Neutral Citation Number: [2026] EWHC 2453 (TCC)

Case No: HT-2024-000377

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
TECHNOLOGY AND CONSTRUCTION COURT (KBD)

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 29 September 2026

Before:

HIS HONOUR JUDGE KEYSER KC
sitting as a Judge of the High Court

- -

Between:

(1) CRAIGARD (DARTFORD) LIMITED **(2) CRAIGARD (DARTFORD) NOMINEES LIMITED**	**Claimants**
- and -	
(1) WESTBURY HOMES (HOLDINGS) LIMITED **(2) WESTBURY LIMITED**	**Defendants**

- -
- -

Andy Creer (instructed by **Hamlins LLP**) for the **Claimants**
Barnaby Hope (instructed by **Knights Plc**) for the **Defendants**

Hearing dates: 4, 8, 9, 10, 11 June 2026

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Approved Judgment

This judgment was handed down remotely at 10.30am on 29 September 2026 by circulation to the parties or their representatives by email and by release to the National Archives.

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HIS HONOUR JUDGE KEYSER KC

Judge Keyser KC:

Introduction

1. This is a terminal dilapidations claim concerning premises formerly known as Persimmon House and now known as Cotton Lake House and situated at Unit 2015 Anchor Boulevard, Crossways, Dartford, DA2 6QH ("the Premises"). The Premises are located at Crossways Business Park and within the Thames Gateway area. They are a purpose-built two-storey office building, built in about 1998, and provide 14,916 square feet of office accommodation, set evenly over the ground and first floors, and parking for 83 cars on a 1.09-acre site.

2. The claimants are the freehold owners of the Premises, having purchased them for £3.1m in March 2021 as a property syndicate investment. Their title is registered at HM Land Registry under title number K798803.

3. The first defendant was tenant to the claimants of the Premises under a lease ("the Lease") dated 9 July 2003 and granted by Dartford Nominees (No. 1) Limited and (2) Dartford Nominees (No. 2) Limited as landlords. The second defendant was surety under the Lease. The first defendant sub-let the office accommodation and was not in occupation of the Premises for the purpose of its business. The three sub-leases were all contracted out of the security of tenure provisions in Part II of the Landlord and Tenant Act 1954.

4. The Lease expired by effluxion of time on 8 July 2023. At the expiry of the Lease the claimants were the owners of the reversion immediately expectant on the term of the Lease and were entitled to the benefit of the performance of the tenant's covenants and conditions.

5. A schedule of dilapidations dated 1 February 2024 was served on the first defendant a few days later.

6. This claim was commenced on 8 November 2024 and served on the defendants on 13 November 2024. By their pleaded case, the claimants claim damages of £1,609,125.53, comprising (i) £1,335,980.15 for remedial works, (ii) £218,145.38 for loss of rental income, and (iii) £55,000 for professional fees. In the light of its own expert evidence, the amount now sought by the claimants in respect of remedial works is reduced to £1,237,571.01.

7. By their defence, which was filed and served on 12 December 2024, the defendants contended that the cost of remedial works consequent on the first defendant's breaches of covenant was £126,051.38 but that damages were limited to £3,123 by section 18(1) of the Landlord and Tenant Act 1927. In the light of their expert evidence, the defendants now contend that the cost of remedial works is £344,440.39 and that the statutory cap on damages is £123,161 (or, if the claimants' case on the scope and cost of remedial works is accepted, £1,059,695).

8. The exchange of expert evidence has resulted in a large measure of agreement as to the scope and cost of works referrable to breach of the repairing covenants; only a few items remain in dispute. In terms of value, there are three big issues in the case: (i) the extent to which the heating, ventilation and air-conditioning ("HVAC") system was out

of repair; (ii) the existence and relevance of any intention on the part of the claimants to replace the entire HVAC system regardless of whether it was strictly in a state of disrepair; (iii) the extent, if any, to which the statutory cap on damages limits the claim.

9. Most, though not all, of the people who had significant involvement in relevant events gave evidence at the trial. I mention here the following persons in particular:

- David Foster: a director of the claimant companies, who had close involvement with the relevant events;
- Paul Foster: a director of the claimant companies and a chartered surveyor; the father of David Foster. In the period relevant to this case, he acted in a consulting capacity and was resident in Guernsey and, accordingly, had little involvement in day-to-day events.
- Matthew Barker: the claimants' Investment and Asset Manager since June 2021. While in his previous employment with Lambert Smith Hampton he had introduced the Premises to the claimants. From about September 2021 he had primary responsibility within the claimant companies for the Premises.
- Thomas Everington: a chartered building surveyor, and the owner and director of Signal Surveyors Limited. He has done a lot of work for the claimants, and on their behalf he carried out a building acquisition survey before they purchased the Premises and later prepared and oversaw the tender process for the works that were carried out and compiled the schedule of dilapidations dated 1 February 2024.
- John Singleton: a project manager for Design and Mechanical Service Limited ("DMS"). In March 2023 he carried out an inspection of the HVAC system at the Premises, and he later wrote a document in the form of a report for the claimants.
- Douglas Rogers: a director of Harrisons Surveyors ("Harrisons"), who managed the Premises on behalf of the first defendant.

10. Evidence was also given by three expert witnesses on each side. I shall mention them and their evidence in the course of discussion of the issues.

11. I am grateful to Mrs Creer and Mr Hope, counsel respectively for the claimants and for the defendants, for the helpful and efficient way in which they conducted the trial.

12. The remainder of this judgment will be structured as follows:

- The Lease (paragraphs 13 – 14)
- The Law (paragraphs 15 – 25)
- The Facts (paragraphs 26 – 73)
- Common Law Damages (paragraphs 74 – 138)
- The Statutory Cap: Valuation (paragraphs 139 – 147)
- Conclusion paragraph 148).

The Lease

13. The following are relevant terms of the Lease.

> "The Tenant [that is, the first defendant] HEREBY COVENANTS with the Landlord for the duration of the Term as follows:
>
> …
>
> Schedule of Dilapidations Costs Etc
>
> 3.5 To pay to the Landlord on demand on an indemnity basis all reasonable costs charges and expenses (including reasonable legal costs and fees properly payable to any Superior Landlord or to a surveyor whether or not the Landlord's Surveyor and bailiff's charges) which may be properly incurred by the Landlord:
>
> …
>
> 3.5.2 in contemplation of or incidental to the preparation and service of a Schedule of Dilapidations during the Term or within 6 months following the determination thereof and
>
> 3.5.3 incidental … to the remedying of any breach of covenant on the part of the Tenant herein contained
>
> …
>
> Full Repair
>
> 3.7.1 To repair and throughout the Term to keep the whole of the Premises including the exterior and structure thereof and including (without prejudice to the generality of the foregoing) all conduits pipes drains channels watercourses sewers wires cables sanitary and water apparatus roads parking areas fences boundary walls lifts plant machinery heating cooling and air conditioning apparatus and appurtenances of whatsoever nature belonging to and/or exclusively serving the Premises in good and substantial repair and condition maintained paved cleansed (damage by any of the Insured Risks excepted unless the policy or policies of insurance shall be vitiated or payment of the policy monies shall be refused in whole or in part in consequence of any act neglect default or omission of the Tenant or any sub-tenant or their respective servants agents licensees or invitees)

3.7.2 To enter into and to maintain in force service and maintenance contracts ('Maintenance Contracts') in respect of the lifts ventilating and heating equipment boilers fire alarm system services and other plant and machinery within the Premises with reputable companies

3.7.3 To obtain satisfactory test certificates as may be reasonably required by the insurers to the Premises and whenever reasonably required to produce copies of such contracts and certificates in relation to all fixed plant and equipment comprised in the Premises and or lifts ventilating and heating equipment boilers fire alarm system services and other plant and machinery within the Premises

Clean Windows

3.8 To clean all windows in the Premises both inside and out at least once in every month during the Term

…

Decorations

3.10.1 In the third year of the term and in every third year thereafter and also in the last three months of the Term (howsoever terminating) but not more than once in the last 18 months of the Term to prepare and paint in a proper and workmanlike manner all the outside wood iron and stucco or cement work of the Premises and all other exterior parts as have previously been painted or ought properly to be so painted with two coats at least of good quality and suitable paint of a tint or colour to be approved by the Landlord such approval not to be unreasonably withheld or delayed and to wash down and clean all tiles glazed panels and bricks and polished stone and similar washable surfaces and to prepare and treat suitably having regard to its nature all outside aluminium bronze and other unpainted metalwork of the Premises

3.10.2 In the fifth year of the Term and in every fifth year thereafter and also in the last three months of the Term (howsoever terminating) but not more than once in the last eighteen months of the Term to prepare and paint in a proper and workmanlike manner all the inside wood iron and other work usually painted of the Premises with two coats at least of good quality and suitable paint and to wash down and dean ail tiles glazed panels and bricks and polished stone and similar washable surfaces and to

prepare and treat suitably having regard to its nature (whether by papering varnishing french polishing or otherwise) all internal surfaces of the Premises which ought not to be painted PROVIDED THAT in the last three months of the Term the tints colours and patterns of all such works of internal decoration shall be such as shall be approved by the Landlord such approval not to be unreasonably withheld or delayed

Statutory Requirements

3.11.1 At all times during the Term to observe and comply in all respects with the provisions and requirements of

3.11.1.1 any and every enactment (which expression in this covenant includes as well any and every Act of Parliament already or hereafter to be passed (including for the avoidance of any doubt but without prejudice to the generality of the foregoing the Fire Precautions Act 1971) and any and every order regulation and bye-law already or hereafter to be made under or In pursuance of any such Act)

3.11.1.2 any regulation of the European Community

3.11.1.3 any court or tribunal and

3.11.1.4 any statutory authority

so far as they relate to or affect the Premises or any part thereof or the user thereof and to indemnify the Landlord at all times against ail claims costs charges and expenses in respect thereof and not at any time during the Term to do or omit or suffer to be done or omitted on or about the Premises or by way of application to any Court any act or thing by reason of which the Landlord may under any enactment incur or have imposed upon it or become liable to pay any penalty damages compensation costs charges or expenses

3.11.2 To comply with all recommendations from time to time of the insurers of the Premises and of the appropriate authorities in relation to fire precautions affecting the Premises

3.11.3 If compliance with any provision of this Clause 3.11 requires the carrying out of works then (unless the Landlord shall in writing elect with the consent of the Tenant to carry out such works at the reasonable and

proper cost of the Tenant) the Tenant shad carry out such works at its own cost to the reasonable satisfaction of the Landlord

Yielding-Up

3.12.1 At the expiration or sooner determination of the Term quietly to yield up unto the Landlord the Premises in such state and condition as shall in all respects be consistent with a full and due performance by the Tenant of the covenants on the Tenant's part herein contained (except the Tenant's fixtures and fittings) the Tenant forthwith making good all damage done to the Premises by such removal

…

Indemnity

3.31.1 To keep the Landlord fully and effectually indemnified from and against all expenses costs claims demands damages and any other liability whatsoever in respect of any action proceeding claim demand loss expense damages costs or other liability in respect of

…

3.31.1.4 any breach of any of the Tenant's covenants contained in this Lease

…

Surety

6.1 The Surety HEREBY COVENANTS with the Landlord so that such covenant shall and does appertain to each and every part of the Premises and so that such covenant shall be construed as If it were a separate and independent covenant with each and every person who shall from time to time be the owner of the reversion immediately expectant upon the Term that throughout the Term the Tenant will punctually pay the tents and other sums payable under this Lease and will perform and observe the Tenant's covenants and conditions contained in this Lease and any authorised guarantee agreement that the Tenant may enter into pursuant to the provisions of this Lease and the Surety will Indemnify and keep indemnified the Landlord against all losses expenses costs claims or damages arising by reason of any non-payment of such rents and other sums and any breaches of such covenants and conditions PROVIDED

> THAT any neglect or forbearance of the Landlord in enforcing any payment covenant or condition or any disclaimer of this Deed by a liquidator or trustee in bankruptcy shall not release or in any way affect the liability of the Surety under this clause".

14. There is no material dispute between the parties as to the interpretation of the tenant's covenants. The second defendant accepts that as surety it is liable to indemnify the claimants against the losses resulting from breaches of the tenant's covenants.

The Law

The Tenant's Obligations

15. As to the standard of repair, Dowding & Reynolds, *Dilapidations: The Modern Law and Practice,* 8th edition, (hereafter, "Dowding & Reynolds") states at para 9:05:

> "As a general principle, the standard of repair imposed by a covenant to 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."

The formulation of the test is taken from the judgment of Lord Esher MR in *Proudfoot v Hart* (1890) 25 Q.B.D. 42, where the covenant was to keep in "good tenantable repair". It has been taken to apply more generally, including to cases referring to "substantial" rather than "tenantable" repair. The standard is not that of perfection. What it requires in any given case is a question of fact and degree: see *Simmons v Dresden* [2004] EWHC 993 (TCC), 97 Con LR 81, (HHJ Richard Seymour QC) at [48].

16. In the present case, the primary covenant in clause 3.7.1 is to keep the premises "in good and substantial repair and condition". Dowding & Reynolds states at para 9:34:

> "A covenant to keep in good or tenantable condition may be held to impose a liability to carry out work going beyond what might ordinarily be called 'repairs'. Even where this is the case, however, it is thought that the standard imposed by such a covenant is to be judged by much the same factors as those that apply to a covenant to repair. In deciding whether the premises are in good or tenantable condition, it will therefore be necessary to apply the *Proudfoot* standard, that is to say, to ask whether, having regard to their age, character and locality, they are reasonably fit for the occupation of a reasonably minded tenant of the class likely to take them."

(See the supporting *dicta* there cited, including my own remarks in *Pullman Foods Limited v The Welsh Ministers* [2020] EWHC 2521 (TCC) at [150].)

17. In *Ultraworth Ltd v General Accident Fire & Life Assurance Corp Plc* [2000] EWHC 172 (TCC), [2000] 2 EGLR 115, the tenant's repairing covenant extended to the combined heating and air-conditioning system at the demised premises. HHJ Havery QC reviewed the authorities and said at [16]:

> "In my judgment, the effect of the authorities in relation to the facts of this case is this. The claimant is not entitled to a new system simply because the system was new at the beginning of the term. It is sufficient to comply with the repairing covenant that the system be in good working order, i.e., that it be in repair, and work substantially as well as the original system did (or as it should have done) when new. It is not necessary that it should require as little maintenance as a new system. Whether the covenant is complied with is a question of fact and degree."

The Measure of Damages at Common Law

18. The primary measure of damages for breach of a repairing covenant, in a claim brought when the lease has come to an end, was stated as follows by Lopes LJ In *Ebbetts v Conquest* [1895] 2 Ch 377 at 384:

> "The general rule with regard to damages in actions of this kind may be stated thus: Where the term has come to an end and the action is on the covenant to leave in repair, the measure of damages is the sum it will take to put the premises into the state of repair in which the tenant ought to leave them according to his covenant, …"

That this measure represents a rule of law was affirmed by the Court of Appeal in *Joyner v Weeks* [1891] 2 Q.B. 31 (a case, unlike *Ebbetts v Conquest*, which concerned an action after expiry of the term of the lease), where Lord Esher MR said at 43:

> "That rule is that, when there is a lease with a covenant to leave the premises in repair at the end of the term, and such covenant is broken, the lessee must pay what the lessor proves to be a reasonable and proper amount for putting the premises into the state of repair in which they ought to have been left."

19. As a matter of the common law measure of damages, no reduction from the amount of the cost of repairs is made where the landlord has decided or arranged to demolish the premises (though see below for statutory intervention) or has re-let on full repairing terms or where the breach of covenant has not affected the rental value of the premises: see *Woodfall: Landlord and Tenant*, para 13:119, and the cases there cited.

20. However, at common law the cost of repairs is not recoverable without limitation. In *Sunlife Europe Properties Limited v Tiger Aspect Holdings Limited* [2013] EWHC 463 (TCC), [2013] 2 P&CR 4, ("*Sunlife*") Edwards-Stuart J said:

> "42. However, the primary measure of damages — the cost of putting the building back into repair — is subject to two rules. The first is that a claimant cannot recover in respect of losses

> which, by acting reasonably, he could have avoided — the so-called 'duty to mitigate'. The second is that a claimant cannot recover a cost of repair that is disproportionate to the benefit conferred by the repair in question (see *Ruxley Electronics & Construction Ltd v Forsyth* [1996] A.C. 344).
>
> 43. It follows, therefore, that if the cost actually incurred by the landlord in seeking to put the building back into the condition in which it should have been left by the tenant is greater than the cost of other work which would be sufficient to put the building into that condition, then the landlord is limited to recovering the costs of the latter."
>
> …
>
> 45. However, I agree with Mr Wonnacott that the appropriate test is not whether the landlord has acted reasonably in carrying out remedial works, but rather whether what the landlord has done by way of repair goes no further than was necessary to make good the tenant's breaches of covenant. …"

21. In the context of the present case, some further passages in the judgment of Edwards-Stuart J in *Sunlife* are relevant.

> "37. Mr Hutchings submitted, and I accept, that even if there is an element of betterment because the landlord chooses to carry out more extensive work than was necessary to put the building in the condition in which it should have been left by the tenant, this does not mean that the tenant escapes liability for the cost of the reasonable repair: see, *Carmel Southend Ltd v Strachan & Henshaw Ltd* [2007] EWHC 1289 (TCC), per Coulson J. at [49] and [54]. He submitted also that if the remedial work involves a new method of design or construction that a landlord was compelled to do in order to comply with current legislation and regulations, that does not absolve the tenant from liability.
>
> …
>
> 39. … In my judgment the starting point must be to consider whether or not, if Tiger [the tenant] had sufficiently performed its obligations as and when they fell due, so that the premises were delivered up at the end of the term in good repair and condition as the leases required, Sunlife [the landlord] could have let or sold the building without any significant discount on the price to reflect the actual condition of the building.
>
> 40. If the answer to that question is yes, then the measure of loss is either the cost of putting the building back into the condition in which it should have been delivered up, or the difference in the value of the building in its actual state and in the state in which it ought to have been delivered up, whichever is less.

Theoretically, the two should be the same but in practice that is often not the case.

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

…

45. … I agree with Mr Wonnacott that the appropriate test is not whether the landlord has acted reasonably in carrying out remedial works, but rather whether what the landlord has done by way of repair goes no further than was necessary to make good the tenant's breaches of covenant. For example, in this case it was accepted that the works carried out by Sunlife were sensible and appropriate and, in the circumstances, were works that it was entirely reasonable for a landlord in Sunlife's position to carry out. But that does not necessarily mean that they were the works that were necessary to restore the building into the condition that it should have been in if Tiger had complied with its obligations under the leases. …

46. In the context of the facts of this case and in the light of the parties' submissions, my conclusions on the law can be summarised as follows:

(1) The tenant is entitled to perform his covenants in the manner that is least onerous to him. In general, therefore, such performance should be the starting point for any assessment of damages.

(2) The tenant is obliged to return the premises in good and tenantable condition and with the M&E [mechanical and electrical] systems in satisfactory working order: he is not required to deliver up the premises with new equipment or with equipment that has any particular remaining life expectancy. The standard to which the building is to be repaired or kept in repair is to be judged by reference to the condition of its fabric, equipment and fittings at the time of the demise, not the condition that would be expected of an equivalent building at the expiry of the lease.

(3) In a case such as the present, where there are covenants against making alterations to the premises, the tenant is not entitled, let alone obliged, to deliver up the premises in a condition that involves any material alteration to the building or the fixtures as demised: the fact that the landlord can consent to any such alteration does not affect the basic obligation.

(4) Accordingly, where the requirement to put and keep the premises and fixtures in good and tenantable condition involves the replacement of plant that is beyond economic repair, the tenant is required to replace it on a like for like or nearest equivalent basis: he is not required to upgrade it in order to bring it into line with current standards (unless required to do so by law or to comply with any necessary regulations). However, as with most obligations in commercial contracts, this obligation must be interpreted in a manner that accords with commercial common sense.

(5) Any claim by the landlord for the cost of repairs is subject to the general rules that

(a) he cannot recover for a loss which, by acting reasonably, he could have avoided, and

(b) he cannot recover the cost of remedial work that is disproportionate to the benefit obtained.

(6) By contrast, where there is a need to carry out remedial work as a result of the tenant's breach of his repairing covenants, the fact that the landlord has carried out more extensive work than was caused by the breach does not of itself prevent him from recovering the cost of such work as would have been necessary to remedy the breach.

(7) Where market conditions at the expiry of the lease require upgrading or refurbishment works to be carried out in order to enable the building to be let to the appropriate type of tenant, a tenant in breach of a repairing covenant is not liable for the costs of any work to remedy the breach to the extent that such work would be rendered abortive by the need to upgrade or refurbish the building (i.e. where there is supersession).

(8) Where the tenant is in breach of his covenant, in the absence of any evidence to the contrary the court is entitled to infer that remedial work is necessary to remedy the breach unless the tenant demonstrates the contrary: by parity of reasoning with the observations of Longmore LJ in *Phethean-Hubble v Coles* [2012] EWCA Civ 349."

22. In addition to the primary measure of the cost of repairs, the landlord is in principle entitled to damages for the consequential loss of rent suffered during the period needed to carry out the repairs. Dowding & Reynolds, op. cit. at para 32-04, states:

> "The current state of the law, at first instance, at any rate, is therefore that in order for loss of rent to be recoverable, it must be shown by evidence that the need to carry out the repairs has prevented the premises from being let in circumstances where they otherwise could have been."

The Statutory Cap on Damages

23. Section 18(1) of the Landlord and Tenant Act 1927 ("section 18(1)") does not alter the method of assessing damages for breach of a repairing covenant; it only provides an upper limit to the amount of such damages. Section 18(1) provides:

> "(1) 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."

It is common ground between the parties that what has been referred to as the second limb of the subsection (the words after the semi-colon: "and in particular etc") does not apply on the facts of the present case. I agree with the parties' agreed position; in view of the agreement, it is unnecessary to say why.

24. Accordingly, in *Sunlife Europe Properties Limited v Tiger Aspect Holdings Limited* [2013] EWHC 463 (TCC), [2013] 2 P&CR 4, at [27], Edwards-Stuart J approved the submission that

> "the measure of the recoverable loss in a terminal dilapidations claim is the lower of:
>
> (1) the total of (a) the cost of remedying the defects (putting the property back into the covenanted condition), and (b) any rent actually lost and other expenses actually incurred whilst the defects are being remedied; and
>
> (2) The diminution in the value of the landlord's reversion, as at the term date, caused by the breaches — the statutory

cap."

It is to be noted that, in accordance with the terms of section 18(1), and consistently with Edwards-Stuart J's judgment, the statutory cap applies to the sum of (i) the cost of repairs and (ii) the loss of rent: that is, it applies to the entire damages claim, not only to the primary measure of damages.

25. Where the former landlord has acted reasonably in carrying out the remedial works (by which is meant that it has carried out works that go no further than was reasonably required to remedy the former tenant's breach of covenant), the starting point is that the actual cost of those works is taken to represent the diminution in value of the reversion, the burden of proving otherwise resting on the former tenant. See Dowding & Reynolds, *Dilapidations: The Modern Law and Practice,* 7th edition, at para 30-32.

The Facts

26. Despite its length, this section of the judgment is not intended to provide an exhaustive discussion of the evidence adduced at trial or a complete narrative. It seeks, rather, to set out sufficient matters to explain how the central points of the dispute have arisen, to indicate the basis for a few findings on disputed issues, and to set the scene for the discussion of some specific matters in the dilapidations claim.

27. After taking the Lease in 2003, the first defendant initially occupied the Premises, but after its acquisition by Persimmon Homes it vacated the Premises and from 2007 sub-let them to multiple occupiers, latterly Medite Smartply UK Limited ("Medite"), The Riverside Group Limited ("Riverside"), and National Business Communications Ltd ("NBC") under sub-leases as follows:

    a) Sub-lease dated 24 May 2018 of a ground-floor suite to Medite from 20 September 2017 to 5 July 2023 at an initial annual rent of £69,660;

    b) Sub-lease dated 19 November 2014 of a ground-floor suite to Riverside from the date of the sub-lease to 5 July 2023 at an initial annual rent of £71,856;

    c) Sub-lease dated 2 September 2019 of the first-floor suite to NBC from the date of the sub-lease to 5 July 2023 at an annual rent of £147,325.

28. Management of the Premises on behalf of the first defendant was undertaken by Harrisons, principally by its director Douglas Rogers. The lift at the Premises was maintained by Otis Lifts under an annual maintenance contract, which provided for periodic servicing and for any necessary attendance on site to deal with faults. The heating, ventilation and air-conditioning system ("the HVAC system") was maintained by Honeywell Systems under an annual contract until May 2022, and thereafter until the expiry of the Lease by David Quick, a former employee of Honeywell Systems.

29. The cost of works of maintenance and repair was passed on to the sub-tenants, on a proportionate basis, under the service charge in their respective sub-leases. Under cross-examination, Mr Rogers accepted that throughout the period after the first defendant ceased to occupy the Premises, especially but not only during periods when offices were not sub-let, the first defendant's rental income from the Premises did not

meet its rental liability under the Lease. He also accepted that during the final four years of the term of the Lease the service charge was substantially less than the amount of the cost of maintenance and repairs. He denied, however, that Harrisons and the first defendant had adopted a deliberate policy of minimising expenditure on maintenance and repairs, though he said that there had been a balancing act of, on the one hand, maintaining the Premises and, on the other hand, keeping the service charge down.

30. The evidence of Mr Rogers was that it had been recognised as early as 2011 that the chillers in the HVAC system were not operating at full capacity and would need to be replaced; he said, however, that the HVAC system as a whole continued to operate satisfactorily so as not to affect the comfortable occupation of the sub-tenants. That latter claim is plainly false. There is plenty of evidence that there had for several years been frequent complaints by those working in the offices, in particular regarding excessive temperatures during the summer months.

31. As regards the first defendant's knowledge of the problems with the chillers, an email that Mr Rogers wrote to the defendants in March 2017 records that "[t]he potential obsolescence of the chiller units" had been known before Harrisons took over the management of the Premises in 2008. In 2011 quotations were obtained from Honeywell for the repair or replacement of the chillers, with a view to programming the work as part of more extensive works at the Premises. However, the work was not done at that stage. In an email to the defendants in January 2017, Mr Rogers noted that "any delay in the replacement of the chillers would be very risky as they are now past their normal life span and we would wish to avoid a serious breakdown during the summer months." An updated and more detailed quotation was obtained from Honeywell in June 2017. As the existing chillers contained R22 refrigerant, which was no longer permitted to be added to existing systems or used in new systems, a new modern equivalent was required. It was envisaged that the chillers would be dismantled in situ and removed by crane through the ventilation openings in the roof, and that the new units would similarly be installed by crane through the roof opening and be assembled when in place. Mr Rogers accepted in evidence that, if new chillers were installed, it would be necessary at the same time to ensure that the rest of the HVAC system was clean and functional.

32. Discussions took place between the first defendant and Harrisons concerning the planning of the works to minimise disruption to the occupiers. In an email to David Huggett of the defendants in August 2019, Mr Rogers wrote:

> "The existing [HVAC] system is the same age as the building and is technically obsolete, but is nursed along by Honeywell our service engineers. This may continue until such time as the system fails and requires re-gassing which will not be possible due to current legislation preventing this. This effectively means that the large part of the air con system in the roof void would need replacement. We have obtained costings from Honeywell but due to the high cost we have tried to obtain alternative quotations without success, mostly due to the need to lift the plant in and out of the roof structure by crane and rebuild a new replacement system, thus a fairly complicated process. The costing previously provided by Honeywell amounted to around £80,000.

> Whilst it is a relatively short period until your lease on the property expires in July 2023, the system could fail at any time with the resultant disruption so we believe we do need to consider replacing the system as we had intended and planned."

33. Mr Rogers said, however, that the decision whether to proceed with the replacement of the chillers or to make a financial contribution to more extensive works by the landlord would have necessitated discussions with the landlord to ascertain the latter's intentions —there would have been no point in replacing the chillers, if the landlord intended to install an entirely new HVAC system—and that those discussions could not progress because in late 2020 the landlord decided to place the Premises on the market for sale. Under cross-examination, Mr Rogers was unable to say why the works had not been carried out earlier in 2020, when the Premises were empty as a result of the Covid lockdown and no question of disruption to the sub-tenants would have arisen. However, in his email to Mr Huggett on 29 April 2020 he wrote:

> "… I believe we are up to date on the building pending the ongoing issue concerning the air conditioning system. At present we are awaiting an update of the estimate for the potential works from Honeywell and will report this when we have it. In the meantime as the building is effectively locked down the air con has been left on its minimal tickover to keep it functional as far as possible. As previously discussed if it can continue and last until July 2023 then it may be possible to avoid the expenditure which I think you indicated you had budgeted around £100K and ideally that would be our objective. If it can appear functional at the end of the lease in July 2023 then I think the landlords may find it difficult to impose any renewal under a dilapidations claim. Likewise we are conscious that it may let us down and have to renew it. At the moment I am inclined to leave it to continue and hope that it remains functional unless you think that you have the budget and should therefore proceed with the works. If you have any views on that please advise me."

34. It was at around the start of 2021 that Mr Barker, then working for Lambert Smith Hampton, brought the Premises to the attention of the claimants as a potential investment opportunity.

35. On 4 February 2021 Mr Everington of Signal Surveyors carried out a building acquisition survey of the Premises on behalf of the claimants, after which he produced a report in March 2021. The report expressed the view that there were no material defects that would make it inadvisable to purchase the Premises, but it did identify a number of issues, most significantly concerning the HVAC system:

> "Comfort cooling and space heating – currently the building is heated using a gas boiler feeding a heating coil within an air handling unit situated in the plant room in the roof void. The cooling load is similarly connected to the same air handling unit. A simple thermostat calls for either heat or cooling depending

> the temperature of the air returning from the offices. From observations on site, we note the following;
>
> a. The cooling system is running on R22 refrigerant so repair will be impossible as this refrigerant gas is no longer obtainable, its use for repair being illegal. It may be that a 'drop in' replacement gas has been retrofitted but we saw no evidence of this.
>
> b. Thus if a catastrophic failure occurred involving the refrigerant system, there would be no option but to replace the cooling part entirely. It would probably be more economical to replace the entire heating and cooling system.
>
> c. Some individual fan coil units in the office ceiling voids have been disconnected.
>
> d. The ceiling grilles used to disperse the heated/cooled air within the offices are poorly positioned and ineffectual at controlling the temperature in the centre of the floor plate. There are no openable windows to mitigate the effects of a failure in the cooling system.
>
> e. Fires stopping is damaged in the chiller area – remedial works would not be onerous.
>
> f. Overall the system has been well maintained but from observations on site and service charge records, it can be determined that the space heating/cooling system is not providing the level of control, low running cost, ease of maintenance or comfort expected of a modern system."

36. Mr Everington's report itself made no recommendations as to what works should be done at the Premises generally or in respect of the HVAC system in particular. However, he gave to David Foster estimated costings, which included approximately £175,000 for replacement of the HVAC system. When cross-examined, Mr Everington could not recall how he arrived at that figure; he said that he had no detailed technical information at the time and that the opinions and costings were simply the product of a short (four-hour) inspection of the Premises and a basic report.

37. Mr Foster produced an Investor Briefing, which was distributed to clients who might be interested in investing in the Premises. It said, "So we are comfortable with the fundamentals but a key part of the DD [due diligence] will be to get a good understanding of the M&E and likely cost of replacement." Parts of the Investor Briefing read as follows:

> "So the potential upside here comes at lease end in 2023 when there is the opportunity to regularise the whole scenario and create a diverse multi let asset at higher rents and with a variety

> of lease expiry dates which should command a stronger investment yield.
>
> …
>
> In order to help do so [i.e. negotiate new leases with the existing sub-tenants], we have assumed that the heating and cooling system for the building is replaced at the time. This would have to be done with the existing tenants in-situ, assuming they want to stay. We have allowed a cost for this in the appraisals which is based on actual costs from a similar installation on another recent project. However getting as accurate a costing for this as possible is quite fundamental to the opportunity so we are meeting building surveyor and contractors on site in the coming week.
>
> …
>
> We have undertaken two different appraisals; an upside and downside scenario. The upside model assumes that all the sub-tenants renew and an exit is then achieved in late 2023 once the lease renewals are concluded. The model assumes capex of £275,000 (£18.40 psf, note: this has been increased by £25,000 following survey) to install a new M&E system for the whole building at the time, this would be the sweetener to the tenants but would have to be completed with them in-situ. …
>
> The downside model assumes that both the smaller ground floor tenants renew but the first floor tenant vacates and a refurbishment and letting campaign is required for that space. We have allowed the same figure of £18.40 psf to replace the M&E to the ground floor in this scenario but allowed £25 psf across the top floor-this would be to undertake a full refurbishment of the space to include new M&E, new lighting, new carpeting, ceiling etc. In this scenario we should be able to claim some dilapidations from the outgoing tenant on the top floor so the £25 capex is net of dilaps (note: this has been increased by £5.00 psf following survey). …"

38. On 8 February 2021 David Foster had an exchange with an investor who queried the replacement of the M&E system. Mr Foster explained: "[T]he heating and AC system for the building … works but it's not very good and is old/original so is coming to the end of its life." In evidence Mr Foster said that he understood that the HVAC "was no longer reliable and so it would have to be replaced in all likelihood"; this depended on the condition in which the Premises were handed back at the end of the Lease, but from the outset it was thought unlikely that the first defendant would carry out adequate repairs (witness statement, paragraphs 23 and 24). He said that it would be "poor asset management" to fail to make timely plans on the basis of the likely requirements when the Lease ended. In an email on 11 March 2021 (I think to another investor, though the context is unclear), Mr Foster wrote:

> "I think it would be worth having a conversation with the head tenant and/or the managing agents once we have purchased it and try and get the items dealt with sooner rather than later via the service charge. However, if they don't engage, Signal Surveyors view is that the wants of repair are not significant enough to warrant a detriment to our reversion and therefore it would not be one to force."

This may possibly indicate that Mr Everington did not at that stage view the problems with the HVAC system as constituting potential breach of the repairing covenant. However, when questioned about this in cross-examination, Mr Everington said that he had no recollection of saying this. And quite what Mr Foster was referring to is unclear from this single email; he may have been responding to a comment or question on a more restricted point.

39. On 26 March 2021 the claimants completed the purchase of the Premises.

40. In April 2021 Mr Rogers, who did not know that the claimants' purchase had completed, wrote to Brendon O'Neill of the defendants and mentioned the situation with the HVAC system. He continued:

> "Having reached this point with only just over two years left on the lease it would seem the best course now would be to not approach the owners about the lease end until such time as they perhaps indicate what they would wish to do with the building themselves and then we could assess how we tactically aim to minimise any potential claim at the lease end. We are of course very experienced in dealing with such matters and would be happy to advise you on this if you so required."

Mr O'Neill replied: "I agree with your stance that we do not approach the current owners in the first instance, we can wait for them or the new owners to make a move."

41. On 28 July 2021 Mr Rogers had his first meeting on site with David Foster. Mr Rogers' evidence was that the only matter of maintenance raised by Mr Foster concerned leaking gutters, and that the matter was attended to by clearing the gutters and resealing the joints and flashings. Mr Foster's evidence was that various topics were discussed, including "some items of general repair". It does not appear that the HVAC system was discussed.

42. On 21 October 2021 Mr Barker sent to Harrisons an email, in which he wrote: "I'm writing to bring the following to your attention. When we acquired Persimmon House, a number of issues were identified by our Building Surveyor that he feels should be addressed; please see attached specification in MS Excel for your comment." Having received no reply, Mr Barker sent a chasing email on 22 November 2021. It does not appear that Mr Rogers replied to that one, either. When cross-examined, Mr Rogers said that he was not sure what Mr Barker was asking; that was a feeble answer, both because it was clear enough what Mr Barker was asking and because, if it was unclear, Mr Rogers could have asked. Mr Rogers also said that Harrisons had not been able to get a response from the claimants. However, I find that, after the claimants initially

sought without success to obtain a response from Harrisons, Harrisons and the first defendant did not attempt to enter into dialogue with the claimants.

43. Mr Rogers' evidence was that during 2022 there was "limited contact" with the claimants, most of it concerning only "normal management administrative matters", and that the claimants made no contact concerning the condition of the Premises or any proposed works of repair or refurbishment that they wished to carry out. "At no time after acquisition and prior to Westbury's lease end did Craigard's representatives contact Westbury or Harrisons to discuss any required works to the property or any of their proposed works to the property" (witness statement, paragraph 58). Efforts by Harrisons to reach agreement with the claimants for the handover of the Premises and a joint inspection before the end of the Lease met with no response (witness statement, paragraph 61). The communications in the autumn of 2021 show this to be a less than accurate depiction of the situation. Also notable is an email to Martin Crick of the defendants in December 2022, in which Mr Rogers wrote:

> "We as managing agents have been conscious of this ongoing liability [viz. to leave the Premises in good repair] and have carried out various refurbishment works over recent years in order to keep the property in good order and to meet that cost by recovering it where possible from the sub tenants. One area of potential expenditure does relate however to the air conditioning system which has been maintained by Honeywell for many years, however parts of it are effectively obsolete and require renewal for the longer term and this has been discussed with your previous directors and I believe you were holding a reserve for this potential expenditure. This is something we will need to discuss further in respect of this lease termination process.
>
> I have not as yet contacted the landlords of the property as to how they wish the property to be handed back to them. There are various options they could take. [Having set these options out, Mr Rogers continued:]
>
> The above process will no doubt commence once we contact the Landlords and initiate the process therefore we will need to discuss this in some detail in the near future before approaching the landlords. From the Landlords point of view tactically they may try and not commit to a course of action as they may feel that by doing so they could delay the process and gain income from Persimmon should this matter not be settled or the property vacated by the due date, hence my suggestion that you may through your lawyers need to initiate the termination process in good time."

44. Mr Rogers said that, having (as he maintained) received no cooperation from the claimants, the first defendant intended to hand back the Premises in a condition that would enable Medite and Riverside to continue to occupy the ground-floor offices, as they wished to do, and the claimants to sub-let the first-floor office on similar terms to the remainder of the building, as NBC had decided to vacate after the expiry of its sub-lease.

45. Meanwhile, Mr Everington visited the Premises on a number of further occasions in 2021 and 2022, when he had conversations with people who worked in the offices there. His evidence, which I accept (and which is supported by a witness statement from one of Medite's employees, Jenny Humphreys, which I received as hearsay evidence), was that office workers reported that excessively high temperatures in the offices were a regular problem in the summer and that the problem had persisted despite many complaints over the years. However, Mr Everington also said that, when he spent a full day at the Premises on 15 August 2022, he was made aware that there were also problems with cold temperatures in the winter, and he concluded that the problems concerned not only the chillers but air-handling and the system generally and that the entire system would need to be replaced.

46. From about mid-2022 (I do not know the precise date) the claimants' website contained marketing material for potential investors in the Premises, which stated: "We plan to refurbish the building to include a complete overhaul and replacement of the building's heating and cooling system. This will subsequently improve each of the tenants' working space, affording them greater control over their working environment. Furthermore, this will also improve efficiency and should go some way to reducing the occupier's running costs." Mr Barker accepted that this could be read as indicating an intention to replace entirely the HVAC system, but he said that it was marketing material, written with "a flourish", and did not truly show any commitment to such a course. However, a report to investors in the spring of 2022 stated:

> "As per the business plan, we will need to invest some capex into the building, which mainly includes replacing the air conditioning and heating systems in the building and potentially replacing the toilets which are a bit dated. This will be the carrot to entice the sub-tenants to renew. Since purchase of this asset we have seen occupiers preferring offices of higher quality finishes but paying rents to reflect that which does mean investing in the building but that can be reflected in the rent that can be achieved. We intend to get our contractors to site in the next few months in order to get some costs together in conjunction with the conversation with the tenants."

Mr Barker said in evidence that, as the precise state of the HVAC system was not known, and as it was also not known to what extent the first defendant would carry out works of repair, the claimants were planning with a view to the worst-case scenario. The text does not convey the sense that replacement of the system was a possibility only (contrast the intention "potentially" to replace the toilets). While, of course, the claimants' ultimate decision remained to be made and might be determined by factors such as cost, it is reasonably clear that they intended at this stage simply to replace the HVAC system.

47. This is confirmed by the tenor of the claimants' discussions in 2022 with the sub-tenants regarding what would happen after the Lease had ended. Those discussions proceeded on the basis of the claimants' stated intention to replace the HVAC system with a new one, because the existing system did not work properly. For example, in an email to a representative of Riverside in May 2022 Mr Barker wrote: "I understand that as a business you are quite content with the space although you pointed to the age of the air conditioning and the inability to 'locally adjust' your heating. It would be our intention

to invest new capital to improve the building, covering issues such as this which of course would be highly beneficial to your." Mr Barker accepted that the ability for the individual offices within the Premises to control their own heating would have been achievable only with a new system, not with repair of the existing system. The position was spelled out even more clearly in Mr Barker's email in November 2022 to Jenny Humphreys of Medite:

> "As you can see we are still in the process of finalising our specification but for you to pass onto your CEO, in summary, we are looking to achieve the following:
>
> 1. Complete overhaul and replacement of the heating and cooling system to provide Tenants with greater, localised, temperature control. This is a dramatic improvement involving the install of a sophisticated system that will notably improve working environment.
>
> …
>
> Of these 'summary points', number 1, the new heating and cooling system, carries with it a major investment from us along with the difficult task of 'physically delivering' it, if there are Tenants in-situ. It will mean that the existing ceiling grid and lighting will need to come down in order for us to remove the existing M&E equipment above and install all new."

48. In September 2022 the claimants instructed Mr Everington to produce a draft terminal schedule of dilapidations and specification of works on the assumption that the Premises, including the M&E systems, would not have been put into a state of repair. David Foster and Mr Everington explained that it would be easier to remove unnecessary works from the specification, if contrary to expectations the first defendant had carried out adequate repairs, than to add them later to a more limited specification. The terminal schedule of dilapidations was to exclude any works in the specification that could be regarded as betterment or supersession (for example, installation of EV chargers and solar panels, and modernisation of the lavatories).

49. Having prepared the specification, Mr Everington put in hand a competitive tender process. It appears to have been the receipt of tenders that made the claimants aware that the cost of the proposed works at the Premises would be very much higher than had been anticipated. On 12 December 2022 Mr Everington forwarded to David Foster, Paul Foster and Matthew Barker the priced specification received from one of the potential contractors. He wrote:

> "Sit down, deep breath …… and have a look at the attached.
> Summary - £900k AND this assumes vacant possession.
> Matt can you please check my areas
> So far as I can see the outline costs are:
> Whole project cost £535.28/m²
> AC cost £294.15/m² - this is MUCH higher that I would expect".

That this came as an unpleasant surprise is illustrated by Mr Barker's half-jocular response: "I fell down a flight of stairs yesterday and think I'll throw myself down the next after seeing this."

50. The following month, Mr Everington circulated some manuscript notes, which set out the pros and cons of, on the one hand, simply replacing the chillers with a modern equivalent and, on the other, replacing the entire HVAC system. (In cross-examination, Mr Everington said that he thought "chiller" ought to have read "entire system", but I do not think so.) He noted that the existing system was inefficient, ineffective, expensive to run and environmentally unfriendly. (That last point is significant, because Paul Foster became eager to promote the Premises to prospective tenants on the strength of their "green" credentials; see further below.) On the other hand, installation of a new system would be costly and cause disruption to the tenants; and the first defendant would contend that it amounted to betterment, which might adversely affect a dilapidations claim. David Foster's evidence was that these notes did not result in any specific agreement or in any change in the claimants' approach. While that may be so, I think it likely that the associated discussions led to the decision to broaden the tender process, with a new timetable and further contractors invited to tender. The new process began in February 2023.

51. In due course, &Stenball Limited ("Stenball") was chosen as the main contractor and a letter of intent was issued on 25 May 2023. Mr Everington stated (witness statement, paragraph 22): "It was noted in the letter of intent that the scope of works would be reviewed prior to start on site. This was to ensure that, had the tenant undertaken works to repair the building, these works would then be excluded from the final contract. I was confident that, as the tenant had undertaken no work to repair the defective air conditioning by the end of May, that [sic] these works would not be completed by the end of the Lease."

52. In February 2023 the claimants instructed DMS to advise in respect of the HVAC system. Mr Singleton attended on site in February and March 2023, when he inspected the system and spoke to people who worked in the offices. During April and May 2023 he was in discussions with Stenball. These fed into Stenball's specification for the HVAC system, and DMS was in due course appointed as sub-contractor to Stenball for the installation of the new system.

53. Mr Singleton's evidence as to the basis of DMS's instructions was not perfectly consistent. The evidence in his witness statement was that the claimants required him to provide a specification that made use of whatever, if anything, could be salvaged in the existing system, but that, "I actually thought the brief to try and use as much of what was there was a bit ridiculous. It is not often possible to use new equipment with very old equipment. To simply replace parts of an old system with new parts, bolting on to dilapidated equipment, does not work as the system must communicate and function as a whole and in this case the whole operation of all the Equipment was controlled by a Building Management System. If one thing is not working, it will affect the whole system" (witness statement, paragraph 18). However, when cross-examined he accepted that, when DMS was first instructed in February 2023, the decision to replace the HVAC system had apparently already been made.

54. After this litigation had commenced, Mr Singleton produced a "report", which is dated 1 March 2023, and reads as though written then, but is in fact a later reconstruction of

what Mr Singleton says is his recollection of his assessment at that time, assisted by reference to the notes he provided to Stenball at the time. (Those notes have not been disclosed.) The report analyses the several component parts of the HVAC system. The advice regarding the chiller unit was unequivocal: it was not functioning properly and was obsolete; parts were not available; it was futile to do further work to the system; it required replacement. Regarding the air-handling unit ("AHU"):

> "The ahu is operational; however age has affected the condition of this system also.
> The coils within the ahu are corroding due to age, they are also blocked with a build up of dirt from over the years, any attempts to power clean these will disintegrate the fins.
> The coils could be replaced but it would be a big job with lots of down time and costly.
> The fans need replacing as do the fan belts, this is possible but again it's the least of the issues.
> The humidifier system has a leak and the needs attention as it leaking water from the bottle."

The boilers appeared satisfactory. As regards the "central extract":

> "The main extract fan has one of the two fans down and therefore is only operating on the one side.
> This model is no longer on the market and parts are not available.
> An upgrade to a Nuaire model would be the best option here, economical and has good longevity and reputation in the market."

In respect of the fan coil units, the report said:

> "All floors have multiple fan coils with 4 port valves allowing for heating and cooling.
> Many fan coils have faults ranging from fan motor failure to 4 port valve and actuator issues.
> The pipework supplying all systems is very dirty and a build up of debris causes valves and such to fail over time, circulation pump failures have also occurred due to this.
> Fan coils can be repaired and 4 port valves and actuators replaced along with modern fans.
> The biggest problem is the Trend, as forementioned this controls everything. When changing to modern parts and motors the Trend also needs upgrading as modern equipment is not supported on the older controls, more on this in the controls section."

In cross-examination, Mr Singleton said that there were between 40 and 60 fan coil units and that he had inspected three of them; he did not want his inspection to be overly intrusive, as the Premises were still occupied. The final element of the system was the "Trend BMS" (a Building Energy Management System developed by Honeywell):

> "The Trend system was installed in 1997 much like everything else and is in serious need of upgrade due to parts failure and obsolete parts.
> If a new chiller was installed, full overhaul of the AHU and fan coil units then the Trend would need totally replacing.
> The current system would not be able to control and support the new equipment.
> Following discussions with our contact at Trend and a recent project we have just completed in Guildford of similar size, a cost of circa £45-55k would need to be spent to replace the system."

The overall conclusion was stated as follows:

> "All the above mentioned works could be achieved, however our opinion is that this is a very out of date way of doing things and far from economical.
> With many modern Heat Recovery and MVHR systems on the market, this would be the way to go.
> The costs to upgrade the existing systems like for like would move up into the hundreds of thousands and not deliver value for money.
> This is not just the case of a chiller upgrade, it's a total overhaul of all plant and controls including power flushing all the pipework throughout the building and changing all pumps, valves, flow switches, regulators.
> If these works were not carried out in this manor the end result would be hundreds of thousands spent on upgrading plant only to be continually returning to site to change pumps, valves and ancillaries at a continued cost."

55. For its part, the first defendant instructed Aventus Commissioning ("Aventus"), who produced a mechanical validation and condition survey report dated 29 May 2023 (and signed off on 12 June 2023). The report used a grading system based on an industry standard formula:

> "A - the element is as new and can be expected to perform adequately to its full normal life
>
> B - the element is sound, operationally safe, and exhibits only minor deterioration
>
> C - the element is operational but major repair or replacement will be needed soon, that is, within three years for a building … and one year for an engineering element
>
> D - the element runs a serious risk of imminent breakdown
>
> X - (a rating added to C or D to indicate that it is impossible to improve without replacement)."

However, as the claimants' M&E expert noted, the actual grading assessment of the plant and equipment within the scope of the report does not accompany the disclosed document. What we have are simply a few gradings shown in the captions to photographs of some components; these include an X rating for the fan coil unit ("FCU") filters, while other components were graded B or C. Aventus inspected 33 out of 48 FCUs. Other than the filters, the visual condition of components was either "poor" (unit chassis, primary insulation, low temperature hot water / chilled water commissioning set) or "average" (primary/secondary VCD [volume control damper] and ducting, insulation of the low temperature hot water / chilled water system). The report did not indicate the need for replacement of the FCUs themselves, but it noted that there were "numerous cases of FCU secondary fans that were noisy"; the report said that "performance may be compromised due to the age of the units", and remarked that there were "issues with ducting, plenums, [and] open ends". Among other findings may be mentioned that AHU chambers were showing signs of water ingress and corrosion; the static balancing valves were "circa 25+ years old" and "now considered obsolete." The report, which was based on a non-intrusive, out-of-hours inspection, has significant limitations. The chiller units and the pumps for heating and chilled water were not operational at the time and could not be assessed. Readings for the flow rates on the low temperature hot water / chilled water system could not be validated. Only the AHU and WC Extract system could be enabled via the BMS control. In consequence, Aventus was unable to drive the FCUs "into full heating and full cooling modes to determine the performance of the systems", because it could not get the BMS to control the actuators that controlled the FCUs.

56. Aventus was not asked to provide a schedule of recommended remedial works or budget costings for those works. Mr Rogers said in evidence that by the time the report was received it was too late to follow up with a request for costings. However, the late date at which the report was sought tends, in my view, to suggest that details of works and costings were not sought because the defendants had no intention of carrying out substantial works to the HVAC system and any such information would have been potentially harmful in the event of a dilapidations claim. (This inference is raised as a possibility by the claimants' expert, Mr Patrick Smallbone, and I think it is a fair one.)

57. In or about May 2023, the claimants sent a message to investors concerning the capital costs for refurbishment of the Premises, which exceeded what had been anticipated. (I have seen only a draft of the message, but Mr Barker accepted that some such message was sent, though the actual message has not been disclosed.) The draft contains the following text:

> "The capital required for the proposed refurbishment exceeds what was originally projected in the business plan.
>
> Before delving into the details of this investment, it's worth emphasizing again that the office sector has undergone a significant transformation since our acquisition. While we anticipated the pandemics impact in our original business plan, we never expected such a drastic change. To remain competitive, Landlords must allocate resources to create high-quality working environments. Failing to do so will likely result in increased difficulties in attracting and retaining tenants, as well as reduced liquidity upon exit. In essence, our goal now is

> to create a leading office building that is situated in a location that still enjoys good tenant demand, but where there are currently no real 'market leading, ESG [Environmental, Social and Governance] Conscious' buildings that have an 'identity'.
>
> …
>
> The specification of works has been carefully reviewed, line by line with each component questioned. However, the reality is that costs have risen, and the scope of the project has expanded (and needs to expand) beyond what was originally anticipated. Therefore, the total contract sum is £1.65m.
>
> With that in mind, we will be looking to raise £1.425m from investors. …
>
> This is clearly higher than we ever expected but there is a real opportunity here. Consider the following:
>
> Refurbishing the property is a strategic move to secure its long-term sustainability and tenant appeal, resulting in a higher rent and increased income. This remains an excellent South East location and the Business Park itself occupies an enviable position. Box ticked for high-quality, well-connected working environment!
>
> Most of the cost increase relate to ESG credentials for the building which is a must have these days to attract a tenant. We will be looking to obtain a BREEAM [Building Research Establishment Environmental Assessment Method] assessment as part of the refurbishment works which will tick further boxes for both investors and occupiers – this includes items such as creating a shower/changing room in the plant room and solar panels on the roof which aren't cheap but we feel will make us 'stand out from the crowd' and are worthwhile pursuing.
>
> It will greatly improve marketability and liquidity and make it more appealing to Tenants and future buyers. If we don't pursue this, we could be looking at considerable void periods, and associated holding costs."

58. Mr Barker said in cross-examination that the message was giving investors the worst-case scenario. That is plainly not right. It was telling them the cost of the works and explaining that, and why, those works were necessary.

59. The evidence of the claimants' witnesses regarding what was intended in respect of the HVAC systems comes down to this: no final decision had been taken before the end of the Lease to replace the system; however, it had become reasonably clear that the first defendant was unlikely to do sufficient works to comply with its repairing obligations; this meant that replacement was anticipated to be necessary. This only really makes sense if it had been decided either that the system needed to be replaced (by whomever

it might be replaced) or that the claimants would replace it regardless of whether replacement was strictly necessary. The communications with the investors and with the tenants lead me to the conclusion that there was no question for the claimants but that the system would be replaced. The investors were not being given a "worst-case scenario"; they were being told what was to be done and how much money was required to do it. And, despite suggestions to the contrary by Mr Barker and David Foster, it is unthinkable that the claimants would have sought to go back on what they had told the sub-tenants about providing a new system. Further, the lack of any serious attempt to get the first defendant to do any works to the HVAC system, coupled with the evident desire—particularly on the part of Paul Foster—to market the Premises as providing environmentally friendly and energy-efficient offices, persuades me that the claimants did not want the first defendant to do anything that could be argued to have put the system into repair.

60. On 21 June 2023 Mr Rogers sent an email to Mr Quick, asking him to visit the Premises the following week and again a couple of days before the Lease came to an end, "hopefully to make sure everything is operational." He wrote: "I also attach copies of the reports on the property and could you look through these and let me know what you could do quite quickly in the next week or so as discussed, plus any comments you may have on the reports." On 3 July 2023, Mr Quick responded:

> "I have been to Persimmon Homes today and changed all the drive belts and filters on the AHU. All plant was left working and the plant room left clean and tidy. The cost for today was £400.
>
> I will revisit site on Wednesday [5 July] to check all plant is running as discussed."

He added a few minutes later: "New belts fitted also x4." It seems to me that these exchanges are indicative of a minimalist approach to compliance with the first defendant's repairing covenants.

61. Upon the expiry of the three sub-leases on 5 July 2023, NBC vacated the first-floor office and, by arrangement with the claimants, the first defendant gave licences to Medite and Riverside to remain in occupation until the expiry of the Lease.

62. Upon expiry of the Lease on 8 July 2023, Medite and Riverside continued to occupy their respective offices on a temporary basis under licences from the claimants. NBC vacated the first-floor office suite.

63. On 17 July 2023 the claimants entered into a JCT contract with Stenball.

64. In August 2023 BWB Consulting Limited ("BWB"), an engineering and environmental consultancy company, provided to the claimants a mechanical and electrical dilapidations report. In respect of the HVAC system, its conclusions were as follows (it is unnecessary to refer to the conclusions on other matters):

> "8.3 The chiller, is not fully operational with 1No. circuit only providing approx. 50% cooling capacity to the building. The chiller also contains R22 refrigerant gas which is being phased

out and can no longer be added to existing systems, therefore the chiller is in need of replacement. Budget cost for replacement of the air cooled chiller is £100,000. As part of the chiller replace works, it will be necessary for the existing roof to be opened up to enable the existing chiller to be removed and the new chiller to be craned into position. The cost of the associated builders to remove the roof together with subsequent reinstatement is not included. The cost of cranage is also not included.

8.4 The air handling units (AHUs) are in reasonable condition but the heat exchanger was found not to be fully clean and would require chemical cleaning due to build up of dirt and debris, the humidifier is not operational and requires replacing and manometer fluid requires replacing. A budget cost for this work is £12,500.

8.5 The BMS Controls installation requires investigating and rectifying as the gas solenoid valve operates and isolates the gas supply when the plantroom doors are left open for a period of time. The system should not operate in this manner and should be rectified to ensure correct operation i.e. upon activation of the fire alarm, knock of buttons or gas alarm. The lamps are also in need of replacement. Budget cost for this work is £5,000.

8.6 The WC extract system is going into fault on a daily basis as reported by the BMS alarms. Allowance should be made for replacing the WC extract fan and the associated airflow switch. A budget cost for this work is £5,000.

8.7 The fan coil units (FCUs) are in good condition however the filters require cleaning and the electrical covers require replacing to the majority of the FCUs. A budget cost for this work is £5,000.

8.8 The 2 No. gas fired boilers were not operational at the time of the intrusive survey as there was no gas supply to them. However, the intrusive survey did identify that they need stripping down and a full service as all 2 No. burner chambers need flushing and debris removing. A budget cost for this work is £2,000.

8.9 The gas fired water heater needs stripping down and a full service as the burner chambers need flushing and debris removing. A budget cost for this work is £1,000.

8.10 The Tenant installed split system DX air source heat pump units require stripping out by the Tenants at the end of the lease. A budget cost for this work is £2,500.

8.11 The electrical distribution system requires retesting, no certification was available on site and the stickers on the

> distribution boards indicated that the testing was overdue. A budget cost for this work is £5,000.
>
> 8.12 An updated Refrigerant installation Inspection and report is required to be carried out, the current lodged CIBSE TM44 inspection report expired in 2017. A Budget cost for this work is £3,000."

However, the executive summary said:

> "As the existing chilled water system is not in repair and the chiller requires replacement it is highlighted that chiller and 4-pipe fan coil systems are now uncommon in modern installations due to the increased efficiency and functionality offered by variable refrigerant flow (VRF) systems. The most economic solution long term for the building is to strip out the chiller, fan coil units and the associated distribution pipework and replace with a fully ducted VRF system throughout. A budget cost for this work is £400,000 excluding builders work."

65. Mr Everington stated (witness statement, paragraph 25):

> "The existing system was identified as faulty during the building acquisition survey in 2021. To rectify this fault the R22 refrigerant would have to be removed and reinstalled. As it is illegal to reinstall R22 gas I considered the most cost-effective way to resolve this breach of the Lease would be to replace the whole system with a new system. This position was reflected in the specification of works put out for tender. This conclusion was verified by the report from BWB which was conducted at Lease end and therefore no changes to the scope of works was required regarding the air conditioning."

66. It may be noted that the version of the BWB report that I have seen is the final version dated 18 August 2023. After receipt of an earlier version, on 7 August 2023 Mr Everington had requested a fairly major revision. In particular, it appears that the original report referred to components having reached "end of economic life"; Mr Everington insisted that the wording be changed to "'not in repair' or similar". This indicates that the report was not really obtained in order to inform the claimants as to the best course of action to take but rather to support a dilapidations claim. I bear this in mind when considering the weight to be placed on the report; of course, it does not show that anything in the report is incorrect.

67. The claimants entered into agreements for new leases with Medite in September 2023 and with Riverside in October 2023. Both Medite and Riverside decanted during the execution of the programme of works at the Premises.

68. The claimants replaced the existing HVAC system with a new Variant Refrigerant Flow ("VRF") system, together with a new mechanical ventilation with heat recovery ("MVHR") system, at a cost of £566,089.15.

69. The works to the ground floor were completed by the end of November 2023, after which new leases of the ground floor offices were granted: to Medite on 4 December 2023, for a term of 7 years at an annual rent of £88,582 with a three-month rent-free period; and to Riverside on 7 December 2023 for a term of 5 years at an annual rent of £111,776.

70. A certificate of practical completion of the contract works was issued on 16 January 2024. (One item of work, the replacement of underfelt in the roof, was only identified in November 2023; the underfelt under the newly installed solar panels was replaced, but the rest has not yet been replaced.) At practical completion, the final account was provisionally agreed at £1,640,231.59. The part of that sum that the claimants attribute to the present damages claim is £1,335,980.15.

71. On 6 February 2024 the Schedule of Dilapidations dated 1 February 2024 was served on the first defendant with a Quantified Demand in the sum of £1,571,187.

72. On behalf of the defendants, Mr Rogers produced a Counter-Schedule in the sum of £126,051.38. That is the pleaded figure in the defence.

73. The first-floor office accommodation has been let to BUPA under two separate leases, each for a 10-year term with a tenant's break clause: one in June 2025 at an annual rent of £93,750; the other in March 2026 at an annual rent of £135,129.

Damages at Common Law

74. It is convenient to deal with this in five parts: (1) remedial works in respect of building fabric; (2) remedial works in respect of mechanical and engineering (M&E) items; (3) causation; (4) loss of rental income; (5) miscellaneous heads of loss.

(1) Remedial works: building fabric

75. Expert evidence was given by one chartered building surveyor on each side: for the claimants, by Simon Brown MRICS of Turner & Townsend PJM UK Ltd; for the defendants, by Balvinder Sagoo MRICS of BOAZ Real Estate Limited. The experts reached agreement on a great many things but differed on several of the more financially important issues. Mr Brown inspected the Premises, although not until the claimants' works had been completed. (As already mentioned, works to replace the underfelt in the roof have not been carried out.) Mr Sagoo did not inspect the Premises; he wanted to do so but was told—apparently, by those who instructed him—that this was not possible. Mr Sagoo also had the disadvantage of having been provided with less information than Mr Brown: when he prepared his report, he had only a copy of the bundle prepared for a mediation, which did not include the parties' witness statements or disclosure. At the stage of the preparation of the joint memorandum, Mr Brown shared some photographs with Mr Sagoo, which assisted in resolving some points of disagreement between them. I shall address only the remaining points of disagreement.

Gutters

76. The alleged defect is: "Tenant has failed to deliver up gutters and downpipes in good repair. Gutter joints are leaking with evidence on all elevations. Aluminium gutters have caused steel screws to deteriorate, causing localised failure (due to dissimilar metals causing accelerated deterioration). Pop rivets are similarly affected by corrosion." The claimed remedial works are: "Clean out all debris from gutters. Take out all steel gutter fixings and replace with stainless steel. Replace all pop rivets with new. Line all gutters with a suitable liquid applied system such as Polyroof." The claimed cost is £61,998.71, which comprises: £29,609.38 for scaffolding (the cost of which is agreed); £29,992.06 for remedial works; and £2,397.27 for a variation of the contract in respect of the repair of roof gutters.

77. Mr Brown's opinion was that the 2021 acquisition report and the photographs within it showed that there were regular problems with leaking at the junction of gutter sections and with overflowing gutters. Further photographs showed that the waterproof lining to the gutters had been damaged by ultra-violet light and suffered solar fading, causing the surface finish to break down and lichen to become well established, and that the fixings to the gutters had corroded, causing regular leaks, and that no substantial repairs had been undertaken before the end of the Lease. His opinion was that there were breaches of the covenants in clauses 3.7.1 and 3.10.1 of the Lease, that the works undertaken were an appropriate remedy, and that the cost ought to be regarded as reasonable as it was the result of a competitive tender. However, he had been unable to verify precisely what the additional £2,397.27 related to and that it was referable to any breach of covenant.

78. Mr Sagoo's opinion was that there was a breach of covenant in respect of the corroded mechanical fixings and that the appropriate remedy would be to carry out a patch repair of leaking joints and replace the fixings, at a cost of £14,000 (plus the cost of the scaffolding). His key point of difference from Mr Brown concerned the application of the liquid membrane, which he considered ought to be applied only to the leaking joints and not to the entire gutter. He considered that the presence of silt in the gutters made it impossible to say whether there was the alleged damage to the surface of the gutters more widely. Subject to that difference, he accepted Mr Brown's opinion as to costings.

79. On this issue, I prefer Mr Brown's opinion. Mr Sagoo said that he could not see lichen in the gutters, only silt. But I agree with Mr Brown that lichen is present. His opinion was that it had become established in the micro-fissures in the coating, and that this would not have occurred to such a degree if the coating had been well maintained and sound.

80. Accordingly, in respect of this item I assess the attributable cost as £59,601.44.

Underfelt

81. The alleged defect is: "Tenant has failed to deliver up underfelt in good repair – friable and disintegrating." The claimed remedial works are: "Replace with new where exposed by PV installation – cost includes quotation set out in 'other costs' and actual expenditure on repairs carried out to the south elevation where PV was installed." The claimed cost is £217,217. That the underfelt was friable and disintegrating was discovered when tiles were removed in order to install solar panels; this is clearly visible in photographs and in videos produced by Mr Everington at the time. The

underfelt was replaced in those locations, at a cost of £4,383, but has not yet been replaced elsewhere.

82. The underfelt has not been exposed in places where it has not been replaced. There is therefore no direct evidence of its condition in those places. However, Mr Brown has expressed the opinion that it will be similarly degraded, because (i) it has been exposed to the same conditions as have the exposed parts and (ii) it is not actually intended for use as roof underfelt (it is Breather-Foil FR insulating fire-retardant breather membrane). He also considered that the exposed parts showed that the underfelt had not been installed correctly, without proper overlapping. Although Mr Brown accepted that there was no evidence of leaking having occurred through the roof, he said that underfelt was the secondary barrier, after the roof tiles, as well as having an insulating function, and that accordingly degradation of the underfelt compromised the functionality of the roof. As regards the costs of remedial works, he considered the amount actually spent (£4,383) to be reasonable. However, he noted that the claim for the outstanding works included the provision of a new roof covering. As the existing slates were not in a poor condition, most of them ought to be available for reuse, though some would break and become unsalvageable when the roof was stripped. Therefore he assessed the reasonable cost of the outstanding works at £140,000.

83. Mr Sagoo accepted that the £4,383 was properly claimed, as the solar panels could not have been installed without replacement of the underfelt. As regards the remainder, however, he did not accept that it was likely to be similarly degraded, and he expressed the view that the absence of reported leakage was evidence that it was not so degraded. If the head of claim succeeded, he accepted Mr Brown's valuation at £140,000.

84. I accept Mr Brown's opinion that the remainder of the underfelt is likely to be in the same condition as the exposed parts. The only argument that Mr Sagoo made against drawing this inference was that there was no history of leakage in the roof. But that is just as true of the areas that were replaced as of the rest.

85. It was not submitted on behalf of the defendants that the inappropriate nature of the existing underfelt—which appears to be part of the original construction—was relevant to the issue of breach of covenant. However, Mr Hope submitted that, in circumstances where the condition of the underfelt was only fortuitously discovered and where there was no history that the functionality of the roof had actually been compromised, then as regards the roof the Premises met the necessary standard of being reasonably fit for the occupation of a reasonably minded tenant of the class that would be likely to take them.

86. In my judgment, although I regard the case as falling near the borderline, the condition of the underfelt constitutes a breach of the covenant in clause 3.7.1, having regard to the standard explained above. The fact that the defective condition was discovered fortuitously is in itself immaterial. The fact that there is no reported history of leakage through the roof is relevant but not determinative. As HHJ Stephen Davies observed in *Blue Manchester Limited v North West Ground Rents Limited* [2019] EWHC 142 (TCC), at [38], "it is not necessary for the disrepair to be so serious as to make the property currently non-functional for the covenant to be breached". Although the roof tiles are providing a satisfactory barrier against water ingress at present, I agree with Mr Brown's opinion that the vulnerability of the Premises to such leakage on account of the absence of the second line of defence is a substantial matter of disrepair. Further,

the condition of the underfelt compromises the roof insulation. Mr Sagoo himself accepts that the underfelt required to be replaced in the areas where the solar panels were installed. This also tends to support the view that the condition of the underfelt elsewhere constitutes a breach of covenant. The remaining question is whether the cost of replacement, as assessed by Mr Brown, is disproportionate to any benefit to be achieved. I did not receive any submission that it was indeed disproportionate, and having regard to the nature of the Premises and the scale of the first-floor office suite I do not feel able to conclude that it was.

87. Accordingly, in respect of this item I assess the attributable cost as £144,383.

Fascias and soffits

88. The alleged defect is: "Tenant has failed to deliver up fascias and soffits in good clean condition. Staining and weathering in evidence. Factory finish is indelibly stained and scratched." The claimed remedy is: "Clean down all fascias, soffits and downpipes. Paint with a suitable paint finish." The claimed cost is £19,500 (£4,000 for cleaning, and £15,500 for painting).

89. Mr Brown explained that the fascias and soffits were factory-finished, meaning that a coating had been applied to them in the manufacturing process. As such, they did not require periodic redecoration, but they did require regular maintenance and cleaning to preserve the finish. Mr Brown's opinion was that the condition of the fascias and soffits as shown on the photographs indicated breaches of the covenants in clauses 3.7.1 and 3.10.1 because there was solar fading, scratching and pitting of the finishes, coupled with lack of regular cleaning, with the result that there was irreversible degradation of the surface. Mr Brown considered that uniform respraying was the appropriate remedy and that the claimed cost was reasonable.

90. In his report and in the joint statement, Mr Sagoo expressed the view that the photographs that he had seen showed nothing more than staining and dirt, for which the remedy was simply to clean the fascias and soffits. He said that it was not usual for a factory-finished component to be repainted unless the finish had been damaged by exposure. When he gave evidence at trial, Mr Sagoo acknowledged that the further photographs might justify respraying the fascias but not the soffits. He was unable to offer a cost of those more limited works.

91. The evidence is limited, because neither expert was able to inspect the items themselves. Nevertheless, I accept that the photographic evidence shows degradation of the fascias. I also accept that this is not a mere matter of aesthetics; it represents a breakdown of the polymers in the protective coating and is material damage that potentially affects functionality. In my view, this constitutes a breach of the covenant in clause 3.7.1 and the remedy is respraying. The evidence is less clear in respect of the soffits; however, they do show a certain amount of scratching and pitting, and I consider that Mr Brown is correct to say that the fascias and soffits had to be taken and treated together. Accordingly I accept the claim in that regard.

Window-cleaning

92. The alleged defect is: "Tenant failed to deliver up window glass and frames in good clean condition. Frames and glass are coated in dust and bird guano." The cost claimed

for cleaning and polishing the windows and frames is £3,000.

93. There is no direct evidence of the condition of the windows and frames at the end of the Lease, though there is photographic evidence of dirt deposits on the frames both a few months before and a few months after that date. Mr Brown's evidence, supported by his own photographs, was that, when he inspected the Premises in October 2025, he found that there was ingrained dirt and staining to the frames, which were resistant to his attempts at cleaning. The tenor of his evidence was that this indicated lack of maintenance over the years and that it would have been reasonable to respray the frames rather than just clean and polish them as the claimants did. He considered the cost of what was done to be reasonable.

94. I do not consider this head of claim to have been proved. While I strongly suspect that the first defendant may not have cleaned the windows at the end of the Lease, this is speculation and is not proved either by the photographs in 2023 or by those in 2025. The fact that cleaning was undertaken by the claimants does not demonstrate that it was required on account of the dirty condition of the windows at the end of the Lease. I accept that Mr Brown's evidence indicates the likelihood of a prolonged lack of maintenance over a number of years. But the claimants have not claimed for the consequences of that; they have claimed for window cleaning, not for respraying.

Carpets

95. The claimants claim £34,247 for replacement of the carpets to the first-floor offices.

96. Mr Brown's opinion was that photographs from 2023 showed wear consistent with several years of use, with compaction beneath desks and chairs and in main walkways and fraying to the edges of carpet tiles. Further, the removal of partitions and kitchenettes installed by the first defendant, which had involved changing some of the floor finishes to vinyl, would also result in the need for remedial works. He stated (report, paragraph 4.15.6): "Whilst, in theory, it might be possible to replace damaged, cut or missing carpet tiles and piece in replacements, in my experience this is only successful where the carpets are almost as new and there is very localised damage or stains, otherwise there becomes a patchwork in appearance between old and new." His conclusion (paragraph 4.15.14) was:

> "In summary of my opinion, while images of the carpets may not appear to show significant damage to the carpets, it is evident they had been subject to several years of wear and areas would be missing where partitions and vinyl is installed. I therefore consider there to be a breach of clause 3.7 and making good required under 3.12.1 following the removal of partitions and vinyls. I consider the claimed costs of £34,247 to be reasonable for the reasons set out above."

97. In his report, Mr Sagoo opined that the photographs did not show anything that would constitute a breach of covenant by the first defendant; in fact, the carpets appeared to be in good condition. He accepted that the first defendant was liable for reinstatement of the carpet where vinyl flooring had been installed, and he estimated a cost of about £1,440 as being reasonable. In cross-examination, Mr Sagoo maintained this position. He accepted that a reasonable tenant would expect carpets that were basically in a new

condition, but he said he could see no defect on the photographs. He thought that it was asking too much of a tenant to require it to avoid a patchwork appearance by replacing the entire carpet rather than simply installing new carpet tiles in place of the previous vinyl.

98. Although the carpets do not appear to be in a bad condition, the photographs do show both areas of wear and depressions resulting from office furniture. These are not things that could be remedied without replacement. A reasonable tenant would expect a carpet that had at least the appearance of being new. Further, I agree with Mr Brown that to place new carpet tiles where there had previously been vinyl, while leaving the rest of the carpet in place, would result in an unacceptable appearance. Accordingly, I accept Mr Brown's opinion and allow this head of claim.

Ceilings

99. The claimants claim a total of £120,475.64 (items 3.1.2.4 and 3.1.2.6 in the Scott Schedule). The defendants dispute the claim in its entirety, on the ground that the works to which it relates are solely dependent on the need for complete replacement of the HVAC system, which they dispute. If the HVAC system did require replacement in full (as to which, see the next section), this head of claim ought in my view to be allowed in full.

100. If the defendants' position as to the HVAC system is correct, however, the position is less clear. Mr Brown accepted that, in those circumstances, the claimed ceiling works would not form part of a reasonable dilapidations claim. His evidence, however, was that, according to the schedule of dilapidations, the suspended metal grid and ceiling tiles were 600mm x 600mm except in the ground-floor Medite suite, where they were 500mm x 500mm. The latter represented an older specification, as 500mm x 500mm ceiling systems had now been discontinued by the main manufacturers. The inference was that unlicensed alterations had been made during the term of the Lease to install the larger specification in certain areas. Mr Brown considered that it would be appropriate to reinstate a consistent standard of ceiling, which would involve installation of 600mm x 600mm ceiling grid and tiles in place of those of the smaller specification in the Medite suite. He also considered that many of the other ceiling tiles were visibly discoloured and that the rest would appear discoloured when set against new tiles, and that to leave the ceiling in proper repair and condition it would be necessary to replace all the tiles in the Riverside suite and on the first floor. He stated the opinion that £43,000 would be a reasonable cost for reinstating the ceilings to a consistent specification and replacing the ceiling tiles.

101. Mr Sagoo's opinion was that no independent breach of covenant in respect of the ceiling had been identified; the remedial works specified had related only to works consequential on the replacement of the HVAC system. He suggested that, if any remedial works were required on the alternative basis proposed by Mr Brown, they might be more cheaply dealt with by using the existing 600m x 600mm tiles and cutting them down. This seemed to me, I am afraid, faintly absurd. First, the greater part of the ceilings is a 600mm x 600mm specification. This is not just a matter of the size of the tiles. The tiles sit in a grid; they rest in ⊥ -shaped supports. So cutting down the tiles would require installation of a grid on a 500mm x 500mm specification. Second, cutting the tiles would clearly be a time-consuming and therefore expensive exercise.

Mr Sagoo offered no costings for this. Third, Mr Brown's uncontradicted evidence was that the tiles would have a tendency to break when removed.

102. Having considered the evidence, and on the assumption that the defendants' position regarding the HVAC system is correct, I accept Mr Brown's opinion both as to the reasonable requirement for the remedial works and for his proposed costing of £43,000.

(2) Remedial works: M&E

HVAC System

103. The main issue between the parties appears from the narrative set out above. In short, it is whether the claimant was entitled to a new HVAC system or whether, despite its age and possible need for higher levels of maintenance, the existing system could by lesser measures be put into good working order so that it worked substantially as well as it did originally. There are, in addition, several less substantial issues regarding M&E.

104. Expert evidence was given by two building services engineers: for the claimants by Mr Patrick Smallbone; for the defendants, by Mr Harrison Krych-Smith. Each of them produced a report. Thereafter, as a result of their discussions, instead of producing a joint statement as required by the case management orders, they produced two documents, each containing a commentary by one expert on the other expert's report and responses by the author of the report. I did not find that at all helpful.

The HVAC System

105. Mr Smallbone noted that the HVAC system was beyond the end of its economic life (as defined in the relevant CIBSE guide) but that this did not mean that it was necessarily out of repair. He focused on the terms of the repairing obligations in the Lease, which he took to mean: that the HVAC system must be functional and performing in accordance with the original design intent and as commissioned; that it must be reliable, operational when needed, and safe to use; that it should not be at risk of imminent failure or malfunction; and that, given regular maintenance attention, it should be expected to continue to operate normally without interruption. He identified the principal issue as being what was needed to effect repair, if repair was possible, as of 9 July 2023, and what was the likely outcome of such endeavours. He considered that the works done by Mr Quick in June/July 2023 were minimal, ad hoc efforts that did nothing to address the significant issues identified in the various reports.

106. Mr Smallbone took as his primary sources of data the witness statement of Mr Singleton and the reports of Aventus and BWB, which he regarded as broadly complementary and which, he said, he interpreted on the basis of his own extensive experience. Of these sources, he considered that Mr Singleton had the particular advantage of being present and involved in the works that were undertaken, including the strip-out of the plant and equipment, and it was on Mr Singleton's evidence that he placed greatest reliance. His position regarding the other reports was to this effect.

- He said that he "formed an unfavourable impression as to the value and accuracy of the Aventus report" because of the omissions noted above (namely, the fact

that it did not address the chillers, the omission of the grading results, and the entire absence of any recommendations or costings). Mr Smallbone accepted that the grading system used by Aventus was appropriate. He said that grades A and B were acceptable and that grade C might be—it depended on the particular facts (I accept his opinion on that point). Among the contents of the Aventus report on which he placed particular reliance, however, were the microbiology results for the heating and cooling closed systems, which showed high levels of NRB (Nitrite Reducing Bacteria), indicating that corrosion of the pipework was in progress and that system blockages were likely to occur on account of sludge formation, and high levels of pseudomonads, which indicated the likelihood that biofilms had formed causing reduced efficiency, corrosion, and blockages in pipes, valves, and heat exchangers.

- He considered the BWB report to be less detailed and technical than the Aventus report—as it undoubtedly is—though he thought it helpful in assessing the condition of the HVAC system. However, he said that it had not been prepared with reference to the tenant's repairing obligations, and he took issue with its treatment of some items. As to the BMS controls system, he noted that Aventus had not been able to determine its functionality, and that BWB had not investigated it and gave no indication whether it was in repair and functional, and he expressed the view that in view of its age its hardware and software were probably out of date and would require updating or replacing; in this regard, therefore, he thought Mr Singleton's was the best evidence of condition. As to the FCUs, he suspected that BWB's opinion that they were in good condition, requiring only cleaning and modest works, was based upon a visual inspection with no intrusive examination or validation of performance, and he thought that Mr Singleton's evidence was more likely to be accurate on this point. As to the boilers, which were not operational when seen by BWB, he noted that it was not established that they functioned correctly; though in cross-examination he said that they were a relatively simple piece of equipment. He said: "Considering the overall condition of the HVAC system at the date of the BWB survey together with the multitude and depth of the defects and the immediacy of obsolescence of the HVAC system components, the recommendation by BWB for full replacement is understandable" (para 5.34).

107. Mr Smallbone's conclusion, in summary, was that any attempt to effect repairs would only have achieved a state of temporary, superficial repair, falling well short of these criteria; accordingly, it was not possible, by means of repair, to return the HVAC system to a state of good and substantial repair. "Repair of the existing system would have been so extensive in nature to address the core deficiencies, and because repair could not have achieved the levels of reliability and performance to satisfy the tenant's obligations, complete replacement was the only viable option" (report, para 7.28). Any attempt to achieve the necessary standard would have involved the following work:

- Replacement of the chiller
- Full refurbishment and reconditioning of the AHUs
- FCUs – Inspection and repair of every FCU, involving extensive replacement of components, including the heating and cooling coils

- Possible replacement of some of the heating and chilled pipework systems following internal pipework inspection and, at best, flushing, chemical cleaning and extensive water treatment
- In respect of the BMS: upgrading of hardware, software, outstations, sensors and actuators, and possibly more extensive replacement on account of incompatibility of the original BMS with new plant and equipment
- Overhaul, servicing and testing, and possible replacement, of boilers
- Overhaul, testing and replacement of failed elements in pumps and ancillary components
- Water treatment of chilled and heated closed water systems
- Ductwork cleaning to current standards.

These works would be prolonged and possibly more expensive than replacement of the HVAC system. In his comments on Mr Krych-Smith's report, he said:

> "Had the tenant carried out maintenance throughout the term as required by lease clause 3.7.1 the system may have been able to perform as described. In actuality it could not, repair attempts would have been futile and have involved significant cost. It was too late, the opportunity had long passed given the age, condition and extensive disrepair identified in the BWB/Aventus report and the WS of JS [John Singleton]."

In cross-examination, he said that embarking on a programme of repairs would be impractical, because it would be an enormous job to try to access and assess 50 FCUs and vast numbers of valves and neither the nature of the defects nor the availability of parts was known and there was no assurance of achieving the necessary standard of performance. Further, even if successful, the works would have to be followed by a continual, intensive and costly maintenance regime. Mr Smallbone expressed the view that the VRF (Variant Refrigerant Flow) system that was installed was probably less expensive than a like-for-like FCU (Fan Coil Unit) system, and that it had the added advantages of being more sustainable and of having lower maintenance costs; and Mr Krych-Smith agreed with this opinion.

108. When Mr Krych-Smith originally wrote his report, he had seen only the BWB report; at that point, neither Mr Singleton's witness statement or "report" nor the Aventus report had been provided to him. By the time of the disclosed, revised report, he had seen the Aventus report, reference to which had been rather clumsily inserted into the text, though not Mr Singleton's material. He expressed the view that the Aventus report took matters no further than the BWB report; at all events, it did not materially inform the contents of his report. Unlike Mr Smallbone, he was not present in court when Mr Singleton gave evidence.

109. Mr Krych-Smith said that, in his experience, a landlord's dilapidations claim relating to the condition, operation and functionality of a HVAC system would be based, as a minimum, on validation reports. These were lacking in the present claim; and he took this lack as one indication that the claimants never had any real intention to consider

repair of the existing system and that its replacement was motivated by marketing and long-term investment considerations.

110. Mr Krych-Smith considered the BWB report to be well written and cogent and, though he was unable independently to verify its observations, he clearly regarded them as credible and as representing the best available evidence of the condition of the HVAC system and thought that the costings in the report were reasonable. His conclusion, based primarily on the BWB report as supplemented by his own repair of that report's omissions, was that the HVAC system required only minor remedial repair and replacement of the chiller to restore full functionality. The works and their cost would have been as follows:

• Chiller replacement inc. ancillary works:	£122,004
• AHU cleaning and humidifier works:	£ 12,500
• BMS Controls repair:	£ 5,000
• WC extract system replacement:	£ 5,000
• FCU cleaning and remedial works:	£ 5,000
• Boiler repair and flushing:	£ 2,000
• Low Temperature hot water pump:	£ 12,000
Total HVAC costs:	£163,504

111. In cross-examination, Mr Krych-Smith expressed agreement with Mr Smallbone's understanding of the requirements of good repair. In a joint statement, he had said: "The [HVAC] systems have no single point of failure. All of the system components must be proven to be in disrepair to justify wholesale replacement." When questioned about this implausible assertion, he rather tied himself in knots: first, saying that disrepair of "a fair majority" of the components would be required; then saying that he would be happy to stick with "all", as per the joint statement; then retreating to the "majority" of the components; and finally saying that it was a question of when the system was beyond economic repair. I think that all he really wished to say was that the fact that a HVAC system does not work does not mean that it requires replacement, because it depends on how much of the system is not working and what it would cost to put it right. Mr Krych-Smith accepted that the installation of a new chiller would require that the entire system be flushed, which might result in other issues with the FCUs, and that it was impossible to know, without inspection, whether the internal coils in the AHU would survive chemical flushing or, without enquiry of suppliers, whether spare parts would be available.

112. In my judgment, it is clear that the defendants had not properly maintained the HVAC system, that this was a calculated failure, that the works done in June/July 2023 were minimal, and that the HVAC system was out of repair at the end of the Lease. I also regard it as clear that the claimants had decided to replace the system and were not interested in the possibility of repairing the existing system. The primary question is whether replacement was necessary to achieve a result consistent with the repairing obligation. The burden lies on the claimants to prove that the answer to that question is in the affirmative.

113. The claimants have not proved their case on this issue to my satisfaction. It was reasonable for the claimants, from their perspective, to consider that the sensible course was to invest in a new system, both for the purpose of future-proofing and with a view to marketing the Premises as high-quality and eco-friendly offices. However, the most

directly relevant law to be applied is found in the dictum of Judge Havery QC in *Ultraworth* and in the conclusions of Edwards-Stuart J in *Sunlife* at [46], especially points (1), (2), (4), (6) and (7). At this stage, it is important to remember that the tenant is entitled to perform the covenants in the manner least onerous to him. It follows that, if either repair or replacement could have been recommended by a reasonable specialist, damages will fall to be assessed on the basis of repair.

114. I make the following observations.

1) The question whether replacement of the entire HVAC system was positively required is one of nice judgement.

2) I do not regard the evidence of either expert as very satisfactory. It does not help that neither of them had the opportunity to inspect the HVAC system, so that they both have to form their opinions on the basis of third-party materials.

3) Mr Smallbone had a tendency to rely on what was unknown (such as functionality of untested components, or compatibility of new and old components, or availability of replacement components) as showing that repair was a minefield and so not feasible. This has in turn a tendency to reverse the burden of proof, as Mr Hope submitted. I also found Mr Smallbone's way of treating the three main sources of information rather problematic. The BWB report, which (broadly speaking) recommended repair rather than replacement, was disparaged in comparison with the Aventus report, as being less detailed and less technical. There was, however, little real acknowledgment that it was a serious and costly report (the quotation for its production was in evidence) and that it was the one primary source that actually addressed the practical issue of the availability of remedial works. As for the Aventus report, however, Mr Smallbone regarded it as of limited value and "accuracy", primarily because of the absence of the gradings of the components. This left the Aventus report sidelined, except for specific analytical data that were used to support a conclusion that problems were more systemic than the BWB report would suggest. Those data, in turn, were considered to corroborate observational evidence of Mr Singleton, who was regarded as the primary source of reliable information regarding the condition of the HVAC system. But, although Mr Smallbone noted that Mr Singleton had tended to use hyperbolic language in describing that condition, he did not advert to (or, quite possibly, know of) certain problems with the latter's evidence: in particular, that Mr Singleton was not—as I am satisfied he was not—instructed on the basis that repair rather than replacement was an option being genuinely considered by the claimants, and that during the course of these proceedings he produced a "report" that was written so as to appear to be contemporaneous with the earlier date that it bears.

4) Mr Krych-Smith, on the other hand, laboured under the disadvantage that his conclusions were formed on the basis of access to limited information. I was also, I am afraid, less than impressed by his treatment, first in his report and then in cross-examination, of the question what would be required for a system to be regarded as a failed system.

5) I have identified, above, problems with the primary sources. For all the claimants' reliance on him, I find that Mr Singleton was not asked to consider possible ways of repairing the HVAC system and did not do so; his concern was with how the system might be replaced. This is highly relevant to an assessment of what he says about the existing system. His original notes, if any, have not been produced. His "report", which is unequivocally written as though contemporaneous with the date it bears, is at best a reconstruction of "what I might have written at the time if I had been asked to produce something of this sort". The Aventus report, though the most detailed and technical, lacks grading results, was limited by inability to test all parts of the system, and does not address necessary works. The BWB lacks the technical input found in the Aventus report and, as Mrs Creer observed, is not a dilapidations report in the traditional sense. It also lacks analysis of the compatibility, in particular, of a new chiller system with the existing BMS—an omission relied on by Mr Smallbone.

6) Nonetheless, the court must do what it can with the available evidence. An absence of desirable evidence must be assessed in the context of the evidence there is; it cannot just be turned against the defendants. As has already been mentioned, Mr Krych-Smith pointed to the lack of a validation report on behalf of the claimants; and Mrs Creer, while justifying this omission on practical grounds, accepted that it was a lacuna. In my view, the most reliable evidence, both as to the condition of the HVAC system at the end of the Lease and in respect of remedy, comes from the BWB report. The report was costly and comprehensive and was the result of a survey by one of BWB's engineers and intrusive inspections by REFCOM-approved engineers employed by the RES Group. The report favoured, as the most economic long-term solution, replacement of the system. But the fact that it itemised and costed remedial works to the existing system makes sense only if such a course of works were considered to be a viable option.

7) To the extent that the claimants have not shown that remedial works were not a viable option, this is because it never intended to carry out such works and did not give them serious consideration.

115. The claimants have not adduced evidence of the cost of repair rather than replacement. The available figures are those given by Mr Krych-Smith.

Lighting/Electrical

116. The claimants advance a number of heads of claim relating to ancillary electrical and lighting matters or consequential on such matters. This part of the claim was not addressed in the experts' joint statements and received very little attention at trial. I have been assisted by counsel's response to my queries after the trial had concluded, which has (I hope) helped me to understand what remains in issue. References below to items are to items in the Scott Schedule. I refer only to items that have not already been encompassed in the findings set out above or in respect of which there is no agreement.

117. Item 1.3.3 is an allegation that: "The Tenant has failed to deliver up external downlighters in repair. Bezels are rusted and glass is opaque." The amount claimed is

£3,000. I accept Mr Sagoo's opinion that the photographic evidence at the end of the Lease does not establish any breach of covenant.

118. Items 2.1.2 and 2.2.2 make identical allegations concerning, respectively, the ground floor and first floor toilets, as follows: "Tenant has failed to deliver up space heating system in repair. Existing gas boiler system has been replaced". The amount claimed for each item is £3,119.92 in respect of fitting new electric heaters. This is one of the items in respect of which there is little evidence. Mr Krych-Smith correctly observes that these items are not supported by the BWB report. I have found no other evidence that the works were required by reason of a breach of covenant by the tenant. Accordingly, I disallow these items.

119. Item 3.1.1.4 is: "Reapply or fit new fire stopping to all areas, risers etc to ensure compliance with current standards." The building surveyors agree that the claimed figure of £1,800 would be reasonable if the defendants were liable for floor air-conditioning works; however, on the basis that they are not, the figure is £900.

120. The next two items relate to "fixed wiring". Item 3.1.2.2 is: "Change fixed wiring to comply with BS7671 – currently DB board is in adjacent Riverside office suite. New supply cable, new DB board, re-configure cabling." The amount claimed is £42,432.74. This item arises because the electrical distribution board serving Medite's offices was located in Riverside's offices and was therefore not readily accessible. Accordingly, the claimants carried out works to install a new sub-main supply cable, a new distribution board and ancillary equipment and to replace the circuit cabling. Mr Smallbone said that these works were required to enable the installation to comply with BS7671 and regulation 5 of the Workplace (Health, Safety and Welfare) Regulations 1992 and that they resulted from breaches of the covenants in clauses 3.7.1 and 3.11.1. I cannot see that regulation 5 of the 1992 Regulations required the moving of the distribution board, no matter how convenient its relocation might have been. As for BS7671, I was not referred to its text. But section 462, to which Mr Smallbone referred, and which deals with isolation of electrical installations, does not appear to me to have required the relocation of the distribution board. Mr Everington stated that when he carried out his inspection in February 2021 he observed that the fixed wiring "was in poor condition overall and not compliant with BS7671." That, however, is vague, both as to the observations made and as to the requirements of BS7671. Further, Mr Everington's instructions were to provide a Building Acquisition Survey Report, which he did on 8 March 2021. In oral evidence he said that his opinions and costing were based on (only) a 4-hour inspection. The report itself stated that covered or inaccessible parts had not been exposed and that no specialist surveys or tests had been undertaken. I can see nothing in the report or the annexed photographs to evidence defective wiring. And Mr Everington is not an electrical expert. In the circumstances, I am not persuaded that this item relates to any breach of covenant or that it concerns anything more than an improvement to the Premises, and I disallow it.

121. Item 3.1.2.3 is: "Check retained fixed wiring to floor boxes as impractical to update to Elektrak. (Check Only.)" The amount claimed is £3,476.28. Mr Smallbone's evidence was that these works were necessary, because the tenant had not provided a valid electrical fixed wiring inspection and test certificate, in breach of clause 3.7.1 of the Lease. Clause 3.7.1 does not actually deal with certificates. Mr Krych-Smith considered that this item (along with item 3.1.2.2) was consequential to the claimed works for replacement of the HVAC system, and he said that he had seen no evidence

to support the claim nor any justification of it. I am not satisfied that the claimants have proved that the claimed costs were referable to rectification of any breach of covenant.

122. Item 3.1.2.7 concerns the lighting in the three office suites: "Medite - Fit new 600 x 600 LED lighting throughout including refitting any feature lighting. Replicate controls for the boardroom (dimming etc) - currently on a 500 x 500 grid to be replaced with a 600 x 600 grid to save cost. Riverside e [sic] - refit existing 600x600 LED lights. FF [first floor] - install new LED light fittings. Accept a 50:50 split of new lights to FF suite." The amount claimed is £42,849.93. There is a dearth of evidence in respect of this item. The BWB report addresses lighting at paras 5.1.4 to 5.2.2. The only need for work identified in the BWB report is to return the lighting to CAT A open-plan layout after the tenant-installed meeting rooms and cellular offices have been removed. Mr Krych-Smith recommended an allowance of £5,000 for those works; otherwise, he said that there was no evidence of disrepair. I am not satisfied that any further works or expenditure are properly referable to any breach of covenant. Accordingly, I award £5,000 for this item.

123. Item 3.1.2.8 is "Make good all disturbed surfaces", for which a claim of £1,908 is made. The building surveyors agree that this item stands or falls with the floor air-conditioning works (though I note that their agreement as to the reasonableness of the cost refers to a figure of £1,068 rather than £1,908).

(3) Causation

124. For the defendants, Mr Hope submitted that the claimants were always intent on a complete refurbishment of the Premises, including full replacement of the HVAC system, and that therefore the claim for common law damages for the remedial works was limited to the cost of those remedial works that would have survived the refurbishment, as most of the items in disrepair would anyway have been replaced. The works said to have been superseded related to the HVAC system, decoration, carpeting and lighting. The case advanced by the defendants in the Scott Schedule was that, of a total of £360,931.39 properly attributable to the cost of remedying disrepairs, only £123,161.07 would survive "supersession".

125. Mr Hope did not cite any authority in support of his submission, which was instead put on the basis of general principles concerning causation. He did, however, refer to section 8.3, "Supersession", in *Dilapidations*, *RICS professional standard* (2016), which contains the following passage:

> "8.3.3 It is generally accepted that a landlord should not be claiming for the cost of repair work where the property is due to be, or has been, pulled down, or such structural alterations made therein as would render the repair work valueless. This situation might be regarded as an example of 'supersession' (although some might refer to this differently, e.g. as 'extinguishment').
>
> 8.3.4 A more complex scenario where 'supersession' is sometimes said to arise is where a landlord completes remedial work that is more expensive or wider in scope ('grander remedial work') than the most economic method by which the

> contractually required work could be completed (the 'basic remedial works'). This scenario should be considered carefully, as sometimes the landlord's claim may have been superseded whereas at other times the landlord would still be able to claim for the cost of the basic remedial works.
>
> 8.3.5 In this scenario, it may be useful to consider the following:
>
> a) what the landlord would have done to the property had the tenant complied with its obligations. If the landlord would still have undertaken the grander remedial work (or other work such as structural alterations, pulling down of the building, works to comply with Minimum Energy Performance Standards, etc.) the landlord may find difficulty in demonstrating a loss as a consequence of the tenant failing to complete the basic remedial work and
>
> b) what the market demands would have done to the property had the tenant complied with its obligations. If the market demands that grander remedial work (or other work such as structural alterations, pulling down of the building, works to comply with Minimum Energy Performance Standards, etc.) be undertaken, the landlord may find difficulty in demonstrating that they have suffered a loss as a consequence of the tenant failing to complete their basic remedial work."

126. The submission rested on two main factual bases. First, there was the claimants' intention to replace the HVAC system. Second, there was a matter I have so far only alluded to, that the claimants were eager to demonstrate strong ESG (Environmental, Social and Governance) performance, achieve a high rating on an EPC (Energy Performance Certificate) and a good BREEAM certification from the Building Research Establishment, not least as this would provide a substantial marketing advantage. These points are well made. The claimants did not want to carry out patch repairs. They did not press the defendants to repair the system; I think they believed they would not do so, and no doubt they hoped they would not do so. They certainly wanted the energy and ecology accreditations. Of course, the context was that the HVAC system was clearly out of repair and not functioning properly. If the defendants had carried out the repairs that they say (and I find) would have discharged their obligations, the claimants would have been left with a functioning system that they hoped to be rid of. As it was, the problem did not arise, because the defendants did not perform their obligations. The defendants' contention is that, if they had done so, the works would have been stripped out anyway, because the claimant would have replaced the HVAC system just as it in fact did. On the balance of probabilities, I agree that that is what would have happened.

127. However, in my judgment Mr Hope's submission is contrary to well established law, and I reject it.

128. In paragraph 23 above I have set out the entire text of section 18(1) of the Landlord and Tenant Act 1927. As I there observed, it is the common position of the parties (with which I agree, for reasons I need not expound) that the second limb of that subsection does not apply in this case. However, it is instructive to consider the second limb, because the situation it covers is analogous to that which, according to the defendants, obtains in the present case: they say that sufficient compliance with the repairing covenants (i.e. by patch repairs) would have been pointless and redundant, as the HVAC system would have been stripped out anyway and replaced in its entirety. If the defendants' argument were correct as a matter of common law damages, the second limb of section 18(1) would have been unnecessary. The purpose of that second limb was explained as follows by Lord Greene MR in *Marquess of Salisbury v Gilmore* [1942] 2 KB 38, at 45:

> "Its broad purpose is not open to doubt. Before it was enacted, a landlord could recover damages from his tenant for breach of a covenant to deliver up in repair notwithstanding that the buildings were going to be pulled down or structurally altered in such a way as to make it useless to perform the covenant. The enforcement of the covenant in such circumstances was regarded as an unjust enrichment of the lessor and the legislature in section 18, sub-section 1, set itself to remove the injustice."

An example of the application of the common law rule is found in the decision of the Divisional Court in *Henderson v Thorn* [1893] 2 QB 164, where Wills J, with whose judgment Lawrance J agreed, said at 167:

> "An action for breach of covenants to repair and leave in repair is brought at the end of the term, and a large sum of money claimed as damages; it is true that the sum paid by the tenant is often a sum preposterous in relation to the real damage to the landlord: as, where he is going to pull down the premises and is, therefore, not the loser by a penny because they are returned on his hands out of repair. In such a case, the rule of law may amount to putting into the landlord's pocket money far beyond the damage which he has actually suffered; but it must be remembered that there are difficulties on the other side, and that, but for this rule of law, a tenant who has broken his contract might come off better than if he had kept it; a result not to be lightly encouraged. It is not surprising that of these two principles the Court of Appeal has chosen that which they believed to be the workable one, that is, that at the end of the term, no matter how indifferent it may be to the landlord whether his premises are in perfect order or not, yet if the repairing covenants are not performed the landlord is entitled to recover the amount necessary to put them into repair."

129. Where the second limb applies, it operates to extinguish the right to damages. Where it does not, the common law rules of damages apply, though the award is capped by the limit in the first limb of section 18(1). The common law does not extinguish the damages on account of the landlord's intentions.

130. This is the position regarding the primary measure of damages, namely the cost of repairs. It remains to consider consequential losses, however, because in my view the position on causation is clearly different when one comes to consider losses that are said to have been caused by the carrying out of remedial works.

(4) Loss of rental income

131. Paragraph 29 of the particulars of claim alleges the following consequential losses in respect of rental income and alternative accommodation costs:

(i) loss of rent under the new leases, consequent on the remedial works: £ 84,916.86

(ii) cost of provision for alternative accommodation for Medite: £ 14,000.00

(iii) loss of rent for 1st-floor suite during the period reasonably necessary to undertake remedial works (9 July 2023 to 16 January 2024): £119,228.52

£218,145.38

132. The loss and its detailed calculation are set out in paragraphs 86 to 88 of Mr Everington's witness statement. The claim in respect of the 1st-floor offices was not pursued at trial.

133. Mr Brown's opinion was that Medite and Riverside could not have remained in occupation of their respective offices during the carrying out of the necessary works to the HVAC system. The duration of the relevant disruption would, however, depend on the scope of the works properly referable to the breaches of covenant. On the basis that the air-conditioning works were limited to the replacement of the chiller, the appropriate period would be 7 weeks. I accept this opinion. However, as he made clear in cross-examination, a longer period might be required if other works of repair were done in addition to replacement of the chiller. I do not have the material on which to base a scientific assessment of the relevant timeline. Doing the best I can, in the light of Mr Brown's stated opinions (with which Mr Sagoo did not feel able to disagree) and of my foregoing findings, I consider it reasonable to attribute a 10-week period of lost rent to the relevant works. Mr Brown also proposed an 18-week programme of works to include the roofing works. However, I am not satisfied that the inclusion of the roofing works justifies extending the period for which alternative accommodation was required.

134. By my reckoning, and on the basis of the rental figures given by Mr Everington, the loss of rent in respect of the ground floor offices was therefore £38,530.38.

135. In addition, the evidence is that the claimants paid Medite £14,000 towards the cost of alternative accommodation. That related to a period of 25 weeks. On a proportionate basis, the figure for 10 weeks is £5,600. This would bring the total loss in respect of the ground floor offices to £44,130.38.

136. However, for reasons indicated above in the discussion of causation, I do not consider that this consequential head of loss is recoverable. The loss in question would have

been incurred regardless of the tenant's breaches of covenant, because of the claimants' intentions regarding the improvement of the Premises. The common law rule discussed in paragraphs 128 and 129 above represents a simple and pragmatic approach to the assessment of the primary measure of damages for breach of a repairing covenant, namely, that the cost of remedial works is taken as the loss. But there is no justification for awarding as consequential damages the amount of expenditure (or loss of income) that would have been incurred anyway and so has not actually been caused by the need to carry out the repairs.

137. Therefore, I award nothing for loss of rent.

(5) Miscellaneous losses

138. There are claims for (i) £55,000 for Mr Everington's professional fees, (ii) £2,950 for the surveyor's fees for the preparation of the Schedule and the Quantified Demand, and (iii) £3,541 for solicitors' fees. In my view, the first defendant's breaches of covenant were a material cause of the incurring of those fees and they are properly recoverable pursuant to clause 3.31 of the Lease.

The Statutory Cap on Damages

139. Evidence on valuation matters in respect of the statutory cap on damages was given by two of the leading experts in the field: for the claimants, Mr Paul Raeburn; for the defendants, Mr David Shortall.

140. The experts were in agreement on the following matters.

- The level of diminution (if any) is linked to the cost of remedying the tenant's breaches of covenant which, in the opinion of the valuer in discussion with the building surveyor, survive a likely purchaser's treatment of the building.

- Three alternative methods of valuation are commonly adopted in the assessment of diminution of value in the context of section 18:

  (i) the comparative method: the use of contemporaneous open market transactional evidence of similar nearby properties in compliant and non-compliant condition;

  (ii) the residual valuation method: this takes as its starting point the value of the end product, from which are deducted the costs of achieving that end product; the resulting balance is the price it is assumed the hypothetical purchaser would pay for the property;

  (iii) the value-affective (or survival, or "shortcut") method: the valuer considers what works other than dilapidations remedies are required to make the property meet modern open market expectations and requirements; the costs of remedial works that are likely to be superseded are filtered out, and the surviving total of the costs is taken to represent the amount by which the value of the reversion has been diminished by the breaches.

- In the present case, Mr Raeburn used both method (i) and method (ii), whereas Mr Shortall used method (iii).

- Whichever method is adopted, the valuers' opinions as to the amount of diminution in value of the reversion are each a function of the aggregate cost of the remedial works that are not superseded by improvement and upgrade works made other than as a necessity to achieve the condition required by the tenant's covenants (i.e. to achieve compliance).

- The widely differing opinions of the building surveyors and the M & E experts as to what was necessary to achieve compliance have a significant impact on the valuers' respective assessments of the cost of the remedial works that are not superseded and, accordingly, the measure of diminution in value. Thus:

  > "If the Claimant is correct in their assertion that the entire HVAC system needed to be replaced to achieve compliance, this has a knock-on effect in requiring repair and/or replacement of components of the building fabric, such that, in the opinion of the Claimant's Valuer there is minimal supersession. Alternatively, if the Defendant is correct in their opinion that replacement of the chiller and repair to the remaining components of the system would achieve compliance, there is minimal impact on the building fabric and the works undertaken by the Claimant, in the opinion of the Defendant's Valuer, result in significant supersession."

- Mr Shortall provided alternative assessments of diminution in value on the basis of the alternative positions as to the position at common law. Mr Raeburn did not assess diminution on the basis of the alternative positions of the building pathology experts; his analysis proceeded on the premise that the required works were those identified by the claimants' experts.

141. Mr Raeburn said that the most satisfactory valuation method in principle is the comparative method, but that the scarcity of true comparables means that the residual valuation method is more commonly used. The usefulness of the residual valuation method was itself heavily dependent on the accuracy of the figures for the deductions, in particular in respect of remedial costs for dilapidations and the length of rental void periods. (See *Tiger Aspect Holdings Ltd v Sunlife Europe Properties Ltd* [2013] EWCA Civ 1656, *per* Lewison LJ at [24].) Mr Raeburn said, however, that the amount of diminution was commonly similar to the aggregate sum of the costs incurred in remedying the breaches, less those that were superseded. In the present case, Mr Raeburn considered that there was comparable transactional evidence of lettings in very similar, albeit not identical states; he therefore felt able to use the comparative method as a secondary method, by way of a cross-check against the residual method. He did not think it appropriate to use the shortcut method of assessing diminution in value, which he considered to be appropriate for negotiations between experienced valuers but not for rigorous analysis or presentation to a tribunal.

142. Mr Raeburn considered that the general trend and market practice was that at lease-end the landlord would look to achieve a "blank canvas", with partitioned floor space returned to open plan, new decorations and carpets that were new or in an excellent

condition. In a location such as the Property, existing HVAC systems were acceptable, provided that they were in good working condition; there was no evidence of higher rental value being achievable as a result of the installation of new systems. New lavatories and the achievement of an EPC A energy-efficiency did appear to assist in achieving slightly higher rentals.

143. On the residual method, Mr Raeburn assessed the Compliant Valuation as £2,022,012 and the Non-Compliant Valuation as £641,922, giving a figure for diminution in value of the reversion of £1,380,090. Mr Raeburn's cross-check by means of the comparative method, using comparables supplied by a firm of letting agents with long experience in letting offices at the Crossways Business Park, gave a figure for diminution in value of the reversion of £1,372,122. He concluded:

> "12.4.3 I thus conclude that the common law claim is not capped by either the primary or secondary methods of assessing diminution in value.
>
> 12.5.1 In summary, I consider that the local lettings evidence shows that if the Property had been yielded up in compliant order, it would have been re-lettable with few to no works of upgrading required, other than LED lighting, at circa £25 per sq ft. With new WCs, solar panels and EV chargers added – none of which cause any supersession – higher, at circa £26/£27 per sq ft.
>
> 12.5.2 Conversely, in the non-compliant state in which it was actually yielded up, the space would still have been potentially lettable, but in my opinion, on the evidence from both the Property itself and Riverbridge House, at no more than circa £12 - £15 per sq ft. The investment yield is also notably weaker for valuing in the non-compliant state, because of the greater risks inherent in such an investment model, including regular voids, tenant default, failing M&E and prospective tenants seeking service charge caps with a corresponding shortfall."

144. Mr Raeburn was an impressive expert witness. The main problem with his evidence, in my view, was that it was entirely premised on the claimants' case as to necessary remedial works; he confirmed in cross-examination that he had not been asked to assess diminution in value on the alternative basis of the position advanced by the defendants' building pathology experts. In the light of my conclusions as to the HVAC system, this creates a significant difficulty because, as Mr Hope observed, it means that Mr Raeburn does not provide me with a figure for diminution in value of the reversion.

145. Unlike Mr Raeburn, Mr Shortall considered the issue of diminution in value of the reversion on the alternative bases of the opinions of the parties' respective experts. He adopted the shortcut valuation approach because "it is clear that the intention of the hypothetical purchaser of the landlord's interest for the building, whether it was yielded up in a compliant state or in its actual condition, would most probably have been to undertake a comprehensive refurbishment and upgrading to meet the needs of modern tenants in the market", so that superseded remedial works would not impact on the bid of the hypothetical purchaser. In disagreement with Mr Raeburn, Mr Shortall

considered that the hypothetical purchaser would probably have refurbished the Property according to a similar scheme to that undertaken by the claimants, including the replacement of the HVAC system, in order to "future-proof" the Property and make it attractive to quality tenants in a market that showed increased demand for high-quality, energy-efficient offices rather than dated workplaces. (See the summary in paragraphs 19.3 to 19.8 of the report.) In the circumstances, there was no need to undertake valuations to assess the most profitable course to take in respect of the Property, because the effect of disrepair on value was more important than absolute values. (See report, paragraphs 14.9, 14.10, 14.21 and 17.8.) Accordingly:

> "14.23 Focusing only on diminution is a simplified way of approaching the diminution in value. It relies on the fact that the absolute values of the building are not essential to the conclusion, and that the exercise of establishing diminution is in effect a market valuation of the Contractual Claim net of the value of those items that are superseded by the hypothetical purchaser's or landlord's intentions.
>
> 14.24 A direct and shortcut approach to diminution is therefore to examine the Contractual Claim and adjust this to reflect supersession/dilution resulting from an analysis of whether these works are likely to be undertaken by a hypothetical purchaser or an incoming tenant.
>
> 14.25 In this case, works of repair are likely to be overtaken or superseded by the proposals of the actual landlord or those of the hypothetical purchaser to improve the building. The intentions of the actual landlord are, in my opinion, the same as those of the hypothetical purchaser in the market."

146. In my view, on the facts of this case, the theoretical argument between the experts is not of great significance. The critical question concerns the approach of the hypothetical purchaser. Mr Shortall's adoption of the shortcut method of valuation makes good sense, in my opinion, if the reason he gives for it—that the likely intentions of the hypothetical purchaser are clear—is correct. However, I prefer the evidence of Mr Raeburn as to what those intentions would have been; specifically, I accept his evidence that the hypothetical purchaser would have been satisfied with a functioning HVAC system, in proper repair, and would not have considered the cost and disruption of installing a new system to be worthwhile. Mr Raeburn was able to back up his opinion with consideration of comparables; and, while criticisms were made of the reliability of those comparables, they do seem to me to provide an element of support for his conclusion. Mr Shortall's evidence on this particular point seemed to me, with respect, to rest at the level of assertion, and, while his opinion is entitled to considerable respect, I found both it and his evidence generally to be less persuasive than that of Mr Raeburn.

147. The conclusion I reach, therefore, is that in assessing the diminution in value of the reversion the court ought to follow Mr Shortall's general approach but on the basis that the hypothetical purchaser would not have had the intention of replacing the HVAC system (which I have found to have been capable of being put into repair). That basis affects the conclusions as to supersession. As Mr Shortall observed in paragraph 15.2

of his report, the actual figures that he produced were dependent on assumptions as to the correctness of the alternative positions advanced as to remedial works by the respective building pathology experts and would need to be revisited in the event that (as is the case) the court were to make intermediate findings. (It was regrettable that, owing to his limited availability, Mr Shortall gave his evidence at the beginning of the trial and so was unable to listen to and address the evidence of the building pathology experts.) I shall ask counsel to seek agreement on the difference made to the figures by the findings set out in the discussion of common law damages and my conclusion as to the likely intentions of the hypothetical purchaser.

Conclusion

148. The result is that the damages payable by the defendants to the claimants are £648,141.47. I am grateful to the parties and their representatives for making this calculation since receiving the judgment in draft. I shall ask them to seek to agree the appropriate orders for interest and costs. If agreement cannot be reached, the outstanding matters can be dealt with either at a further short hearing or by way of written submissions.