

Neutral Citation No: [2004] EWHC 993 (TCC)

**IN THE HIGH COURT OF JUSTICE**  
**QUEENS BENCH DIVISION**  
**TECHNOLOGY AND CONSTRUCTION COURT**

St. Dunstan's House,  
133-137, Fetter Lane,  
London, EC4A 1HD

Date: 18 May 2004

Before:

**HIS HONOUR JUDGE RICHARD SEYMOUR Q.C.**

-----  
  
(1) PHILIP LOUIS SIMMONS  
(2) ANTHONY SIMMONS  
(3) HARVEY COHEN  
- and -  
MICHAEL COLEMAN DRESDEN

**Claimants**

**Defendant**

-----  
-----  
  
**Edward Denehan** (instructed by Solomon Taylor & Shaw for the Claimants)  
**Janet Bignell** (instructed by Nabarro Nathanson for the Defendant)

-----  
  
**JUDGMENT**

**Introduction**

1. Until he sold the freehold interest in the premises to a company called Associated Commercial Enterprises Ltd. (“ACE”) in April 2002 Mr. Michael Dresden, the Defendant in this action, was the freehold owner of premises (“*the Premises*”) known as and situate at 27, John Street and 21, John’s Mews, London WC1. At 27, John Street was a mid-terrace house originally constructed, so it would seem, in about the middle of the eighteenth century as a private residence. It is convenient to refer to that house as “*the House*”. The House comprises a basement, ground floor and four upper floors. The House fronts onto John Street. John’s Mews is a street which runs parallel to John Street. Behind the House, between it and John’s Mews, there is an open area which it seems was originally the garden of the House, but which in more recent times has been paved over to provide car parking spaces. Between the open area and John’s Mews there is a garage with doors to front and rear and thus through which there is access to the open area immediately behind the House. Above the garage there are two one-bedroom flats, one on the first floor and one on the second floor. The garage and the two flats above it are known as 21, John’s Mews. In this judgment I shall refer to the garage as “*the Garage*”, to the flats as “*the Flats*” and to the Garage and the Flats collectively as “*the Mews*”.
2. Mr. Dresden purchased the Premises in 1972. His intention at that time was to use the House, at least, as offices for the purposes of his practice as a solicitor. With that end in view he had the House refurbished to a high standard in keeping with its age and character on the ground and first floors, and he had the upper floors rebuilt. At the time of his purchase there was a cottage on the site of the Mews. It was Mr. Dresden who caused the Garage and the Flats to be built.
3. By about 1976 Mr. Dresden had decided that he no longer wished to occupy the House for the purposes of his professional practice. He seems to have contemplated selling the Premises, but in the event he decided to let them to the Claimants in this action, Mr. Philip Simmons, Mr. Anthony Simmonds and Mr. Harvey Cohen. Those gentlemen were at that time all in practice together as chartered accountants. The name of the firm in those days was Simmons Cohen Fine & Partners. The composition and name of the firm went through transformations over time. By October 2001 the firm had become a limited liability partnership called Simmons Gainsford LLP, but Mr. Anthony Simmonds remained a member, in fact the senior member.
4. By a lease (“*the Lease*”) dated 16 October 1976 and made between (1) Mr. Dresden and (2) Mr. Simmons, Mr. Simmonds and Mr. Cohen (to whom I shall refer collectively in this judgment as “*the Tenants*”) Mr. Dresden demised the Premises to the Tenants for a term of 25 years from 16 October 1976 at an initial rent of £28,000 per annum. The Tenants occupied the House for the purposes of their practice from time to time until about January 1997, when they moved to larger premises in Chandos Street, London W1. The Tenants sub-let the Flats for residential occupation by a variety of tenants over the years.
5. After the Tenants had ceased to occupy the House for the purposes of their practice they sought to minimise their liabilities over the remainder of the term created by the Lease. After an abortive attempt to surrender the Lease, they sub-let what amounted to the whole of the House and the Garage to Arden Chambers Ltd. (“*Arden*”), the service company connected with the chambers of Mr. Andrew Arden Q.C. The sub-letting was effected by two underleases (“*the Arden Underleases*”), each dated 1

September 1997. The first underlease related to the basement, ground, first and second floors of the House, which were demised for a term commencing on 1 September 1997 and expiring on 14 October 2001. The second underlease concerned the third and fourth floors of the House, which were demised for like period.

6. With the approach of the expiration of the term created by the Lease the Tenants began to give attention to the need to deliver up the Premises in the condition required by the relevant covenants in the Lease, and in particular to identification of what works needed to be carried out and to making provision for those works to be carried out. Shortly, Mr. Simmonds negotiated an agreement with Mr. Arden, on behalf of Arden, to the effect that Arden would surrender the Arden Underleases with effect from the end of August 2001 and also contribute a sum of £25,000 towards the cost of works necessary to be undertaken in the House. A consequence of that agreement, which was carried into effect, was that vacant possession of the House was available to the Tenants and their contractor for a period of some six weeks to enable necessary internal works to be undertaken. The execution of external works was able to commence earlier. The Tenants took advice, in particular from Mr. Ian Major, a chartered building surveyor, as to what works were necessary to be undertaken in order to comply with the relevant covenants in the Lease and caused those works to be commenced. Considerable works were undertaken, but unfortunately the works intended could not be completed prior to the determination of the term created by the Lease. One reason for that was that it did not prove possible for the Tenants to obtain vacant possession of the Flats. The other principal element of work which, although intended, was not completed, related to the central heating controls. A sum of £17,500 was tendered on behalf of the Tenants to Mr. Dresden on giving up possession of the Premises which was intended to take account of the incomplete works. Mr. Dresden cashed the cheque by which the sum of £17,500 was tendered, but it was not, in the end, contended on behalf of the Tenants that by that action he had disabled himself from pursuing any claim for damages for breach of covenants in the Lease. The trial before me was of just such a claim.
7. This action began as a claim on behalf of the Tenants in Kingston-upon-Thames County Court for repayment by Mr. Dresden of an amount of rent overpaid by the Tenants at the end of the term created by the Lease. That claim was disposed of by an order made by District Judge Coni on 23 July 2002 that there be judgment for the Tenants for the amount of the overpayment, £17,962.40, but with a stay of execution pending the trial of a Part 20 claim made on behalf of Mr. Dresden for damages for alleged breach of the covenants in the Lease. That claim was particularised in a Scott Schedule which went through a number of versions. In its final version the Scott Schedule contained some 162 main items, many of which had a number of sub-items. The somewhat intimidating extent of the Scott Schedule was rendered more digestible by the fact that there was a measure of agreement between the expert building surveyors instructed on each side as to the existence of a number of the alleged breaches. There was also a measure of agreement as to the cost of remedying various of the alleged breaches. Even where the cost of remedying an alleged breach was not agreed, there was in some cases agreement as to the appropriate remedy itself. However, the main feature of the Scott Schedule, where it related to matters as to which there was no agreement at all, was that the issue was whether a matter of complaint amounted to a breach of a relevant covenant at all.
8. In the next section of this judgment I set out the terms of the covenants in the Lease of which it was contended on behalf of Mr. Dresden that the Tenants were in breach as at

15 October 2001. In summary, the relevant covenants were concerned with repair or decoration of the Premises. By the date of the trial the amount of the loss allegedly sustained by Mr. Dresden, inclusive of interest, was put at £274,738.45, if calculated by reference to the alleged cost of necessary repair and decorative works, together with associated professional fees, and allowing for loss of rent and insurance rent over a period of 20 weeks estimated as being necessary to carry out the relevant works. However, it was accepted on behalf of Mr. Dresden that the effect of *Landlord and Tenant Act 1927 s.18(1)* was that the amount which it was open to him to pursue was limited to the amount by which the value of the reversion immediately expectant upon the Lease was diminished as at 15 October 2001. It was contended that that amount was £150,000. It was the latter amount, plus interest, which was actually claimed at the trial.

9. Mr. Dresden did not in fact cause the works said to be necessary as a result of the alleged breaches of the covenants in the Lease of which complaint was made to be carried out. He now has neither the intention nor the ability to cause them to be carried out. By an agreement dated 26 March 2002 he agreed to sell the Premises to ACE at a price of £2,655,000. That sale was completed on 18 April 2002.
10. In his report prepared for the purposes of this action Mr. Major assessed the cost of remedying the wants of repair and decoration in the Premises as at 15 October 2001 which he accepted at a total of £24,210. That figure took no account of the payment of £17,500 made on behalf of the Tenants on giving up possession. Consequently, if it were found that Mr. Dresden had sustained any loss as a result of the breaches of the covenants in the Lease of which complaint was made, credit would need to be given to the Tenants for the payment of £17,500 already made. However, the main point made on behalf of the Tenants concerning the claim of Mr. Dresden was the contention that, in the light of the sale of the Premises to ACE at a price of £2,655,000, Mr. Dresden actually sustained no loss whatever as a result of the breaches of covenant which were accepted on behalf of the Tenants. It was submitted on behalf of the Tenants by Mr. Edward Denehan that, on the evidence, the elements of disrepair and want of decoration, or satisfactory decoration, of which complaint was made on behalf of Mr. Dresden had no impact on the sale price achieved for the Premises and would have had no effect on the price achieved had a sale been effected on 15 October 2001.

### **The material terms of the Lease**

11. In the Lease those whom I have called the Tenants were called collectively "*the Tenant*". Clause 2 of the Lease was, so far as is presently material, in these terms:-

*"THE Tenant hereby jointly and severally covenants with the Landlord in manner following (that is to say):-*

*(3)In the year commencing the Sixteenth day of October One thousand nine hundred and seventy-nine and thereafter in every third year of the said term and also in the last year thereof whether determined by effluxion of time or otherwise (and in the case of the last treatment to a colour or tint approved in writing by the Landlord) to paint french polish or otherwise treat as the case may be all the outside wood metal stucco and cement work of the demised premises usually or requiring to be painted french polished or otherwise treated with three coats of*

*best paint or best quality polish or other suitable material of the best quality in a proper and workmanlike manner and to wash down all tiles faiences glazed bricks polished stone and similar washable surfaces including the glazed bricks on the flank wall of No. 28 John Street*

- (4) *In the year commencing the Sixteenth day of October One thousand nine hundred and eighty-three and thereafter in every seventh year of the said term and also in the last year thereof whether determined by effluxion of time or otherwise (and in case of the last treatment to a colour or tint first approved in writing by the Landlord) to paint french polish or otherwise treat as the case may be all the inside (excluding the northern front vault) wood and ironwork usually or requiring to be painted french polished or otherwise treated of the demised premises including the floor surfaces and all additions and fixtures thereto with two coats of best paint or best quality polish or other suitable material of the best quality in a proper and workmanlike manner and afterwards grain marble and varnish the parts (if any) usually grained marbled and varnished and also wash distemper paint as aforesaid or repaper the ceilings and walls in the usual manner and to wash down all tiles faiences glazed bricks and similar washable surfaces all such work to be carried out to the satisfaction of the Landlord's Surveyor*
- (5) *From time to time and at all times during the said term well and substantially to repair renew cleanse and keep in good and substantial repair and condition and maintain the demised premises and every part thereof and all additions thereto including all glass in the windows and sash cords and the door furniture and all Landlord's fixtures and fittings and appurtenances thereunto belonging of whatsoever nature and to replace all missing keys and renew all washers to taps and ball valves and other like appliances as and when necessary ...*
- (7) *At the expiration or sooner determination of the said term quietly to yield up the demised premises so painted polished papered treated washed repaired cleansed and kept as aforesaid together with all additions and improvements thereto and all fixtures which during the said term may be affixed or fastened to or upon the demised premises (Tenant's or trade fixtures only excepted Provided always that the same shall be removed prior to the termination date and any damage caused by the removal thereof shall forthwith be made good) and any partitions fixtures and fittings which are not upon the demised premises at the date hereof shall be removed and any damage made good should the Landlord so require and if the Tenant shall not have complied with this clause at the expiry or sooner determination of the said term then the Landlord shall carry out the works and recover the costs of so doing from the Tenant*

*(8) At all times during the said term at the Tenant's own expense to observe and comply in all respects with the provisions and requirements of any and every enactment (which expression in this covenant shall include as well any and every Act of Parliament already or hereafter to be passed any and every order regulation and bye-law already or hereafter to be made under or in pursuance of any such Acts) so far as they relate to or affect the demised premises or any additions or improvements thereto or the user thereof for the purposes of any manufacture process trade or business or the employment or residence therein of any person or persons or any fixtures machinery plant or chattels for the time being affixed thereto or being thereupon or used for the purposes thereof and to execute all works and provide and maintain all arrangements which by or under any enactment or by any government department local authority or other public authority or duly authorised officer or court of competent jurisdiction acting under or in pursuance of any enactment are or may be directed or required to be executed provided and maintained at any time during the said term upon or in respect of the demised premises or any additions or improvements thereto or in respect of any such user thereof or employment or residence therein of any person or persons or fixtures machinery plant or chattels as aforesaid whether by the Landlord or Tenant thereof and to indemnify the Landlord at all times against all costs charges and expenses of or incidental to the execution of any works or the provision or maintenance of any arrangements so directed or required as aforesaid and not at any time during the said term to do or omit or suffer to be done or omitted on or about the demised premises any act or thing by reason of which the Landlord may under any enactment incur or have imposed upon it or become liable to pay any penalty damages compensation costs charges or expenses ...*

*(16) Not without the Landlords consent such consent not to be unreasonably withheld at any time during the said term to make any alterations or addition to the electrical installation of the demised premises nor make any alteration or addition whatsoever structural or otherwise in or to the demised premises or any part thereof nor cut maim or remove any of the walls beams columns or other structural parts thereof and if granted to be without prejudice nevertheless to the provisions of sub-clause (8) hereof and in addition to the Landlord's legal costs and disbursements the Tenant shall pay to the Landlord fees in accordance with the appropriate professional scale for approving the alterations and in addition fees for the general supervision of the alterations*

*(17)(a) Not without the consent in writing of the Landlord first obtained (such consent not to be unreasonably withheld and if granted to be without prejudice nevertheless to the provisions of sub-clause (9) hereof) to use the demised premises or any*

*part thereof or suffer the same to be used otherwise than as high class offices in respect of 27 John Street and Garaging in relation to the Ground Floor of 21 Johns Mews within the meaning of Class II of the Town and Country Planning (Use Classes) Order 1972 and residential use in respect of the 1<sup>st</sup> and 2<sup>nd</sup> Floors of 21 Johns Mews ....*

*(c) To clean the windows in the demised premises as often as occasion shall require and at least once in every calendar month.”*

### **The breaches of covenant alleged**

12. It is, I think, unnecessary for the purposes of this judgment to consider in any detail the 160 alleged breaches of covenant which were accepted on behalf of the Tenants and the cost of repairing which was agreed at a total of £19,125. The only issue in relation to those alleged breaches was whether it was appropriate to make allowance, in addition to the agreed cost of repair of individual items, in respect of contractor's overhead and profit, professional fees, and such like matters. The agreed breaches of covenant were all described in the latest version of the Scott Schedule and were helpfully listed by Miss Janet Bignell, who appeared on behalf of Mr. Dresden, in a table which she prepared called “*Table 1*”.
13. In another table prepared by Miss Bignell, “*Table 2*”, she listed the 46 items of alleged breach of covenant set out in the latest version of the Scott Schedule in respect of which it was accepted that the Tenants were in breach of covenant as at 15 October 2001 and the nature of the appropriate remedial work in relation to each item was agreed, but the alleged cost of those agreed works was not agreed. It was contended on behalf of Mr. Dresden that the cost of repairing these items, before making allowance for contractor's overhead and profit and so forth, would have been £7,815, while Mr. Major assessed the relevant total costs at £2,690.
14. In respect of a further 84 alleged breaches of covenant set out in the latest version of the Scott Schedule either it was contended on behalf of the Tenants that the cost of remedial work said to be necessary to deal with the item was excessive, or a nil allowance in respect of cost of repair was made. In a number of cases it was accepted on behalf of the Tenants that the facts as to the condition of the relevant items were as contended in the Scott Schedule, but it was denied that any remedial action was necessary because the item was insignificant. In other instances the case for the Tenants, where an allowance of nil for repairs was made, was generally that the item in question was included elsewhere or was duplicated. The relevant items from the Scott Schedule were listed by Miss Bignell in “*Table 3*”. The alleged cost of the remedial works, before allowance for contractor's overhead and profit and similar items, for which the expert building surveyor instructed on behalf of Mr. Dresden, Mr. Gregory Lander, contended totalled £19,720. It was accepted on behalf of the Tenants that work for which cost had not been allowed elsewhere was appropriate only to deal with 27 of the 84 items. It was asserted that the cost of dealing with those items, before addition of elements for contractor's overhead and profit, professional fees, and so forth, was a total of £2,395. Of the 56 items in respect of which it was contended that an allowance of nil was appropriate, 23 related to alleged damage to skirting trunking.

15. The skirting trunking was, essentially, a melamine-faced medium density fibreboard-type skirting with a void behind to accommodate electrical and telecommunications wiring. During the term of the Lease various modifications had been made from time to time in the location and details of the points in the trunking in the various rooms in the House at which there was a power point or a telephone plug or a computer modem. As a result of these modifications points had been moved and the hole where a point had previously been had been covered with a blanking plate, or screw holes were left which had not been filled. In one or two places the skirting trunking was misaligned as between different sections or had dropped relative to the top of the skirting, which was a separate piece fixed horizontally. In general terms the position adopted on behalf of Mr. Dresden was that any section of skirting trunking which had been affected by alterations which had left blanking plates or unfilled screw holes or similar signs of modification should have been removed and replaced with a new, unblemished section. In contrast, the position adopted on behalf of the Tenants was that the skirting trunking still functioned satisfactorily as such and the cosmetic blemishes which were present did not warrant any action.
16. The other items in respect of which it was contended on behalf of the Tenants that a nil allowance in respect of claimed cost of repair was appropriate were, using their respective numbering in the Scott Schedule:-
- (i) item 6.1, a roof light cover discoloured by rust staining from a rail above it: the case for the Tenants was that nothing required to be done;
  - (ii) item 6.4, alleged defects in asphalt around a new flue – in fact in respect of this item the case on behalf of the Tenants was that the asphalt had been satisfactorily repaired, rather than that it remained defective but no work was necessary;
  - (iii) item 7.4, water penetration around the entrance to the north vault, was accepted as correctly recorded, but the cost of repair was said to have been included in the allowance made for item 7.1;
  - (iv) item 10.3, dirty brass fittings on the front door of the House: the claimed cost of remedy was for cleaning and relacquering and the case for the Tenants was that the originals had not been lacquered and needed cleaning on a regular basis just because they were brass;
  - (v) item 16.4, incomplete paintwork to reveals and underside of cills: the case for the Tenants was that the incomplete decorations were minor and did not require further work;
  - (vi) item 31.3, damage to the veneered finish to a door: the case for the Tenants was that nothing required to be done;
  - (vii) item 32.4, paint left on a window glass: the case for the Tenants was that nothing required to be done;

- (viii) item 36.3, back panels to lavatories warped: the case for the Tenants was that the minor undulations in the panels did not require anything to be done;
- (ix) item 37.6, similar to item 36.3 in nature and response;
- (x) item 43.3, similar to item 31.3 in nature and response;
- (xi) item 47.2, paint on light fittings: the case for the Tenants was that nothing was required to be done;
- (xii) item 48.2, similar to item 32.4 in nature and response;
- (xiii) item 50.3, cupboard doors catching: the case for the Tenants was that nothing was required to be done;
- (xiv) item 51.2, internal face of box sash at junction with exterior not filled and fully painted to all three large sliding sash windows: the case for the Tenants was that nothing required to be done;
- (xv) item 63.1, similar to item 32.4 in nature and response;
- (xvi) item 65.2, ingress of moisture around rooflight section: the case for the Tenants was that this was condensation;
- (xvii) item 70.1, a lavatory seat and cover discoloured and damaged as a result of heavy usage: the case for the Tenants was that nothing required to be done;
- (xviii) item 73.2, loose flooring; the case for the Tenants was that the flooring was not loose, what was loose was a duct cover to a service duct and nothing required to be done;
- (xix) item 76.1, electric intake cupboard door veneer pulling away from panel: the case for the Tenants was that nothing required to be done;
- (xx) item 77.2, door leading into the main basement was not self-closing: the issue seemed to be whether the self-closing device provided needed adjustment, the case for the Tenants being that nothing needed to be done;
- (xxi) item 81.1, areas of plaster in the gas meter cupboard were missing and untidy gaps had been made to accommodate pipework and the hot water cylinder thermostat in the cupboard: the case for the Tenants was that these were original features of the House when let to the Tenants;
- (xxii) item 82.2, an uneven floor: the case for the Tenants was that the unevenness was the result of a duct in the floor;
- (xxiii) item 82.4, missing pigeon holes in the interior of the safe: the case for the Tenants was that nothing needed to be done;

- (xxiv) item 88.1, replacement of three cracked bricks: the case for the Tenants was that nothing needed to be done;
- (xxv) item 88.2, plant growth around the bottom section of a wall: the case for the Tenants was that nothing needed to be done;
- (xxvi) item 91.1, similar to item 88.2 in nature and response;
- (xxvii) item 94.3, a scratched switchplate: the case for the Tenants was that nothing needed to be done;
- (xxviii) item 95.2, defective grouting: it appeared that the case for the Tenants was that the appropriate work had been allowed for in the sum allowed for regrouting tiles in respect of item 95.1;
- (xxix) item 97.1, a soiled carpet: the case for the Tenants was that the soiling was minor and that nothing required to be done, even if, which was not accepted, the Tenants had any obligation to repair carpets;
- (xxx) item 98.5, some wiring had been run on the surface in the first floor flat of the Flats: the case for the Tenants was that nothing required to be done;
- (xxxi) item 99.2, a stained carpet: the case for the Tenants was that nothing required to be done;
- (xxxii) item 102.3, similar to item 98.5 in nature and response;
- (xxxiii) item 121.1, control wiring inadequately secured: the case for the Tenants was that this was cosmetic and that nothing required to be done.

17. Miss Bignell helpfully prepared a “*Table 4*” in which she listed those items in the latest version of the Scott Schedule in respect of which it was disputed on behalf of the Tenants that there had been any breach of covenant at all. There were 167 such items. Virtually all of those items could be conveniently grouped into one of a small number of categories. Miss Bignell in Table 4 divided the 167 items into 12 categories. Those categories, the number of items in each, and the total value attributed to the category, were respectively as follows:-

- (i) wallpaper, 23 items valued at £20,720;
- (ii) brass, 34 items valued at £1,310;
- (iii) carpet, 12 items valued at £1,900;
- (iv) cleaning, 14 items valued at £840;
- (v) vinyl floor covering, 1 item valued at £30;
- (vi) interior décor, 8 items valued at £1,310;

- (vii) exterior décor, 2 items together valued at £350;
  - (viii) general repairs, 43 items valued at £8,875;
  - (ix) miscellaneous, 7 items valued at £2,450;
  - (x) statutory requirements, 5 items valued at £780;
  - (xi) electrical repairs, 17 items valued at £1,885;
  - (xii) radiators, 1 item valued at £8,000.
18. The main issue in relation to the items in the wallpaper category arose from the fact that at the time of his refurbishment of the House Mr. Dresden had caused to be fixed, at least in the offices on the second, third and fourth floors of the House, and, to a lesser extent on the ground and first floors, vinyl wallpaper. During the currency of the Lease there had been periodic redecorations of the offices in which vinyl wallpaper had originally been applied and in each of those redecorations the original wallpaper had been painted over. A similar treatment was carried out as part of the works which the Tenants caused to be carried out in anticipation of the coming to an end of the term created by the Lease. Mr. Dresden's case was that that treatment did not amount to compliance with the obligations as to decoration contained in clause 2(5) of the Lease because, on proper construction, what the Tenants were obliged to do was to repaper with vinyl wallpaper that which had originally been so treated. There were some other complaints about wallpaper, in particular that silk wallpaper hung in panels had not been replaced and that nail holes in wallpaper had not been made good, but by far the bulk of the complaints related to non-replacement of vinyl wallpaper. The case for the Tenants was that they were not required under the Lease to replace vinyl wallpaper with new, rather than paint over it. The answer to other complaints about wallpaper seemed to be that it was not reasonable to require the hanging of new paper.
19. So far as the allegations of breaches of covenant in relation to brass were concerned, the issue was whether the Tenants were required, in order to perform their obligations under the Lease, to have tarnished brassware cleaned and relacquered. The items in question were mostly door handles or cover plates for electric power points. There were also some radiator grilles. It was not suggested that the door handles did not function satisfactorily as door handles or that the cover plates or the radiator grilles did not adequately perform their respective intended functions. The complaints concerned matters of aesthetics. Mr. Dresden's position was, essentially, that when the Premises were demised the brassware was shiny and new and that he was entitled to have it returned to him in that condition.
20. At the time of the grant of the Lease the Tenants purchased the carpets in the House. From time to time during the term some, at least, of those carpets were replaced, but at the end of the term the carpets then fitted were steam-cleaned and left in situ. I have already mentioned a couple of instances in which there were small amounts of staining on carpets left in the Premises. That staining was shown on photographs which were put in evidence and it was plain that the areas affected were small. In one instance the staining resulted from a leaking radiator valve and was in the area immediately below the offending valve. The more general complaint about carpets was in relation to alleged splits. Those splits occurred where sections of carpet had been laid abutting

each other and the gap between them had opened. The case for the Tenants was that no work was necessary to deal with the opening of those gaps.

21. Although there were one or two instances in which it was said that windows or walls required cleaning, most of the items allocated in Table 4 to cleaning concerned aluminium frames. Mr. Dresden's case in relation to each complaint about cleaning was that cleaning had not been undertaken before the Premises were delivered up, while the answer given on behalf of the Tenants was that all relevant items had been cleaned.
22. The evidence concerning the small item of alleged breach of covenant constituted by the vinyl flooring was somewhat unclear. It was said that the floor covering was stuck down and ought to have been removed. It seemed that ultimately that was all that was said about it, although in the final version of the Scott Schedule it was alleged that the floor covering was defective.
23. The items assigned by Miss Bignell in Table 4 to "*interior décor*" or "*exterior décor*" were essentially complaints that areas had been missed during redecoration prior to the end of the term or that areas had not been painted satisfactorily. Although the formal position adopted on behalf of the Tenants was that all decoration had been carried out properly, in cross-examination Mr. Major realistically accepted that there could have been areas which had been missed or not dealt with as he would have wished.
24. Miss Bignell's category "*General Repairs*" covered a broad spectrum of somewhat miscellaneous items. Generally the issue in relation to each item was whether what was complained of was correct in terms of being a matter which required remedy. There was thus some conceptual overlap with items which were allocated by Miss Bignell to Table 3. The matters which were assigned to "*General Repairs*", and the answers given on behalf of the Tenants, using the numbering adopted in the Scott Schedule, were these:-
  - (i) item 2.3, deterioration to the timber of an access cover caused by water penetration: the case for the Tenants was that the degree of water penetration did not require any action;
  - (ii) item 4.1, defective asphalt in a box gutter: the case for the Tenants was that there was no want of repair;
  - (iii) item 5.2, damage caused to asphalt on the roof of the House by air conditioning units standing on it: the case for the Tenants was that the air conditioning units had been placed on the roof by Mr. Dresden and anyway the roof was watertight;
  - (iv) item 14.1, there was an opening in brickwork on the rear elevation of the House where three pipes passed through, which opening needed to be closed: the case for the Tenants was that the pipes were not installed by them;
  - (v) item 16.2, untidy wiring was coiled up in a store room: the case for the Tenants was that nothing was required to be done;

- (vi) item 18.2, sections of pavements forming the parking area were uneven: the case for the Tenants was that the minor undulations admitted did not require anything to be done;
- (vii) item 19.1, windows had stuck as a result of decoration: the case for the Tenants was that the windows in question were operating satisfactorily at the end of the term;
- (viii) item 24.1, surface-mounted wiring – in fact wiring in a surface-mounted trunking – to a fan should be concealed in a chasing: the case for the Tenants was that the surface-mounting of a trunking to contain the wiring in question was satisfactory;
- (ix) item 25.2, fine cracking to an area of ceiling which required making good and redecorating: the case for the Tenants was that there was no defect;
- (x) item 35.3, a door catching on a carpet: the case for the Tenants was that there was no defect;
- (xi) item 37.2, a damaged door latch: the case for the Tenants was that there was no defect;
- (xii) item 38.1, a damaged lavatory seat: the case for the Tenants was that the seat was in repair;
- (xiii) item 38.4, loose sections of floor boarding: the case for the Tenants was that this had been the position since the refurbishment works carried out on behalf of Mr. Dresden in 1974;
- (xiv) item 44.4, areas of defective plaster on the side of a chimney flue: the case for the Tenants was that the plaster in question was not defective;
- (xv) item 50.2, dirty and discoloured brass grilles to an air conditioning unit: the case for the Tenants was that the grilles were in repair – in other words the issue seemed to be the same as for items otherwise allocated by Miss Bignell to her “*Brass*” category;
- (xvi) item 54.3, internal glazed screen to lantern light missing: the case for the Tenants was that it was never there;
- (xvii) item 60.1, loose floorboards: the case for the Tenants was that the relevant floorboards were not loose;
- (xviii) item 60.2, recessed light fittings were not in keeping with the style of the House and should be replaced and the ceiling made good: the case for the Tenants was that the style of the lighting was in keeping with a reception room for office user;

- (xix) item 60.3, original lighting should be replaced: the case for the Tenants was that the replacement lighting was satisfactory and enhanced the qualities of the room;
- (xx) item 63.2, similar in nature and response to item 60.2;
- (xxi) item 64.3, damaged door handle: the case for the Tenants was that the door handle, although old, was serviceable;
- (xxii) item 69.2, a broken wash basin: the case for the Tenants was that it was not broken when possession was delivered up;
- (xxiii) item 70.2, lavatory cubicle doors not closing adequately: the case for the Tenants was that they were closing adequately when possession was delivered up;
- (xxiv) item 76.2, dampness by a radiator: the case for the Tenants was that the area in question had been treated;
- (xxv) item 76.3, a manhole cover was sealed: the case for the Tenants was that that was how it had been left in 1974;
- (xxvi) item 78.1, floor damaged by excessive loading: the case for the Tenants was that the floor had not been damaged;
- (xxvii) item 84.1, water ponding on the roof of the Flats: the case for the Tenants was that the roof was watertight, and that was accepted;
- (xxviii) item 85.1, television aerial wires draped across roof of the Flats: the case for the Tenants was that there was nothing unsatisfactory in that;
- (xxix) item 86.1, similar in nature and response to item 85.1;
- (xxx) item 86.2, area of defective lining to a box gutter: the case for the Tenants was that the gutter was watertight at the date of the delivery up of possession;
- (xxxi) item 87.2, similar in nature and response to item 85.1;
- (xxxii) item 105.2, two locks to doors worn and defective: the case for the Tenants was that the locks in question were in working order at the end of the term;
- (xxxiii) item 115.2, telecommunications equipment left behind: the case for the Tenants was that British Telecommunications plc should remove it;
- (xxxiv) item 132.1, complaint about water meter pipework and lack of insulation of that pipework: the case for the Tenants was that the meter was installed by the relevant water company in accordance with its own requirements;

(xxxv) item 133.1, cold water storage tank rusting and in imminent danger of failing: the case for the Tenants was that the tank was serviceable at the end of the term;

(xxxvi) item 134.1, a water heater was not working and the pipework feeding it was inadequately insulated: the case for the Tenants was that the heater was working at the end of the term;

(xxxvii) item 135.3, the rubber feet on a lavatory seat had deteriorated: this was accepted by Mr. Major in cross-examination;

(xxxviii) item 136.1, the washers and sealing glands of some taps showed signs of wear: Mr. Major accepted this in cross-examination, subject to the point, accepted on behalf of Mr. Dresden, that there was a degree of overlap in relation to the cost claimed with item 69.3;

(xxxix) item 137.1, sanitaryware dirty and stained: that was accepted on behalf of the Tenants, but it was said that an appropriate allowance for remedial work had been included in item 69.3;

(xl) item 138.1, boiler unit covered by cement slurry: the case for the Tenants was that the boiler unit was new in September 2001;

(xli) item 156.1, similar in nature and response to item 133.1;

(xlii) item 157.2, similar in nature and response to item 133.1;

(xliii) item 159.1, defective tiling: Mr. Major accepted this in cross-examination.

25. Most of the complaints assigned by Miss Bignell to the category of “*Miscellaneous*” concerned the non-removal at the end of the term created by the Lease of cupboards or other modifications having essentially a storage function. The case for the Tenants was that the cupboards and so forth were valuable and useful, so there was no need to remove them. There was an inconclusive debate in the evidence of Mr. Lander and that of Mr. Major as to whether it was a legal requirement of a listing, such as the House had, as a Grade II building, that any modifications to fixtures of whatever sort in the building needed permission, and thus whether, if such permission had not been obtained, any modifications made during the term needed to be reinstated at the end of it. This affected in particular items 50.1, 56.1 and 57.1 of the final version of the Scott Schedule. The issue was one of law. However, neither Miss Bignell nor Mr. Denehan sought to pursue it in submission. The other “*Miscellaneous*” items which should be mentioned specifically are item 52.2 and item 66.2. Item 52.2 related to an antique mirror which showed black spots through the glass. Mr. Dresden’s case was that the mirror needed to be resilvered. The case for the Tenants was that the mirror was in a condition in keeping with the character of the House. Item 66.2 was a complaint that the burglar alarm at the House had not been left in working order. The case for the Tenants was that it was a tenant’s fitting.

26. The items allocated by Miss Bignell to the “*Statutory Requirements*” category all concerned either half-hour fire resistance or ventilation for lavatories. The fact that the matters complained of were not in accordance with current requirements was accepted, but the case for the Tenants was that they were not bound to carry out modifications to the original structure so as to comply with modern regulations. The same point was made in relation to a number of the complaints concerning alleged electrical defects. Apart from that the main issue in relation to alleged electrical defects was whether the defect alleged actually existed or whether the relevant installation was in working order at the end of the term.
27. The question raised concerning radiators, individually a substantial cost item, was one of principle. As part of the refurbishment works which he caused to be undertaken after purchasing the House, Mr. Dresden had installed a central heating system which utilised radiators manufactured by a Danish company called Hudevad. It was a feature of those radiators that they were manufactured with integral control valves. In 2001 some of the valves on the Hudevad radiators were found to be defective. Because the valves were integral with the radiators it was necessary to replace both radiator and valve where a control valve was not functioning satisfactorily. It was found that Hudevad radiators were on long delivery from Denmark, and so a decision was made to replace those radiators which needed to be replaced with radiators which were readily available in the United Kingdom in September 2001. It was not suggested that the replacement radiators obtained and installed were not perfectly satisfactory as radiators or did not deliver appropriate heating. The complaint, in the end, simply amounted to an assertion that the replacement radiators were not of the same design as the Hudevad radiators, and they should have been. The photographs put in evidence did show that the replacement radiators were visibly different from the Hudevad radiators, if one compared them, without having any particularly striking feature as radiators. Equally, other than to a connoisseur of radiators, the Hudevad product did not seem to have any particularly striking aesthetic feature. It was simply a flat-panelled radiator, whereas the replacements had a ridged appearance. In the works which the Tenants caused to have carried out at the end of the term of the Lease Hudevad radiators and the new radiators were not mixed in any individual room. Each room in the House had either Hudevad radiators or the new radiators. The case for the Tenants was that their obligation was simply to provide serviceable radiators and not to replace defective Hudevad radiators with other Hudevad radiators of the same design.
28. I have already to an extent indicated my findings of fact concerning the state of the Premises at the expiration of the term created by the Lease. The findings which I have so far indicated are in relation to matters about which there was not, as the evidence turned out, a dispute. Before coming to consider the evidence as to matters concerning which there remained a dispute at the conclusion of the trial it is necessary to address the submissions made as to the proper construction of the relevant clauses of the Lease and the appropriate standard of repair of the Premises.

**The nature of the obligations as to repair and decoration under the Lease and the appropriate standard of repair – the submissions of the parties**

29. In broad terms Miss Bignell contended that, upon proper construction of the obligations of the Tenants under the Lease as to decoration and repair, the Tenants were bound to repair and to decorate to a high standard, commensurate with the nature of the Premises, their location and their condition at the date of the demise. The

conclusion to which this submission led, according to Miss Bignell, was that the Premises should have been delivered up at the end of the term essentially in the condition in which they had been demised. Whether that was the standard which ought to have been achieved was especially relevant to the claims in respect of failure on the part of the Tenants to repaper with vinyl wallpaper those rooms so papered at the date of the Lease, in respect of brassware and in respect of the failure to replace defective Hudevad radiators with new Hudevad radiators of the same design.

30. Mr. Denehan, on the other hand, submitted that the standard of repair which the Tenants had to achieve if they were to perform their covenants was such repair as, having regard to the age, character and locality of the premises, would make them reasonably fit for the occupation of a reasonably minded tenant of the class who would be likely to take the Premises. That standard was, implicitly, lower than that for which Miss Bignell contended. Whether a lower standard than that for which Miss Bignell contended was sufficient was important to the case of the Tenants that minor defects, particularly those of a cosmetic nature, did not require remedy because a reasonably minded tenant would not have required the Premises to be in absolutely perfect condition.
31. Miss Bignell adopted as her starting point in support of her submission the proposition that the approach to the construction of the relevant covenants in the present case which ought to be adopted was that explained by Lord Hoffmann in the well-known passage from his speech in *Investors Compensation Scheme v. West Bromwich Building Society* [1998] 1 WLR 896 at pages 912G to 913F:-

*“The principles may be summarised as follows.*

*(1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.*

*(2) The background was famously referred to by Lord Wilberforce as the “matrix of fact”, but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.*

*(3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them.*

*(4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the*

*meaning of its words. The meaning of words is a matter of dictionaries and grammars: the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax: see Mannai Investments Co. Ltd. v. Eagle Star Life Assurance Co. Ltd. [1997] AC 749.*

*(5) The “rule” that words should be given their “natural and ordinary meaning” reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had. Lord Diplock made this point more vigorously when he said in Antaios Compania Naviera SA v. Salen Rederierna AB [1985] AC 191,201:*

*“if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must be made to yield to business commonsense.” ”*

32. I do not think that Mr. Denehan dissented in principle from the approach for which Miss Bignell contended, following Lord Hoffmann, but he did place heavy reliance upon the general guidance given specifically in relation to standard of repair under covenants to repair in leases given by Lord Esher MR in *Proudfoot v. Hart* (1890) 25 QBD 42 at pages 52 to 53:-

*“Lopes LJ has drawn up a definition of the term “tenantable repair” with which I entirely agree. It is this: “ “Good tenantable repair” is such repair as, having regard to the age, character, and locality of the house, would make it reasonably fit for the occupation of a reasonably-minded tenant of the class who would be likely to take it”. The age of the house must be taken into account, because nobody could reasonably expect that a house 200 years old should be in the same condition of repair as a house lately built; the character of the house must be taken into account, because the same class of repairs as would be necessary to a palace would be wholly unnecessary to a cottage; and the locality of the house must be taken into account, because the state of repair necessary for a house in Grosvenor Square would be wholly different from the state of repair necessary for a house in Spitalfields. The house need not be put into the same condition as when the tenant took it; it need not be put into perfect repair; it need only be put into such a state of repair as renders it reasonably fit for the occupation*

*of a reasonably-minded tenant of the class who would be likely to take it.”*

33. Miss Bignell in her turn accepted that the approach explained by Lord Esher MR in *Proudfoot v. Hart* was in principle appropriate and was one which had been adopted for many years. However, she submitted that, as applied to the circumstances of the present case, the effect was that a high standard of repair was appropriate, given, in particular, the character and location of the Premises. Miss Bignell reminded me that in *Anstruther-Gough-Calthorpe v. McOscar* [1924] 1 KB 716 Atkin LJ had said at page 734:-

*“Repair is not confined to houses; it applies to chattels, and it connotes the idea of making good damage so as to leave the subject so far as possible as though it had not been damaged. It involves renewal of subsidiary parts; it does not involve renewal of the whole. Time must be taken into account; an old article is not to be made new; but so far as repair can make good, or protect against the ravages of time and the elements, it must be undertaken.”*

Miss Bignell also relied upon the comment of Lord Denman CJ in *Burdett v. Withers* (1837) 7 Ad & E 136 at page 138 that in the case of a claim for damages for breach of a repairing covenant in a lease,

*“It is very material, with a view both to the event of the suit, and to the amount of damages, to shew what the previous state of the premises was.”*

34. Further, Miss Bignell prayed in aid in respect of her submissions as to the standard of repair and decoration required under the covenants in the Lease the terms of the user covenant, by which the House was to be used as “*high class*” offices. Miss Bignell drew to my attention the decision of the Court of Appeal in *Patoner Ltd. v. Lowe* [1985] 2 EGLR 154. In that case the issue was whether an underletting of residential premises was in breach of a covenant in the head lease which permitted only sublettings “*consistent with the letting of high class furnished accommodation*”. In his judgment in that case Russell J, sitting in the Court of Appeal, said at page 156:-

*“In my judgment, furnished accommodation, in order to qualify for the description “high-class furnished accommodation”, must be shown to have been not merely better than average but rather much better than average, or even very much better than average.”*

35. In her written opening note Miss Bignell drew together her submissions in relation to the main matters of principle between the parties in relation to standard of repair or decoration in this way:-

*“The standard of internal decoration to No 27 and, in particular, whether Cs were obliged to re-paper in the last year of the term and to what standard*

*It is D's case that the Cs were obliged to repaper in the last year of the term with good quality vinyl paper. Instead, the Cs simply applied paint to the existing paper. D submits that:*

*(1) to comply with their covenant at clause 2(4) of the Lease the Cs were obliged to repaper the walls in question and not simply to paint over the existing wallpaper. In the last year of the term, clause 2(4) required the tenant to "repaper the ceilings and walls in the usual manner ..."*

*(2) in accordance with clause 2(4), the decorative work was also to be "carried out to the satisfaction of the Landlord's Surveyor". Not only was the work not carried out to the satisfaction of Mr. Lander, the Cs deliberately disregarded Mr. Lander's letters specifying that wallpaper was required and giving details of the wallpaper required. On a true construction of clause 2(4) of the Lease, Mr. Lander's decision as to the need for new vinyl wallpaper is binding in this regard.*

*(3) the walls were to be repapered in "the usual manner". On a true construction of the Lease this could only refer to the manner in which the walls were papered at the commencement date of the Lease. That was with good quality vinyl paper, not paper with paint applied to it.*

*(4) on a true construction of clause 2(4) of the Lease and the Lease as a whole, there is an emphasis on the use of the "best" materials. That requires the use of good quality vinyl paper, not paper with paint applied to it.*

*(5) the offices were only to be used as "high class" offices. Again, this emphasises that it was intended that the Premises would be decorated in a manner appropriate for such use.*

*(6) in assessing the appropriate standard of decoration, D points to the fact that wallpaper of the kind insisted upon by Mr. Lander existed in the Premises at the commencement of the Lease was [sic] of this standard;*

*(7) the Premises are a Grade II listed building and it is inappropriate to paint over existing paper rather than to repaper with vinyl wallpaper of a suitable standard;*

*(8) the standard of decoration insisted upon by Mr. Lander is suitable for a building like the Premises in the location of the Premises.*

*Approximately £21,000 of the work identified as required by Mr. Lander relates to such matters. Mr. Major denies breach.*

- *The quality and standard of internal repairs to No. 27*

*The following items are amongst the matters identified and appear on numerous occasions throughout the Scott Schedule:*

- *trunking, approximately £2,000 of the work identified as required by Mr. Lander relates to such matters;*
- *repairs to carpets, approximately £1,700 of the work identified as required by Mr. Lander relates to such matters;*
- *brass door furniture, approximately £1,120 of the work identified as required by Mr. Lander relates to such matters;*

*On the whole, Mr. Major denies breach, or records the damage as “very minor” in relation to the trunking.*

*It is D’s case that:*

*1. the works identified by Mr. Lander are necessary to comply with clause 2(5) of the Lease. In particular, in addition to repairing the Premises, the Cs were obliged to “maintain” the Premises. This required the Cs to maintain the Premises in accordance with their standard at the date of commencement of the Lease.*

*2. the offices were only to be used as “high class” offices. Again, this emphasises that it was intended that the Premises would be repaired and maintained in a manner appropriate for such use.*

*3. in assessing the appropriate standard of repair, D points to the standard of the Premises at the commencement of the Lease;*

*4. the Premises are a Grade II listed building and as such an appropriate standard must be applied;*

*5. the standard required by Mr. Lander is suitable for a building like the Premises in the location of the Premises.*

*- The replacement of the radiators*

*Mr. Lander identifies the cost of replacement radiators at £8,000. Mr. Major denies breach. The Cs replaced the radiators installed by D with radiators of an inferior quality, seemingly because they could not obtain radiators of the original type and standard in the time available after they commenced works to the Premises before the expiry of the Lease.*

*D submits that:*

*1. the works identified by Mr. Lander are necessary to comply with clause 2(5) of the Lease. In particular, in addition to repairing the Premises, the Cs were obliged to “maintain” the Premises. This required the Cs to maintain the Premises in*

*accordance with their standard at the date of the commencement of the Lease.*

*2. the offices were only to be used as “high class” offices. Again, this emphasises that it was intended that the Premises would be repaired and maintained in a manner appropriate for such use.*

*3. in assessing the appropriate standard of repair, D points to the standard of the Premises at the commencement of the Lease;*

*4. the Premises are a Grade II listed building and as such an appropriate standard must be applied;*

*5. the standard required by Mr. Lander is suitable for a building like the Premises in the location of the Premises.”*

36. Notwithstanding the terms of the first paragraph numbered (2) in the passage quoted from her submissions in the preceding paragraph, that under the heading “*The standard of internal decoration to No. 27 and, in particular, whether Cs were obliged to re-paper in the last year of the term and to what standard*”, in her oral opening submissions Miss Bignell, correctly as it seemed to me, disavowed any contention that the effect of the requirement in clause 2(4) of the Lease that “*all such work to be carried out to the satisfaction of the Landlord’s Surveyor*” was to extend the scope of the work required to be done in order to comply with that covenant to include whatever work the Landlord’s Surveyor considered should be carried out. She accepted that the effect of the relevant words was simply that the standard to which works otherwise falling within the scope of the covenant was to be carried out was to the satisfaction of the Landlord’s Surveyor. That modification of the position adopted in her written opening note effectively removed the issue of the satisfaction of the Landlord’s Surveyor as one in contention in this action. It was not said that any of the remedial works which had actually been carried out on behalf of the Tenants had not been carried out to the satisfaction of Mr. Dresden’s surveyor, Mr. Lander, in the sense that any item of work had not been carried out competently as the item of work which it purported to be. For example, it was not contended that Mr. Lander was not satisfied that the standard of the painting over vinyl wallpaper was proper as painting. What he was not satisfied with, in the example taken, was that it was painting that was done rather than replacement of the vinyl wallpaper. It is right to say that he was also critical of the fact of painting over vinyl wallpaper, rather than painting over bare plaster or over lining paper, but there was no criticism, for example, that the painting had streaks or an insufficient number of coats. Again, in relation to the replacement of radiators, there was no suggestion that Mr. Lander was dissatisfied with the quality of the workmanship of the installation of the new radiators. What he was dissatisfied with was the fact that the new radiators were not Hudevad radiators.
37. So far as the decorating covenants were concerned, Miss Bignell relied on a dictum of Cleland J in the South African case of *Gemmell v. Goldsworthy* [1942] SASR 55 at page 57 that:-

*“This conclusion is not affected by the fact that the agreement in the present case contains a term to paint every two years. The performance of that term does not displace Gemmell’s duty to “keep up” the painting under the term to repair – that is to say,*

*should the inside or outside painting become defective or destroyed, Gemmell would be liable, under the term to repair, to make good those defects notwithstanding he had recently painted the premises under the term to paint. The term to paint every two years is absolute and unconditional. It had to be done whether it was apparently necessary or not, whereas the duty under the term to repair was to “keep up” the condition of the painting during the intervening period of two years only if and when it was necessary and proper to do so.”*

I do not think that Mr. Denehan dissented from the proposition that the obligation to paint in the last year of the term created by the Lease was absolute in the sense that decoration had to be undertaken whether strictly necessary or not. Again, I do not think that he dissented from Miss Bignell’s submissions that under clause 2(3) of the Lease what had to be dealt with was “*all the outside wood metal stucco and cement work*” and that under clause 2(4) what had to be dealt with was “*all the inside ...wood and ironwork .... the ceilings and walls ... [and] all tiles faiences glazed bricks and similar washable surfaces*”. It was not in dispute that the standard required, so far as decoration was concerned, was that the work be done “*in a proper and workmanlike manner*” and, in relation to the interior decorations, “*to the satisfaction of the Landlord’s Surveyor*”.

38. In her closing submissions Miss Bignell emphasised that the covenant in clause 2(5) of the Lease included obligations not merely to repair, but also to “*renew*”, to “*cleanse*” and to “*maintain the demised premises and every part thereof and all additions thereto*”. She accepted that the due performance of the covenant did not require that the Tenants achieve a state of perfection, but she submitted that the obligation to “*maintain*”, in particular, directed especial attention to the condition of the Premises at the date of the demise. She relied upon the obligation to “*renew*” in support of her argument that the radiators in the Premises which required replacement should have been replaced with Hudevad radiators. The force of the obligation to “*cleanse*”, she contended, was not merely that a cleaning operation should be carried out, but that it should be effective in producing clean premises and parts thereof.
39. Miss Bignell relied particularly upon the covenants in clause 2(7) and (16) of the Lease in the context of the cupboards installed in the Premises during the term and the alterations made to a bookcase unit in one of the principal rooms. She contended that the cupboards had been installed and the alterations to the bookcase unit made without the consent of Mr. Dresden. There was actually no evidence to that effect, notwithstanding that Mr. Dresden himself gave evidence at the trial, so in fact clause 2(16) did not seem to be relevant to any issue which I have to decide. More promising was Miss Bignell’s reliance upon clause 2(7), for in a letter dated 7 August 2001 to Mr. Major, Mr. Lander did write, amongst other things:-

*“g) Cupboards*

*You will note from my Schedule that I have referred to various cupboards having been altered or additional cupboards having been provided and my Client is looking for these areas to be reinstated to their original form.”*

Miss Bignell submitted that clause 2(7) was also relevant to complaints about defects in the carpets in the Premises. She accepted that the carpets originally in the Premises had been sold by Mr. Dresden to the Tenants at the time of the original demise, and that some carpets had subsequently been replaced at the expense of the Tenants. Although the Tenants were not required to remove the carpets at the end of the term, Miss Bignell submitted that they should have done so or left them in good repair. The obligation to leave the carpets in good repair arose, as I understood her submission, in substitution for incurring the cost of removal or because the carpets, if left, were fixtures and the provisions of clause 2(5) of the Lease then applied to them.

40. The relevance attributed by Miss Bignell to clause 2(8) of the Lease was that she contended that the effect of it was that the Tenants had to comply with any statute, order or regulation coming into force during the term created by the Lease which was capable of applying to the Premises or some part thereof, whether it actually did so or not. In other words, by way of example, as there was electrical wiring in the Premises to which the regulations made by the Institution of Electrical Engineers was capable of applying, the Tenants were bound to comply with the regulations from time to time in force, even if regulations made after the date of the Lease did not have retroactive effect.
41. Mr. Denehan, in his written opening on behalf of the Tenants, also helpfully sought to address, as Miss Bignell had done, the issues of principle between the parties in relation to alleged breaches of the repairing and decorating covenants in the Lease. He adopted a slightly different approach in identifying categories of breaches from that taken by Miss Bignell, but essentially his listing of the issues in principle was the same as hers. He elaborated his submissions on these issues in his opening as follows:-

*“6.3 Of the disputed items, they may be categorised as follows:*

*6.3.1 Failure to wallpaper.*

*6.3.2 Failure to repair/clean/replace carpets.*

*6.3.3 Failure to adequately replace radiators.*

*6.3.4 Brass fittings.*

*6.3.5 Damaged mirror.*

*6.3.6 Other items.*

*6.4 **WALLPAPER:** By far the largest area of dispute concerns the alleged failure on the part of Cs to wallpaper the walls of the House. D costs this work at £21,170.00.*

*6.5 It is admitted this has not been done. Cs say this work was not needed in order to comply with the covenants in the Lease. D says, in effect, he is entitled to have the Premises back as he created them in 1972. The court is here concerned with the standard of repair demanded by covenants in general form.*

6.6 *The test as to the required standard is well established: the standard of repair required is such repair as, having regard to the age, character and locality of the premises, would make them reasonably fit for the occupation of a reasonably minded tenant of the class who would be likely to take the premises. The premises need not be put into the same condition as [w]hen the lease was granted; nor need the premises be in perfect repair.*

6.7 *Rather the premises have to be rendered reasonably fit for the occupation of a reasonably minded tenant of the class who would be likely to take the premises. If the reasonably minded tenant of the class [who] would be likely to take the premises would refuse to take the premises bec[ause] of some want of repair, then the tenant has not complied with the covenants. If he or she would, the covenants have been complied with.*

6.8 *C case is that the reasonably minded tenant of the class minded to take a lease of the Premises would have no objection to the walls of the House being painted in the manner that Cs painted them at the end of the Lease. Indeed, the Cs go further and say such a tenant would prefer painted walls, as they are more durable and require less maintenance and care tha[n] expensively wallpapered walls.*

6.9 *As a general observation in this context Cs will submit that D over specified the Premises in terms of decoration when he carried out his 1972 works. This is not surprising as he was fitting out and decorating accommodation for his own use. The fact that D demanded decoration “in authentic Georgian style using the highest quality material” is not the test for determining what the reasonably minded tenant seeking office accommodation in the Premises would have required in 1976. If D had wished to retain control over the nature of the decorative finishes in the Premises, the Lease would have expressly so provided, but it does not.*

6.10 *It is further submitted that the approach of Mr. Lander to the assessment of the standard of repair needed to comply with the covenants in the Lease is wrong. First, he seeks to achieve a perfect state of repair, which is not the standard. Provided the Premises are substantially in repair, Cs have complied with their obligations. Second, Mr. Lander’s goal has [been] to bring the Premises “up to a modern lettable standard”, which standard was “an improved standard to that of which the [Premises are] at the present time.”*

6.11 *Mr. Lander described the works specified by Mr. Major as the “necessary works”. It is submitted that what he meant by that expression was the works necessary to comply with the covenants in the Lease. What Mr. Lander specified in his schedule of dilapidations was, for the most part, the work*

*necessary to bring the Premises up to a modern lettable standard, and that Cs were not obliged to do under the covenants in the Lease or at all.*

6.12 *This element of D's claim reflects the history described in Part 4 of these submissions. Long before D had even considered the likely existence or not of dilapidations at the end of the term, he was effectively budgeting for a claim of between £250,000.00 and £400,000.00. Thereafter, with the assistance of Mr. Lander, D sought to manoeuvre himself into a position best [to] exploit a claim against Cs, without any considered assessment of whether or not any such claim was maintainable. This manoeuvring involved formulating an inflated claim.*

6.13 *The court should reject in its entirety D's claim in respect of the lack of wallpapering in the House.*

6.14 **CARPETS:** *D claims £3,800.00 in respect of the carpets in the Premises. Cs owned all the carpets in the Premises. The carpets did not become fixtures, nor did they otherwise become part of the Premises. It follows that they did not have to be replaced, repaired or cleaned. The fact that Cs did clean and replace some of the carpets means D is better off than if Cs had removed all the carpets at the end of the term as they were entitled to do.*

6.15 *In any event, Cs make the same submissions in respect of the carpets as they do in respect of the wallpaper. What Cs left in the Premises was sufficient for the reasonably minded tenant of the class likely to take a lease of the Premises.*

6.16 *For these reasons D's claim in respect of the carpets should be rejected in its entirety.*

6.17 **RADIATORS:** *D claims £8,000.00 for this item. As part of their works, Cs replaced all radiators with off the shelf steel radiators. D's complaint seems to be that the modern radiators installed by Cs should be replaced with the same radiators that D installed in 1972.*

6.18 *Cs make the same submissions in respect of the radiators as they do in respect of the wallpapering.*

6.19 *Accordingly D should not recover for this item.*

6.20 **BRASS FITTINGS:** *The value of these items is £1,280.00. The debate between the experts is this: Mr. Lander says they are badly tarnished; Mr. Major says they are old but in repair.*

6.21 *Cs submit that the brass fittings are of the required standard having regard (inter alia) to the age and character of the House. D falls into the trap of insisting upon perfect repair,*

*and ignoring the obligation that the Premises need only be in substantial repair.*

6.22 **MIRROR:** *D claims £350.00 in respect of this item. The only mirror in the House was sold to Cs by D. Cs repeat the submissions made in respect of the carpets. Accordingly D should not recover for this item.*

6.23 **OTHER ITEMS:** *In respect of the vast number of other disputed items, the debate between the experts is along the same lines as that which applies to the brass fittings. Cs make the same submissions in respect of the other items.”*

42. In his written closing submissions Mr. Denehan elaborated his submissions as to the correct construction of clauses 2(4) and (5) of the Lease and as to the standard of repair required. What he said about standard of repair was essentially to the same effect as what he had said in his opening submissions, the material parts of which I have already quoted. However, it is material to set out his submissions in closing on the construction of clauses 2(4) and (5):-

*“2.2 Clause 2(4): the internal painting covenant. There are a number of elements:*

*2.2.1 all inside wood and iron “usually” or required to be painted french polished or otherwise treated of the demised premises including the floor surfaces and all additions and fixtures thereto with two coats of best paint or best quality polish or other suitable material of the best quality in a proper workmanlike manner*

*2.2.2 grain marble and varnish the parts (if any) “usually” grained marbled and varnished and also wash distemper paint as aforesaid or repaper the ceiling and walls in the “usual manner”.*

*2.3 When clause 2(4) of the Lease requires something to be treated as it had been previously treated, the word “usually” is used. The word is not used in the context of the treatment of ceilings and walls. The ceiling and walls may be washed, distempered painted as aforesaid “or” repapered in the usual manner. The “or” is disjunctive; it provides the covenantor with an option. The walls may be was[h]ed, distempered painted or papered.*

*2.4 The words “usual manner” simply describe the manner in which the covering is to be applied; it must be usual.*

*2.5 Clause 2(5), the repairing covenant, is expressed in terms of substantiality. Thus the covenantor is obliged ... “substantially” to repair [re]new cleanse and keep in good and substantial repair and condition.*

*2.6 It is submitted that this qualification makes the obvious point that a building may be in repair provided it is in substantial repair. The court is obliged to give effect to the “good sense” of the agreement between the parties. And an agreement construed to mean that the state of repair must be perfect will fall into the trap of lacking good sense.”*

43. A little later in his written closing submissions Mr. Denehan recapitulated the Tenants’ case in relation to the main items of contested breaches of covenant in this way:-

*“2.15 **Wallpaper:** No requirement for the Claimants to re-wallpaper the Premises. That which is on the walls is pleasing and function[al]. The debate was reduced to whether paint on vinyl wallpaper would [be] likely to get under the paper at the edges. There was no evidence of that.*

*2.16 **Carpet:** These are the Claimants’ items. No need for them to be repaired or replaced and there is no claim that they should have been removed. Defendant cannot now make such a claim as from his own mouth we have it that they assisted with the sale of the Premises.*

*2.17 **Brass fittings:** In repair. Tarnish is not something that requires cleaning; it is not dirty. It is the natural process which affects the substance out of which the fitting is ma[d]e. In any event consistent with the age and character of the premises.*

*2.18 **Radiators:** Ultimately all a question of aesthetics. It is submitted the steel panel radiators are so common as to be anonymous. They are of adequate standard for an office building of this kind. There is no mis-matching within rooms. It will be noted that the Defendant requires replacement within all rooms.*

*2.19 **Damaged mirror:** Not only is item the Claimants’ but the fact the Defendant has included it i[n] hi[s] schedule is indicative [o]f .. the lack of good sense he has applied to the covenants in the Lease.*

*2.20 **Roof works:** All the roofs are wind and watertight. Some redistribution of chippings is needed and that has been conceded. Some slight ponding, but that does not mean the roof is out of repair. Again, the requirement that the whole roof be lifted to eliminate ponding is illustrative of the Defendant’s exaggerated claim.*

*2.21 **Paintwork:** Large sums are [claimed] for total repainting to timber work. It is submitted that if a standard less than perfect is the required standard, then those minor incidences where painting has not been total are within the required standard. Similarly with the failure to paint behind radiators.*

2.22 **Vault works:** *The vaults are basically dry. Mr. Lander accepts they may be drying out, yet demand[s] extensive works. Vaults are vaults. The reasonably minded tenant taking these premises in 1976 would not require the same standard in the vaults as in the other rooms.*

2.23 **Water tank:** *According to Mr. Lander rust pin holes in this suggested failure imminent. No evidence that this has occurred. No evidence that IPG [that is to say, ACE] has replaced.*

2.24 **Air-handling unit:** *Mr. Major agrees this should be removed. As it is an expensive item, Mr. Lander wants it to be repaired. Mr. Lander's inconsistency between this item and, say, the cupboards, is noteworthy. Cost of removal should only be allowed.*

2.25 **Cleaning:** *There has not been perfect cleaning. No building is perfectly clean. The good sense of the agreement represented by the Lease indicates that the degree of cleaning undertaken is sufficient.*

2.26 *In respect of the large number of very small items which are not admitted or agreed, the Claimants invite the Court to take a broad brush approach based upon the different standard of repair, cleaning etc. urged upon the Court by the parties.*

2.27 *The Claimants submit that a useful test is to have regard to what IPG have done. That company has not implemented the schedule of dilapidations and yet occupies part of the Premises and has sub-let other parts."*

44. Mr. Denehan submitted in respect of clause 2(7) of the Lease that the entitlement of Mr. Dresden, if any partitions, fixtures or fittings which were not on the Premises at the date of the Lease were not removed, was simply himself to remove them and to recover the cost of so doing from the Tenants. There was no obligation to do anything else, such as repair what was left behind. He pointed out that removal of the carpets had not been required, and that, far from the carpets or the cupboards in fact being removed after the end of the term, ACE expressly sought that they should be included in the sale of the Premises and they were included.
45. The position adopted on behalf of the Tenants in relation to clause 2(8) of the Lease was that the effect of it was that the Tenants were only obliged to comply with statutes, orders and regulations "*so far as they relate to or affect the demised premises or any additions or improvements thereto or the user thereof*". Consequently, Mr. Denehan contended, statutes, orders or regulations which were passed or made after the date of the Lease did not have to be complied with unless they did actually apply to the Premises.

#### **The nature of the obligations as to repair and decoration under the Lease and the appropriate standard of repair - conclusions**

46. I accept the submission of Miss Bignell that clause 2(3) and (4) of the Lease required that the exterior and interior of the Premises be redecorated in the last year of the term

created by the Lease, whether that was strictly necessary or not. It follows that, to the extent that areas requiring decoration were missed, or, as in the case of silk wallcoverings, not addressed because it was not considered that they were in need of attention, there was a breach of covenant.

47. I do not accept the submission of Miss Bignell that, upon true construction of clause 2(4), the Tenants were bound to repaper in the last year of the term any wall which had been papered at the beginning of the term. I found Mr. Denehan's analysis in paragraphs 2.2 to 2.4 inclusive of his closing submissions of the nature of the obligations created by clause 2(4) entirely convincing. Critical, as it seems to me, is the use of the disjunctive in the expression "*also wash distemper paint as aforesaid or repaper the ceilings and walls in the usual manner*". As Mr. Denehan submitted, as a matter of language that formulation gave the Tenants an option as to the treatment to be applied to walls, save, as it seems to me, that the force of the word "*repaper*" was that the option of papering was only available if a wall or ceiling had previously been papered. Contrary to the submission of Miss Bignell, in my judgment the words "*in the usual manner*" were, as Mr. Denehan submitted, an adverbial phrase qualifying the verbs "*wash distemper paint ... or repaper*", and not equivalent to some expression such as "*whichever may be appropriate, having regard to the decorative treatment at the date of the Lease*". That Mr. Denehan's analysis was correct was, it seems to me, confirmed by the fact that no provision was made in clause 2(4) for the landlord to choose the wallpaper to be hung in the last year of the term, which one would have thought would have been an obvious provision to make if wallpaper was required to be hung wherever wallpaper had been hung at the date of the demise. Per contra, express provision was made for the landlord to approve the colours or tints of paint, french polish or other treatment of interior wood or ironwork. It does not seem to me that the analysis for which Mr. Denehan contended was flawed, as Miss Bignell seemed to submit, because of the terms of the user covenant which required the House to be used as high class offices. A high class office is not necessarily one in which the walls are papered rather than one in which the walls are painted. I shall come in my consideration of the evidence concerning disputed breaches of covenant to deal with the suggestion that painting over existing vinyl wallpaper was unsatisfactory, or thought by Mr. Lander to be so, as a method of decoration, either generally or in a high class office.
48. The important part of clause 2(5) of the Lease, as it seems to me, was the words "*well and substantially to repair renew cleanse and keep in good and substantial repair and condition and maintain the demised premises and every part thereof and all additions thereto*". I accept that, taken in isolation, the word "*repair*" connotes, as Atkin LJ said in *Anstruther-Gough-Calthorpe v. McOscar*, "*the idea of making good damage so as to leave the subject so far as possible as though it had not been damaged*". The basic concept is thus that, so far as is physically possible, something the state of which has been altered as a result of physical harm or wear and tear is to be restored to its original state. However, in clause 2(5) the standard to be achieved by repair, renewal or cleansing was expressly qualified. What was required was that the Tenants "*well and substantially*" repair, and so forth, and keep in "*good and substantial*" repair. The force of "*substantially*" and "*substantial*", in my judgment, was to require that in its essentials, but not necessarily in each and every minute detail, the Premises were to be repaired, renewed, cleansed and kept. I do not think that that is a standard which in practical terms is different from the standard of "*such repair as, having regard to the age, character, and locality of the house, would make it reasonably fit for the occupation of a reasonably-minded tenant of the class who would be likely to take it*"

which Mr. Denehan submitted was the appropriate standard. What that standard requires in any given case must be a question of fact and degree. In reaching a conclusion as to whether the requisite standard had been met in respect of a particular matter it is plainly relevant to take into account the standard of repair and decoration at the date of the demise and also the uses to which the Premises were permitted to be, and had been, put. To that extent I accept the submission of Miss Bignell as to the significance of the user covenant.

49. I accept the submission of Mr. Denehan that upon proper construction of the Lease the effect of clause 2(7) was that the sole remedy of Mr. Dresden in respect of any partitions, fixtures or fittings not upon the Premises at the date of the demise which he required to be removed and which were not removed was to remove them himself and recoup the cost of so doing from the Tenants. Mr. Dresden had, of course, a choice as to whether or not to require removal of partitions, fixtures or fittings. If he did not exercise that option, as he did not in the case of the carpets, no other obligation on the part of the Tenants, such as to repair what was not removed, arose in substitution. I therefore reject the submission of Miss Bignell that items removal of which might have been, but was not, required under clause 2(7) fell within the scope of clause 2(5). It follows that the Tenants were not in breach of covenant in relation to the condition in which the carpets were left when possession was given up, even if otherwise, as to which I have considerable doubt, any of the opening of splits between adjoining sections of carpet or minor staining about which complaint was made would have amounted to a breach of clause 2(5) had that covenant applied. Although removal of cupboards was, as I have said, required by Mr. Lander on behalf of Mr. Dresden, the cupboards were not in fact removed and so no costs were incurred by Mr. Dresden in removing them. The failure to remove cupboards would, therefore, at best attract only an award of nominal damages.
50. I accept the submission of Mr. Denehan that clause 2(8) of the Lease only applied to statutes, orders and regulations which did actually apply to the Premises and not to matters which did not apply in fact because they did not have retroactive effect or for some other reason. In my judgment the submission of Mr. Denehan was plainly correct in the light of the express qualification in clause 2(8) that enactments and so forth were to be complied with *“so far as they relate to or affect the demised premises or any additions or improvements thereto or the user thereof”*.

### **Findings of fact concerning disputed breaches of covenant**

51. As I have already indicated, in many instances the facts as to the actual condition of some part of the Premises when possession was delivered up by the Tenants were not in dispute. Even where there was a dispute as to whether a particular matter amounted to a breach, usually the issue was not what its condition actually was, but whether the matter complained of was of such significance as to mean that in respect of it there was a breach of covenant. Mr. Denehan relied heavily on the fact that the Premises were sold to ACE for £2,655,000 in April 2002 without any work having been done in them by Mr. Dresden and upon the fact that, since purchase, ACE, although it had done some work, had certainly not set about tackling each and every one of the breaches of covenant alleged. Apart from the refitting of the kitchens and bathrooms in the Flats, it did not clearly emerge in evidence what work ACE had caused to be undertaken.

52. The evidence as to alleged breaches of covenant, the remedial work appropriate, and the cost of such work, which was called on behalf of each party was that of a building surveyor. In the case of Mr. Dresden the building surveyor was Mr. Lander. In the case of the Tenants the building surveyor was Mr. Major.
53. Mr. Major, as I have already related, was engaged on behalf of the Tenants before the end of the term of the Lease to advise them upon necessary works and to arrange for those works to be carried out. In broad terms, therefore, his position was that the works which he had advised should be carried out, and which were carried out, were the works which it was necessary to have carried out in order to comply with the Tenants' obligations under the Lease. That was only his position in broad terms, because it was always acknowledged that there were some necessary works – in particular in the Flats and to the central heating controls in the House – which it had not been possible to carry out before 15 October 2001, but which needed to be carried out. It was in respect of those works that the sum of £17,500 was tendered to Mr. Dresden. Mr. Major also accepted in his report prepared for the purposes of this action, incorporating his comments upon the Scott Schedule, that some additional works were necessary. Further, in cross-examination he agreed that some yet further works were necessary.
54. Mr. Lander was also involved before the date of expiry of the term created by the Lease. He made comments to Mr. Major on the works proposed to be carried out on behalf of the Tenants while those works were in progress, in particular in his letter dated 7 August 2001, to which I have already referred. He told me in cross-examination that his basic approach throughout his involvement had been to seek to have the Premises restored to the condition in which they had been at the date of the demise.
55. Mr. Lander incorporated by reference, as it were, in his report a report as to alleged defects in the mechanical and electrical engineering services and drainage at the Premises prepared by a company called Shakespeare Pullen & Slade Ltd. dated 30 November 2001. The exact status of this report for the purposes of the action was never really grappled with. Miss Bignell suggested to Mr. Major in cross-examination that the company was a perfectly reputable company, which may be so, but he said that he had never heard of them and knew nothing about them. I accept that evidence. A consequence of the adoption, somewhat uncritically, by Mr. Lander of the report and schedule of defects prepared by Shakespeare Pullen & Slade Ltd. and the incorporation of the schedule of defects in the Scott Schedule was that a degree of duplication was thereby produced. Specifically it was established at the trial that the following items were duplicated:-

<u>Mr. Lander's defect</u>	<u>Shakespeare Pullen &amp; Slade Ltd. defect</u>
76.4	107.1
82.1	115.1
48.1	125.2
37.1	135.3
69.3	136.1

18.1

161.3

56. Although each of Mr. Lander and Mr. Major was cross-examined about some of the items listed in the latest version of the Scott Schedule, there were several hundred items about which neither was specifically asked. Some of those items were in the same general category as other items which they were asked about – examples were complaints about failure to replace wallpaper, failure to clean and relacquar brassware, carpets and skirting trunking. However, there were quite a number of items which did not fall into any obvious general category and about which there was no cross-examination. Mr. Denehan submitted that I should adopt a broad brush approach to such items. Miss Bignell submitted that I should seek to apply to such items findings which I made in relation to items in respect of which there was cross-examination.
57. Where it was accepted by Mr. Major that a particular breach of covenant existed, but he differed from Mr. Lander as to the appropriate remedial works, again there was limited investigation in cross-examination of the differences between them. Insofar as one can generalise, in most cases about which either was cross-examined the difference seemed to be about the extent and quality of what was required. Mr. Major in all instances in which there was a difference as to the extent of necessary work contended that less work at less cost was necessary than Mr. Lander asserted needed to be undertaken.
58. The cost of remedying any item in the latest version of the Scott Schedule for which either Mr. Lander or Mr. Major contended was stated simply as a spot price. That is to say, it was stated as an amount of £x, invariably a round figure number, without any detailed explanation of how it had been calculated. Thus there was no indication in respect of any item of how many manhours had been allowed for doing the work, at what rates of wages or what allowance had been made for the cost of necessary materials. Mr. Lander told me in his report prepared for the purposes of the litigation that he had based his prices on the BMI Maintenance Price Book published by RICS Building Cost Information Service Ltd., but offered no more detailed explanation of his calculations. Mr. Major, as I understood it, based his costings on his experience as a building surveyor who habitually arranges for the carrying out of work of the type described in the latest version of the Scott Schedule. The alleged basis for costings advanced by Shakespeare Pullen & Slade Ltd. did not emerge. It was common ground between Mr. Lander and Mr. Major, as matters turned out, that if one was assuming that someone would actually carry out the works the subject of the latest version of the Scott Schedule it would be necessary to add allowances for contractor's preliminary costs, builder's work in connection with services installations, contractor's overhead and profit, professional fees for contract administration, professional fees for a planning supervisor, insurance, and, if applicable, value added tax. Mr. Major did not deal in detail in his evidence with the appropriate allowances. Mr. Lander's allowances were £15,000 for contractor's preliminary costs, £2,000 for builder's work in connection with services installations, 10% for contractor's overhead and profit, 11.5% for professional fees for contract administration, £7,000 for professional fees for a planning supervisor and £3,000 for insurance. In the absence of any alternatives proposed by Mr. Major I accept those allowances made by Mr. Lander.
59. I shall come shortly to indicate my findings on individual items of alleged breach of covenant. Before doing so I should indicate my views of both Mr. Lander and Mr. Major, because my findings have been influenced by those views. I found each of Mr. Lander and Mr. Major to be in his own way an impressive witness. Mr. Lander was

plainly extremely thorough and meticulous. He also clearly had high standards both in what he considered required repair or other remedial action and in the remedial action which he considered appropriate. I am confident that Mr. Lander accurately identified in his schedule of dilapidations, incorporated in the latest version of the Scott Schedule, everything which arguably amounted to a breach of covenant in relation to matters other than mechanical and electrical services or drainage. In relation to alleged defects in mechanical and electrical engineering services or drainage I was not able to form any view as to the accuracy of what was alleged in the latest version of the Scott Schedule save where what was alleged was accepted by Mr. Major. Quite simply, without evidence from someone from Shakespeare Pullen & Slade Ltd., I am driven to find that any alleged defect in mechanical and electrical engineering services or drainage which was in dispute as to existence or necessary remedial work or cost of necessary remedial work was not proven as to whatever was in dispute. Mr. Major impressed me as a surveyor of wide experience who was in tune with the standards which a reasonably minded prospective tenant of premises like the Premises for commercial use would expect. He also seemed very much in touch with the costs which would have to be paid in the market place for items of work such as those the subject of the Scott Schedule, in contrast with Mr. Lander, who relied on a price book. It was not that Mr. Major's evaluation was always lower than that of Mr. Lander. As to the items the subject of Table 1 they were in agreement as to 160 items with a total value of £19,125. I was satisfied that where Mr. Major differed from Mr. Lander on pricing of the same work he had sound reason to do so based upon his experience and I accept his assessments. However, I felt that Mr. Major was perhaps not quite as diligent as Mr. Lander in identifying defects. For that reason he had initially missed those matters identified in Table 1 which were not intended to be covered by the payment of £17,500 and he had also missed the items which he accepted when they were put to him specifically in cross-examination. He was also, I thought, sometimes a little unrealistic in the precise extent of work thought to be necessary to deal with an alleged defect. By way of example, at one point in his cross-examination he suggested that wood which had been affected by water just needed to be allowed to dry out. On closer examination of a photograph of the relevant damage he accepted that in fact the wood was rotten and needed to be replaced.

60. With the introduction which I have given, I set out my findings on the various individual items of alleged breach of covenant which were in dispute as to existence, or the extent of necessary remedial action, and which have not been resolved by my findings as to the correct construction of the relevant covenants in the Lease. I am thus at this point concerned with the items listed in Table 3 or in Table 4. So far as Table 2 is concerned, for the reasons which I have given I find that the appropriate cost of repair in the case of each item is that assessed by Mr. Major.
61. **Skirting trunking:** The skirting trunking included in its condition as delivered up various blanking plates and surface mounted fixings, typically telephone sockets. The purpose of the skirting trunking was to provide a conduit in which electrical, telecommunications and information technology wiring could run. It was necessary to the useful functioning of the trunking that access to the wiring running in it should be available at points at intervals in the trunking so as to connect electrical appliances, telephones and computers by means of some appropriate socket. In other words, if the trunking were restored to its condition as at the date of the demise, holes would have to be made in it by a new occupier of the House to instal sockets and wire them to cables behind. As sockets and holes concealed by blanking plates already existed, if the existing trunking were kept, as was the case, access to wiring and connection of

electrical appliances, telephones and information technology equipment could be obtained by reuse of the existing sockets or re-opening the holes covered by blanking plates. In those circumstances it does not seem to me that a reasonably minded tenant would expect that means of access to wiring within the skirting trunking which was in fact available would be removed by replacement of sections of trunking with means of access with virgin trunking in which he would have to create his own means of access. Other alleged defects in the skirting trunking were unfilled screw holes where fittings previously surface-mounted had been removed. It does not seem to me that the skirting trunking was not in substantial repair by reason of the presence of such holes. They were barely visible and had no effect on the functioning of the trunking as such. Finally, in one or two instances the sections of trunking were not flush where they abutted other sections or the top of the skirting trunking. As shown in the photographs put in evidence these, in my judgment, were minor matters which did not have the consequence that the skirting trunking was not substantially in repair. For these reasons I reject the complaints that the Tenants were in breach of covenant by reason of the condition in which the skirting trunking was left.

62. **Other Table 3 items in respect of which Mr. Major made a nil allowance:** In the interests of proportionality I intend to indicate for each relevant item a brief conclusion as to breach and, where appropriate, a cost net of the elements of contractor's preliminaries and such like items – that is to say, a finding on the cost as set out in the latest version of the Scott Schedule itself.

- (i) item 6.1, I find that the roof light was not adequately cleaned and I accept Mr. Lander's cost of £350;
- (ii) item 6.4, I am not satisfied that the asphalt was defective – I accept the evidence of Mr. Major in preference to that of Mr. Lander;
- (iii) item 7.4, I accept the evidence of Mr. Lander that timber had rotted and I accept that the cost of remedy would be £150 in addition to the cost allowed in respect of item 7.1;
- (iv) item 10.3, I accept the evidence of Mr. Major that the front door brass fittings had not originally been lacquered and find that no work was necessary – unlacquered brass has the quality of needing periodic polishing if it is required to shine;
- (v) item 16.4, I accept the evidence of Mr. Lander, which Mr. Major accepted might be right, that the paintwork was incomplete: however, the suggested cost of remedy of £1,700 seems to me to be excessive and in the absence of any alternative costing or breakdown of the £1,700 I am not satisfied that a cost of appropriate remedial action has been proved;
- (vi) item 31.3, I accept that the extent of the damage was such that no remedial action was required;
- (vii) item 32.4, I accept that the extent of the paint left on the window glass was not such as to require remedial action;

- (viii) item 36.3, having regard to the evidence of Mr. Major concerning the back panels to lavatories, and the photographic evidence put before me, I am not satisfied that the alleged warping amounted to anything other than minor undulation which did not require remedial action;
- (ix) item 37.6, same conclusion as for item 36.3;
- (x) item 43.3, same conclusion as for item 31.3;
- (xi) item 47.2, same conclusion as for item 32.4, although the items in question were light fittings rather than window glass;
- (xii) item 48.2, same conclusion as for item 32.4;
- (xiii) item 50.3, the catching of a cupboard door does not seem to me to mean that the cupboard or the door was not in substantial repair;
- (xiv) item 51.2, I accept that the decoration was incomplete and needed to be completed: I also accept the cost of £120 contended for by Mr. Lander;
- (xv) item 63.1, same conclusion as for item 32.4;
- (xvi) item 65.2, I am not satisfied that there was water penetration and so I am not satisfied that any remedial action was required;
- (xvii) item 70.1, I do not consider that a lavatory which was useable as such was not in substantial repair because the seat and cover were discoloured or had suffered minor damage;
- (xviii) item 73.2, I am not satisfied that the problem with this item was loose flooring rather than a loose duct cover to a service duct: if the latter was the case it does not seem to me that the need to screw down the cover meant that the duct or the cover were not in substantial repair;
- (xix) item 76.1, same conclusion as for item 31.3;
- (xx) item 77.2, I am not satisfied that the need to adjust the self-closing device on a door meant that the door was not in substantial repair;
- (xxi) item 81.1, having seen a photograph of the relevant area and heard the view of Mr. Major concerning access to the hot water cylinder thermostat, I find that the matters complained of were original features of the Premises as let;
- (xxii) item 82.2, I accept the case for the Tenants that the apparent unevenness was due to a duct in the floor and did not amount to a breach of covenant;

- (xxiii) item 82.4, I do not consider that the absence of a few pigeon holes meant that the strong room was not substantially in repair;
- (xxiv) item 88.1, I find that the 3 bricks in question did need to be replaced, but that the cost of doing so, by analogy with the cost allowed by Mr. Major for item 87.3, was £35;
- (xxv) item 88.2, I do not consider that minor plant growth at the bottom of a wall meant that the wall was not substantially in repair;
- (xxvi) item 91.1, same conclusion as for item 88.2;
- (xxvii) item 94.3, minor scratching to a switchplate which was otherwise useable as intended did not mean, as it seems to me, that the switchplate was not in repair;
- (xxviii) item 95.2, I find that the grouting was defective and did need to be made good: however, I accept Mr. Major's contention that an adequate allowance for the cost of so doing had been included in his assessment of the cost of dealing with item 95.1;
- (xxix) item 97.1, this is a carpet item and thus fails;
- (xxx) item 98.5, it does not seem to me that to run electrical wiring on the surface of a wall amounts to a defect;
- (xxxi) item 99.2, this is another carpet item and thus fails;
- (xxxii) item 102.3, same conclusion as for item 98.5;
- (xxxiii) item 121.1, I am not satisfied that the control wiring was inadequately secured.

In the result, in respect of the items other than skirting trunking in Table 3 in respect of which Mr. Major made an allowance of nil, I find that defects with a cost of repair of a total of £655 were proved.

63. There was not much investigation in cross-examination of either Mr. Lander or Mr. Major of those items in Table 3 in respect of which Mr. Major agreed that there was a defect which required repair but took a different view from Mr. Lander as to the extent of the necessary repair. One item which was the subject of cross-examination was item 1.1 in the latest version of the Scott Schedule. That item concerned ponding on the main roof of the House. In respect of this item it seemed to me that Mr. Major had significantly underestimated the extent of the work required and I accept the estimate of cost of Mr. Lander of £1,000 in preference to the estimate of £150 of Mr. Major. I find that the works in question were, as Mr. Lander contended, a three man job. Another item which was the subject of cross-examination was item 48.3, which concerned a brass radiator grille which Mr. Lander considered needed replacement because it was discoloured and also needed to have base metal fixing screws replaced with brass screws. Mr. Major accepted only that the screws needed to be replaced. I

deal below with brassware items generally. Anticipating my findings on that issue, on this item I accept the approach of Mr. Major and find that only the screws needed to be replaced. I also accept his costing of that operation at £20. A further item upon which there was cross-examination was item 76.4, which concerned a hole in the ceiling of an electricity cupboard. It was common ground that the hole needed to be made good, but Mr. Major allowed only £50 for that work, while Mr. Lander allowed £120. On this point I prefer the evidence of Mr. Major. The remaining items in Table 3 in respect of which it was accepted that some work needed to be done, but there was a dispute about cost, which were the subject of cross-examination were items 6.3, 7.1, 37.1, 68.1 and 71.4. I consider these in turn.

64. Item 6.3 concerned missing chippings on the roof of the House. It was accepted that the chippings needed to be replaced, but there was a dispute as to whether that would cost £20, as Mr. Major asserted, or £50, for which Mr. Lander contended. I prefer the costing of Mr. Major. Item 7.1 concerned the plastered finish to the walls and ceiling of the north vault, which had been affected by dampness. The issue between Mr. Lander and Mr. Major was as to the number of coats of render which needed to be applied. Mr. Lander contended for four coats so as to achieve water-tightness. Mr. Major asserted that two coats would be adequate to restore the vault to its condition as at the date of the demise. I prefer the evidence of Mr. Major as to the necessary works. I think that Mr. Lander accepted the cost suggested by Mr. Major for the work which Mr. Major considered necessary. At all events I accept that cost. Item 37.1 was another damaged lavatory seat. Mr. Lander considered that it required replacement because it was chipped. Mr. Major was not able to say whether it was chipped or not, but he was prepared to allow £5 to refix it as he accepted that it was loose. I am not really persuaded that a loose, or even a slightly chipped, lavatory seat which could still be used for its intended function was not in substantial repair, but if Mr. Major was prepared to allow £5 it does not seem to me to be worth rejecting that assessment. Item 68.1 was the case to which I have already referred in which Mr. Major initially thought that damp timbers merely needed to be permitted to dry out, but on inspection of the relevant photograph accepted that what one could see was rot. I therefore accept the evidence of Mr. Lander that stripping out and replacement of defective timbers was required and that the cost of that operation would have been a total of £550, rather than the £100 allowed by Mr. Major. Finally, item 71.4 was another rotten timber item, this time in a unit in which were set basins. Mr. Major was persuaded in cross-examination that considerably more work than the replacement of the plywood base for which he had allowed was necessary. I accept the evidence of Mr. Lander on this item and also his costing of £700, rather than Mr. Major's allowance of £150, as the cost of the necessary work.
65. The items listed in Table 3 in respect of which it was accepted on behalf of the Tenants that some work was necessary, but there was a dispute as to what, and about which there was no cross-examination, were items 2.4, 5.3, 11.3, 17.1, 37.5, 47.3, 51.1, 52.3, 53.1, 55.2, 68.2, 69.4, 71.2, 75.1, 89.1, 95.1, 129.1, 132.2, 142.1 and 154.2. As to those items I just have to do the best I can. My conclusions are as follows:-
- (i) item 2.4, a discoloured rooflight: the issue was whether it needed to be replaced or merely cleaned; by analogy with my finding on item 6.1 I find that it needed to be replaced and I accept Mr. Lander's cost of so doing, £100;

- (ii) item 5.3, allegedly defective upstands: the issue was the extent of the repair required; I did not accept the evidence of Mr. Lander in respect of an item of a generally similar nature, item 6.4, and thus I do not accept it in respect of this item; I therefore accept Mr. Major's cost of £50;
- (iii) item 11.3, slab damage: again the issue was the extent of the repair required; my overall feeling was that Mr. Lander sought in his specification of works of remedy which he considered necessary to err, if at all, on the side of a scheme which he was confident would be sufficient, rather than to run any risk that what seemed adequate might for some reason not be satisfactory; he also, I thought, was inclined to make generous provision for the costs of the works which he considered necessary; by contrast, Mr. Major was perhaps inclined in some instances to underestimate the extent of the necessary work, although I considered that his prices were generally more reliable than Mr. Lander's where they differed over the same work; in the present instance I accept that the work necessary was that identified by Mr. Major and that his price of £150 was appropriate;
- (iv) item 17.1, uneven pavements: this was again a case of a dispute as to the extent of the necessary work; I accept the assessment of Mr. Major as to that and also his price of £200;
- (v) item 37.5, defective grouting: here the issue was simply the cost of the appropriate work, £50 or £30; I accept Mr. Major's figure of £30;
- (vi) item 47.3, minor cracking: again an issue as to the cost of the necessary work, £110 or £20; I accept Mr. Major's figure of £20;
- (vii) item 51.1, a discoloured brass floorplate: the issue was whether it needed to be replaced at a cost of £50 or cleaned at a cost of £10; again anticipating my findings in relation to brassware generally, I find that only cleaning was necessary;
- (viii) item 52.3, a discoloured brass grille: the issue was the same as in the case of item 51.1 and my conclusion is the same;
- (ix) item 53.1, a discoloured brass light fitting: the issue was the same as the general brassware issue, namely whether the light fitting needed to be relacquered; my finding is that it did not;
- (x) item 55.2, a discoloured brass radiator grille with base metal screws: this is similar to item 48.3 and my conclusion is similar, namely that all that was necessary was to replace the base metal screws with brass, at a cost put by Mr. Major at £10;
- (xi) item 68.2 was similar to item 68.1, in relation to which I accepted the evidence of Mr. Lander, and I treat this item

similarly, allowing his estimated price of £500, rather than Mr. Major's £100;

(xii) item 69.4 was similar to item 71.4, in relation to which I accepted the evidence of Mr. Lander, and I treat this item similarly, allowing his estimated price of £700, rather than Mr. Major's £150;

(xiii) item 71.2, water damage to panels: Mr. Major treated this item as giving rise to the same issues as item 68.1; I therefore treat this item as I did item 68.1 and accept the evidence of Mr. Lander and his costing of £1,200, rather than Mr. Major's £100;

(xiv) item 75.1, alleged water damage to the front vault: Mr. Major considered that the vault had been properly treated for damp as part of the works which he organised and was basically just drying out, although he accepted that minor works costing £100 were necessary; Mr. Lander accepted that the vault might be drying out; I accept the evidence of Mr. Major as to the works necessary and their cost;

(xv) item 89.1, cracked bricks: the issue was simply the appropriate cost of the necessary works; I accept the costing of Mr. Major of £40 in preference to the costing of Mr. Lander of £150;

(xvi) item 95.1, cracked tiles which required regrouting: another instance in which the issue was simply the cost of the necessary works; I accept the costing of Mr. Major of £25 in preference to the £150 allowed by Mr. Lander;

(xvii) item 129.1, another instance of a difference simply as to the cost of the necessary work, in this instance the removal of fans and cables; again I accept the costing of Mr. Major of £40 in preference to the costing on behalf of Mr. Dresden of £200;

(xviii) item 132.2, a hot water cylinder: the issue was whether the cylinder needed to be replaced or simply the jacket; this was an item dealt with in the report of Shakespeare Pullen & Slade Ltd and was not supported by any evidence called before me; I accept the evidence of Mr. Major in relation to this issue;

(xix) item 142.1, a defective air handling unit: the issue was whether this unit, which was defective and apparently redundant, should simply have been removed, as Mr. Major contended, at a cost of £300, or replaced with a new unit, at a cost of £2,800, as Mr. Lander asserted; as I understood it, this unit was one which fell within clause 2(7) of the Lease, and thus should simply have been removed;

(xx) item 154.2, the cleaning of a feed and expansion tank: the issue was whether the proper cost was £60, as Mr. Lander

contended, or £30 allowed by Mr. Major; I accept the evaluation of Mr. Major.

66. The effect of my findings on Table 3 items is that I found proved breaches of covenant additional to those accepted by Mr. Major the cost of remedying which, before additions for contractor's preliminaries and such like items, I found to be £655, and in relation to items where the dispute was as to the extent or cost of the necessary repair I found that additional allowances of £3,980 should have been made. In other words, I found that the allowance of £24,210 made by Mr. Major needed to be increased, before taking into account any items in Table 4, by £4,635.
67. I turn to the items listed in Table 4. Most of the items can be dealt with as general categories by reference to the categorisation which Miss Bignell adopted, but the category of "*General Repairs*" requires individual attention.
68. **Wallpaper:** I have already indicated my conclusion that, on proper construction of clause 2(4) of the Lease, the Tenants were not required by express agreement to replace wallpaper hung in the Premises at the date of the demise with wallpaper, rather than paint. The principal remaining issue is whether the method of applying paint over vinyl wallpaper was a satisfactory method of decoration. It seems to me that it was. Vinyl wallpaper is simply wallpaper to the intended visible surface of which a plastic coating has been applied. It was not suggested that that plastic coating was an inappropriate substrate to which to apply paint, in the sense that the paint would not adhere or that its finished appearance would show streaks or something of that kind. Mr. Lander made two points in relation to his objection to the application of paint over vinyl wallpaper. The first was that the plastic surface of the wallpaper has a textured effect which could show through paint. The second was that paint could penetrate the gaps between adjoining sheets of paper on a wall and cause the paper to lift. Mr. Major countered that there had, over the years, been a number of applications of paint over the vinyl wallpaper in the Premises and that had had the effect of covering any visible texturing of the wallpaper. He also told me that there were no signs of paper lifting. I accept the evidence of Mr. Major on both of these points. I am confident that if there had been any texturing of the plastic covering of vinyl wallpaper visible through any paint Mr. Lander would have noted that, and probably photographed it. Equally I have no doubt that Mr. Lander would have noted any area in which wallpaper was in fact lifting. He seemed to accept that it was appropriate to apply paint over a lining paper, and it is difficult to understand why paint applied over vinyl wallpaper should cause it to lift by penetrating gaps between adjacent sheets, but that would not happen if paint was applied over lining paper. I therefore reject the suggestion that the Tenants were in breach of covenant because paint was applied over vinyl wallpaper.
69. The vinyl wallpaper hung in panels in the front ground floor room, the subject of item 58.2, Mr. Major accepted had not been the subject of any decoration at all, but just left. In respect of that item, therefore, there was a breach of the covenant in clause 2(4) of the Lease. Mr. Lander valued this item at £1,500. As a matter of impression that strikes me as a high figure, but Mr. Major did not suggest any alternative and so I accept it.
70. **Brass:** The difference between Mr. Lander and Mr. Major in relation to brassware generally was that Mr. Lander contended that all brassware, in particular door furniture and facing plates over floor-mounted electric socket outlets, had, when

originally installed as part of the works which Mr. Dresden caused to be undertaken before occupying the House as his own firm's offices, been protected by a lacquer coating, that that lacquer coating had, wholly or partially, worn off over the years, and so all relevant items needed to be removed, cleaned and relacquered. Mr. Major, on the other hand, asserted that all relevant items functioned satisfactorily as intended – the door handles all worked, for example – and that the fact that lacquer coatings had worn off, so that brassware needed polishing to keep it bright, did not mean that any of the brassware was not substantially in repair. Mr. Lander seemed inclined to regard the tarnishing of the brassware as a breach of the covenant in clause 2(5) of the Lease to cleanse. There is, of course, a sense in which the wearing away of a protective coating of lacquer gives rise to an issue of repair, for a protective coating which has been worn away can be replaced. However, in considering the substance of the matter and what a reasonably minded tenant might expect, it is plain that the issue is really one of aesthetics. Would a prospective tenant of a Georgian building require bright, shiny brassware, or would he accept older-looking tarnished brassware which would need polishing if it was desired to keep it bright? The answer to that question, as it seems to me, is that a reasonably minded tenant would be unconcerned by this detail. As long as the door handles, and other items of brassware, performed their intended function satisfactorily it seems to me that they were substantially in repair, whether tarnished or not. If, as to which I am not altogether persuaded, the issue of cleansing is relevant, in my judgment a realistic view needs to be taken of what amounts to clean, especially in relation to something the cleanliness of which at any given time is affected by the operation of natural forces on a daily basis. I should be loathe to find that something which needs regular cleaning in any event – for example, by dusting or polishing - could not be said to be in substance clean just because a speck of dust or a degree of tarnishing could be found upon it.

71. In relation to one brassware item, item 16.1, the evidence of Mr. Lander was that some screws were missing. I accept his evidence on that point. His assessment of the cost of the replacement of the screws, and, I think of some other works, was £30. Elsewhere Mr. Major has allowed £10 for the replacement of screws, and I consider that to be an appropriate allowance in this instance.
72. **Carpet:** I have dealt with carpets already in my consideration of the proper construction of the Lease. On the evidence there were in any event only splits in carpet where there was a gap between adjacent runs of carpet, and two or three small areas of staining. I should not in any event have been inclined to find that the carpets in the Premises were not substantially in repair.
73. **Cleaning:** I accept the evidence of Mr. Lander in relation to the items listed in Table 4 in the “*Cleaning*” category and find that they did all require the cleaning for which he contended. I accept his evaluation of the cost of cleaning for each and thus the overall total for these items is £840.
74. **Vinyl floor covering:** I am not satisfied that the one item in this category had been proved.
75. **Interior décor:** I accept the evidence of Mr. Lander as to the deficiencies in the interior décor elaborated in the items which Miss Bignell assigned to this category and I also accept his evaluation of the cost of the necessary remedial works at sums totalling £1,310.

76. **Exterior décor:** I accept the evidence of Mr. Lander as to the deficiencies in exterior décor elaborated in the items which Miss Bignell assigned to this category and I also accept his evaluation of the cost of the necessary remedial works at sums totalling £350.
77. **General Repairs:** My findings on the 43 items in this category were as follows:-
- (i) item 2.3, deterioration to the timber of an access cover caused by water penetration: I accept the evidence of Mr. Lander on this item and also his costing of the necessary remedial work at £50;
  - (ii) item 4.1, defective asphalt in a box gutter: I did not find this item, which was not the subject of cross-examination, proved; I have rejected the evidence of Mr. Lander as to other alleged asphalt defects;
  - (iii) item 5.2, damage caused to asphalt on the roof of the House by air conditioning units standing on it; I accept the evidence of Mr. Major that the roof was watertight and find that no remedial work was necessary;
  - (iv) item 14.1, an opening in brickwork on the rear elevation of the House where three pipes passed through: I am not satisfied that the opening had been created by the Tenants – Mr. Lander seemed to accept that it had not been – and consequently I am not satisfied that the House had not been let with this opening; it did not seem to require any work in any event;
  - (v) item 16.2, untidy wiring in a store room: Mr. Major accepted that the wiring was not left tidy; this struck me as an item which was rather borderline as to whether it amounted to a breach of covenant, but as it was only valued at £50 I gave Mr. Dresden the benefit of the doubt;
  - (vi) item 18.2, sections of pavements forming the parking area were uneven: I accept the evidence of Mr. Major that the minor undulations present did not mean that the parking area was not substantially in repair;
  - (vii) item 19.1, windows had stuck as a result of decoration: I accept the evidence of Mr. Lander in relation to this item and also his estimated cost of £300;
  - (viii) item 24.1, wiring in a surface-mounted trunking to a fan: this did not seem to me to amount to a breach of covenant at all; if, as to which there was no direct evidence, but which seems possible, the fan had been installed during the term of the Lease, Mr. Dresden might have required removal of the fan and wiring under clause 2(7), but he did not; what Mr. Lander said was necessary was to conceal the wiring in a chase, but that is not a matter of repair;

- (ix) item 25.2, fine cracking to an area of ceiling: the description of this item, which was not the subject of cross-examination, indicated that it was a minor matter which did not mean that the relevant room was not substantially in repair;
- (x) item 35.3, a door catching on a carpet: I accept that the door did catch on the carpet, but I am not persuaded that the door was, on that account, not substantially in repair;
- (xi) item 37.2, a damaged door latch: as Mr. Lander only valued this item at £5 it did seem very minor; I was not persuaded that the door was not substantially in repair by reason of whatever the unexplained damage was;
- (xii) item 38.1, a damaged lavatory seat: as is apparent from earlier comments in this judgment, there were a number of such items; broadly the damage complained of seemed to be a chip in the edge of the seat in each case; I was not persuaded that the seat, otherwise operational, was not substantially in repair simply by reason of the presence of a chip in the edge;
- (xiii) item 38.4, loose sections of floor boarding: no evidence was led to challenge the assertion on behalf of the Tenants that the Premises were let in the condition complained of and it seemed a minor matter in any event as Mr. Lander only ascribed a cost of £20 to it;
- (xiv) item 44.4, an area of defective plaster on the side of a chimney flue: I accept the evidence of Mr. Lander as to the existence of this defect and also his costing of £300 for the necessary remedial works;
- (xv) item 50.2, dirty and discoloured brass grilles to an air conditioning unit: this item was not different in principle from the other brassware items and I reject it;
- (xvi) item 54.3, internal glazed screen to lantern light missing: the case for the Tenants that the missing screen had been absent at the date of the demise was not challenged by evidence and I did not accept that this alleged breach was proved;
- (xvii) item 60.1, loose floorboards: I accept the evidence of Mr. Lander that the floorboards were loose and I accept his costing of £50 for fixing them;
- (xviii) item 60.2, recessed light fittings not in keeping with the style of the House: this was another item which it seemed to me fell within clause 2(7) and, removal not having been required, there was no breach of covenant;
- (xix) item 60.3, original lighting to be replaced: this was, in my judgment, an item similar to item 60.2 and I reached the same conclusion in relation to it;

- (xx) item 63.2, another item similar in character to 60.2 and in relation to which I reached the same conclusion;
- (xxi) item 64.3, damaged door handle: I was not persuaded that the door handle was damaged; the response of Mr. Lander to the suggestion that it was in repair was to refer back to item 21.2, which was concerned with tarnishing and the possible need for relacquering, not with alleged faulty operation;
- (xxii) item 69.2, a broken wash basin: I accept the evidence of Mr. Lander that the basin was broken during the term and I accept his estimate of the cost of remedy at £300;
- (xxiii) item 70.2, lavatory cubicle doors not closing adequately: I accept the evidence of Mr. Lander that the doors were not closing adequately and I accept his estimate of the cost of remedy at £30;
- (xxiv) item 76.2, dampness by a radiator: I accept the evidence of Mr. Lander that there was dampness and I also accept his estimated cost of necessary works at £300;
- (xxv) item 76.3, a manhole cover was sealed: I accept the evidence of Mr. Lander as to the facts for which he contended, namely that the cover was sealed, and I accept his estimated cost of the necessary remedial works at £100;
- (xxvi) item 78.1, floor damaged by excessive loading: I accept the evidence of Mr. Lander that the floor of the relevant room, which had been used as a filing room, had been damaged by excessive loading and did require releveling; I also accept Mr. Lander's estimated cost of the necessary work at £1,500;
- (xxvii) item 84.1, water ponding on the roof of the Flats: Mr. Lander accepted that the roof was watertight and I find that there was no want of repair;
- (xxviii) item 85.1, television aerial wires draped across the roof of the Flats: the relevant wires were shown in a number of photographs put in evidence; they seemed to me to be adequately clipped; I find that there was no want of repair;
- (xxix) item 86.1, a similar item to item 85.1 and in relation to which I consequently reached a similar conclusion;
- (xxx) item 86.2, area of defective lining to a box gutter: Mr. Lander accepted that the gutter was watertight and I find that there was no want of repair;
- (xxxi) item 87.2, another item similar to item 85.1 and in relation to which I consequently reached a similar conclusion;

- (xxxii) item 105.2, two locks to doors worn and defective: I accept the evidence of Mr. Lander as to the existence of these defects and I also accept his estimated cost of remedial works of £100;
- (xxxiii) item 115.2 telecommunications equipment left behind: I accept that the equipment should have been removed and I also accept the estimated cost of removal contended for on behalf of Mr. Dresden of £250;
- (xxxiv) item 132.1 complaint about water meter pipework and lack of insulation of that pipework: I accept the evidence on behalf of the Tenants that the relevant pipework was installed by the appropriate water company in accordance with its requirements and I therefore find that there was no want of repair;
- (xxxv) item 133.1, cold water storage tank rusting and in danger of failing: it was accepted on behalf of Mr. Dresden that the tank was not leaking; there was a dispute as to how likely was the risk of a leak; I was not persuaded that the condition of the tank was such as to require its replacement by the Tenants in order to perform their covenants under the Lease;
- (xxxvi) item 134.1, a water heater was not working and the pipework feeding it was inadequately insulated: I was not satisfied that this item had been proved;
- (xxxvii) item 135.3, rubber feet on a lavatory seat had deteriorated: the facts were not ultimately in dispute, and I accept that, by reason of the defect, the seat was not serviceable and needed to be replaced, at a cost of £25;
- (xxxviii) item 136.1, the washers and sealing glands of some taps showed signs of wear: this was accepted by Mr. Major in cross-examination, and it was accepted by Mr. Lander that there was a degree of overlap, which he evaluated, and Mr. Major agreed, at £40 between this item and item 69.3; the two items together Mr. Lander costed at £150; eliminating the overlap reduced that to £110; Mr. Major allowed £30 for item 69.3 and I have accepted that assessment – it was a Table 2 item – while Mr. Lander allowed £70 for item 136.1; one of my reasons for accepting Mr. Major’s assessment of item 69.3 was to take account there of the £40 overlap; consequently I assess the cost which should be allowed in respect of item 136.1 at the sum of £70, the overlap already having been taken into account;
- (xxxix) item 137.1, sanitaryware dirty and stained: Mr. Major accepted the facts as to this item but contended that an adequate allowance had been made for the necessary costs of remedial work for this item in his allowance of £30 for item 69.3; I do not accept that and allow the £50 for which Mr. Lander contended on top of what was allowed in item 69.3;

(xl) item 138.1, boiler unit covered by cement slurry: I accept the evidence of Mr. Lander on this item and also his estimated cost of cleaning and overhaul of £150;

(xli) item 156.1, this item was similar to item 133.1 and I reached a similar conclusion in relation to it;

(xlii) item 157.2, this item also was similar to item 133.1 and I reached a similar conclusion in relation to it;

(xliii) item 159.1 defective tiling: ultimately there was no dispute as to the facts concerning this item and I accept the estimated remedial cost of £100 contended for on behalf of Mr. Dresden.

78. **Miscellaneous:** All of the items included by Miss Bignell in this category in fact fell within clause 2(7) of the Lease. I have already indicated my conclusions concerning cupboards. The other two items were the antique mirror which Mr. Dresden sold to the Tenants at the commencement of the term and a burglar alarm which they installed. They were not required by Mr. Dresden to remove either the mirror or the burglar alarm at the end of the term and he himself did not cause either of those items to be removed from the Premises. In the result all of the items in this category fail.
79. **Statutory Requirements:** The question of what statutory requirements actually applied to the Premises was not investigated during the trial. It was really a matter of law, but my attention was not drawn to any requirements upon which reliance was placed. In those circumstances I am not satisfied that any of the items which was said to fall within this category had been proved.
80. **Electrical repairs:** In the absence of any evidence from any representative of Shakespeare Pullen & Slade Ltd., which had apparently formulated the list of alleged electrical defects, I was not satisfied that any alleged electrical defect which was not accepted on behalf of the Tenants had been proved. The items in this category therefore all fail.
81. **Radiators:** It does not seem to me that the Tenants could be said to be in breach of covenant because they replaced defective Hudevad radiators with radiators not of Hudevad manufacture or of appearance similar to the Hudevad radiators originally installed in the Premises. As I have said, no complaint was made about the performance of the replacement radiators. The complaint was simply that in appearance they differed from the Hudevad radiators. In my judgment a covenant such as that in clause 2(5) of the Lease is performed, in the case of a defective radiator, if the defective radiator is replaced by another radiator of equivalent performance to the defective radiator and which is broadly similar in shape, size and colour to the radiator being replaced. The new radiator does not have to match precisely the old.
82. In financial terms my findings concerning the items from the latest version of the Scott Schedule listed in Table 4 amount to the conclusion that items with a total value of £7,635 in addition to the items which Mr. Major accepted and were listed in Table 1 or Table 2 were proved. Overall, therefore, it seems to me that Mr. Major's evaluation of breaches of covenant with a total value of £24,210 being made out needs to be modified to add further breaches listed in Table 3 which I have found proved with a value of £4,635, and further breaches listed in Table 4 which I have found proved with

a value of £7,635. The overall total of individual costs which were accepted or proved thus came to £36,480. If it were necessary to assess what would have been the actual cost of undertaking the work which I have found to be necessary to remedy the breaches of covenant which I have found proved it would be appropriate to add to the total of £36,480 the allowances made by Mr. Lander for contractor's preliminaries and so forth which I have accepted as follows:-

(i) Contractor's preliminaries	£15,000
(ii) Builder's work in connection with services installations	£2,000
(iii) Contractor's overheads and profit, at 10% of £36,480	£3,648
(iv) Professional fees for contract administration at 11.5% of total cost of building work, £57,128	£6,570
(v) Professional fees of planning supervisor	£7,000
(vi) Insurance	£3,000
(vii) Value Added Tax, if applicable on all the above items save insurance.	£12,372

Thus, depending upon whether Value Added Tax was applicable or not, the costs would have totalled £73,698 (without Value Added Tax) or £86,070 (with Value Added Tax).

### **Diminution in value**

83. While it has been necessary for me to consider the submissions and evidence concerning the breaches of covenant alleged as against the Tenants and the costs of remedying those breaches of covenant, all of that has really been by way of a prelude to a consideration of the main issue in this action, which was the question whether, as a result of the admitted or proved breaches of covenant, Mr. Dresden suffered a diminution in the value of his reversionary interest in the Premises.
84. Miss Bignell submitted that the question of whether Mr. Dresden had sustained a diminution in the value of his reversionary interest in the Premises arose, and arose only, because of the need to consider the effect in this case of the provisions of *Landlord & Tenant Act 1927 s.18(1)*. That subsection is in these terms:-

*“Damages for a breach of a covenant or agreement 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, whether such covenant or agreement is expressed or implied, and whether general or specific, 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 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 render valueless the repairs covered by the covenant or agreement.”*

85. Miss Bignell submitted that at common law the measure of damages for breach of a covenant to repair was the cost of the repairs, or at least the cost of repairs was highly material to an assessment of the damages. She pointed out that not all of the claims of Mr. Dresden in this action were for damages for breach of the repairing covenant in the Lease. There were, for example, the claims for damages for breach of the decorating covenants. However, she expressly conceded in her written opening that:-

*“D accepts that in this case, the damages will be limited to the value of the damage to the reversion as a result of the Cs failure to carry out the works of decoration and to remove the Cs alterations.”*

86. Again in her written opening Miss Bignell submitted that how one assessed the diminution in the value of a reversionary interest as a result of breaches of repairing, decorating and analogous covenants was, in this case, by carrying out two valuations of Mr. Dresden’s interest in the Premises as at 15 October 2001, namely:-

*“a) On the assumption that the Premises were then in the state they would have been in if the Cs had performed their covenants – this necessarily involves identifying what works the Cs should have done;*

*b) On the basis that the Premises were then in their actual state and condition.*

*The difference between the 2 figures represents the damage to the reversion caused by the disrepair.”*

87. Mr. Denehan accepted that at common law the general rule was that the measure of damages for breach of a covenant to deliver up premises in repair was the cost of putting the relevant premises in repair, together with loss of rent during the period needed to carry out the repairs and professional fees incurred in connection with the repairs, and Value Added Tax, if applicable. However, he reminded me of a helpful passage in the judgment of Dillon LJ in *Culworth Estates Ltd. v. Society of Licensed Victuallers* (1991) 62 P&CR 211 at page 214:-

*“The measure of damages for the disrepair of the property at the end of a lease is the diminution in value of the landlord’s reversion, that is, with a freehold reversion the difference between the value of the premises in their state of unrepair as handed back to the landlord at the end of the term and the value that the premises would then have had if they had been*

*returned to the landlord in the state in which they would have been if the covenants in the lease had been fulfilled. See generally the judgment of Denning LJ in Smiley v. Townshend and see also Hanson v. Newman. As Denning LJ stated in Smiley v. Townshend the question to be asked is by what amount, at the end of the lease, was the value of the existing reversion reduced by reason of the lack of repair. He pointed out, on the same page, that in cases where the repairs have been, or are going to be done by the landlord, the cost may be a very real guide. That is essentially how the cost of repairs comes into the assessment of damages – as a guide to the diminution in value of the reversion. It follows that Denning LJ was correct in saying that:*

*in cases where it is plain that the repairs are not going to be done by the landlord, the cost of them is little or no guide to the diminution in value of the reversion, which may be nominal.”*

88. Mr. Denehan submitted that it was for a person claiming damages for breach of a repairing covenant to prove his loss, and, in particular, in a case in which the landlord neither has undertaken, nor intends to undertake, any repairs, it is for him to prove, if he so contends, that the cost of repairs is evidence of the diminution in the value of his reversion. In that context Mr. Denehan referred me to an observation of Neuberger J in *Craven (Builders) Ltd. v. Secretary of State for Health* [2000] 1 EGLR 128 at page 131K. I accept that submission, which Miss Bignell did not in fact contest. I also accept the submission of Mr. Denehan, based upon the consideration of the issue by Mr. Recorder Barry Green Q.C. in *Crown Estate Commissioners v. Town Investments Ltd.* [1992] 1 EGLR 61 at pages 64M to 65C, that it was also for the person claiming damages for breach of a covenant to deliver up in repair to prove for the purposes of *Landlord & Tenant Act 1927 s.18(1)* what was the diminution in the value of his reversion. So, however precisely it arose in the present case, it was for Mr. Dresden to prove that the value of his reversion in the Premises as at 15 October 2001 had been diminished and by how much.
89. In support of their respective cases as to diminution in value each of Mr. Dresden and the Tenants called expert evidence from a valuer. Mr. Peter Beckett was called on behalf of Mr. Dresden, while Mr. Simon Davidson was called on behalf of the Tenants.
90. Mr. Beckett I found to be a paragon of an expert witness. He was most anxious to help the Court and took some trouble, for which I was grateful, to explain his approach to valuation. He was open-minded, fair, clear in his evidence and interested in engaging intellectually with the problem of how to assess diminution in value. In the end, for reasons which I shall explain, I did not accept that his approach was apposite in the rather unusual circumstances of the present case. However, I have no doubt that in many cases it would be a valuable approach. I note that H.H. Judge Peter Bowsher Q.C. found an earlier, and slightly less refined, version of the approach was of great assistance to him in *Shortlands Investments Ltd. v. Cargill plc* [1995] 1 EGLR 51, in which Mr. Beckett also gave evidence as an expert witness.
91. Mr. Davidson also was anxious to assist the Court and clear in his evidence. It was not at all his fault that in the end I did not find his evidence of much assistance. The real

problem was that his expertise lay especially in residential valuation and, as I shall explain, that area of expertise was not really relevant to the issues to which fell to be considered in this case.

92. Of the two valuations which Miss Bignell submitted needed to be made for the purpose of assessing whether the value of Mr. Dresden's reversion in the Premises had been diminished, and if so by what amount, one, the value of the Premises in its actual condition as at 15 October 2001, presented no difficulty. Both Mr. Beckett and Mr. Davidson agreed that the market for residential properties and the market for commercial properties in the WC1 area of London was for practical purposes flat between 15 October 2001 and 26 March 2002, the date of the contract for the sale of the Premises to ACE for the sum of £2,655,000. It was therefore common ground that the value of the Premises as at 15 October 2001 in their actual condition at that time was £2,655,000.
93. It was when one came to consider what would have been the value of the Premises in some better condition than their actual condition as at 15 October 2001, whether that for which Mr. Lander contended, that which Mr. Major accepted, or that which I have found would have been necessary if the Tenants were to have complied with their covenants, that difficulties arose. Mr. Beckett told me during his evidence frankly, and on more than one occasion, that he found it impossible to say what the value of the Premises as at 15 October 2001 would have been had it been in a better condition than it in fact was. The reason for that was, essentially, that the price achieved on the sale of the Premises to ACE was so much in excess of what any other property in John Street or the surrounding area had ever sold for that there were really no other sales of property which might have been considered comparable to the Premises which could provide guidance. The buildings in John Street were originally constructed as residences. However, by October 2001 most, but not all, were used as offices. Nonetheless, there was potential for a property formerly used as offices to be sold for use as residential premises. In the case of the House itself, prior to sale Mr. Dresden had obtained a grant of planning permission authorising a change of use to residential accommodation, and when the Premises came to be marketed they were marketed to potential residential occupiers as well as to potential commercial users. Mr. Beckett was able to discover some information concerning sales of properties in John Street, but the only one which he found at all helpful was a sale of 5, John Street in March 2002 at a price of £1,575,000. What he said about that sale in his report dated 1 April 2004 was:-

*“5.4.2 But for the element of retrospection [meaning that the sale took place after 15 October 2001], it's obvious that no 5 is comparable to the Property. Nonetheless, the sale at £1,575,000 in March 2002 is perplexing. Compared to the sale in the Property at more or less the same date, and to the sale of no 5 itself said to be in hand at present [at a price of £2,750,000], it seems to have been at a very low level, albeit one which might be said to be consistent with what had gone on before, taking the schedule of transactions as a whole.*

*5.4.3 At ground, first and second floor level, 5 John Street is very much more characterful than the Property. It has many more period features. The staircase at ground floor and first floor level is a fine one. The basement is bright and usable. The*

*condition is probably about the same – namely a little bit shabby and dreary. The third floor is utilitarian and very shabby. The kitchens and WCs in no 5 are better than those at the Property, but they're not of the best.*

*5.4.4 There is a rather strange rear annexe with offices in it. These are lit with roof lights. There is no rear access to it.*

*5.4.5 I should have expected no 5 to sell at a slightly better rate per square metre for the main building than the Property. In fact, the opposite happened. Indeed, on an NIA [Net Internal Area] (weighted) basis, the Property sold for almost double.*

*5.4.6 This is made more perplexing by the fact that there is a sale mooted at present at £2,750,000 – a figure much more in line with the price achieved at the Property.*

*5.4.7 In the face of declining rental values, the offsetting effect of increased owner-occupation is insufficient to explain this conflict. The market is not generally thought to be rising, and no 5 has not been significantly improved between sales.”*

94. As Mr. Beckett did not derive much assistance from the other transactions of which he ascertained details, it is not necessary to spend much time on them in this judgment. What he said about them, compendiously, in his report dated 1 April 2004, was:-

*“5.6.1 The remainder of the transactions schedule at Appendix 2 gives only impressionistic help.*

*5.6.2 Reference 1 was sold at a price that now looks extremely low, particularly given that that property has rather more accommodation than the Property, and was more or less a modern building inside a period façade.*

*5.6.3 Reference 3 seems to be a transaction at a low price, as does reference 4 – an extremely recent transaction - and reference 7. Reference 8 gives loose support for the idea that the bottom of the range may be somewhere around £2 million. I do not know whether any of these properties were sold with rear accommodation; perhaps they were not.*

*5.6.4 The three residential sales on page 3 of the schedule of transactions give some support to the notion that commercial values lie above residential.*

*5.6.5 Apart from the transactions in numbers 5 and 27 John Street, these transaction details are impressionistic only. The transactions numbered 11, 12 and 13 are not even impressionistic. There is obviously some factor at work which tends to reduce value in each case, probably substantial leasehold interests inferior to the freehold.*

*5.6.6 The remaining transactions are only there to give some support to the estimated rental value I have used for the contractual claim (explained later) - a very minor consideration in the present exercise.”*

95. The range of sale prices set out in Appendix 2 to Mr. Beckett’s report dated 1 April 2004 for offices was between £950,000 for 19, John Street in January 2004 and £1,875,000 for 36, John Street in May 2002. So far as residential properties were concerned Mr. Beckett gave details in Appendix 2 to his report dated 1 April 2004 of just two sales, of 4, John Street in November 2003 at a price of £1,200,000 and of 13, John Street in March 2000 at a price of £1,500,000. He also listed three sales at figures of £762,000 or less which he described as of uncertain relevance. All of the properties in John Street of the sales of which Mr. Beckett obtained details differed in some way or other from the Premises. In particular, most lacked a garage or flats to the rear. In order to try to compare the sales of office premises Mr. Beckett calculated in the case of each sale where this was possible a price equivalent to a price per square metre. The range was from £4,256 per square metre for 19, John Street to £8,111 per square metre for the Premises. The price at which 5, John Street is currently under offer is equivalent to £9,037 per square metre.
96. Mr. Beckett helpfully logged in his report dated 1 April 2004 the bids submitted for the Premises during the informal tender process which eventually resulted in the sale to ACE at a price of £2,655,000. For the purposes of the informal tender the Premises were divided into two lots, respectively the House and the Garage as Lot 1 and the Flats as Lot 2. Seven bids were received, of which three were for the Premises as a whole. Apart from the bid of ACE, the other two were from a Mr. Sakkali in the sum of £1,900,000 and from London & Newcastle in the sum of £1,550,000. There were two bids just for the House and Garage, respectively from Mr. Sakkali in the sum of £1,500,000 and from Mr. and Mrs. de las Casas in the sum of £1,700,000. The two bids for the Flats alone were one in the sum of £406,000 from Dr. Philipp Bonhoeffer and one in the sum of £413,000 from Stamp Properties Ltd. The levels of the bids thus indicated that the bid of ACE was by over three-quarters of a million pounds, or nearly 40%, higher than the next highest bid for the Premises as a whole. Mr. Beckett and Mr. Davidson agreed that the value of the Flats as at 15 October 2001 in their actual condition was £420,000. If one added that figure to the highest bid for the House alone, £1,700,000, the result would be £2,120,000, an amount still less than the amount of the bid of ACE by £535,000, or just over 25% of £2,120,000. These bid figures and the levels of sales of other properties in John Street identified by Mr. Beckett indicate, in my judgment, that either ACE was not a knowledgeable and prudent purchaser, or that, for whatever reason it was especially anxious to obtain the Premises and was thus a special purchaser paying over the market rate.
97. The assessment which Mr. Beckett made of the available valuation evidence he set out in section 5.5 of his report dated 1 April 2004 in this way:-

*“5.5.1 The sale of 27 John Street, in March 2002, is obviously relevant but for the factor of retrospection. I think it’s fair to say that there was nothing in the three transactions that had taken place between March 2000 and the valuation date in this case to suggest that either the Property nor [sic] 5 John Street would sell for as much as £2,655,000.*

5.5.2 *Mr. Warrener's [the agent who marketed, and achieved the sale of, the Premises in March 2002] explanation for this is a better marketing programme. Allowing for a certain amount of professional pride in this thought, there may be something in it. Perhaps until then, agents had emphasised unduly sales of other properties at an earlier date and lower price, without giving much thought to whether they could achieve something significantly better. Occasionally a dramatic and sudden re-rating of values can occur, where the dispassionate observer might have expected the forces at work to play out slowly. Valuers are probably at their least effective at such a time.*

5.5.3 *Taking these two important comparables together, I am led to the view that there is a range of values, somewhere between the level achieved for no 5 in March 2002 on the one hand, and the level achieved for the Property (and potentially, now, for number 5 as well) on the other. I have adopted a range of £2,000,000 (being a sensible mid-point between these extremes) to the actual sale price of 2,655,000."*

98. Mr. Beckett was plainly, and in my judgment rightly, concerned that a consideration of the valuation evidence as I have summarised it did not enable one to reach a conclusion as to what he called "*the absolute*" value of the Premises if in the condition of repair considered appropriate by Mr. Lander as at 15 October 2001, by which he meant what someone in the market would have paid for the Premises in that condition as at that date. He thus concentrated his attention on seeking to ascertain a figure for diminution in the value of Mr. Dresden's reversionary interest in the Premises which did not depend critically upon any supposed valuation of the Premises in the condition of repair contended for being absolutely correct. The method which he adopted was a refinement of that which was accepted in *Shortlands Investments Ltd. v. Cargill plc*. The calculation is sophisticated. As I have said, I have no doubt that in many cases the calculation would be of great assistance in assessing the diminution in the value of a reversion. However, the critical weakness of the method in a case such as the present, as it seems to me, is that the calculation assumes that which has to be demonstrated, namely that there has been a diminution in the value of the reversion. The calculation is not designed to test whether there has actually been a diminution in the value of the reversion, but on the assumption that there has been, to calculate what it was.
99. As I do not accept that the method of calculation adopted by Mr. Beckett was of assistance in the particular circumstances of this case for the fundamental reason which I have mentioned, I trust that I may be forgiven for giving only a summary explanation of Mr. Beckett's approach. It is based upon the assumption that a purchaser of a building in disrepair will either incur expenditure in dealing with the disrepair, or, if he accepts the building in the condition in which it in fact is, will modify the price which he is prepared to pay to reflect the fact that the building is out of repair. That may be so in many cases. However, the present was not an ordinary case. I have already commented upon the standards which Mr. Lander contended were appropriate to be achieved by repair if the covenants in the Lease were to be complied with. It is material also to record that in the sales particulars by which informal tenders were sought for the Premises there was included this passage concerning Lot 1, the House and the Garage:-

*“Until recently the property has been used as barrister’s [sic] chambers and has now been redecorated and is therefore ready to use as prestigious offices of c. 3595 sq ft net (334 sq m).”*

In other words, not merely were the House and Garage, at least, not being sold as in need of repair, they were positively being sold as not in need of repair. If that was the perception of bidders, they would not in any event have formulated their bids on the basis Mr. Beckett’s calculation assumed.

100. In essence, Mr. Beckett did two principal calculations, one based on the actual sale price of £2,655,000 and the other based upon £2,000,000, but the calculation can be undertaken based on any value. Each calculation was in two parts. As Mr. Beckett explained at section 9 of his report dated 1 April 2004, one starts the calculation in each case with the supposed value of the relevant property in its actual condition at the date of valuation. One then adds elements in respect of the assessed allowance for cost of repairs, other works which a potential purchaser might consider necessary, supervision and planning fees (an allowance calculated as a percentage of the cost of works), Value Added Tax on the foregoing elements at 17.5%, interest on the costs so far calculated, an allowance for insurance, interest on the purchase price for the estimated duration of the project, and acquisition costs. By the addition of these elements one produces a figure which Mr. Beckett called *“target value for the property”*. That is the first part of the calculation. The assessed allowance for cost of repairs included in the calculation of the *“target value for the property”* in this case was made on the basis of an analysis of the schedule of dilapidations as produced and priced by Mr. Lander so as to seek to identify, and exclude, items which Mr. Beckett considered to be *“supersession”*, that is to say, items which might strictly have been appropriate if the Premises were to be left in a condition complying with the covenants in the Lease, but which would be of no value to a purchaser, for example because he would replace some part of the Premises – the example given during the trial concerned the rather old-fashioned lavatories – in whatever condition of repair it was at the date of purchase. The purpose of identifying the *“target value for the property”* was to have a number from which to undertake the calculation which I have just described in reverse, by subtraction of allowances for matters added in the first part of the calculation, but with no elements for assessed cost of repairs, with adjusted percentages for costs calculated on a percentage basis and with adjusted periods for costs calculated by reference to periods, the adjusted periods being less than in the first part of the calculation because there was no need to allow time for the execution of repairs. This was the second part of the calculation. The essential difference between the two parts of the calculation was that in the first part of the calculation account was taken of the cost of repairs, but that was left out of the second part of the calculation. The result of the second part of the calculation was a figure which Mr. Beckett described as *“value in compliance with covenants at the date of expiry”*. The purpose of calculating that value was to have a figure from which to subtract the number with which one started the calculation, the supposed value in actual condition, the difference between the two figures being the diminution in value caused by the property being out of repair. With a starting figure of £2,655,000 the result of the calculation was a difference of £159,409. With a starting figure of £2,000,000 the difference was £153,049. Mr. Beckett rounded these figures to £150,000, which figure he considered to be the diminution in the value of the reversion of Mr. Dresden as at 15 October 2001. If that conclusion were correct, it would, of course involve the proposition that had the Premises been in the condition which Mr. Lander considered appropriate as at 15 October 2001, someone in the market place would have been

prepared to pay £2,805,000 for them. There was not a scrap of evidence to suggest that there was ever any prospect of that happening.

101. Mr. Davidson considered sales or attempted sales of a number of residential properties in the area of John Street and reached the conclusion that the Premises were not worth more, as at 15 October 2001, than £2,655,000 in any condition. His view was that, prospectively as at 15 October 2001, the most likely purchaser of the Premises was someone who would wish to put them to residential use. While from Mr. Davidson's perspective as an expert in residential property that conclusion may be understandable, it did rather disregard the evidence that the highest bid for the Premises by a very long way came from a commercial occupier. Another problem with Mr. Davidson's evidence, as it seemed to me, was that, like Mr. Beckett, although having cast his net rather wider, he was not able to identify any sales of properties which were particularly satisfactory as comparables. He discovered details of only one sale, of 13, Bedford Row, which ante-dated the sale of the Premises. That sale only slightly ante-dated the sale of the Premises, being in March 2002, and was at a price of £3,400,000. Mr. Davidson's evidence was that Bedford Row was one of the premier streets in the area, and that the property had been refurbished to a very high standard, something of the order of £1,000,000 having been spent on it. Mr. Davidson considered sales of two other properties not in John Street, respectively 8, Great Ormond Street and 38, Great James Street. The former sold for £1,810,000 in May 2003 and the latter for £1,800,000 in July 2003. To compare these sales with that of the Premises Mr. Davidson analysed each in terms of a price per square foot of gross internal area, the appropriate yardstick for residential, rather than commercial, property. The sale of 13, Bedford Row amounted to a price of £600 per square foot, that of 8, Great Ormond Street to a price of £392 per square foot and that of 38, Great James Street to a price of £593 per square foot. In John Street itself Mr. Davidson was aware of the sale of 5, to which I have already referred. He also mentioned the sale of 4 at a price of £1,750,000, amounting to £262 per square foot, in January 2004. His other references in the context of actual properties were to attempted sales of 13, 17, and 18, John Street. He assessed the price per square foot referable to the House of the sale of the Premises at £422 per square foot.
102. For the reasons which I have given I reject the approach of Mr. Beckett as of assistance in the circumstances of the present case, whilst acknowledging that in other, perhaps more usual, circumstances it may be of great value. As I have said, despite his considerable efforts to help me, I did not in the end find the evidence of Mr. Davidson of great assistance, principally because he was not able to deal with the attractiveness of the Premises to commercial purchasers such as in fact bought it. I was therefore left with the fundamental question had it been proved that the value of the reversionary interest of Mr. Dresden in the Premises had been diminished as at 15 October 2001 by reason of the breaches of covenant which I have found proved? The answer is negative. Not merely was I not satisfied that the value of the reversionary interest of Mr. Dresden in the Premises as at 15 October 2001 had been diminished by reason of the breaches of covenant of the Tenants, but I was entirely satisfied that, notwithstanding those breaches, he had, with the assistance of Mr. Warrener, achieved an extremely advantageous sale at a price far in excess of what, before it happened, anyone would possibly have thought the Premises could be worth.

## **Conclusion**

103. Notwithstanding the breaches of covenant on the part of the Tenants which were admitted or which I have found proved, I find that Mr. Dresden suffered no diminution in the value of his reversionary interest in the Premises as at 15 October 2001. This Part 20 claim therefore fails and is dismissed.