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Shortlands Investments Ltd *v* Cargill plc

OFFICIAL REFEREES' BUSINESS

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JUDGE BOWSHER QC

[1995] 08 EG 163

Landlord and tenant — Terminal dilapidations — Effect of tenant demand for new specifications — Negative reversionary value — Whether cost of repairs measure of damages — Proper application of limit applied by section 18(1) of the Landlord and Tenant Act 1927 to negative reversionary value

By an underlease dated September 11 1981 the plaintiffs held a term for 99 years (less 10 days) from June 24 1981 of 150,000 sq ft of office premises the rent for which was agreed at £3,396,000 in respect of the September 1991 rent review. By a subunderlease dated January 31 1985 the defendants held a term of parts of the building giving up possession of most parts of their demise upon the exercise of a break clause on September 29 1991. By the subunderlease the defendants covenanted to keep the interior of the demised premises in a good and tenantable repair and condition and to yield up in such repair and decorative conditions in accordance with the covenants. Three of the floors of the premises were eventually let to W Ltd in October 1992 to whom was paid £690,000 by the plaintiffs, being an estimate of the sum required to bring the premises up to the normally accepted letting condition. The plaintiffs claimed damages from the defendants based on a terminal schedule of dilapidations, contending that the cost of carrying out the disputed repairs was the proper measure of damages. Because the plaintiffs had not carried out any repairs, the defendants submitted that the plaintiffs had not suffered any loss and the cost of repairs was not the appropriate measure: the rule in *Joyner* v *Weeks* [1981] 2 QB 31 should not be applied in the light of *dicta* in *Tito* v *Waddell (No 2)* [1977] Ch 106 at p332. Further, that section 18(1) of the Landlord and Tenant Act 1927 limited the diminution in value of the reversionary interest because in current market conditions incoming tenants required specification changes, which would render unnecessary certain repairs.

Held*: Judgment was given to the plaintiffs for £294,934.47. At common law the damages are the diminution of the landlords' reversionary interest and events after the determination of the lease do not affect the matter except that they may be evidence of what was in prospect at the time the lease came to an end. Having regard to the necessity to pay the sum to W Ltd, the plaintiffs suffered damages notwithstanding the negative value of their reversionary interest. In the present case, the cost of repairs is the best possible guide in the assessment of damages. As the defendants were liable for only some of the items of disrepair, the only way of assessing that part of the difference in value of the reversion was by examining the cost of repairs and then applying the limit imposed by section 18(1) of the Landlord and Tenant Act 1927. In determining the diminution in value for the purposes of the first limb of section 18(1), a test derived from *Cunliffe* v *Goodman* [1950] 2 KB 237 was appropriate: viewing the question as at the date when the covenant ought to have been performed, was it inevitable, either because of a settled intention of the landlords, or for some other extraneous reason that the premises would be pulled down or altered in such a way as to cause diminution of the value of the reversion. On the evidence, what was bound to happen and what was reasonably foreseeable was that the incoming tenant would use the disrepair as a bargaining point so that the value of the plaintiffs' reversion was diminished. In considering the application of section 18(1) to the gross costs of repairs and loss of rent, the plaintiffs' reversionary interest always would have had a negative value and one had to assume a transaction under which something was paid to the transferee of the interest. The diminution in the reversionary interest was the difference between the amount which would have been paid by the willing transferor of that interest to the willing transferee if the premises were delivered up in a condition in conformity with the covenants and the amount paid out by the willing transferor to the willing transferee if the premises were delivered up in their actual condition. Because the common claim was greater than the diminution in value so assessed, judgment would be for the latter.

This was a claim for damages by the plaintiffs, Shortlands Investments Ltd, against the defendants, Cargill plc, on terminal dilapidations relating to premises at 3 Shortlands Road, Hammersmith, London.

Michael Driscoll QC and Erica Foggin (instructed by Forsyte Kerman) appeared for the plaintiffs; Joseph Harper QC and Jonathan Karas (instructed by Slaughter & May) represented the defendants.

Giving judgment, **JUDGE BOWSHER QC** said: The plaintiffs claim damages for dilapidations on the termination of a tenancy of office premises. The claim is now limited to £304,599 plus interest from September 29 1991.

The defendants admit that there were some wants of repair and decoration on the termination of the tenancy, but dispute other allegations of disrepair. It is agreed that the cost of remedying the defects admitted by the defendants would be in excess of £50,000. On the latest admissions, the figure admitted would be about £56,386.77.

The defendants say that despite their admissions, and despite whatever else might be proved against them, they are not liable to pay anything to the plaintiffs for two reasons:

1. At the time of the termination of the tenancy, it was inevitable that any incoming tenant would require a new fit-out of the premises, which would remove any disrepair.

2. Such disrepair as there was did not give rise to any diminution in value of the plaintiffs' reversion, which had a negative value.

The plaintiffs contend that there was a diminution in value of the reversion equivalent in amount to the total of both the cost of remedying the breaches and the loss suffered while the remedial works were to be carried out.

The premises

At the London end of what has been called "the M4 corridor" there have been built a number of office blocks. In particular, in Hammersmith, there was a considerable quantity of building in the 1980s. In about 1980, the building the subject of this action was completed. It is an impressive glass-clad building at 3 Shortlands Road, rated by one of the witnesses as nine out of 10 for Hammersmith office buildings.

The building was constructed in 1979-80. It is a substantial office block providing approximately 150,000 sq of office accommodation on ground, mezzanine and nine upper floors. It has a leisure centre and restaurant on the ground and mezzanine floors for the use of occupiers. Those facilities are also available to a small number of members of the public on a membership basis. The building comprises four wings (the north wing, the south wing, the east wing and the west wing) arranged around a central core. Each floor consists of approximately 16,000 sq ft of accommodation. The office accommodation is fitted throughout with variable air-volume air-conditioning, perimeter convector heating, three-compartment underfloor trunking and suspended ceilings. The building is conveniently located in that it is within minutes (by car) of the M3, M4 and M40 motorways, and within minutes (on foot) of the Metropolitan and District Underground lines.

Leases and underleases of the premises

There have been some complex property transactions in relation to

the plaintiffs' interest in the property. Those transactions are of little importance to the present action, having taken place within one group of companies and the owners of those companies. The claim is effectively an action brought by a firm of consulting engineers, Sir William Halcrow & Partners, through a company which it owns.

It is agreed that, in relation to the premises in question, the plaintiff company is to be regarded as an investment company.

The freeholder of the building is Hammersmith and Fulham London Borough Council. On September 11 1981 the borough granted a lease of the whole of the building to Norwich Union Life Assurance Society for a term of 99 years from June 24 1981. Norwich Union granted an underlease on the same day, September 11 1981, of the whole of the building to the partners of Sir William Halcrow & Partners for a term of 99 years less 10 days from June 24 1981. That is the plaintiffs' underlease.

The partners of Sir William Halcrow & Partners occupied the premises and other parts of the building from about 1981 until about 1985. From early 1985 Sir William Halcrow & Partners continued to occupy only small parts of the building.

On October 30 1990 the plaintiffs took an assignment of the underlease of the building.

The defendants' subunderlease, the subject of these proceedings, was granted on January 31 1985 by partners of Sir William Halcrow & Partners to the defendants.

On October 28 1990 the defendants granted a sub-subunderlease of the south wing of the seventh floor to General Electric Technical Services Co for a term of years from June 24 1989 to September 28 1996.

On December 21 1990 the defendants exercised a break option contained in clause 9(ii) of the subunderlease bringing their interest in the property personally occupied by the defendants to an end on September 29 1991.

General Electric Technical Services Co remained in occupation of the south wing of the seventh floor after September 29 1991. Their leasehold interest contains obligations in respect of repair and alterations in similar terms to the obligations in the defendants' subunderlease and no claim is made by the plaintiffs in respect of the south wing of the seventh floor.

The present action accordingly concerns only the fifth, sixth and a part of the seventh floors of the building.

It is agreed between the parties that the relevant date for the assessment of damages, if any, is September 29 1991.

The defendants' subunderlease, in clause 3, contains the following terms:

> The tenant . . . hereby covenants with the landlords as follows: . . .
>
> (iii)(a) To keep the interior of the demised premises including the internal plaster faces of the boundary walls that enclose the demised premises and all additions thereto and the Landlord's fixtures thereon properly cleansed and in good and tenantable repair and condition (damage by Insured Risks excepted)
>
> (b) To renew as necessary the carpets laid in the demised premises to such a standard as shall be reasonably required by the Landlords and in the case of the last renewal before the determination of this subunderlease in such colour as shall be reasonably required by the Landlords
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> (iv) In or before One thousand nine hundred and eighty-six and thereafter once in every five years of the term (but no more than five years shall elapse between each successive painting and treating as set out hereunder) and in the last year of the term (howsoever determined) in a proper and workmanlike manner to paint with two coats of good quality paint (the tint or colour thereof used in the last year of the term to be approved by the Landlords) paper whitewash colourwash distemper grain varnish french or wax polish and otherwise to decorate to the reasonable satisfaction in all respects of both the Head Lessor's Surveyor and the Landlord's Surveyor such parts of the interior of the demised premises as have been previously or usually or which ought to be so treated and as often as may be necessary to clean and treat in a suitable manner for its maintenance in good condition all the inside wood and metal work and polished stone not requiring to be painted polished or distempered and to clean all tiles glazed bricks and similar surfaces . . .
>
> (x) Not without the prior written consent of the Landlords and the Superior Landlords (such consents not to be unreasonably withheld) . . . to cut maim or injure or permit or suffer to be cut maimed or injured any of the walls or structural members of the demised premises or the buildings nor without such consents to make or maintain or permit or suffer to be made or maintained any other alteration or improvement or any external projection on the front thereof or any material change or addition whatsoever in or to the demised premises (including the cables wiring light fittings and the Landlords' fixtures therein) or any part thereof (PROVIDED ALWAYS that the Tenant shall be entitled to carry out works of an internal non-structural nature without such consents) . . .
>
> (xxxiii) To yield up the demised premises with all Landlords' fixtures and additions thereto wires cables and lighting apparatus and pipes at the determination of the term in such repair and decorative condition as shall be in accordance with the covenants hereinbefore contained.

There are no terms of the defendants' lease requiring the tenants to reinstate internal non-structural alterations at the end of the term. As a result, it has been common ground that it was permissable for the tenants to remove extensive non-structural alterations without making good the unsightly results of the removal.

There are terms of the plaintiffs' lease which forbid assignment or other disposal by them of parts of their tenancy except by subletting on a full market rent. Those terms contribute to the difficulty of assessing damages.

History after exercise of the break option

At the same time as the defendants exercised their break option, other tenants also exercised break options so that on September 29 1991 almost half of the building became empty. The exercise of the break options was no doubt connected with the fact that the commercial property market was collapsing badly. In this action it has been described as "in free fall", and in September 1991 no one knew where it would all end. The position of the plaintiffs as pig in the middle, having to pay rent subject to an upwards-only revision and other outgoings with much reduced income coming in, was described by one of their advisers as "dire". To make matters worse, overbuilding in the 1980s resulted in there being much unoccupied new office space and the plaintiffs were competing for tenants with the owners of brand new buildings.

The detailed history is as follows:

The building was occupied immediately prior to September 29 1991 as follows:

Ground floor (south & west wings)

Reception area and otherwise occupied by Halcrow Fox and by the building superintendent.

Ground floor (north east wings)

Let to OKI whose lease expired on September 28 1991 when OKI vacated

1st and 2nd floors

Let to Chase Manhattan Bank NV who exercised an option to break their lease effective Septembver 29 1991

3rd floor

Let to ITM Corporation Ltd

4th floor

Let to General Electric

5th, 6th floors west and south wings of 7th floor

Let to the defendants

South wing 7th floor

Sublet by defendants to General Electric, who remained in occupation after Spetember 29 1991

North & East wings of 7th floor, 8th and 9th floors

Let to General Electric

On December 1990 the defendants served notice of their intention to exercise their contractual right to break the lease with effect from September 29 1991.

In May 1991, Kemp & Hawley, the plaintiffs' managing agents, gave advice to the plaintiffs in relation to the building as a whole. Mr Peter Beckett FRICS, of that firm, gave evidence both as to the facts of what he saw and did at the relevant time, and as to opinion of valuation. He advised that the defendants' premises were fitted out to

SHORTLANDS INVESTMENTS LTD v CARGILL PLC *(continued)*

a good standard, but that there would be a need to consider serving the defendants with a schedule of dilapidations related to the end of the tenants' tenancy. By mid-1991, the plaintiffs faced the prospect of some 45% of the office space in the building becoming vacant by September 29 1991 at the same time as an upwards review of the rent payable by them under their own underlease of the whole of the building. As well as losing the defendants as tenants of the premises the plaintiffs were to lose OKI as tenant of part of the ground floor and Chase Manhattan's first and second floors. It was recognised by Kemp & Hawley in May 1991 that the condition of Chase Manhattan's first and second floors was poor and worse than that of the defendants' and OKI's. Chase Manhattan used their part of the premises as a training centre and the poor state of repair and decoration was obvious even before they had moved out. In the case of other tenants, the disrepair and need for redecoration was more obvious after they had moved out. When tenants' fittings and furniture were moved, deficiencies in the decorations and state of repair were revealed. Mr Beckett described the defendants as good tenants. I accept the evidence of Mr Beckett in these as in most other respects.

On September 5 1991 the plaintiffs served a schedule of dilapidations on the defendants following an inspection of the premises by Watkinson & Cosgrave, chartered building surveyors. The defendants did not attempt to do all the work specified in the schedule and by September 29 1991 the defendants had vacated the premises save that their contractors returned shortly afterwards to complete the removal of certain items of equipment. The premises were reinspected by Watkinson & Cosgrave on October 30 1991 and a revised schedule of dilapidations was produced as a result of that reinspection. Evidence was given in support of those schedules by Mr J W Goedecke FRICS of Watkinson & Cosgrave. Since service of those schedules, the plaintiffs have conceded that the defendants are not obliged to remove the non-structural partition walls, which they installed, nor to replace carpets. As I have already indicated, some of the items in the schedules are admitted (subject to allegedly overriding defences) and some are disputed.

As at September 29 1991 the plaintiffs had not made any decision as to what works, if any, they would carry out to the premises the subject of this action. Those premises together with the other vacant office space in the building were being marketed as they were. In the meantime the plaintiffs, through Kemp & Hawley, were negotiating with Norwich Union, the headlessee, whose agents were Strutt & Parker, with regard to the market rent for the whole of the office space in the building as at September 29 1991. For this purpose Kemp & Hawley were seeking as low a figure as possible and they suggested to Strutt & Parker on November 13 1991 a rent of £22.50 psf. Strutt & Parker rejected that figure as quite unacceptably low.

In December 1991 Kemp & Hawley advised the plaintiffs to settle their rent review negotiations with their own tenants and their own landlord on the footing that the agreed market rent for office space in the building as at September 29 1991 was £23.50 psf. Kemp & Hawley advised the removal of the partitions and the carpets from the first and second floors formerly let to Chase Manhattan which "present very badly", but did not advise that any work needed to be done to the premises formerly occupied by the defendants or to OKI's former office space for the time being.

In January 1992 the plaintiffs and Norwich Union, their landlord, agreed the market rental value of the building as at September 29 1991 at £3,396,000 pa, which was considered to establish "the market rental value of the building let on conventional occupational leases on a floor by floor basis" at £23.50 psf.

In a written agreement made by the parties' valuers for the purpose of this action, it was agreed that the rent reviews with the plaintiffs' tenants in the building, all with a view to agreeing or determining the market rent as at September 29 1991, were settled by agreement and the basis of the settlement was a rent for a typical floor at £385,000 pa, which is equivalent to £23.50 psf.

The premises previously occupied by the defendants remained unlet, although interest in them was being shown by Walt Disney. After some negotiation, Mr Beckett on behalf of the plaintiffs made an offer to Walt Disney including the offer of a capital sum by the plaintiffs which Kemp & Hawley stated they regarded as a sum required

> in order to bring the space up to what we have described as "basic landlord's standard". By this we mean the standard and condition when it was first let. . . Either our client [the plaintiffs] will pay over the dilapidations moneys to your clients [Walt Disney] or we will organise the work . . .

In that letter, Mr Beckett offered a sum of about £660,000 to cover the outgoing tenants' dilapidations and, in addition, offered a sum not exceeding £750,000 towards Walt Disney's fitting-out costs.

I accept Mr Beckett's evidence that the negotiations with Walt Disney genuinely reflected the fact that work would have to be done to the premises to bring them up to the standard and condition they were in when first let to the defendants and that as between the plaintiffs and Walt Disney that cost would have to be borne by the plaintiffs with the plaintiffs being left to obtain compensation from their former tenants. The negotiations with Walt Disney did not result in a letting to Walt Disney.

By June 1992 the plaintiffs were in negotiations with Waste Management International Services Ltd ("WMI") for the letting of the fifth and sixth floors, and also the second floor of the building.

WMI later revealed that they intended to carry out a substantial refurbishment of the second, fifth and sixth floors. That refurbishment put the fifth and sixth floors into a far higher standard of fitting out than they had previously enjoyed.

On October 13 1992 the plaintiffs concluded an agreement with WMI to let the second, fifth and sixth floors of the building to WMI. By clause 2(5) of that agreement the plaintiffs agreed to pay to WMI £690,000 plus VAT, which was expressed to be "the tenant's estimate of the sum required to bring the premises up to the normally acceptable condition for the letting of such premises by a landlord". Mr Beckett stated in evidence that the sum of £690,000 plus VAT represented an estimate for carrying out the works required to bring the floors up to a "landlord's basic standard", that is, the works required to be carried out by the schedules of dilapidations prepared in respect of those floors. In his written factual evidence in chief, Mr Beckett wrote and attested:

> The payment of £690,000 plus VAT was discussed and agreed specifically in the light of the state of the premises. It was in this context alone that it was agreed, whereas the other concessions . . . were accepted as being the normal concessions that had to be given to reflect the market for premises in good repair at that time.
>
> This sum was intended to represent the cost of bringing the premises up to a "landlords basic standard". The tenants were provided with a copy of the costed schedule of dilapidations and estimates for the necessary works by me during the course of the negotiations as guidance to the standard the landlord was seeking and the likely cost. The cost estimates that I used for the purpose of my negotiations were based on works being carried out in respect of the first floor. The estimate was for about £200,000 per floor. The second floor was in a completely unacceptable condition. However, when one came to examine the required repairs and redecoration to those floors the actual cost of works would not have been very much different.
>
> However, they would not accept my calculations nor the figure that I offered. They made it clear that the figure of £690,000 plus VAT was not negotiable. Mike Roberts of Gooch and Wagstaff told me that he had a costing done but I was never shown that costing. My figures were based on an estimate of the direct cost of the works. Taking into account the risk that the actual cost would be higher and the indirect cost of the works, such as financing costs, I was persuaded that it would not be possible to persuade WMI to move from its figure.

In cross-examination, Mr Beckett qualified his evidence. He was not sure that he had sent a copy of the costed schedule of dilapidations to WMI's agents, though he did send it to either WMI or Walt Disney.

SHORTLANDS INVESTMENTS LTD v CARGILL PLC *(continued)*

He accepted that there was no relation between the figure of £690,000 and the £105,000 claimed from the defendants as the cost of doing the works (exclusive of other costs). Mr Beckett explained that WMI were not interested in the legal liability of the defendants to the plaintiffs: for example, they were dissatisfied with the state of the carpets and accordingly demanded payment for carpets even though the plaintiffs do not now claim payment from the defendants for carpets. Mr Beckett did, however, contend that the £690,000 was closely related in amount to the damage to the reversion calculated by a different method.

It is plain from Mr Beckett's evidence that he did not negotiate the figures in the schedule of dilapidations with the representative of WMI figure by figure in the way that a landlord's building surveyor might discuss these figures with the surveyor to an outgoing tenant. However, it is equally plain from his evidence that the fact that the premises were in disrepair gave to WMI a bargaining counter, which enabled them to demand and obtain a sum specifically for the disrepair in addition to the other payments and special terms for which they were able to negotiate as incentives to take the lease.

In his written statement dated April 29 1994, Mr Beckett stated:

> I agree with the general principle that [in September, 1991] landlords were offering very attractive incentives to incoming tenants. The vital question is: would a "reasonable landlord/developer" offer an incoming tenant a sum of money to repair and redecorate the premises when they were in a good state of repair and decoration already? One has only to ask the question to answer it. If the condition of the premises was sub-standard because of failure to repair and decorate, logically the landlord would have had to offer bigger incentives than if the premises were in a good state of repair and decoration. No amount of mixing up of repair and decoration on the one hand and "fitting out" on the other can defeat this logic.

Later in the same document, in answer to Mr Lyall's argument about the premises having a negative value, Mr Beckett stated:

> If the value [of the premises] is somewhat negative in value in repair, then it is yet more negative out of repair.

I accept all of that evidence from Mr Beckett and I reject the evidence of Mr Stephen Lyall where it is opposed to Mr Beckett's evidence. Mr Lyall is an expert who came on the scene fairly recently. His evidence was strongly argumentative without always having the support of logic. He was very ready to draw inferences adverse to the plaintiffs from documents which he read only after the event. Mr Beckett, on the other hand, seemed to be a very honest witness as to the facts of which he had first-hand knowledge, including the negotiations with WMI, and he gave his evidence of opinion modestly and with a willingness to make proper concessions and his evidence appeared logical and sensible.

Three leases were subsequently granted by the plaintiffs to WMI of the second, fifth and sixth floors of the building, each being for the residue of 25 years for September 29 1991 at a rent of £302,000 pa.

WMI carried out substantial works of refurbishment to the second, fifth and sixth floors. Those works included some of the remedial works which the plaintiffs allege the defendants should have carried out. Having conducted a view of the building I have seen enough of the WMI premises in their present condition to obtain a general impression of them. It is quite clear that, as has been said in evidence, on September 29 1991, no one could have been expected to foresee that a future tenant would outfit the premises to the very high standard chosen by WMI. The defendants contend that that extensive and lavish refit rendered the claimed repairs unnecessary.

The south and west wings of the first floor were subsequently let by Halcrow Properties Ltd who had acquired the plaintiffs' leasehold interest in the building on November 1 1992 to Office Angels Ltd ("OA") on March 2 1993 for a term of 10 years from September 29 1991 at an initial annual rent of £192,000 pa. OA did not carry refitting works to anything like the standard of WMI's works nor were the premises let to OA after substantial refitting works had been carried out to them, but OA did replace the ceiling tiles with more modern ceiling tiles.

The west wing of the seventh floor was subsequently let by Halcrow Properties Ltd to General Electric in December 1993. GE did not carry out any substantial refitting works nor were the premises let to General Electric after substantial refitting works had been carried out to them.

The ground floor is let to Hanes, who have not changed the ceiling.

The approach to assessment of damages

In the light of both the admitted and the disputed breaches of covenant, what is the correct approach to the assessment of damages?

Leading counsel for the plaintiffs and the defendants put forward conflicting submissions. The plaintiffs rely on a conservative view of a well-known line of authorities on dilapidations cases which they submit are binding on all courts except possibly the House of Lords. The defendants submit, however, that those authorities ought to be read in the light of decisions on damages of more general application.

The first question to be considered is: What is the measure of damages to which the plaintiffs would be entitled but for section 18(1) of the Landlord and Tenant Act 1927?

The leading text books state the approach to be as follows: *Woodfall's Law of Landlord and Tenant* (1993) para 13.081 p13/60 reads:

> At common law the measure of damages for breach of covenant to leave in repair at the end of the term was the cost of putting the premises into the state in which the tenant ought to have left them . . . In addition the landlord is entitled to damages of loss of rent during the period needed to carry out the repairs.

McGregor on Damages, 15th ed paras 1001 to 1003 reads:

> **1001** Where the action is commenced after the expiration or earlier determination of the term the damages at common law are such a sum as will put the premises into the state of repair in which the tenant was bound to leave them. The first clear judicial holding that this was the proper measure is that of Denman J in *Morgan* v *Hardy* followed by the Court of Appeal in the leading case of *Joyner* v *Weeks*. In this latter case the choice between the two measures of cost of repairs and diminution in the reversion's value was directly before the court, and it was decided that the former represented the true measure; whether or not it exceeded the latter was a question that need not be explored. Lord Esher MR said that to award the cost of repairs was such an inveterate practice as to amount to a rule of law, while Fry LJ regarded such a rule as one of great practical convenience since it was far simpler than the alternative one and he had no hesitation in endorsing it. Megarry VC in *Tito* v *Waddell (No 2)* questioned whether this case did indeed lay down that cost of repairs was the invariable rule of damages, but that this was the universal interpretation is clear from the decisions dealt with below, and from the intervention of statute, otherwise uncalled for, in the form of Section 18(1) of the Landlord and Tenant Act 1927.
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> **1002** The cost of repairs is the short way of expressing the normal measure; more precisely it should be expressed, as by Wright J in *Joyner* v *Weeks*, as the cost of repairs with some allowance for loss of rent or occupation during repair and with some deduction, where proper, by reason of substitution of new for old. . .
>
> **1003** The cost of repairs would in the normal case properly represent the extent to which the lessor has been injured by the breach. But where the circumstances were such that the loss to the lessor was less by reason of the fact that the repairs were not to be done completely or so thoroughly or were to be done by a third party at no expense to the lessor, the normal measure still applied: all these factors were in effect held to be collateral and did not go in mitigation. Thus no reduction of the damages was made in all the following circumstances: (1) where the landlord had decided before the end of the lease to pull down the buildings and had done so before action: *Inderwick* v *Leech*; (2) where the lessor had made an agreement with a third party to grant him at the end of the defendant's term a new lease under which the buildings were to be pulled down by the third party, the conditions of the premises having formed, it was said, no ingredient in the price: *Rawlings* v *Morgan*; (3) where, owing to a deterioration in the neighbourhood, the premises would command as high a rent even though the covenant to repair was not strictly complied with: *Morgan* v *Hardy* followed in *Anstruther-Gough-Calthorpe* v *McOscar*; (4) where the Plaintiff had granted a new lease to a third party to run from the

SHORTLANDS INVESTMENTS LTD v CARGILL PLC *(continued)*

expiration of the defendant's lease under which the third party covenanted to repair, so that the performance of the defendant's covenant to repair was a matter of pecuniary indifference to the plaintiff; *Joyner* v *Weeks*.

The plaintiffs rely heavily on *Joyner* v *Weeks* [1891] 2 QB 31, where Lord Esher said at p43:

. . . for a very long time there has been a constant practice as to the measure of damages in such cases. Such an inveterate practice amounts, in my opinion, to a rule of law. That rule is 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 into the state of repair in which they ought to have been left. It is not necessary in this case to say that that it is an absolute rule applicable under all circumstances; but I confess that I strongly incline to think it is so. It is a highly convenient rule . . . it is . . . I think, at all events, the ordinary rule . . .

In *Joyner* v *Weeks* the court disregarded the fact that before the lease expired the landlord had entered into a contract with a new tenant under which the tenant was to pull down part of the premises and repair the rest.

Without being so blunt as to say so, counsel for the defendants in effect invited me to hold that there was no such rule of law as was stated by Lord Esher. Counsel did expressly invite me to hold that it was not an invariable rule of law and did not apply in this case. Counsel relied first on *James* v *Hutton and Cook* [1950] KB 9, an appeal from an official referee. In that case a tenant, under licence, took down a shop front and erected a new one on terms that he would replace it on request. The premises were requisitioned by the War Department in 1941 and apparently were still requisitioned in 1949. In the circumstances, it was not surprising that the official referee and the Court of Appeal decided that the landlord had suffered no loss from the shop front not being put back into its previous condition. In that case, Lord Goddard CJ, giving the judgment of the Court of Appeal (sitting with Tucker and Singleton LJJ) expressly approved the decision in *Joyner* v *Weeks*, but added (at p16):

. . . that case must be regarded as proceeding on the footing that the plaintiff suffered damage by the tenant yielding up the house out of repair. We see no ground here for assuming that the plaintiff in this case has suffered any damage at all.

Counsel also relied on certain extracts from Megarry V-C in *Tito* v *Waddell (No 2)* [1977] Ch 106 at p332. After some discussion of *Wigsell* v *School for Indigent Blind* (1882) QBD 357 and other cases which have been cited to me, Megarry V-C said at p332C:

. . . if the plaintiff has suffered little or no monetary loss in the reduction of value of his land, and he has no intention of applying any damages towards carrying out the work contracted for, or its equivalent, I cannot see why he should recover the cost of doing work which will never be done. It would be a mere pretence to say that this cost was a loss and so should be recoverable as damages.

In the absence of any clear authority on the matter before me, I think I must consider it as a matter of principle. I do this in relation to the breach of a contract to do work on the land of another, whether to build, repair, replant, or anything else: and I put it very broadly.

First, it is fundamental to all questions of damages that they are to compensate the plaintiff for his loss or injury by putting him as nearly as possible in the same position as he would have been in had he not suffered the wrong. The question is not one of making the defendant disgorge what he has saved by committing the wrong, but one of compensating the plaintiff. In the words of O'Connor LJ in *Murphy* v *Wexford County Council* [1921] 2 IR 230, 240:

"You are not to enrich the party aggrieved; you are not to impoverish him; you are, so far as money can, to leave him in the same position as before."

Second, if the plaintiff has suffered monetary loss, as by a reduction in the value of his property by reason of the wrong, that is plainly a loss that he is entitled to be recouped. On the other hand, if the defendant has saved himself money, as by not doing what he has contracted to do, that does not of itself entitle the plaintiff to recover the saving as damages; for it by no means necessarily follows that what the defendant has saved the plaintiff has lost.

Third, if the plaintiff can establish that his loss consists of or includes the cost of doing work which in breach of contract the defendant has failed to do, then he can recover as damages a sum equivalent to that cost. It is for the plaintiff to establish this: the essential question is what his loss is.

Fourth, the plaintiff may establish that the cost of doing the work constitutes part or all of his loss in a variety of ways. The work may already have been done before he sues. Thus he may have had it done himself, as in *Jones* v *Herxheimer* [1950] 2 KB 106. Alternatively, he may be able to establish that the work will be done. This, I think, must depend on all the circumstances, and not merely on whether he sues for specific performance.

Counsel also relied on a passage from Megarry V-C's judgment at p329 where, commenting on *Joyner* v *Weeks*, he said:

I know that in *Westminster (Duke)* v *Swinton* [1948] 1 KB 524, it was said that in *Joyner* v *Weeks* it had been held that "the cost of repairs was the measure of damages in all cases," and that in the latter case Lord Esher MR had said that he was very much inclined to think that this was an absolute rule. But he expressly refrained from holding that this was so; and what both he and Fry LJ actually decided was that it was "the ordinary rule," or "the ordinary *prima facie* rule," and that it was subject to there being no circumstances which made it inapplicable . . .

By way of further comment on *Westminster* v *Swinton*, it should be added that Denning J, the judge at first instance, was not applying *Joyner* v *Weeks*, he was distinguishing it. At p533 he said:

As to damages for breaches of these covenants, the decision of Atkinson J in the case of *Eyre and Another* v *Rea* must not be taken as a decision that in every breach of this kind the cost of reinstating the premises is the measure of damages. I am sure Atkinson J did not mean that. The position is that in *Joyner* v *Weeks*, it was held by the Court of Appeal that on a breach of covenant to deliver up in repair at the end of the lease, the cost of repairs was the measure of damages in all cases, even though the money was not going to be used on repair, and even though the premises were going to be pulled down next day. That was never applied to cases of covenants to keep in repair during the term, see *Conquest* v *Ebbetts*.

I am very conscious that the function of damages in civil actions is to compensate the plaintiffs, not to punish the wrongdoer. That is a principle which has been forgotten all too often in modern cases. Plainly, if the plaintiffs have suffered no damage, or only minimal damage, one does not begin to assess damages. But here, in the light of my view of the evidence of Mr Beckett, it is plain that the plaintiffs *did* suffer damage. If the premises had been delivered up in a state of good repair and decoration the premises would have had a negative value, but as they were delivered up in a bad condition, they had a worse negative value. That worse negative value was evidenced by subsequent events when Mr Beckett had to offer a very large sum of money specifically related to the condition of the premises. It would be unfair to the defendants to say that the whole of the money paid to the incoming tenants, WMI, in respect of disrepair represented the loss to the plaintiffs from the defendants' breaches, because, in part, that money was related to matters (like carpets) which are not the responsibility of the defendants under the terms of the lease.

So there are damages to assess. How should they be assessed?

The defendants submit that the rule in *Joyner* v *Weeks* appears to have arisen at a time before courts became used to dealing with complicated principles of valuation. By implication I am asked to reject the rule. It is, however, quite clear that so far as the Court of Appeal expressed itself as stating a rule (and there were limits to the expression of the rule), the rule in *Joyner* v *Weeks* stands today subject only to section 18 of the Landlord and Tenant Act 1927: *Hanson* v *Newman* [1934] Ch 298; *James* v *Hutton and Cook* [1950] KB 9. *Jones* v *Herxheimer* [1950] 2 KB 106; *Smiley* v *Townshend* [1950] 2 KB 311. *Bwllfa & Merthyr Dare Steam Colleries (1891) Ltd* v *Pontypridd Waterworks Co* [1903] AC 426 relied on by the defendants is irrelevant because in the different circumstances of that case the House of Lords held that statutory compensation (not damages) was to be assessed not by relation to a fixed date (the giving of a counternotice) but by reference to what the coal owners would

SHORTLANDS INVESTMENTS LTD v CARGILL PLC *(continued)*

have made out of the coal during the whole time it would have taken them to get it.

At common law, the proper measure of damage is the difference in value of the reversion at the end of the lease between the premises in their then state of unrepair and in the state in which they would have been if the covenants had been fulfilled. Matters happening after the lease came to an end do not affect the matter except that they may be evidence of what was in prospect at the time the lease came to an end. In most cases the cost of repairs is a good guide to the difference in value of the reversion.

In this case, the cost of repairs seems to me to be the best possible guide in the assessment of damages. As at the end of the lease, one of the matters to be taken into account in valuing the reversion in its actual state was the consideration that any incoming tenant would demand a sum of money related to the disrepair. That sum of money would be related to the disrepair as viewed by the incoming tenant, not to breaches of the outgoing tenants' covenants. In this case, the actual disrepairs were greater than the disrepairs for which the outgoing tenants were responsible, so the only way of assessing that part of the difference in value of the reversion for which the tenants were responsible is by examining the cost of repairs and then applying to that the "cap" imposed by the 1927 Act.

Section 18(1) of the Landlord and Tenant Act 1927 imposes a limit on the common law measure, but does not alter the method of its assessment: *Crown Estate Commissioners* v *Town Investments Ltd* [1992] 1 EGLR 61* at p63H.

Section 18(1) imposes a limit on the recoverable damages in the following terms:

> Damages for breach of a covenant . . . to keep or put premises in repair during the currency of a lease, or to leave or put premises in repair at the termination of a lease . . . shall in no case exceed the amount (if any) by which the value of the reversion (whether immediate or not) in the premises is diminished owing to the breach of such covenant . . . and in particular no damage shall be recovered for a breach of any such covenant . . . 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 render valueless the repairs covered by the covenant.

The words in section 18 after the words "and in particular" on their literal meaning are not relevant to this action. There was no demolition and there were no structural alterations. However, since those words are plainly intended to be by way of example, they may be some guide to the meaning of the earlier part of the section.

Relying on *Cunliffe* v *Goodman* [1950] 2 KB 237, a decision itself based upon the judgment of Lord Greene MR in *Marquess of Salisbury* v *Gilmore* [1942] 2 KB 38, counsel for the plaintiffs submitted that the courts have interpreted the expression "alterations . . . would render valueless the repairs covered by the covenant" as not being satisfied by a mere foreseeability test. Counsel submitted that the test is whether at the date of termination of the lease the landlord had formed a firm and settled intention to carry out the alterations; if the landlord had considered the possibility, but not reached a definite decision, then the tenant failed to cap the damages otherwise payable at common law. Counsel went on to argue that as the test for the second limb of section 18(1) requires evidence of a definite intention on the part of the landlords to carry out the relevant works, then where the tenants rely upon future works for the purpose of the first limb of section 18(1) the test should be no different, that is, it is not a matter of mere foreseeability but of definite intention as at the date of termination of the lease.

I agree with counsel for the plaintiffs that construction of the second part of section 18 is helpful in construing the first part of that section, but the test he proposes, that there must be a definite intention on the part of the landlords to carry out the works, is too narrow.

In *Cunliffe* v *Goodman* [1950] 2 KB 237 at p249, Cohen LJ said:

> The question then arises, what is the test by which the fate of the building as at the relevant date — namely, the date at which the covenant ought to be performed — is to be ascertained? I have already pointed out that a building may be destined for demolition either because the landlord has so determined or because some extraneous authority has decided to exercise its powers in that behalf.

Plainly Cohen LJ was putting forward that test very much with the facts of *Cunliffe* v *Goodman* in mind.

A test which would be in keeping with the decision of *Cunliffe* v *Goodman* and which would encompass the facts of this case (and no doubt some others) is as follows:

> Viewing the question as at the date when the covenant ought to have been performed, was it inevitable, either because of a settled intention of the landlord, or for some other extraneous reason that the premises would be pulled down or altered in such a way as to cause diminution of the value of the reversion?

That test would not be inconsistent with the final submissions of counsel for the defendants, though he did not formulate a test in that way. I propose to apply the test I have formulated.

Although the reference in section 18 to alterations is limited to structural alterations, as I have said, that reference is only by way of example and I do not read the second part of the section as ruling out consideration of non-structural alterations under the first part of the section if non-structural alterations will cause material diminution to the value of the reversion. No doubt it did not occur to the draftsmen of the Act that non-structural alterations were likely to have an impact on the value of the reversion, but this is a case where unusual market conditions combined with modern methods of building and fitting out offices create a situation which perhaps could not have been foreseen in 1927.

The defendants make both a broad submission and a more narrow submission on this point. The broad submission is based on the evidence of Mr Lyall. Mr Lyall said that, because the plaintiffs were competing for tenants with other prospective landlords who could offer modern office buildings, it was inevitable that any incoming tenant would demand a modern fit-out. In particular, and by way of example, the ceiling tiles were old fashioned in that they have two long sides and two short sides, whereas the modern fashion is for square ceiling tiles: as a result, existing damaged ceiling tiles could be replaced only by special order. It was said that, regardless of the state of cleanliness and repair of the ceiling tiles, any incoming tenant would want to replace the ceiling tiles with square tiles and so any money spent on cleaning tiles or replacing defective tiles would not improve the value of the reversion or — to put it another way — the disrepair and lack of cleanliness of the ceiling tiles did not result in diminution of the value of the reversion. The narrower submission, and the only one put in the defendants' final submissions in reply, was that inevitably the partitions would be taken down by the incoming tenant and therefore the carpets would be damaged and also the ceilings would be so damaged that they would have to be replaced.

I reject both those submissions on the facts. They are inconsistent with Mr Beckett's evidence, which I accept, and they are inconsistent with what in fact happened. WMI and Office Angels have made substantial refits (though the refit by Office Angels is much less extensive than that of WMI), including replacement of the ceiling tiles with modern ceiling tiles. But other parts of the building are occupied with "old-fashioned" tiles, though many of the "old-fashioned" tiles, which I saw on a view during the trial, need cleaning. (I do bear in mind that we are now three years after the relevant date.) WMI in particular wanted a prestige head office, and have it. But as at September 29 1991 it could not have been said that every incoming tenant would have such wishes. It has to be remembered that one of the outgoing tenants used their premises as a training school and appeared to be willing to use their premises with an old-fashioned

*Editor's note: Also reported at [1992] 08 EG 111.

SHORTLANDS INVESTMENTS LTD v CARGILL PLC *(continued)*

fit-out. Another tenant might well have come along with limited aspirations as to fit-out, though I cannot believe that, however limited the aspirations of an incoming tenant, the opportunity would have been missed to demand compensation for disrepair. As regards the more limited submission, the damage caused by movement of partitions, I reject that also. Certainly, the chances of an incoming tenant wanting to use partitions in exactly the same positions as those used by the outgoing tenant were slim in the extreme. Equally, once the partitions were moved, it would become apparent that the carpet was worn in places which would not "match" the new positions of the partitions. But the carpet is not now a part of the claim. It is not alleged to be relevant to the alleged damage to the reversion and it can be disregarded. As to the ceiling, I do not accept that it has been shown on the evidence that moving the partitions would have caused such damage to the ceilings as to make it necessary to replace the ceilings. Some damage to the ceilings might have been caused on moving the partitions, and it might be that that part of the damage would have been the responsibility of the plaintiffs to put right, but I do not accept such evidence as there is that such damage would require total replacement of the ceiling.

In summary, I do not accept that any incoming tenant was bound to refit the premises in such a way as to repair the defects left by the defendants, nor do I accept that it was reasonably foreseeable that that would happen. What was bound to happen and was reasonably foreseeable was what in fact did happen, namely that the incoming tenant would use the disrepair as a bargaining point so that the value of the plaintiffs' reversion was diminished.

In the light of those observations, I turn to consider the detailed assessment of damages. In accordance with the approach taken by counsel for both parties, I begin with the cost of works and the lost outgoings during the time taken for the works. I shall then consider to what extent, if at all, the resulting figure should be "capped" by a calculation under section 18 of the 1927 Act.

The cost of works and associated costs

At common law on the plaintiffs' original figures, the damages would be:

Limb 1:	£105,125.5	(cost of works)
Limb 2:	£200,046.45	(loss of 12 wks' rent)
	£59,356.28	(loss of 12 wks' service charge)
	£30,740.80	(12 wks' void rates)
	£395,269.03	

Each figure of 12 weeks should be reduced to 11 weeks for the following reasons. In his evidence, Mr Goedecke worked on the basis that the works would take 12 weeks. Very fairly and reasonably, that figure was reduced by Mr Goedecke in his evidence to 11 weeks. Mr M J Armstrong ARICS, a director of Herring Baker Harris, called by the defendant to give evidence on its behalf as an expert building surveyor, said that the works would take six and a half weeks. One of the differences between them was that Mr Goedecke assumed that the professional advisers would be doing other things at the same time. I have the impression that this difference of approach explains the difference between the parties on this important issue. If everyone concerned, professional men, main contractors and subcontractors, were to drop everything else and give top priority to the works, those works might well be done within Mr Armstrong's period (barring accidents). While I agree that it would have been the duty of the plaintiffs in mitigation of damage to give this matter the highest reasonable priority, I do not see that they could be expected to carry everyone else along with them in that endeavour and the highest reasonable priority is a lesser requirement than the highest possible priority. I hold that 11 weeks is the better figure.

It is accepted between the parties that any difference between them as to the amount of work required will not substantially affect the time taken.

The revised figures claimed by the plaintiffs under this head are therefore as follows:

Limb 1:	£105,125.50	(cost of works)
Limb 2:	£183,375.90	(loss of 11 weeks' rent)
	£54,409.92	(loss of 11 weeks' service charge)
	£28,179.07	(11 weeks' void rates)
	£371,090.39	

Under this part of the claim it remains only for me to consider the details of the claims for the costs of the works.

The breaches alleged by the plaintiffs, but disputed by the defendants, are the following 28 items on the Scott Schedule third amendment:

Ceiling tiles:	Items 12-20a
Air-conditioning and perimeter heating unit:	Items 48 and 50
Clips on heating unit:	Item 119
Redundant cabling:	Items 118, 129-132, 135
Redundant halon gas fire extinguishers:	Item 137

Ceiling tiles: items 12-20a. There are two distinct forms of breach alleged by the plaintiffs. First, there are discoloured or stained tiles, the cost of cleaning and protecting of which is agreed subject to denial of liability at £21,540. Second, there are damaged tiles, the cost of replacing which is said to be £2,243, but both the cost and the existence of any damaged tiles are denied.

Discoloured tiles. The plaintiffs' evidence that there were discoloured or stained tiles was provided by Mr D Purtle, the building superintendent, Mr Peter Beckett, Mr A Cosgrave ARICS and Mr John Goedecke FRICS, a partner in Watkinson & Cosgrave, who was called as the plaintiffs' expert building surveyor. Some photographic evidence also was relied on. The interpretation of some of the photographs was open to argument and I put them on one side. I do, however, accept the oral evidence of the plaintiffs' witnesses, which in Mr Purtle's case was supported by detailed notes in the form of plans.

The defendants' covenants included an express covenant "to clean all tiles". There was no evidence that the tiles had been cleaned during the tenancy and I accept that the tiles had not been cleaned during the tenancy and that they needed cleaning and that they needed a protective coating in the same way that a raincoat needs a protective dressing after it has been cleaned and as part of the cleaning process.

To clean some tiles and not to clean others would produce an appalling patchwork effect. All the tiles had to be cleaned and coated.

The cost of remedy is agreed at £21,540.

Damaged tiles. Mr Purtle's evidence, which was specific both as to the number and location of damaged and missing tiles, was not challenged on cross-examination and the evidence to the contrary was not convincing. I accept the evidence of physical damage to the ceiling amounting to a breach of covenant on the part of the defendants. There was some speculation that some damage to ceiling tiles was caused by others for whom the defendants were not responsible. I do not find that that speculation amounts to proof.

The cost of remedy is agreed.

Air-conditioning/perimeter heating units: items 48 and 50. There are two items still disputed. Item 48, although described as agreed in the Scott Schedule 1/31, and in Mr Armstrong's report at 3B/10 and not varied by him in examination-in-chief, is now disputed. The defect complained of is simply that a part of the landlords' fixture was removed during the term and not replaced at the end of the term. So far as item 50 is concerned, the cost of remedying this item is agreed at £800. The defendants removed a heating unit and did not replace it. The only dispute is as to whether the tenant was liable to replace it. The unit is part of a heating system which without that unit is not effective in the room from which the unit was removed. If a tenant removes part of the premises or of the landlord's fixtures in those premises, the premises or the fixtures are out of repair. The tenants

were not permitted by this lease to remove the landlords' fixture and they were under an express covenant to yield up the premises and the fixtures at the end of the term in good repair. The proviso which entitled the tenants to carry out internal non-structural works cannot sensibly be relied on to excuse the damage which has been done here. These items are proved.

Clips on heating unit: item 119. This item, costed at £500, requires the removal of clips which the defendants fixed to the heating unit to hold cables installed by the defendants, but removed when the defendants vacated. They therefore serve no purpose at all any more. The defendants say that the clips are in good condition and there is therefore no disrepair. I reject that argument. The heating unit is the landlords' fixture. Leaving it with the redundant clips affixed to it is not leaving it in a good and tenantable state of repair or condition and there is therefore a breach of the covenants to keep in tenantable repair and condition.

Redundant cabling: items 118, 129-132,135. The defendants laid cabling throughout the premises in connection with equipment which the defendants also installed. The defendants have then removed the equipment at the termination of the subunderlease, but left the cabling. The relevant items in the Scott Schedule have an agreed cost of £6,675; item 132 alone has an agreed cost of £5,500. The disputes here are: (i) whether the defendants did the work; and (ii) whether the defendants were obliged to do the work.

As to (i), the work was identified as outstanding in the schedule of dilapidations served in December 1991, and so far as item 132 is concerned it was photographed in November 1991.

The plaintiffs relied primarily upon the photographic evidence and the evidence of Mr Goedecke to prove this breach. The defendants employed Mr Noerenberg to remove all communication cables, other than those that were the responsibility of BT and Mercury. Mr Noerenberg was not called by the defendants and only one invoice from him was produced in evidence. That invoice was for £1,350, although the agreed cost of the works to which the disputed items in the Scott Schedule related was £6,675. Either Mr Noerenberg charged much less than the surveyor thought was reasonable, or he did not do all the work. It may be that when Mr Noerenberg tackled the work he found there was less to do than the surveyors had anticipated. One does not know, there is no evidence about these matters. The defendants did, however, call their telecommunications manager, Mr Stephen Morton, and his evidence was that after Mr Noerenberg had done his work he carried out "spot checks" on the premises. Mr Morton did not inspect every duct and he himself admitted in cross-examination that he had not inspected the ducts above the suspended ceilings. He also admitted that BT and Mercury cables were not removed by Mr Noerenberg or anyone else on behalf of the defendants, but that admission does not appear to me to tell the whole story. The strongest evidence in favour of the defendants came from the plaintiffs' witness, Mr Purtle, the building superintendent at Shortlands. He was a plainly honest witness and was in the best position to know about matters of this sort. In cross-examination he said that Mr Noerenberg slipped out cabling and then Woolf came and made good after him. Then Mercury came and took out Mercury equipment *and wiring*. In re-examination he said that by the end of September there might have been a few Mercury cables left, but he thought that the communication and power cables had been removed.

There was no evidence that British Telecom removed any of its cables.

The evidence most strongly relied on by the plaintiffs was a photograph taken by Mr Beckett in about November 1991, showing a jumble of cables hanging from the ceiling in what had been the computer room, with one cable going down to an old-fashioned dial telephone resting on the floor.

From what I have said about the evidence so far, it might be inferred that it is most likely that the cables in that photograph were British Telecom cables. I take the view that it was the responsibility of the defendants to get those cables removed even though they were not the property of the defendants. I need not give my reasons for holding that view because I find that the plaintiffs have not proved their case on these items. The figures which have been agreed are the costs for the *whole* of the work. Those agreed figures are not appropriate to be applied in the light of my findings of fact. It may be that some small part of the work of removing cables was not completed, but I do not have any basis for assessing the cost of it and I therefore award nothing under this head. I should say that in a dispute of this kind I would not usually be reluctant to make a broad assessment of costs within the context of the evidence given if I thought it just to do so. But in this case, while I find that on the balance of probabilities the work of removing cabling was not wholly completed by the defendants, I am unable to say whether the remaining work was substantial or minimal.

Redundant ventilation ducts: items 122, 127, 136, 141. These are ducts which the defendants installed to serve equipment, which was also installed by them. The ducts enable the equipment to be ventilated through grilles or vents cut into windows. It was accepted by Mr Armstrong, the defendants' building surveyor, that the windows are visible from outside the building. The defendants removed the equipment, but did not remove the ducts which served the equipment. The most expensive of the three items is item 136, which the defendants admit, save that the defendants contend, and the plaintiffs accept, that a part of this item is a duplication of item 127. The plaintiffs claim in respect of all three items a total of £5,150 and the defendants, having heard the evidence, now admit liability for £3,900, leaving £1,250 in dispute. As I understand it, the dispute is a dispute as to the need for carrying out the repairs. I take the view that the plaintiffs are entitled to the full sum of £5,150.

Redundant halon gas fire extinguishers: item 137. This is a single item costed by both parties at £1,450 which the defendants dispute on the footing that, while it was installed by the defendants as fire-protection equipment ancillary to other equipment which the defendants have removed, the defendants are under no obligation to remove the fire-protection equipment. However, the fire-protection equipment is incomplete and therefore not in good and tenantable condition. The equipment would not be acceptable to an incoming tenant. One should look at this matter more broadly than either party has done. The halon gas fire extinguishers are specialist pieces of equipment in a particular place in the building and there was only a remote possibility that an incoming tenant would want to position equipment in such a place as to find it useful to take over the redundant part of the fire-extinguishing equipment by purchasing those extra parts which would make it usable and placing new equipment under it. The question is not, "Was this equipment left in good and tenantable condition?" (as to which the answer would be, "No", because it was not working) but, "Were the premises as a whole delivered up in good and tenantable condition?" to which the answer would be certainly "No", because the premises were left with some redundant equipment in them which would have to be removed to make the premises usable. There was general agreement on the evidence that the redundant equipment was valuable. Whether its value was greater than the cost of removing it was not established to my satisfaction and the question is, in any event, irrelevant. There was no obligation on the plaintiffs to take on the role of scrap merchants when possession was up to them. I find this head of claim proved.

Summary of building costs

I have disallowed the item for redundant cabling, but allowed all the other disputed items. I am told by counsel for the plaintiffs that the direct building costs of the items claimed by the plaintiffs (excluding the cleaning of carpets) amount to £62,335.95. The amount attributable to the disallowed item is £6,675, and after that item has been subtracted the direct building costs allowed amount to £55,660.95.

SHORTLANDS INVESTMENTS LTD v CARGILL PLC *(continued)*

It is agreed that to those basic building costs have to be added certain agreed additions as follows:

	£57,032.25
Preliminaries and profit 12%	£6,679.13
	£62,340.08
Fees:	
Preparation of schedule	3,600.00
Negotiation 5%	£3,116.80
Supervision 11.25%	£7,012.80
	£76,069.68
VAT @ 17.5%	£13,312.19
Gross cost of works	£89,381.87

To that figure should be added the figures comprised in what the plaintiffs call limb 2 of the common law claim, making the following addition:

Limb 1:	£89,381.87	(cost of works)
Limb 2:	183,375.90	(loss of 11 weeks' rent)
	54,409.92	(loss of 11 weeks' service charge)
	28,179.07	(11 weeks' void rates)
	£355,346.76	

Section 18 of the 1927 Act

Both parties and their experts are agreed that the valuation of the leasehold reversion in the premises is entirely hypothetical. Valuations are commonly made on the basis of an imaginary sale, but in this case the sale could not have taken place. Valuations have in fact been made on the basis that the leasehold reversion is sold to an investor, but it is agreed that in practice it would not be so sold and in law it could not be so sold because of the covenant (to which I have referred) forbidding it. The parties ask me to proceed on the basis of hypothetical valuations.

The valuation for the purpose of a sale is made on the basis of a willing seller and a willing purchaser. Mr Lyall accepted the concept of a willing seller, but was unable to accept that in this case there was a willing purchaser. Much time was taken in discussing this both in cross-examination and in submissions. I think the difficulty is partly a matter of words and partly a matter of principle where confusion is perhaps engendered by the words.

Normally when property is transferred from one person to another, the transferee pays money to the transferor and so it is natural to think of the transferee as the purchaser. In this case, however, the transferor had to pay money to the transferee to persuade him to take on the burdens of the property transferred so that the transferee could then make a profit from the rent receivable. In these circumstances it is difficult to apply the label of purchaser to the transferee. In the unusual circumstances of this case one has to consider, among other things, how much money had to be paid by the willing transferor to the willing transferee, bearing in mind that if no money were to be so paid there would be no willing transferee. The diminution in value is the difference between the amount of money paid out by the willing transferor to the willing transferee if the premises were delivered up in a condition in conformity with the covenants and the amount paid out by the willing transferor to the willing transferee if the premises were delivered up in their actual condition. There would be no willing "purchaser" if no money were paid to him.

At the heart of this case, as it seems to me, there is a point of principle which arises out of the implicit assumption of Mr Lyall and the defendants that it is impossible to accept that one negative value can be worse or better than another negative value. The point never came out into the open in express terms, but it seems to have been assumed by Mr Lyall that once the value of a property gets down to £nil there cannot be any diminution in value. That may be true in many or perhaps most cases of chattels. It is quite a different situation where an owner of a leasehold property has an onerous interest which he wishes to transfer. Such an interest is transferable on the market if not "saleable". If one assumes a willing transferor and a willing transferee, there will be a point in negotiations for a payment from the transferor where the parties are willing to do a deal.

The two valuation experts in this case are agreed that they have adopted the same approach to valuation — what Mr Beckett has called "the residual approach". Mr Beckett has prepared two schedules, A and B, and taken the difference between the end figures of each schedule as the diminution in value. Apart from the submissions that there is no diminution in value, the defendants do not challenge the approach in those schedules, but they do challenge some of the individual figures. Apart from the challenge to the cost of the works, those challenges are of no importance, because the figures are reproduced in each schedule and since the only important result is the difference between the end result of each schedule the size of figures in common between them is of no importance so long as they remain common. For example, under the heading of "Deductions", schedule A begins with an item of "Deficit of headrent for 30 weeks". That period is made up of four weeks to remove partitions and lay carpets and 26 weeks for marketing period. None of that period of 30 weeks is for the defendants' account: it is a period in relation to which the plaintiffs would have suffered expenses even if the defendants had complied with their covenants and is compared with a period of 41 weeks' deficit of headrent incurred on the actual state of repair and decoration. There has been some discussion that a marketing period of 52 weeks would have been more appropriate. It makes no difference and I make no finding about it. If the marketing period should be 52 weeks, for the period of 30 weeks we would substitute 56 weeks and for the period of 41 weeks we would substitute 67 weeks and the difference would be the same, namely 11 weeks, which would be translated into cash sums each with similar differences.

I do not propose to say any more about details which are common to both schedules.

There are two important disputes on the figures in the schedules:

1. The cost of the works necessary to remedy the breaches of covenant — I have already dealt with that.

2. The length of time to be taken in doing those works.

I have already indicated that I prefer the figure of 11 weeks for doing the work.

I have been provided with a revised schedule B worked on the reduced period of 11 weeks. Schedules A and B are annexed to this judgment. The difference between the end-totals is £304,599 so that the latest position is that the plaintiffs limit their claim to £304,599.

It appears that the common law claim, on my findings, is greater than the section 18 "cap" and the figures on the section 18 valuation are therefore vital. If the disallowed figure of £6,675 plus percentage "add-ons" but excluding the 5% "add-on" for negotiation, which Mr Beckett has excluded from both schedules A and B, and interest were removed from the computation of schedule B, it seems to me that that should produce the correct end-figure for comparison with schedule A, but I would welcome further assistance. Subject to further argument, schedule B should be amended by deducting from the negative figure at the end as follows:

Net value:		-397,221
Redundant cabling:	6,675.00	
Supervision 11.25%	750.94	
	7,425.94	
VAT @ 17.5%	1,299.54	
	8,752.48	
Interest for 6 months @ 12%	525.15	9,277.63
		-387,943.37

The difference between Schedule A and Schedule B then becomes:

387,943.37
92,622.00
295,321.37

SHORTLANDS INVESTMENTS LTD v CARGILL PLC *(continued)*

Subject to further argument on details, there will be judgment for the plaintiffs for £295,321.37. I invite submissions on the claim for interest from September 29 1991.

Appendix 1
Schedule A
3 Shortlands, Hammersmith International Centre, London W6
Valuations of the interest of Shortlands Investments Ltd as at 29th September 1991 in respect of the fifth, sixth and part seventh floors

For assumptions underlying the valuations, see the accompanying notes.

A Valuation assuming Tenant's compliance with covenants (Revision 1)

A.1 Estimated value let and in good repair

	36,888ft²	at	£23.50	866,868	
Less Headrent:	36,888ft²	at	£17.62	649,967	
Profit rent					216,901
89 years' purchase at 17% — sinking fund attracting 4% and 35% tax thereon					5.82
Estimated value let and in good repair					1,262,364

A.2 Deductions:

(i) Deficit of headrent for 30 weeks		374,981	
(ii) Non-recoverable service charge for 30 weeks		148,390	
(iii) Void rates		55,626	
(iv) Interest on rent, service charge and rates (see statement)		27,079	
(v) Letting fees (15% + VAT)		152,785	
(vi) Marketing costs		50,000	
(vii) Profit to purchaser @ 25% of gross value above		315,591	
(viii) Works a. Cost	165,648		
b. Fees and VAT	48,452		
c. Interest thereon for 6 months at 12% pa	12,846		
Total cost of work		226,946	
(ix) Acquisition costs say		10,000	
Total deductions unrelated to purchase price			1,361,398
			-99,034
(x) Interest for 30 weeks on purchase price at 12% (credit)			-6,412
A.3 Net value: Estimated value unlet and in state of repair envisaged by tenants' covenants			-92,622

Appendix 2
Schedule B
3 Shortlands, Hammersmith International Centre, London W6
Valuations of the interest of Shortlands Investments Ltd as at 29th September 1991 in respect of the fifth, sixth and part seventh floors

For assumptions underlying the valuations, see the accompanying notes.

B Valuation in actual state of repair and decoration (Revision 2)

B.1 Estimated value let and in good repair

	36,888ft²	at	£23.50	866,868	
Less Headrent:	36,888ft²	at	£17.62	649,967	
Profit rent					216,901
89 years' purchase at 17% — sinking fund attracting 4% and 35% tax thereon					5.82
Estimated value let and in good repair					1,262,364

B.2 Deductions:

(i) Deficit of headrent for *41* weeks		512,474	
(ii) Non-recoverable service charge for *41* weeks		202,800	
(iii) Void rates		83,805	
(iv) Interest on rent, service charge and rates (see statement)		48,033	
(v) Letting fees (15% + VAT)		152,785	
(vi) Marketing costs		50,000	
(vii) Profit to purchaser @ 25% of gross value above		315,591	
(viii) Works: a. Cost	235,464		
b. Fees and VAT	68,873		
c. Interest thereon for 6 months at 12% pa	18,260		
Total cost of work		322,597	
(ix) Acquisition costs		10,000	
Total deductions unrelated to purchase price			1,698,085
			-435,721
(x) Interest for *41* weeks on reverse premium at 12% (credit)			-38,500
B.3 Net value: Estimated value unlet and in actual state of disrepair			-397,221