of reinstatement is not the appropriate measure of damage if the expenditure would be out of all proportion to the benefit to be obtained,

2) The appropriate measure of damage in such a case is the difference in value even though it would result in a nil award (page 367).

28. Lord Lloyd cited English Authorities, to the same effect, in particular Steyn LJ in Darlington Borough Council v Wiltshier Northern Ltd [1995] 1WLR68 at 79. He concluded, as a general principle, that if the court takes the view that it would be unreasonable for the plaintiff to insist on reinstatement "as where, for example, the expense of the work involved would be out of all proportion to the benefit to be obtained, then the plaintiff will be confined to the difference in value"(page 369).

29. Lord Lloyd went on to consider the issue of intention and concluded that it should be considered as an element of reasonableness.

"I fully accept that the courts are not normally concerned with what a plaintiff does with his damages. But it does not follow that intention is not relevant to reasonableness at least in those cases where the plaintiff does not intend to reinstate."(page 372) This is consistent with the approach in the 1927 Act. The Court is concerned with the landlord's intent at the date of the termination of the lease.

30. Lord Lloyd concluded that: "In the present case, the Judge found as a fact that Mr Forsyth's intention of rebuilding the pool would not persist for long after the litigation had been concluded. In these circumstances it would be "mere pretence" to say that the cost of rebuilding the pool is the loss which he has in fact suffered.

31. Lord Lloyd accepted the position that "Where a party is contending for a high, as opposed to a low cost measure of damages, the court must decide whether in the circumstances of the case, such a measure is reasonable". One of the factors, which he said may be taken into account as being relevant, is the genuineness of the plaintiff's desire to pursue the course which involves the higher cost. "Absence of such desire (indicated by untruths about intention) may undermine the reasonableness of the higher cost measure."

32. At page 361, Lord Mustill emphasised that "The test of reasonableness plays a central part in determining the basis for recovery."

33. The speech of Lord Jauncey covered much the same ground as Lord Lloyd. His approach is summed up at page 57:

"Damages are designed to compensate for an established loss and not to provide a gratuitous benefit to the aggrieved party from which it follows that the reasonableness of an award of damages is to be linked directly to the loss sustained. If it is unreasonable in a particular case to award the cost of reinstatement, it must be because the loss sustained does not extend to the need to reinstate."

34. In relation to the common law assessment of damages there is no tension between S18 of the Landlord and Tenant Act 1927 and the common law as expounded in Ruxley even though in Ruxley Lord Lloyd was concerned with Contract law rather than the 1927 Act. Under the Act, the damages for breach of a covenant or agreement to leave in or put in repair at the end of a lease, must be decided in accordance with established common law principles, subject to the statutory cap relating to damage to the reversion (subject to any other exceptions under the common law). The common

law rule is intended to provide a landlord with reasonable compensation for the damage which he has suffered. This is appropriate because Parliament has decided that reasonable damages for dilapidations cannot exceed the value of the diminution of the value of the reversion.

35. In Latimer v Carney [2006] EG86 at paragraph 24 of her judgment, Arden LJ said in relation to Ruxley that:

"In that case the House of Lords held that where expenditure to be done to an asset to remedy a breach is out of all proportion to the benefit to be obtained, the damages will be the diminution in value of the asset rather than the expenditure."

36. Arden LJ went on to say that "Although courts are not normally concerned with what a party does with its damages, a landlord's conduct in taking steps to remedy a breach of the covenant to repair, may throw light on the question of whether the repairs were reasonably necessary and thus, on the question of whether there was any diminution in the value of the reversion as a result of the repair."

37. At paragraph 34 of her judgment Arden LJ referred to Dowding and Reynolds on Dilapidations 3rd Edition (2004). She referred to two broad types of case:

"The first is where the notional purchaser would simply demolish the premises or alter them so substantially as to make the existing state of repairs irrelevant to the value of the premises. In that sort of case the court may well find that there was no damage to the reversion caused by the disrepair and the landlord could recover no damages. The second broad type of case is where the purchaser is likely to upgrade the premises in such a way that the pre-existing state of repair was relevant only to a limited extent. In such a case only some of the repair works would survive the refurbishment."

38. Although I have set out matters differently, my reasoning is consistent with that of Arden LJ.

39. I should emphasise the test of reasonableness in relation to common law damages. In Van Dal Footwear v Ryman [2009] EWHC 646(TCC) at paragraph 27, His Honour Judge Wilcox considered that where economic repair was possible but the claimant decided to replace an item in disrepair with a new design, (replacing an existing 17th century fabric with new and modern materials) this was not a reasonable repair but a replacement and therefore the claimant was not entitled to damages.

40. It is convenient to apply as a separate test what has come to be regarded as the second limb to S18 because it provides a test as to whether the former tenants can show that the landlord intended to pull down the building at or shortly after the termination of the lease or to make such structural alterations as to render valueless the repairs covered by the agreement.

41. A key question in relation to the assessment of Common Law damages relates to the date on which the question of a landlord's intent has to be considered.

42. All parties agree that the decision of the Court of Appeal in Cunliffe v Goodman [1950] 2KB237 is good law. That case related to dilapidations. The landlord claimed

that no decision had been taken to refurbish the building at or shortly after the determination of the lease. The tenant claimed that the decision had been taken and was inevitable.

43. The Court of Appeal held unanimously that the date of decision referred to in the 1927 Act was the date of the termination of the lease. In this respect they followed Joyner v Weeks. The question they posed was the following "At that date, did the landlord intend to make such structural alterations of the building as would render valueless the repairs covered by the covenant or agreement?"

44. At page 254 Asquith LJ set out what was necessary to establish intention:

"This leads me to the second point bearing on the existence in this case of "intention" as opposed to mere contemplation. Not merely is the term "intention" unsatisfied, if the person professing it has too many hurdles to overcome or too little control of events; it is equally inappropriate if, at the material date, that person is, in effect, not deciding to proceed but feeling his way and reserving his decision until he shall be in possession of financial data sufficient to enable him to determine whether the project will be commercially worthwhile." Later at page 253 Asquith LJ emphasised that "there must be a decision on the part of the landlord"… "a clearly informed intention" … "the landlord has made up his mind."

45. The result in a number of cases might well be different if the words "at or shortly after the termination of the lease" had been interpreted to include a period of time for reflection after the termination of the lease during which a landlord would make up his mind what to do.

46. The decision of the House of Lords in Ruxley means that a consideration of the position at the date of the termination of the lease is subject to the overall test of reasonableness. If only one course of action would be inevitable at that date, it would, for example, be unreasonable to award damages based on indecision where the reasonable course of action would involve making such structural alterations as would render valueless the repairs which the tenant was obliged to carry out. This is not in conflict with Cunliffe since Asquith LJ was clearly referring in his judgment to the position where a landlord was in a state of genuine indecision and had insufficient information on which he could reasonably come to a decision.

47. In relation to the common law assessment, apart from the question whether to demolish the premises or to make radical structural alterations or to repair, a further question is what is the standard of repair which a landlord is reasonably entitled to expect? Within a range of possibilities, is it the landlord's standard or the tenant's standard of repair? What if the landlord's works go beyond what is needed for repair?

48. Under Clause 2(5) of the Head Lease the tenant covenants "well and substantially to repair, uphold, maintain, cleanse and keep in good and substantial repair the demised premises and all additions thereto."

49. The parties are agreed that the test is what the reasonable tenant would do in order to make the premises reasonably fit for occupation- see Proudfoot v Hart [1890] 25QBD42 and Westbury Estates v The Royal Bank of Scotland (2006)CSDH177

50. The standard of repair, as set out in Proudfoot v Hart by Lopes LJ, is the standard of repair which, having regard to the age, character and locality of the building, would make it reasonably fit for the occupation of a reasonably minded tenant of the class who would be likely to take it.

51. The lease is dated 1973. The building is in the heart of the City of London close to the Lloyds Building. It was in 1973 and is now, a prestige block in the heart of the financial area. The standard of repair is that which is required to put such a 1973 building in repair. The tenant is not required to improve a 1973 building to the standard of 2008.

52. The further question is "whose standard?" In Dowding and Reynolds on Dilapidations 4th edition at 214-215, the learned authors say that "where the covenanting party is the tenant, it is for him to decide which method of repair to adopt. Provided he chooses an appropriate standard of repair, then he has performed the covenant notwithstanding the fact that, had the choice been up to the landlord, a more expensive solution would have been adopted" – see George Fischer Holdings v Multi Design Consultants [1998]61ConLR85, and Riverside Properties v Blackhawk Automotive [2005]1EGLR114 at 121.

53. In this case there is a dispute as to whether or not the scheme for the cladding put forward by the Defendant's expert Mr Plough would have provided an appropriate standard of repair.

54. I should refer to supercession. In this case there is no dispute that the landlords have carried out a scheme of refurbishment which goes considerably beyond what the tenants could have been expected to pay to put the premises in repair. At Common law the landlord is entitled to recover (subject to the cap) reasonable damages relating to the actual loss that has been suffered assessed at the date of the termination of the lease. This is achieved by assessing the cost of the works which should have been carried out by the tenant and by deducting the cost of any works which would have been rendered valueless by other works which would have been carried out by the landlord if the property had been put into repair by the tenant.

55. Mr Hutchings, for the Second Defendant makes a further submission in relation to the statutory cap taking account of diminution of value by reference to Latimer v Carney and a decision of Mr Recorder Reese in Firle Investments v Datapoint (unreported 2000). He said that the reasoning applies in a case where the premises have a latent development value.

56. In Latimer Arden LJ at paragraphs 34-36 says as follows:

"The second broad type of case is where the purchaser will be likely to upgrade the premises in such a way that the pre-existing state of repair was relevant to a limited extent. In such a case only some of the repair works would survive the refurbishment. Dowding and Reynolds states in paragraph 29-41 that in such a case, depending on the facts, the diminution in the value of the reversion might well be limited to the cost of those repair works which would survive the refurbishment…" "On this basis, what Mr Reese(the Recorder) holds in Firle Investments v Datapoint International Ltd is that it is likely that there is no diminution in value when repair works are superceeded

by works of refurbishments that would be undertaken by the purchaser…Firle is about the supercession of repairs by modernisation works."

57. At paragraph 338 Arden LJ went on "I would, however, accept that where repair works that the tenant in breach of covenant is bound to do will be overtaken by refurbishments that the landlord or purchaser of the property proposes to do that indicates that the reversion has a latent development value. The landlord would have to show that the repairs carried damage to the reversion and this may in the circumstances be difficult."

58. In Firle Mr Reese QC poses the question that once it is accepted that the hypothetical purchaser was the only sort of person interested in purchasing the property and that Firle itself intended the same refurbishment, one has to consider the extent to which it was worthwhile to have carried out the repairs and what is the real damage to the reversion.

59. Mr Hutchings claims that the hypothetical purchaser in this case, as in Firle, would be "one who would have purchased the building with a view to doing more or less exactly what the landlords themselves did by way of refurbishment. Applying the cap the result in that there is no diminution of value and relatively minimal damages."

60. I am urged to approach the diminution question from a practical stand point. Mr Hutchings contends that it is apparent that at the hypothetical auction at the term date, the hypothetical purchaser would not have been approaching the purchase of the out of repair building with an eye fixed on any costed schedule of dilapidations. He would approach the purchase with a schedule of the actual works that he was going to do in his hand. This being the case, he contends that the bid would only be reduced by the cost of those works which survive the refurbishment.

61. On this basis Mr Hutchings submits that all the hypothetical bidder would factor in is the cost of the survival items – on Mr Eden's figures £351,000 and on Mr Mander's figures £124,000.

62. Mr Hutchings contends that there is no injustice to the Claimants because, by choosing to spend £5,000,000 on a "back to core" refurbishment, the Claimants have brought to the market a far superior product thus realising its development potential. This is now a Grade A building commanding rents of £50 per square foot rather than a less desirable Grade B building commanding a rent of £41.12 per square foot.

63. The Second Defendant submits, therefore, that

1) The true diminution in value is best represented by the cost of those works which survive the refurbishment which the Claimants have carried out.

2) The valuation effect of those items is agreed or can be ascertained once I have made findings in relation to the carpets and the cradle.

64. The first argument is, in essence, that at Common law and by statute a landlord is not entitled to damages where the property has development potential which, if carried out at some later stage, (regardless of any intention at the termination of the lease) would result in the property being pulled down or such structural alterations or

other refurbishment undertaken so as to render valueless the repairs to be carried out by the current tenant at the end of the lease. It seems to me, that this argument is not sustainable.

65. The common law rule is that the law is not interested in what a successful claimant does with his damages. The exception to the rule, set out in the 1927 Act and in Ruxley, is that the court should not award compensation where it would be unreasonable to do so because, at the due date, the Claimant had reached a decision to pull down or refurbish or it was inevitable that such was the only reasonable decision in which case the Claimant would obtain a windfall. It is this unfairness in Joyner v Weeks that the 1927 Act was seeking to remedy.

66. Mr Hutchings' primary contention on the basis of the wording of S18 of the Act is that a landlord should not be entitled to recover damages for dilapidations where a property has latent development value which may (or may not) be realised at some stage in the future. As a result there is no diminution in the value of the reversion whatever state the premises are left in. This has not been argued successfully in the 83 years since the Act has been passed.

67. To accord with Mr Hutchings' submission the relevant provision of the Section would read "Damages for breach of covenant shall in no case exceed the amount by which the value of the reversion (including it prospective value) is diminished owing to the breach of such covenant".

68. On the point of principle, I conclude that this was not what Parliament intended. The 1927 Act (S18(1)) altered the law as set out in Joyner v Weeks. It was not intended to deal with a case where there is a latent development value which may or may not be realised at some future date. It would be unreasonable if a landlord was told that he could not have the cost of the disrepair of the previous tenant because of a development value which at the date of the termination of the lease, he had no intention of realising.

69. Further, on the facts, there is the insuperable objection that I have no evidence to support the claim that the prospective purchaser would be bound to redevelop or that the premises do not have additional value to the reversion because they could have been let in their repaired state rather than be immediately redeveloped. The agreed expert evidence is that if the building had been left in repair, the prospective purchaser would have been more likely to let after minor refurbishment than to undertake a major redevelopment. This might very well have provided an additional value by which the reversion has been diminished.

Conclusions on the Law

70. 1 Under S18(1) of the Landlord and Tenant Act 1927 the court has to assess the value of damages required at common law reasonably to compensate a landlord for the tenant's breach of covenant to repair at the end of the lease. The damages which the landlord can recover may not exceed the statutory cap.

70.2 The first step is to assess the Common Law damages. The principles are set out in Ruxley. They are to provide reasonable compensation for an established loss and

not to provide a gratuitous benefit to the aggrieved party. The reasonableness of the damages is to be linked directly to the loss sustained.

70.3 The common law principle is that the courts are not normally concerned with what the plaintiff does with his damages, but Ruxley confirmed that current intention is relevant when considering what sum is reasonable to award by way of damages. This principle also applies under the 1927 Act.

70.4 The date at which the damages are to be assessed is at the date of the termination of the lease-see Cunliffe v Goodman. A landlord's intention as at that date is an important part of reasonableness.

70.5 It is in accordance with the Statute, and the Common law principles set out in Ruxley, that a landlord will not recover damages for dilapidations if he has formed the intention at the date of the termination of the lease, that he will, at that date or shortly after the termination of the tenancy, pull down the premises or make such structural alterations as to render valueless the repairs covered by the agreement because it would not be reasonable to award damages on that basis.

70.6 Applying Ruxley principles, where the landlord has not reached a decision at the date of the termination of the lease, but there is only one reasonable decision which he could take, it may provide reasonable compensation to assess damages on the basis that the landlord has reached that decision. Asquith LJ's reasoning in Cunliffe v Goodman is intended only to apply where there is a reasonable decision to be made.

70.7 Both the 1927 Act and Ruxley are concerned with present intention at the date of the termination of the lease. The fact that the property has development potential in the future is not relevant to the assessment of Common Law damages.

70.8 Under the Act, the sum awarded cannot exceed the value by which the reversion is diminished as a result of the breach of covenant. The value is to be determined as at the date of the termination of the tenancy.

70.9 There is no diminution of the value of the reversion, if a decision has been taken by the date of the termination of the lease that, at that date or soon after, the property is to be pulled down, or to be so altered structurally as to render valueless the repairs covered by the covenant or agreement.

70.10 The intention of the Act is to provide a landlord with reasonable compensation for the tenant's breach of covenant. The purpose of the cap is to achieve that result and not to deprive the landlord of damages to which he would otherwise be justly entitled. This proposition is illustrated by Lord Lloyd's Speech in Ruxley. If there is no immediate intention to redevelop if the property is put in repair, the basis of the valuation of the damage to the reversion includes the value of having the property for re-letting.

70.11 The standard of repair is that which is reasonable in all the circumstances. The court must take into account all relevant circumstances, including the locality of the building and the age of the building.

70.12 The doctrine of supercession is well established. Where the landlord would act in the same way as he did act if the premises had been returned in repair, he can recover the reasonable cost of carrying out the dilapidations less the cost relating to any works that are superseded by other works that the landlord has carried out. Where the landlord can prove that he would have acted differently if the tenant had returned the premises in repair, the landlord can recover the reasonable cost of the dilapidations less the cost of any subsequent work which the landlord would have carried out and which would have rendered valueless the works which the tenant should have carried out.

70.13 The traditional view is that there are two limbs to Section 18 of the 1927 Act. This division is helpful in that the issues in relation to repair under what is considered the first limb must be considered objectively i.e. what a reasonable landlord would do to put the premises in repair, whereas the second limb is subjective, namely a consideration of what this landlord actually decided at the date of the termination of the lease and whether it was reasonable for him so to decide.

70.14 There is no difference in relation to quantum of damages between contract and tort. The general rule is that damages are fixed at the date of breach. The issue arose in Dodd Properties v Canterbury CC [1980]1AllER928 at 933 where Megaw LJ held that "The true rule is that where there is a material difference between the cost of repair at the date of the wrongful act and the cost of repair when the repairs can, having regard to all the relevant circumstances first reasonably be undertaken, it is the latter time by reference to which the cost of repairs is to be taken in assessing the damages".

70.15 Loss of rent will only be awarded where it represents a landlord's actual loss and a causal connection can be established between the failure to repair and the loss which is claimed. – see the judgment of Mr Recorder Anthony Butcher QC in Scottish Mutual Assurance Society v British Telecommunications Plc (unreported) but cited in Dowding & Reynolds Para 29-18.

71. The Provisions of the Leases. I now set out the main provision of the leases and sub-leases which provide a framework within which to consider the facts.

72. Clauses 2(3-4) of the Headlease contains the tenant's covenants for maintenance of the building. Clause 2(5) requires the tenant:

"Well and substantially… to keep in good and substantial repair and condition the demised premises and all additions thereto…"

73. Clause 2(6) requires the tenant at the expiration of the term quietly to yield up the premises in repair together with all additions and improvements, and all landlords fixtures.

74. Clause 2(9) requires the tenant to observe and comply with all Orders, Regulations and By-laws affecting the demised premises in relation to any machinery plant or chattel affixed thereto.

75. Clause 15(ii) requires the tenant not at any time during the term to make any alteration or addition whatsoever, either externally or internally, structural or otherwise, on the demised premises without the consent of the landlord.

76. Under Clause 3.14.5 of the Underlease, the Second Defendant covenants as follows:

"Unless the landlord(acting reasonably) directs the Tenant in writing to the contrary, to remove any alterations additions or improvements made to the Demised Premises, and all tenants fixtures fittings furniture and effects at the expiration or sooner determination of the Term, and to make good any damage caused by such removal ,to the landlord's reasonable satisfaction, and to reinstate the demised premises to accord with the Schedule of Works and otherwise in accordance with the obligations of the Tenant hereunder…"

77. By Clause 1.2.1 of the Licence to Alter it is provided that:

The expression "Landlord includes the persons from time to time entitled to the reversion immediately expectant on the determination of the term granted by the licence.

78. By Clause 3.9 of the Licence to Alter, the Second Defendant covenants with the landlord directly:

"At the end or sooner determination of the term granted by the Underlease or in the event of this licence becoming void, to reinstate and restore the Underlet premises (if so required in writing by the Landlord or the Tenant) in accordance with the provisions of Clause 3.14.5 of the Underlease."

The Facts

79. On 24th January 2005 Mr Montresor, on behalf of the then freehold landlords, Land Securities PLC, inspected the external cladding (curtain walling) at 34-36 Lime Street. The Report dated 19th August 2005 referred to the landlords' constantly evolving strategy for the building and referred in particular to the "Recent Focus" This was an assessment prepared by Donaldson's (surveyors) indicating significant refurbishment/redevelopment possibilities and reflected the rent differential between pre-refurbishment and post-refurbishment of the premises.

80. At paragraph 4.2.1 of the Report, under "Acquisition cost", the Report noted that Grainmarket (who proposed to acquire the building) sought to maximise the rental income and capital appreciation by acquiring buildings in need of refurbishment at competitive prices.

81. Under "Portfolio Construction," in paragraph 4.2.2 the Report noted that "…Grainmarket will seek to create a portfolio which balances refurbishment projects with non-refurbishment projects. The rental stream of non-refurbishment buildings provides income for the day to day running of the company and for interest repayments."

82. Under paragraph 4.4.1 the Report notes that "Grainmarket is prepared to undertake a range of refurbishment projects from redecoration, to the refurbishment of all the common areas… through to full redevelopment of a building."

83. On the 24th August 2007, Mr Crader, Managing Director of the Claimant (and Grainmarket), in an email to Mr Hassett of NCB, who were concerned with providing the finance for the project, said in relation to the building that the tenants had occupied for twenty five years, that "the plant and cladding are past their economic life." Mr Crader's response to Mr Hassett was to ask how much refurbishment would be required and what sort of cost would be required to do up the building.

84. In August 2007 the vendor's agents, Knight, Frank and Rutley, prepared a summary report for the vendors, Land Securities PLC. It noted in paragraph 2.4 of the Report the presence of asbestos. In paragraph 3.3 of the Report, there was no mention of any water ingress but the Report said "The cladding, however, is 30+ years old and appears tired, and could be said to have reached the end of its effective economic life." The Report noted that the external cladding included asbestos based insulation, which was sandwiched behind the sheet cladding sections. The report went on, "This boarding is not easily accessible and is identified in the tenant's Asbestos Register and has been accepted on a "label and manage basis."

85. On 30th October 2007 the property was purchased by the Claimants for £70.10 million.

86. The opinion letter from their agents, Savills, dated the 10th October 2007, (para.11.2) noted that "The cladding is in excess of thirty years old and appears tired and consideration may need to be given to its replacement/refurbishment in the medium term. The cladding does, however, incorporate asbestos based insulation boards [sic] are sandwiched behind the sheet cladding sections (see further comment on this below)".

87. The Asbestos Survey of May 2007(para 11.2.4) made various recommendations which included removing asbestos debris in the duct vents in the roof level plant room and the asbestos based insulating board to plinths in the boiler room, but permitted the monitoring of other items. However a "Phase 3 intrusive survey" would need to be undertaken should any significant work of refurbishment/demolition be considered.

88. After the Claimants had purchased 34-36 Lime Street, they wrote about their plans in their Report to Shareholders in December 2007. Under "Outlook" the Report said of Lime Street and another recently acquired property, "Refurbishments to the communal parts and suites are planned as well as re-gearing of leases. This should enable us to outperform what will be a "soft" investment market over the next year. Two of our acquisitions (Lime Street –) could become part of much larger development plays and this should give a further opportunity to create value."

89. In anticipation of the termination of the leases Mr Crader sent an email on 7th January 2008 requesting to view the property.

90. A Status Report dated 21st January 2008 (Mr Crader was on the circulation list) said under the heading "building works"

- RSA Dilapidations – meeting with Malcolm Hollis within the next week."

- Potential Refurbishment Scheme

- Possible re-cladding required via dilapidations claim [Re-modelling/infill of retail arcade]

91. On 23rd January 2008, following his meeting with Mr Crader, Mr Bartle Woolhouse of Malcolm Hollis wrote to him to say that it would be necessary to clear the building of tenants before the repairs could be carried out. He also advised that the claim would be in the region of £2 million, broken down into reinstatement, redecoration and repair costs, with a sum to be added for loss of rent. In relation to the cladding he said, "Clearly the extent of the disrepair is as yet unknown for this element; therefore the extent of the requirement for remedial works is also unknown. Current evidence strongly suggests, however, that wholesale replacement may be the only viable option. Firm evidence will only become available following further investigations (see below) and ultimately best evidence during and upon completion of the works."

92. In oral evidence Mr Crader and Miss Charlton both gave evidence to the effect that Malcolm Hollis was making a sales pitch for the work.

93. In oral evidence Mr Crader also said that Mr Bartle Woolhouse was his contact with the professionals who would be involved in any works relating to the termination of the leases. I find that the letter from Malcolm Hollis was a sales pitch but it was also an expression of a reasonable way of proceeding. I find that Mr Crader's response was that Malcolm Hollis should go ahead and investigate.

94. Mr Josey, the Claimant's expert, was instructed and received an email from an Associate at Malcolm Hollis, Mr Bayliss, on 1st February 2008 attaching a copy of the Montresor Report. The email said "I look forward to receiving your proposals for arranging and monitoring the opening up works and designing and specifying on a performance basis the replacement of the cladding system."

95. On 6th February 2008 the Claimant served a schedule of dilapidations and reinstatement.

96. On the 15th February 2008 Mr Crader sent an email to his Bank Manager, Mr Woodward, saying "As requested I am sending you the Excel showing how Lime Street will work if we do the major refurb of 34-36…"

97. Mr Josey responded to Mr Bayliss on 19th February 2008. The email is predicated on a refurbishment to provide "a lighter more open, airy aesthetic is the current vogue as can be seen when viewing other newer buildings in the area." He commented that "replacement of the curtain walls is a relatively straightforward matter, but there will be some vagaries relating to the existing structure until it is exposed."

98. As far as the inside of the building is concerned, Mr Josey wrote that "once we get inside the building and the full client brief is known, we will be able to develop a number of initial schemes for consideration that should provide a suitable solution."

99. On 27th February 2008 Mr Bayliss and Ms Tilbury, in response to an invitation to tender, put forward a proposal for the replacement of the curtain walling and refurbishment of 34-36 Lime Street "A CAT A refurbishment of the internal office space is also to be undertaken prior to the re-marketing of the building."

100. Mr Crader said in oral evidence that he had not made up his mind what should happen to 34-36 Lime Street and that Malcolm Hollis were tendering in the hope of obtaining a contract for major refurbishment work. Their proposal was in response to an invitation to tender dated 28th January 2008. No documents have been disclosed setting out the nature of the invitation.

101. The proposal would indicate that Mr Crader had not made a firm decision as to what course to adopt:

5.1.1 "We understand that the project is primarily being commenced to rectify the defects identified in the existing curtain walling system. As the defects revealed during the preliminary invasive investigation works commenced by the previous building owner are of an extensive nature, wholesale replacement of the building's curtain walling is considered a more financially viable option than removing and reinstating the curtain walling to execute the requisite repairs."

102 On the 5th March 2008 Mr Cheyne of Household Henderson set out its fee proposal for internal refurbishment. In relation to "external improvement works", he said that he understood that a feasibility study was being carried out on the replacement of the cladding to the façade.

103. On 19th March 2008, Mr Dawes of Malcolm Hollis sent an email to Mr Josey. He said that it looked as though an architect's firm would be leading the redevelopment project for cladding replacement and it would be up to them who they appointed to carry out the cladding replacement.

104. Mr Josey replied on 20th March 2008 that as a firm of architects, his firm would be able to handle the whole of the cladding package from inception through to completion. Mr Josey went on to express concern that decisions had already been taken in principle and that his firm would be required to find the evidence to support them.

105. In particular he said "I understand that a decision has been taken in principle to replace the curtain walls and to recover the cost from the tenants."

106. In Mr Dawes' response email, dated 26th March 2008, he reassured Mr Josey that Malcolm Hollis appreciated that Mr Josey's advice would be "absolutely unbiased" and that "We will be acting on your findings rather than historical ones".

107. Mr Crader said that he was advised by Malcolm Hollis that it would be necessary to clear the building in order that the repairs to the property could be undertaken. On that basis no extensions to leases would be granted beyond the term date.

108. The Lime Street Status Report dated 26th March 2008 again referred to "Potential Refurbishment Scheme" and "possible re-cladding via dilapidations claim". Mr Crader said in oral evidence "The difficulty was, until we could get in and really

investigate the cladding, which meant getting into the inside of the building and getting something over the outside, we could not really be sure what the state of the cladding was."

109. On 28th March 2008, Mr Josey sent a fee proposal to Malcolm Hollis in relation to the proposed condition survey. It was envisaged that the investigations would be carried out in the week of 31st March 2008 and would include some intrusive work, as well as a visual inspection. By 31st March 2008 Household Henderson had been appointed to manage the refurbishment of the building. On 1st April 2008 Mr Cheyne of that firm, wrote to Ms Scarth, the Assistant Manager on site, purporting to act on behalf of Grainmarket in relation to opening up works.

110. On 2nd April 2008, Mr McKellar of Household Henderson wrote to Mr Backhouse of MPA Construction Consultants and Mr Joyce of the Sellway Joyce Partnership asking for a quotation for managing a project which had as its scope of works:

"Section 1) will be the internal refurbishment[of] the core areas and 2 of the shops, refurbishment of the office areas to a basic level to include decorations, new carpet and ceilings and the M&E upgrade and replacement works.

Section 2 will be the removal and replacement of the curtain wall system and associated work".

111. On the 9th April 2008 Mr McKellar sent Mr Crader an email attaching a draft programme for discussion. He said "I have split it into the Refurbishment and the Re-cladding."

112. Within half an hour Mr Crader had responded by email "Status ok. Is the build time realistic?" The programme allowed for inspection of the cladding and report, followed by concept design, tendering, and appointment of the cladding specialist and a period of "90 days?" for carrying out the work.

113. The first site meeting of the Project Team took place on the 11th April 2008. Mr Crader was present. The Minute noted that "to be clear, justification for replacement will depend in part on its effect on the dilapidation claim. We do accept there will be a cost over and above the dilapidation claim but the goal is to keep that to a minimum, whilst enhancing and modernising the building."

114. Under "Budget and Dilapidations claim," the Minute noted that a large part of the claim would be the cladding repair. 2/3 of this would be paid by the single head tenant". The Minute noted that Malcolm Hollis would be responsible for splitting the claim.

115. It is clear that the effect which the work on the cladding would have on the dilapidations claim was much in the mind of Mr Crader, who would, himself, take the decision on what works would be undertaken at the end of the lease. His email dated the 18th April 2008 is explicit:

"1.1 To be clear, the justification for replacement will depend in part on its effect on the dilapidation claim. We do accept there will be a cost over and above the

dilapidation claim, but the goal is to keep that to a minimum whilst enhancing and modernising the building."

116. Part of the problem that Mr Crader had in deciding what work should be carried out to the cladding related to the difficulty in obtaining access to the premises and carrying out opening up works to see the state of the building behind the cladding. A further difficulty related to the use of the cradle which would enable the cladding on the outside of the building to be closely inspected. It is clear that efforts were made on behalf of Malcolm Hollis in advance of the termination of the lease to obtain the necessary access to the building but, for whatever reason, they were unsuccessful. No one has suggested that the Claimants were at fault. A site visit was arranged for 30th April 2008 but, in the event, only provided very limited access, insufficient to verify the condition of the building (see email to Mr McKellar of 2nd May 2008).

117. The Minute of the second site meeting on 24th April 2008(at which Mr Crader was not present) made a reference to refurbishment of the office entrance and core areas and "possible replacement of the curtain wall".

118. In the Minute of the Claimants Company Board Meeting in Luxembourg on the 24th April 2008, there is a reference to costs for the project greater than £3.5m. In cross-examination Mr Crader agreed that the costs referred to would include re-cladding.

119. It is clear that Mr Crader was concerned that the cladding might need to be replaced. In his email to Mr Cheyne of 25th April 2008 he said "The issue with the cladding is it appears to be falling off – see Bart Woodhouse for details. If we can save it and make it look good, that would be great, but I have my doubts – however, please explore the option".

120. On 28th April 2008, Househam Henderson notified the Health and Safety Executive that "The project consists of the refurbishment of entrance and core areas and replacement of external cladding to the existing six floor building".

121. On the 30th April 2008 the First Defendant prepared its schedule of dilapidations relating to the Underlease.

122. On 7th May 2008 the First Defendant served its schedule of dilapidations on the Second Defendant.

123. The third Site Meeting on 8th May 2008 shows how ideas had developed. At the site visit they had found a plan which indicated details of the curtain wall. "Mark Crader is happy for HH to look at a glass and Portland stone façade".

124. As an Appendix to the Note of the Meeting, Mr Crader set out the scope of the work to be carried out when the Claimants obtained possession of the building. He emphasised again that repairs would be done under the dilapidations claim "and it is important that no cost is incurred by Grainmarket Asset Management" Later he said "To be clear, the justification for replacement will depend in part on its effect on the dilapidation claim. We accept there will a cost over and above the dilapidation claim but the goal is to keep that to a minimum whilst enhancing and modernising the building."

125. Work on the replacement scheme was continuing. In May 2008 Springett Associates set out the proposed structural work as "3.Reclad the building

Replacing the cladding with a similar lightweight metal/glass system will not cause any major structural problems…"

126. The fourth Site Meeting took place on 22nd May 2008. The Minute again referred to the "possible replacement of the curtain wall and the Budget and Dilapidations claim. In relation to access to the building, the Minute noted at 7.1 "Bickerdike Allen awaiting access. If cradle cannot be used BA to propose alternative means of inspection by spider or cherry picker". The Appendix to the Note repeats that justification for replacement works would depend in part on its effect on the dilapidation claim.

127. The Minute of 5th June 2008 Site Meeting noted that there had been an internal inspection by Mr Gill who noted.

- "Evidence of extensive and recent leaking on second and third floors.
- Deterioration of seals generally.
- Pitting and deterioration of the cladding system finish which is not repairable.
- Poor quality double glazing – 6mm tinted glass, 6mm cavity and 6mm clear glass.
- Double glazing units beginning to fail – expected life generally 3 years maximum…"

The Minute also noted that the Claimants were not able to do a full external survey because the cradle was out of commission.

128. On 20th June 2008 the Underlease expired by effluxion of time.

129. On 24th June 2008 the Claimant achieved vacant possession on expiry of the Headlease by effluxion of time. A few days before, Mr McKellar sent an email to Mr Gill:

"It is highly likely we will be replacing the cladding so please would you give me a fee for drawing up a cladding specification."

130. The sixth Site Meeting took place on 25th June 2008. The Minute recorded at item 74 that Mr McKellar reported that it was "highly likely we will be replacing the cladding." The Appendix again referred to the cladding and "possible replacement of the curtain wall" but continued to emphasise that the goal remained that the cost of refurbishment over and above the sum recovered for dilapidations was to be kept to a minimum.

131. On 26th June 2008 Mr McKellar sent an email to Mr Cheyne. Item 4 said "Cladding Replacement, shops and Lewin's on the island not to be re-clad." It was put to Mr Crader in cross examination that there was a need to re-clad and the decision had already been taken. Mr Crader said that he had made no decision at this stage to re-clad.

132. The Claimant's 2nd Property Growth Report dated June 2008 referred to 34-36 Lime Street as follows: "We have taken advice from dilapidation experts and have currently tendered for works bar the cladding which have come in at our budget figure. However, it is the cladding which creates most uncertainty as it is not until the site has been fully stripped back that we will know for sure that the cladding needs replacing and therefore how it affects our claim against the outgoing tenant." In oral evidence, when pressed, Mr Crader said "We had not decided to replace the cladding. We thought replacing the cladding was certainly possible, maybe even probable, but we had not made the decision to do so. We couldn't. We did not have the information to make that decision" He said that he had in mind polishing up the cladding as they had done at No 120 Leman Street.

133. Mr Crader went on to say in oral evidence that it was not until 5th September 2008 that he made the decision to replace the cladding. The decision is evidenced by an email from Mr McKellar, saying that "the cladding will definitely be replaced ".

134. Before that date it is clear that at least detailed planning was continuing on the basis that it was likely that the cladding would be replaced – see e.g Minutes of Site Meeting of 17th July 2008. However, it is clear that the dilapidations claim was also being progressed. The fact that the two were linked is clear from the email from Mr Davis of Malcolm Hollis to Mr Josey, copied to Mr Crader and dated 24th July 2008.

135. Mr Crader was concerned in July and August 2008 at the advice he was receiving. Some of the problems are set out in Mr Gill's response to Mr McKellar's email dated 2nd September 2008. It would appear that on 30th July 2008 the professionals had use of a cherry picker to act as a temporary cradle which enabled them to inspect the outside of the building. They visited the building again on 3rd September 2008 and produced an addendum Report. Mr Gill's report considered that because of the asbestos behind the cladding, the asbestos needed to be replaced in its entirety.

136. I can deal briefly with the rest of the history. In September 2008 Bickerdike Allen Partners reported on the state of the building. In relation to the curtain walling, the Report noted that it was 30 years old, using the technology current at the time and had performed reasonably well. The Report said that part of the curtain walling leaked and that the double glazing was approaching the end of its reasonable life (Para 3.1) "The double glazing units have done well to last this long (4.5)" If the thermal insulating properties of the building are to be improved significantly, either the existing system is going to be over clad or a new curtain walling system is going to have to be installed" (4.13)

137. On 5th September 2008, after he had returned from holiday, Mr Crader, as he put it, "threw in the towel" and said that the curtain walling should be replaced providing the cost did not go over £1.2m.

138. Work on the building commenced on 27th September 2008.A contract was formally entered into with Blenheim House Construction Ltd for the replacement of the core areas and common parts.

139. Mr Crader summed up his position. "I was, in retrospect, probably dragged kicking and screaming into changing the cladding. There was a lot of pressure on me

at the time. I needed answers. We had a problem with the asbestos. We had a potential problem with the planners and I had a building I had to get back into repair. I did not have the luxury of a year and a half to decide what to do. I needed answers and I needed them quickly." The reference to "a year and a half" was a reference to the date of Mr Josey and Mr Plough's Reports.

140. On 27th October 2008 the Claimants served their revised schedule of dilapidations and reinstatement.

141. On 29th October 2008 the Claimants served their pre-action protocol letter.

142. On 4th December 2008 planning consent was granted for "the demolition of existing cladding and re-cladding of all elevations and plant; new glazed entrance subject to conditions."

143. On 6th February 2009 building contract specifications were provided between the Claimants and Blenheim House Construction.

144.On 5th March 2009, the Claimants served a further revised schedule of dilapidations and reinstatement and on 16th March 2009 the Particulars of Claim were issued.

145. Mr Crader repeated in oral evidence that neither of the two schemes being put forward by the experts was available to him when he took the decision in 2008. He said that it took the consultants many months to come up with what could have been done to the curtain walling and he did not have the luxury of waiting that long.

146. The note of genuine uncertainty from Mr Crader is also reflected in the opinion of the expert valuers in their joint statement of 20th January 2010(Para 1.6) that, had the building been returned to repair at the term date, a reasonable purchaser would have not have carried out a major refurbishment of the premises including the re-cladding, but would have "carried out minor enhancement works".

147. Having reviewed the evidence and the documents, I accept Mr Crader's evidence that he had not reached a firm decision to replace the cladding by the 24th June 2008. Mr Crader is a business man who clearly makes his own decisions, having taken the advice of the experts and considered it. I am satisfied that he was waiting for his experts to enter the building and provide him with a detailed report and valuation. I am also satisfied that he would make his decision in relation to the cladding based, not only on the professional advice that he had been given, but also on the economic situation. The summer of 2008 was a time of financial and economic uncertainty, although the serious financial crash occurred a few months later.

148. I am also satisfied that Mr Crader's June 2008 report to investors set out his position clearly:

"Our big opportunity and indeed risk would be the dilapidations claim/building cost….however it is the cladding that creates most uncertainty as it is not until the site has been fully stripped back that we will know for sure that the cladding needs replacing and therefore how it affects our claim against the outgoing tenants."

149. I conclude that Mr Crader, at the date of the termination of the lease, had reasonable alternative options. This is based on the agreed conclusion of the experts that the life of the cladding could be prolonged for a further ten years, after which it would be necessary to renew the cladding. Mr Crader could reasonably have refurbished the existing cladding or stripped it out or renewed the cladding. I find that his decision as to how to proceed depended crucially on what sum he would recover from the dilapidations and upon the uncertain economic circumstances at the time of the termination of the lease. I also find that he had not formed any clear intention as at the date of the termination of the lease. Part of his problem was that, through no fault of his own, that he had not been able to gain access to the building either for himself or the professionals who he had retained to advise him.

150. Applying the principles under the 1927 Act and taking account of the common law principles set out in Ruxley, I conclude that, at the date of the termination of the lease, Mr Crader had, reasonably, come to no clear decision as to whether or not to replace the cladding. There was a genuine decision to be made once he and his experts had inspected the building and he had worked out the financial position. If there had been, on the evidence, no realistic option at the date of the termination of the lease but to replace the cladding, I should have concluded, applying the test of reasonableness set out in Ruxley that the Defendants had shown that at or before the termination of the lease, the alterations to the building would be carried out. If the repairs required under the lease had been carried out by the Defendants, I am satisfied Mr Crader would probably not have carried out the extensive refurbishment which was in fact carried out but would have carried out the minor enhancement works which the experts have set out in their opinion. At Common Law the Claimants are entitled to recover the reasonable cost of repair less the cost of the minor enhancement works. This is subject to the separate argument that there would in any event have been no diminution of value because of the site's development potential. I have already rejected this argument. The experts are agreed that if the Claimant's refurbishment scheme applies the cap will be relevant . If the Defendant's scheme applies it will not. The experts will be able to agree the figures in either eventuality based on my findings.

151. I now consider the specific issues.

The Cladding Experts

152. Mr Josey the Claimants' expert, is a leading expert in the field of curtain walling, windows and cladding. His CV notes a number of cases where he has acted as an expert witness in construction cases involving specialist knowledge of these areas.

153. He said in answer to questions from me that he rarely got involved in landlord and tenant matters. When pressed to recall when was the last occasion on which he was involved in a landlord and tenant case, he referred to a case in 1995 which was not in fact a landlord and tenant case.

154. Mr Josey has no practical experience as to what standard is reasonably required of a tenant in dilapidations cases in order to put the premises into repair. He has however considerable experience which is relevant to assessing the practical consequences of any scheme. He has also been able to examine the building in detail.

These are very relevant matters in considering Mr Josey's objections to Mr Plough's scheme and the question of whether or not it is reasonably practicable.

155. It is agreed that if Mr Plough's scheme does not put the premises into repair to the appropriate standard, compensation is to be awarded by reference to Mr Josey's scheme. It is also agreed that (subject to Mr Hutching's separate argument) if I find in favour of Mr Plough's scheme the cap becomes irrelevant.

156. Mr Plough, the Defendant's expert, set out his qualifications in oral evidence. He said that he started out with his father in the curtain walling business in 1969. In 1977 he started to specialise in investigations in curtain wall and window failures and in remedial solutions for the failures. He re-joined his father in 1985 and since then he has been involved in over 740 different projects.

157. He said in oral evidence that 5%-10% of his work is concerned with investigating and reporting on work which needs to be completed by a landlord or a tenant at the end of the lease, and it was a mixture of work for landlords and tenants.

158. I have formed the general impression that Mr Plough is a compelling witness who has had practical hands on experience in investigating work which needed to be completed by a tenant at the end of a lease.

159. I take into account that Mr Plough only inspected the property on 8th January 2009, that his inspection was less thorough than Mr Josey, that he was only able to see one of the smoke vents and that all the internal wooden window sills had been removed.

160. I find that Mr Josey's inspection of the building was more thorough and reliable. However I am also satisfied that Mr Plough's scheme was based on years of practical experience. This, of course, is only a starting point. I must consider fully Mr Josey's practical objections.

161. If Mr Plough's scheme provides a reasonable standard of repair in all the circumstances, including the age of the building, its locality, and the length of time the cladding could reasonably have been expected to last, it should be adopted.

Whose scheme should be adopted ?

162. The standard of repair is that which would be expected by a reasonably minded tenant of 34-36 Lime Street in 1973. There is no doubt that a high standard of repair would be expected, bearing in mind, however, the age of the building and the life expectancy of the cladding.

Curtain Walling (Item 140)

163. The Claimant contends that Mr Plough's scheme would not put the premises into repair for three main reasons:

(a) It is in part aesthetically inappropriate for the premises;

(b) The risk of failure is too great;

(c) In any event it will have an unacceptably short life span;

164. The difference in cost between the two schemes is significant. The parties have agreed that Mr Plough's solution would cost £41,476. Mr Josey's solution would cost, on the Claimants figures, £173,388(plus an agreed figure of £16,244 for consequential and inevitable breakage of units and seals). Mr Plough puts the cost of Mr Josey's solution at £71,444 (plus the agreed figure of £16,244).

165. The experts are agreed that the curtain walling scheme, when it was installed in 1973 was "a bespoke purpose designed semi-unitised scheme, constructed from non-thermally broken extruded aluminium sections and flat rolled aluminium sheet spandrel panels and formed aluminium sheet for coping and flashings." It was, in its day a high specification.

166. It is agreed that there were stains down the side of some of the mullions that were the result of water penetration. The experts are also agreed that there were water stains on sill boards that were probably the result of water penetration. There were also water stains on the asbestos cement backing board applied to the spandrel panels.

167. There are minor disputes as to what Mr Josey and Mr Plough saw in their inspections of the building. They are of minor importance since it is agreed that Mr Plough's scheme must be judged on the basis that it is a comprehensive scheme.

168. In relation to repairs to glazing compounds, the experts have proposed alternative solutions. Mr Josey favours deglazing each unit, removing the old Rubboseal 033, preparing the framing and reglazing, using the new glazing compound.

169. Mr Plough has described his scheme as " top capping" He said that it has been used on a number of buildings that he has worked on in the past and that he is carrying out, at present, a large office development at South Side, 105 Victoria Street in Central London using the same method.

170. The process involves (i) cutting back and raking out the old glazing compounds (ii) applying a sealing primer and (iii) top capping with a silicone sealant.

171. He said that the silicone bonds fully to the glass and metal substrate thereby restoring the front sill. This process would be carried out on both the external and internal joints.

172. Mr Josey makes a number of different objections to Mr Plough's scheme.

173. First, he says that the cladding would only last between five and eight years. This is insufficient protection where the lease to be granted would be ten years albeit with a break clause. The repairs might well not "go the distance".

174. His second objection is that the scheme requires a very high level of workmanship and, in particular, a special tool to be made for removing those parts of the Rubboseal which remained properly adhered to the aluminium.

175. His third objection is that the glass panels to the double glazing units themselves had aluminium edge tape around them, which was adhered to the glass. The units were put in place and the Rubboseal was sealed over the edge tape. When the

Rubboseal was partially cut away, that would, in Mr Josey's opinion, bring the edge tape with it. The presence of adhesive residue from the edge tape would have to be thoroughly cleaned away or the silicone seal would be compromised and fail within a short time. This would be extremely difficult if not impossible to achieve.

176. Mr Josey's fourth objection is that it was a feature of double glazing units in the 1970s that the edge seal between the two units was a gooey non-setting substance. Mr Josey saw some units with the gooey substance. This did not apply to all the units. Mr Plough examined the units which had a firm edged seal. Mr Josey's concern was that in those windows with the gooey substance, the windows were not "bedded in" to the Rubboseal on three sides. If part of the Rubboseal was cut away prior to the application of the silicone, there was a risk that the whole of the aluminium edged tape would come away, and that the gooey substance would ooze out, further compromising the adhesion of the silicone and exposing the double glazing unit to condensation. Further, on the three sides on which the windows were not bedding into the Rubboseal, subsequent recovery of deflection caused during the cutting out works would risk disruption to the newly applied top capping.

177. His next objection is that the silicone mastic should ideally have a 6mm surface to adhere to. Here the relevant edge is 3mm. There is no dispute that under Mr Plough's scheme, the silicone seals would have to be checked every six months to ensure that they had not deteriorated. If a problem arose, necessary maintenance work would need to be done. It is contended by the Claimants that a reasonably minded tenant would be concerned at the need to carry out such an inspection to ensure that the building did not leak. "It smacked of a patch".

178. Finally, the Claimants contend that Mr Plough's evidence as to the success of top capping in other buildings is unreliable.

179. Mr Josey's objection that Mr Plough's approach does not comply with the Insulation Glazing's Association recommendation, last revised in 1968, has rightly, been abandoned.

180. Mr Plough considers that his scheme would have a life span of 10-15 years. It would have a twelve year guarantee.

181. The duration of the repair is of considerable importance because although the normal life of this cladding is 35 years, a period which has expired, the experts are agreed that, with repair, it could be prolonged for another ten years. After that time it would be necessary to replace the cladding.

182. I accept Mr Plough's evidence that he has had sufficient experience of using top capping to be able to give cogent evidence as to its reliability as a system and its reasonable life expectancy.

183. Mr Plough's scheme would fail to be acceptable, unless I find that it lasts for 10-15 years rather than 5-8 years contended for by Mr Josey. Although I am told that there would be a break clause after 5 years in a lease, I am satisfied that the subsequent purchaser or lessee would need to have a reasonable assurance that the cladding would not fail before the end of the ten year lease.

184. I accept the evidence of Mr Plough that he has done a number of these repairs successfully. I find that Mr Plough's scheme provides a reasonable assurance that it would last for a least 10 years. In addition, the cladding would have the benefit of a warranty for 12 years for design work and workmanship. I note Mr Plough's evidence that on other occasions where he has used this type of repair, no one has so far called upon such a warranty. I do not find that the objection that the cladding needs to be inspected every six months is a bar to acceptance of the scheme. We are dealing with cladding which is close to the end of its natural life. The premises would be let on that basis.

185. I return to Mr Josey's third objection, which if accepted, would be a fundamental objection to the scheme. He said in his supplemental report that the remedy contained a return profile forming a lip edge to the extrusion which would make the removal of the Rubboseal in the neat manner indicated on Mr Plough's drawing impossible. In cross examination he emphasised that "the bit that's under the lip, you are not going to be get it out unless you've got some raking device and you are never going to be able to check to make sure you've actually got it all out."

186. Mr Plough disputed this. He also said in cross examination that he did not think that it was very important because the sealant would actually be bonding and forming a seal against water ingress. He also explained that there are specialist trade contractors who are able to devise a tool to get out the Rubboseal under the lip.

187. In oral evidence Mr Plough explained how this tool could be constructed so as to be effective. He said that it would be a tool devised for that particular job:

"It will be a thin blade that would form a piece of metal into a thin section with a return flange on it… We have comparable tools where we have had to cut out Rubboseal on other projects, perhaps not quite in the same shape or design"

188. He emphasised that he was talking about "a very small risk in a small area which we would always make every endeavours that we could to remove that and I think that the residual risk is very, very small indeed, if there is any at all because we would make every endeavour to remove the original Rubboseal." Finally, both experts agreed that Rubboseal was relatively easy to remove. I prefer Mr Plough's evidence to Mr Josey and do not find Mr Josey's objections sustainable.

189. In relation to the fourth objection, Mr Plough disputes that the units had gooey edge seals. He bases his objection on his experience. He was adamant that:

"In all my time that I have looked at Pilkington Mark 6 units I have never seen gooey edged seals. So it is not a unit I have ever come across and I have looked at quite a few failures of Mark 6 units."

190. I am inclined to accept Mr Plough's evidence on this but in any event Mr Plough's solution is intended to be comprehensive and so it must be judged.

191. He explained in cross examination why his solution would be successful:

"We have a concept that we are keeping in place the original Rubboseal which would remain in place."

192. Later, he explained, by reference to a drawing, what happened to the Rubboseal.

"It is actually supporting the edge seal of the double-glazed unit. You would not be disturbing it. Even if you took the foil tape away altogether it would still be sitting on the Rubboseal."

193. Mr Small QC for the Claimants appeared in cross examination to be accepting Mr Plough's explanation, subject to the concern that this was specialist maintenance work.

194. In relation to the complaint that the silicone mastic ought ideally to have a 6mm surface to adhere to, I accept Mr Plough's evidence that extra adhesion would be gained inside the gap between the aluminium and the glass.

195. Additionally, in relation to the need for a six monthly inspection, Mr Josey accepted that a similar maintenance programme would be required under his scheme as under Mr Plough's scheme.

196. Finally there is a concern that the scheme would require a high level of workmanship. In this regard, Mr Josey agreed in cross examination that his scheme too, would require a high level of workmanship. I am satisfied on the evidence that either Mr Plough's or Mr Josey's scheme would require a high degree of workmanship by a specialist contractor and that,if this was not possible or forthcoming, either scheme would fail. In the absence of such specialist workmanship, it would be inevitable that the cladding, which was very close to the end of its expected life, would have to be replaced. However I am satisfied and find that Mr Plough knows and would have employed specialist contractors who would have been able successfully to carry out his proposed scheme.

Lower Spandrel Panels (Item 141)

197. Mr Plough's solution is to "apply a bandage joint of sealant across the joint between the cladding panels. The joint depth and width would be in the region of 6-8 mm deep and 15 mm wide." Mr Josey's solution is to overclad the panels which Mr Plough regards as far in excess of what is required to carry out an effective repair.

198. Mr Josey raises a number of objections to Mr Plough's scheme. First he says that the bandage will alter the external appearance of the property. Mr Plough accepts that the seals will vary but says that the aesthetic objection could be met by applying a uniform maximum 25cm across the frontage of the building. This, the Claimant contends, would be an inappropriate alteration to the building because it would make it clear that there were problems with the seals which were being dealt with on a temporary basis. Mr Josey thought that they could not be cleaned satisfactorily.

199. Secondly, Mr Josey believes that the solution would have a life expectancy of 5-8 years which is too short to be effective.

200. Thirdly Mr Josey contends that, in any event, the method of repair would not be adequate since there would be a real risk of water falling behind the silicone joint and the bond breaker tape. "The sealant used throughout the cladding system to seal metal

to metal joints was extensively split and ruptured. This allowed air and water to leak into the building."

201. Finally the Claimants contend that Mr Plough's solution would be prohibited by Clause 2(15)(ii) of the lease where the tenant covenants not to make or change the existing design or appearance or the external decoration scheme of the demised premises without first submitting plans, sections, drawings etc to the lessor and receiving their consent in writing (which shall not be unreasonably withheld).

202. It was put to Mr Plough in cross examination that anyone walking past the building would see the bandage sealant and know that there had been a problem with water leakage. He replied that "They would look up and see a new seal" Since they would see new seals everywhere elsewhere in the building, there would be no reason to think that there had been a problem with water leakage.

203. When Mr Josey was asked about his life expectancy of 5-8 years for bandage sealant, he had to say that he had no experience of bandage sealant going beyond 8 years simply because you would only be called back if the bandage sealant failed. He said that he had done it to a number of buildings and had not been called back. He said that "Five to eight years was the kind of life expectancy I have got out of doing it."

204. Mr Josey said that he recommended bandage seals but that it had got a limited life expectancy. It had to be inspected regularly and may need to be replaced on a regular basis. He then gave the rather surprising answer to me, in view of his previous answers, that he had not done it since 1995. Mr Josey ended by saying, the bandage seal, if you were looking price wise from all the options that you might have, is probably the most economic."

205. Mr Plough's evidence is that the life expectancy of the bandage scheme would be sufficient. It would be included in the twelve year warranty for design and workmanship.

206. Mr Josey also made a number of practical objections to the bandage scheme. First he said, in his supplemental report, that "the top end of the seal would be open to the weather in that the bond breaker would be exposed at the top of the joint." Mr Plough explained that, on the contrary, the vertical joint would over seal the horizontal joint and the bond breaker would not be exposed. I accept Mr Plough's evidence.

207 Next, Mr Josey objected to the bandage scheme because "Dirt would adhere to the sealant." It was pointed out that dirt adheres to sealant come what may and that the colour would match the previous bronze anodised colour which could be touched up more easily than the white colour.

208. Finally, Mr Josey suggested that differential movement would be a problem. It was put to Mr Plough that you may have differential movement caused by gusts of wind which create an oscillating or flutter effect and cause things to move differentially. Mr Plough said that he would be very surprised if wind hit one panel and not the other one. "Wind acts on panels together and acts on the whole building

together…I don't really understand how we are going to get fluttering of a 3-mm aluminium sheet on a building like that."

209. Mr Plough said that he found a fluttering effect "very unlikely, to be quite honest." I accept his evidence.

210. It is suggested that Mr Plough's remedial scheme was contrary to the terms of the lease. Having set out the terms rather more extensively than the Claimant in its final submission, I conclude that if the remedial scheme was appropriate, the landlord would be acting unreasonably not to give its consent.

211. I reject Mr Josey's objections and find that Mr Plough's scheme was an appropriate remedial scheme in respect of the lower spandrel panels.

The cost of certain elements in Mr Josey's scheme

Item 140

212. There is a dispute as to the cost of glazing and re-glazing under Mr Josey's scheme – the first element of item 140. The Claimant says that the cost is £145,312 + £16,244 for consequential 10% breakage of units and seals. The Defendant contends for £71,444 net (£209,705.73-£103,098 gross) to which must be added the sum of £16,244.

213. Ms Charlton seeks to justify the Claimant figure by reference to a surveyor who is said to have discussed the costings with two cladding contractors. In her supplemental report she sets out how the figure of £145,312 is arrived at. Ms Charlton had to admit that she has no expertise herself which is why she thought it appropriate to use the advice of others.

214. Ms Charlton's figure was £478 per unit while Mr Plough's figure was £235 per unit. The email from EAA providing the costings for Ms Charlton is very brief but it prices a two page scope of works. Mr Plough said that EAA are cladding installation specialists not cladding refurbishers. Mr Plough said that it was necessary to go to refurbishment specialists. Ms Charlton charged an allowance of £72 per glazing unit for working next to asbestos. Mr Plough contends that this is not necessary since there is no evidence that there would be any drilling into the asbestos zone.

215. Mr Plough relies on an estimate from Mr Hoy of Thames Contract. He said that Mr Hoy had done a great deal of this kind of work "on other projects and over many years. It is not just as if they had done it recently. They had been in this business for a long, long time doing this kind of work".

216. Mr Plough also explained that "We are talking about using techniques that haven't been used, probably in the curtain walling industry for the last twenty years. We are talking about using fully bedded glazing systems going into refurbishing an existing-or repairing an existing cladding system and you really need the knowledge and awareness of how to do that sort of work. I would be surprised if trade contractors involved who put in new work have ever done anything like this…"

217. I find Mr Plough's evidence compelling as to why EAA does not have the necessary expertise or experience to put in a reliable tender. I prefer the evidence of Mr Plough and Mr Hoy and I accept Mr Hoy's estimate as providing the reasonable estimate of cost on which I can rely.

Lower Spandrel Panels (Item 141)

218. In relation to Mr Josey's solution there are agreed figures of £5,275 for replacement seals and £118,400 for pre-forming new panels. The figure for fixing and sealing new panels is not agreed.

219. The Claimant's figure is £76,405. The Defendants' figure is £50,427.

220. Ms Charlton's figure for the Claimants of £76,405 is broken down into £50,020 for fit and pack out for the new panel and £26,385 for silicone sealing the perimeter joints.

221. Ms Charlton's evidence was that she had been provided with this information by Mr Evans. She said that the costing was not competitively tendered. Unfortunately Ms Charlton did not have explained to her the basis of Mr Evans calculation which would have been admissible for the court as hearsay evidence.

222. Mr Plough in providing the Defendants' figure did not seek any tender but relied on his own experience. He said that he based his estimate on the workmanship involved in fitting eight screws into each panel. In his opinion the cost contended for by the Claimant was too high.

223. In the absence of any explanation from Ms Charlton as to how the higher figure could be justified and bearing in mind Mr Plough's explanation of the scope of the work which needed to be done, I prefer the evidence of Mr Plough and adopt his figure of £50,427.

Item 156 Additional cost of asbestos in Mr Josey's scheme

224. This claim does not apply to Mr Plough's remedial scheme. In relation to Mr Josey's scheme, the claim is made for £20,000 to cover asbestos protection. It arises in respect of items 140(de-glazing and re-glazing) and Item 141(repairs to the lower spandrel zone). While Mr Josey's scheme sought to avoid, as far as possible, direct intrusion into the asbestos boards, the question is whether the risk of disturbance of asbestos remained, and, in particular, the risk of disturbing existing asbestos dust in the voids behind the cladding.

225. In her oral evidence, Ms Charlton said that there was a risk that asbestos protection would be required where the panels have been drilled into the asbestos zone. She said that a specialist contractor would have to assess how likely it would be that the works would disturb the asbestos area. She explained that the claim is made, not for having to work very carefully and therefore more slowly next to asbestos, but for undertaking ceiling works around where the asbestos work was taking place, so that if any asbestos was released, it would be contained.

226. Mr Plough's opinion is that asbestos protection would not be necessary. He said in oral evidence "The reasons for this view are that the internal timber cills and ceilings butt up against the aluminium frames of the windows and these would not be disturbed when removing glazing beads to access the double glazed units. Externally the fixings for the proposed new cladding panels do not penetrate the panel zone where the asbestos is located; instead they go through the window frames sections."

227. Mr Plough explained in cross examination that Mr Josey's detailing showed screws going through framing sections which are near where asbestos is located. He said that if you use, for example, self-drilling fixing like Tek screws to fix the panel then you would not make any holes through the original system. "It would just go straight through and you would seal on that."

228. When he came to give evidence, Mr Josey frankly accepted that he knew a limited amount about asbestos protection. He agreed that "The over cladding panel that I detailed does not get fixed to anything that contains asbestos. It gets fixed into the framing above and below the asbestos containing panel…with the hope that it is not going to create an asbestos problem". He said that his design was intended to avoid any specialist asbestos work.

229. I note that the works would have been carried out by a specialist contractor. I accept Mr Plough's evidence supported by Mr Josey's design intent that on the balance of probabilities asbestos protection would have not have been required and the problem would have continued to be managed on a "label and manage basis". If I had accepted Mr Josey's scheme, I would, therefore, have rejected this claim.

The Cradle Item 79

230. The Claimants' case is that, in addition, to its repairing obligations under Clause 2(5) of the Headlease, the First Defendant covenanted by Clause 2(7) to comply with all statutory requirements relating to the premises or any machinery attached to them.

231. The Defendants admit that the cradle was in disrepair and that it required maintenance and repairs costing £6,095.83. The Claimants make additional claims over this sum for (1) £5,460 for a certificate of safety under the regulations and (2) work to the holding down units costing £21,998.77.

232. It is admitted that, at the termination of the lease, there was no valid certificate of testing and examination of the cradle available as required by the Lifting Operations and Lifting Equipment Regulations (LOLER) 1998 Regulation 19(1)(b) and Schedule 1 Para 10 Reg 11 because the Regulations require that a current certificate should be signed and available for inspection (my underlining). It is also claimed that the cradle track was not securely fixed to the roof of the building and was unsafe to use. The cost of carrying out the necessary repairs to the cradle to remedy the problem with unsafe fixings, and carrying out the LOLER testing and certification is claimed at £31,747.33.

233. Since the cradle was unsafe the Claimant makes a further claim for the installation of a temporary trolley (Engineering item 86) to allow inspection of the cladding to take place.

234. The Defendants' case is that no liability beyond the amount conceded of £6,095.83 has been proved.

235. The experts, Ms Charlton and Mr Moon have agreed that:

(i) The value of the maintenance and repair items is £4,224

(ii) The value of the maintenance and repair items plus testing under LOLER is £9,684 (i.e. including the £4,224)

(iii) The value of maintenance and repair items plus testing under LOLER/plus remedial works to the holding down units (and or points) is £21,998.77

(iv) The work to the holding down units is not required on account of the deterioration in their condition. They were as demised.

(v) Upon disclosure of the defect in the sample of the holding down units exposed, the competent person carrying out the thorough examination must notify the employer and make a written record and the employer must ensure that the equipment is not used until rectified.

236. In cross examination Ms Charlton agreed that the figure in (iii) is payable if the Defendants are responsible for the design failing.

237. The Defendants claim that there is no basis for saying that there was no valid certificate at the term date. They rely on a photo on the cradle, the certificate dated 28th September 2007, and an email from Mr Taylor to Mr Boardman.

238. The requirement for the certificate arose as a consequence of the discovery, a year after the expiry of the lease, of a design failing. It is claimed that if the First Defendant is not liable for the design failure, it cannot be responsible for the requirement for the cost of the certificate or the consequences of the design failure.

239. Further, Clause 2(7) obliged compliance with the Regulations during the term of the lease. On its proper construction it did not require the tenant to deliver up a certificate to the landlord on the term date.

240. The relevant term on yielding up is Clause 2(6). It does not require yielding up in compliance with Regulations. Further the LOLER Regulations did not apply because they only applied where the equipment was used or provided for use.

241. The work on the holding down units, bringing the total cost to £21,998.77 arises out of the discovery of a design fault in the holding down units which was discovered in July 2009. This resulted in rectification of the cradle at the additional cost hence the amended claim. It is contended by the Defendants that these costs cannot be recovered from an out going tenant who did not use the cradle and was unaware of the defect.

242. It is also contended that the Claimant is not entitled to recover under the terms of Clauses 2(5), 2(6) and 2(7) of the lease and that the parties would never have been able to recover these costs which are a significant windfall long after the end of the term because the Claimant chose to put the cradle back into use.

243. The expert surveyors gave a supplementary joint statement dated 23 February 2010 in relation to the cradle. Ms Charlton said that the cradle had not been used for a number of years and that in these circumstances it was "not unreasonable" for the Claimant to test the equipment in order to be certain of its safety. Therefore a claim for the full cost of testing, repairs and remedial works to the track was reasonable.

244. The First Defendant's surveyor, Mr Moon, noted that the cradle had a valid certificate under the 1998 Regulations to a date beyond the termination date. The Defendants accepted that minor works of maintenance and minor repair were payable amounting to £4,224. Mr Moon concluded that further claims relating to invasive testing of the cradle track and further works to the cradle track to modify the anchorage system should not be accepted. There had been no deterioration to the condition of the track anchorage system and the remedy claimed was not as a result of repair but as a result of deficiency in the original design installation. The cost of providing a temporary cradle (£2,938.45) is agreed.

245. It does not seem to me that the Claimant suffered any loss as a result of the fact that the Defendants were unable to find the LOLER certificate at the date of the delivery up of the lease. The certificate was found later and found to have been effective to a date beyond the date at the end of the lease. As far as the other sums claimed are concerned, these seem to me to relate to a design fault and not therefore to be the responsibility of the Defendants. I therefore find that the Claimants are entitled to recover the agreed sums but not entitled to recover any sums beyond that.

Carpets (Items 115-122)

246. The Claimants have claimed for the net cost of new carpets in the sum of £122,400.

247. The experts have reached the following agreement. I assume that all the figures are net figures.

(i) If carpet had been laid and left in situ, the Claimant's subsequent works would have rendered the carpets valueless.

(ii) If carpet had been laid and later taken up by the Claimants, the salvage value would be £51,500.

(iii) If the Defendants had made a contribution in relation to the carpets, a fair figure would have been £61,200.

(iv) On points (ii) and (iii), a reasonable compromise would be the sum of £56,350 on the basis that it was feasible to take the carpets up and store them.

(v) The vat rate should be 16% which should be added to the £56,350.

248. The Second Defendant contends that the new carpets would be destroyed by the refurbishment and therefore the figure for this item should be nil. It contends that no reasonable landlord would require a tenant to put carpets down which would then be destroyed.

249. In the joint statement of 23rd February 2010, Ms Charlton said that in her opinion the floors would have been left in open plan configuration with new carpets. The carpets would have been of good quality and acceptable design in order to comply with the lease. The carpets could have been taken up during the works and re-laid. This would have been considerably less expensive for the landlord than providing new carpets so that, presumably, is what the landlord would have done.

250. Mr Moon, supported by Mr Saunders, said that in his opinion it was unlikely that the carpet would have been of a pattern and colour agreeable to the landlord's marketing team and would have been discarded. The landlord would have been likely to offer a choice of carpet specification to incoming tenants or a rent concession to allow the tenant to make its own selection as part of the fitting out scheme.

251. Mr Moon noted that the Claimants laid new carpet only in the first floor office accommodation which was the show suite. The cost of taking up and setting aside new carpets and placing them in storage was a significant labour cost that the landlord would have been unlikely to accept. If the carpet had remained in place during the works it would have been valueless.

252. In his evidence, Mr Austen said that there should be no allowance for the carpets because they would be rendered valueless by the subsequent works.

253. When Mr Moon gave evidence, I put to him that it was likely that the claim for carpets would have a significant value and that a reasonable landlord and a reasonable tenant would enter into negotiations. The negotiations would take account of the fact that the carpets which the tenant put down might not be acceptable to the incoming tenant, and would, in any event, having been put down, have to be stored. Mr Moon agreed that "It would a very sensible accommodation between the parties to arrive at an appropriate sum of money for the tenant to pay to discharge its obligation in relation to carpets." Mr Moon was clear that if the carpets had been put down and left down, the process of refurbishing the building would have damaged the carpets irreparably.

254. Mr Moon noted that the agreed cost of putting down the carpets was £122,400. He said that the experts considered the carpets in relation to survival of the Claimant's works and came to conclusions about it. They did not consider the possibility that there would be a negotiation and that the Defendants would pay a reasonable sum in discharge of their obligations. Mr Moon said that they had not focused on the idea, not that it was in any way unreasonable.

255. Mr Moon agreed that in the supercession scenario it would be very unlikely that the landlord would stand by, watch the tenant put down the carpets, and leave them down for their value to be destroyed by the subsequent refurbishment. He agreed that it would be likely that there would be sensible discussions between the landlord and the tenant to arrive at a figure which would provide reasonable compensation. In arriving at a reasonable figure I take into account the experts agreement which is set out above. When asked what offer would merit serious consideration, Mr Eden said that the negotiation might well come out at £50,000. In my view the appropriate reasonable negotiated net figure to provide compensation in relation to the carpets is £50,000. This net sum is based on the figures before me. The figures were discussed

before me on the basis of net figures. A reasonable sum would be the net figure grossed up i.e. £72,157.05

6. The rent of the property in repair

256. The Claimants contend that they are entitled to recover against the First Defendants the loss of rent during the whole period that would have been taken to carry out the dilapidation works on the basis that the Defendants agreed to deliver up the premises in good repair and failed to do so. It is agreed that in relation to any successful claim for lost rent, the cost of rates and insurance would also be included. The Claimant claims that the relatively minor repairs required under the lease could have been carried out with the sub-tenants in place. Mr Crader said in his witness statement that he would have attempted "to do a deal" with the tenants so that they could remain in place while the minor refurbishment works were carried out around them as he had done at the neighbouring building 37-39 Lime Street. In this event there would have been a continuity of rent.

257. It is agreed by the building surveyors that the premises could have continued to be occupied while the minor improvements to the common parts were carried out.

258. In support of this claim it is said that certain tenants expressed an interest in remaining in occupation and that accordingly, on the balance of probabilities, had the building been returned in repair, the Claimant would have been able to continue the lettings.

259. The Defendants cite Dowding and Reynolds 4th Edition Para 29-18 in support of the proposition that lost rent during the period of any repair works can in principle be recovered as part of the Claimant's loss, but it will only be awarded where it represents the Claimant's actual loss. It is only if the landlord can prove, on the balance of probabilities, that the carrying out of those repairs after the end of the term has prevented or will prevent the letting of the premises for the whole of that period that the landlord can claim these damages. This is clearly the correct approach.

260. In this case the Defendants contend that Mr Crader has given no evidence that the premises would have been let earlier but for the breaches which the Claimant has taken time to remedy. They point out that the claim was never pleaded on the basis that the Claimants (or the tenant) would have carried out the repairs while the tenants remained in the building paying rent. The Defendants further contend that the Claimant made no concerted attempt to retain the existing tenants. Further they contend that there is no evidence that the Claimant would have succeeded in securing rental agreements with the tenants at the level of rent claimed i.e. £45 per square foot. Such evidence as exists tends to show that the tenants intended to leave at the end of the lease.

261. A Status Report for 34-36 Lime Street dated 21st January 2008 set out the position in relation to various sub-tenants. Argosoft Consultants were "Going to service offices elsewhere". Total Systems Services Processing Europe were moving to 10 Chiswell Street EC2. Pattinson and Brewer said that, although their adviser had made contact with regard to renewal of the lease, they were likely to leave. There is no comment in relation to other tenants apart from Oxygen Insurance. There were discussions with them for a six month rolling continuation of occupation of the

building whilst refurbishment works were undertaken(subject to 6 months notice) "At rent passing."

262. On 4th March 2008 Tavergate Underwriting Group emailed to say that they wished Mr Crader to consider extending their occupation for a further six months following which the lease might be determined by six months notice by either party.

263. On 25th March 2008 CFT Financials requested an extension of the lease for two to four weeks. Mr Crader was asked about this and was advised by Hollis that it was necessary to have possession of the building in order to carry out the necessary repairs and refurbishment.

264. The updated schedule dated the 26th March 2008 noted that Fusion Insurance/XP Underwriting had requested an extension of their lease and that Accenture UK had now also requested an extension of its lease.

265. The 34 Lime Street Management Report for March 2008 noted that Accenture had decided not to remain at 34 Lime Street. The Report now anticipated that none of the current tenants would be staying at 34 Lime Street although a request had been put forward by CFT Finance to remain for a few weeks after the end of the lease.

266. I am satisfied on the evidence that the Claimants have not proved, on the balance of probabilities, that the existing tenants would have remained after the expiration of the head lease even if the Defendants had only carried out modest works of refurbishment. In those circumstances this claim fails. The loss of rent claim must therefore be calculated on the basis of the time it would have taken to carry out Mr Plough's scheme less the time after the termination of the lease it would have taken to carry out the minor improvement works. The calculation may also take into account the length of time which it would have taken in any event to let the premises.

267. In subsequent argument it was suggested that this claim cannot proceed on any other basis because it was not pleaded. This argument by Mr Hutchings has no merit because a) the further claim is contained in the list of issues and b) it was considered in detail by the various experts. The difference between Mr Plough's scheme and the time to be taken in carrying out the minor refurbishment works is five weeks.

268. In addition the Claimants say that if they had been able to enter the premises before the termination of the lease they would have completed the projected four weeks of Preliminaries before the termination of the lease. Since they were unable to examine the premises in detail they were unable to reach a conclusion as to what to do with the premises and therefore unable to advance the minor works by the four weeks.

269. After careful consideration I conclude that there is insufficient evidence to satisfy me that the Preliminaries would in fact have been carried out before the tenants had vacated the premises. I therefore allow five weeks rent.

Partitions and Ceilings

270. There is a dispute between experts in relation to the removal of partitions erected in the building by sub-tenants.

271. In their first joint statement dated 11th January 2010, the experts said that in the view of the Claimant's surveyor, Ms Charlton, the Claimant was entitled to recover the cost of repair/replacement of the section of the ceilings that were damaged by the removal of the partitions. The First Defendant's surveyor, Mr Moon, said that the ceilings were stripped to accommodate the Claimants' improvement works to services. The Second Defendant's surveyor, Mr Saunders, supported the opinion of Mr Moon.

272. There is no dispute as to the cost of the partition work. The Defendants claim that from the point of view of damage to the reversion, there is no effective difference to the desirability of the premises for letting or difference in the price per square foot which could be achieved depending on whether or not the partitions were removed. Any damage to the ceilings is incidental to the removal of the partitions.

273. In his evidence Mr Manders said that there was some partitioning on some floors and some floors were virtually open plan. He said that from his own direct experience there were people in the market that looked for partitions. If a prospective tenant wanted to get the building back on the market as soon as possible, having some space with partitions would help. It would provide a good mix of available letting space. Mr Manders applied this logic to the notional person standing in the auction room. He rejected the suggestion that the purchaser in the auction room would calculate his bid on the basis that he would take the partitions out.

274. Mr Eden, the Claimant's expert, said that if you leave the partitions in place you are likely to restrict the market. He said that people wanted to move partitions "It may be that one or two people may have a requirement for some of them (partitions) to some places but by the time you have fiddled around and worried about all of that and then getting new partitions to match the old, you are just, I think going down the wrong road." Mr Austen agreed with the proposition of Mr Small QC that a hypothetical purchaser would adjust his bid to allow for his removal of the partitions and making good.

275. My attention was drawn to an email from Mr Boardman to Mr Moon dated 25 June 2008 in which Mr Crader is reported to have said at a meeting (attended also by Mr Taylor who gave oral evidence) that he "would be ripping out the ceiling and starting again". Mr Crader said in his witness statement and in oral evidence that on 25 June 2008 he did not have the information necessary to make a decision on the future of the building. I accept Mr Crader's evidence on this.

276. On this issue I find for the Claimants and take the view that the partitions should have been removed by the tenants and that they suffered loss by reason of the Defendants failure to remove them. My finding is informed by my site visit to the building. It has not been argued before me that the work would have been superseded by the minor work would have been superseded by the minor refurbishment works that the Claimants would have carried out if the building had been left in repair.

<u>The Correct Floor Area</u>

277. The very helpful joint statement from the valuers dated 4th December 2009, amended on 29th January 2010, sets out a small area of disagreement in relation to the floor area to be valued. I understand that this disagreement has now been resolved.

The Claims against the First and Second Defendants

278. The claim by the Claimants against the First Defendant is made under Clause 2(15) iii of the original Lease dated 31 August 1973 namely that the tenant shall not at any time during the term make any alteration or addition whatsoever either externally or internally, structural or otherwise to the demised premises without consent to the landlord. It would appear to be an alternative to the main claim.

279. The claim by the Claimants against the Second Defendant is made under Clause 3.14.5 of the Underlease dated the 24th September 1997 via Clause 5 of a licence to underlet of the same date and under Clause 3.9 of a licence for alterations dated 24th September 1997.

280. The Claimant's case is that Clause 3.14.5 of the Underlease required the Second Defendants (unless the landlord directs the sub-tenant to the contrary) to remove any alterations, additions or improvements to the demised premises and all tenants fixtures, fittings, furniture and effects at the expiration of the term, to make good any damage caused by such removal and to reinstate the premises "to accord with the Schedule of Works and otherwise in accordance with the obligations of the tenant hereunder."

281. By Clause 3.9 of the Licence for Alterations, the Second Defendants covenanted with the landlord directly:

"At the end or sooner determination of the term granted by the Underlease or in the event of this licence becoming void, to reinstate and restore the underlet premises if so required in writing by the landlord or the tenant in accordance with the provisions of Clause 13.14.5 of the Underlease."

282. In respect of notice, the Claimants and the First Defendant rely on the Schedule of Dilapidations dated 6th February 2008 served by the Claimant against the First Defendant in March 2008 and by the First Defendant on the Second Defendant on the 7th May 2008. The Second Defendant now concedes that proper notice has been given.

283. The Claimants' case against the Second Defendant is that by reason of the Clauses which I have set out, the Second Defendant undertook direct obligations to the Claimant. On that basis the Claimants were entitled to maintain a claim for reinstatement unless such a claim was unreasonable in all the circumstances where, for example, the expense of the work involved would be out of all proportion to the benefit to be obtained.

284. The Claimants contend that in this case such a claim is reasonable because the Claimants did in fact dismantle the First and Second Defendants' fixtures and fittings and it is clear that the refurbishment was a consequence of the condition in which the property had been left.

285. On the basis of my analysis of the law, I have made the necessary findings in respect of the factual matters. The Claimants are entitled to recover against the 2nd Defendant directly the cost of the dilapidations calculated on the common law basis. If clarification is needed I will amend the judgment accordingly.

The First Defendant's claim against the Second Defendant

286. The First Defendant's claim against the Second Defendant depends on an analysis of a rather complicated network of agreements. By an Underlease dated 25th September 1997 the premises were sub-let by the predecessors in title of the First Defendant to the Second Defendant except for the main structure, the common parts and the shop units.

287. By Clause 4.4.1 of the Underlease under the heading "Repair and Maintenance", the obligation to repair and keep the main structure in good and substantial repair was imposed on the First Defendant. By Clause 5.3 the First Defendant also had an obligation to provide services as defined in Part 3 of the Fourth Schedule, which included, in particular, maintaining the common parts.

288. Under this agreement the Second Defendant was under an obligation under Part 1 of the Fourth Schedule to pay a service charge which would reflect 90.75% of the First Defendants' annual expenditure on service charges (see Clause 5.3 and paragraph 9 of Part 1 of the Fourth Schedule). The balance of 9.25% would appear to relate to the shop units which were not included in the Underlease.

289 A Deed of Waiver was also entered into between the First and Second Defendants on the 25th September 1997, the same day as the Underlease. Annexed to it, as an integral part of the agreement, was what described in Paragraph 1.1.2 of the Deed of Waiver as a Substitute Draft Lease. Under the Deed of Waiver the parties agreed in Clause 2 that until the 20th March 2008 the Lease shall take effect and be read and construed as if the provisions contained in the Substitute Draft Lease in relation to or concerning the Service Charge were substituted for the provisions relating to or concerning the Service Charge set out in the Lease and as if the rights as set out in the Substitute Draft Lease to the Tenant to provide the Services and the Additional Items were granted thereby."

290. Under the Substitute Draft Lease (attached to the Deed of Waiver) a separate repairing obligation under Clause 3.7.2 of the Head Lease was imposed on the Second Defendant. This was the specific obligation to repair and to keep the Main Structure in good and substantial repair and it was entered into as a separate covenant to that requiring the Second Defendant to keep the demised premises(i.e. excluding the Main Structure) in good repair(Clause 3.7.1). Clause 3.7.2 provided as follows "Without prejudice to Clause 3.7.1 above to repair and keep the Main Structure in good and substantial repair …"

291. Clause 3.8.1 of the Substitute Draft Lease required the Second Defendants in the years commencing 24 June 1997 and 2002 "and also in the last year of the Term(howsoever determined) to paint and/or treat as appropriate the exterior of The Complex (except the shop windows or fascias of the shop units in a good and workmanlike manner…).

292. Under Clause 1.1.5 of the Substitute Draft Lease The Complex means "the land and buildings demised by the Head Lease … and includes the Common Parts…"

293.By Clause 3.9.1 the Second Defendant was under an obligation prior to carrying out the Tenants obligations under Clause 3.7.2 and Clause 3.8.1 to consult with the landlord and take account of its reasonable requirements.

294. By Clause 3.9.2, before carrying out the works pursuant to Clauses 3.7.2 and 3.8.1, the Second Defendant was required to provide three estimates and produce them to the Landlord for approval.

295. By Clause 3.32 the Second Defendant agreed "At the expiration or sooner determination of the term quietly to yield up the Demised Premises to the Landlord in such repair and decorative condition as shall accord with full compliance by the Tenant with its covenants under this Lease."

296. The obligation to provide these services was also placed on the Second Defendant by Clause 5.3 and paragraph 1 of Part 2 of the Fourth Schedule. In return, the Second Defendant was entitled to recover the service charges from the First Defendant (paragraph 2.2 of Part 2 of the Fourth Schedule).

297 .Annual Expenditure, the basis in which the service charge was to be completed was defined in Paragraph 3 of Part 1 of the Fourth Schedule as follows: "The aggregate of all costs, fees, expenses and outgoings reasonably incurred by the Tenant during the relevant Financial Year in complying with its obligations under Clauses 3.7.2 and 3.8.1 and 3.9 hereof. The services to which the service charge relates is set out in part 3 of the Schedule. They relate to maintaining Common Parts and Landlord's fixtures and fittings "without prejudice to the obligations under Clauses 3.7.2 and 3.8"

298. Under the Substitute Draft Lease, the service charge percentage to be paid by the First Defendant was also to be 9.25% of relevant Annual Expenditure (see paragraph 1 of Part 1 of the Fourth Schedule).

299. Under the definition of Annual Expenditure in paragraph 3 of Part 1 of the Fourth Schedule, the First Defendant contends that the Second Defendant was specifically entitled to include, within its service charge demand, sums referable to complying with the obligation under Clause 3.7.2 i.e. its obligation to keep the main structure in repair (and para 3.8.1 decorate the exterior). Paragraph 1.1 of Part 3 makes it clear that the obligation to keep the main structure in repair was something which the Second Defendant could charge as relevant services. The Second Defendant contests this interpretation on the basis that, if this interpretation was correct, there would have been no need for the later Deed of Variation.

300. By a Deed of Variation dated 13th September 2006,(Clause 5.1) the First and Second Defendants agreed that the then existing Clause 1.1.3 in the Deed of Waver would be deleted(reference to the expiry dates in Clause 2) and that, from that date, the Deed of Variation was to be extended for the period of the underlease as follows:

"1.1.3 Waiver Period means the period from 25th September 1997 expiring on the date on which the term expires". The term was defined by the Clause 2.2 as commencing on 25th September 1997 and expiring on 20th June 2008.

301. In addition it was also agreed in the Deed of Variation that the existing Clause 2 in the Deed of Waiver should be deleted and be replaced by the following clause:

"2. Waiver. The Landlord and the Tenant agree that until the date on which the term expires the lease shall take effect and be read and construed as if the provisions in the Substitute Draft Lease were substituted for the provisions set out in the lease".

302. Also deleted was the Service Charge Reconciliation in Clause 5 of the Deed of Waver. This was achieved by Clause 5(3) of the Deed of Variation.

303. The First Defendants' case is that the obligation to repair the main structure was imposed upon the Second Defendant by the Substitute Draft Lease and in so far as the First Defendant was liable to the Claimant in respect of disrepair of the main structure, the Second Defendant is liable to indemnify the First Defendant.

304. The Second Defendant acknowledges that it had obligations to repair and reinstate the premises which mirrored those contained in the First Defendant's lease. It claims that it was not a full indemnity and that it ceased on the termination of the Underlease.

305. The Second Defendant claims that thereafter it has no liability for the main structure. It did contend that the Deed of Variation, on its true construction, only substituted the provisions of the Substitute Draft Lease until the day prior to the expiry of the Second Defendant's term so that at the term date, the provisions of the original underlease applied. Therefore the provision in the Substitute Draft Lease to keep the "main structure" in good and substantial repair did not apply at the term date. In subsequent argument Mr Hutchings appeared to abandon this contention. He was right to do so.

306. The Second Defendant's main argument is that Clause 3.32 of the Substitute Draft Lease, properly construed, sets out in full the covenant to yield up the demised premises. The main structure is not part of the demised premises. Therefore it claims that the main walls, structural parts, doors, cladding etc are all excluded from the Second Defendant's obligations at the end of the term.

307. Thirdly the Second Defendant contends that the obligations in Clauses 3.26.1 and 3.26.2 of the Substitute Draft Lease relate to acts or omissions in the demised premises only(Clause 3.26.1) and only in respect of any breach or non observance of matters to which this demise is subject.

308. The Second Defendant contends that this apportionment of risk accords with commercial common sense. The First Defendant remains solely responsible at its term date for any cladding repairs. The Second Defendant contends that, on its proper construction, it had no obligation to maintain the main structure until the Deed of Variation in September 2006 and that it is highly unlikely that the Second Defendant would have been willing to take on liability for the main structure when, for the majority of the period of the ten year underlease, that responsibility rested with the First Defendant.

309. Finally, it is argued that the First Defendant remains liable to the Second Defendant for breaches of its obligations to the landlord up to the time of 2006

variation. The Second Defendant is entitled to set off against the First Defendant's claim, damages which the Claimant may recover for pre-2006 breaches of the underlease. This set off would result in relieving the Second Defendant of any liability for damages other than in relation to the demised premises.

310. In response Mr Harry submits, and I agree, that the effect of Clause 2, 3.1 and 3.2 of the Deed of Waiver is to reverse the service charge obligations from those imposed in the Underlease, thus imposing on the Second Defendant the general repairing obligations under the lease. These include the obligations under Clause 4.4.1 and 4.4.2.

311. Mr Harry notes Clause 3.7.2 of the Substitute Draft Lease under which the Second Defendant covenants "without prejudice to Clause 3.7.1 above to repair and to keep the main structure in good and substantial repair". Clause 3.7.1 refers specifically to the demised premises. Clause 3.7.2 does not.

312. At Clause 3.9 of the Substitute Draft Lease, the Second Defendant covenants:

"Whenever practicable prior to carrying out any work under the tenants' obligations contained in Clause 3.7.2 and 3.8.1(to paint the exterior of the building) to consult with the landlord…to procure three estimates and to produce them to the First Defendants".

313. Mr Harry contends that although there is no doubt that the main structure is not demised to the tenant, nevertheless the tenant has repairing obligations in relation to the main structure from 25 September 1997.

314. Mr Harry also contends that it was a critical part of the agreement between the First and Second Defendants, set out on the face of the Substitute Draft Lease, that the Second Defendant undertook the obligation to repair the main structure. In order to support this obligation, the Second Defendant was given the right to erect scaffolding which had been previously been given to the First Defendant. The Second Defendant was required therefore to keep the premises in repair. Mr Harry's case is that the Second Defendant was in breach of that covenant and that the First Defendant is entitled therefore to pass on the cost of fulfilling that obligation to the Second Defendant. This obligation was imposed on 25th September 1997 in the series of agreements. The purpose of the Underlease was to secure the position of the Claimants.

315. Mr Harry submitted that there was nothing unfair or illogical in the provision since it was now for the Second Defendant to carry out the service obligations for which it was entitled to recover a substantial sum through the service charge from the First Defendant. This included a charge for repairing the main structure. In so far as the Second Defendant failed to discharge its obligation to repair the main structure, the First Defendant was entitled to recover the cost of their breach of obligation from them.

316. Mr Hutchings' final position is that he agrees that under the Deed of Variation, in 2006 the Second Defendant assumed the obligation to repair the main structure and to paint the exterior of the building. Before that date the obligation remained with the First Defendant. Any breaches of covenant before 2006 were the First Defendant's

responsibility. However, although the Second Defendant was responsible for the repair of the cladding from 2006 onwards to the 20th June 2008, it was not under an obligation to deliver up the premises in repair when vacant possession passed to the Claimant four days after the termination of the lease.

317. The Second Defendant accepts that between 2006 and 20th June 2008 it was plainly in breach of its obligation to repair the main structure but claims that this is of no effect at the termination of the lease and does not provide any continuing rights for the First Defendant against the Second Defendant.

318. Mr Hutchings submits that the provisions in the Deed of Variation had value because it could be enforced by specific performance or by requiring the Second Defendant to carry out the work during the currency of the lease. If no action had been brought by the term date then the requirement in relation to delivery up only related to the demised premises and not to the main structure including the cladding.

319. Having considered the helpful submissions of both parties I conclude on this issue.

a) The Deed of Waiver and the Substitute Draft Lease both dated 25 September 1997 did impose obligations on the Second Defendants under Clause 3.7.2, 3.8.1 and 3.9 in relation to maintainence of the exterior of the building and in particular the cladding. To hold otherwise would be to disregard substantial parts of the Draft Lease which were intended to have effect.

b) The Deed of Waiver, the Substitute Draft Lease and the Deed of Variation impose duties on the Second Defendants in relation to the common parts and exterior of the premises which were separate to those relating to the demised premises.

c) Clause 3.32 related to delivering up of the demised premises. It could not and did not relate to the Second Defendant's other obligations since, in respect of other parts of the premises, there was nothing to deliver up. The Clause has no impact on the Second Defendant's obligations under Clauses 3.7.2, 3.8.1 and 3.9.

d) These clauses placed a contractual duty on the Second Defendant to carry out its obligations under Clauses 3.72 and 3.8.1. These were separate obligations to those under the Underlease since they could not be supported by a grant of land rights. They were entered into for consideration and were therefore enforceable in contract.

320. A separate argument is raised over the claim relating to the cradle. The Second Defendant claims that it is included within the definition of "Service Apparatus". It forms part of the common parts and is not demised to the Second Defendant. The First Defendant claims that the cradle is included in the definition of "Complex Maintenance Equipment and Plant" and is included within the Second Defendant's obligations.

321. Under Clause 1.1.34 of the Substitute Draft Lease, and in identical form in other places, "Service Apparatus" is defined as follows:

"Service Apparatus means the following which may now or at any time during the Term be installed or serve the complex and be used for or in connection with the

storage passage and supply of services to or from the complex including (but without prejudice to the foregoing):-

1.1.34.1 All drains sewers pipes wires cables and other conducting media; and the plant housing and all fixtures apparatus and installations"

322. The Second Defendant contends that the cradle bolted on to the top of the roof structure is a landlord's fixture and comes within the definition of "Service Apparatus".

323. The Second Schedule of the Substitute Draft lease headed "Rights Reserved to the Landlord" assists in the definition of Service Apparatus. It provides as follows:

"1. Service Apparatus

The right to the free and uninterrupted passage and running of main services drainage telephone and other services or supplies from and to the Shop Units and other parts of the Complex and any adjoining and neighbouring property in and through the Service Apparatus and the right to connect ducts."

324. Window cleaning cradles are referred to in the First Schedule under Clause 7 in relation to the requirement to enter the premises to perform obligations under the Underlease. This has nothing to do with the maintenance of services in the sense of drains, sewers, telephones etc or the plant which is necessary to provide them.

325. The First Defendant contends that the cradle comes within the definition of Complex Maintenance Equipment and plant. This is defined in Clause 3 of Part 3 as "Supplying, providing, purchasing, hiring maintaining, reviewing, replacing, overhauling and keeping in good and serviceable order and condition all fixtures bins receptacles tools appliances materials equipment and other things which the Tenant may reasonably consider desirable or necessary."

326. The First Defendant contends that the cradle is or may be reasonably required in relation to the Second Defendant's obligation to clean the building and is included within the definition set out above.

327. I conclude that the First Defendant is correct. There is an apparent confusion because the Substitute Draft Lease uses the term "service" in two different senses. In the definition of Service Apparatus it uses the term service in connection with provision of light, heat, water, drainage, telephone etc i.e. what used to be called public services. These are not the Second Defendant's obligations. Clause 3 of Part 3 refers to services in the sense of obligations which the Second Defendant is obliged to perform. The Second Defendant is required under Clause 3.8 to redecorate and clean the complex. The keeping of the Cradle in good and serviceable condition is part of this requirement. I therefore conclude that the Second Defendant is liable to pay the sum of £6,895.83 for the repair of the Cradle.

<u>Cost of Schedule of Dilapidations</u>

328. This and the next issue were argued before me at a further hearing. The Claimants claim the cost of producing the Schedule of Dilapidations in the sum of £18,000.

329. The Defendants rely on the Judgment of Lewis J in Maud v Sanders [1943] 2 All ER at 783. In that case the learned Judge declined to make any award of damages for the preparation of the Schedule of Dilapidations. He appears (at p784) to have accepted the Defendant's characterisation "that £20 is not really damages for the breach of covenant because it does not represent damage to the reversion". He appears to have rejected the claim and argument that it was only due to the fact that the lesee had broken his covenant to deliver up in good and proper repair that the landlord had had to incur that expense in order to assess the damage to which he was entitled for the breach of the Defendant's covenant.

330. In Lloyds Bank v Lake [1960] WLR 884 His Honour Sir Brett Cloutman VC QC had to consider the same issue. He concluded that he must follow Maud v Sanders even though the correctness of the decision had been "somewhat doubted" by learned textbook writers. He noted that the practice was to address the issue of who pays for the Schedule of Dilapidations in the lease and thought that this was because the law and practice was as Lewis J stated. He concluded "In this state of the authorities and of the practice as I know it, I think I must follow the decision in Maud v Sanders and if a different practice is to be laid down this must be by the Court of Appeal."

331. The current edition of Woodfall's Law of Landlord and Tenant (2010) and the 4th Edition of Dilapidations The Modern Law and Practice(with at least one author in common) set out the decision in Maud v Sanders as established law.

332. The Defendants say that I should follow it. The Claimants contend that I should start my considerations with the approach taken by the Court of Appeal in Joyner v Weeks and the 1927 Act. It is argued that The Court (and the Parties) must first consider the question of Common Law damages and the consider damage to the reversion. An integral part of the consideration of a landlord's claim at the end of the lease is the Schedule of Dilapidations. This is not served as part of any litigation but in the pre litigation phase as an integral part of establishing a claim.

333. The sum claimed is also in dispute. The Claimants claim the sum of £18,000. They rely on the evidence of Mr Crader who said in his statement that from various copy invoices it can be seen that the Claimants paid the sum of £21,997.71 in respect of the dilapidations schedules. On this basis the Claimants contend that they should recover the sum claimed i.e. £18,000. They note that Mr Crader was not cross-examined on this issue.

334. The Defendants claim that the sum is excessive. They rely on Mr Moon's Report in which he says that the sum is excessive. He concludes (Para 7.15.5) that in his opinion a reasonable sum as the Claimant's surveyor for preparing the Schedule of Dilapidations should not exceed £6,000. "That would be a reasonable fee on the assumption that all items were well founded or alternatively the fee should be reduced proportionately to reflect reduction of the sums claimed."

335. I deal first with the factual position and then the legal principle. There are four Invoices relied on dated 18 December 2007, 23 April 2008, 30 June 2008 and 22

October 2008. The first Invoice is stated to relate to updating the Schedule of Dilapidations. The second invoice refers to "interim fee for ongoing dilapidations advice, including attendance at meetings." The third Invoice relates to "Interim fee No2 for work in connection with outstanding dilapidations matters between 23 April and 30 June 2008". These three Invoices which include work after the premises have been delivered up amount to £10,874.04 including VAT or £8,259.50 excluding VAT. It is evident from the description of the work that it may well have included other matters than the drawing up of the Schedule of Dilapidations.

336. The final Invoice dated 22 October 2008 is headed "Interim invoice for professional services rendered between 1 July and 21 October 2008." It amounts to the sum of £11,123.67 including VAT. It makes no reference to the preparation of a Schedule of Dilapidations. I find that the Claimants have not proved on the balance of probabilities that this sum is related to the preparation of a dilapidations schedule.

337. Bundle F sets out a number of Schedules of Dilapidations and Schedules of Reinstatement. It is clear that the Claimants cannot recover the cost of each of these Schedules.

338. I accept Mr Moon's evidence that the reasonable cost of preparing Schedules of Dilapidations should not exceed £6,000 plus vat. This seems to provide fair remuneration.

339. I note that the relevant Schedule of Dilapidations relied on by the Claimants for notice is that dated 6 February 2008.

340. I have considered carefully the issue of law both in relation to the Authorities and the textbooks. I cannot see any reason of principle as to why a reasonable sum should not be recoverable from a tenant for serving a Schedule of Dilapidations at the end of a lease. The Schedule is required as a direct consequence of the tenant's breach of covenant. The diminution of value only operates as a cap. Lord Lloyd in Ruxley made it clear that in many cases the cost of repair would be the obvious measure of damage. Lewis J's analysis of general principle cannot survive the more detailed analysis of Lord Lloyd in Ruxley set out in particular at Paragraphs 25 and 26 of this Judgment.

341. On my earlier analysis I have found that the position is no different in cases under Section 18 of the 1927 Act. I find therefore that in this case the reasonable cost of preparing a Schedule of Dilapidations is the direct consequence of the tenant's breach and is recoverable. Subsequent costs may be recoverable in the litigation but this was not argued before me and are, in any event, a matter for later assessment.

342. I therefore award £6,000 plus VAT under this head of damage.

Interest

343. There is no dispute that the Claimants are entitled to interest from 24 June 2008. The dispute is as to the appropriate rate of interest.

344. I adopt the approach of Jackson J in Claymore Services v Nautilus Properties [2007] BLR 452 at 461. Jackson J reviewed the Authorities. He took as the

appropriate rate of interest that which in his discretion was reasonable, bearing in mind all the relevant circumstances. These circumstances included, in particular, the rate which the Claimants would expect to have been charged for borrowing the sum in the judgment -see Forbes J in Tate and Lyle v GLC [1982] 1WLR 149 at 154.

345. In support of its claim the Claimants have exhibited the documents in relation to the loan facility of £4m for the refurbishment which they did carry out. The figure was 3% over LIBOR. The Claimants say that this is in line with market rates and that it is notorious that during the "Credit Crunch" it has not been possible to arrange borrowing at rates close to base rates.

346. The Defendants say that the figure should be not more than base rate plus 1 per cent in line with the authorities in McGregor on Damages Eighteenth Edition where McGregor maintains the view that the norm is one per cent over base rate.

347. At Paragraph 15-116 the learned author notes that "The London Inter-Bank Offered Rate (LIBOR) has very much come to the fore as an appropriate interest rate to award. However it has tended to be utilised by agreement of the parties rather than by adjudication of the Court."

348. In this case there is no basis on which to infer that the Claimants would have paid a lower rate if they had had to borrow the smaller sum in this judgment rather that the £4million. The Defendants in argument confined themselves to an assertion that the sum should be lower without presenting any reasoned argument to support their assertion. I award interest at 3 per cent per annum over LIBOR.

Conclusions

349. I adopt Mr Small QC's helpful analysis in his final oral submission. The valuers are all agreed that, at the valuation date, the premises in repair had a value of £13.9 million because the purchaser would not do any major refurbishment. Out of repair, the value was substantially less because either the repairs had to be done or if they were not carried out, there was a case for doing a substantial refurbishment.

350. The notional purchaser might well decide to upgrade the premises to some extent irrespective of the state of repair. Mr Crader gave evidence that, in common with other buildings which he had purchased, he would have done some minor upgrading. To the extent to which that upgrading would have superceded the repair work which the tenant would have carried out the cost must be deducted from the reasonable cost of the repair. I am told that there are no such costs to be deducted in this case.

351. On the basis of the substantial agreement which the experts have been able to reach and my findings on the disputed items the experts have now reached agreement as the figures which are annexed as a schedule of the judgment.

352. I find for the Claimants against both Defendants. I find for the First Defendants against the Second Defendants on the issues in dispute between them. The Schedule of damage based on these findings is annexed to this judgment.