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Case No: HT 11 209

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14 May 2013

Before:

THE HON MR JUSTICE RAMSEY

Between:

Hammersmatch Properties (Welwyn) Limited	**Claimant**
- and -	
(1) Saint-Gobain Ceramics and Plastics Limited	**Defendants**
(2) Saint-Gobain Abrasives Inc.	

Judith Jackson QC (instructed by **Thomas Eggar LLP**) for the **Claimant**
Nicholas Dowding QC & Elizabeth Fitzgerald (instructed by **Shulmans LLP**) for the **Defendants**

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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THE HON MR JUSTICE RAMSEY

Mr Justice Ramsey :

Introduction

1. These proceedings concern a claim for dilapidations on the termination of a lease of a large 1930s industrial and office building known as the Norton Building in Welwyn Garden City.

2. The claim arises out of a lease dated 14 December 1984 ("the Lease") originally between John Willmott Developments Limited and Norton Abrasives Limited for a term from 1 October 1984 to 28 December 2009. The rent at the time of the termination of the lease was £675,000 per year.

3. In February 1984 Norton Abrasives Limited, now the First Defendant ("Saint-Gobain") acquired the freehold of the site which includes the Norton Building from the Commission for the New Towns. It sold off the remainder of the site for redevelopment and in November 1984 arranged to take a lease-back by transferring the freehold to John Willmott Developments which led to it entering into the Lease. Under the Lease the Norton Company, now the Second Defendant by a change of name, acted as guarantor.

4. In about March 1987 the Claimant ("Hammersmatch") which was originally a joint-venture partner with John Willmott Developments Limited bought out that company and therefore became the successor landlord under the Lease.

Background

5. The Norton Building was purpose built as a manufacturing facility in the early 1930's for the Norton Group, a leading US manufacturer of grinding wheels. It was originally part of a much larger site, the entirety of which was demised to the Norton Grinding Wheel Company Limited by two 999 year leases granted in 1931 and 1936.

6. The Norton Building consist of an East and a West Wing. The East Wing is a four-storey block with a basement area. The West Wing is two storeys high. At the North and South of the building are two five storey towers containing staircases, toilets and lifts and the two wings interconnect via these towers at ground and first floor level.

7. By the early 1980s the Norton Group no longer needed either the entirety of the Norton Building or the remainder of the site. In 1981 Saint-Gobain under its former name of Norton Abrasives Limited granted a lease ("the Vosper Lease") to Hawker Siddeley Dynamics Engineering Limited ("Hawker Siddeley") for 35 years from 14 May 1981. Under that lease the West Wing of the Norton Building and the first floor of the East Wing were leased to Hawker Siddeley which by a series of takeovers and name changes became part of the Vosper Thorneycroft Group of Companies. The relevant tenant is conveniently referred to as "Vosper". The two storey West wing of the Norton Building as well as the first floor of the Norton Building is frequently referred to as the Vosper Building. The 1981 lease was varied so as to determine on 28 December 2009, the same date as the Lease.

8. Vosper vacated the Vosper Building by the end of 2000. Saint-Gobain sublet part of the ground floor to an engineering company until 2003 at which time Saint-Gobain vacated the whole of the Norton Building. There were a few tenancies-at-will of small parts of the Norton Building and arrangements for two telecommunications masts to be put on the roof. Subject to the occupation of those parts, the Norton Building has been empty since 2003.

9. Initially Vosper's agents, Chesterton and Mr Davies of Davies and Co sought to negotiate a lease of the Vosper Building to Hertfordshire Careers Services. During the course of 2000 draft heads of terms were exchanged but by November 2000 it became clear that this transaction was unlikely to go ahead. In February 2001 Vosper therefore looked for other possibilities. One such possibility was an organisation called Saturn who were specialists in the field of serviced business centres but this came to nothing.

10. Prior to vacating the premises both Vosper and Saint-Gobain sought to be released from their respective liabilities. They instructed letting agents. In late 1999 discussion began between Edwin Hill, acting on behalf of Saint-Gobain and Mr David Payne the managing director and majority shareholder of Hammersmatch with a view to the Norton Building being redeveloped and the lease surrendered.

11. By mid-2002 the proposals had reached the point at which Hammersmatch had decided to apply for planning permission for the conversion of the Vosper Building to a health club with serviced offices above. This led to an application for planning permission on 27 December 2002. That planning application was not dealt with in the statutory time period and Hammersmatch appealed against the deemed refusal. The planning inspector dismissed the appeal in a decision dated 5 August 2004. Hammersmatch applied for Judicial Review and on 24 February 2005 Mr Justice Collins quashed the inspector's decision. That decision was appealed to the Court of Appeal and on 16 November 2005 the appeal was allowed and the inspector's decision was reinstated. Thereafter Saint-Gobain sought to obtain lettings of the Norton Building but only achieved lettings of small parts and the arrangements for the telecom masts on the roof.

12. Between February 2007 and September 2008 various possible ways of developing the site were considered by Mr Max Lyons of Lyons Sleeman and Hoare, a firm of architects and by Mr Rob Holloway of RGH Architects. In July 2008 consideration was also given to possibly leasing space within the Norton Building to Threshers.

13. In the meantime on 15 September 2008 Mr Graham Payne (the son of David Payne) of Stimpsons wrote to Ms. Gaenor Parry, who had previously worked for the local Council and was a consultant who was involved in the application for planning permission for the health club. He sought advice from Ms Parry in relation to the likely need or requirement for planning consent when undertaking certain work as Hammersmatch were keen to avoid submitting a planning application for any works that could lead to parking restrictions being imposed by the local authority. Such works included the internal division of the building to create individual self-contained premises; installation of new internal lifts and internal fire escape staircases; installation of new entrance/reception canopies; resurfacing the existing car park and hard standing areas and demolition of the existing warehouse.

14. By that stage, given the expiry of the lease at the end of 2009, discussions between Saint-Gobain and Hammersmatch with a view to redeveloping the Norton Building and surrendering the Lease were taken no further.

15. On 12 February 2008 Hammersmatch instructed Mr Justin Ansell of Stimpsons, Chartered Surveyors, to prepare a schedule of dilapidations. He prepared that schedule of dilapidations which was served on Savills Commercial Limited, acting on behalf of Saint-Gobain on 18 December 2008. In response on 19 December 2008 Savills wrote to Stimpsons saying that they noted there were no details of Hammersmatch's intentions for the Norton Building and asking what they intended to do with the building at the end of the Lease.

16. In response on 6 January 2009 Stimpsons said that Hammermatch's intention for the property at the lease end "*would be to comply accordingly by repairing, reinstating and redecorating the premises pursuant to the lease covenants for immediate marketing.*"

17. On 27 January 2009 Solicitors then acting for Saint-Gobain wrote to Hammersmatch following consideration by them of a programme of works to deal with dilapidations. They raised issues over the telecommunications masts on the building and whether Hammersmatch would prefer to retain those masts and negotiate directly new leases for them on the expiry of those currently in place.

18. Following receipt of that letter Mr Ansell wrote to Mr Payne of Hammersmatch on 30 January 2009 and said this:

> "*As the letter states, the lead-in period for mast and infrastructure removal would be significant, bureaucratic and generally problematic for the tenant. I suspect this would impinge on the overall works programme they are proposing and interfere with their dilapidations strategy. It would be worthwhile declining their offer to take on negotiations and liabilities in respect of these installations. I am fairly sure that this particular point will be considered carefully by the tenant and could decide whether or not they undertake works pursuant to lease covenants. Clearly, any disruptions to the tenant's work programme will undoubtedly be an advantage to the landlord and could force them to abort any works proposals, with a view to settling the claim financially.*"

19. On 5 May 2009 Mr Graham Payne wrote to Mr Lawrence Pinkney, a property consultant who had advised Hammersmatch from about 1999. In that letter Mr Graham Payne confirmed his recommendations for the refurbishment of the Norton Building and the likely achievable rental levels. He said that any refurbishment should seek to enhance and exploit the character of the existing building while meeting modern office occupiers' requirements. He gave recommendations for the refurbishment in terms of the internal suites having new full access raised floors, new windows, air-conditioning and LG7 anti-glare lighting, fair-faced brick walls and exposed ceilings and pipes, lighting and air-conditioning, all painted in matt black to create a loft style appearance. Based upon those works he would recommend a rent of £14.50 per square foot.

20. In the meantime Saint-Gobain had instructed Derrick Kershaw Partnership to prepare documents so as to tender for dilapidation works at the Norton Building. They intended to start onsite on 31 August 2008. However by 21 September 2008 it seems that it had been decided that Saint-Gobain would not carry out work in relation to the dilapidations.

21. On 9 December 2009 Mr Ansell wrote to Hammersmatch and their Solicitors about proposals for dilapidations and said this:

> *"Please appreciate that preparing a specification of works for circa £5m of repairs will take time, probably 6 weeks or so plus at least another 6-8 weeks for the tender process and 2 weeks for detailed tender analysis. We anticipate at least 20 site visits to assist contractors/subcontractors/lift specialists/M+E specialists etc and answering numerous queries, information requests during the tender process. Approximately 100-150 contracting personnel will pass through the site and buildings during this period. It is an extremely busy time for us. We must be very careful to ensure that these contractors never get to know that there is a possibility that final contract may never be awarded, for whatever reason."*

22. As recorded in an exchange of emails on 15 December 2009 between Mr Nigel Palmer of Lambert Smith Hampton and Mr Graham Payne there was a need to review the marketing position against the dilapidations position for the Norton Building. Mr Graham Payne said that the situation was *"tricky and restrictive. Needs some thought."*

23. Following correspondence between the solicitors for the parties, Thomas Eggar LLP wrote a letter of claim pursuant to the Dilapidations Protocol to Saint-Gobain's former solicitors on 11 January 2010, referring to a claim of £6.8m. They stated that it was Hammersmatch's intention to carry out the works and that it had started the process of preparing specifications and obtaining funding.

24. In a meeting on 14 January 2010 between Mr David Payne, Mr Graham Payne and Mr Nigel Palmer, the marketing of the Norton Building was discussed. Some handwritten notes summarised what was said in relation to marketing. It recorded that a minimum of one floor of, say, 13,000 square feet needed to be presented as finished to attract an occupier bearing in mind the amount of available stock ready to move into. It then stated: *"Problem = dilaps v replace/repair not refurb = catch 22 on finishes /spec??"* A note in the margin states *"supercession argument re dilaps."*

25. This was also referred to in a letter written by Mr Nigel Palmer on 27 January 2010 in which he said:

> *"Clearly the current situation is rather sensitive and we need to be aware of the associated risks involved in our marketing and what we can actually offer having regard to such issues as supercession. You need to carefully consider what works are envisaged for the property...*
> *I note from our previous conversations that the ongoing discussions and agreement for the works could take anything from 6 to 12 months. Balanced against this background however, is a need for Graham and I to not only be*

> *aware of current potential enquiries for the property but also to be proactive in our approach but having regard to the previously identified constraints.*"

26. In response to that letter on 9 February Mr David Payne said this:

> "*As to dilapidations, I do not think this needs to limit our ambitions. Clearly, as an occupier comes along, we would have to take a commercial view vis-à-vis how much we could claim towards putting the building into a habitable condition for which, of course, Nortons would be liable.*"

27. On 18 February 2010 Mr Nicholas Webb of Nicholas Webb Architects LLP wrote to Mr David Payne referring to their last meeting stating that he had now carried out work necessary to take a project for hotel use of the Norton Building to a stage where a planning application could be lodged at the beginning of May 2010. In reply Mr Payne said that there was a "*timing issue vis-à-vis dilapidations*". Further discussions took place in early May 2010 between Mr Payne and Humberts Leisure and a construction and property consultancy, Thomas & Anderson, concerning a potential hotel development. Whilst Mr Payne forwarded the correspondence to Mr Nicholas Webb, he wrote to him on 2 June 2010 to say he was not in a position to speak about it at that stage.

28. By March 2010 Saint-Gobain had instructed Shulmans to deal with the dilapidations claim. Discussions between solicitors then led to the suggestion of a mediation.

29. Some other possibilities of dealing with the Norton Building were discussed within Lambert Smith Hampton in July 2010 but Mr Palmer wrote this to a colleague on 5 July 2010, when it was envisaged that the dilapidations issue might be resolved by a mediation in mid-September 2010:

> "*Having spoken recently with my joint agent the feedback is that until the client has sorted out the on-going dilaps.issue he is not yet in a position to give any guide price-should hopefully be sorted mid September so will need to re-visit it then.*"

30. Following an unsuccessful mediation in September 2010, Thomas Eggar wrote to Shulmans on 22 December 2010 enclosing a formal revision to the claim figures in the letter of claim and stated that the claim had been revised in the light of a tender from ER Armfield Limited which Hammersmatch wished to accept.

31. In reply on 18 February 2011 Shulmans pointed out that despite Hammersmatch saying that they would carry out the works, the works had not been done. They also referred to advice from Mr Davies that there was no demand for a property like the Norton Building given the lettings market in Welwyn Garden City. They continued by stating:

> "*Given this is the view of Mr Davies, and the fact that your client presumably knows the Welwyn market very well also, it seems incredible that your client would even contemplate spending a sum in excess of £5m undertaking the works set out in the schedule prepared by Mr Ansell.*

> *Given this the reasonable landlord at the end of the lease term would not carry out the works your client continually represents that they will be carrying out and therefore the proper measure of any damages would be the diminution in value of the landlord's reversionary interest."*

32. In reply on 17 March 2011 Thomas Eggar stated that in the period of financial recession Hammersmatch did not have access to funding to do the work. They repeated an offer that Hammersmatch was prepared to commence and carry out the works on undertakings from Saint-Gobain to finance them on a staged basis. They referred to Saint-Gobain having failed to provide any meaningful response to the Schedule of Dilapidations and said that, if there were not sensible discussions, Hammersmatch would have no alternative but to commence proceedings.

33. Shulmans responded on 24 March 2011 stating this:

> *"The proposal that you put forward regarding your client undertaking the works and these being funded by our client is not an attractive one to our client. The reason behind this is simply that, based upon the professional advice they have received, no reasonable landlord considering their position as at the term date of the lease would undertake those works. The advice that our client has is that if the works undertaken in the schedule were carried out then the landlord would have an old fashioned building for which there was no demand in the current market place. It would of course be in repair but what there would be in repair would essentially be a 1930s building with 1970s fit out. The unequivocal and clear advice our client has is that there would be no market for such a building, no reasonable landlord would carry out those works and therefore there is no reason for our client to even contemplate the arrangement proposed."*

34. After further exchanges between solicitors, these proceedings were issued on 2 June 2011 and served by post on 3 June 2011. On 11 November 2011 the court gave directions leading to the trial. Those directions included permission to call expert evidence from Building Surveyors, Mechanical and Electrical Engineers, Valuation Surveyors and Letting Agents, with provision for the experts to meet and produce joint statements followed by the production of expert reports. As a result of those and subsequent meetings the scope of expert evidence was much reduced.

The Issues

35. The parties were able to agree on the issues which arose for consideration in the following terms:

(1) Issue 1: The extent of Saint-Gobain's breaches of covenant:
   (a) 1.1 What works should Saint-Gobain have carried out under the Lease?
   (b) 1.2 What is the reasonable and proper cost of the necessary works?

(2) Issue 2: Fees: What is the reasonable and proper cost of professional fees?

(3) Issue 3: The measure of damages for diminution in value of the reversion under the first limb of s.18(1) of the Landlord and Tenant Act 1927:

(a) 3.1 Is Hammersmatch entitled to recover the cost of the works plus fees or does the statutory cap under the first limb of s.18(1) apply?

(b) 3.2 Whether Hammersmatch's claim for loss of rent and insurance are subject to the statutory cap imposed by the first limb of s.18(1) or whether they are recoverable in any event.

(4) Issue 4: Loss of rent

(a) Is Hammersmatch entitled to recover loss of rent?

(b) What is the appropriate figure?

(5) Issue 5: Loss of Insurance: Is Hammersmatch entitled to damages representing the cost of insuring the premises until re-let?

(6) Issue 6: Interest: Is Hammersmatch entitled to interest and if so at what rate?

The Evidence

36. Hammersmatch called evidence from Mr David Payne, the managing director and majority shareholder of Hammersmatch's holding company. He provided two witness statements and gave evidence of the history of the Norton Building from 2000 onwards. He also gave evidence for the reasons why Hammersmatch had not carried out the dilapidations work. Hammersmatch also called evidence from Mr Graham David Payne, Mr David Payne's son. As stated above he is a surveyor working with Stimpsons at its Welwyn Garden City Office and has been involved with the Norton Building since the late 1990s. He gave evidence of that involvement. There was also evidence from Mr Norman Barr who is a self-employed caretaker who acts as part-time caretaker of the Norton Building. He was originally employed in that capacity in the 1970s. He gave evidence of various aspects of the facilities at the building.

37. Saint-Gobain called Mr Leslie Foulger, who has been the Group Property Manager for the Saint-Gobain Group in the UK since 2001. A surveyor within his department, Mike Smith, was responsible for the Norton Building until Nick Pogson took over in 2006. Subsequently other people also became involved. All of them reported to Mr Foulger who himself took direct responsibility in September 2008. Prior to that date his evidence was based largely on documents. Saint-Gobain also called evidence from Mr James Ruthven, a senior director and head of rating at BNP Paribas Real Estate UK, who gave evidence of rating appeal work which that firm carried out for Saint-Gobain from late 2008 to August 2011.

38. There was evidence from Building Surveyors. Hammersmatch instructed Mr Justin Ansell of Stimpsons Surveyors LLP. He is a Member of the Royal Institution of Chartered Surveyors and qualified as a Chartered Building Surveyor in 2004. He currently heads up the Building Consultancy Department at Stimpsons. He has significant experience of dilapidations and is a member of the RICS Dilapidations Forum.

39. Saint-Gobain instructed Mr Edward Shaw, a Director in Savills Commercial LLP. He is qualified as a Chartered Building Surveyor and was an Associate from 1988 before becoming a Member of the Royal Institution of Chartered Surveyors. He began his career as a building surveyor in 1982. He sits on the RICS Professional Group Board and is a past chairman of the RICS dilapidations working group, responsible for the Dilapidations Guidance Notes (5th Edition) published in May 2008.

40. The Building Surveying Experts met on a number of occasions and were able to narrow the issues arising from the Schedule of Dilapidations so that I was provided with an agreed cost of building fabric dilapidations in the sum of £1,785,578.15.

41. I heard evidence from Mechanical and Electrical Engineers. Hammersmatch instructed Mr Ray Cantrell of RI Cantrell Engineer Ltd. He has a degree in Electrical Engineering and worked for many years for the Post Office and subsequently for the National Design Consultancy, a building engineering services consultancy owned by Royal Mail. After a period with an independent consultancy he set up his own company. He has carried out a large amount of building engineering services survey work and since 2007 has specialised in it. He is a member of the RICS Dilapidations Forum, a Chartered Engineer, a Member of the Institution of Engineering and Technology and a Fellow of the Chartered Institute of Building Services Engineering.

42. Saint-Gobain instructed Mr Graham Clarke, a Director of a firm of engineering consultants, FHP Engineering Services Solutions Ltd. He is a graduate of the Dublin Institute of Technology and has worked in building services since 1988, becoming a Director of his current firm in 2000.

43. The Mechanical and Electrical Engineering Experts met on a number of occasions and were able to narrow the issues so that I was provided with an agreed cost of mechanical and electrical dilapidations in the sum of £435,926 in respect of External M&E works (repairs and reinstatement), Lighting (repairs and reinstatement), Radiators and Heating (repairs and reinstatement) and other works such as sprinkler works, removing redundant equipment and minor repairs.

44. There remained only a few items of dispute between the experts in relation to the boilers, HV and LV switch panels and lifts, including the lift pits. Whilst Mr Cantrell had wider experience, in particular, in relation to lifts, he did not have service or testing data on the relevant items of mechanical and electrical plant to justify his evidence that replacement was needed. Mr Clarke was able to provide more information in relation to his view that repair was appropriate.

45. I also heard evidence from Valuers. Hammersmatch instructed Mr John Gould of Gould & Company. He is a Fellow of the Royal Institution of Chartered Surveyors, qualifying as a Chartered Surveyor in 1961. He founded his own firm and was Senior Partner until he retired in 2003 and has since continued as a Consultant. He has extensive experience as a valuation surveyor.

46. Saint-Gobain instructed Mr James Marland, a Director in Savills Commercial Limited. He joined Savills after graduating in 1973 and became a partner in 1980. He is a Fellow of the Royal Institution of Chartered Surveyors. Since then he has

specialised in valuation and negotiation primarily in relation to rent reviews and dilapidations.

47. There are substantial disputes between these experts in relation to the appropriate basis for valuing the Norton Building which I will deal with below.

48. I also heard evidence from Letting Agents. Hammersmatch instructed Mr Colin Mitchell, a Partner in a firm of Chartered Surveyors, Brown & Lee, based in Stevenage. He is a Fellow of the Royal Institution of Chartered Surveyors and an RICS Registered Valuer. He has experience both in Welwyn Garden City and in the area and is responsible for the asset management department of his firm.

49. Saint-Gobain instructed Michael Davies, principal in the firm of Davies & Co. After graduating he worked in the Valuation Office of the Inland Revenue before working as a chartered surveyor for firms in Hertfordshire. He formed his own firm in 1991 and has had extensive experience of property in Welwyn Garden City. He has also had a long involvement with the Norton Building.

50. Again there were substantial disputes between these experts on the possibility of marketing and letting the Norton Building which I will also deal with below.

51. I now turn to consider the issues in this case.

Issue 1: The extent of Saint-Gobain's breaches of covenant

52. Given the agreements which have been reached, I now turn to consider the question of what works Saint-Gobain should have carried out under the Lease and of the reasonable and proper cost of the necessary works in relation to the remaining M&E items.

53. In approaching the remaining items in dispute I bear in mind the following general principles:

(1) A covenant to keep in good repair and condition is not engaged unless there exists a state of disrepair, that is a deterioration from some previous physical condition: see Post Office v Aquarius Properties [1987] 1 All ER 1055 and Fluor Daniel Properties v Shortlands [2001] 2 EGLR 103.

(2) If there is a state of disrepair it has to be established that the item is below the standard of repair contemplated by the covenant and, if so, what remedial work is needed to restore that item to that standard.

(3) The appropriate standard of repair is such repair as having regard to the age, character, and locality of the premises, would make them reasonably fit for the occupation of a reasonably minded tenant of the class who would be likely to take them: see Proudfoot v Hart (1890) 25 QBD 42; Fluor Daniel Properties v Shortlands [2001] 2 EGLR 103; Mason v TotalFinaElf (UK) [2003] 3 EGLR 91.

(4) The standard of repair is an objective one which is to be ascertained by reference to the circumstances at the date of the lease and what a reasonably minded tenant would require to render the premises reasonably fit for use as a

place from which to run its business; see Fluor Daniel Properties v Shortlands [2001] 2 EGLR 103.

(5) The question is what would be required to make the premises reasonably fit for occupation, not what an incoming tenant would require at the end of the lease: see Westbury Estates v RBS [2006] CSOH 177 at [37]; Carmel Southend Limited v Strachan and Henshaw Limited [2007] 3 EGLR 15 at 17E.

(6) The appropriate standard of repair must take account of the age of the building. The obligation is not to return the premises to the condition that they were in at the start: see Mason v TotalFinaElf (UK) [2003] 3 EGLR 91.

(7) In considering the appropriate standard of repair it is relevant to consider the user clause in the lease: Simmons v Dresden [2004] EWHC 993(TCC) at [34] and [48].

(8) When considering whether replacement rather than repair is the appropriate standard:

(a) Replacement is only required if repair is not reasonably or sensibly possible: see Dame Margaret Hungerford Charity Trustees v Beazeley [1993] 2 EGLR 143 and Carmel Southend Limited v Strachan and Henshaw Limited [2007] 3 EGLR 15.

(b) It is for a claimant to prove relevant disrepair and that it is of such an extent or nature that repair is not reasonably or sensibly possible: see Mason v TotalFinaElf (UK) [2003] 3 EGLR 91.

(c) Where a reasonable surveyor might equally well advise either repair or replacement, damages are to be assessed by reference to the cost of repair unless replacement would be cheaper: Riverside Property Investments v Blackhawk Automotive [2005] 1 EGLR 1114: Carmel Southend Limited v Strachan and Henshaw Limited [2007] 3 EGLR 15.

(d) The fact that an item has exceeded its indicative life expectancy so that it would or might be economic for a prudent owner to replace it does not mean that it is not in a good and safe working order repair and condition: see Fluor Daniel Properties v Shortlands [2001] 2 EGLR 103 at 111G and Westbury Estates v RBS [2006] CSOH 177 at [35-37].

54. In the present case I must therefore take into account the age, character and locality of the Norton Building which was a purpose-built manufacturing building which was about 50 years old at the date of the lease. It is necessary to consider what a reasonably minded tenant of the relevant user class would reasonably require in December 1984 to render the building fit for occupation for the purposes contemplated by the lease, being an industrial building with ancillary offices (West wing and first floor of East wing) and offices on the 2nd and 3rd floors of the East wing and a wholesale warehouse or repository on the ground floor of the East Wing.

55. I now consider the relevant disputed mechanical and electrical items in the light of those principles.

Boilers

56. It is common ground that one boiler, which had been totally dismantled, requires replacement. It is also agreed that the remaining four boilers are in a state of disrepair and the issue is whether those boilers require repair or replacement.

57. There have evidently been problems in the past and two boilers appear to have had parts taken to keep the other three boilers running. One boiler merely has parts and it is agreed that it needs replacement. There is also a second cannibalised boiler. There are no records of maintenance or repair work carried out on the boilers.

58. In 2009 there was concern that the heating should be able to be operated to prevent the sprinkler system from freezing. On 22 July 2009 Mr Foulger referred to obtaining a cost for "*nursing*" the boilers through to the end of the lease. This was also referred to in an email of 26 October 2009 when it was stated that "*hopefully they can crank up the existing boilers*" to stop the sprinkler system freezing up. Mr Foulger also wrote to Mr Ansell on 2 October 2009 saying that he could now confirm that "*the existing heating installation has been repaired and is now operational sufficient to provide the background heating necessary to protect the sprinkler installation.*"

59. In August 2009 Mr Robert Lane, a Director of Electrical Mechanical Installations Limited ("EMI") reported on the heating system as follows:

> "*The existing plant is over 20 years old, many of the parts no longer available, there are 5 boilers of which only 3 may work as the other two have had parts removed which we can only assume they have used to recondition the other boilers in the past. We have no way of telling if the boilers will function and after a full service and commission the boilers may still be pumping out a high level of carbon dioxide which is unacceptable due to faulty burner bars, faulty heat exchanger and gas assembly. If we are unable to regulate the gas due to faulty components the whole install will be condemned....*"

60. Mr Barr gave evidence of the boiler performance and said that prior to 2003 four boilers were operating to a good standard but since the building became unoccupied the boilers were off for most of the time and were only used to heat the building to 4°C to prevent frost damage to the sprinkler system. He said that by the end of the lease three of the four boilers were working and one had been used for spares.

61. There was a visit to the property by the Mechanical and Electrical Experts, Mr Cantrell and Mr Clarke, on 19 January 2012 when the boiler manufacturer was also present to identify the boiler type and model and confirm whether the spare parts were available. Mr Clarke refers to an email from Mr Tony Fell, the chief engineer at Powrmatic Limited, stating that he was able to obtain sections and burner bars from Italy and that thermostats, pilot assemblies, transformers, control boxes and natural gas injectors were still stock items although stock levels may be very low. Mr Fell confirmed to Mr Clarke that the boilers were manufactured in 1984.

62. On the basis of that evidence I consider that it is necessary to replace two boilers, both the one which is accepted that needs replacement and the one which is being cannibalised to provide spares for the others. It has not been working for some years and has had substantial parts removed.

63. So far as the age of the boilers is concerned, they were some 25 years old in December 2009 and the life factor in the CIBSE Guide M is 25 years. Whilst this indicates that replacement might be appropriate, given the fact that three boilers have been operating and there are spares available, I do not consider that it means that those three boilers need replacing.

64. The existing three working boilers are evidently able to heat the building although only used to prevent the sprinkler installation from freezing. Whilst there is no service record and the boilers have not recently been used to provide extensive heating, I see no reason why, given the availability of spares, those three boilers could not be repaired to provide a proper level of heating. I consider that that is the appropriate remedial works in this case for those three boilers.

65. So far as the cost of replacement is concerned, I have figures within the tender document produced by ER Armfield Limited in September 2010. That includes for boiler plant removal at £6,536, new boiler installation at £33,000, a provisional sum for other replacement pumps to the boiler room at £6,000 and controls to the heating installation at £21,334. I also have the quotation from EMI in the sum of £62,800 for carrying out the replacement work. Mr Cantrell explained that the figure of £33,000 was based upon the replacement of 4 boilers and therefore I consider that the appropriate figure for the replacement of each boiler is £8,250. This gives a total of £16,500 for the replacement of the two boilers.

66. Mr Clarke's figure for repairing the boilers is £26,600, consisting of £3,000 per boiler plus £8,000 to cover the cost of repairs to the boiler control panel. Mr Cantrell agreed that a figure of £3,000 per boiler was not unrealistic. He also thought that £8,000 for repairing the control panels was "*not ridiculous*" but that it was more likely to be in the range of £10,000 to £12,000.

67. To repair the three boilers I consider that £3,000 should be allowed for each boiler, making £9,000. In relation to the repairs to the control panel, the figures within the tender evidently include items such as a pressure set and vessel, gas solenoid and knock off button and a combined dirt and air separator as well as the main control panel, which appear to be unlikely to be necessary for the repair. Making allowances for those items I consider that the figure given by Mr Clarke of £8,000 to cover the repairs of the boiler control panel is more reasonable. It follows that the cost of repair of the three boilers should be £9,000 plus £8,000 to cover the cost of repairs to the boiler control panel, a total of £17,000.

68. Overall the cost of the two replacement boilers (£16,500) and the cost of repairing the three boilers and the boiler control panel (£17,000) gives a total of £33,500.

HV and LV Switchpanels

69. Again the issue is whether there should be repair or replacement. Information from Hawker Siddeley Switchgear by email dated 15 May 2012 would indicate that the HV switches were replaced in the 1960s. It is not clear precisely when the LV Switches were manufactured or replaced.

70. The switchgear is currently functioning but, at present, there is a low load and whilst Mr Cantrell doubted whether they would carry a high current he did not know whether they would. No testing has been carried out on the switchpanels.

71. Whilst the CIBSE Guide M life factor is 30 years for the HV switch panels and 25 years for the LV Switch Panels, I am not persuaded that they need wholesale replacement at this stage. They evidently need some repairs to be carried out to the switch panels to reinstate metering, repair the door panels and re-spray the cubicle panel. It is common ground that £5,000 is a fair price for these repairs.

72. The question is whether or not switches need to be replaced when no testing of the HV or LV switches has been carried out to show whether they do need replacement. I do not consider that in those circumstances it has been established that wholesale replacement of the switchpanels is justified. The Hawker Siddeley report provides confidence that there is an appropriate repair solution for the HV switch panels and Mr Cantrell agreed that it would be possible to replace the HV and LV switches.

73. However, given the nature of electrical equipment I consider it appropriate to make some allowance for replacement of some of the HV switches and LV switches. Based on figures which have been provided of £15,000 to £20,000 for HV switches and £1,000 for LV switches, I consider that £40,000 should be allowed for HV switchgear and £8,000 should be allowed for LV switchgear replacement.

74. As a result I consider that the appropriate sum to allow for the repair to the switch panels is £5,000, for the repair to HV switches is £40,000 and for the repair to the LV switches is £8,000, making a total of £53,000.

Lifts

75. There are two issues in relation to the lifts: first, whether the passenger lift and the goods lift need replacing or whether they can be repaired; secondly, whether the lift pits beneath each lift need to be deepened.

76. On an inspection in December 2011 neither lift was operational. The lifts were subject to a lift consultant's report carried out by Steven Morrison Associates (Bromley) Limited ("SMA") dated 8 January 2009. In relation to the passenger lift the report identifies a number of faults which should be repaired and also identifies a remaining life expectancy of major components ranging from 2 to 10 years. Similarly for the goods lift there are faults and a life expectancy of major components ranging from 2 to 6 years.

77. The SMA report recorded that the passenger lift was an Otis lift installed in the 1960s with the controller drive being modified by Protobyte in 1997. The goods lift it identified as an original 1960s Otis lift modernised by Otis in 1981. Whilst Mr Cantrell thought it more likely the lifts dated from an earlier pre-war period he had made no enquiries of Otis or Protobyte and I proceed on the basis of the information in the SMA report.

78. There are lift maintenance records available until 2003 and those do not suggest that either lift has reached a level of failure which would justify replacement: see CIBSE Guide M at paragraph 13.2.1. Whilst the CIBSE Guide M life factor is 15 years for

lifts there is nothing in the servicing records and no tests have been carried out which would show that replacement is required. Rather I consider that repair and replacement of parts is appropriate. SMA have produced costs for the repairs. In my view the appropriate way to value the costs of repair is by taking the costs of identified repairs and also taking account of the worst case scenario costs in terms of other items to take account of the fact that the lifts have not been operational. In making this allowance, I exclude the additional items which Mr Cantrell thought would be necessary. In my judgment by taking a worst case scenario there would be sufficient allowance to deal with the matters which Mr Cantrell has raised. I consider that that is a pragmatic and appropriate way to make a proper allowance for repair of the lifts.

79. In the circumstances in relation to the passenger lift the cost of identified repairs and testing is £24,850 and the cost of additional repairs, on a worst case scenario is £16,800 giving a total of £41,650. In relation to the goods lift the cost of identified repairs and testing from the SMA report is £25,950 and the cost of additional repairs on a worst case scenario is £23,500, giving a total of £49,450. Combining the figures for the passenger lift (£41,650) and for the goods lift (£49,450) gives a total figure of £91,100 which I consider is the appropriate cost of repair.

80. On the basis of the identified repairs and the repairs of major parts, I do not consider that deepening of the lift pits arises. The lifts would be kept in a state of repair but I do not consider that they reach the "tipping point" at which the repair works would fall within the scope of BS EN 81 therefore requiring them to comply with new requirements.

Summary

81. It follows that, in addition to the agreed mechanical and electrical items of £435,926, I allow an additional sum of £177,600 (£33,500 for boiler, £53,000 for HV and LV switchpanels and £91,100 for lifts). It follows that the total figure for mechanical and electrical work is £613,526 (£435,926 and £177,600).

82. As a result of the agreements between the parties and the findings set out above, the reasonable and proper cost of the necessary works which Saint-Gobain should have carried out under the Lease is as follows:

(1)	The agreed value of the building work dilapidations:	£1,785,578
(2)	The agreed cost of the M&E dilapidations:	£435,926
(3)	The value of the non-agreed M&E dilapidations:	£177,600
		£2,399,104

Issue 2: Fees

83. The parties have agreed that the reasonable and proper cost of professional fees is as follows:

(1) Supervision of building works: 5.75%;

(2) CDM Co-ordination: 0.9%; and

(3) Supervision of mechanical and electrical works: 5.5%.

84. I shall add these fees to the cost of the works when I come to consider the calculations below.

Issue 3: The measure of damages for diminution in value of the reversion under the first limb of s.18(1) of the Landlord and Tenant Act 1927

85. The major issue that I have to decide is whether Hammersmatch is entitled to recover the cost of the works plus fees, as set out above or whether the statutory cap under the first limb of s.18(1) applies. This depends on whether and to what extent the breaches of covenant on the term date resulted in a diminution in the value of Hammersmatch's freehold reversion on that date.

86. Section 18(1) of the Landlord and Tenant Act 1927 provides as follows:

> "*Damages for a breach of a covenant or agreement to keep or put premises in repair during the currency of a lease, or to leave or put premises in repair at the termination of a lease, whether such covenant or agreement is expressed or implied, and whether general or specific, shall in no case exceed the amount (if any) by which the value of the reversion (whether immediate or not) in the premises is diminished owing to the breach of such covenant or agreement as aforesaid; and in particular no damage shall be recovered for a breach of any such covenant or agreement to leave or put premises in repair at the termination of a lease, if it is shown that the premises, in whatever state of repair they might be, would at or shortly after the termination of the tenancy have been or be pulled down, or such structural alterations made therein as would render valueless the repairs covered by the covenant or agreement.*"

87. There are therefore the two limbs of s.18(1). The first limb limits damages to the amount by which the value of the landlord's reversion is diminished because of the breaches of the repairing obligation. This considers, objectively, the reduction, if any, in the market value of the landlord's interest on the term date because of those breaches. The second limb extinguishes damages altogether where, on the term date, the landlord intends at or shortly after the term date to demolish the premises or carry out such structural alterations as would render the repairs valueless. This looks, subjectively, to the landlord's actual state of mind on the term date.

88. The first limb therefore puts a ceiling on the recoverable damages so that they cannot exceed the diminution of the value of the reversion. The second limb extinguishes the right to recover damages altogether so as to avoid an injustice where the cost of the work to put the premises in repair would be recoverable when, in fact, the premises were going to be or had been demolished or altered so as to render the repairs valueless.

89. In the present case, Saint-Gobain relies only on the first limb. It does not say that as at December 2009, Hammersmatch had formed a fixed and settled intention, in the sense of an intention "*so far as in him lies*" to bring about and has reasonable prospects of

bringing about (see: Cunliffe v Goodman [1950] 2 KB 237), to demolish or carry out structural alterations which would have rendered the repairs valueless.

90. Rather, Saint-Gobain says that the question of diminution in value depends on how the notional buyer on the term date would have assessed the value of the premises in and out of repair and, in particular, whether in this case their value for letting following sub-division would have exceeded their site value. In this context Saint-Gobain submits that the notional buyer of the premises on the term date, whether in or out of repair, would have bought them for their site value with a small upward adjustment in price if they had been in repair. Saint-Gobain submits that the central question is whether, and if so to what extent, the value of the Norton Building for letting following the sub-division would exceed the site value.

91. Hammersmatch submits that, on the evidence, by carrying out the repairs and by subdividing it into the 11 units, as shown on the plans prepared by Mr Gould, together with a small amount of largely cosmetic upgrading work, the Norton Building could be let as offices on the first to third floors and the majority of the ground floor could be let for light industrial type use. Hammersmatch submits that in the state of disrepair there is no comparable market for the property. On the evidence it is submitted that the difference in value between the building in repair and the building in disrepair would be greater than the cost of repairs and therefore the cost of repairs should form the basis for the damages calculation.

92. I now turn to consider the two valuations on the term date. First, the value of the premises in their covenanted state on that date and, secondly, the value in their actual state as at that date.

Value in Repair

93. There is a major dispute between the parties as to the rents and void periods to be assumed in valuing the Norton Building in repair.

94. Mr Mitchell's valuation was on the basis that the building was divided into 11 units and that minimal work would need to be carried out to create those lettable units. His view was that, on this basis, a rental income of £11 per square foot could be achieved for the better office units and that the whole building could be let in 36 months. He based this on his view of the comparables which were dealt with in the Experts' Joint Statement.

95. Mr Davies' view, supported in relevant respects by Mr Marland, is that the offices would need significant upgrading work to be carried out to be able to let the property and that work would go well beyond the scope of the repair works. On that basis his view was that the rents would not exceed £9 to £10 per square foot and that no more than 50% of the office space would be let in a four year period.

96. In relation to the industrial units, it is common ground that they would have some value. Mr Mitchell considered that Unit G5 could be used as offices and that G6 had office potential. Mr Mitchell assessed rents of £5 per square foot generally with Unit G5 being £11 and Unit G6 being £7.50 per square foot. His view is that all the industrial units could be let in 24 months.

97. Mr Davies' view is that those looking for industrial units would not be so concerned at the difference between the units being in repair and being in disrepair. He considered that

there would only be something like a 10% difference in the two values. He assessed the rents, with the units in repair, at £1.50 to £4 for Units G1 to G4 and G6. Unit G5 he thought could be an ancillary office and assessed the rent at £7.50. He considered that full occupancy would be difficult to achieve and that lengthy marketing periods would be required. He thought that, in repair it would take 2 years to fill 75% of the space or 60% in its existing condition and that full occupancy would probably never be achieved.

98. Before I turn to consider each of those valuations, I must deal with criticisms which each party makes of the other expert. On behalf of Hammersmatch it is submitted that Mr Davies, by his previous involvement, had formed an unsupported pessimistic view of the Norton Building and an adverse view of Mr David Payne, which he has expressed in a number of documents. As a result it was submitted that he showed a degree of personal enmity and involvement which an independent expert should not have. His involvement in relation to Saint-Gobain's dilapidations strategy was also criticised. It was said that he had become allied to and an advocate of Saint-Gobain's case and, on the basis of what Mr Foulger said in cross-examination, was instrumental in the dilapidations strategy adopted by Saint-Gobain. As a result, it was submitted that he lacked independence from his client's cause and that this was a seriously adverse factor when considering the weight to be attached to his evidence.

99. On behalf of Saint-Gobain, it was submitted that the criticism that Mr Davies' view was coloured by a dislike of Mr David Payne was not a fair one. It was said that Mr Davies' view of the Norton Building has been consistent ever since he first became involved with it, irrespective of whether he was advising Vosper, Hammersmatch or Saint-Gobain. It was also said that his view accorded with the views expressed by others similarly involved.

100. Rather it was submitted on behalf of Saint-Gobain, that Mr Mitchell's view of what would happen in the market should be given much less weight than that of Mr Davies. It was stated that Mr Mitchell was not a letting agent but an asset manager and that he had not personally carried out any letting agency work by marketing properties, negotiating with occupiers or landlords or agreeing transactions since 1993.

101. By contrast it was said that Mr Davies had 30 years of experience as a specialist letting agent dealing with office/industrial properties on the A1 corridor and that, during the 2 year period around the valuation date, he had handled 83 office and industrial transactions in Welwyn Garden City. In particular it was said that he had personally handled every single one of the agreed office and industrial comparables, except one at Broadwater Road. In addition it was pointed out that he had acted as a letting agent in relation to the Norton Building in various periods since the late 1990s. As a result it was submitted that his expert opinion on the letting market for the Norton building in December 2009 should carry considerably greater weight than that of Mr Mitchell.

102. I consider that there is some justification in the criticisms made by each party. Mr Davies evidently did not have or, at least express himself to have, a high opinion of Mr David Payne which is unfortunate. He also suffered from a difficulty which often arises where a surveyor is involved in advising on and negotiating a dilapidations claim and then comes to give expert evidence. The two roles are entirely different and experienced surveyors are aware of that. Very often the impression is given that the surveyor has become too closely aligned with the tactical position of the client. In this case it is clear that Mr Davies had formed a pessimistic view of the Norton Building.

Having seen him give evidence it is clear that this was his honest view of that building, based on a great deal of experience in the local area.

103. Mr Mitchell does not have the same recent personal experience in the local area but his past experience and his position in his firm mean that he has knowledge of the area from which he is able to form a view on the marketability and rental value based on agreed comparables.

104. In the end my assessment of the evidence depends less on the forensic criticisms of the experts and more on the cogency of the views expressed by the experts and the reasoning for their conclusions. In particular, I found it difficult to see why Mr Mitchell relied on comparables CM1 to CM3 at Appendix 1 to the Experts' Joint Statement. Those comparables were three Grade A transactions in Watford and Hemel Hempstead for HQ buildings from the late 1980s or early 1990s which, as the photographs confirm, are not comparable to the Norton Building and there is no explanation as to why they would be comparable buildings to property in Welwyn Garden City. Further when it came to explaining how his rental values were derived from the agreed comparables, Mr Mitchell provided no supporting reasoning or methodology. Whilst I accept that there is often a degree of subjective assessment, some explanation needs to be provided.

105. Mr Davies' views were more detailed and more supported and, in general, I found his reasoning persuasive, if at times too pessimistic. However the history of transactions and views in relation to the Norton Building does justify a pessimistic view of the prospects of letting the office space without significant work to raise the standard of the accommodation and also of the period which would be taken to let it or obtain rental income given the need for rent free periods.

106. This view is supported. In particular, Edwin Hill advised Saint-Gobain in July 1999 that it was "*not the sort of accommodation required by most occupiers in today's market and as such, whilst I would not go as far as to say the whole building is unlettable, it will always be likely to be difficult to generate any significant income from subletting, other than in numerous parts, on short leases, at deficit rentals.*" Barker Parry, Town Planning Consultants, advising Hammersmatch in June 2002 said that the building "*is not readily adapted to modern day commercial requirements without extensive refurbishment*" and in July 2006 that it was "*no longer considered suitable for modern day users on account of its age, nature, constructional material, layout, access, ceiling heights and space configuration etc.*". Similarly, Mr Lawrence Pinkney, a property consultant engaged by Hammersmatch to provide support for a planning application, stated at a meeting in July 2002 that "*tenants could be found for small parts but generally the space was no longer providing suitable accommodation for B1/B2 operators and the building would always remain substantially vacant*" and in a report in December 2002 that the building was "*no longer capable of reasonably beneficial use on account of the age, nature, constructional materials, layout, access, ceiling heights, space configuration and lease structure.*"

Office Rents and Voids

107. Substantial void periods and rent free periods are indicated by the office comparables at Appendix 2 to the Expert Joint Statement. In relation to the office space I consider that Mr Mitchell's view that the whole building could be let in 36 months is unduly

optimistic and is not supported by the more attractive letting opportunities indicated by the comparables. On the other hand Mr Davies' view that no more than 50% of the office space would be let in a four year period is probably too pessimistic. I consider that over a four year period it is probably more realistic to assume the whole building would be let with proper marketing and the positive effect of tenants coming into occupation.

108. So far as rents are concerned, Mr Mitchell referred in re-examination to the comparable at 1a Howard Court where a rent of £13 per square foot had been obtained after a vacant period of 2 years 4 months with a rent free period of 12 months. However the photographs show that it is a modern purpose built self-contained office building in which it is understood the tenant installed air conditioning and evidently was not a good comparable with the Norton Building.

109. Mr Davies relied on the comparable at the second floor of 29 Broadwater Road, which let at £10.50 per square foot after a vacant period of 1 year 11 months, with a rent free period of 2 years. It had been fully refurbished with air conditioning. The photos and evidence support this being a purpose built Grade B office building.

110. Again, I prefer the evidence of Mr Davies whose approach seems much more realistic. I have come to the view that, with appropriate refurbishment, the Norton Building would be let so as to achieve a rent which was at levels below, but not substantially below, Grade B office accommodation. In my view £10 per square foot for the office accommodation would be a sound basis for valuing the building.

Industrial Units Rent and Voids

111. In relation to the industrial units, I consider that Unit G5 could be used as ancillary offices with a rent of £7.50 per square foot. I am not persuaded that Unit G6 could be put to office use so as to attract office rental values. For the other units I consider that Mr Mitchell's value of £5 per square foot is too high, by comparison to the comparables in Appendix 3 to the Experts' Joint Statement, for the totality of the accommodation. Mr Davies' graded values look more realistic but given the industrial nature of the accommodation, I consider that the rental values would be likely to be a little higher. I would assess the values as £5 per square foot for G3, £4 for G1 and G6, £3 for G2 and £2.50 for G4.

112. In relation to the periods to achieve full occupancy, Mr Mitchell's view that all the industrial units could be let in 24 months, in repair, compares to Mr Davies' view that, in repair, it would take 2 years to fill 75% of the space and that full occupancy would probably never be achieved. Whilst full occupancy might be difficult to achieve, I consider that, with appropriate marketing and with the positive effect of tenants in occupation, it should be possible to achieve full occupancy in 2 years.

The refurbishment scheme

113. In order to achieve the office rents and void periods, it would be necessary to carry out a refurbishment scheme. The experts are not agreed as to what would be the appropriate scope of the refurbishment work.

114. Hammersmatch proceed on the basis that it would be necessary to divide the building up and let it in 11 Units. It is therefore necessary to consider what works would be necessary to convert the Norton Building into those units and what work of

refurbishment would be required to achieve the appropriate rents. Those works would have to include the items set out below.

115. The evidence of cost was not satisfactory. Mr Clarke referred in his supplemental report to information which he had provided to Mr Marland by email and which Mr Marland had incorporated into his valuation. These costs were based on Mr Clarke's experience but were not the subject of any detailed description or costing. Mr Gould had provided no figures for the cost of works until he did so in cross-examination.

116. The relevant works necessary to convert the Norton Building to units and refurbish them to the rents which I consider are appropriate are as follows:

(1) The work required to carry out the physical separation into units by the erection of partitions. The agreed cost is £18,000.

(2) Electrical distribution and meters. Mr Clarke has estimated £5000 per unit for this work, giving a figure of £65,000 based on 13 installations being required. Mr Gould put forward a figure of £1,200 for each unit. I cannot accept Mr Gould's figure but consider that some reduction should be made to the figure put forward by Mr Clarke as his figure seems high compared to other items in his report and there is no detailed justification. I allow £50,000.

(3) Roller shutter doors on the ground floor. I accept that it would be necessary to provide these to give proper access to the industrial units and this was confirmed by Mr Mitchell and Mr Gould. I accept Mr Marland's view that three would be needed, one in each of G2, G4 and G6. Mr Shaw's cost is that the cost would £12,000 each. Mr Gould did not provide a figure. I accept the figure of £12,000 and the total of £36,000.

(4) The provision of new toilets. Mr Gould had allowed for two toilet blocks on the ground floor and one on the first floor, each block containing 5 WCs or WCs/urinals, giving 15 new WCs/urinals in all. He had not given locations for where on the floors these would be installed. His cost was £16,000 per block. He also allowed for 4 disabled toilets, one on each floor, at a cost of £12,000. The total cost for toilets was therefore £60,000. Mr Marland's minimal refurbishment scheme provided for 4 new toilets on the upper floor at a cost of £22,500 each, 5 new toilets for the ground floor industrial units at a cost of £4,000 each and one toilet for the ground floor office at a cost of £4000. His total cost was £152,000. Mr Gould's evidence of the location of the toilets was unsatisfactory but equally the provision included by Mr Marland and costed by Mr Clarke seems high. I consider that £110,000 is a reasonable allowance.

(5) Refurbishment of the existing toilets. Mr Gould had allowed for the provision of new tiling and mirrors at a cost of £20,000 based on 50m^2 at £40 per m^2. Mr Marland's minimal refurbishment included for 6 toilets to be refurbished at a cost of £42,000. I think that more extensive work would be needed than Mr Gould has allowed for and I allow £35,000.

(6) Works to the main entrance. Mr Gould allowed for overcladding the entrance porch together with other limited works to the finishes of the reception area. His cost was £15,000 but this excluded disabled ramps which he accepted would be needed. Mr Marland's minimal refurbishment scheme allowed £119,850 based on 1410 square feet at £85 per square foot and also £10,000 for electrical work. It is clear that some refurbishment would be needed to make the reception attractive to potential tenants but the allowance made by

Mr Marland seems high. In addition he allowed for a second reception and stairs to be provided to the North East part at a cost of £130,000. I accept that some work would be needed there but am not persuaded that it should be so extensive. I propose to allow £120,000 overall.

(7) The provision of a fire alarm system providing zoned coverage to each unit. Mr Gould agreed that this would be necessary. His cost was £10,000. Mr Clarke's cost was £12 per m^2, leading to an allowance by Mr Marland of £124,800 for 10,400 m^2. The figure of £12 per m^2 is not explained. I propose to allow £80,000.

(8) Making the passenger lift DDA compliant. Mr Gould provided a figure of £5,000 which I adopt.

(9) Converting the goods lift into a passenger lift. I accept that on the basis of his cross-examination, Mr Mitchell had assumed two DDA compliant passenger lifts for his rental values. I consider that to achieve the relevant rental values this would be needed. No figure has been provided for this but I allow £20,000.

(10) The provision of LG7 lighting in the office floors. Again, on the basis of his cross-examination, Mr Mitchell's rents had assumed LG7 compliant lighting and Mr Gould agreed with this. The agreed "in repair" specification is limited to repairing the existing fluorescent lighting. For the rental value of accommodation which, as stated above, is below the lower end of Grade B, I am not persuaded that it would be necessary to install LG7 lighting in all the office accommodation to achieve the rental value of £10 per square foot. In my judgment an allowance would have to be made for it to be installed in some offices to attract tenants and I consider that an allowance of £200,000 should be included to cover this item.

(11) Works to the car park. The "in repair" specification is limited to the existing concrete in repair. It is evident that additional car parking would be needed and Mr Gould envisaged the concreting of the existing grassed areas and marking up the bays. No figure has been provided but I allow £65,000.

117. Mr Marland put forward additional features which he considered were necessary for a minimal refurbishment scheme. I have dealt above with the refurbishment for reception and the toilets and accepted, in part, those additional works. I consider that the staircase to the rear of Unit G4 would need to be upgraded and the rear staircases heated and allow £15,000 and £10,000 for that. For accommodation at the rental values allowed, below the bottom of Grade B accommodation, I do not consider that VRV air conditioning and ventilation or modern raised access floors would be necessary. Some tenants might want these facilities but I consider that they would be subject to other arrangements and not included in rents at the levels indicated. On that basis to create and refurbish the units so as to achieve the rental levels indicated, I consider that items (1) to (11), upgrading of the staircase and heating of the staircases would be needed. The total cost of that work is £764,000.

The Yield

118. Mr Gould has used a yield of 9%. He noted that prime yields had hardened taking the "all property" yield to 6.6%. He says that significant adjustments have to be made in relation to the Norton Building and he arrived at a figure of 9% to take account of the second-hand nature of the building, the fact it would have to be let in parts and also that there would be occasional voids and pressure for capped service charges.

119. Mr Marland considered that a yield of 9% would only apply if the Norton Building provided high quality premises let on long term leases. He gave some examples of yields which ranged from 8.95% to 13.34%. He concluded that yields of 9% to 10% could be achieved for good quality buildings in good locations around London but that when the quality fell the yield could rise substantially. He says that if the Norton Building provided good modern accommodation then the yield would be no less than 10% and was likely to be substantially higher. However he used a yield of 10% in his calculations.

120. In their closing submissions Saint-Gobain sought to contend for a yield higher than 10% on the basis that it was difficult to see why the Norton Building should achieve a yield less than the comparable in Bracknell which gave rise to the 13.34%. Mr Gould said in cross-examination that he would accept a figure of 10%. Whilst I accept that the yield on the Norton Building would be higher than comparable high quality buildings for a number of reasons identified by Mr Gould and Mr Marland and also set out in Saint-Gobain's closing submissions, Mr Marland was prepared to take a yield of 10% and I consider that for this building that is the figure I should adopt even with the more limited refurbishment scheme which I have identified above.

The Deferment Period

121. I have set out above my conclusions on the void periods. In his calculation Mr Gould used a period of 36 months for the deferment of the income stream, whilst Mr Marland used 45 months. I consider that Mr Marland's period of deferment is to be preferred to that of Mr Gould. The average letting void of 24 months reflects the period of four years for the offices and 2 years for the industrial units. I also accept the periods of 3 months for preparation of the refurbishment scheme and 6 months to execute it. The rent free period of 12 months also seems to represent a reasonable figure based on the comparables. This gives a present value when the income is discounted at 10% of 0.699.

Other costs

122. I consider that it is appropriate to allow acquisition costs at 5.75% calculated at the stage of the valuation based on the rental values and the yield. Mr Marland made a deduction on this basis in his Appendix 7 of what amounts to 5.44%. He also made a further 5.75% deduction from his final value. Mr Gould made one deduction of 5.75% from the final values in his calculations in Appendices F and K. I do not consider it reasonable or appropriate to deduct two sets of acquisition costs within one valuation. Although it may be argued that the deduction should be made at a later stage, on balance, I consider the earlier valuation stage is more appropriate. In relation to construction costs I consider that for this type of work fees of 10% would be reasonable. Finance at 8% is also, I consider appropriate. As Mr Marland says it reflects the difficulty in obtaining debt financing at the time and the inherently high risk nature of the project.

123. In relation to void costs, it is common ground that there would be costs to bear during the void and also rates to pay. Mr Gould accepts these in principle and allows void costs of £100,000 in the first year decreasing to nil after 30 months and void rates of £300,000 in the first year decreasing to nil after 20 months. Mr Marland allows £100,000 per year for the 24 month period for the void services and £240,000 per year

for the void rates over the same period. I adopt Mr Marland's figures which I consider to be reasonable estimates where they differ from Mr Gould and I consider that they have been calculated over the appropriate period.

124. Letting costs are allowed by Mr Gould at about 10% and at 15% by Mr Marland. For letting this property it would be necessary to pay higher letting fees and I adopt the 15% of Mr Marland.

125. Mr Marland also makes an allowance for risk/profit of 15% which increases the costs. He says that this is a high risk investment/development opportunity and so has allowed 15% of the cost of purchase and subsequent costs. Mr Gould sees no reason why a risk or profit element should be allowed in the valuation. I am not persuaded that it is an appropriate allowance to be made in this case in valuing the building.

Summary

126. Taking account of the matters set out above, the valuation in repair would be £3,061,251, calculated as follows:

Unit	Area	Rental	Total Rent	Sub-totals	Totals
3.1	12,797	£10	127,970		
2.1	12,781	£10	127,810		
1.1	13,409	£10	134,090		
1.2	15,898	£10	158,980		
1.3	4,163	£10	41,630		
G1	5,465	£4	21,860		
G2	8,475	£3	25,425		
G3	7,132	£5	35,660		
G4	20,814	£2.50	52,035		
G5	2,500	£7.50	18,750		
G6	5,494	£4	21,976		
			766,186		
10% yield					£7,661,860
45 month deferment at 10% 0.699					£5,355,640
Less Purchaser's costs 5.75%				440,557	
Less Letting costs 15%				114,928	
Less void costs 24 months £100,000pa				200,000	
Less empty property rates				480,000	

24 months £240,000pa					
Less cost of works				764,000	
Less Construction Fees 10% of costs of works				76,400	
Financing costs 39 months at 8% pa				218,504	
Total costs				2,294,389	
Profit on costs Nil				0	
Total				2,294,389	£2,294,389
Value in repair					£3,061,251

127. Mr Marland's calculation on this basis led to a negative value because of the refurbishment cost which he assumed in his calculation with the additional impact of fees and interest. He also concluded that a more extensive refurbishment scheme would not produce a higher value as the costs of such a scheme would not produce a higher rental income.

Site Value

128. Mr Marland then looked to see what the development value would be. He noted that the site of the Norton Building had good development potential being a level 4.27 acre site with two access points and no adverse ground conditions or contamination. He also assumed that there would be vacant possession and that the site had the benefit of sufficient service capacity in terms of gas, electricity, telecommunications, water and drainage. He considered that as the property was in an employment area it should be capable of achieving B1, B2 or B8 uses.

129. Mr Marland noted that there had been very few land transactions in Welwyn but there was, in his view, one comparable in terms of Broadwater Park, Broadwater Road, Welwyn for which he had details and in which Mr Davies had been involved. The site was 4.49 acres but his view was that with tree preservation orders only 2.85 acres would be developable. He noted that contracts had been exchanged in December 2009 for £2,100,000. This gave a value of £736,842 per acre. Applying that to the Norton Building site of 4.27 acres gave a value of £3,146,315. As there was a building on the site which would have to be demolished, he used a figure of £200,000 which Mr Gould had provided for the cost of demolition. This gave a value of £2,943.315 which Mr Marland rounded up to £2,950,000.

130. He concluded that as the building would be demolished it would theoretically be the same value in repair and out of repair. However he saw some advantages in the

building being "in repair" for a speculative developer and said that he thought a hypothetical purchaser in December 2009 might have paid up to an additional £100,000 had the building been in good condition. He therefore concluded that the value in repair would have been £3,050,000 and in disrepair £2,950,000. It followed that the diminution in value was £100,000.

131. On behalf of Hammersmatch it is said that there are a number of objections to Mr Marland's approach of using Broadwater Park as a comparable. First it is pointed out that Broadwater Park was a cleared site whereas the Norton Building has a building on it in disrepair. Secondly, it is said that the Broadwater Park sale was a sale to a public authority for a site for a central resources library and so is the value of a site which needed planning permission for Class D use. Thirdly, it is submitted that Mr Marland's assumption that the hypothetical buyer would be a speculator cash buyer or an owner occupier of the site for redevelopment is not borne out by Mr Davies' evidence. He says that there is no effective demand due to the state of the economy and market for speculative office development and speculative B1, B2 or B8 development has no effective demand due to market conditions and bank lending policies. He also says that there is no demand for sale for owner occupier office development. Mr Davies says that there is some demand on the basis of sale for owner occupier industrial/warehousing development and the strongest sector would be for sale for open storage uses for owner occupation. He says that the site would have to be offered in up to four plots and demand on any other basis would be weak.

132. Instead Hammersmatch relies on a site value which Mr Gould has calculated on the basis of a residual valuation. His calculation is £2,100,000 as set out in Appendix F to his report. The basis of his valuation is that the building would be demolished and redeveloped for B1, B2 or B8 use. On this basis he calculates that the Gross Development Value less the Costs of Development would be £2,091,605 which he rounds up to £2,100,000.

133. On behalf of Saint-Gobain it is submitted that, all things being equal, a valuation by reference to comparables is more reliable than a residual valuation. The question is whether, therefore, the approach of Mr Marland using Broadwater Park as a comparable is appropriate.

134. I have come to the conclusion that, whilst superficially attractive, a valuation exercise which is based on the value of Broadwater Park is not making a proper comparison with the Norton Building. The sale of a cleared site to a local authority cannot, in my judgment, be compared to the sale of the Norton Building to potential buyers. When this is added to the uncertainty of how the trees on Broadwater Park would be dealt with in arriving at a development value per acre, I do not consider that a calculation for the value of the Norton Building can properly be derived from the valuation of Broadwater Park in the manner in which Mr Marland seeks to do. Further, some account would have to be taken of and some calculation would have to be made based on the way in which the site would be used by the hypothetical buyer to arrive at a value for this type of buyer. This has not been done by Mr Marland.

135. In relation to Mr Gould's valuation, he points out that his calculation is based on an assumption of planning permission and he points out that there is no planning permission and that there have not been any preparations for redevelopment proposals

and there is no guarantee of planning permission. Whilst I accept those cautions, there are various allowances built into his calculation and I have therefore come to the conclusion that it is appropriate to take a site value of £2,100.000 as the site value in this case.

Value in Disrepair

136. Mr Marland has put forward a valuation of the diminution in value based on the value of the Broadwater Park comparable. However that calculation is merely based on his "finger in the air" figure of £100,000 for the additional value of the property in repair. Whilst valuation is a question of assessment and judgment, there has to be some reasoning related to the underlying value of the property and the risks and costs involved.

137. For those reasons I am not persuaded that Mr Marland's calculation of the Norton Building in repair and in disrepair, leading back to his figure of £100,000 for diminution in value assists me in coming to a conclusion where, as here, I have found that the Norton Building does have a positive value in repair.

138. I therefore turn to consider Mr Gould's approach of calculating the out of repair valuation on a cost of works basis. Obviously, Mr Marland did not prepare a calculation on that basis because his in repair calculation produced a negative value. It was also well below any site value. Mr Gould did carry out such a calculation and his latest version is at his revised Appendix K. That calculation has evidently to be adjusted for the agreed cost of the dilapidations and my findings as to the cost of the mechanical and electrical dilapidations.

139. The starting point is the value in repair of £3,061,251 set out above. The agreed value of the building work dilapidations is £1,785,578. The cost of the mechanical and electrical dilapidations, including the agreed figure of £435,926, is £613,526. The total cost is therefore £2,399,104.

140. There then has to be an allowance for fees. These are agreed and are to be applied as 5.75% for supervision of the building works and 5.5% for supervision of the mechanical and electrical works, with 0.9% for CDM co-ordination to be applied to the whole works. This gives rise to an additional sum of £158,007 calculated as follows:

(1)	Supervision of building works: 5.75% of £1,785,578	= £102,671
(2)	Supervision of M&E works:5.5% of £613,526	= £ 33,744
(3)	CDM co-ordination: 0.9% of £2,399,104	= £ 21.592
		£158,007

141. The total cost of the works and fees is therefore £2,557,111 (£2,399,104 and £158,007).

142. Financing costs are, I consider, appropriate to allow for the work to be carried out over 12 months at 10% averaged over that period, leading to 5% of £2,557,111 or £127,856, giving a total of £2,684,967. In addition a risk and management allowance of 15% should be added to this, giving £402,745 (15% of £2,684,967). That gives an overall total of £3,087,712.

143. At this stage, it can be seen that the deduction from the value in repair at £3,087,712 means that the cost of putting the building in repair exceeds the value of the property in repair of £3,061,251. It seems to me that this supports the submission by Saint-Gobain that the diminution in value is not represented by an out of repair valuation based on the cost of the works in this case. In terms of the intention of Hammersmatch, it seemed to me that the evidence did not show any clear intention one way or another but was more an approach of keeping options open pending these proceedings in circumstances where, I accept, Hammersmatch could not obtain or afford the funding necessary to put the building in repair. I therefore accept Saint-Gobain's submission that, at least in any sense which is probative of the diminution in value on the term date, Hammersmatch did not intend to carry out the dilapidations for which it claims. In my judgment, that is the appropriate approach in this case.

144. As submitted on behalf of Saint-Gobain and as accepted by Mr Gould in cross-examination, once the resulting figure falls below the site value, then the diminution in value is the difference between the in repair value and the site value.

145. As set out above I have come to the view that the site value is better reflected by Mr Gould's calculation of £2,100,000 than by Mr Marland's use of the comparable at Broadwater Park.

146. On this basis and avoiding the false impression of mathematical accuracy in the figure, I consider that the diminution in value should be based on the difference between the value of the property in repair calculated as £3,061,251 or rounded to £3,000,000 and the site value of £2,100,000. In those circumstances I assess the diminution in value at £900,000.

Issue 4: Loss of rent/insurance

Loss of rent

147. I now consider whether Hammersmatch is entitled to recover loss of rent and, if so, what is the appropriate figure.

148. It is common ground that loss of rent is only recoverable, if at all, by way of damages for breach of the obligation to repair. Therefore the statutory limit on damages in s.18(1) of the Landlord and Tenant Act 1927 applies. As the statutory ceiling applies in this case so that damages are limited to £900,000 being the amount by which the value of the Hammersmatch's reversion was diminished because of the breaches of the repairing obligation, this is not a case where Hammersmatch can recover loss of rent in addition to the cost or repairs.

Loss of Insurance

149. In Hammersmatch's closing submissions it accepted that any claim would be dealt with by way of the claim for loss of rent and there was no need to consider this separate head of claim. As a result Hammersmatch is not entitled to damages representing the cost of insuring the premises until they are re-let.

Issue 5: Schedule Costs

150. These have been agreed at £15,000 for the Schedule of Dilapidations, £4320.40 for the mechanical and electrical schedule and £1,000 for the fees for service of the schedules. The total claim is £20,320.40.

Issue 6: Interest

151. I now turn to consider Hammersmatch's claim for interest. It is common ground that interest should apply at 4.5% per annum. In relation to the damages of £900,000 the interest should apply from the term date of 28 December 2009. It should also apply to the schedule costs. I would ask the parties to seek to agree the date when interest starts to apply on the schedule costs and also a figure for interest.

Summary and Conclusion

152. For the reasons set out above, I consider that Hammersmatch's damages are limited by s.18(1) of the Landlord and Tenant Act 1927 to the value of the diminution of the reversion which I have assessed at £900,000. In addition Hammersmatch is entitled to the cost of the schedules of £20,320.40 and to interest at 4.5% per annum in a sum to be calculated.