Neutral Citation Number: [2014] EWHC 3855 (TCC)

IN THE HIGH COURT OF JUSTICE **Claim No. HT13-213**

QUEENS BENCH DIVISION

TECHNOLOGY AND CONSTRUCTION COURT

Before: His Honour Judge Waksman QC sitting as a Judge of the High Court

BETWEEN:

LAINDON HOLDINGS LIMITED

Claimant

-and-

SOUTH ESSEX MENTAL HEALTH AND COMMUNITY CARE NHS TRUST

Defendant

Hearing Dates: 20, 21, 22 and 24 October 2014

David Holland QC (instructed by DLA Piper LLP) appeared on behalf of the Claimant

Mark Wonnacott QC (Bevan Brittan LLP) appeared on behalf of the Defendant

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.

INTRODUCTION.

1. This is a dilapidations claim brought by the claimant landlord, Laindon Holdings Limited ("Laindon"), against the tenant, South Essex Mental Health and Community Care NHS Trust ("SE") following the determination of the lease on 28 January 2011. The purpose-built office premises concerned are at 1-4 Dunton Court, Aston Road, Laindon ("the Premises"), which is in a suburb of Basildon in Essex.

2. The Premises had been occupied by SE since 28 March 2002. Laindon also owned a similar property across the road, 5-8 Dunton Court (5-8).

3. The lease, dated 28 March 2002, contains the following material terms:

   (1) Clause 1.46: "Defect" means "any defect in the Premises, including Tenant's fitting-out works arising from defective design or defective supervision or defective workmanship or materials employed in the construction of the relevant Premises."

   (2) Clause 1.47: "Tenant's fitting-out works" means "the Tenant's fitting-out works as defined in the agreement, including the lift works as defined in the agreement and internal partitioning works at the Premises."

   (3) The key provisions are contained under 3.3, repairing, cleaning, decoration, etc.

      (a) 3.3.1: "To repair the Premises and keep them in good condition and repair, save for damage caused by one of more of the insured risks, or the landlord's obligations."

      (b) 3.3.2: "To repair or replacement from time to time the landlord's fixtures and fittings in the Premises as may become necessary at any time during the exploration of the term."

      (c) 3.3.3: "To redecorate the interior of the Premises (if reasonably required), in a good and workmanlike manner, with appropriate materials of good quality and to the reasonable satisfaction of the Surveyor in the fifth, tenth, fifteenth and last year of the Term."

   (4) 3.4.3: "the tenant may make any internal non-structural alterations to the Building without the consent of the Landlord"

   (5) 3.4.5: "to remove any additions, alterations and improvements made to the Premises at expiration of the term if so reasonably requested by the landlord, to make good any part or parts of the Premises which may be damaged by such removal provided that for the avoidance of doubt the Tenant will not be obliged to remove or reinstate in respect of the Tenant's Fitting-Out Works."

   (6) 3.6: "Statutory obligations":

3.6.1 “at the Tenant's expense, to execute all works and provide and maintain all arrangements ..that are required pursuant to the Tenant's use of the Premises and in order to comply with the requirements of any (existing or future) statute, government department, local authority or other public or competent authority..”

3.6.2 “Not to do anything in the Premises by reason of which the landlord may become liable to pay any penalty ...”

3.6.3: “To comply in all respects with the provisions of any statutes and obligations imposed by law to the Premises or in respect of any trade or business being carried on in the Premises.”

(7) Landlord's costs, at 3.10, include: “expenses properly incurred in contemplation or connection with the preparation and service of a schedule of dilapidations during or at expiration of the term.”

(8) 3.12: (1). “If called upon to do so, the Tenant will produce to the landlord or surveyor plans, documents or other evidence the Landlord may reasonably require in order to satisfy itself that the provisions of the lease have been complied with, the Landlord paying the Tenant's reasonable costs in connection therewith.”

(9) 3.16: “At the expiration of the Term ..3.16.1.. to yield up the Premises in repair and in accordance with the Lease.”

(10) And finally, clause 7, headed "Defects": “No covenant by the Tenant or other provision in this Lease ...is to be construed as requiring the Tenant to remedy any Defect [defined in clause 1.6] in the Premises or carry out any works of repair attributable to such Defect of which the Tenant has notified the Landlord within the first nine years of the term.”

4. SE had served its break notice on 19 April 2010. On 19 October 2010 it served a document setting out what it said were the extent of its obligations to repair the Premises and bring them into good condition, as required by the lease, and priced at £71,497. Laindon noted this but did not agree or disagree with that pricing or statement of works. It preferred instead to permit SE to do the works and then consider the position at the determination of the lease. See its letter dated 29 October 2010. It appears that an unfortunate logjam over whether the surveyors for each side were also required to address any legal issues arising in connection with responsibility for the works prevented the parties from taking the sensible course, which was to engage with the question of works at that early stage and see what could be agreed as falling within the tenant's responsibilities and at what cost.

5. That said, I do not consider it necessary for the purposes of this judgment to delve any deeper into that issue. On 20 November 2010, some eight years and eight months into the lease, SE served a clause 7 defects notice upon Laindon.

Between December and January 2011, SE undertook the works it said were necessary to discharge its obligations.

6. On 17 March 2011, Laindon served its terminal schedule of dilapidations on SE in the total sum of £522,637, of which £395,815 were said to be the cost of works and the balance being "on costs".

7. Several attempts at settlement were made, including mediation in March 2014, but to no avail. Since termination of the lease, the Premises have been marketed unsuccessfully to potential new tenants at an asking rent of £12.75 per square foot ("psf"), along with 5-8 which went on the market for new tenants a few months earlier.

8. In the period now of some three and three quarter years since the termination of the lease there have been no written offers for the Premises at all. In the meantime, they lie empty. It follows, and Laindon accepts, that notwithstanding the very substantial dilapidation claim brought in relation to the Premises, they were nonetheless in a marketable condition as far as potential new tenants were concerned. The property at 5-8 has not attracted any new tenants either.

9. Laindon intends to carry out all of the works which it says are necessary, regardless of whether SE is found to be in breach of covenant in respect of them, but it will only do so once a tenant is found.

10. Mr Brook, as the director responsible for Laindon's property portfolio, explained that he could not recommend doing half a million pounds' worth of work any earlier. It could not be done any earlier for cash flow reasons. That was his view, even though if Laindon waited until the new lease was signed there would then have to be a further rental void while the works were done.

THE PROCEEDINGS AND THE PRESENT CLAIM.

11. Proceedings were issued on 14 June 2013. The amounts claimed have been amended in the course of this action and the present claim is now as follows:

    (1) Total cost of works: £181,290. Together with contractor's preliminaries and other fees this came to £208,484.

    (2) Added to this are "on costs" of £106,867, alternatively £89,910, plus a debt claim of 8,195, giving a total of £323,000 or £306,000.

12. Of this, SE admits just under £51,000. In addition, of course, there is the alternative calculation under section 18 of the Landlord and Tenant Act 1927 which has to be performed. This requires a determination of the open-market value of the Premises as at 28 January 2011 on two bases. First, on the assumption it was in a state fully complaint with the tenant's obligations, and secondly in its actual state. The difference in value between the two then forms a statutory cap on any dilapidations claim.

13. As to that, Laindon's expert valuer Mr Rona considers that the fully compliant OMV was £1.67 million whereas its actual condition value was £1.32 million, yielding a difference in value or a statutory cap of over £353,000. Mr Rona also postulates an alternative capital value for the Premises, if converted into three separate offices, of £500,000.

14. For his part, SE's expert valuer Mr Marland says that the fully compliant value was only £83,000 while in actual condition it was only £72,000, so the consequent difference in value is only £10,000. He also says that the value of the Premises irrespective of condition for the purpose of a sale to enable conversion for a residential development would be £415,000.

15. Those alternative figures are significant for this reason: if the fully complaint value of the Premises was less than their value if converted for either office or residence use, ie £500,000 or £415,000, then the statutory cap would fall to zero. This is because at that level, and irrespective of any breach of obligation on the part of the tenant, there could be no difference in value between the fully compliant Premises and in their actual value, because either way, they will then be converted and have their conversion value.

16. Laindon does not contend that this argument is not in theory available. However, it says there is no risk of any value of the Premises falling as low as £500,000, or anything like it.

THE EVIDENCE

17. I heard first from Mr Brook, a director of Laindon, as noted above, and then Mr Howlett, a director of SE. Neither was in a position to give much evidence that bore directly on the issues before me, which were almost exclusively matters of expert evidence. Where there were disputes as to what the true or proper cost of a particular item of works was, no live factual evidence was called, and in those cases I had to rely upon the views of the building surveyors, occasionally assisted by some documents.

18. As to the building surveyors, I heard from Mr Moss of Lambert Smith Hampton for Laindon, and Mr Blackmore of Savills for SE. They produced a helpful joint statement on 25 June 2014. I then heard from Mr Rona and Mr Marland, to whom I have just referred, on the issue of valuation. They also produced a helpful joint statement, dated 23 July 2014, but that made plain the wide gulf that remained between them.

THE COMMON LAW CLAIM.

19. I deal first with the claim based on the cost of repair and then the "on-costs".

Date of assessment

20. Before turning to the individual items, I deal with a preliminary point which is concerned with the date of assessment of the cost of repair. As already noted, they still have not been done by Laindon. SE contends that the usual "rule" should apply, namely that the court assesses the costs as at the date of termination, namely January 2011, irrespective of whether they have been done or not. But Laindon says the court should assess them as at today's date. Although Laindon's claimed date for assessment, ie now as opposed to January 2011, was not highlighted as such in the Particulars of Claim nor in opening, the evidential foundation for it was there, in my view; SE did not object to the point being taken in closing submissions and so I have heard arguments on this from both sides.

21. I accept that ordinarily and in the vast majority of cases the date of assessment will be the date of termination of the lease. However, it is clear from cases such as *Dodd Properties (Kent) Ltd v Canterbury City Council* [1980] 1 WLR 433, that if the landlord can show that in all the circumstances he acted reasonably in delaying doing the works, the cost of repairs will be assessed as at the date of the trial. See also *Dowding & Reynolds* at 32-08.

22. I have already cited Mr Brook's evidence about why Laindon delayed doing the works. Essentially it is a matter of cash flow. And with at least two substantial properties already vacant since 2012, one can readily understand this. So did Mr Marland for SE, who expressed agreement with this approach. Certainly in the events which have occurred, namely a long tenant void, such considerations can amount to reasonableness for the purpose of allowing a later date. This is supported by *Dodd Properties* itself showed, where the trial judge considered that the postponement of repair works necessary as a result of the defendant's building operations was reasonable where this was due to matters of "financial stringency" on the part of the landlord, along with a desire to see what amount the court would actually award at trial where quantum (as here) was in dispute. The trial judge, however, considered that he was bound in law nonetheless to assess at the date of breach. But that was reversed in the Court of Appeal.

23. It is thus all a question of reasonableness to be decided by the court. And in my view, given the difficult position in which Laindon found itself, no doubt along with other commercial landlords, due to the recession, I am quite satisfied that it was reasonable for Laindon to wait, even if one consequence would be a further loss due to the rental void while the buildings works were being done. That said, although Laindon wishes to wait further until a tenant does come along, the only practical date now is today. And that was the course adopted in *Dodd Properties* as well. Accordingly, I shall assess the repair costs as at today's date. I should add that I am satisfied that Laindon will do the works in accordance with the intentions expressed on its behalf by Mr Brook.

Scope of Repair Obligations

24. By way of a further preliminary point, I make two uncontroversial observations in relation to clause 3.3.1. It is common ground that the expression "good condition"

can be wider in scope than merely putting in repair. In other words, an item may have been repaired or put in repair but still not achieve good condition. That said, good condition does not, of course, mean perfect condition.

25. Secondly, as to the standard of repair, this is such repair as, having regard to the age, character and locality of the Premises, would make them reasonably fit for the occupation of a reasonably minded tenant of the sort likely to take them.

Individual Items

26. Against that background I now turn to the individual items. I should preface this by saying that neither in respect of the building surveyors nor the valuers did I consider that one expert was generally more credible or impressive than the other. I think they were all doing their best to assist the court. Whose view I preferred was very much dependent upon the context, ie the particular item or matter in dispute, as will be seen below.

1. External defects.

27. See Scott schedule items 59 and 87 under Decorations. Laindon claims £28,125. SE accepts £2,717. It is common ground that external decorations need to be undertaken every three to five years. SE last did them in 2009, but the standard of that work was criticised in the report by BRE, dated 14 November 2011, as well as in Mr Moss's report. The external works were done pursuant to a quotation from R&J Building Services Limited dated 27 December 2008 ("the R&J quote").

28. There is no express obligation to carry out external redecorations at a particular, or any, frequency. The case therefore has to be put on the footing that as at January 2011 the external decorations were in a state of disrepair or not in good condition.

29. The key point here, in my judgment, is that in fact the external decorations were not done or redone in 2011 or even now. Moreover, Laindon does not intend to do them until a tenant is found. But had they been done properly in 2009 they would have to have been done by now anyway. Accordingly, Laindon should not be compensated for work which it did not do and which, if done, would have to be superseded, as it were. Mr Holland accepted that if the cost of repair is to be assessed now and not in 2011 as I have found, that point must be correct.

30. Had it been necessary to assess the external decorations claim on the merits, I would say as follows: first they were carried out in January 2009, ie during the winter. And I accept, as Mr Moss says, that as a matter of common sense and building practice that is not an appropriate time for such work. See paragraphs 14.1 to 14.5 of his report which went into some detail on the poor condition of the paintwork, which he found on inspection. His conclusions were supported by the BRE report on those decorations carried out in November 2011. There was no live evidence from BRE at trial but I see no reason not to treat it as corroborative of Mr Moss's view.

31. Mr Blackmore's report was much more limited here, essentially being confined to his view that the paintwork was generally of a good standard. In evidence, he disagreed with the findings of the BRE report to the extent that he not only thought that the decoration was basically sound but he also thought some or all of the deterioration noted was due to water ingress as a result of a design problem with the parapet walls.

32. While I found that Mr Blackmore's evidence about certain inherent defects was generally persuasive (see below), on these particular items I was not persuaded that he was correct, given that the extensive and detailed BRE report seemed to put the problem clearly down to a poor finish and inadequate work in the first place.

33. Overall, I prefer the evidence of Mr Moss, supported, as it was, by the BRE report, that the paintwork had deteriorated prematurely, given that it had only been done in 2009. There is no express covenant on the part of the tenant to redecorate externally, as I have said, but in my judgment the poor standard of the redecoration meant that the external decoration to the Premises were not in repair or in good condition in any event as at January 2011.

34. Given the extent of the poor condition of the external paintwork, I agree with Mr Moss that the only prudent course would be to redecorate entirely. And I accept, therefore, his stated cost at £28,125 had I been assessing as at January 2011. In the event, of course, that claim is not made out as I am assessing at today's date, I therefore award the admitted or agreed sum which is £2,717.

2. Internal decorations.

35. Laindon claims £21,100 here and SE accepts only 950. See the very many items, 136 to 505 and 507 to 512 of the redecorations part of the Scott schedule. Mr Moss said that the standard of internal decorations was poor and that a full internal redecoration was required. Mr Blackmore's basic point was that the claim comprised no more than a very large collection of minor imperfections which did not amount to a breach of clause 3.3.3.

36. Here, I prefer the more detailed and focused evidence of Mr Blackmore. He said that he had spent many hours in 2012, with two graduate assistants, going through the items which he described above, rather like snaggings after new works. They could not find any significant defects. And when he reinspected with Mr Moss in May 2004, he could still only point to a small number of very minor decorative defects which Mr Blackmore said no normal tenant would have been able to spot, although Mr Moss did not wholly agree with that.

37. Mr Blackmore added that he would not have advised a prospective tenant that all the works claimed by Laindon should be done, and in fact did not do so when advising a prospective tenant in relation to 5-8. I take his point that to say that a very small blemish on a door, for example, 1 mm by 1 mm required entire

repainting or replacement was completely unreasonable and he could not advise a prospective tenant to make an issue over it. By way of example, Mr Blackmore was referred to a redundant screw fixing at item 281. He could not find it, and then he discovered it in a cupboard below the ceiling. In addition, there was a paucity of photographs from Laindon, in my view, showing the particular defects complained of, even at trial, which is somewhat surprising given that SE had questioned the existence of these defects already.

38. There was no detailed examination of all the many listed items, nor would it have been proportionate to do so. Looked at broadly, I consider that this claim is a counsel of perfection and does not amount to a breach on the part of SE of 3.3.3. Accordingly, I allow only the admitted sum of £950.

3. External works.

39. Laindon claims £7,700 and SE accepts £1,045. See items 1 to 26, 28 to 30 and 32 to 58 of the Scott schedule (less items 21, 45, 46, 51 and 53, which have been dropped). This covered lack of repairs to or good condition or lack of good condition of parts of the roof and external brickwork. I deal with the essential items below.

(1) Clean off lichen. See item 15. This item is agreed, but not the cost. I consider that the amount of 2660 claimed is excessive, even with the use of a cherry-picker and I consider that Mr Blackmore's figure of £450 is much more realistic. There is little doubt that a saving on cherry-picker costs could be made by combining it with other work at the same time.

(2) £1,000 to remove rust-stained slates. See item 13. In the event, I was shown only two photographs, being numbers 4 and 5 at divider 95A, but the circular staining thereon was extremely small and barely visible. I disallow this as de minimis.

(3) £230 for brickwork and chipped lintel repairs, items 25, 26 and 30. There were no photographs at trial to show this and there was no significant cross-examination of Mr Blackmore's view that he could not see it. So I disallow that item.

(4) Non-matching slates, £500 is claimed. See item 12. In evidence, Mr Moss accepted it was possible that Laindon had installed these, not SE, which is what Mr Blackmore had said. In any event, there are no photographs to show them and I disallow this item.

(5) Algae staining, £510, item 56. The claim is for removing paint and algae staining to the brickwork. Neither Mr Moss nor Mr Blackmore cross-examined on this specifically, but I preferred Mr Blackmore's written evidence to the effect that paint and algae could not be found and that Mr Moss could not provide photographs or location. Again, I disallow this item.

40. There are then 25 remaining items, all of which are disputed, which amount to a total of £2150. The point here is not that these were not items requiring repair, but that they constituted or arose due to defects within the meaning of clause 146 of the lease. SE had no obligation to carry out such repairs provided that a defects notice pursuant to clause 7 was served, which it was on 2 November 2010.

41. That notice included the following items.

> "1.2. Breach: Rubbish and dirt to hidden gutters. Rubbish, dirt ...flashing offcuts..scaffolding accumulating..Remedial Works Required: Remove all rubbish....
> "1.3. Breach: Roof leaks ...ceiling tiles damp stained. Remedial works required: Investigate and remedy large number of roof leaks
> "1.4. Breach: Parapet coping. Cracks to visible section to pointing to main parapet coping. Remedial works required: Rake out and renew all cracked and defective parapet coping."
> 2.2. Breach: Brickwork. Vertical movement cracks evident below large numbers of windows at ground level. Remedial works required: Investigate cause of vertical brickwork movement cracks below large numbers of GF windows and renew or repair defective brickwork.
> "2.3. Breach: Roof parapet gable. Serious water penetration. Movement evident in the majority of main roof parapet gables above .. sliding sash windows. Remedial works required: Investigate and cure serious water penetration and movement. ..Renew all cracked and damp affected plasterwork and damp affected the joinery."

42. Although this was served late but strictly within time, I do not accept that this notice was tactical. I accept that it was done because on a dilapidations claim, if reliance is placed on defects then the relevant notice under clause 7 has to be served. Mr Blackmore's clear evidence is that there was a serious design defect in the property, in that no expansion joints were inserted when the Premises were built, with the result that thermal horizontal movement has occurred, resulting in vertical cracking. While this point was not accepted by Laindon, it has put in no evidence that an expansion joint was fitted, which would have been easy to do, if that was the case, at any point during the trial. I therefore proceed on the basis that there was none, and if there was none it is clearly a design defect.

43. Mr Blackmore says that there is now cracking to many of the window sills, as shown in some of the photographs, and this is continuing and has got worse since 2011. It has also led to cracks in the brickwork, for example item 29. He also pointed to poor design of parapet walls by reference to photographs, and also that the roof was poorly designed, because where excess water coming off the roof which can flow into the gutters because the water in the gutters had got frozen, instead of running over the gutters and outside, the water went back under the slates and rained internally. I thought that Mr Blackmore's evidence on the whole question of inherent defects generally was clear, detailed and impressive, and I accept it.

44. Mr Moss disagreed with the inherent defect allegations, although his disagreement differed depending on the item concerned. He could not say in some cases, for example items 1 to 15, if these were due to works done by Laindon, and in the case of some items he accepted that they could have arisen before the lease began. The truth is that Laindon did not fully engage with the defects notice other than to reject it, so there is no detailed rebuttal.

45. Criticism was made of Mr Blackmore's evidence on inherent defects in that he had not previously articulated in particular the lack of an expansion joint as the cause of the cracked brickwork which was referred to in many of the items claimed here. I accept that, but on the other hand the defects notice did not purport to state the cause of the defects but rather what they were and how they should be remedied. Moreover, the Scott schedule contained a detailed reference back to individual sections of the defects notice where relied upon to rebut any particular item.

46. The upshot is that I reject this final element of the claim under the external works, as I have all the others, and therefore the sum allowed is £1,045.

4. Scaffolding.

47. Item 60 in the Scott schedule. This is a costs issue only. The item itself is agreed. Laindon claim £29,500 as against 16,492 offered by SE. Both parties agree scaffolding would need to be hired for at least a four-week period. It would be charged on a four-week period. Mr Moss took his figure from "well-publicised rates". He suggested that SE's figures drawn from the R&J quote "fell short because, in truth, that was for one week only", although in cross-examination Mr Moss fairly said that he could not tell if the R&J quote was for four-week scaffolding or not. Certainly a statement from R&J explaining the line "add for each week" in relation to scaffolding would have been helpful. However, we do have Mr Blackmore's evidence that he spoke to R&J, who confirmed that in fact the hire period was for six weeks and, moreover, on that basis he said it certainly would cover four weeks. In his view, the rates in 2011 were actually lower than in 2008 because of the recession.

48. In any event, the R&J quote was for the actual works done in January 2009, which it is common ground were quoted for on the basis of, and done in, at least four weeks. Accordingly, I find that the scaffolding element within that quotation must have been for four weeks.

49. If one accepts that, as I do, then there is, in my judgment, no reason not to accept the lower figure of £16,492, based, as it is, on an actual quotation. I accept that Mr Moss says that the calculation of £20,500 is based upon well-publicised rates, although in fact he does not say from which year this was obtained. It is not safe, therefore, to assume that today's rates are significantly different from that at the end of 2008 or themselves higher than that at 2011 because of the recession. That means that the only real difference between the parties was whether the R&J quote was for four weeks or not, and I have resolved that in favour of SE.

50. Accordingly, I allow the scaffolding claim to the extent only of 16,492.

51. While it is said that the 9.5% at the end of the quotation should be included, I do not do so because that is the profit element and this will be taken into account later in relation to contractor's preliminaries.

5. External areas.

52. Laindon now claim £7,815 and SE agrees £3,585, so the dispute is over £4,230. I deal only with what are now the disputed items.

    (1) Item 61. Fractured mortar joint. Mr Blackmore attributed this to a lack of expansion joint. And I agree. So I disallow that, at 1,065.

    (2) The same goes for items 73 and 76, with a total claim of 2,440. Item 71 is now reduced to 255 and item 74 is reduced to 320, and finally item 8 is at 150. The key difference between the experts here is that Mr Blackmore says these defects either could not be found or they duplicated others. There are no photographs to show them, despite SE's dispute over them, and notwithstanding Mr Moss saying in relation to 98 that a meaningful photograph could not be shown, I am not satisfied that those three items are made out.

53. Accordingly, the sum allowed under this head is £3,585 as admitted by SE.

6. Suspended ceilings.

54. This is represented by items 107, 131 and 132 in the repair section of the Scott schedule. Laindon claims £16,600. SE offers £21. Mr Moss says that there was localised damage to the tiles or discolouration. Most of the amount claimed is due to the use of a specialist cosmetic refurbishment process known as acoustic dye treatment which will refurbish tiles and give them a constant consistent appearance. This costs £13,350. In some cases, tile renewal would be required as well. See paragraph 8.1 and 8.2 of his report. In evidence, he accepted the discolouration was difficult to see in the photographs, and indeed at a joint meeting on 14 October he had to open the blinds to let natural light in, he said, before they could be seen at all. However, at paragraph 8.1.4 of his original report, Mr Rona said this:

> "Item 131 relates to the suspended tiled false ceilings and identifies that there are "dirt marked and chipped tiles and discolouration and requires specialist acoustic dye to be applied. Having inspected the premises, this item is considered unreasonable and there is no "breach" as such. There is no requirement for the Tenant to paint or decorate non-previously decorated items such as the suspended false ceiling, merely to clean and replace any significantly damaged or chipped tiles. There are relatively few and therefore this entire item has been deleted."

55. I accept that those observations were made in the context of valuation, not cost of repair, but it does weaken Laindon's position, especially where, despite the issue over it, no relevant photographs have been produced.

56. I take Mr Moss's point that where significant numbers of panels need replacing one may need to replace all of the tiles to give a consistent appearance or to undertake the acoustic dye treatment. But the difficulty here is knowing the extent of the problem, and that is speculation at best, on the evidence before me from Laindon. By contrast, Mr Blackmore gave a detailed account of the extensive replacement work done on the ceilings by SE prior to its departure. See his paragraph 5.4, his room-by-room assessment, at appendix H.

57. In those circumstances, I consider, save for £21, this item must fail.

7. Carpets.

58. Prior to the end of the lease, SE replaced the carpet at a cost of £38,234. It is common ground that it used the same specification and colour as before but it laid the carpet in sheets, as opposed to tiles which is what was there before. It is clear from the specification of the tenant's fit-out works dated July 2002 (see divider 25 at pages 388 and 397) that the pre-existing carpet had been all or mainly in tile form. In fact, prior to doing the work SE expressly informed Laindon that it would be laying the carpet in broadloom, ie sheet, form. See the letter dated 12 January 2011.

59. Laindon did not respond to or engage with that letter in any way, which in my judgment is unfortunate, but it is not argued that by its silence Laindon is now estopped from contending that the use of broadloom rather than sheets was a breach of clause 3.3. And given the earlier context, and the correspondence, I can understand why not.

60. I consider this point on the merits therefore. Laindon says that the tiled carpets were or became landlord's fixtures and therefore there is a breach of clause 3.3.2 because they were not replaced, since tiled carpet was not used.

61. SE's first point in answer is to say that the carpets were the tenant's fixtures and not the landlord's so clause 3.3.2 does not apply. I do not agree. Where the landlord has not required reinstatement (and it did not ultimately do so here), it must be the case that the carpets form part of the landlord's fittings and fixtures. Indeed, in my judgment, the act of replacing the carpets was, objectively viewed, SE's attempt to comply with clause 3.3.2. So that clause does apply to the previous tiled carpet, in my view.

62. SE then said that the change of carpet amounted to a non-structural alteration under 3.4.3. I do not agree. Changing the carpet is a change of fixtures or fittings, not altering the Premises. In any event, the fact still remains that in my judgment the tiled carpets had become part of the landlord's fixtures and fittings.

63. In my judgment, the real and only question is whether tiled carpet is "replaced" when sheet carpet is laid instead, for the purpose of clause 3.3.2. Mr Moss did not really assist on this. He accepted that the carpet as laid was not in disrepair and was in good condition, but he said the issue of whether it should have been tiles was outside his expertise. For his part, Mr Blackmore questioned whether the principal covering before had been tiles. But as stated above, I take the view that it was. Mr Blackmore accepted that if there were tiles before, then to lay broadloom was something different. He said that in these premises tiles were less advantageous than in other cases because the floors were concrete and there was no underfloor access point. But he agreed that tiles give greater flexibility, especially when it comes to moving partitions. He added that the tiles also would have a tendency to curl or wear.

64. I consider that in an office context, where the tenant's requirements may change as to internal partitions and where, as here, the parties had previously considered it appropriate to use tiles, there is a real and not merely cosmetic difference if broadloom is used instead. Accordingly, there has been a failure to replace the carpet tiles here.

65. It is submitted on behalf of SE that the replacement of tiles with broadloom is all the landlord's fault since it failed properly to engage with SE. But given that no separate legal point is made in relation to the letter of the 12 January 2011, I do not see that this affects the position. Indeed, it is unclear to me why SE did not use tiles. After all, it knew what was there before.

66. Accordingly, I allow Laindon's claim here in the sum of £41,445, there being no separate issue as to quantum.

8. Plaster imperfections.

67. Notwithstanding that the claim has been brought down now from £1,650 to £500, I prefer Mr Blackmore's evidence on the point, namely that these alleged defects are very minor imperfections at best, and I do not consider that there has been a breach of clause 3.3. The three photographs submitted to the court on this point, at 95A, page 1152 W to Y, do not really show anything significant.

9. Stiff windows.

68. That as been agreed now at £2,000.

10. Air conditioning.

69. This head of claim has taken various twists and turns in the course of the litigation. But very realistically, in the course of the trial Laindon abandoned any claim in respect of it, save for £4,500. It arises in this way. As at 2011, the Daikin split air-conditioning system was 11 years old. It was working perfectly well. There were no indications of any real problems. However, there was some lack of maintenance records, the extent of which is not clear.

70. While Capita may have been wrong to maintain, through various iterations of its M&E report, that there were no records, Mr Brook in evidence could not point to what records were handed over. Certainly there are some records of maintenance being done and checks being made of the air-conditioning system, and in particular there seems to have been maintenance done in late 2010 and early 2011 generally. See the documents in Bundle 2.1 at pages 429, 436, 440, 455, 514 and 930. And in Bundle 5.2 at 746 to 785, some of which at least expressly refer to the air-conditioning system. So it cannot be said there were no maintenance records at all. The complaint is that there was not a full set.

71. Although Capita Symonds said that the pipework was in good condition and that all the fan coil units were in good working condition, it still suggested that general maintenance now should be done, at a cost of £4,500. I can quite see that a hypothetical purchaser with an eye to a new tenant may well want a routine check of the system, involving some maintenance carried out. But that does not mean that there was a breach of obligation on the part of SE.

72. There is no evidence that the air-conditioning system required repair or was not in good condition. I can see no breach of clause 3.3. I do not accept that the lack of maintenance records, without more, means that the system was not in good condition, especially when it was fully inspected by Capita.

73. As to clause 3.6.1 and clause 3.6.3, relied upon by Laindon, this is an entirely new point, and there were no particular obligations or requirements which had been specified which were broken. To the extent that it is evidence at all, the Capita report made no reference to a breach of clause 3.6.

74. It is then said that there was a requirement of 3.12.1 made by Laindon upon SE to produce a full set of records. However, there is no evidence of any such express request.

75. It is then said that in the handover letter from SE dated 28 January 2011 that must raise an inference that such a request was made. Having looked at that letter I do not accept that. If Laindon had made such a particular request it could no doubt provide a copy. But there was no such copy.

76. Finally, clause 3.16 was relied upon, but all that requires is for the tenant to yield up the Premises in good repair.

77. Accordingly, however desirable a check in maintenance inspection may have been, the lack of records in respect of maintenance does not here constitute any breach on the part of SE, and I therefore disallow this item entirely.

10. M&E repairs other than air-conditioning.

78. Laindon claim £16,490 for this. See item 506 of the Scott schedule. SE offers £1,000. The difficulty for Laindon is that there is no live expert evidence to back

this up because Capita Symonds were not called to give evidence, and Mr Moss said that he was reliant entirely on Capita's report.

79. Mr Blackmore, for his part, gave a detailed critique in his report on the M&E claims, and explained how he arrives at £1,000. He was not cross-examined on any of that, save that he said that when he pointed out that he could not see some of the claim defects, he said he would have expected to have been taken on a visit to show the items or have a photograph, but this did not happen here. Indeed, in closing submissions Mr Holland realistically had to concede that there was in truth no proper evidential basis for this part of the claim. Accordingly, I allow the £1,000 agreed by SE only.

11. Doors.

80. Originally Laindon claimed £6,000, now reduced to 4,250. SE offered 2,000. These items were originally in the reinstatement section of the Scott schedule, which has been abandoned, and these particular elements now reappear as part of the repair claim without any objection.

81. Overall, the question is the adequacy of any repairs to the doors, for example making good after the removal of locks. There is no real issue of principle here. It is largely a question of the standard or otherwise of the works done to the doors.

82. Here, I found the evidence of Mr Moss more persuasive. For example, he identified a particular door as a fire door, so that it needed to be solid, which did not appear to be so from the making good he observed. I agree with him that photograph 53 shows a door in poor condition. I also take account of the fact that to allow for more repair works and less replacement, the claim was reduced from £6,000. Accordingly, I allow the £4,250 as claimed.

Conclusions on Individual Items

83. That then concludes all the items here. The floor boxing has been agreed. This brings the total cost of the repair items (before going any further) to £75,270.

Contractor's preliminaries

84. The issue is whether they should be at 15%, as argued by Laindon, or 12% according to SE. I consider Mr Blackmore to be much more convincing here than Mr Moss. The latter agreed that in early 2011 contractors were falling over themselves to do work. He accepted that some might seek only 12% at that point, although Mr Moss still thought 15% was appropriate as at 2011, and he had some experience of that.

85. Mr Blackmore gave a much more realistic weight to the recession as at that time, emphasising, as he did, contractors who were "going bust" and that they simply would not quote 15%. He pointed in his report fairly to the absence of any quotation for that period obtained by Laindon, and it is of course Laindon who

bears the burden of proof. Accordingly, had the assessment date been January 2011, I would have allowed only 12%. However, given that I am assessing the cost of repair at the trial date, and here Mr Blackmore said that 15% is now an appropriate figure, I allow 15%.

86. I reject the argument that because I have set a notional date for repairs as at today even though they would be done in the future, 15% is not appropriate.

87. The total cost of the repair work is £75,270, and therefore to that figure must be added prelims at 15%, giving a further figure of £11,291.

Other costs

88. These are first of all the organisation and maintenance of the works. They are agreed at 10% of the works in the prelims, which comes to £8,656. Secondly, CDM coordinating, again the percentage is agreed, and that yields a figure of £1,298.

89. The subtotal therefore of the prelims and additional fees is a further £21,245. If one adds that to the basic cost of repairs it produces a repair figure now of £96,515.

On-costs of loss of rent, empty rates and insurance.

90. These heads of loss are claimed on the footing that when the works are done for whatever period Laindon will be unable to recover any rent and the payment of rates and insurance will be for no benefit, or wasted, as it were.

91. Mr Wonnacott argues that there is no reason why Laindon should not do the repair works now, even before finding a new tenant. He prays in aid Mr Rona's suggestion that the works could be done during the period required for the negotiation of any new lease. In my judgment, that is clearly wrong, for the reasons given by Mr Brook.

92. Given that Laindon has made the decision in principle not to do the works until a tenant is found, they will not actually be done until that tenant is signed up, as it were. This necessarily means that, absent the repair period, the tenant could go straight in.

Lost Rental Period

93. There is a question as to what that rental period should be. Given the extent of the works required due to SE's breach, that that has now been much reduced. Subject to any further point, doing the best that I can, I would reduce that period from four to two months.

Rent

94. As to what the rent is likely to be, subject to any further argument, since the only postulated rent on which I have had submissions is that implicit in the hypothetical value of the Premises, not now, but as at January 2011, which I deal with below, the rent should be taken as £10 psf. I use that rent on a two-month basis to provide a figure of £20,070.

Insurance

95. As to insurance, I accept Mr Brook's evidence that the rate is the same as before. That would yield a wasted insurance figure of £1,560 for the four-month period. This needs to be reduced by half, to £781

Rates

96. As for the rates, the appropriate level is that payable with the present relief. There is no evidence that this relief will not continue, and indeed it has continued to date. The four-month figure was £9,862 so for two months it is £4,931. On that footing, the total of the on-costs is £25,782.

The Total Common Law Claim

97. That would then bring the total repair claim up to 122,297. I cannot see how there can be an interest claim since the works have not yet been done and no money has been expended.

98. Subject to mathematics and the question of any cap, that, then, is my judgment on the common-law claim.

VALUATION

The Law

Generally

99. I now turn to the statutory cap enacted by section 18. This provides as follows:

> "Damages for a breach of covenant or agreement to keep or put premises in repair during the currency of the lease or put in repair at determination of the lease whether such covenant or agreement is expressed or implied, whether general or specific, shall in no case exceed the amount if any by which the value of the reversion, whether immediate or not, in the premises is diminished owing to the breach of such covenant or agreement as aforesaid."

100. Its effect has been described as follows.

> "The effect of s.18 is, in any case where its application is in issue between the parties, to require the court to find the amount of the damage to the value of the reversion of the

> premises caused by the failure to repair. To do this the court has to find the difference between the value of the premises in disrepair on the open market and the value that the premises would have had if there had been no breach of the covenant to repair."

(See *Latimer v Carey* [2001] 1 P&CR 13 at paragraph 25)

101. Then, in *Val Dal v Ryman* [2010] 1 WLR 2015**,** the matter was put thus at paragraphs 4 and 22:

> "The diminution in value is assessed by assuming an outright sale of the landlord's interests in the property on the term date in the open market, on the basis that the defendant had done all the work which the tenant ought to have done and on the basis of its actual state and condition. The difference between these two values is the diminution in value caused by the breaches."…
>
> "The only hypotheses required or permitted by section 18(1) of the 1927 Act are first, the hypothesis that there are two simultaneous sales of the reversion, and second, the hypothesis that, in relation to one of those sales, the property was in the physical condition required by the repairing covenants. No other hypothetical facts are required or permitted."

102. As to the detailed nature of the two valuations, first it is common ground that the valuation on the basis of actual condition takes into account all items of disrepair whether this is as a result of a breach of covenant on the part of the tenant or not. It is truly the value of the property as is. That being so, it is a constant, as it were, and not dependent on what particular breaches of covenant the court does or does not find in relation to the disrepair. But the full compliance value will shift depending on the breaches found. To the extent that the tenant was in breach, then this hypothetical value assumes those breaches to have been rectified. The hypothetical purchaser, therefore, will not be reducing his bid by the cost of repairing those items which are the tenant's responsibility because they will notionally have been done. However, to the extent that there are other works which the purchaser would reasonably require to be done, which were not the responsibility of the tenant, their costs will be deducted from the gross value of the property, assuming, of course, that they actually do have an effect on value.

103. Those latter reductions will also be made from the value of the property for the purpose of looking at it in its actual condition. The difference is that the cost of repair which is the responsibility of the tenant will be deducted as well, to the extent that it impacts upon value.

104. In many cases, the only real question is what difference in value to the property is made by the extent of the repair items which are the tenant's responsibility, which may be less than the actual cost of repair, hence the cap. This case is somewhat more complex, because, first, it is said that Laindon would want other works to be done in any event, or at least the hypothetical purchaser would. And second, if, after taking those into account, the value of the Premises sinks below £415,000 or £500,000 (see paragraph 15 above), any difference in value disappears altogether because of the Premises' alternative value, which does not turn on the disrepair items since they would be converted in any event.

105. There is one related point. Mr Wonnacott argues that there is a question as to whether the hypothetical purchaser in relation to a valuation on either basis will want the property "as good as it can be" as opposed to seeking only essential repairs. In my judgment, the hypothetical purchaser will not require every last piece of work which has been alleged against the tenant but where the tenant has not been found liable. I deal below with the detail of any such repairs. I therefore only include such additional works (not being works to rectify the tenant's breach of covenant) as the reasonably minded hypothetical purchaser would require to be done, the cost of which would then be deducted from the bid price. Whether one would call those items "essential repairs" or not does not matter in my view.

The use of hindsight.

106. In the leading case of *Latimer* Arden LJ made the following point about section 18:

> "The valuation exercise required by section 18 falls to be formed at the date of determination of the lease containing the covenant to repair. But on general principle, subsequent events can be taken into account if they relate to the bases of valuation and thus throw light upon it. Such events would include refurbishment or sale of the premises after the term date."

107. Mr Holland invited me to conclude from that case and *Dowding & Reynolds* at 30-37 to 30-41 that I could only have regard to future events insofar as they show what must have been known at the time. I consider this to be unnecessarily restrictive and not a conclusion entailed either by *Dowding & Reynolds* or *Latimer*. While I accept the obvious point that one cannot simply use the fact that the Premises have now been un-let for nearly four years to say that the hypothetical expected void in January 2011 must be taken as four years, this does not mean that the subsequent actual void is wholly irrelevant. It can act as some material by which one can judge the accuracy or otherwise of the opinions of the expert as to the expected position in January 2011, particularly here where as at January 2011 many landlords were unable to let office premises, being in the middle of an extremely serious recession. That recession did not suddenly end after January 2011, and the letting void which followed was a feature of that selfsame recession.

108. Accordingly, I consider that what happened after January 2011 is of some relevance, at least, when one is considering the valuation evidence as to the hypothetical value as at January 2011 both in relation to rental void and also achievable rent.

The Experts

109. On value, I heard from Mr Rona for Laindon, a surveyor with his own practice in Essex, with more than 30 years' experience of valuing, principally in the East London and Essex areas. And then, for SE, I heard from Mr Marland, a surveyor with Savills who is based in the City and with a somewhat wider geographical area. He accepts that Mr Rona had a greater local knowledge concerning the area

where the Premises are situated, although in fact he did value the shopping centre nearby in Basildon Town Centre. Both surveyors qualified in 1973.

110. Both surveyors first sought to value the Premises on the footing that they would be sold to a purchaser who would wish to let it to a tenant much as before. On that footing I first consider the value on the basis that the Premises are in full repair with no breach of tenant's obligations, and without requiring any further works to be done by the landlord as required by the hypothetical purchaser ("gross value").

111. There are substantial differences between the experts on the following matters, which affect gross value:

(1) The headline rent which could be expected;

(2) The multiplier to be applied implicit in the yield so as to achieve capital value and

(3) Also relating to that value, the length of any predicted rental void.

I consider each in turn:

Gross Value

Headline rent.

112. Mr Rona puts this at £12.75 psf, while Mr Marland puts it at £10. The Premises have in fact been marketed unsuccessfully since January 2011 at £12.75 psf. It is common ground and indeed common sense that the asking rent is not necessarily that which will be obtained. Moreover, here, Laindon was at the same time seeking to let 5-8, and with equal lack of success.

113. While I can see that a prospective purchaser might be interested in taking both properties, I accept Mr Marland's point that, overall, the fact that there was a very similar office block available with the same asking rent would probably put the prospective buyer in a somewhat stronger negotiating position than if it were not there, because he could to some extent play one prospective property off against the other. The fact that the seller is the same does not change this, because the purchaser would know that this was a seller with two empty properties it needed to sell.

114. Mr Rona's comparables were used by him essentially on the question of yield and overall value and not the expected rent. For that, he simply relies on the asking rent of £12.75 psf as recommended by two commercial agents in Basildon and his own experience. However, I consider that Mr Rona was too dogmatic here. When asked if a tenant would be found if the asking rent was £10 psf instead, he said he did not know, and indeed he could not say even if the asking rent was £5 psf. That seemed to me to ignore the obvious.

115. Mr Marland put the expected rent at £10 psf. Again, essentially not based on comparables but on his feel for what a prospective purchaser would expect at that time, aware of a low demand for office space generally and the fact of 5-8 being for sale also. Although his local knowledge is less than that of Mr Rona, I preferred his evidence on this point. It is also backed up by the fact that the Premises have still not attracted any offers after nearly four years. That must call into question, among other things, the accuracy of an express expected rental of £12.75 psf as at 2011. Of course, a seller like Laindon can take a long-term view, as Mr Brook said in evidence. It can hold out for a high rent on the basis that one day someone would come along and pay it. But that does not mean that £12.75 should be taken as the proper expected rent.

116. In my view, the correct figure is £10 psf.

Multiplier.

117. Mr Rona says a multiplier of 12, ie 8.33 per cent, is appropriate, while Mr Marland says it is 10 per cent. Mr Rona has drawn on comparables showing a yield of 6 per cent, in other words a multiplier of 16, in Argent Court, where there is an implicit multiplier of 12. For his part, Mr Marland's comparables gave a higher percentage than 10 but he accepted that they were all cases of over-rents. He accordingly arrived at a yield of 10% (multiplier of 10) as opposed to the 13.825% or 12.8% shown in his comparables. But he could not satisfactorily explain, to my mind, why his choice of multiplier of 10 was any more accurate than Mr Rona's choice of 12.

118. Here, I prefer the evidence of Mr Rona and I therefore take a multiplier 12.

Rental void.

119. Mr Rona has assumed a rental void of 12 months, to include the time taken to find a tenant, and a rent-free period. Mr Marland says it would be four years to find a tenant and then a further 12-month rent-free period on top. Both agree there would be some rental void and that there would have to be a rent-free period as well.

120. On the question of a rent-free period, I accept that a 12-month rent-free period was being commonly sought by tenants in 2011. Mr Rona's evidence was somewhat inconsistent on this point because while he said in his report that it would take 12 months to find a tenant (see paragraph 9.7), he then said in evidence that the 12 months would also include the rent-free period. Indeed, in his original report he made no allowance for any rental void at all, which I consider to be wholly unrealistic. The fact that recently he said he had sold a property for a client where the tenant moved in immediately is not relevant to the position in 2011.

121. Mr Marland was not seriously challenged in cross-examination on his 12-month rent-free period. Overall, I consider that that is the correct period.

The period to find a tenant.

122. As to the period that it should be assumed will allow before a tenant can be found at all, again Mr Rona's present estimate of something less than 12 months (to allow for the rent-free period) is suspect, especially bearing in mind that initially he would not have allowed for any void at all. He was also less convincing here because the calculations he produced did not make any allowance for an empty rates period.

123. Given the extent of the recession and the lack of the demand as at 2011, I accept Mr Marland's evidence that the void must be taken to be more than 12 months. I also accept here that knowledge of local conditions is less important because the state of the market and the lack of demand for office space was a national phenomenon.

124. Mr Marland arrives at four years on the basis that this is how long it would take to let the entire building in parts. See paragraphs 7.12 and 7.13 of his report. His approach here was not seriously undermined in cross-examination. I do, however, accept the point that an assumption of four years letting void is somewhat arbitrary because it assumes still that there will be a hypothetical buyer who is going to wait for four years, and then another year on top for a rent-free period, and then adjust his bid accordingly, when, as Mr Marland accepted, he might in truth just walk away. Indeed, Mr Marland saw the property overall in January 2011 as a major liability, though he agreed that someone might buy it.

125. On the other hand, the failure to let after nearly four years is telling. And it is not inappropriate to factor this in since, on any view, January 2011 was still very much in the middle of the recession.

126. Doing the best that I can, I consider that the proper letting void is two years,. Added to the rent-free period, this makes three years.

Gross Value Calculations

127. I now turn to the calculations to give the gross value, before separating out the two bases of value. On my figures, the value, before any deduction, is going to be first of all the yearly rent, which will be 12,042 X 10 being £120,420. With a multiplier of 12, this gives a value of £1,445,040.

128. From that I deduct the purchaser's costs, which I take at 5.75%. I do not accept that two sets of purchaser's costs should be deducted, one at the beginning, and one at the end, on some notional resale by the end purchaser. There is only one transaction, and that is the hypothetical purchase, which drives the valuation. The deduction for purchaser's costs is £83,090.

129. One then needs to deduct three years' rent, but not at 100% because of the need to apply a discounted cash flow figure. On the basis of a yield of 8.33% at 3 years and using the table provided to me by Counsel, the figure is £285,105.

130. There is then a further deduction for rates. I accept Mr Marland's contention that there would be a three-month rate-free period for the prospective purchaser. In addition, I calculate rates on the discounted basis at Laindon's current rates liability. That would equate to £2,466 per month. Over 33 months, this is £81,367. One then deducts the empty service cost of £1.50 psf, which is £54,189. There is then a further £18,063 for letting costs, being 15% of the annual rental of £120,042.

131. These deductions all add up to £521,814 off the original value of £1,445,040. This gives a gross value of £923,000 before sealing with any other items.

Value on a full compliance basis

132. I now turn to the further deductions in respect of works other than by reason of SE's breach. Mr Marland puts these at a value of £200,000. This sum is in respect of air-conditioning, external decorations and partition work. I consider each in turn.

Air Conditioning

133. SE contends that on a full compliance basis, and thus on an actual condition basis as well, a deduction of £125,000 should be made, to refer to the fact that the hypothetical purchaser would replace the entire air-conditioning system. At one point, the argument for this (made in a different context by Capita Symonds for Laindon), was that a discontinuance on environmental grounds of the existing refrigerant R22 would mean that the whole system would require replacement by January 2015. That point is not now pursued.

134. What is said is that the system by January 2011 had gone past its recommended life of 10 years. See the Capita Symonds report. So that the prudent course would be to replace it even though it is working properly and even though a replacement refrigerant can be sourced via regassing. For present purposes, I accept that the replacement cost would be at £100,000. If one adds preliminaries and fees etc , it comes to £125,000.

135. Mr Rona took the view that, whatever the suggested lifespan, in reality no hypothetical purchaser would require a replacement system, because this system works perfectly well, even though originally he had thought that replacement was necessary on R22 grounds. Though somewhat anecdotal, his experience of his own and client's offices was in relation to a similar system going well past the official lifespan, sometimes for 20 years or more. Here, it is important to remember that the hypothetical tenant in this market would be unlikely to take a lease for more than 5 years.

136. Although Mr Marland said in his report that replacement was necessary and would be required by an incoming tenant, in evidence he agreed that, absent the R22 issue, the air-conditioning might be agreed to be left as is.

137. On the alternative of regassing, there was some late evidence produced from Daikin and also a government agency, but not, in my judgment, of very much use, save that it is accepted that regassing, with a different refrigerant is an obvious alternative to replacement. Mr Marland thought that regassing was more suitable to larger systems. But there was no real research done on this point and nor have there been any figures produced.

138. I simply do not accept that an incoming tenant as at 2011, or the hypothetical purchaser with an eye to the incoming tenant, would require replacement of the whole air-conditioning system. But I can see that regassing would be required. I do not have a figure for that, because none was suggested. If there was to be regassing, I doubt whether there would be a separate maintenance charge of as much as £4,500. Doing the best I can, I take a prudent course and make an allowance here of £7,000.

Subdivision and partition works

139. Next, Mr Marland makes a further allowance of £75,000 for subdivision of the Premises to make it easier to let, and partition works. In his closing submissions, Mr Wonnacott argued for £50,000 in respect of partitions etc and then £25,000 on the footing that the Premises would require repainting in the void period. However, as at January 2011, Laindon was in breach of covenant in relation to the external decorations to the tune of £28,125 claimed (see above). Accordingly, the full compliance value must assume that that work is done, so there is not to be added a further sum of £25,000 as claimed by Mr Wonnacott.

140. As to partitions, I consider that this particular deduction is speculative, and also because on my figures, it does not follow that there will necessarily be sequential subdivided tenants. Nonetheless, there needs to be some prudent allowance, and I make that in the sum of £25,000. I have then allowed a modest one month's rental void while these works are done of £12,891.

Conclusions on the Full Compliance Basis

141. The total deductions are now £566,705. Removing them from the starting figure of £1,445,040, leaves a net value on a full compliance basis of £878,335.

Actual condition basis.

142. On an actual condition basis, all the above deductions must be made, but in addition there is a deduction for the further works occasioned by SE's breach of covenant. Mr Rona made a pound-for-pound reduction on repair costs claimed, save for air-conditioning and suspended ceilings, but I did not find SE liable for the vast majority of the sums claimed anyway, and I have already made an appropriate deduction for air-conditioning.

143. I deal with Mr Marland's comments on each of the items below. It must be remembered, however, that he is opining on the effect on value of each item on

the basis of SE's case as to the quantum of such items for which it is responsible, not Laindon's case.

Carpet flooring.

144. This is a major item for which SE is responsible. I do not accept that the hypothetical purchaser would want merely to change the carpets to the extent of accommodating any partitions. I agree with Mr Rona's analysis of the importance of tiles. Consequently there must be a full deduction of £41,445.

Exterior works, scaffolding, exterior areas

145. Mr Marland makes no adjustment for these items at all, on the basis that in the context of a total rental void of 4 years they would be absorbed by the landlord. He also points out that none of this stopped the Premises being marketable. That is true, but this does not mean they have no impact on the value that a reasonable tenant or hypothetical purchaser would put on the Premises on the basis that these matters need to be addressed. We are here, of course, not now talking about a four-year rental void but a two-year void (plus one year's rent-free).

146. Consequently, I allow the deductions in the full extent of SE's liability here, which is £21,122.

External decorations

147. As at January 2011, Laindon would have been in breach of covenant here, as claimed, and so the total sum of £28,125 is deducted.

Other items.

148. Here I have found largely in favour of SE. However, Mr Marland simply worked simply off SE's case on these items (where it had offered zero). That has now changed and, as he did not say that even if present, these items would make no difference to the value, I do make a deduction. This come in total at £8,965.

Preliminaries

149. If preliminaries are added now at 12% (because it is January 2011), it adds a further £11,959. Added to this is CDM at £11,161 and coordinating costs at £1,674.

Conclusions on Actual Condition Basis of Valuation

150. The total repair cost, therefore, is £156,451. To keep parity with the full compliance valuation, I have not added preliminaries or extra fees to the partitioning costs of £25,000 on either basis. One then adds what I consider should be three months' loss of rent, to take into account the extent of the works done here, at £38,671.

151. The total deductions from gross value, therefore, here are £716,936. That then produces a net actual condition value of 728,104.

Conclusions on the Repair Claim

152. Accordingly, the difference in value for section 18 purposes is £150,231. The upshot of this is that, since the common law claim is only £122,297, the difference in value cannot act so as to reduce it because it is comfortably more than the common law claim.

153. Nor is there any prospect, on these figures, or anything like them, of the value of the Premises on either the full compliance or the actual condition basis sinking as low as £500,000. Accordingly, the point about the difference in value dropping to zero does not apply.

154. The common law award, therefore, remains at £122,297.

THE DEBT CLAIM.

155. Laindon now claims £6,375 in respect of the agent's fees of LSH and Capita Symonds. These are agreed.

156. That only leaves £1,820 claimed in respect of legal fees incurred in drawing up the schedule of dilapidations. This is a much reduced figure and on its face is highly reasonable. I have also now seen the relevant documents and invoices, I have had an explanation from Mr Brook, contained in his third witness statement of 22 October 2014, as amplified in cross-examination. Despite the absence of documents such as a client care letter, the invoices plainly bear out the sum claimed (see pages 15 and 16 of exhibit JB3), and accordingly I allow it.

157. Therefore the total debt claim is £8,195.

CONCLUSION.

158. Accordingly, if one adds the debt claim of £8,195 to the repair claim of £122,297, one reaches a total figure for judgment of 130,492.