

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
TECHNOLOGY AND CONSTRUCTION COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 07/03/2013

Before :

THE HON. MR JUSTICE EDWARDS-STUART

Between :

Sunlife Europe Properties limited

Claimant

- and -

(1) Tiger Aspect Holdings Limited

Defendants

(2) Tiger Television Limited

Martin Hutchings QC (instructed by **Forsters**) for the **Claimant**
Mark Wonnacott (instructed by **Mishcon de Reya**) for the **Defendants**

Hearing dates:

8 - 11.10.12

15.10.12

7.12.12

18.2.13

Judgment

Mr Justice Edwards-Stuart :**Introduction**

1. This is a terminal dilapidations claim. The Claimant (“Sunlife”) is the owner of a combined office and retail premises at 3-5 Soho Street, 6/7 Soho Street and 12 Soho Square. The premises had been let by Sunlife’s predecessor to the predecessor in title of the Second Defendant (“Tiger”) under two leases with full repairing covenants. The leases were dated 22 May 1973, in relation to Nos 6/7 and 12, and 25 March 1974, in relation to Nos 3-5. The First Defendant is the guarantor under the leases.
2. The leases were for a term of 35 years and both were due to expire on 24 March 2008. Sunlife purchased the reversions in May 2006. The leases continued beyond the expiry dates because Tiger made a request for new tenancies. However, Tiger subsequently changed its mind so those tenancies came to an end on 14 November 2008 when Tiger moved out. For the short period when the tenancies continued after the original expiry dates under the leases the interim rents were agreed at £273,500 for Nos 3-5, and £287,500 for Nos 6/7 and 12.
3. By early October 2006 Sunlife appears to have become concerned about the condition of the premises and so it arranged for the preparation of an interim schedule of dilapidations. This was done by a Mr Iain Feasey, a Chartered Building Surveyor who was employed by Lambert Smith Hampton. Mr Feasey inspected the premises whilst they were still occupied by Tiger (although a retail unit forming part of No 3-5 was vacant). The schedule that he prepared in October 2006 showed a total cost of putting the premises into repair at about £740,000.
4. Mr Feasey inspected the premises again in November 2008, just after Tiger had vacated them. As a result of this inspection he prepared an uncosted schedule of dilapidations. On 3 December 2008 he sent a copy of this to the surveyor who was then acting for Tiger. On 6 March 2009 Mr Feasey sent a costed version of that schedule to Tiger’s surveyor. This showed a total claim, representing the cost of putting the premises back into repair, of over £2.5 million.
5. About two or three weeks later Tiger notified Sunlife that it had instructed a different surveyor, Mr Lee Davison of DTZ. He inspected the premises on 1 April 2009. Mr Davison produced a response to Mr Feasey’s schedule, but dealing only with the building fabric items (and not the mechanical and electrical (“M&E”) installation), which showed a cost of about £150,000.
6. On 18 August 2009, following completion of initial asbestos surveys and the strip out works, which had enabled a thorough investigation of the M&E installation, a further costed schedule of dilapidations was prepared by Mr Feasey. This showed a total sum claimed of about £2.45 million. Mr Davison’s schedule in response, issued in December 2009, showed costs totalling only about £87,000 - significantly lower than the sum shown in his first schedule. The parties were clearly a very long way apart.
7. Finally, following completion of the remedial works, Sunlife produced a schedule of dilapidations in which it claimed £2.42 million.

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8. By the time of the trial Sunlife's claim for damages by reference to the cost of the remedial works was £1,573,894, including the contractor's preliminaries and overheads and profit. Sunlife also had other claims, such as the cost of obtaining validation reports (£37,663), Lambert Smith Hampton's project management fees (at 4.88%) and for certain remedial works that had not yet been undertaken. In addition, there was a claim for 30 weeks lost rent. The total sum claimed by Sunlife amounted to a figure of the order of £2.172 million, plus interest.
9. Tiger, by contrast, asserted that the remedial works attributable to want of repair amounted to about £700,000, but it did not accept that this was a sum that Sunlife was entitled to recover. It was Tiger's case that Sunlife's claim was capped by the amount of the diminution in value of the premises as a result of Tiger's breaches of the repairing covenants, which Tiger contended was no more than about £240,000.
10. Mr Mark Wonnacott, who appeared for Tiger, summarised Tiger's case in this way. He submitted that in order to let the building in 2009 Sunlife had to carry out a significant upgrade and refurbishment, which is what it did. Mr Wonnacott submitted that if Tiger had complied sufficiently with its obligations under the leases Sunlife would have been left with a building that was in working order and good condition, but by reference to 1973/4 standards. If the premises were in this condition, ran Tiger's argument, they would not have been a lettable proposition in 2009 to the type of tenant who might be expected to take a building of this age and location. In other words, if Tiger had carried out the maintenance and repair required by its obligations, and no more, Sunlife would still have had to carry out nearly all of the work that it in fact carried out. This is because, Mr Wonnacott submitted, these premises, if in good repair but in line with 1973/4 standards, could only have been let at a very substantial discount. As a result, the diminution in value that resulted from Tiger's breach of its obligations under the covenants was of the order of £240,000.
11. In short, Tiger's case is that if it had carried out remedial works to an extent sufficient to discharge its obligations under the covenants, a major refurbishment to bring the premises up to 2009 standards of the type actually carried out would still have been necessary. Sunlife submits that the sum claimed, which is less than the amount that it has actually spent, represents the cost of the work necessary to put the building into the condition in which Tiger should have left it.

The premises

12. The buildings are situated in a prime location on the north side of Soho Square. At the time of their construction in the 1970s the Soho area was the premier area in London for advertising agencies and film companies. The buildings were originally constructed as separate adjoining buildings and let as 'grade A' high class office and retail premises to a leading advertising agency, Geers Gross Advertising Ltd, for use as their headquarters. The buildings together comprise 15,300 sq ft of space, consisting of basement, ground and four upper floors; 3-5 Soho Street also has a fifth floor. The buildings were originally separated by a loading bay (now a car park) but in about 1980, the second to fourth floors were knocked through to provide intercommunicating open space at these three levels.
13. It appears to be common ground that the premises were built to a state of the art standard in 1973/4 and fitted out with a modern, integrated, heating ventilation and air

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conditioning (“HVAC”) system, fitted carpets, suspended ceilings to most areas and aluminium double glazed centrally hung pivot windows. In that state, they were capable of being let to a high class tenant for 35 years with full repairing and maintenance obligations. Tiger occupied them as its headquarters building from 2000 to 2008.

14. The original four pipe heating and air conditioning system was supplied by water from a cooling tower and water chiller on the roof of the buildings. This system supplied air conditioning to each of the floors via perimeter chilled water fan coil units (“FCUs”), the pipework for which was concealed in the suspended ceilings of the floor beneath. Fresh air was supplied via air handling units (“AHUs”) in the basement of the buildings, which were connected by pipework to the roof top boilers and water chillers. The AHUs supplied fresh air to each FCU on each floor via ductwork which was also concealed in the suspended ceilings in the floor beneath. Heating was provided by six boilers.
15. It appears that the original system was not maintained or repaired by successive tenants and few, if any, of its component parts were renewed when they broke down as the leases required. At some stage, which I was told was in about 1991, various alterations were made to the systems. The water chillers were replaced with air cooled chillers. On certain floors, where it would appear the FCUs were no longer in a serviceable state, DX units were installed to replace the old system. Fan convectors may also have been installed a few years later, in about 1994.

Tiger’s occupation of the premises

16. When Tiger acquired the premises as their new headquarters in 2000 from First Leisure Corporation, they were generally in a poor state of repair and a reverse premium of £490,000 was paid to Tiger by the outgoing tenant in what, I find from the evidence, was a reasonably strong letting market. Tiger carried out a limited general refurbishment in 2000 - but apparently without licence from the then landlord. This included the installation of new partitions with consequent alterations to the electrical services to suit the new layout. But it seems that Tiger was not keen to incur substantial costs on premises with leases that were due to expire in 8 years time, so it was only prepared to undertake a limited amount of work. There may have been problems with the works that were carried out at that point, because no O&M manuals or records of the works, such as wiring diagrams, were provided (or, if they were, they have since been lost).
17. Tiger did not carry out any maintenance of the original HVAC system, although it seems that it was advised that if such works were not carried out the plant would become non-operational. One of the lifts was taken out of operation and remained so for some years. Temporary repairs were carried out by Tiger to the roof before expiry of the leases, which Sunlife contends concealed roof defects. Nos 3-5 Soho Street appear to have been entirely neglected from 2005. On expiry of the Leases, Tiger provided almost no maintenance records or details of the works that it had undertaken, despite being requested to do so.

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18. Turning to events in a little more detail¹, in February 2000 Tiger commissioned a report from Conditioned Environment Services Ltd. This report confirmed that the originally installed integrated systems were ‘*in a poor state of repair*’ with no attempt having been made to repair and maintain the original heating and air conditioning system. Ad hoc additions to the systems had been made by previous tenants (e.g. the installation of DX systems to some of the offices), and even these systems and the air cooled chillers were described as ‘*at least ten years old and ...therefore well into... [their]... useful life*’. Conditioned Environment Services proposed that a VRF Multi System be installed to provide heating and cooling and said that it could be linked to the present ventilation system. Occupiers in 2000 reported that the air-conditioning distribution system was unsatisfactory - as evidenced by the individual air conditioning units that had been installed in a number of offices. In relation to part of the basement, ground and first floors of Nos 3-7 Soho Street (a part that was later sublet), the report stated that ‘*all fan coil units are blocked off and in a very poor state. From talking to the tenant it appears they do not work or provide heating. They have built their office layout on the (basis) that these do not operate.*’
19. Tiger was quoted a sum of £250,000 for replacement of the air conditioning system but, like its predecessors, it appears to have decided to leave the original integrated systems in disrepair and carry out its own ad hoc alterations. So Tiger undertook cheaper works which included the removal of perimeter fan coil units.
20. Tiger’s contractors also noted that ‘*there is no heating system to speak of as suspected*’ and that in relation to the air conditioning and heating ‘*for servicing repairing a system that is obsolete we have allowed £140,000...*’. However, it appears that this suggested work to repair the integrated heating and air conditioning system was not done.
21. Tiger installed a series of storage heaters and radiators for heating to suit their proposed office layout to supplement the existing ad hoc systems installed by their predecessors. Most of the existing ventilation system was retained, but as the perimeter units had been removed, grilles were installed in the floors to allow the circulation of air to the individual floors.

The leases

22. The two leases, which were in almost identical form, contained, amongst others, the following covenants to be performed by the tenant:
- (1) By clause 2(3)(a):
- “well and substantially to repair cleanse maintain and amend and keep in good and substantial repair and condition the premises and all additions thereto (including all glass in windows and any sash cords and the door furniture) and the fixtures and fittings therein and the structure walls faiences vaults drains gas water and other pipes electric wiring and cables boilers radiators and heating apparatus and appurtenances thereto”.
- (2) By clause 2(3)(b):

¹ I take the following part of the judgment largely from Sunlife’ opening submissions.

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“at all times during the said term to keep any lifts and other machinery in and upon the premises and all shafts pillars pits and doors and cage work machinery motors and installations connected therewith and the air conditioning installations and ducting in good and substantial repair and condition and from time to time whenever necessary to replace renew and reinstate the same to the reasonable satisfaction of the Landlord his Surveyor and the Surveyor of the Insurance Office’ . . . ‘and to employ a reputable firm of engineers . . . for the purpose of servicing and maintaining the said machinery and other items referred to herein.’

- (3) By clause 2(4), to clean and decorate in the last year of the term.
- (4) By clause 2(5), not to make “*any structural alteration or addition to the premises or any part*’ and against making ‘*any structural alteration . . . to any fixtures or fittings therein or to any other item therein*”
- (5) By clause 2(5), subject to consent not being unreasonably withheld, not to make “*any other alteration or addition to the premises or any part thereof*”.
- (6) By clause 2(5), subject to consent not being unreasonably withheld, not to “*cut maim or injure . . . the walls floors roof timbers sky and lantern lights and other parts of the premises*”.
- (7) By clause 2(6), not to fix any “*machinery*” on the exterior of the premises, without the written approval of the landlord.
- (8) By clause 2(10), to comply with all enactments

“so far as they relate to or affect the premises or any additions or improvements thereto or the use thereof or any fixtures machinery plant or chattels for the time being affixed thereto or being thereupon”.
- (9) By clause 2(24), to pay the reasonable costs of preparation and service of a schedule of dilapidations.
- (10) By clause 2(27), to

“yield up the premises with all additions and improvements thereto and with any lifts therein and all the landlord’s fixtures and fittings therein and thereon at the expiration or sooner determination of the term in good and substantial repair and condition in accordance with the covenants hereinbefore contained”.

The measure of damage - cost of repairs

23. There is no dispute that Tiger and its predecessors did not comply with the repairing obligations under the leases, so this case is all about the measure of damages. Mr Martin Hutchings QC, who appeared for Sunlife, submitted that Sunlife was entitled to the cost of the remedial works, together with the associated costs and the consequential loss, because the relevant works have in fact been carried out. In these circumstances, he submitted that the burden of proof was on Tiger to show why the primary basis of the claim, namely the cost of the remedial works, was not the appropriate one in the circumstances.

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24. In a contract to carry out works where the works have not been properly performed, the starting point is that the claimant is entitled to be put in the position that he would have been in if the works had been carried out in accordance with the contract. Generally, since he is contracting for the carrying out of work, this means that he is entitled to the costs of completing the work or making good the defects in it. However, the decision of the House of Lords in *Ruxley v Forsyth* [1996] 1 AC 344, shows us that the general rule that the cost of reinstatement is the appropriate measure of damages does not apply if the expenditure would be out of all proportion to the benefit to be obtained.
25. In dilapidations cases, there is another limit to the damages that can be recovered. This is by virtue of what is known as the “statutory cap” imposed by section 18(1) of the Landlord and Tenant Act 1927.
26. The first limb of section 18(1) of the Act, which is what is relevant for present purposes, provides as follows:
- “Damages for breach of a covenant or agreement to keep or put 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 express 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) is diminished owing to the breach of such covenant or agreement as aforesaid . . .”
27. Accordingly, Mr Wonnacott was in my judgment correct to submit that the measure of the recoverable loss in a terminal dilapidations claim is the lower of:
- (1) the total of (a) the cost of remedying the defects (putting the property back into the covenanted condition), and (b) any rent actually lost and other expenses actually incurred whilst the defects are being remedied; and
 - (2) The diminution in the value of the landlord’s reversion, as at the term date, caused by the breaches - the statutory cap.
28. But unfortunately when it comes to the detail it is not as simple as that. Mr Wonnacott relies heavily on what he referred to as the rule of minimal performance, that is to say the rule that where a contract can be performed in more than one way, the performing party can choose the way that is least onerous to him. He is under no obligation to perform the contract in some other more time-consuming or expensive manner, simply because the other party would like it, if there is a more economic and compliant means of doing so. I did not understand Mr Hutchings to challenge the rule as a matter of principle, which I regard as correct, but he did take issue with Tiger’s application of the rule to the facts of this case.
29. In this case, Mr Wonnacott submits that the subject of the repairing covenants was the original “base build” installation and equipment. For example, if at the start of the lease the building was fitted with a particular type of radiator, the tenant is not obliged to do any more than to keep such radiators in good repair and condition, assuming that this can be done for the whole term of the lease. However, if the radiators have a life that is considerably less than the term of the lease, then the tenant will perform his contract if he replaces them with radiators of the same or a similar type. It does not

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matter that radiators of that type have, in the meantime, become obsolete so that by the time of replacement they would never (or seldom) be fitted out of choice. In this context, he referred me to the observation of HH Judge Toulmin CMG QC in *PGF II SA v Royal and Sun Alliance Insurance plc* [2010] EWHC 1459 (TCC), where he said, at paragraph 51:

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

The dates of the lease in that case are, of course, very close to those of the leases in the present case, making the observation particularly pertinent.

30. Mr Wonnacott submits that this is so even if the obsolete radiators would be more expensive to procure than the method of heating that has replaced them. Indeed, he goes further, and submits that the tenant would not be entitled - at least, under these leases - to replace the failed radiators with a different and better form of heating so long as replacements for the existing radiators can be procured. This is, of course, an artificial situation because one would not readily imagine that a landlord, faced with the alternative of being given a cheaper, better and up to date solution, would opt to have the old radiators replaced by equivalent obsolete equipment as a matter of choice.
31. Thus the primary position taken by Mr Wonnacott was that Tiger was under no obligation to do (and, indeed, was forbidden to do) anything more than repair and maintain the M&E services and, where necessary, replace any components that could not be repaired on a like for like basis. I think that by “a like for like basis” Mr Wonnacott meant, or at least came to accept, that this could embrace replacement with the nearest equivalent product if the original item of plant was no longer made. He did not, understandably, go so far as to submit that Tiger was bound to replace items that were obsolete and beyond repair with precisely similar items regardless of cost. Mr Wonnacott relied on *Creska v Hammersmith and Fulham LBC* [1998] 3 EGLR 35 (where the Court of Appeal held that a covenant to repair and maintain defective underfloor storage heating would not be performed by installing modern electric space heaters instead), and *Gibson v Chesterton (No. 2)* [2003] EWHC 1255 (in which HH Judge Rich QC held that replacing perimeter fan coil units with new units in the ceiling would be an “improvement”, rather than a “repair”). In this context, he relied also on the covenant against making alterations to the property. In his words, the obligation was “*to give back to the landlord the air conditioning and heating system which had been demised to the tenant in the 1970s (with the modifications allowed by the license alterations in 1991) in a satisfactory state of repair, for a system of that type and that age, nothing more, nothing less.*”.
32. Further, Mr Wonnacott reminded me that a tenant’s obligation is only to deliver a heating and ventilation system that was in good working order, even though the system may have been new at the beginning of the term of the lease. The tenant is not required to give back the premises with a new system: see *Ultraworth Ltd v General Accident Fire & Life* [2000] 2 EGLR 115.

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33. In this claim it is Tiger's case that it would have been possible to repair those items of M&E plant which failed during the term of the leases, and that accordingly Tiger could satisfactorily have complied with its obligations under the repairing covenants if it had carried out those repairs or replacements as and when they became necessary. It submits also that much of the plant, if properly maintained in accordance with the covenants, would have still been in working order at the expiry of the leases.
34. Thus if Tiger and its predecessors had complied with the repairing covenants, the premises could have been left at the end of the term with adequately maintained 1970s M&E equipment, although in the case of some items which had come to the end of their life during the term, the equipment delivered up would have included replacements - on a like for like, or nearest equivalent, basis - for some of the original base build items of equipment.
35. This, submits Mr Wonnacott, is the hypothetical condition of the building which forms one side of the equation in the diminution in value assessment. The other side is the premises in the condition in which they were actually left when Tiger moved out. Having in mind the valuation evidence that he proposed to call, Mr Wonnacott's opening submission was that the diminution in value resulting from Tiger's breaches of covenant, when correctly assessed in the manner that I have described, would be of the order of £250,000.
36. A central issue in this case is whether or not the premises would have required refurbishment of the type actually carried out if Tiger (or its predecessors) had complied with the terms of the leases. A further issue, at least at the beginning of the trial, was whether or not the building would have been acceptable to a tenant of the type likely to occupy it in 2009 if the original base build equipment had been kept in good repair and condition, rather than replaced in 2008/09 with up to date equipment suitable for offices of the type of Sunlife's premises. As I will explain in more detail below, by the end of the trial this issue had fallen away.
37. Mr Hutchings submitted, and I accept, that even if there is an element of betterment because the landlord chooses to carry out more extensive work than was necessary to put the building in the condition in which it should have been left by the tenant, this does not mean that the tenant escapes liability for the cost of the reasonable repair: see, *Carmel v Strachan* [2007] 2 EGLR 15, *per* Coulson J at paragraphs 49 and 54. He submitted also that if the remedial work involves a new method of design or construction that a landlord was compelled to do in order to comply with current legislation and regulations, that does not absolve the tenant from liability. He relied on *Mason v Totalfinaelf* [2003] 3 EGLR 13, where Blackburne J held that complete replacement of a roof with a new roof constructed of modern materials and to a different design still constituted repair.
38. In my view, this claim gives rise to three principal issues. First, what was the scope of Tiger's obligations under the covenants in the two leases? Second, what is the reasonable cost of putting the building back into the condition in which it should have been if there had been sufficient performance by Tiger of those obligations? Third, Tiger having failed to make sufficient performance of its obligations under the leases, what is the difference between the value of the building in its actual condition at the expiry of the leases and the condition that it should have been in if there had been sufficient performance by Tiger of its obligations? For the purpose of these last two

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questions, the tenant's obligation is to put and keep the premises in such repair as, having regard to the age, character, and locality of the building, would make it reasonably fit for the occupation of a tenant of the class who would be likely to take it: see *Proudfoot v Hart* (1890) 25 QBD 42. For shorthand, in the rest of this judgment I shall refer to this hypothetical tenant as the "appropriate type of tenant".

39. By way of observation, I consider that Tiger's initial focus on the comparison between the work actually carried out by Sunlife and the condition of the building if Tiger had performed its covenants was misconceived. In my judgment the starting point must be to consider whether or not, if Tiger had sufficiently performed its obligations as and when they fell due, so that the premises were delivered up at the end of the term in good repair and condition as the leases required, Sunlife could have let or sold the building without any significant discount on the price to reflect the actual condition of the building.
40. If the answer to that question is yes, then the measure of loss is either the cost of putting the building back into the condition in which it should have been delivered up, or the difference in the value of the building in its actual state and in the state in which it ought to have been delivered up, whichever is less. Theoretically, the two should be the same but in practice that is often not the case.
41. If the answer to that question is no, then the court must consider what work would have been required at the expiry of the lease in order to put the premises (if properly maintained and put in good condition by the tenant) into a condition that would enable it to be let to the appropriate type of tenant at a fair market rent. This may have two consequences. First, the landlord cannot recover the cost of that additional work from the tenant. Second, the additional work may make worthless some of the work that would have been necessary to put the building into repair with the result that, if such work has not been done, the landlord has suffered no loss and accordingly cannot recover any damages in respect of that breach. This is known as "supersession".
42. However, the primary measure of damages - the cost of putting the building back into repair - is subject to two rules. The first is that a claimant cannot recover in respect of losses which, by acting reasonably, he could have avoided - the so-called "duty to mitigate". The second is that a claimant cannot recover a cost of repair that is disproportionate to the benefit conferred by the repair in question (see *Ruxley v Forsyth, supra*).
43. It follows, therefore, that if the cost actually incurred by the landlord in seeking to put the building back into the condition in which it should have been left by the tenant is greater than the cost of other work which would be sufficient to put the building into that condition, then the landlord is limited to recovering the costs of the latter.
44. The fallacy in Tiger's argument, as originally presented, was that it was founded on the assumption that the building could not have been let in 2009 to the appropriate type of tenant if Tiger had complied with its repairing obligations under the lease. Tiger now accepts that, subject to some fairly minor improvements (such as the upgrade of the main toilets), the premises could be let to a tenant of the appropriate type if Tiger had complied with its covenants.

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45. However, I agree with Mr Wonnacott that the appropriate test is not whether the landlord has acted reasonably in carrying out remedial works, but rather whether what the landlord has done by way of repair goes no further than was necessary to make good the tenant's breaches of covenant. For example, in this case it was accepted that the works carried out by Sunlife were sensible and appropriate and, in the circumstances, were works that it was entirely reasonable for a landlord in Sunlife's position to carry out. But that does not necessarily mean that they were the works that were necessary to restore the building into the condition that it should have been in if Tiger had complied with its obligations under the leases. The problem that arises in this case is that, whilst Sunlife's works were reasonable, in both cost and extent, it is submitted that they were works that Tiger could not have carried out under the terms of the leases (at least, not without the landlord's consent). Ironically, some of them were in fact cheaper than the work which Tiger now contends it was obliged to do.

My conclusions on the law

46. In the context of the facts of this case and in the light of the parties submissions, my conclusions on the law can be summarised as follows:
- (1) The tenant is entitled to perform his covenants in the manner that is least onerous to him. In general, therefore, such performance should be the starting point for any assessment of damages.
 - (2) The tenant is obliged to return the premises in good and tenantable condition and with the M&E systems in satisfactory working order: he is not required to deliver up the premises with new equipment or with equipment that has any particular remaining life expectancy. The standard to which the building is to be repaired or kept in repair is to be judged by reference to the condition of its fabric, equipment and fittings at the time of the demise, not the condition that would be expected of an equivalent building at the expiry of the lease.
 - (3) In a case such as the present, where there are covenants against making alterations to the premises, the tenant is not entitled, let alone obliged, to deliver up the premises in a condition that involves any material alteration to the building or the fixtures as demised: the fact that the landlord can consent to any such alteration does not affect the basic obligation.
 - (4) Accordingly, where the requirement to put and keep the premises and fixtures in good and tenantable condition involves the replacement of plant that is beyond economic repair, the tenant is required to replace it on a like for like or nearest equivalent basis: he is not required to upgrade it in order to bring it into line with current standards (unless required to do so by law or to comply with any necessary regulations). However, as with most obligations in commercial contracts, this obligation must be interpreted in a manner that accords with commercial common sense.
 - (5) Any claim by the landlord for the cost of repairs is subject to the general rules that
 - (a) he cannot recover for a loss which, by acting reasonably, he could have avoided, and

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- (b) he cannot recover the cost of remedial work that is disproportionate to the benefit obtained.
- (6) By contrast, where there is a need to carry out remedial work as a result of the tenant's breach of his repairing covenants, the fact that the landlord has carried out more extensive work than was caused by the breach does not of itself prevent him from recovering the cost of such work as would have been necessary to remedy the breach.
- (7) Where market conditions at the expiry of the lease require upgrading or refurbishment works to be carried out in order to enable the building to be let to the appropriate type of tenant, a tenant in breach of a repairing covenant is not liable for the costs of any work to remedy the breach to the extent that such work would be rendered abortive by the need to upgrade or refurbish the building (i.e. where there is supersession).
- (8) Where the tenant is in breach of his covenant, in the absence of any evidence to the contrary the court is entitled to infer that remedial work is necessary to remedy the breach unless the tenant demonstrates the contrary: by parity of reasoning with the observations of Longmore LJ in *Phethean-Hubble v Coles* [2012] EWCA Civ 349.

The valuation issues

47. As I have already indicated, when Mr Wonnacott opened Tiger's case, it looked as though the issue of supersession would be the dominant one in the trial. So to some extent it was, until Tiger accepted that it could not challenge the evidence of Sunlife's valuation expert, Mr Krendel, that the premises, if delivered up in accordance with the terms of the leases but in line with 1973/74 standards, could have been re-let to a tenant of the appropriate type with relatively modest additional works (the upgrade of the toilets being one of them).
48. This change of position had the following consequence. Whilst Tiger accepted many of the items in Sunlife's Scott Schedule, it contended in relation to a number of other items that the extent of works carried out and claimed for by Sunlife was much greater than was in truth required and would have involved making unauthorised alterations to the property or otherwise acting in breach of the terms of the leases.
49. On the basis of Tiger's estimate of the type of work that was actually necessary to put the premises back into the required state of repair and its cost, its valuation expert, a Mr Smith, assessed the value of the building as £4,658,000 in its repaired state. Mr Krendel was also asked to carry out the same exercise, and he produced a figure of £4,885,000. These were known as valuation (iv). The valuations were made before Tiger's change of position.
50. Mr Krendel's valuation of the premises in disrepair, assuming that the works that Sunlife claimed were necessary to put it back into good repair and condition were carried out, was £4,462,000: this was valuation (i). The two valuation experts also produced comparable valuations of the premises in disrepair: for example, one basis on which they did so assumed that all the works actually carried out by Sunlife had to be done. Mr Krendel's valuation was £4,210,400, and Mr Smith's valuation was

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£4,410,000 - so they were £200,000 apart, a fairly small difference. These were known as the second permutation of valuation (i).

51. In fact Mr Smith was not called to give evidence, and so I mention his valuations at this point merely for the purpose of the narrative. The important point is that the valuations of the two experts were fairly close. Founding himself on this, and accepting Mr Krendel's valuations (or, preferably, some form of splitting the difference, if he could so persuade the court), Mr Wonnacott submitted that the diminution in value of the premises caused by Tiger's breach of the repairing covenants was £423,000 or, splitting the difference, £335,500.
52. On this basis, Mr Wonnacott submitted that the court could save itself the effort of working through the individual items in the Scott Schedule because the claim was clearly limited by the statutory cap to one or other of the above figures.
53. Despite the ingenuity and fluency with which Mr Wonnacott developed this argument, in my judgment it had a fatal flaw. The flaw was that Mr Krendel and Sunlife did not accept as correct the factual basis on which the former had been asked to make valuation (iv).
54. Valuation (iv) was on a basis formulated by Mr Smith, which was: "*As if, by 14 November 2008, only those works in the 'APPROPRIATE REMEDY' column of the Scott Schedule had already been done*". The Appropriate Remedy column in the Scott Schedule was Tiger's assessment of the work necessary to remedy a particular breach alleged by Sunlife. Tiger then made its assessment of the cost of carrying out that work. So far as the Scott Schedule was concerned, therefore, these columns represented Tiger's case on the type, extent and cost of the work necessary to put the building back into the condition if Tiger had performed its repairing covenants in the least onerous way possible.
55. If Tiger's entries in these two columns in the Scott Schedule were correct, then valuation (iv) might well be appropriate. Needless to say, Tiger said that they were: but of course this was not accepted by Sunlife.
56. It has therefore been necessary for me to consider Tiger's entries in these two columns in relation to every item in the Scott Schedule that is in dispute. Once this exercise has been carried out, it should be the court's figures that must be inserted into the relevant part of valuation (iv) and not Tiger's Appropriate Remedy figures. So what at first appeared to be a dispute the outcome of which hinged on a point of principle, has become a dispute that has had to be fought out on the battlefield of the detail.
57. It is to this exercise that I now turn.

The witnesses*Generally*

58. In addition to the experts, I heard from three witnesses. For Sunlife, they were Mr D'Souza, a Regional Finance Manager employed by one of Sunlife's associated companies who was responsible for overseeing the claim, and Mr Glenn Wright, a building surveyor employed by Lambert Smith Hampton who was responsible for the

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project management of the remedial work on behalf of Sunlife. Tiger called Mr Darren Fahy, who was Tiger's Operations Manager from about 2006. He was responsible for the services at the premises during the last three years of Tiger's occupation.

59. There were two experts in building surveying, Mr Feasey, to whom I have already referred, and Mr Lee Davison, the building surveyor called on behalf of Tiger. However, as will be apparent from the facts that I have already set out, Mr Feasey's evidence also covered evidence of fact in relation to the condition of the building at various times.
60. I thought that each of these witnesses gave evidence in a reasonably straightforward manner. However, as I have already mentioned Mr Davison did not become involved in the claim until March 2009, some four months after Tiger had vacated the premises. The other limitation to his evidence, which was not of his own making (since his client was not in occupation of the building, he was not in a position to obtain tenders from contractors), was that his pricing of the work that he considered appropriate was by way of budget figures, usually based on pricing books and the like. It was his view that the effect of the works carried out by Sunlife had been to provide a building substantially different in appearance and character from that which had been demised originally. However, a substantial part of his evidence was directed to issues about supersession, many of which fell away once it was accepted that the original base build plant would have been suitable in 2009 provided that it had been properly maintained and kept in repair.
61. Since the issues that I have to decide depend very largely on the evidence of the M&E and valuation experts, I shall say a little more about each of those experts who gave evidence.

Mr Peter Masters

62. Mr Peter Masters is a building services surveyor. Having gained an HNC in Building Services Engineering, he has had over 30 years experience of M&E services in commercial property.
63. He was instructed initially in February 2009 by Sunlife's contractors to investigate the extent and state of the M&E systems in the building with a view to providing a rough estimate of the costs of the repair and reinstatement works that might form the subject of a dilapidations claim against the former tenant.
64. He said that he found the M&E services to be in a "shocking condition" and that, in 31 years experience, he had never seen premises in such a bad state.
65. Mr Masters was challenged about the potential conflict of interest between his role as an adviser at that stage and his current role as an independent expert. He said that he could not see any such conflict.
66. He was cross-examined, very skilfully if I may say so, by Mr Wonnacott on the differences between his initial forecast of the work that he thought needed to be done, which was prepared on 6 February 2009, and the budget costs that he had prepared on 11 May 2009, by reference to the contents of a Condition Survey carried out by

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independent assessors, Hayward Solutions Ltd, in April 2009. Hayward Solutions described some of the mechanical plant, such as the chillers, as being in satisfactory condition although they had been unable to carry out any tests because they had been drained down. They noted that spare parts were still available.

67. In his original forecast Mr Masters had noted, in relation to the chillers, "*Replace due to phase out of R 22*" (R 22 was the type of refrigerant gas used in chillers of that vintage). However, in his May budget, he had added the words "*and general neglect*". Mr Wonnacott suggested that there was no justification in the Hayward Solutions' report for the additional comment about general neglect. Mr Masters said that the chillers were off-line and not in use. They were in disrepair because they had not been run for 9 years. He said that compressor evaporation coils and other such items suffer damage if they are allowed to stand idle for long periods, and they become useless. He considered that Hayward Solutions was merely noting that they had seen a "*superficially OK*" plant and that, in the circumstances, since they had not been able to carry out the thorough validation for which they had been engaged, limited reliance could be placed on their conclusions.
68. Mr Masters was firmly of the view that he was an engineer who had responsibility for advising Sunlife and that his advice had to be based on his own independent opinion.
69. I have to say that I found Mr Masters' response to this line of cross-examination to be somewhat over robust: however, that was perhaps understandable, since Mr Wonnacott did not shrink from making it clear that Mr Masters' integrity was under attack. I am not prepared to find that Mr Masters was deliberately taking a position in order to advance Sunlife's case against Tiger. The comments in his May budget costs were very substantially supported by the specialist M&E services advisers, Callisia, who had instructed Hayward Solutions, and other specialists, to inspect various items of plant. In their letter dated 30 April 2009, enclosing the reports from Hayward Solutions and the other specialists, Callisia wrote:

"The building has suffered over the last part of its life from we feel a lack of good and regular preventative maintenance as is evident by items of plant failing And being switched off, without any attempt of repair and in extreme circumstances electrically isolated. Coils on the air handling plant have become blocked, filters collapsed and although some of the air handling units run they are showing signs of being poorly maintained and generally abused.

The boilers would appear to still, if reinstated, have the ability to operate but after being drained down for such a long time the internal condition of the empty system could well render them effectively useless.

The chillers again appear to have the ability to function if reinstated but again being left obsolete for such a long period they may well prove more trouble than if they were replaced. The refrigerant gas in the units is R22 which is at the end of its life span and in a matter of a few years these units will be unusable due to the refrigerant gas being banned for use within new or existing items of plant.

...

Finally the buildings mechanical installation has effectively been left in a poor condition due to a lack of good and proper maintenance but also the decision to make items obsolete only exacerbates the possible degeneration of items of plant. The age

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of plant and installation as a whole is circa 20 years old, with a newer few replaced units, and coupled with the lack of good preventative maintenance, we cannot see how it would be cost-effective to attempt to reinstate most if not all of the plant. The network of pipework, where not just cut off randomly, and ductwork throughout the building shows not (sic) sign of a consistent overall system and in many cases has been modified for previous tenants and coupled with the condition of the water and ducts we cannot see how effective its re-use in terms of cost would be."

70. From this it seems that Callisia's conclusions were broadly consistent with those of Mr Masters, as reflected in his May budget costs. Mr Masters was entitled to form his own independent opinion and was not bound to accept the view that an item of plant was in a satisfactory condition in circumstances where he was aware that it had been out of use for several years and that it had not been possible to test it.
71. However, I consider that Mr Wonnacott's cross-examination did demonstrate that Mr Masters' opinions should not always be accepted at face value but in some instances should be considered critically in the light of the material available to support them.

Mr Darren Penson

72. Mr Darren Penson was Tiger's M&E expert, although his expertise was in the mechanical services rather than electrical services. In respect of the latter, he was assisted by a colleague, Mr Shane Baker, who was not called as a witness and did not provide a witness statement.
73. Mr Penson holds a Higher National Degree in Building Services from Southbank University. He has 27 years experience in the industry, most of which has been in the field of design consultancy rather than dilapidations. It is only during the last 10 years or so that Mr Penson has become involved in dilapidations claims. He said that he had dealt with about a dozen such claims during that period. He did not carry out any validation testing on the plant and he visited the premises for the first time on 6 September 2012 - about a week before he finalised his first report. However, the premises had been visited by Mr Baker on three occasions: in March, August and November 2009.
74. Mr Penson accepted if the premises had been kept in good repair during the term of the leases he would expect the tenant to have replaced some parts of the M&E services. He accepted that Sunlife had acted reasonably in installing the replacement system that is now in place. He said that he would have given similar advice if he had been advising Sunlife, although he did not agree that the replacement was "like for like".
75. Mr Penson said that all the estimated costs submitted on behalf of Tiger in relation to the M&E services were just that, namely estimates. He had not obtained any quotations from any contractors. Nor had he inspected any of the ductwork that was in place at the expiry of the leases.
76. Mr Penson agreed that he had no specific experience of the property market in Soho and that he could not speak to the letting market in that area. His approach was to assume that in 2009 M&E systems in a building ought to be designed and arranged so as to give the occupier flexibility and the opportunity to achieve the maximum density

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of occupation. Mr Penson said that it was unlikely that the 1974 installation in the buildings would be able to provide a comfortable office environment "in the modern day", as current occupancy levels were higher² and the extensive use of computers resulted in greater heat gain within an office.

77. In relation to the electrical system, in his report, he said this, at paragraph 6.3.4:

"The LV distribution network for a 1974 installation, including distribution boards and sub main cabling, would not be suitable for a modern day office environment due to the earth leakage associated with modern day IT equipment resulting in potential overload current within the neutral conductors, meaning the sub main cabling for a 1974 installation would most likely be undersized."

I take this to represent the views of Mr Baker.

78. Mr Penson struck me as a fair and objective witness, who was ready to concede a point where appropriate. However, there were three main limitations to his evidence. The first was the fact that he only visited the building on one occasion, and that a considerable time after Tiger had left it. Second, all his figures for remedial work were pure estimates which had not been tested against any quotations from a specialist contractor. Third, he had not had the opportunity to inspect any of the relevant plant or ductwork, his views being based on photographs or reports by others.

79. An example of the handicap under which Mr Penson was working was his evidence in relation to the air handling units. It was agreed that these were in disrepair but Tiger's case was that they could be repaired. Mr Penson said that his views were based on the report by Recom (who had also been engaged by Callisia) since he had not inspected the original units. He agreed that if, as Mr Masters had said, owing to the narrow access to the basement it was necessary to cut the old coils in half in order to get them out then it would not be possible to replace the units. He therefore could not say whether or not like for like replacement was in fact a possible remedy.

80. In my view Mr Penson's evidence about the need for flexibility and maximum density of occupation is a product of his design consultancy background rather than being necessarily directed or relevant to the office property market in the area of Soho. He accepted that the original air conditioning system was designed for open plan offices and would have been difficult to adapt for use with a cellular office arrangement.

81. In relation to the boilers, he agreed that if a boiler had been drained for some years, rather than a few months, he could not say that it could be put back into use even if it looked satisfactory.

Mr Paul Krendel

82. Mr Paul Krendel is a partner in the firm of DE & J Levy, a firm with whom he has been for his entire career of 37 years. He is a Fellow of the Royal Institution of Chartered Surveyors. His experience has been mainly to do with offices in central London and, by coincidence, his firm had originally been involved when these

² This assertion was in fact not borne out by what was found on the view, where the actual level of occupancy in the occupied offices was quite low.

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particular leases were granted in 1973/74. Mr Krendel has considerable experience of the area around Soho. He did not see the premises in their state of disrepair after Tiger moved out.

83. I found Mr Krendel to be a careful and impressive witness and, in the event, as I have already indicated there was relatively little difference between the various valuations arrived at by him and by Mr Andrew Smith, Tiger's valuation expert (who was, in the end, not called to give evidence).
84. Mr Krendel was firmly of the view that the premises could have been let in 2008/09 if they had been delivered up in accordance with the tenant's repair covenants. He said in his report that it would have been unnecessary to undertake any additional work of upgrading save for the main toilets and, possibly, some work to improve the exterior. According to Mr Krendel, the building, if left in a good state of repair "*would have been entirely appropriate for its location*" and in a condition consistent with that for which tenants in the area would have been looking.
85. These views were not challenged by Mr Wonnacott, very properly since he was not going to call his own expert.
86. In terms of the market, Mr Krendel said that after the Lehman collapse the office letting market froze until the end of 2008. In 2009 rents started to fall rapidly and did not stabilise until 2010. The investment market, by contrast, recovered much more quickly. He agreed that it would have been very difficult to market the property in November 2008.
87. In re-examination he said that if the building had been properly maintained and repaired over the course of the leases, there was nothing to suggest that it would not have been suitable for letting on a 5-10 year lease. He disagreed with the suggestion that further work (apart from upgrading the toilets) would still have been necessary if the tenant's covenants had been performed.
88. Bearing in mind these observations and my conclusions on the law, I now turn to the items in the Scott Schedule.

The Scott Schedule issues - items in dispute as to amount

The building works items (item numbers in the Scott Schedule in brackets)

89. The Scott Schedule provided an itemised breakdown of the remedial work carried out by Sunlife, summarising the work that Sunlife contended was required, and its cost, together with the alternative work (where different) contended for by Tiger, and its cost. It ran to over 230 items. They were divided into three categories. Those with an orange background were in dispute as to the extent of the work and/or the amount of the item. Those with a blue background were agreed as to the amount, but in dispute as to liability. Those with a green background were agreed, both as to liability and amount. About two thirds of the items were disputed in one respect or another.
90. For reasons connected with the genesis of the schedule, and which were perfectly logical, the items did not necessarily appear in numerical order: for example, item 128 appeared on page 8, whereas items 116-120 appeared on page 11, followed by items 111 and 112 on page 12. I was helpfully provided with an index to enable me to

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navigate the document more easily. I will follow the same course and, in general, take the disputed items in the order in which they appear in the Scott Schedule, and not in numerical order.

The main roof (2, 3)

91. There is no evidence that Tiger carried out any work to the roof during the term of the leases. Equally there is very limited evidence that the roof leaked: one small area of water ingress is shown in the end of lease photographs taken by Sunlife. Sunlife claims that the roof needed to be repaired by applying a multi layered liquid plastics roof covering at a cost of £37,844, which is the work that it carried out. This is disputed by Tiger, who say that the roof could have been effectively patch repaired at a cost of about £9,500.
92. I am not persuaded that a tenant of the type that could reasonably be anticipated to take a lease of this building would be concerned by the existence of patch repairs on the roof. Mr Hutchings submitted that the situation was directly comparable to that of the garage forecourt in *Totalfinaelf v Mason* [2003] 3 EGLR 13. In that case the judge found that the “*degraded and patched nature of the hardstanding of the forecourt area gives the premises a tired and rundown appearance*”. The judge held that this was not what would be expected by a reasonably minded oil company intending to use the premises as a place from which to run the businesses of a filling station and an attached shop. That conclusion is not difficult to understand: front of house appearance is important, even in a garage. However, here we are not talking about front of house appearance but about a roof on to which the tenant would be unlikely to go except for the purposes of attending to the plant which was located there.
93. Although there was evidence that the flat part of the roof had been used in the past for sitting out, the surface was not suitable to withstand the point loads of tables and chairs and Tiger had been advised not to continue the practice. This advice was given by surveyors instructed by Tiger before it acquired its interest in the leases. Those surveyors, Stanwood Professional Services, said, at page 8 of their report of February 2000:

“We also noted a number of other chairs on the felt covering and it is essential that all the said chairs are removed otherwise with people sitting in them the chair legs can cause indentations into the felt covering which can cause damage and allow rainwater ingress through the felt.”
94. It is clear, therefore, that this was not a roof which was intended for recreational use. I do not consider that if it was tidily patched it would have been a factor that would have adversely affected the judgment of the appropriate type of tenant. I find that such a tenant would have been concerned with its weatherproofing properties, rather than its appearance.
95. As it happened, the repairs carried out by Sunlife were not a success. The roof leaked frequently after they were carried out, something that did not impress potential tenants, and this seems to have continued for over a year.

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96. It seems that the roof had been kept in a watertight condition by the carrying out of appropriate patch repairs from time to time. Mr Feasey said in his witness statement that he had “*always doubted the suggestion that the main roof surfaces could be patch repaired due to the general condition, number of serious splits and tears and the presence of previous patch repairs and painted over-coating*”. I do not doubt that his belief was genuinely held, but the method of patch repairing seems to have worked in the past.
97. I am satisfied that the roof was not in good and substantial repair on the expiry of the leases, but I see no reason why the carrying out of patch repairs should not have provided a reasonable standard of repair, assuming that the work was done properly. Tiger has assessed the cost at £9,500. This figure appears to be based on a visual observation.
98. I do not accept that the roof required total recovering as proposed by Sunlife, but I consider that Tiger’s cost probably makes no allowance for dealing with the additional hidden defects that would almost certainly have appeared during the remedial works. I would therefore increase Tiger’s allowance to £12,500, roughly one third of the sum claimed by Sunlife, to reflect further works that would have become necessary if a patch repairs scheme had been implemented. To this must be added preliminaries and overheads and profit (“OHP”), in the percentages which have been agreed - which are 8.42% and 9%, respectively. This applies to all of the following items, unless stated otherwise.

The lead mansard roof (4)

99. Around the exterior of the fifth floor is a lead mansard roof. The photographs showed what appeared to be cracking on the front elevations of the lead. It is Sunlife’s case that the lead needs to be replaced in its entirety. In his report Mr Davison took the view that the damage was minor and could only be seen in six areas. He considered that a simple soldered repair, requiring only minimal labour costs, materials and tools, would suffice.
100. However, he accepted in cross examination that if the photographs showed crazing to the extent of cracking, the lead would need to be replaced. My conclusion after a detailed examination of the photographs is that the lead has cracked in places to an extent that it justifies total replacement. Accordingly, I allow this item in full. I accept the sum claimed by Sunlife, which is £17,500.

The facade (32)

101. The lower two storeys of the elevations to the building were faced with dark coloured ribbed concrete panels. These had been damaged. Sunlife claims the sum of £10,560.50, being a lump sum cost provided by the contractor for all the repairs and decoration requirements to the facades at the front and rear of the properties. The repairs to the front involved cleaning down all the surfaces and painting them with external masonry paint, having carried out repairs to the damaged concrete. No breakdown was provided. Tiger accepts that it should pay a contribution of £3,000, which is in respect of the repairs to the rear elevation. This is accepted by Sunlife as a fair and reasonable contribution to that part of the works.

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102. What Sunlife has done is to re-render the front elevations to produce a new flat finish in a light colour. This work cost £26,455. Mr D'Souza said that it was carried out because it was in a poor state and Sunlife had been advised by its contractors that they could not guarantee the quality of the repairs to the original ribbed concrete.
103. I asked Mr Wright whether, if the client did not like the colour of the panels and there was no damage to repair, they could not just be repainted. His answer was yes, but he then said (according to a note taken by Sunlife's team that has not been challenged) that the "*client just decided to replace the panels as they were not very desirable to look at. Smooth finish is better than ribbed*". Mr D'Souza said that Sunlife's intention was to bring the building into repair and make it look presentable. He was asked by Mr Wonnacott in cross examination why the facade was changed from black to white. Mr D'Souza said: "*lots of pigeons; black shows their mess more than the colour now*". He acknowledged that pigeons were a problem in Soho Square.
104. I consider that the oral evidence given by Mr D'Souza and Mr Wright comes rather closer to the truth, than the more general observations in their witness statements. It may be correct that Sunlife was told by the contractors that the panels would be difficult to repair, but I am satisfied that it wished to change the facade in any event for aesthetic and practical reasons. Accordingly, I find that even if Tiger had left the black ribbed panels in good repair, Sunlife would nevertheless have re-rendered the facade to make the building look more attractive. For these reasons, I value this item at £3,000.

Windows (33-52)

105. The position as to the state of the windows at the expiry of the leases is not satisfactory. A survey was carried out by The Interiors Group ("TIG") in June 2009, according to which some 90 odd windows required attention. Of these, a little over 25 were described as "*full service + clean between glass*" (or words to similar effect). However, the quotation for the repairs appears to have been a global figure (at least there is no breakdown in the papers). This quotation appears to have been for £64,520, which was the sum originally claimed by Sunlife. However, the survey was carried out some 8-9 months after Tiger's leases expired, and a number of windows on the ground floor were noted as having been "tagged" by vandals. On reflection, Sunlife decided, very properly, not to pursue a claim in respect of these windows, which reduced the claim by £9,672.50.
106. By the conclusion of the trial, the amount claimed that was in dispute was £54,487.50, of which Tiger was prepared to admit £25,000. The window schedule was the only evidence as to the state of the windows as at June 2009 and it was not supported by any form of witness statement. It had simply been adopted by Sunlife's expert, Mr Feasey, along with the contractor's lump sum quotation. When Mr Feasey inspected the building in October 2006 and prepared his schedule of dilapidations, the total amount claimed in respect of the windows was well under £10,000. Whilst I readily accept that this inspection was carried out whilst the building was fully occupied, which would have prevented a close or detailed inspection, the disparity between Mr Feasey's estimate at that time and the amount claimed in June 2009 is striking.
107. In the absence of any more satisfactory evidence to justify the sum claimed, I consider that there is no alternative but to value the disputed elements of the claim in the

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amount offered by Tiger, namely £25,000. I reject Tiger's suggestion that the wholesale replacement of the windows supersedes the dilapidations claim. There is no evidence that a decision had been taken to replace the windows at the time when the leases expired. I accept Mr D'Souza's evidence that if the windows had been left in good condition by Tiger, Sunlife would not have spent any money on replacing them. I also accept his evidence that the decision to do so was taken following receipt of TIG's survey in mid 2009, when it became apparent that the cost of wholesale renewal - a little over £100,000 - was not disproportionately greater than the estimated cost of repair, as represented by TIG's quotation.

108. Accordingly, I accept Tiger's estimate that the reasonable cost of repairs to the windows to restore them to good tenable condition was £25,000.

Suspended ceilings (57-86, 128, 130, 135)

109. For the reasons that I give in relation to the M&E installation, I consider that the ceiling tiles and the grid had to be removed in the ground to fourth floors inclusive. I agree with Mr Feasey that it would not be acceptable to create a patchwork effect by fitting some new tiles into a ceiling that contained a substantial proportion of existing tiles. However, I agree with Tiger that the proportion of damaged tiles was such that many good tiles could have been salvaged and reused. From what I have seen in the photographs, the proportion of damaged tiles appears to be far less than that contended for by Sunlife. I consider that sufficient undamaged tiles could have been recovered so that, at least on some of the ceilings, the damaged tiles could have been replaced by undamaged tiles taken from other ceilings, even allowing for damage caused by the partitions and a certain amount of damage and breakage during taking down. Doing the best I can, I consider that the ceilings on two of the larger floors could probably have been made good using recovered ceiling tiles, leaving new tiles to be used on the other floors.
110. I have not been able to find in the documents a unit cost for new tiles or, for that matter, the number of tiles in a particular ceiling. Even if I did have these figures, I would still have to make an allowance for the cost of sorting and setting aside tiles from other ceilings that could be reused. In these circumstances, all that I can do is to adopt a broad brush approach. I have therefore deducted a sum of £3,500 to reflect the saving that could have been achieved if the ceilings on two floors had been tiled with existing ceiling tiles recovered from other ceilings.

Window cills (111)

111. The dispute here is about the condition of the window cills at the expiry of the leases. Sunlife's case is that they were so bad that they all needed to be replaced. Tiger says that painting them would have been sufficient. Tiger's position is based largely on the fact that Mr Feasey did not report any defects at all in the window cills when he produced his first schedule in October 2006. In my view, there is nothing in this point. When Mr Feasey first inspected the building it was occupied and flat surfaces, such as window cills, would inevitably have been covered with clutter.
112. In his report Mr Feasey said that numerous window cills were found to have been in disrepair at the expiry of the leases, in that there were cills that had been damaged by damp, or had become stained as a result of damp, and that there were generally

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uneven and damaged surfaces to the cills throughout the building. He said that there was also a mis-match of different finishes to the sills. But in cross examination Mr Feasey said that he did not think that more than 20% of the cills needed to be replaced as a result of damage. Nevertheless, according to Mr Feasey, those advising Sunlife concluded that replacing the cills throughout with a white sprayed MDF board was the most cost effective repair solution, as opposed to repairing each cill individually. He did not accept that this work could have been done for the £1,500 suggested by Tiger.

113. On this point I accept Mr Feasey's evidence, which seems to me to accord with common sense. Once it became necessary to replace a significant proportion of cills because they were damaged, I consider that it was very likely necessary to replace the others in order to achieve an acceptable consistency of finish and appearance. If the cills had been properly maintained during the course of the leases, they should not have needed such extensive remedial work: ordinary repair by filling and painting should have been sufficient. But that was not the position. I therefore allow this item in the sum claimed of £5,484.38.

Doors (112)

114. This item is for the replacement of all of the main internal core doors. It seems that the initial assessment was that the doors would not have to be replaced, but simply repaired where necessary and repainted. To this end the doors were all protected during the works, but a decision was then taken to replace them nonetheless.
115. The sum claimed amounts to a little under £500 per door. The Scott Schedule refers the reader to the photographs in support of the allegation that many of the doors were badly damaged and therefore beyond repair. In Sunlife's bundle of photographs there are only six photographs of doors, and even in those photographs it is not always easy to tell what is actually wrong with the particular door shown. As I have already noted, there was evidence that Sunlife initially intended to keep most of the doors because during the remedial works they were protected with an appropriate covering. If at that stage, Sunlife had intended to replace all the doors, this would not have been necessary. I therefore infer that at that stage most of the doors were not in a condition that was thought to justify replacement.
116. I am prepared to accept Sunlife's evidence that some of the doors were badly damaged, but I do not find that this is established for all 28 doors the subject of this claim. Doing the best I can, I find that probably 8-10 doors were in need of replacement as a result of poor maintenance during the leases, but that any others that were badly damaged were probably damaged during the course of the works. I therefore consider the appropriate amount for this item is £7,000 (£4,000 to replace 8-10 doors, and £3,000 to repair and redecorate the remainder).

Fire curtain (114)

117. Mr Wonnacott concedes that "*if it is right that the tenant's obligation was to leave the property in repaired 1973/4 condition, then this item must be allowed in full as part of the common law loss*". He submits that this only ceases to be the case if the statutory cap applies.

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118. I therefore allow the sum claimed for this item in full, namely £6,835.00 (subject, of course, to the application of the statutory cap).

Basement toilets (146)

119. These were left by Tiger in an absolutely shocking state. Half the fixtures were missing, and they were filled with rubbish. They required major refurbishment.
120. It was Sunlife's case as opened that these toilets were not upgraded to the same standard as the other toilets in the building (for which no claim is made, because Sunlife accepts that they had to be and were refurbished to a much higher standard than was required by Tiger's obligations under the leases).
121. If this were correct, then I would have concluded that Sunlife was entitled to the sum claimed in full. However, it was suggested during the trial that in fact these toilets were upgraded to the same standard as those in the rest of the building. I have to confess that I did not notice this at the time when I conducted a site visit, but what was done is a matter of fact and so I directed that photographs were to be taken so that the position could be clarified. This was done and it is quite clear that the basement toilets have in fact been upgraded to the same standard as those on the other floors. However, it remains the evidence that upgrading the basement toilets to this extent was not necessary in order to let the building: Sunlife could simply have restored these toilets to the working but utilitarian condition in which Tiger should have left them. Since Sunlife has carried out repairs, albeit to a much higher standard than the covenants require, for the reasons that I have already given it is entitled to recover the cost of the work actually needed to remedy the breach of covenant. I do not know the precise cost of doing this, but I consider that if I allow 50% of the sum claimed, namely £8,437.50, that will probably be about right.

Internal decorations

122. Sunlife claims £58,699.26 for the cost of international redecoration. Tiger contends that this is a supersession item in its entirety.
123. I consider that the replacement of the windows and the removal of some of the internal walls carried out by Sunlife would have rendered a substantial part of any redecoration by Tiger prior to the expiry of the leases as worthless. However, I consider that some of that work would have survived, such as the redecoration of staircases, the painting of internal doors and the redecoration of some parts of the ground and lower ground floors. I can do no more than make a very rough assessment of the proportion of the total that this work would represent. Taking a broad approach, I allow Sunlife 25% of the sum claimed, that is £14,674.82.

M&E items

124. By way of a general observation, I have to say that the parties' cases in relation to the M&E equipment were presented in a thoroughly confusing manner. I found it difficult to relate the items of plant described in the written submissions with the precise items in the Scott Schedule³, and next to impossible to establish the precise scope of the

³ For example, in his closing submissions Mr Hutchings referred to an item entitled "Ductwork", which embraced items 151-7, 168, 191-3 and 199 in the Scott Schedule. Many of these are included in the

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agreement between the experts which was set out in the form of a schedule. The problems were further compounded by Tiger's change of position in relation to the suitability of 1973/4 heating and ventilation plant for a 2009 tenant. Tiger's initial approach to the case, denied by Sunlife, was that a heating and ventilation system that may have represented state of the art equipment in 1973 would no longer be appropriate or acceptable in 2009 for a tenant of the appropriate type and this informed its responses in the Scott Schedule.

125. Accordingly, the discussions between the respective M&E experts had taken place against this background and with those adopted positions. Tiger had been making a root and branch attack on Sunlife's case in relation to the M&E plant, asserting that the wholesale replacement of the existing system amounted to supersession. Tiger's case was that all that it was required to do under its covenants was to keep the existing base build equipment in good condition or, if it had to be replaced, to replace it with identical equipment or the nearest equivalent. Sunlife's repairs did not amount to this, and although Tiger accepted that Sunlife had acted perfectly reasonably in installing the system that it did, Tiger's case was that the original system however well maintained would have been stripped out in any event in order to provide a system that would be acceptable to the appropriate type of tenant in 2009.
126. However, in his closing submissions Mr Wonnacott accepted that the building in its properly maintained 1973/4 condition would have been lettable in 2009, albeit at a reduced rent.
127. Unfortunately, Tiger's change of position did not become clearly apparent until it made its closing submissions, although the change of direction was foreshadowed by the nature of the cross-examination of Mr Krendel and Tiger's decision not to call its own valuation expert. I do not criticise Mr Wonnacott for his change of position, even if it did represent a late bending to the wind, but it did make the task of the trial judge immeasurably more difficult - much of the preceding evidence having been presented and challenged from a standpoint that no longer held good.
128. I have therefore had to approach the evidence afresh and to consider in detail points that I may well have had to consider in a different light if Tiger's case had remained as originally presented. One result of this is that counsel may have omitted to pursue certain lines of cross-examination that might otherwise have been followed. However, the delay between the conclusion of the evidence and the hearing of closing submissions has already been far too long⁴ and, in these circumstances, I propose to do my best on the information and evidence before the court rather than to create a further delay by requiring the recall of some of the witnesses to give further evidence.

The main components of the heating, ventilation and air conditioning system

claim for heating and ventilation, which has been agreed. Item 168 of the Scott Schedule simply refers to "Fresh Air Ventilation Systems". Mr Wonnacott's submissions referred to "M+E Ventilation works" with a sum claimed of £190,871.25, which represented 4 items in the Scott Schedule.

⁴ This delay of 2 months was caused by the unavailability of one of the parties' counsel owing to existing professional commitments and the added difficulty of finding a day in the court's diary on which to hear the submissions.

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129. The M&E experts are agreed that the main components of the heating, ventilation and air conditioning system had to be stripped out and replaced. That includes the chillers, the pipework and ductwork in the ceiling voids, associated cabling, perimeter fan coil units, the pressurisation units, pumps, the air handling unit in the basement plant room, the removal of redundant plant at roof level at the isolation of the associated electrical and mechanical circuits to enable this to be done.
130. As I have indicated, at the time of the experts' joint statement there was a disagreement over supersession but by the end of the evidence Tiger's view on this had changed. Accordingly, the supersession argument having disappeared there is no remaining issue between the M&E experts about the claim in respect of the heating, ventilation and air conditioning system. I consider that this and other work that I find to have been necessary would have required the removal of all the false ceilings, both the tiles and the supporting grid. I do not accept the suggestion that it would have been practicable to install new pipework and ductwork if the grid remained in place.
131. The sum that has been agreed in respect of the replacement of the main components of the system is £195,660.80.
132. This leaves certain other parts of the M&E system in respect of which the parties are still in dispute. I will take these items by item.

The hot and cold water systems, including boilers and staircase radiators (169, 171)

133. The cold water was provided by bulk storage tanks on the roof which fed (by gravity) the cold taps situated throughout the building. There is no evidence about the condition of the cold water pipework, virtually all of which must have been intact at the expiry of the leases (otherwise Tiger would not have had cold water).
134. The hot water was initially fed from the boilers but, by the expiry of the leases, was, according to Tiger's expert, Mr Penson, supplied by an immersion heater. Mr Masters also thought that the boilers were not in operation at the time when the leases expired. Mr Fahy, who was Tiger's Operations Manager since about early 2006 and who had been with them since 2004, said that he thought that the boilers were in operation up until the expiry of the leases. However, Mr Fahy's recollection about the boilers was not good because he thought that there were two boilers in each plant room, when in fact there were three. In the light of the other evidence, I consider that Mr Fahy may be mistaken in thinking that the boilers were still in use at the expiry of the leases, although I accept that the boilers must have been in service during some of his time with Tiger. I conclude, therefore, that the boilers had been off line for many months at least by the time that the leases expired.
135. Thus, so far as to the domestic hot and cold water system was concerned, I find that the original pipework was still in use and, seemingly fit for use, at the expiry of the leases. There is no evidence as to the internal condition of the pipes, although I have no doubt that they would have needed flushing out, cleaning and appropriate treatment.
136. The essential question in relation to the hot water system is whether the boilers and the rest of the heating system should have been replaced, or whether they could have been put back into good repair.

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137. Mr Masters instructed specialist air conditioning and heating engineers, Callisia, to carry out a validation assessment on the mechanical services in the buildings. They in turn instructed Hayward Solutions Limited to examine the condition of certain items of plant. Hayward Solutions noted that there were 6 boilers although they commented on only 5 of them. Their overall conclusion in relation to the plant as a whole was that “*strong consideration should be given to replacing the plant as it is very near its life expectancy*”. The recommendation of Hayward Solutions was to replace the whole of the plant, save for the air handling units and the calorifier. They described each of the boilers as being in satisfactory condition, although since the system had been drained down they were unable to fire the boilers and complete any combustion tests.
138. Callisia’s conclusion in relation to the boilers was in the following terms:
- “The boilers would appear to still, if reinstated, have the ability to operate but after being drained down for such a long time the internal condition of the empty system could well render them effectively useless.”
139. Taking the evidence as a whole I am satisfied that the boilers were not in the condition required by the leases when Tiger moved out. On balance, I conclude that given the uncertainty about the condition of the boilers the appropriate course was to replace them. I consider that Tiger’s standards of maintenance were so poor that it could not be safely assumed in their favour that the boilers were in good working order.
140. As I have indicated, there is no evidence that the hot and cold water pipework was unserviceable. I therefore find that Sunlife has not proved that Tiger is liable for the cost of replacing this pipework. However, as Tiger’s expert accepts, the hot and cold water pipework would have to be flushed, cleaned, treated and pressure tested. Tiger has allocated an estimated cost of £17,500 for reinstating the hot and cold water system, including the testing and treatment of the pipework.
141. The figure for the replacement of the hot and cold water system claimed by Sunlife, £54,002.50, is agreed as the cost of the work carried out. This effectively involved the removal of the existing hot and cold water pipework, together with the boilers and other heating equipment.
142. Tiger’s figure of £17,500 assumes that the boilers and other associated plant could be serviced and overhauled, as could the remaining fan coil units that formed part of the current heating system, and that they do not require replacement. The hot water was heated not only by the boilers but also by two calorifiers, one of which was situated in the basement. There were pumps in the plant rooms on the roof and at the top of the main staircase.
143. Mr Masters concluded that the calorifiers, which were 20 years old, had to be replaced owing to the build up of scale. However, Hayward solutions said that from a visual inspection the calorifier in the basement “*appears to be ok*”, but they recommended that it should be pasteurised and treated to the relevant standards to prevent any risk of Legionella. Mr Masters agreed with this, if the unit was to be retained.
144. However, Mr Masters said that he had concluded on the basis of his own inspection that there was a build up of scale in the calorifiers to an extent that justified

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replacement. He said, at paragraph 7.9.7 (ii) of his report, that “*no amount of sterilisation and other form of treatment would have returned the calorifiers to a state of good repair*”. He noted also that the life cycle estimate for this type of plant is less than 25 years. In the absence of any evidence of a proper maintenance regime by Tiger, and given the age of the calorifiers - at least 20 years, I prefer the evidence of Mr Masters. I consider that the same probably applies to any associated pumps.

145. Accordingly, I find that there should be no deduction from the amount claimed in respect of the hot and cold water systems apart from the cost of replacing the pipework.
146. In his “Forecast Budget Costs” of February 2009, Mr Masters allowed £25,000 for “*flush, clean, treat, etc*” of the heating and cooling water systems. In his budget of May 2009, he allowed £35,000 for replacing all the heating pipework: a difference of £10,000.
147. There is no equivalent figure for the cold water pipework, but the estimate for “*flush, clean, treat, etc*” for that pipework was £6,000. From this I infer that the overall length of the cold water pipework was probably no more than about one third of that of the hot water and heating pipework. I will therefore assume, in the absence of any better evidence, that the cost of replacing the cold water pipework would have been about 40-50% more than the cost of flushing and cleaning it: say, £3,000.
148. Accordingly, I find that Sunlife must give credit of £13,000 (£10,000 + £3,000) against its claimed figure of £54,002.50. In other words, for this item I allow £41,002.50.
149. A further related item is the replacement of the staircase radiators. Sunlife’s case on this was not specifically challenged in cross examination. It appears that the staircase radiators were part of the original base build equipment and I consider it unlikely that any steps were taken by Tiger to ensure that the appropriate additives were used to prevent corrosion or the build up of scale in these radiators. If, as I have found, the boilers were not in use at the end of Tiger’s occupation of the building, it seems likely that these radiators were not in use either. Again, given Tiger’s poor maintenance record, I consider on balance that these radiators were also in a poor condition and that replacement was justified.
150. At paragraph 7.9.5 (i) of his report, Mr Masters said:
- “... I am of the opinion that the lack of maintenance, water treatment and general servicing of valves that had led to the poor condition and performance efficiency of the radiators (with many of them not being operational for years (as identified by First Property Services in 2006) . . . had resulted in a schedule of repairs that was so extensive that replacement was more cost effective.”
151. I accept this evidence which, it seems to me, accords with the probabilities of the situation. Accordingly, I allow the sum of £2,500 claimed by Sunlife for this item.

The controls (172, 200)

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152. It was not in dispute that the control system for the heating and ventilation had to be replaced. Tiger's position is that the control system that has been installed for the main building is a complicated building management system that is far more sophisticated than the original rather simple system. I did not understand this to be disputed. The new system permits programming for individual floors, rather than the building as a whole.
153. Sunlife did not put forward any alternative figure to the £12,500 contended for by Tiger for the main building. So far as that is concerned, I accept Tiger's estimate of £12,500 in default of any alternative. However, I am not persuaded that the same considerations apply to the retail unit, and so for that I allow the sum claimed, namely £6,533.75.

The fresh air ventilation (168, 199)

154. I have already mentioned the difficulties of relating the submissions of each of the parties to the relevant items in the Scott Schedule. However, so far as the ductwork is concerned, there is in my view a short answer. Mr Masters has seen and inspected the ductwork. At paragraph 7.9.3(i) of his report, he said:

“I am of the opinion that the lack of maintenance, bacterial cleaning and general bad cork cutting of ducts (left with over names) that had led to the poor condition and non-operation of the ductwork distribution system had resulted in a schedule of repairs that was so extensive that replacement was more cost effective.”

155. The work that he identified by way of repair included reinstating the ductwork, replacing missing, cut and disconnected sections of ductwork with new ductwork, clearing debris, dirt, dust and contamination from the existing ducts, undertaking bacterial analysis, thorough and deep chemical cleaning and the removal and treatment of corrosion. Since Mr Penson had not seen the ductwork in its original condition, but had been confined to the examination of photographs, he was not really in any position to express an informed opinion. In my judgment, therefore, the evidence of Mr Masters is to be preferred.
156. In relation to the air handling units, Mr Masters said that it was simply not possible or cost efficient to undertake part replacement of components to the existing units. One of the units was in the basement and the relevant coil could not have been replaced owing to the narrow stairway and door to the plant room. In fact, when the coils in the original air handling units were removed, they had to be cut into sections in order to get them out of the building. In addition, Mr Masters said that the plant was well in excess of its life expectancy and had been poorly maintained. He said that even if Tiger was correct in saying that the air handling units could be repaired, the work required was so extensive that it would not be cost-effective. He listed the work as follows:
- overhaul and replace inlet louvres
 - overhaul and replace air damper motors and actuators
 - replace the filter media housings
 - provide new filter media
 - replace corroded heating and cooling coils
 - overhaul fan and fan motor and replace fan belt

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- service and overhaul of unit in general
- carry out hygienic clean of unit
- treat corrosion and repaint internal sections
- replace control valves and actuators
- replace AHU access door seals and handles
- overhaul extract fans and fan motors.

157. His estimate to carry out these works for both the supply and extract air handling units was £130,000, a little over the sum actually claimed. Again, I prefer the evidence of Mr Masters who has seen and inspected the plant over that of Mr Penson who has not.
158. Accordingly, although the *prima facie* measure of damage is the cost of this work, Sunlife has mitigated its loss by adopting a less expensive solution. The cost of this alternative solution therefore represents the amount recoverable. It is irrelevant, as Mr Wonnacott appears to contend, that the solution actually adopted in order to mitigate the loss is not one that would have been open to Tiger. However, Tiger is entitled to take the benefit of the mitigation. I therefore allow this claim in full in relation to both the main building and the retail unit. That is in the sums of £121,542.50 and £42,648.75, respectively.

WC supply and extract ventilation (170)

159. It appears that the extract fan was replaced in 2008. The experts are therefore agreed that this could have been repaired, although photographs of it suggested that it had not been well maintained. In his closing submissions Mr Hutchings accepted that the extract fan could be salvaged and repaired *in situ* and that the disagreement between the parties arises over the replacement (rather than repair) of the supply fan.
160. The supply fan was in a very poor state of repair and I accept the evidence of Mr Masters, who has seen it, that it was beyond economic repair. In the light of the concession made in the experts of agreement, I have to conclude that the extract fan could have been repaired. The only figure put forward for the cost of repair is Tiger's estimate of £7,500 for both fans.
161. The claim is for £20,146.25. Since I have not been referred to any breakdown of the figure claimed, I propose to treat it as shared equally between the two fans. This produces £10,073, to which I propose to add £2,500 to reflect the cost of repairs to the extract fan (I am assuming that Tiger's estimate of £7,500 is not split equally between the two fans because the supply fan was in a much worse state of repair: I have therefore allocated one third of it to the extract fan and two thirds to the supply fan). Accordingly, I allow £12,573.

The mechanical wiring (184, 196)

162. This is not dealt with as a discrete item within either of the experts' reports, and the Scott Schedule gives no clear idea of what is really in dispute. However, the report by Klec Services Ltd described the mechanical wiring as very poor and well past its service life.
163. Since I have concluded that most of the M&E system that existed at the expiry of the leases, save for the hot and cold water and heating pipework, was beyond economic

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repair, I consider that all the new items would have had to be rewired in any event - but even if that were not the case, in my view the Klec report puts the matter beyond doubt. Since the figure is agreed by Tiger as a proper cost for the work done, I propose to allow it in full.

164. Accordingly, in respect of this item I allow in full the sums claimed of 12,960.05 and £2,880.74, respectively, for the main building and the retail unit.

The electrical mains and sub mains distribution (178)

165. The Klec report painted a damning picture of the electrical installation. It said that the remedial work was required. It recommended that all the landlord's fuse boards required replacement, as did much of the wiring from those fuse boards. It said that the whole of building No 3 needed rewiring. The summary read as follows:

“No circuit diagrams or fuse board charts, no warning signs, live cables left hanging from ceilings and floors, damaged switch sockets, overloading on circuits, excessive earth loop readings, ring main circuits not correct, equipment not fixed correctly, 20 year old fuse boards and MCBs no earth links on most of trunking and conduit systems. No earth cables to most circuits. No isolators on some equipment, circuits doubled up, old circuits not removed correctly.”

166. Tiger adduced no evidence from an expert electrical engineer. Mr Penson, who is a mechanical engineer, dealt with all the M&E items. The input into his report on the electrical side came from an associate at GDM, Mr Shane Baker, who visited the property on 31 March, 21 August and 9 November 2009. Mr Penson did not visit it until 6 September 2012, about a week before he signed his report.
167. In the circumstances I do not feel able to place much reliance on Tiger's expert evidence in so far as it relates to the electrical installations. I consider that the electrical installation, both the mains and sub mains distribution and the small power, was in a very poor state. The complete absence of any wiring or circuit diagrams would have meant that any attempt to repair the systems by leaving the majority of the existing cable in place (assuming that it was otherwise suitable) would have been extremely time-consuming.
168. I consider that the only reasonable course open to Sunlife, given Tiger's widespread failure to keep the electrical installations in good condition, was to replace the whole system. I therefore allow the full amount claimed in respect of this item, namely £36,582.98.

The small power system (179, 197)

169. Tiger was prepared to agree £30,000 in relation to the small power in the main building, as against £37,293.20 claimed. Tiger did not suggest that the latter figure was unreasonable. Accordingly, there cannot have been any very major disagreement between the experts about the scope of the work required.
170. But in any event, and for the reasons given in relation to the previous item, I consider that the sums claimed for this item should also be recovered in full, namely £37,293.20 and £8,288.75 (for the retail unit - a figure which is agreed).

Approved Judgment*The fire alarms (180)*

171. Mr Masters recommended replacement of the fire alarm because of its “*poor condition and traceability of cabling*” and “*cabling being modified with no recording of routes and locations on drawings or building plans*”.
172. Tiger suggested in the Scott Schedule that all that was required was a modification of the existing system to reflect an open plan arrangement. I agree with Sunlife that this solution must be impractical if it is not possible to trace accurately the wiring within the system. Mr Wonnacott submitted that the fire alarm was obviously working at the end of the lease, because Mr Fahy told Mr D’Souza how to operate it. This may be so, but this does not get round the fact, admitted by Tiger, that it had to be modified. This was because the system had been designed or adapted to accommodate a partitioned building, not the open plan building that existed at the outset of the term.
173. It seems to me, therefore, that I should allow this item in full. The sum claimed is £40,964, and I consider that Sunlife is entitled to recover that figure.

The external lighting (55)

174. I have not been able to find any evidence to support this item. It has therefore not been proved and so I allow nothing.

The internal lighting (181-2, 194-5)

175. This is an item on which there is substantial disagreement. Sunlife claims £108,726.85, as against £19,000 offered by Tiger. Tiger does not suggest that the sum claimed is unreasonable if the work had to be done - but that is what it disputes.
176. Sunlife’s response to item 121 in the Scott Schedule reads as follows:

“[Tiger’s] response fails to address the requirement to reinstate the light fittings to an open plan configuration.

The light fittings yielded up at lease expiry comprised various alterations, with non-uniform downlighters and spotlights having been installed over the course of the lease term, to suit [Tiger’s] bespoke partitioned office layout.

[Tiger] has accepted the need to remove the partitioning but has not commented upon the subsequent requirement to reinstate the light fittings back to an open plan configuration. Furthermore, it was necessary to remove the light fittings to facilitate the M&E repair works within the ceiling void. Having been removed the light fittings were not capable of being reinstated, due to condition and unsuitability given they relate to [Tiger’s] bespoke fit out rather than the open plan configuration required by the lease.

The remedial works undertaken are therefore considered reasonable and merely represent a modern cost effective equivalent of the original installations, as you could not replace with 1970s original fittings.”

177. As I have said, the floors were open plan at the start of the leases. Tiger, or its predecessor, installed partitions and must have altered the lighting arrangements to suit that layout. However, I am not persuaded that some of the light fittings themselves could not have been reused - in the sense that if they had been in their original positions Sunlife could not in principle have complained of any breach of

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covenant. In this respect, it is for Sunlife to prove the breach and in my judgment it has not done so.

178. Accordingly, I consider that some discount has to be made to reflect the fact that some of the existing lighting would have been compliant if it was in the right places. But the removal of the partitions and the need to revert to an open plan office layout had the consequence that the lighting would have had to have been taken down and rewired in any event.
179. There is no way in which I can, on the information available, arrive at an accurate figure to reflect the fact that a substantial proportion of the light fittings were fit for reuse (in that they were not in a condition that represented a breach of Tiger's repairing obligations). Doing the best I can, I propose to reduce the sum claimed by 20%. This conclusion also disposes of the problem presented by the fact that some of the light fittings that were present at the expiry of the leases appear to have been removed by sub-contractors who were allowed by Sunlife to camp in the building.

The remaining items relating to the mechanical services (173-5, 185-7, 198, 201)

180. In the light of my findings, it follows that Sunlife must be entitled to recover each of these items⁵ in full because they are consequential on the principal items of expenditure. I do not consider that any significant difference to the sums claimed would have been made as a result of Sunlife's recovery being a little less than the sums claimed.

Other items remaining (208, 216, 218)

181. These are for making good holes in slabs where former equipment has been removed, additional builders work and Building Control approval.
182. In relation to the making good holes in the slab (item 216), since I have approached this claim on the basis that, broadly speaking, items of plant should have been repaired or replaced on a like for like (or nearest equivalent) basis, it may well be that it would not have been necessary to make good many of these holes because the original equipment would still be in place. Tiger has offered £750, and I see no reason not to accept that figure.
183. In relation to the additional builders work (item 218), similar considerations apply. I would allow 35%, namely £1,400.
184. In relation to the Building Control approval (item 208), I consider that this would have been incurred in any event. Although Sunlife carried out what might be described as a substantial refurbishment of the building, I consider that the work that it would have had to do as a result of Tiger's breaches of covenant would have been sufficiently extensive to warrant similar expenditure, albeit that the scope of the works overall was slightly less. I therefore allow the sum claimed, namely £5,200. I have not added the contractor's preliminaries and overheads and profit in respect of

⁵ The items in question are: mechanical commissioning, O&M manuals (both mechanical and electrical), preparation of the tender packages for the mechanical and electrical works, electrical commissioning and builders work in connection with the electrical and mechanical work.

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the Building Control approval, because this is not a cost which I consider could be reasonably foreseen to attract these mark-ups.

The Scott Schedule issues - items in dispute as to liability but agreed as to amount

185. These are set out in a schedule helpfully prepared by the parties and are known as “the Blue Items”. In each case, the amount has been agreed but Tiger disputes that the work results from its breaches of the covenants. I will therefore take them item by item.

Riser cupboard doors (113)

186. In an e-mail dated 1 September 2009 from Mr Wright to Mr D’Souza, Mr Wright said that at the time of construction the existing riser doors would have complied with the Building Regulations, but that they did not comply with the current regulations. He said that owing to the extent of the works currently being undertaken, the cupboard riser doors had to comply with the regulations. Mr Wright concluded by saying that “*It is very unlikely that you will be able to claim these costs from the tenant*”. Mr Wright was unable to explain, in answer to a question from Mr Wonnacott, why this item formed part of the claim. He said that he could not answer because he was not dealing with the dilapidations claim.

187. It will be apparent, from the conclusions that I have reached in relation to other aspects of the claim, that the works that it would have been necessary to carry out in order to put right the want of repair caused by Tiger’s breaches of covenant would have been very similar in extent to those that were actually carried out. The principal difference would have been the wholesale replacement of the windows, but I doubt whether that would have made a crucial difference.

188. It seems to me that, on the balance of probability, the riser cupboard doors would have had to have complied with the current regulations if the hypothetical works that I have described above had been carried out. Accordingly, I allow the sum claimed of £17,914 in full.

Asbestos survey (98)

189. In cross examination Mr Wright said that the demountable partitions were screw fixed to the ceiling grid, which in turn was mechanically fixed to the concrete slab with wire fixings. He said that if you are only taking down partitions from the grid, then you would not need an asbestos survey just because of the possible presence of asbestos in the concrete slab above. From this answer I infer that if the grid was being taken down, as I find it would have had to have been in order to facilitate the mechanical works, an intrusive (Type 3) asbestos survey would have been required. This inference accords entirely with the evidence given by Mr Feasey in his report in relation to the application of the Control of Asbestos Regulations 2006 to the situation in the building.

190. Although I do not find that a Type 3 survey was required as a result of the removal of the partitions, I do consider that the evidence has established that it would have been required once there was any work that involved fixing into the concrete slabs above

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the false ceilings (or the removal of any such fixings). I therefore allow this item in the sum claimed, namely £1,320.

Asbestos removal (165, 220)

191. It was conceded by Mr Davison that the removal of all the ductwork fixings would create the need for the removal of any asbestos. It is an item of expense that has actually been incurred. I have no reason to think that the amount would have been different if M&E works to the extent that I consider would have been necessary as a result of Tiger's breach of its obligations under the covenants had been carried out.
192. Accordingly, I allow the sum in full, namely £6,762.48.

The lifts (176, 177, 183)

193. It is common ground that lift No 2 had been switched off and was out of use. I presume that this was an economy measure in order to save running costs, although I do not think that the evidence actually disclosed the reason. Accordingly, there was a cost of putting it back into service and I see no reason to doubt Sunlife's figure of £2,346.65.
194. The sum originally claimed in relation to the two lifts was in excess of £50,000. The evidence of Mr Masters about this was not entirely satisfactory, since in an e-mail dated 2 October 2009 he said that the lifts had been left in a "safe and well maintained condition". In fact the major part of the sum claimed clearly involved long-term upgrade works and was not a consequence of the lifts being otherwise than in good condition at the expiry of the leases. The costs claimed for repairing the lifts has now been reduced to £6,955. In his closing submissions Mr Hutchings said that this was in respect of works identified in the validation reports for each lift. Whilst I have been referred to the breakdown of this figure, I have not been referred to (or able to find for myself) any report or reports giving the reasons for the work identified.
195. Accordingly, in the absence of any clear explanation from Sunlife as to the reason for each item of work I propose to allow the balance of the figure offered by Tiger in respect of items 176 and 177 in the Scott Schedule, namely, £5,000. That produces £2,653.35.

The bases for roof mounted plant (213)

196. In the light of the agreement in relation to the M&E items, which includes new plant on the roof surfaces, it seems to me that this item must be allowed. This is another item to which the principle of mitigation applies (see paragraph 158 above).

Diamond drilling for routes (214)

197. I allow this item also, for the reason that the installation of significant new plant was required as a result of Tiger's breaches. Again, the observation about mitigation applies here also.

Builders work for ductwork routes/risers (215)

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198. Both for the reasons already given, and because I consider that the ductwork had to be replaced, I allow this item.

Additional furrings to plant room (217)

199. In the light of the agreement in relation to the M&E items, I would allow this item also.

Acoustic screens to plant area and planning (209, 219)

200. I am not persuaded that these are a consequence of Tiger's breaches of the repairing covenants. I am not satisfied that if the plant had been repaired or replaced during the course of the leases in accordance with the covenants, that the requirement for these screens would ever have been imposed or that there would have been a need for planning permission.

Professional fees and drawings (207, 210, 211, 212)

201. In the light of my previous conclusions, I consider that the structural engineer's fees should be allowed in full. In relation to the architectural and services design drawings, I allow items 210 and 211 in full - because they appear to relate to the basic works required - but I will reduce by 50% the amount claimed for item 212 because these relate to features that to some extent go beyond the scope of the work that I have found to be necessary.
202. These items were paid direct by the contractor. Accordingly, in my final calculations of the assessed sum I have added prelims and OHP to these items.

The Scott Schedule issues - items not in dispute

203. These have helpfully been set out in a schedule ("the Green Items") and the total amount agreed, including preliminaries and OHP, is £178,550.

The Scott Schedule issues - summary

204. I have set out above my conclusions on each of the disputed items and the figures are summarised in three schedules that are attached to this judgment. The results are summarised below:

Item	Sum allowed
Agreed M&E items	£195,660.80
Disputed M&E items	£501,870.65
Total M&E	£697,531.45
Total M&E plus prelims and OHP	£823,382.06
Total building works	£132,764.55
Total building works plus prelims and OHP	£156,898.22

Total Blue Items (including prelims and OHP)	£92,195.06
Total Green Items (including prelims and OHP)	£178,550.73
TOTAL	£1,251,026
LSH fee @ 4.88%	£61,050.07
GRAND TOTAL	£1,312,076

205. To the total must be added £37,663 for the validation reports and £3,515, which is the agreed cost of preparing the Schedule of Dilapidations. This produces £1,353,254, which is the amount that I award, subject to the operation of the statutory cap.

The statutory cap

206. I must now revert to the statutory cap. Mr Wonnacott submits that the court is bound by the opinion of Mr Krendel in valuation (iv), which is not challenged by Tiger because he submits that this represents the value of the premises in repair to 1973/74 standards. I have already pointed out that this valuation was made on a basis that Mr Krendel himself did not accept. Mr Wonnacott submits that this does not matter: he says that it is for the court to determine whether the basis of the valuation is right or wrong. In fact, valuation (iv) does not simply represent the value of the premises in repair to 1973/74 standards: it has built in to it the assumption that this state of repair can be or could have been achieved by the expenditure identified by Tiger. This is not the case.
207. A difficulty with any consideration of Mr Krendel's valuation (iv) is that no breakdown of the calculation has been provided to the court, and neither side is willing to ask for one. However, there are three things that can be said about Mr Krendel's valuation (iv). First, Mr Krendel did not agree with (and, so far as one can tell, probably did not adopt) Tiger's approach to supersession as set out in Mr Smith's valuation (iv). Second, Mr Krendel took Tiger's figures as set out in the Scott Schedule (as the basis of the valuation required him to do). Third, Mr Krendel did not agree with the approach involved in valuation (iv) for the reason recorded in the experts' joint statement, which was in the following terms:

“In the Claimant's expert's opinion, if the Properties were in the state of repair alleged by the Defendants that they should have been in, this would result in a reduced capital value of the Properties only insofar as it had any effect on the rental value and/or marketing period (and not because further works would be necessary). In the Defendants' expert's opinion, the gross development value is arrived at by utilising the same annual rent and an appropriate yield deferred by the combination of the period within which “the necessary works” (as defined below) are undertaken plus the marketing void and rent free.

Approved Judgment

The works in this instance would be the total cost of the works (ie. total cost of all the works that would be undertaken by a hypothetical purchaser) less those items which would not be the subject to supersession had the appropriate remedy work been undertaken by the Defendants prior to the term dates (ie. those items which would have survived any alterations and improvements that a prospective purchaser would have carried out).”

208. I have made the first two observations about Mr Krendel’s approach on the basis of an email dated 9 October 2012 that he sent to Sunlife’s solicitors. In this he said that when arriving at his figure in valuation (iv) he allowed the sum of £716,010 in respect of dilapidations and then took a sum of £1,304,222 as the works that a purchaser would have had to carry out. The first of these figures can be found in Mr Smith’s valuation (iv), and the second is the difference between the first figure and the figure for the “Total cost of works” taken by Mr Smith, namely £2,020,301.
209. It is not clear how Mr Krendel dealt with the point of disagreement noted in the experts agreed statement which I have set out above. Although the court raised the possibility of recalling Mr Krendel to deal with this point, neither party supported this approach.
210. In the absence of the calculations supporting Mr Krendel’s valuation (iv), the court is not in a position to adjust it in order to reflect the court’s assessment of the cost of the work than was necessary to remedy Tiger’s breaches of covenant.
211. In these circumstances the court must do its best to assess the value of the premises on the basis that Tiger had carried out the work that I have found was necessary in order to comply with its covenants. Mr Hutchings referred me to authorities that indicated that this was the appropriate course in a case where the evidence before the court on valuation was incomplete (see: *Latimer v Carney* [2006] EWCA Civ 1417; *Crewe Services & Investment Corp v Silk* [1998] 2 EGLR 1).
212. Although Mr Smith’s valuation (iv) has not been proved in evidence, it has been referred to extensively and, as a calculation, it is before the court. It is reasonably clear and the working is self-evident and, so far as the methodology is concerned, much of it is uncontroversial. Mr Smith’s figure for valuation (iv) of £4.659 million was slightly lower than Mr Krendel’s figure for valuation (iv) of £4.885 million. It seems fair to assume, therefore, that if I adopt Mr Smith’s methodology but substitute the figures that I have found to be the cost of the work that represents Sunlife’s loss as a result of Tiger’s failure to comply with its covenants, I will arrive at an “in repair” valuation that is a fair reflection of the material before the court and my findings.
213. This calculation is set out in an appendix to this judgment. The valuation arrived at is £5.870 million. Mr Krendel’s assessment of the value of the building in its actual condition, which I accept, is £4,462,000. Therefore the diminution in value of the premises based on my reworking of Mr Smith’s valuation (iv) is £1,408,000. This represents my estimate of the statutory cap. Since it is over £50,000 more than I estimate of the cost of the works required to remedy Tiger’s breaches of covenant, the statutory cap does not operate to limit Sunlife’s recovery in this case.
214. If I am wrong in this conclusion, then I consider that the amount of the diminution in value is to be inferred from the costs of the repairs reasonably necessary to make good

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the loss caused by Tiger's breaches of covenant, there being no satisfactory evidence that it is any lower amount. Accordingly, on this basis I would hold that the diminution in value is no less than the amount that I have assessed as the cost of the appropriate repairs (as summarised in paragraph 205 above).

215. I consider that the appropriate rate of interest is 3%, to run from the date of expiry of the leases.
216. I will, if necessary, hear counsel on any matters arising out of this judgment (including any slips or errors of arithmetic in the schedules), including any questions of costs that cannot be agreed.

Schedules:

[Scott Schedule disputed items](#) (pdf page 4)

[Blue Items SS - as awarded](#) (pdf page 1)

[Green Items - final agreed between parties](#) (pdf page 2)

[Smith \(iv\) reworked](#) (pdf page 6)



Neutral Citation Number: [2013] EWCA Civ 1656

Case No: A1/2013/0846

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT QUEENS BENCH DIVISION,
TECHNOLOGY & CONSTRUCTION COURT
MR JUSTICE EDWARDS-STUART
HT11432

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17 December 2013

Before :

LORD JUSTICE LONGMORE
LORD JUSTICE LEWISON
and
LORD JUSTICE FLOYD

Between :

SUNLIFE EUROPE PROPERTIES LIMITED	<u>Appellant</u>
- and -	
TIGER ASPECT HOLDINGS LIMITED & ANR	<u>Respondent</u>

Mr Mark Wonnacott QC (instructed by Mishcon De Reya) for the Appellant
Mr Martin Hutchings QC (instructed by Forsters LLP) for the Respondent

Hearing date: 5th December 2013

Approved Judgment

Lord Justice Lewison:

1. At common law the measure of damages recoverable by a landlord at the end of the lease for breaches by the tenant of his repairing obligations is the cost of the repairs that the tenant should have carried out, plus loss of rent during the period needed to carry out those works. However, the common law measure of damages is capped by section 18 of the Landlord and Tenant Act 1927 which limits damages to the diminution in value of the landlord's reversion caused by the breaches. The conventional way of calculating that diminution is by valuing the reversion in the state in which it actually was at the end of the lease and comparing that value with the value of the reversion in the state in which it should have been at the end of the lease. The difference between the two values is the diminution in value of the reversion.
2. In our case the tenant (Tiger) left the premises, which were offices in Soho Square, in very poor condition, despite having had a lease containing comprehensive repairing obligations. After the tenant had vacated the property in November 2008 the landlord (Sunlife) carried out extensive work in order to relet it; and then sued the tenant to recover the cost of those works.
3. Edwards-Stuart J, in a meticulous judgment, assessed the common law measure of damages at £1,353,254. There is no appeal against that finding, which therefore represents the starting point. He also found that the value of the reversion in its actual condition at the end of the lease was £4,462,000. There is no appeal against that either. The third component was the value of the reversion in the condition in which it ought to have been. The judge assessed that at £5,870,000. The outcome of these figures was that the diminution in value exceeded the cost of the necessary works, with the result that the statutory cap did not apply. Accordingly, the judge awarded the landlord the cost of the necessary works, plus various incidental items. It is the judge's assessment of the value of the reversion in the condition in which it ought to have been against which the tenant appeals. The judge's judgment is at [2103] EWHC 463 (TCC), [2013] 2 P & CR 55. Mr Mark Wonnacott QC presented the tenant's appeal, and Mr Martin Hutchings QC presented the landlord's response. For the reasons that follow I would dismiss the appeal.
4. The details of the landlord's claim and the tenant's responses to them were set out in a Scott Schedule. The judge described at [89] how the Scott Schedule was compiled. The important point to note at this stage is that it began by setting out the work that the landlord had actually carried out after the end of the lease, and which it alleged the tenant should have carried out in order to comply with its covenants. Some items were in dispute as to the extent of the work or the amount of the item. Some were in dispute as to liability.
5. The fact that there is no challenge to the judge's assessment of the measure of damages at common law is critical to an understanding of the issues. As Mr Wonnacott rightly said the common law measure of damages was established by the decision of this court in *Joyner v Weeks* [1891] 2 QB 31. Lord Esher MR formulated it thus:

“That rule is that, when there is a lease with a covenant to leave the premises in repair at the end of the term, and such covenant is broken, the lessee must pay what the lessor proves to be a

reasonable and proper amount for putting the premises into the state of repair in which they ought to have been left.”

6. Fry LJ agreed, approving the earlier judgment of Denman J in *Morgan v Hardy* (1886) 17 QBD 770, who in turn approved the statement in *Mayne on Damages*:

“Where the action is brought upon the covenant to repair at the end of the term, the damages are such a sum as will put the premises into the state of repair in which the tenant was bound to leave them.”

7. Thus, in assessing the common law measure of damages the judge was required to find the sum that would have put the premises into the condition in which the tenant ought to have left them. The judge fully appreciated the nature of this task. At [38] he identified the three key issues, which were:

“First, what was the scope of Tiger's obligations under the covenants in the two leases? Second, what is the reasonable cost of putting the building back into the condition in which it should have been if there had been sufficient performance by Tiger of those obligations? Third, Tiger having failed to make sufficient performance of its obligations under the leases, what is the difference between the value of the building in its actual condition at the expiry of the leases and the condition that it should have been in if there had been sufficient performance by Tiger of its obligations? For the purpose of these last two questions, the tenant's obligation is to put and keep the premises in such repair as, having regard to the age, character, and locality of the building, would make it reasonably fit for the occupation of a tenant of the class who would be likely to take it: see *Proudfoot v Hart* (1890) 25 QBD 42. For shorthand, in the rest of this judgment I shall refer to this hypothetical tenant as the “appropriate type of tenant”.”

8. I did not understand Mr Wonnacott to challenge the accuracy of that self-direction. The judge repeated, in several places, the nature of the task that he had to perform in order to answer the second question. Thus at [41] he said that:

“...the court must consider what work would have been required at the expiry of the lease in order to put the premises (if properly maintained and put in good condition by the tenant) into a condition that would enable it to be let to the appropriate type of tenant at a fair market rent. This may have two consequences. First, the landlord cannot recover the cost of that additional work from the tenant. Second, the additional work may make worthless some of the work that would have been necessary to put the building into repair with the result that, if such work has not been done, the landlord has suffered no loss and accordingly cannot recover any damages in respect of that breach. This is known as “supersession”.”

9. At [43] he said that:

“It follows, therefore, that if the cost actually incurred by the landlord in seeking to put the building back into the condition in which it should have been left by the tenant is greater than the cost of other work which would be sufficient to put the building into that condition, then the landlord is limited to recovering the costs of the latter.”

10. At [45] he said:

“... the appropriate test is not whether the landlord has acted reasonably in carrying out remedial works, but rather whether what the landlord has done by way of repair goes no further than was necessary to make good the tenant's breaches of covenant.”

11. In all these statements the judge was firmly focussing on what works were necessary to put the building into the condition in which the tenant ought to have left it.

12. The judge carried out the task identified by the second of the two issues with conspicuous care. A few examples will suffice. One of the items in dispute was a lead mansard roof which the landlord had replaced. The tenant's expert accepted that if the roof had crazed to the point of cracking, it would have had to be replaced. The judge found that it had “cracked in places to an extent that justifies total replacement”: [100]. Thus replacement of the lead was something that the tenant was required to have done. Another disputed item was the cost of replacing boilers. The tenant's case was that they could have been repaired or reconditioned. The judge concluded at [139]:

“Taking the evidence as a whole I am satisfied that the boilers were not in the condition required by the leases when Tiger moved out. On balance, I conclude that given the uncertainty about the condition of the boilers the appropriate course was to replace them. I consider that Tiger's standards of maintenance were so poor that it could not be safely assumed in their favour that the boilers were in good working order.”

13. On the other hand, when considering the basement toilets the judge concluded that the landlord had carried out works that went beyond that which the tenant could have been obliged to do. He therefore assessed the damages for that item at 50 per cent of what the landlord had actually spent: [121]. A further disputed item was the façade. The judge found that even if the tenant had left it in good repair, the landlord would have re-rendered the façade to make the building more attractive. He therefore disallowed the bulk of the landlord's claim for this item: [104].

14. He found that with some exceptions the work that the landlord had actually carried out was either work that the tenant ought to have carried out in order to comply with its covenants; or was cheaper work that the landlord had carried out by way of mitigation of its loss. There is no challenge to any of the judge's findings in that respect. The end result of the judge's careful examination of all the items in the Scott

Schedule was that he came to the sum of £1,353,254. This represented what the judge considered was the cost of putting the building back into the condition in which it should have been left by the tenant, plus some additional incidental items. That, as he said, would be the measure of damages unless it exceeded the statutory cap.

15. One issue arose in the course of the appeal about the burden of proof in relation to the statutory cap. Mr Wonnacott submitted that in a case in which the landlord does work that differs from the work that the tenant could have been compelled to do in order to comply with its covenants, the burden of establishing that the statutory cap did not apply lay on the landlord. He relied in this connection on the decision of HH Judge Baker QC in *Mather v Barclays Bank plc* [1987] 2 EGLR 254. That was a case in which a banking hall had been substantially remodelled to suit the needs of an incoming tenant: the Halifax. The modifications included the relocation of lifts, the installation of part central heating and part air conditioning, the rearrangement and upgrading of toilets and so on. As Judge Baker put it “the whole place was stripped out”; and he found that there was no way of telling what would have happened if the tenant had left the premises in good repair. It was in that context that Judge Baker said:

“At this point, I should perhaps notice the submission of Mr Berry as to onus of proof. He said that once the landlords had established a diminution in value, the onus shifted to the tenant to show that the diminution was less than the cost of the repairs. He referred me to a number of cases on this, of which *Jones v Herxheimer* [1950] 2 KB 106 was the latest. This is a case where the landlord had to do some repairs to relet the premises. They were, I think, quite modest repairs. But, again, there was no question there of improvements to the premises. The Court of Appeal were concerned to dispose of a submission that in every case there had to be evidence of values of the reversion, such as I have got here. You cannot start off just by saying this is the cost of the repairs, *ergo* that is the cost of diminution of the reversion. That had been suggested in the earlier case that I mentioned, *Landeau v Marchbank*, by Lynskey J, but that idea was exploded in the Court of Appeal. They held that there are cases where the cost of repairs does afford *prima facie* evidence of the diminution in value, and those cases are where the premises are going to remain the same but where the landlord is going to do the repairs or have them done. In that case, he had in fact done them.

Therefore, one can quite see in that sort of situation that once the landlord has proved those facts, the burden should shift to the tenant then to show that the reversion has not been diminished at all by the repairs because he has done repairs that were totally unnecessary or something of that sort and they have not added to the value of the reversion at all. In that situation one would expect the tenant to have the burden of showing that that was so. But I cannot apply it to the situation here where the premises are inevitably going to be improved,

and substantial works, costing well over twice what the repairs are going to cost, are going to be carried out by the Halifax. There is no onus in those circumstances on the tenant, once the landlord has shown that some allowance has been made to the tenant, even though it has been structured in a form attributing the rent allowance to the want of repairs. It has not been proved that any diminution in the value of the reversion is attributable to the allowance for the repairs.”

16. The key to Judge Baker’s reasoning is, in my judgment, his appreciation that he was dealing with a case in which “the premises are *inevitably* going to be improved.” That is not our case because, on the judge’s findings in our case, if the tenant had left the building in the state in which it ought to have been left, the landlord would not have carried out the works that it did; see [36] and [47]. In addition, as I have said, the judge’s finding was that the work that the landlord in fact carried out was, with some exceptions, the work that the tenant ought to have carried out in order to put the building into the condition in which it ought to have been handed back. Thus, in my judgment, the judge was correct in concluding at [214]:

“... I consider that the amount of the diminution in value is to be inferred from the costs of the repairs reasonably necessary to make good the loss caused by Tiger’s breaches of covenant, there being no satisfactory evidence that it is any lower amount.”

17. That is sufficient to dispose of the appeal, but the main focus of the argument related to the valuation exercise. In deference to the careful arguments I must deal with that question.
18. Based on the Scott Schedule (and of course before the judge had made any factual findings) each side instructed a valuer: Mr Paul Krendel FRICS for the landlord and Mr Andrew Smith MRICS for the tenant. Each expert produced a report and a joint statement in which they attempted to distil the points on which they agreed and disagreed. That statement contained four valuations. The first two related to the actual condition of the building and need not concern us. Valuations (iii) and (iv) concerned the hypothetical state of the building; that is to say the value of the building in the state in which the tenant ought to have left it. The basis of valuation (iii) was that on 14 November 2008 (when the lease came to an end):

“... the works in the “REMEDIAL WORKS REQUIRED/UNDERTAKEN” column of the Scott Schedule had already been done.”

19. On that basis Mr Krendel’s valuation was £6,559,300; and Mr Smith’s was £6,465,000. It is important to note that the basis of valuation was agreed between the valuers. It took as its starting point the assumption that the works that the landlord in fact carried out after the lease had ended had been carried out before it had ended. The underlying premise was that the work that the landlord had carried out was work that the tenant should have carried out in order to comply with its covenants. The valuers also agreed that on that hypothesis an incoming purchaser or tenant would not have

carried out any further work of great significance. The underlying premise in fact tallied, for the most part, with the judge's findings.

20. In his first report Mr Krendel expanded on his reasoning. He said at paragraph 5.3.7:

"The Premises are to be valued in repair on the basis that what was originally demised was delivered up in the condition required under the Lease. Accordingly, I have valued the premises in repair with the benefit of an air conditioning system in accordance with what was originally installed, solid floors with perimeter power points, 2 automatic passenger lifts, double glazed aluminium framed windows, carpets, mineral tile suspended ceilings and recessed fluorescent lights. In certain cases, either due to replacement being required, or the disrepair allowing for replacement with credit to be given for betterment (such as the windows) the premises have been improved, but I do not consider that any of the works undertaken are improvements which have added to the letting or capital value of the Premises or caused any supersession in relation to the Defendant's repairing liabilities."

21. His conclusion was that:

"... the Premises, if left in a good state of repair would have been entirely appropriate for its location. It would be in terms of specification and rental levels what tenants in this area would have been looking for in the open market in late November 2008."

22. He amplified that conclusion in later parts of his report. In essence the judge accepted his evidence; and indeed it was ultimately common ground that if left in good repair, the property could have been relet without the need to carry out further works of any significance.

23. The basis of valuation (iv) was that on 14 November 2008:

"... only those works in the "APPROPRIATE REMEDY" column of the Scott Schedule had already been done."

24. On that basis Mr Krendel's valuation was £4,885,000 and Mr Smith's was £4,659,000. In this case, however, the basis of valuation was not agreed. It is, however, important to understand what the disagreement was. The tenant's primary case at trial was that performance of the relevant covenants would have left the building in a state in which it was unlettable, with the consequence that any incoming purchaser would have ripped out much of the repair work that the tenant ought to have carried out. Mr Smith's valuation (iv) therefore proceeded by taking the capital value of the building following refurbishment, deferring that value for the period needed to carry out the refurbishment and then deducting the cost of works that the incoming purchaser would need to carry out plus a developer's profit on those costs. The deferment factor reduced the capital value of the completed building by just over 12 per cent, and the developer's profit on the cost of the works was 20 per cent. He

explained his methodology in section 15 of his expert report. Mr Smith's valuation was, therefore, what is referred to as a residual valuation. This kind of valuation takes the finished product as its starting point and then deducts the time cost and money cost of getting there. It assumes that what a purchaser will pay is the surplus after he has met out of the proceeds of sale of the finished building his costs of construction, his costs of purchase, the time and money cost of finance, and an allowance for profit. What is left is the residual value. The essential point about a residual valuation is that the less the purchaser has to spend in achieving the end product, the greater will be the surplus and hence the greater will be the residual value. Thus the more the tenant ought to have done, the less is left for the incoming purchaser to do. Since the residual value is heavily dependent on the accuracy of the estimated deductions, a change in those deductions will change the residual value. That is one reason why residual valuations are not favoured where more reliable valuation methods exist. The tenant's case encapsulated in valuation (iv) was that the incoming purchaser would have had to spend £2 million or thereabouts because the building would have been unlettable if left in a state that complied with the tenant's covenants. But the tenant's case in that respect was abandoned by the end of the trial.

25. There was some debate about the way in which Mr Krendel produced his equivalent valuation (iv). It is fair to say that his workings were not entirely clear. This may have resulted from a misunderstanding on his part of what assumptions Mr Smith's valuation (iv) entailed. Mr Krendel said in his third report that his valuation (iv) was based on the building being "still in its 1973/4 state", which is what he understood to have been the basis of Mr Smith's valuation (iv). He understood that he was required to proceed on the assumption that a purchaser of the building would have had to spend a large sum of money (which he took as £1.3 million) in order to make the building lettable. But he protested that he did not agree with that assumption.
26. In the event, Mr Smith was not called to give evidence. Mr Krendel was, and he was cross-examined. Mr Wonnacott relied strongly on two passages in that cross-examination. The first was this:

"Q. ... What you are saying is that if we did all the works that we say ought to have been done, you could have let it for £511,500 per annum?"

A. That's my estimate.

Q. Yes, I understand. And that is lower than your estimate of what it could have been let for if the £1.7 million of works were to be done?

A. Yes."

27. The second was this:

"Q. ... Just to be clear, you are saying I think that if we had done all of our works before the lease end then the property in that condition would have fetched £4.85 million pounds?"

A. £4.88."

28. Based on those passages Mr Wonnacott argued that Mr Krendel had accepted that the building, in the state in which the tenant should have left it, would have commanded a price of £4.88 million. It therefore followed that the diminution in value of the reversion was the difference between that sum and the value of the property in its actual condition. That difference would have been of the order of £420,000 instead of the £1.35 million that the judge awarded. However, that argument, in my judgment mis-states the assumptions that Mr Krendel made in coming to his valuation figure. The underlying assumption was that the valuation had to take into account the further assumption that a considerable quantity of further works needed to be carried out in order to make the building lettable. It was that assumption that Mr Krendel challenged. That he had in fact made that assumption for the purposes of valuation (iv) is clear from other parts of his cross-examination. Thus he said that the assumption that he made was in an e-mail to the landlord's solicitors. It is that e-mail which explains that he had assumed that a further £1.3 million of works would be necessary. But he was cut off in his explanation by the terse comment from Mr Wonnacott that assumptions were a matter for the judge. Later on Mr Krendel explained that his figure was a "comparative valuation" because he had been asked to put his figures on Mr Smith's valuation (iv). Mr Smith's valuation (iv) assumed that some £2 million of work would be needed to make the building lettable, so Mr Krendel worked on a similar basis. As he explained:

"I've applied a cost of works of just over £1.3 million as compared to his £2.02 million.... So the whole stance of this valuation is that you go further, not because you have to, but because you need to to be able to achieve a letting of the building."

29. Now, whether Mr Krendel was right or wrong in his understanding (and although the judge's next intervention on the transcript suggested that he thought that Mr Krendel might have been wrong in his understanding, personally I think that he was right) it was unquestionably what Mr Krendel thought valuation (iv) was meant to do.

30. In his judgment the judge said at [206]:

"In fact, valuation (iv) does not simply represent the value of the premises in repair to 1973/74 standards: it has built in to it the assumption that this state of repair can be or could have been achieved by the expenditure identified by Tiger. This is not the case."

31. This was a finding of fact that the work identified by the tenant which formed the basis for valuation (iv) would not have amounted to compliance with the covenants.

32. The judge continued at [207]:

"A difficulty with any consideration of Mr Krendel's valuation (iv) is that no breakdown of the calculation has been provided to the court, and neither side is willing to ask for one. However, there are three things that can be said about Mr Krendel's valuation (iv). First, Mr Krendel did not agree with (and, so far as one can tell, probably did not adopt) Tiger's approach to

supersession as set out in Mr Smith's valuation (iv). Second, Mr Krendel took Tiger's figures as set out in the Scott Schedule (as the basis of the valuation required him to do). Third, Mr Krendel did not agree with the approach involved in valuation (iv) for the reason recorded in the experts' joint statement..."

33. The point about supersession is that Mr Krendel did not agree that a further £2 million (or, for that matter, £1.3 million) worth of works would have needed to have been carried out if the building had been left in a condition that complied with the lease. The judge also said, correctly, that Mr Krendel's valuation (iv) took the tenant's figures set out in the Scott Schedule, because the valuation required him to. Having considered the difficulties the judge said at [210]:

"In the absence of the calculations supporting Mr Krendel's valuation (iv), the court is not in a position to adjust it in order to reflect the court's assessment of the cost of the work that was necessary to remedy Tiger's breaches of covenant."

34. The judge described what he did at [212]:

"Although Mr Smith's valuation (iv) has not been proved in evidence, it has been referred to extensively and, as a calculation, it is before the court. It is reasonably clear and the working is self-evident and, so far as the methodology is concerned, much of it is uncontroversial. Mr Smith's figure for valuation (iv) of £4.659 million was slightly lower than Mr Krendel's figure for valuation (iv) of £4.885 million. It seems fair to assume, therefore, that if I adopt Mr Smith's methodology but substitute the figures that I have found to be the cost of the work that represents Sunlife's loss as a result of Tiger's failure to comply with its covenants, I will arrive at an "in repair" valuation that is a fair reflection of the material before the court and my findings."

35. Mr Wonnacott QC, on behalf of the tenant, made two broad criticisms of the judge's approach. First, he said that since Mr Smith was not called to give evidence the judge should not have used his valuation as the template for his calculation. Second, he said that the tenant accepted Mr Krendel's valuation (iv) and, having done so, the judge should simply have adopted it without more.
36. The tenant's decision not to call Mr Smith to give evidence did not make his report (or his valuations) disappear into thin air. On the contrary, CPR Part 35.11 says:

"Where a party has disclosed an expert's report, any party may use that expert's report as evidence at the trial."

37. If a party can use the report as evidence, I can see no objection to the judge doing so. I think that Mr Wonnacott in fact accepted that in so far as the judge was using Mr Smith's valuation as a template (having described its methodology as uncontroversial) he was entitled to do so.

38. Mr Wonnacott's second objection was that the judge ought to have stopped at paragraph [210]. If he could not make adjustments to Mr Krendel's valuation he should simply have accepted Mr Krendel's headline figure. I reject that submission. Mr Krendel had valued on a basis that required him to make an assumption that he thought was wrong. The judge agreed with him that the assumption was wrong. In those circumstances it would have been quite inappropriate to have simply taken a headline valuation figure made on an erroneous assumption.
39. I have explained that valuation (iv) was a residual valuation. The eventual output is thus heavily dependent on the inputs. Although both Mr Krendel and Mr Smith were valuation experts, they were not experts in building costs or repairing liabilities, which were dealt with by other experts and the judge respectively. Each of them acknowledged this in the preparation of their reports. Accordingly, having made his findings the judge was fully entitled to adjust Mr Krendel's valuation (iv) or Mr Smith's valuation (iv) in order to insert the correct inputs for the cost of works. That is what he did, and in my judgment, he cannot be faulted for having done so.
40. I would dismiss the appeal.

Lord Justice Floyd:

41. I agree.

Lord Justice Longmore:

42. I also agree.