Neutral Citation Number: [2015] EWHC 2128 (TCC)

Case No: HT-2012-000018

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

Royal Courts of Justice
Rolls Building
7 Rolls Building, London EC4A 1NL

Date: 30th July 2015

Before :

MR. ANDREW BARTLETT QC
(sitting as a Deputy High Court Judge)

- -

Between :

CONSORTIUM COMMERCIAL DEVELOPMENTS LIMITED	**Claimant**
- and -	
ABB LIMITED	**Defendant**

- -
- -

Stan Gallagher Esq (instructed by **Wannops LLP**) for the **Claimant**
Simon Pritchett Esq (instructed by **DLA Piper UK LLP**) for the **Defendant**

Hearing dates: 8th - 10th July 2015

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR. ANDREW BARTLETT QC

Mr. Andrew Bartlett QC:

The claim and the issues

1. This is a claim for dilapidations upon expiry of a business lease.

2. The lease was granted in 1996 by the claimant to a predecessor of the defendant for a term of 15 years expiring on 16 June 2011. The demised premises are known as Capella House, Snowdon Drive in Milton Keynes (formerly known as Citylink House).

3. The estimated cost of remedying the breaches of covenant has been agreed as follows (net of VAT, which is not claimed):

i)	Repair	£244,351.88
ii)	Redecoration	nil
iii)	Reinstatement items[1]	£11,000.00
iv)	Statutory items	£2,300.00
v)	*Aggregate of above works costs*	*£257,651.88*
vi)	Preliminaries at 10%	£25,765.19
vii)	*Total cost of works*	*£283,417.07*
viii)	Fees for contract administration (10%)	£28,341.71
ix)	Preparation of schedule	£3,500.00
x)	*TOTAL*	*£315,258.77*

4. This can conveniently be presented as sub-totals inclusive of applicable preliminaries and fees as follows:

i)	Repairs	£295,665.77
ii)	Reinstatement items	£13,310.00
iii)	Statutory items	£2,783.00
iv)	Preparation of schedule	£3,500.00
v)	*TOTAL*	*£315,258.77*

[1] This set of figures differs from that in the expert building surveyors' joint statement because on Day 3 of the trial the parties re-allocated to repairs some items which the surveyors had included under reinstatement, and reached a further compromise on the values. The parties' agreement has slightly increased the claim, from £314,225.73.

5. It is agreed that the remedial works would take 12 weeks. The claimant claims the loss of rent and rates during that period. This claim is calculated at £45,666.24 (calculated pro rata from the passing rent of £160,000 pa, and rates at £728.60 per week).

6. It is common ground between the parties that the tenant overpaid rent at the expiry of the lease, in the sum of £43,068.52 plus VAT, totalling £51,682.22. It is agreed that there should be an appropriate credit for this.

7. The issues between the parties are:

   i) The diminution in the value of the reversion by reason of the lack of repair, and hence whether the head of claim for repair costs (£295,665.77) is capped by s18(1) of the Landlord and Tenant Act 1927;

   ii) Whether on the facts of the case the correct measure of damages for the reinstatement items and statutory items is their remedial costs or their effect on diminution in value, and, if the latter, what damages should be awarded;

   iii) Whether or to what extent the claimant can additionally recover rent and rates for the estimated duration of the remedial works;

   iv) Whether the credit to the defendant for overpaid rent should include VAT;

   v) The appropriate rate for awarding interest.

8. The immediate landlord at the expiry of the term was an associated company of the claimant; it is agreed between the parties that no point is taken as to this.

Evidence

9. Mr. William Fattal, Managing Director of the claimant, gave oral evidence. I found his evidence to be careful and truthful, with only a few mistakes where he had to be reminded of the facts from contemporary documents. He was evidently an experienced property investor. I received unchallenged witness statements from Mr. Dudley-Smith, who oversaw the production of the schedule of dilapidations by Mr. Maile, and from Mr. Broughton, the defendant's Head of Real Estate UK, whose evidence concerned only the receipt of the schedule of dilapidations and the correction of an immaterial point about whether a reinstatement notice was served. Because of the parties' agreement on estimated remedial costs it was not necessary for their respective building surveyors to be called to speak to their joint statement. A valuation expert was called by each party: by the claimant, Mr. James Steevens of CBRE, and by the defendant, Mr. Duncan Locke of GVA. Both valuation experts were well qualified; I assess their evidence below. My factual findings reflect my assessment of the contemporary documents, Mr. Fattal's evidence, and additional information provided by the experts.

The premises

10. Capella House was built probably in the early 1990s, designed as open plan space with a central service core (toilets and kitchenette). It is a detached single-storey glass-fronted building of just under 15,000 sq ft. The experts have agreed a figure of

14,875 sq ft for the net internal area. It is a steel-framed construction with a shallow pitched steel roof and is externally clad with mirror-glass windows on the front and on the major parts of the side elevations. There is cladding to the remainder of the side elevations and to the rear. The specification of the property includes solid concrete floors throughout, and carpeting to the front portion. The entire accommodation has an air conditioning system and suspended ceilings. There is a small roller shutter door for deliveries at the rear. The eaves height is typical of a low single storey building, about one half of the 18 feet which is the minimum for normal warehouse uses. The frontage onto Snowdon Drive is 400 ft. There is parking for 61 cars. The building is a typical B1 hybrid business unit of its era. The only thermal insulation under the steel roof is a thin glass fibre layer resting on the suspended ceiling.

11. It is located on a business park in the Winterhill area, on the fringe of the central business district of Milton Keynes. It backs onto the main railway line between London and Milton Keynes, and is situated in the south-eastern part of Snowden Drive, which at that location is a no-through-road. It is about 15 minutes' walk from the central shopping area and from the railway station, but in an area to which people would tend to drive rather than walk.

12. Over recent years the north-western end of Snowden Drive, which is closer to the town centre, has been redeveloped for out-of-town retail purposes, with many well-known traders in occupation. The eastern extent of the retail area falls a few buildings to the west of Capella House. Buildings in the immediate vicinity of Capella House are primarily used for warehousing or office purposes.

13. The rateable value is recorded as £87,500 against the description "Repair Centre and Premises", with special category code "Offices (inc Computer Centres)", and on the basis of a division between "offices" of 565.18 m^2 (6,083 sq ft) and "workshop/warehouse" of 821.68 m^2 (8,844 sq ft).

History and condition

14. The first use of the building was as a furniture showroom and offices. The 1996 lease permitted any use falling within Class B1. It was used partly as office space and partly for demonstrating robot welding and for training purposes.

15. Under the terms of the lease the tenant undertook a full repairing obligation subject to an exception for inherent defects and subject to a limit of not being required to put the premises into any better state than evidenced by an agreed schedule of condition attached to the lease.

16. The initial rent was £75,000 pa. The second rent review as from 29 September 2005 set it at £160,000 pa.

17. The property was sublet in late 2003. The subtenant vacated about four years[2] before the expiry of the term. The defendant received a payment of £160,000 from the sub-tenant for the release of the sub-tenant's liabilities. The defendant marketed the property unrepaired, but it did not attract another occupier and it remained vacant for the remainder of the term. During this period the defendant appears to have done

[2] The evidence did not identify the precise period, which was variously stated as five or three years.

almost nothing towards fulfilling its obligations as regards the condition of the property, so that by 16 June 2011 it had suffered significant deterioration. The agreed schedule of dilapidations is substantial. Primary examples are (inclusive of preliminaries and fees, at 2011 prices):

i) because the air-conditioning system was not maintained, it became unusable and needs to be wholly replaced at a cost of £106,480;

ii) the external areas became overgrown to such an extent that their restoration will cost £51,920;

iii) the carpeting needs to be wholly replaced at a cost of £24,290.

Events since the expiry of the term

18. The schedule of dilapidations was served on or around the term date. The defendant did not complete the tenant's columns in the schedule until April 2012 when its Defence was filed.

19. It is common ground that, given the weak state of the market in 2011, the property had little prospect of being let while out of repair. The overall picture which I derive from Mr. Fattal's oral evidence is that the claimant did not wish to expend its own resources on the repairs while the defendant continued to "play hard ball" in its response (or lack of response) to the schedule of dilapidations; in addition, the claimant reasonably took a long term view, considering that it would make better sense to wait until the market improved and then achieve a better rent, rather than seeking to attract a tenant by carrying out expensive works and offering the premises at such a low rent as would quickly attract a new tenant.

20. An offer for the freehold interest was made by an adjoining owner, but the claimant (or its associated company) held the property as a long term investment and was not interested in selling it. Since the offer was not taken up and was from a special purchaser it is of no real help as regards valuation.

21. Notwithstanding the poor state both of the market and of the property, interest expressed by a company called "Synovate" in September 2011 led to draft heads of terms dated 28 October 2011. By these terms Synovate offered to take the premises in good repair for ten years at £128,150 pa, with a break clause at the end of the fifth year and two six month rent free periods, one at the start of the term and one in the sixth year. The rent was stated to be calculated as £9.75 psf on an office area of 11,466 sq ft and £4.75 psf on a warehouse area of 3,445 sq ft. Allowing for the rent free periods, this equates to an effective rent of £7.20 psf. The landlord was to carry out some additional works, of which the most significant was to be the fitting of a raised floor to the "front half" of the building. Negotiations ground to a halt following Mr. Fattal's letter of 22 November 2011. It seems the proposed transaction did not proceed owing to a combination of circumstances: partly because the claimant wanted an increased rent reflecting the cost of installing the raised floor, partly because the premises were larger than Synovate needed, partly because Synovate had a stringent requirement for the date at which they needed to be able to take occupation, and partly because Mr. Fattal suffered a family bereavement at the critical time in the negotiations.

22. For a variety of reasons the Synovate offer is of limited assistance for the purposes of the valuation exercise which lies at the heart of the principal issue between the parties; in particular:

    i) Agreement was not reached and the offer did not mature into an actual transaction.

    ii) Synovate were also considering other potential premises at the time, and it is unclear how keen they really were on Capella House, which appears to have been somewhat larger than their requirements.

    iii) The proposed division between the office area and the warehouse area (which drove the total rent offered) was presumably dependent upon Synovate's own particular requirements, which may not have matched how the market in general would have viewed the potential division of uses within the building.

    iv) A capital value cannot be derived from the proposed effective rental without making a judgment as to the appropriate yield at the relevant time and in the relevant circumstances.

Issue (i) - valuation

23. The experts' valuations of the premises as at the term date in their reports and in the experts' joint statement are:

    i) In good condition – Mr. Steevens £1,150,000, Mr. Locke £775,000;

    ii) In actual condition – Mr. Steevens £600,000, Mr. Locke £700,000.

24. These valuations are for the sale of the freehold with vacant possession at the valuation date. The valuers agreed that at the relevant time the market was poor, with very little demand from the investment market, and a substantial over-supply of business accommodation in Milton Keynes. They both considered that the best price was to be obtained by a sale to an intending owner-occupier rather than to an investor intending to find a tenant. Their respective figures are not precisely comparable as they stand, because their assumptions of what would constitute good condition were not identical; I bear this in mind where relevant.

25. Mr. Steevens' approach in his report was essentially to consider the state of the market in Milton Keynes, to list out three market letting comparables and fourteen vacant possession comparables, and to state his in-repair and out-of-repair valuations of Capella House. His report contained no analysis of the relative relevance of the various comparables, and no explanation of how his in-repair valuation was arrived at ("£1,150,000 reflecting £77.12 psf"). The reasoning by which he derived his out-of-repair valuation from his in-repair valuation was incomplete, since the adjustments that he identified in his report did not on their face justify the size of the difference.

26. When cross-examined, he said that his report had been written for lawyers, so he did not think that going into his reasoning in more detail would help. He said he had used the comparables to assess "the tone of pricing" and had made a judgment about where Capella House sat in the (unspecified) "hierarchy of buildings". While I fully

understand that valuation is more an art than a science, and an important element in valuation is the judgment made by an experienced and well-informed practitioner, the weakness in Mr. Steevens' approach is its excessive subjectivity. One would expect a valuer's subjective judgment to be informed and backed up by careful reasoning based on objective criteria. Careful analysis of the comparables would have highlighted that the three market lettings were of minimal assistance, being of offices in the central business district, and that the so-called "vacant possession transactions" were subject to a number of serious drawbacks as comparables: some were stated at quoting prices rather than transaction prices, some were very different in size (either much smaller than Capella House or much bigger), some were at irrelevant locations, and some were in unknown condition. In the absence of proper analysis, the comparables could be substantially misleading as to the true "tone" of the market for Capella House. When Mr. Pritchett put to Mr. Steevens that his report lacked an analysis to show how he got from his comparables to his valuation figure, Mr. Steevens stated that he would not wish to carry out the process which counsel suggested. I asked Mr. Steevens which came first, his figure of £1,150,000 or his figure of £77.12 psf. He said it was the figure of £1,150,000, which he had divided by the area to arrive at the freehold value psf. The next morning he clarified this answer, stating that he had first taken £75 psf, from which he had calculated a total value, which he "rounded" to £1,150,000. He had then calculated back from the rounded figure, to arrive at £77.12 psf. He provided no clear reasoned justification for the figure of £75 psf. In my view the lack of objective reasoning vitiated the reliability of his subjective judgment. There were other matters which further reduced my confidence in his opinion, including the fact that it transpired that he wrote his report at an unspecified date in about 2013, but signed it off in January 2015 without checking whether better information on the comparables had become available, and the fact that during his oral evidence he was unwilling to make judicious concessions when matters were pointed out to him that ought to have caused him to reconsider.

27. Mr. Locke's approach was markedly different. In his report he also looked at a range of comparables, but he applied his judgment to them and identified the most relevant, stating his reasons for taking this view. During the hearing, when additional relevant information became available, or existing matters which he had not considered were drawn to his attention, he was willing to reconsider and adjust his views in the light of them. (It was unfortunate that much of the new information was from his own firm, and he could have obtained it earlier, but Mr. Gallagher wisely judged that it was not appropriate to object, and Mr. Steevens was recalled to deal with the new information.)

28. Mr. Locke selected as his most relevant comparable a property known as Linford Pavilion, Sunrise Parkway, Milton Keynes. I accept his view that it was the most relevant. Criticisms of Mr. Locke's valuation made by Mr. Gallagher focused on Mr. Locke's failure to make sufficient adjustments, taking into account the differences between Linford Pavilion and Capella House, especially in the light of the information that Mr. Locke had not considered at the time when he wrote his report. There is considerable force in some of these criticisms, as Mr. Locke at least partly recognised during cross-examination. It became clear that from the £54.44 psf obtained at Linford Pavilion he should have adjusted not downwards but upwards to arrive at the value of Capella House.

29. Mr. Gallagher also criticised Mr. Locke for placing too much reliance on a single comparable. I do not consider this to be justified. It seemed to me to be clear, both in Mr. Locke's report and during his oral evidence that he appropriately took into account other properties.

30. For the above reasons, I place greater reliance on Mr. Locke's expert evidence, which I found to be more satisfactory than Mr. Steevens', but with the qualification than Mr. Locke's views on figures require significant adjustment to fully reflect the matters which he had not taken into consideration in his report.

31. Mr. Steevens' report contained three comparables at figures close to the £77.12 psf which he assigned to Capella House. Seckloe House was offered on the market at £75.07 psf, but it emerged that the price achieved was £62.30 psf, and this was for residential re-development. Kingsbridge House was offered at £75.20 psf, but the price achieved was unknown, so it provides no reliable support for this price level (examples were given in evidence of prices quoted being very substantially greater than prices achieved). A modern B1 office unit at Drakes Mews achieved £77 psf in May 2011, but this was a very small unit of 2,274 sq ft. Mr. Steevens accepted that prices per sq ft were lower for larger units. I conclude that £77.12 psf is too high a figure for Capella House.

32. The property identified in Mr. Steevens' report with the closest similarity to Capella House was a 16,641 sq ft trade counter business unit in Snowdon Drive, comprising a warehouse and 6,000 sq ft of offices on a 1.5 acre plot. Mr. Steevens said he had walked past it, and the state of repair appeared good. The warehouse had full height eaves (18-20 feet). Because of the differences between the two properties comparison with Capella House is not straightforward. Further, unfortunately the pricing information was of uncertain significance, the sale price being stated as "circa £1.1m" in 2013. If the price achieved was in fact £1.1 million, this would represent £66.10 psf as at 2013.

33. Linford Pavilion sold for £870,000 plus VAT[3] in October 2010, after being marketed for 12 or 18 months (£54.44 psf). I accept Mr. Locke's view that its location, as compared with the location of Capella House, has no clear advantage or disadvantage. The level of market pricing did not change materially from October 2010 to 26 June 2011. Certain factors point towards the need to adjust upwards from £54.44 psf for the purpose of assessing the value of Capella House in an in-repair condition:

    i) The sale of Linford Pavilion was by an administrative receiver, who would be under a duty to obtain a proper price, but might be under some pressure to get a sale concluded, particularly after a substantial marketing period.

    ii) The building is a little older than Capella House.

    iii) Unlike Linford Pavilion, Capella House has a suspended ceiling throughout. Both buildings have a degree of flexibility in the proportions of office space and other space. At Linford Pavilion, part of the warehouse area was converted to office use by a tenant. At Capella House the office proportion is

[3] I accept Mr. Locke's view that the VAT is not relevant for the purpose of considering Linford Pavilion as a comparable.

capable of being increased, albeit at a lesser standard, by relying on artificial light towards the rear. Of the two, Capella House has the greater flexibility for increasing the amount of office use; this tends to increase the value, because office space is valued more highly psf than storage or other non-office space.

iv) The full air-conditioning at Capella House (combined heating and cooling) is also an advantage over Linford Pavilion.

v) While Linford Pavilion was sold in "reasonable condition", there were some dilapidations needing to be remedied.

34. Factors reducing the impact of the above advantages of Capella House are:

i) While neither property had raised floors through the office area, in Linford Pavilion a tenant had installed raised floors in part of the warehouse area used as a computer room.

ii) Linford Pavilion has an additional half acre of land, which may be attractive for expansion.

35. The above analysis of the features of the Linford Pavilion transaction, seen within the broader context of the other available information of comparables, suggests an open market value at or slightly above £60 psf for Capella House in good repair at the valuation date. £60 psf would produce a valuation figure of £892,500 (£60 x 14,875). £61 psf would produce a figure of £907,375 (being £61 x 14,875). I therefore assess a value of £900,000. For clarity, this figure does not assume the prior installation of a raised floor to make the building more attractive for office use.

36. Mr. Gallagher presented additional arguments on the question of freehold valuation based on comparisons of rental amounts. I am not persuaded that anything in these additional arguments should cause me to adjust the figure at which I have arrived above. This valuation is not dependent upon the Synovate offer; I would add that in my view it is not inconsistent with it.

37. The next question is the out-of-repair value.

38. I accept Mr. Locke's view that, especially in the market as it was at the relevant time, one cannot simply take a pound-for-pound approach, so as to deduct from the in-repair value the full cost of repairs in order to arrive at the out-of-repair value. On the other hand, it is clear that Mr. Locke's opinion on the out-of-repair value, as expressed in his report, was formed on the basis of an incorrect understanding of the full extent of the necessary repairs. He was proceeding on the basis of the defendant's building surveyor's original estimate of £103,582, which was superseded by the much greater figure subsequently agreed. The external clearance and landscaping works would alone cost over £50,000. A purchaser wanting the property for a preponderance of office use would be likely to want the carpeting renewed (nearly £25,000). Mr. Locke had not appreciated that, because of the fixed glazing, renewal of the air-conditioning at a cost in excess of £100,000 would be, for practical purposes, essential.

39. In cross-examination Mr. Locke accepted (in the context of the in-repair valuation in his report) that in the light of the agreed repair costs an adjustment for repairs might need to be in the region of 20%, rather than the 10% which he had allowed. I formed the impression that this 20% was a minimum and might have been larger if he had had more time to consider. If it were legitimate to apply the 20% to the revised valuation of £900,000, this would suggest a diminution in value of at least £180,000. Looking at it another way, if his reduction was £75,000 when he believed the repairs would cost the amount originally assessed by the defendant's surveyor, it might be reasonable to infer that, with a true repair cost agreed at three times the size, the reduction should be in the region of three times £75,000, namely £225,000. The lower of these figures (£180,000) is very similar to the aggregate cost of the three major items of disrepair referred to in paragraphs 17 and 38 above, which is £182,690; the upper figure (£225,000) would allow more of the repairs to be done, and would represent a diminution of just over £15 psf. In closing submissions Mr. Pritchett proposed a total deduction of about £10 psf from the in-repair value.

40. Mr. Steevens' assessment of the diminution in value was much larger, at £550,000. While I take into account what he said, I do not accept it at face value for several reasons:

    i) His in-repair value was on the basis of an assumption that the property would be improved by installation of a raised floor at the seller's expense.

    ii) I have determined above that his in-repair value is too high.

    iii) He stated in oral evidence that a buyer would take a pound-for-pound approach. On this I accept Mr. Locke's contrary view as more persuasive. Mr. Steevens stated in his report that any estimate of repair costs made by a buyer would be on the generous side. If this was intended to suggest that the diminution in value would be greater than the repair cost, this would be even more extreme than a pound-for-pound approach; in my view it is not justifiable.

    iv) He suggested in his report that a buyer would allow about £27 psf for refurbishment works, plus professional fees. The derivation of the figure of £27 psf, from a stated bracket of £25 to £35 psf, was unclear. Allowing for fees would increase the £27 to around £30 psf (which would calculate out at a little under £450,000), but this allowance does not explain the £550,000 diminution which he put forward in his report. In his oral evidence he said the difference represented the time to do the works, finance costs of the acquisition, a margin to cover contingencies, and a profit for the trouble of doing the work. This does not generate confidence in his views; if he had properly thought through the exercise of assessing the diminution, these further considerations should have been mentioned in his report.

41. Approaching the question from the other end, Mr. Locke was impressed by evidence of a comparable at 2 Rockingham Drive, Linford Wood, a self-contained office building of 13,800 sq ft, which was sold for £675,000 in poor repair, equivalent to £48.91 psf. This sale was described on 18 March 2015 as having occurred recently. He considered the rise in the market from 2011 to 2015 was about 10%. Subject to the uncertainty arising from the lack of information on the details of the repairs that

were required, this suggests about £45 psf for office space in poor condition in 2011. This would represent an adjustment somewhere in the region of £15 psf for repairs, as compared with my assessment of about £60 psf for Capella House in good condition. While Capella House was a somewhat different kind of building from 2 Rockingham Drive, this gives at least some indication of an appropriate scale of adjustment.

42. In the light of the above considerations, and bearing in mind on the one hand that Capella House is a hybrid building, rather than 100% office space, and on the other hand that the full cost of repairs is agreed at £295,665 (representing £19.87 psf), I conclude that a purchaser would require and a seller would accept a reduction of about £15 psf (say, £225,000) to allow for the items of disrepair. On this basis I assess the value of Capella House at the valuation date with the repair items un-remedied at £675,000. Given my evaluation of the evidence of the experts it is unsurprising that this is higher than Mr. Steevens' figure and lower than Mr. Locke's.

43. It follows that the damages for lack of repair are capped at £225,000, being the difference between £900,000 and £675,000.

Issue (ii) - reinstatement items and statutory items

44. There are ten true reinstatement items (totalling £13,310): remove concrete barriers, control panels, remove doorway and frame, remove consumer unit, remove anti-static flooring, remove caged area, reinstate ceiling grid, remove consumer units, remove cabling/power outlets, remove stud wall.

45. The statutory items comprise providing an asbestos management register and providing an NICEIC electrical test certificate, at an estimated cost of £2,783.

46. The measure of damages for these items is governed by the common law. The parties referred me to the relevant passages in Dowding and Reynolds, *Dilapidations: The Modern Law and Practice*, 5th edition. The question is what, in all the circumstances, is the landlord's loss. Where the landlord claims reinstatement, it is necessary to consider whether reinstatement is reasonable. Where the landlord has not carried out the work, and does not intend to do so, the measure is likely to be the diminution in the value of the reversion. Where the landlord reasonably intends to carry out the works, the measure will be based on the costs of the works (sometimes with the addition of ancillary losses).

47. In my view it was clear from Mr. Fattal's evidence that the intention is to re-let the premises in good condition once the present litigation is resolved and in better market conditions. The items that I am here concerned with are small. Prima facie, the items listed all need to be carried out. There are some of them which might not be necessary if a particular proposed tenant happened to want different works done, but this is mere speculation.

48. Approaching the question as depending upon the balance of probability, I find that the likelihood is that the works will be carried out by the landlord in due course. This is a reasonable course of action. Accordingly, the appropriate measure of damages is the agreed cost as claimed.

Issue (iii) – claim for lost rent and rates

49. As Mr. Gallagher correctly submitted:

> "It is uncontroversial that a landlord is entitled to recover, in addition to the cost of the remedial works, any consequential losses suffered as result of the breaches (see *Dowding & Reynolds on Dilapidations* (5th Ed) para 29-21 for a convenient summary of the law on point). The issue is one of causation and quantum".

50. The claimant founds its case on the fact that it is common ground that marketing cannot usefully start until Capella House has been put into repair. Any letting can reasonably be expected to take time to secure. The claimant submits that the whole marketing process must be deferred by a works period of 12 weeks, given that the marketing cannot usefully be commenced until the remedial works have been done. Contrasted with the actual situation, the claimant submits as regards the counter-factual situation where the defendant complied with its obligations:

> "It may have been promptly re-let and in any event it could have begun to be marketed. Hence the marketing period, commencing the process of re-letting would have begun then, indeed it could have been marketed earlier. If, counter-factually, CH [Capella House] had been in repair/progressing to a state of repair before the term date, the marketing could have commenced before the term date. The Lease reserves to the landlord rights of entry to place a letting sign and "… *for the purpose of disposing of any interest*" (Sch. 2, paras 5.5 & 5.6) …. Hence, if CH had been in repair, or at least progressing toward a state of repair late term, CH could have been effectively marketed before the term date."

51. On the evidence, the market was very difficult in Milton Keynes in 2011, even for properties in good condition. There was a large excess of supply over demand. I am unable to draw the conclusion that a prompt letting would probably have been effected promptly if the property had been in good condition at the expiry of the term.

52. As regards the contention that the whole marketing process was delayed, a difficulty which the claimant faces is that it is artificial to regard the marketing period as a set period of time such that, if commencement is delayed, the achievement of a transaction will be correspondingly delayed. In poor market conditions it might take a year or even several years to find a suitable and willing tenant. When such a tenant is found, it will probably make no difference to the timing of the transaction with that tenant whether the property has been on the market for, say, 18 months prior to that tenant's introduction or for, say, 15 months prior to that event.

53. The claimant cannot derive any assistance, in regard to this head of claim, from the Synovate offer. In my judgment the evidence did not show that the lack of repair was the decisive factor in the offer not maturing into a transaction.

54. In the circumstances I consider that on the facts of the case the claimant has not succeeded in establishing on the balance of probabilities a loss of rent and rates resulting from the defendant's breaches of covenant. The claim for lost rent and rates therefore fails.

Issue (iv) – the credit for overpaid rent

55. The overpaid rent was paid with the addition of VAT. It is common ground that the overpayment was a mistake and needs to be reversed. When a transaction carrying VAT is reversed, the reversal needs to include the VAT. A credit note is normally issued for the VAT-exclusive amount and the VAT that was charged upon it. In my judgment the appropriate amount of credit must include the VAT, and it will be up to the parties to make the necessary consequent adjustments as between themselves and HM Revenue and Customs.

Issue (v) – rate of interest

56. The claimant claims interest on damages as from 16 June 2011 pursuant to s35A of the Senior Courts Act 1981. The claimant recognises that 2% above base (ie, 2.5%) is commonly awarded, but seeks an award at 6%. The claimant submits:

> "What takes this case out of the norm is that ABB, a large corporation, negotiated a payment by its sub-tenant (HTC) of £160,000 to release HTC from its terminal dilapidations liabilities to ABB under the sub-tenancy, yet ABB has not applied this sum to complying with its (ABB's covenants) under its lease from CCD. Rather, ABB elected to leave CH in gross disrepair on the term date."

57. The defendant's position is that interest should be awarded at a commercial rate, which it suggests in the circumstances should be between 1% and 2% above base rate.

58. I do not agree that the circumstance relied on by the claimant takes the case out of the norm so as to justify an increased rate of interest. I agree with the principle of awarding a commercial rate. On the authorities, the appropriate rate should take into account the category of claimant. For many years it was common to award 1% over base to blue chip claimants and 2% over base (or possibly more, if the evidence justified it) to smaller companies. Recently it has been judicially recognised that, with base rates at a low level, the differential between base rate and the rate at which commercial parties can borrow has tended to increase: see the discussion in *Challinor v Juliet Bellis & Co* [2013] EWHC 620 (Ch) (not affected by the reversal of the liability decision on appeal [2015] EWCA Civ 59). In the light of this general trend, but constrained by the limited information provided in the present case, I consider it appropriate in the circumstances of the present case to award 2.5% above base rate, constituting a rate of 3.0% pa.

59. Since the valuation date for the purposes of damages for breach of contract and the time when the overpayment of rent was made are close to each other, it is fair to calculate the interest after first netting off the credit against the amount of damages.

Conclusions

60. For the above reasons I determine that the claimant is entitled to damages calculated as follows:

Diminution of value owing to lack of repair	£225,000.00
Reinstatement items	£13,310.00
Statutory items	£2,783.00
Preparation of schedule	£3,500.00
Loss of rent and rates	£nil
Sub-total	£244,593.00
Less credit for overpayment	(£51,682.22)
Net damages	£192,910.78

61. In addition I award interest on the net amount of damages at the rate of 3% per annum from 16 June 2011 to the date of this judgment. The parties have agreed that this calculates out at £23,862.80.

62. I am grateful to both counsel for their assistance, not least for their constructive approach to ensuring that the trial proceeded efficiently. I will deal with questions of costs on the basis of written submissions unless it transpires that an oral hearing is required.