Neutral Citation Number: [2021] EWHC 216 (Ch)

Case No: PT-2019-000099

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
PROPERTY TRUSTS AND PROBATE LIST (ChD)

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

Date: 11 February 2021

Before :

HHJ PAUL MATTHEWS
(sitting as a Judge of the High Court)

- -

Between :

CRITERION BUILDINGS LTD	**Claimant**
- and -	
(1) MCKINSEY & COMPANY INC (UNITED KINGDOM)	**Defendants**
(2) MCKINSEY & COMPANY INC	

- -
- -

Nicholas Trompeter and Alice Hawker (instructed by **Simkins LLP**) for the **Claimant**
Stephen Jourdan QC and Philip Sissons (instructed by **CMS Cameron McKenna Nabarro Olswang LLP**) for the **Defendants**

Hearing dates: 13-21 October 2020

- -

Approved Judgment

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

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Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to BAILII on the date shown at 10:30 am.

HHJ Paul Matthews :

INTRODUCTION

1. This is my judgment on the trial of a claim, brought by claim form issued on 5 February 2019, for sums in respect of service charges said to be due under leases of the well-known Criterion Building in Piccadilly Circus, central London. In fact, this consists of three adjacent buildings on an island site bounded by Piccadilly Circus to the north, Haymarket to the east, Jermyn Street to the south, and Lower Regent Street to the west. On the western side is Lillywhites, the sportswear specialist, to the north are the Criterion Theatre and Criterion Restaurant, and to the east and south are offices, with retail units on the ground floor. The current claim concerns only the offices, and only those occupied by the first defendant. These offices are known by their postal address, One Jermyn Street.

2. The sums claimed were originally over £2.5 million, plus interest, but were reduced by amended particulars of claim to £2,232,259.65, plus certain costs and interest. The claimant is the current owner of the landlord's reversion in an underlease dated 12 March 1993, made between a company called Criterion Developments Ltd as landlord and the first defendant as tenant, with the second defendant acting as surety. The first defendant is a company incorporated in the State of Delaware, United States of America, and is a subsidiary of the second defendant, a company incorporated in the state of New York, United States of America. The landlord's reversion on the underlease became vested in the current claimant on 20 August 2015. The head lease, out of which the underlease of March 1993 was granted, was made on 7 August 1992 by the Crown Estates Commissioners on behalf of the Crown, in favour of a company called Mountleigh Criterion Ltd, for a term of 125 years. The relationship between this company and Criterion Developments Ltd was not explained in evidence, but nothing appears to turn on that.

3. The underlease of March 1993 was for a term of 25 years. Accordingly, it would expire in March 2018. But on 21 December 2005 a supplemental lease was entered into, which granted a further term to the first defendant (with the second defendant as surety) for the period from 12 March 2018 to 25 September 2018. A further lease was granted on 8 February 2019 to take effect from 29 September 2018 to 31 December 2019. It is not argued that this further lease changes the position between the parties. The tenant vacated the demised premises by that date, and is no longer in possession.

4. Over the last few years, a number of issues have arisen between the parties as to the propriety and correctness in law of certain demands made by the claimant for service charge against the defendants. The claim as originally put forward also included elements of unpaid rent, but it appears that nearly all such rent questions have been disposed of. Accordingly, this claim now largely concerns service charge only. The service charge questions can be divided into six distinct parts.

5. In summary form, these are as follows:

(1) There is an issue as to the way in which service charges are apportioned between the various sub tenants of the claimant as head lessor ("the apportionment issue").

(2) There is an issue as to the sinking or reserve fund contributions said to be due by the sub tenants ("the sinking fund issue").

(3) There was an issue as to the cost of external repairs and decorations; this had been resolved between the parties by the first day of trial. I was told that the defendants no longer contest this issue.

(4) There is an issue as to service charge as to the cost of works to goods lifts in the building ("the goods lift issue").

(5) There was an issue as to service charge as to the cost of works to the fireman's lifts in the building ("the fire lifts issue"); but this is now subsumed under (2) above.

(6) Lastly, there were a number of issues arising in relation to the service charge budget for 2018 ("the additional items issue"), but they are also now subsumed under (2).

There is also a separate issue *not* about service charge, but relating to a question of possible arrears of rent, arising out of a claim to set off ("the set off issue").

6. The trial was heard remotely, using the MS Teams videoconferencing platform, between 13 and 21 October 2020. It is pleasing to be able to record that, using this technology, and despite having some 14 or so participants apart from me, and 7 witnesses, the trial proceeded relatively smoothly.

THE RELEVANT LEGAL DOCUMENTS

7. Of the legal documents which I have so far mentioned, there are four which are relevant to the issues arising in this claim. Three are leases. They are the headlease dated 7 August 1992, the underlease dated 12 March 1993, and the supplemental lease dated 21 December 2005. The other document is the deed of variation, also dated 21 December 2005. It varies the underlease of 12 March 1993. (As I have said, the further lease of 8 February 2019 does not alter matters.) The relevant terms of these documents are as follows.

Head lease

8. The head lease was granted by the Crown to Mountleigh Criterion Ltd for 125 years from 7 August 1992. So far as relevant, clause 3 of that head lease provides as follows:

> "THE Tenant HEREBY COVENANTS with the Landlord and as a separate covenant with the Commissioners as follows:-
>
> […]

> (3) During the said term as often as necessary well and substantially to repair uphold clean and keep in repair the demised premises (including all Landlord's fixtures thereon and additions thereto)
>
> […]
>
> (7) (a) In the year 2007 and in every subsequent fifteenth year and in the year immediately preceding the expiration or sooner determination of the said term (howsoever determined) or whenever reasonably required by the Landlord to clean all the outside stonework of the demised premises
>
> (b) In the year 1996 and in every subsequent fourth year and in the year immediately preceding the expiration or sooner determination of the said term (howsoever determined) to paint with at least two coats of paint in such colours as shall be approved and such manner as shall be approved or directed by the Landlord all the outside parts of the demised premises previously or usually painted
>
> (c) In the year 2000 and in every subsequent eighth year, and in the year immediately preceding the expiration or sooner determination of the said term (howsoever determined) to paint with at least two coats of paint and to paper and polish respectively all the inside parts of the demised premises previously or usually so treated save in relation to the parts of the demised premises coloured green and green hatched black on Drawings Nos GA/-4/Z - GA/09/Z annexed hereto in respect of which the Tenant shall only be required to maintain such inside parts to an appropriate decorative standard
>
> (d) To carry out all the work mentioned in sub-clauses (a) (b) and (c) hereof with good quality materials in a workmanlike manner and to the reasonable satisfaction of the Landlord
>
> […]".

Underlease

9. The underlease was granted by Criterion Developments Ltd to the first defendant (with the second defendant as surety) for 25 years from 12 March 1993. So far as relevant, clauses 2, 3 and 5, and Parts I and IV of the schedule, provide:

> "2 THE DEMISE
>
> In consideration of the rent and the covenants reserved by and contained in this Lease:-
>
> 2.1 the Landlord at the request of the Surety DEMISES to the Tenant:-
>
> 2.1.1 ALL the Demised Premises;
>
> 2.1.2 TOGETHER WITH the rights set out in Part I1 of the Schedule: and

2.1.3 EXCEPT AND RESERVED to the Landlord as stated in Part III of the Schedule:

2.2 for the term of twenty five years from the 12th day of March 1993 (subject to determination as hereinafter provided) subject to the exceptions and reservations restrictions stipulations covenants rights reservations provisions and other matters contained imposed by or referred to in the Superior Lease; and

2.3 the Tenant PAYING during the Term:-

2.3.1 until the 13th day of April 1995 a peppercorn and thereafter the yearly rent of FIVE MILLION TWENTY FIVE- THOUSAND SEVEN HUNDRED AND EIGHTY EIGHT POUNDS (£5,025,788) (subject to the provisions for revision contained in Clause 6) by equal quarterly payments in advance on the usual quarter days in every year clear of all deductions whatsoever the first (or a proportionate part) of such payments in respect of the period commencing on the 14th day of April 1995 and ending on the quarter day next following to be made on the 14th day of April 1995;

2.3.2 as additional rent clear of all deductions whatsoever the monies payable by the Tenant under Clause 3.3 as from the 12th day of March 1993;

2.3.3 as additional rent clear of all deductions whatsoever any Value Added Tax payable in respect of the yearly rent referred to in Clause 2.3.1.

3 TENANT'S COVENANTS

THE TENANT COVENANTS with the Landlord as follows:-

[…]

3.3 Insurance premium and party expenses and service charge

[…]

3.3.2 To pay to the Landlord the due proportion of the service charge and to observe and perform the Tenant's obligations relating to the service charge and services as set out in Part IV of the Schedule.

[…]

5 LANDLORD'S COVENANTS

THE LANDLORD COVENANTS with the Tenant as follows:-

[…]

5.3 Services

To use all reasonable and diligent endeavours to observe and perform the Landlord's obligations to provide the services and relating to the service charge

and services as set out in Part IV of the Schedule hereto in accordance with the principles of good estate management cost effectively and reasonably efficiently.

5.4 Superior Lease obligations

The Landlord shall pay the rent reserved by and observe and perform those covenants on the part of the tenant contained in the Superior Lease concerning repair and maintenance of the Demised Premises and (insofar as it affects the Demised Premises) the Building so far as the same are the obligation of the Landlord pursuant to Clause 5.3 and concerning insurance of the Demised Premises and (insofar as it affects the Demised Premises) the Building.

[…]

Schedule

Part I

Description of the Demised Premises

All those premises forming part of the lower basement (levels -4 and -3) basement (level -2) lower ground (level -1) ground (level 0) first second third fourth fifth sixth seventh and eighth floors of the Building shown for identification purposes by red edging on Plan Numbers 2-14 and the Basement Mezzanine Area.

[…]

Part IV

Service Charge Provisions

Section 1

1 Tenant's liability to pay service charge

1.1 The Tenant shall pay to the Landlord by way of additional rent the due proportion (as defined below) of the total cost (including Value Added Tax**)** ("the service charge") to the Landlord in any service charge period beginning or ending during the Term of the services and expenses specified in this Part of the Schedule and defraying the costs and expenses relating and incidental to such services.

1.2 The Tenant shall pay to the Landlord by way of additional rent clear of all deductions whatsoever the whole of the additional cost to the Landlord of providing any of the services at the request of the Tenant outside Office Hours or in the event that services are provided outside Office Hours for the use of the Tenant and any other tenant(s) or occupier(s) of the Building

2 Definition of “due proportion”

In this Schedule the expression "the due proportion" shall mean a fair proportion to be determined from time to time by the Landlord or the Landlord's Surveyors taking into account the use made of and the benefit received from the services and expenses and each of them and for the avoidance of doubt different proportions may be applied to different services or items of service charge expenditure (including if appropriate the attribution of the whole of the cost of any service or item of service charge expenditure to the Tenant) and the Landlord shall (having regard to the terms of this Lease and the principles of good estate management) adjust the due proportion to make fair allowances for differences in the services provided or supplied to or enjoyable by any Lettable Unit.

3 Advance payments on preliminary basis

3.1 The due proportion of the service charge shall be discharged by means of advance payments to be made on the same days upon which rent is payable under this Lease and by such additional payments as may be required under paragraphs 4 and 5.

3.2 The amount of each advance payment shall be such amount as the Landlord may reasonably determine as likely to be equal in the aggregate to the due proportion of the service charge for the relevant service charge period and which is notified to the Tenant at or before the time when the demand for an advance payment is made.

3.3 For the purposes of this Part of the Schedule "service charge period" means the period of twelve months from the twenty-fifth day of December to the twenty-fourth day of December in each year (or such other period as the Landlord may from time to time determine and notify to the Tenant).

3.4 The service charge shall be deemed to accrue on a day-to-day basis in order to ascertain yearly rates and for the purposes of apportionment in relation to periods other than of one year.

4 Service charge accounts and adjustments

4.1 The Landlord shall promptly as soon as may be practicable after the end of each service charge period submit to the Tenant an itemised statement duly certified (if so requested by the Tenant) by the Landlord’s Surveyors and audited (if so requested by the Tenant) giving a proper and full summary of the service charge for the service charge period just ended and shall if requested by the Tenant (but not more than once in each service charge period) permit the Tenant to inspect copy invoices or other records of expenditure relating to the service charge for the preceding service charge period.

4.2 If the due proportion of the service charge as certified shall be more or less than the total of the advance payments (or the grossed-up equivalent of such payments if made for any period of less than the service charge period) then any sum due to or payable by the Landlord by way of adjustment in respect of the due proportion of the service charge shall forthwith be paid or allowed as the case may be.

4.3 The provisions of this paragraph shall continue to apply notwithstanding the expiry or earlier determination of this Lease in respect of any service charge period then current.

5 Exceptional expenditure

In the event that the Landlord shall be required during any service charge period to incur exceptional expenditure which forms part of the service charge the Landlord shall be entitled to recover from the Tenant on demand the due proportion of the service charge representing the whole of that expenditure.

6 Sinking funds and reserves

6.1 With a view to securing so far as may reasonably be practicable that the service charge shall be progressive and cumulative rather than irregular and that tenants for the time being shall bear a proper part of accumulating liabilities which accrue in the future the Landlord shall be entitled to include in the service charge for any service charge period an amount which the Landlord reasonably determines is appropriate to build up and maintain a sinking fund and a reserve fund in accordance with the principles of good estate management.

6.2 Any such sinking fund shall be established and maintained on normal commercial principles for the renewal and replacement of lifts plant machinery and equipment in or upon the Building.

6.3 Any such reserve fund shall be established and maintained to cover prospective and contingent costs of carrying out repair decoration maintenance and renewals and of complying with statutes bye-laws regulations of all competent authorities and of the insurers in relation to the use occupation and enjoyment of the Building.

7 Advance payments deposit account

7.1 This paragraph applies to such part of the monies ("the relevant monies") paid by the Tenant and other tenants and occupiers of the Building by way of service charge (including for the avoidance of doubt sinking funds and reserves) as for the time being has not been disbursed in payment of the costs and expenses of providing services in and to the Building.

7.2 The Landlord shall keep the relevant monies in a separate interest bearing account until and to the extent that they may be required for disbursement then or in the then immediate future in payment of the costs and expenses of providing services in and to the Building.

7.3 Interest earned upon such account (less any tax payable) shall be credited to the account at regular rests in each year.

7.4 Until actual disbursement the relevant monies shall be held by the Landlord for the benefit of the persons so contributing.

8 Landlord's protection provisions

The Tenant shall not be entitled to object to the service charge (or any item comprised in it) or otherwise on any of the following grounds:-

8.1 The inclusion in a subsequent service charge period of any item of expenditure or liability omitted from the service charge for any preceding service charge period; or

8.2 An item of service charge included at a proper cost and in accordance with the terms of this Lease might have been provided or performed at a lower cost; or

8.3 Disagreement with any estimate of future expenditure for which the Landlord requires to make provision so long as the Landlord has acted reasonably and in good faith and in the absence of manifest error; or

8.4 The manner in which the Landlord exercises its discretion in providing services so long as the Landlord acts in good faith and in accordance with the terms of this Lease.

9 Vacant parts of the Building

In no event shall the due proportion of the service charge be increased or altered by reason only that at any relevant time any part of the Building may be vacant or be occupied by the Landlord or that any tenant or other occupier of another part of the Building may default in payment of his due proportion of the service charge.

l0 Service charge to exclude tenant's liabilities

There shall be excluded from the items comprising the service charge any liability or expense for which the Tenant or other tenants or occupier of the Building shall individually be responsible under the terms of the tenancy or other arrangement by which they use or occupy the Building.

11 Management charges

The Landlord shall be entitled to include in the service charge:-

11.1 Either a reasonable fee for the provision of services or the reasonable cost of employing managing agents for the carrying out and provision of services under this Part of the Schedule; and

11.2 Any reasonable cost of the accountants or auditors for auditing the service charge or providing other reasonable services in connection with the service charge.

Section 2

Services

(1) Repairing maintaining renewing and replacing in order to keep in substantial repair and condition and cleaning and decorating the foundations exterior roof (other than the roof of the atrium within the Demised Premises and of the dome on and above the seventh floor of the Building) external and any party walls and other load bearing members or other parts of the structure (other than the glass walls of the atrium) of the Building and such other parts of the Building and the Common Parts as are not the responsibility of the tenants of the Building.

(2) Cleaning the exterior of the roof of the atrium within the Demised Premises and the exterior of the roof of the dome on and above the seventh floor of the Building.

(3) Maintenance operation cleansing repair decoration alteration and replacement (when in the interests of good estate management) of the lifts in and serving the Building (other than those within the Demised Premises) and of the Conducting Media in and serving the Building.

(4) (a) The provision of heating to the Building and providing hot water to the Demised Premises and the lavatories in the Common Parts during such hours as the Landlord reasonably considers appropriate or as the Tenant may request (subject to the Tenant paying the whole of the additional resulting cost pursuant to paragraph 1.2 of Section 1 of this Part of the schedule) throughout the year including insurance maintenance servicing repair decoration and replacement of the installation.

(b) Ventilating and cooling the Building through the ventilation and air-conditioning installations in the Building during such hours as the Landlord reasonably considers appropriate or as the Tenant may request (subject to the Tenant paying the whole of the additional resulting cost pursuant to paragraph 1.2 of Section l of this Part of the Schedule) including insurance maintenance repair replacement and any decoration of the installation.

(c) The provision of electricity and water to the Building including insurance maintenance servicing repair decoration and replacement of the installations.

(5) Cleaning and lighting such parts of the Common Parts as are usually or ought to be cleaned and lit including the cleaning of the interior and exterior of the windows therein and the exterior of the glass in all of the windows in the Building including insurance maintenance repair replacement and any decoration of the equipment used in connection therewith.

(6) Provision of such security measures (including burglar alarms and surveillance systems) as the Landlord may reasonably consider appropriate.

(7) Providing maintaining repairing and replacing the fire detection fire alarm fire prevention and sprinkler systems in the Building save to the extent that they lie within the Demised Premises and the fire fighting equipment in the Common Parts and securing a supply of water thereto.

(8) Providing and maintaining any plants sculptures and other decorative features of the Building.

(9) The disposal of refuse from the Building including the collection and compaction thereof and the provision of receptacles in connection therewith.

Section 3

Expenses

(1) Premiums incurred by the Landlord (and not recovered pursuant to Clause 3.3.1) in insuring against property owners' liability employers' liability and third party liability and any other insurance maintained by the Landlord in respect of the Common Parts and the Building (including insuring plant and machinery and the plate glass in the Common Parts against damage or destruction).

(2) Any existing or future taxes rates charges duties assessments impositions and outgoings whatsoever in respect of the Common Parts.

(3) All charges assessments and outgoings for electricity gas oil and other fuels telephone water and public or statutory utilities payable in respect of the Common Parts and any additional levy or impost by the local or other competent authority in respect of refuse collection.

(4) Taking all proper and reasonable steps for complying with or making representations against or otherwise contesting the incidence of the provisions of any legislation or orders or statutory requirements thereunder concerning town planning compulsory purchase public health highways streets drainage or other matters relating to or alleged to relate to the Common Parts and the Building or any requirement of any public or local authority which is not the responsibility of the tenants of the Building.

(5) Providing premises in connection with the management security and maintenance of the Building including workshop and office and living accommodation for staff employed for purposes connected with the Building (including the cost of office and cleaning equipment furniture and other like costs and in respect of any such premises within the Building a notional rent in respect thereof equivalent to the open market rental value thereof assuming them to be available for use as storage space within the Building).

(6) Providing management security maintenance cleaning and other staff and/or contractors including providing to all persons from time to time employed by the Landlord or its agents for purposes connected with the Building wages salaries special clothing and uniforms rest rooms pension fund contributions payments in respect of National Health Insurance and other payments required to be made by statute and other benefits.

(7) Providing inspecting maintaining repairing and renewing signs signposts location maps and displays and furniture in or upon the Common Parts and the Building.

> (8) The proper fees charges and expenses of any agents retained by the Landlord to manage the Building accountants surveyors architects engineers solicitors or any professional advisors employed for the purposes of or in connection with any of the provisions of this Part of the Schedule.
>
> (9) Borrowing any necessary sums on arm's length terms for or in connection with the provision of the services set out in this Part of the Schedule including the interest commission banking charges or other charges thereof.
>
> (10) Providing maintaining repairing renewing and insuring machinery and equipment used in connection with the provision of the services set out in this Part of the Schedule and the costs of leasing any such machinery and equipment.
>
> (11) Providing maintaining repairing and replacing machinery and equipment in connection with the goods yard in the Common Parts and goods handling in the goods yard.
>
> (12) Establishing and maintaining reasonable financial reserves to meet the future costs (as from time to time estimated by the Landlord) of performing its obligations referred to in this Part of the Schedule.
>
> (13) Whenever and as often as the Landlord shall properly think fit enforcing any covenant or condition or exercising any right of entry contained in any lease underlease licence or agreement relating to the Building or any part thereof and where such enforcement or re-entry would be for the benefit of the occupiers of the Building as a whole.
>
> (14) Providing any other services and facilities as the Landlord may reasonably deem to be necessary or desirable (a) in the interest of good estate management or (b) for the benefit of the tenants of the Building."

Supplemental lease

10. The supplemental lease and the deed of variation were both made on 21 December 2005 by Allied Irish Trust Corporation to the first defendant (with the second defendant as surety). The lease was for the short period from 12 March to 28 September 2018. So far as relevant, clause 3.2 of that lease provides:

> "Notwithstanding Clause 3.1 hereof the Tenant shall be entitled to deduct or set off from the yearly rent reserved by this Lease (and any value added tax on rent) any monies due to the Tenant pursuant to Clause 2.2 of the Deed of Variation dated 21/12/2005 and made between (1) The Criterion Isle of Man Unit Trust (2) McKinsey & Company, Inc. United Kingdom and (3) McKinsey & Company, Inc, (plus any value added tax thereon) in the event and to the extent that the Landlord shall have failed to comply with its obligation to pay to the Tenant such monies on the due date."

Deed of variation

11. As I have said, the deed of variation varies the underlease of 12 March 1993. So far as relevant, clause 2.2 of the deed provides:

> "2.2 To the extent that the Landlord's consent is necessary for carrying out the Tenant's Works and the Landlord has provided such consent and subject also to the Landlord being satisfied that the Tenant's Works have been carried out (the Landlord acting reasonably), the Landlord shall reimburse the Tenant for the costs incurred in carrying out the Tenant's Works (or any part of them) within 30 days following receipt by the Landlord of a receipted invoice relating to the Tenant's Works issued by a contractor employed to carry out the Tenant's Works provided that:
>
> > 2.2.1 the Landlord shall not be required to reimburse any costs incurred by the Tenant in carrying out the Tenant's Works after 31 December 2010 or in respect of which the Tenant has not provided the Landlord with a receipted invoice by 30 June 2011 (save where the Tenant is in dispute with the contractor employed to carry out the Tenant's Works in which case the Tenant must have notified the Landlord of the Tenant's Works carried out and provided details of the costs in question and details the dispute by no later than 30 June 2011); and
> >
> > 2.2.2 in complying with its obligations under this Clause the Landlord shall not be required to reimburse the Tenant for more than an aggregate amount of £2,500,000 (exclusive of VAT) in relation to the Tenant's Works.
>
> 2.3 To the extent that the Landlord's consent is required for the Tenant's Works the Landlord shall confirm to the Tenant at the time that consent to the Tenant's Works is requested whether or not the Tenant will be required to reinstate the Tenant's Works in question at the expiry (or earlier determination) of the Term and in reaching such decision the Landlord shall act reasonably having regard to the nature of the Tenant's Works the subject of the Tenant's application and the original specification of the Premises."

WITNESSES

12. The following witnesses gave factual evidence at the trial of this claim: on behalf of the claimant there were called Andrew Sell, head of asset management at Criterion Capital Ltd (appointed asset managers to Criterion Capital Group), Stephen Marsh, a director of O and M Lift Consultancy Services Ltd (advising the claimant), Peter Chapman, a director of Orbit Property Management Ltd (the claimant's managing agents), Peter Kelly, finance director at Orbit Property Management Ltd, and Emma Louise Hammond, Director of Real Estate for the second defendant. Because of the settlement of the issues relating to the external works, it was not necessary to call other witnesses in respect of whom witness statements had been served. In addition, there were expert witnesses called: on behalf of the claimant there was called Colin Edgar of Malcolm Hollis Ltd, as an expert witness in the field of lift engineering, and on behalf of the defendants there was called Simon Russett of Hoare Lea Ltd, as an expert witness in the same field. I set out my impressions of the witnesses as follows.

13. Andrew Sell had limited evidence to give, and was careful to respond precisely, frequently asking for clarification. I am confident that his evidence was truthful.

14. Peter Chapman was a straightforward and transparent professional witness. He accepted correction, and answered questions even against his or the claimant's interest. I accept his evidence without reservation.

15. Peter Kelly was a clear and straightforward, and also highly knowledgeable witness. I accept his evidence without reservation.

16. Stephen Marsh was a knowledgeable, clear and fair witness, who accepted correction, and had no brief to give partisan evidence (his company having been effectively sacked by the claimant in 2015). I am satisfied that he was telling the truth throughout, and I accept his evidence without reservation.

17. Emma Louise Hammond was a careful, clear and businesslike witness, who stuck to what she knew and did not try to speculate or stray outside her knowledge. I am in no doubt that what she said was truthful, at least so far as she knew.

18. There were two experts called before me. The first was Colin Edgar, called as a lift expert on behalf of the claimant. He was very knowledgeable, professional and indeed unflappable, and clearly trying to help the court. He gave his honest professional opinion, usually with a sound basis for each point that he made (although there were one or two cases where I was not so sure). In my view his perspective was more balanced that that of Mr Russett, and his conclusions more justified. At the same time, I accept that his approach was a more conservative approach.

19. The other expert was Simon Russett, called by the defendants. He was less objective, and therefore less impressive, as an expert witness. This was not because he was not trying to help the court, but because he was starting from a different position, and adopting a different methodology. First of all, he accepted and indeed adopted the earlier reports of Mr Ron Cooke, of the same company, Hoare Lea, who had been instructed on behalf of the defendants to provide a report *from a tenant perspective*. Second, Mr Russett inspected the two goods lifts on only one occasion, in 2020, when he carried out no operational test for one of them, and only a basic functional test for the other. He appears to have assumed that what Mr Cooke had previously found was true without checking it for himself. Third, he struck me at least as much an advocate as an expert witness, because he indulged in speculation and made legal arguments. For example, he speculated about the source of excessive heat within the GL 10 lift machine room, although he could not point to any possible source of heat within that room except the winding machine itself. For another example, he speculated about the source of replacement parts to the machinery, and accepted when challenged that this was speculation on his part. For a third example, he sought to make a legal argument about the scope of the maintenance contract for the lift.

20. Accordingly, where there is a significant difference between the two experts, I generally prefer the view of Mr Edgar.

THE ISSUES

21. The claim itself is a straightforward one, for sums claimed to be due under the lease. The defendants accept that the first defendant was a tenant under the lease and bound by its covenants. So the claim is defended by the defendants only on the basis of the issues referred to. The focus is accordingly on these. I will deal with each of the outstanding issues arising in turn.

The apportionment issue

Introduction

22. By clause 2.3.2 of the underlease, the tenant covenants to pay as "additional rent" sums under clause 3.3, which includes "service charge". Under paragraph 1.1 of section 1 of part IV of the schedule, the service charge for the purposes of clause 3.3 is the "due proportion" of the total costs of the services and expenses specified in that part of the schedule. "Due proportion" is defined at paragraph 2 as "a fair proportion to be determined" by the landlord, taking into account "the use made of and the benefit received from the services and expenses and each of them". Over the years, the claimant and its predecessors in title have charged a certain proportion of the total costs and expenses to the defendants as the "due proportion".

The parties' contentions

23. The defendants' case is that what the claimant has charged as the "due proportion" does not comply with the lease because it is not "fair". They say they have paid too high a percentage of the service charges for the whole building, because the way in which the service charges were apportioned favoured another tenant (the Criterion Theatre and Restaurant) at their expense. In their amended defence, they plead as follows:

> "8. The sums demanded by the claimant do not represent a fair proportion of the total costs it has incurred (or might in the future incur) in providing services to the building.
>
> […]
>
> (2) up to and including the service charge year ended June 2013, the claimant apportioned to the total costs it had incurred in providing services to the building by allocating those costs between six schedules. Each of the tenants in the building contributed a varying percentage of the total costs of each schedule. The defendants believe that those percentages were based upon the internal floor areas of the units occupied by each of the contributing tenants.
>
> […]
>
> (5) The percentages applied by Orbit to each schedule do not reflect the respective internal floor areas of the units within the building occupied by each contributing tenant.
>
> (6) Despite repeated requests, the claimant and its agent have failed or refused to reconsider this method of apportionment but have instead maintained that it

> reflects a long established practice and is justified on this basis. The claimant has also indicated that it does not consider it necessary, practical or in the interests of good estate management to adopt a more sophisticated or accurate method of apportionment.
>
> (7) The claimant is thereby in breach of the requirements imposed by paragraph 2 of the schedule to the lease.
>
> (8) In the circumstances the defendants instructed Property Solutions (UK) Ltd ("PSL") to review the claimant's method of apportionment and to devise an alternative method which more accurately reflects the provisions of the lease. PSL's proposed method involves allocating costs between four schedules (whole building, PPM M&E, lifts 1, 2 & 9 and Goods Lift) and then devising percentages for each tenant contributing to those schedules by reference to the actual floor area of each unit.
>
> (9) Applying PSL's methodology to the alleged total costs of providing the services … the demands made by the claimant overcharge the defendants by at least the sums set out in the table below: [total from July 2015 to June 2019: £215,631.72].
>
> (10) in the circumstances, the claimant is required to prove that the sums demanded in respect of each service charge year from and including the year ended 30 June 2014 at the expiry of the current lease represented due proportion as that term is defined in paragraph 2 of part IV of the schedule to the lease and/or the current lease. …"

24. I add only that the defendants sought by application notice of 1 July 2020 to re-amend the defence to plead implied terms based on *Braganza v BP Shipping Ltd* [2015] 1 WLR 1661, SC. However, permission to re-amend it was refused by Chief Master Marsh on 22 July 2020. Accordingly, I need not consider any such terms.

25. In its amended reply, the claimant pleads to this as follows:

> "10. For all the reasons set out herein, paragraph 8 is denied. The claimant has only ever demanded from the defendants the due (and hence a fair) portion of the total costs in the relevant service charge periods of the services and expenses specified in sections 2 and 3 of part IV of the schedule to the lease and defraying the costs and expenses relating and incidental thereto.
>
> […]
>
> 12. As to paragraph 8(2):
>
> 12.1. It is admitted that, in relation to the service charge periods ended about June 2003 – June 2013, the claimant's predecessor in title (as opposed to the claimant) apportioned the total of all service charge costs and expenses across six schedules …
>
> […]

12.4. The claimant is unable to admit or deny the defendant's belief in the final sentence of paragraph 8(2). However, it is admitted that the six schedule apportionment was based upon the internal floor areas of each lettable unit (apart from the theatre, in respect of which an 80% discount was applied by reason of the fact that, apart from a small ground floor ticket office, the entirety of the demised space was (and is) laid out over four basement levels).

[…]

15. Paragraph 8(5) is denied. The apportionment exercise carried out by Orbit across the two schedules did reflect (and continues to reflect) the internal floor areas of each lettable unit within the building, albeit in the case of schedule two disregarding Lillywhite's demise. Thus:

15.1. The physical extent of the defendant's demise represents 54.42% of the total internal floor area of the building.

15.2. Hence, the figure of 54.42% is used in (the new) schedule one (just as it was used in the previous schedule one).

15.3. The figure of 78.23% in (the new) schedule two represents 54.42% of the total internal floor area of the building, disregarding the internal floor area of Lillywhite's demise, i.e. 54.42% of 69.56%.

16. As to paragraph 8(6):

16.1. From time to time since 2015, the defendants have requested the claimant to justify the method of apportionment described in paragraph 14 above. The claimant has repeatedly and fully complied with these requests.

16.2. It is denied that the claimant has refused to reconsider the method of apportionment. …

17. Paragraph 8(7) is denied. The claimant has not acted in breach of the requirements imposed by paragraph 2 of section 1 of part four of the lease, either as alleged or at all …

18. As to paragraph 8(8):

18.1. It is admitted that the defendants instructed PSL to review the claimant's method of apportionment and to devise an alternative method.

18.2. It is admitted that PSL's proposed alternative methodology is as described by the defendants.

18.3. It is denied that this proposed alternative methodology: (i) "more accurately" reflects the provisions of the lease; or (ii) if implemented, would result in the first defendant paying the due (or an otherwise fair) proportion of the service charge under the lease.

19. As to paragraph 8(9):

> 19.1. It is denied that the claimant has overcharged the defendants in respect of any service charge (or any item comprised in it), either as alleged or at all.
>
> […]
>
> 20. As to the first sentence of paragraph 8(10):
>
> 20.1. It is denied (in so far as the same is alleged) that the claimant has the legal burden of proving that the (or any of the) sums demanded and claimed herein represent the "due proportion" of the service charges for the relevant service charge periods.
>
> 20.2. Without prejudice to the foregoing, the sums demanded and claimed herein represent precisely that.
>
> […]"

26. The defendants were given permission to file and serve a rejoinder. In it, they said this:

> "4. As regards paragraph 12 the defendants are unable to admit or deny, as stated in paragraph 12.4, whether any discount was applied to the theatre, the amount of that discount or why the claimant and/its predecessor in title decided to apply that discount and the claimant is required to prove the same.
>
> […]
>
> 6. As regards paragraph 15, no admissions are made as to whether the percentage of the service charge costs apportioned to the defendant in the two schedules accurately reflects the internal floor areas of the parts of the building demised to the defendants. … The claimant is accordingly required to prove (i) which measurements of the internal floor areas of the lettable units and the building it relied upon in calculating the percentage is set out in paragraph 15 and (ii) that those measurements are accurate. …
>
> 7. As to paragraph 16,
>
> (1) It is denied, as stated in paragraph 16.1 that the claimant has properly justified the method of apportionment applied before the commencement of these proceedings …
>
> (2) The defendants are unable to admit or deny whether, as stated in paragraph 16.2, the claimant has been willing to listen to and take account of any and all legitimate concerns which the defendants might have regarding the building …
>
> 8. As regards paragraph 17:
>
> (1) it is denied, as stated in paragraph 17.1, that the facts and matters set out in paragraph 14 demonstrate that the claimant's predecessor in title, whether via Orbit or otherwise, properly took into account the use made by, and the benefit

> received from, the services and expenses by each tenant of a lettable unit in determining the proportion of the service charge to demand from the defendants;
>
> (2) As regards paragraph 17.3, the claimant has failed to explain how it has arrived at the range of percentages specified therein and the defendants cannot, therefore, plead further thereto. …
>
> 9. As to paragraph 18 PSL's proposed method of apportionment is fair and accurate whereas the claimant's is not because PSL's method (i) uses accurate measurements for the internal floor areas; and (ii) by adopting four schedules instead of two takes proper account of the extent to which the tenants of each of the Lettable Units benefits from the services.
>
> 10. As to paragraph 19, the figures set out in the table at paragraph 8(9) of the amended defence have been calculated by re-apportioning the service charge costs and expenditure identified in the service charge accounts for each year in question between the four schedules proposed by PSL …
>
> 11. As to paragraph 20, the claimant asserts that the defendants are liable to pay the sums set out in the particulars of claim which are said to represent service charges due under the lease. In the circumstances the claimant does bear the legal burden of proving that the sums claimed represent a due proportion of the total cost to the claimant (or its successor) of the services and expenses specified in sections 2 and 4 of part IV of the schedule and defraying the costs and expenses relating and incidental to such services."

The burden of proof

27. Mr Trompeter for the claimant accepts that the claimant bears the *legal* burden of proving that the sums claimed represent a due proportion of the total cost to the landlord of the relevant services and expenses. But he says that the burden of raising the due proportion question is an evidential burden cast on the defendants. Unless and until the defendants make a prima facie case for saying that the sums claimed from them are not the "due proportion" of the cost, the claimant does not have to deal with the point. Since, Mr Trompeter says, the defendants have not alleged any failure in the process by which the sums claimed are ascertained, but simply asserts that the "due proportion" claimed is not "fair" (and therefore not in accordance with the lease), the claim must succeed.

28. Mr Trompeter relies on *Yorkbrook Investments Ltd v Batten* (1986) 18 HLR 25. In that case, which was about the reasonableness of service charges which the claimant landlord was seeking to enforce against the defendant tenant, Wood J, giving the judgment of the Court of Appeal (O'Connor LJ and himself), said, at 34-35:

> "During argument on the issue of garden maintenance, it was indicated that registrars of county courts and those practising in this field were finding difficulty in dealing with the burden of proof when considering applications for declarations under the Housing Acts. Having examined those statutory provisions, we can find no reason for suggesting that there is any presumption for or against a finding of reasonableness of standard or of costs. The court will reach

> its conclusion on the whole of the evidence. If the normal rules of pleadings are met, there should be no difficulty. The landlord in making his claims for maintenance contributions will no doubt succeed, unless a defence is served saying that the standard or the costs are unreasonable. The tenant in such a pleading will need to specify the item complained of and the general nature - but not the evidence - of his case. No doubt discovery will need to be ordered at an early stage, but there should be no problem in each side knowing the case it has to meet, providing that the court maintains a firm hold over its procedures. If the tenant gives evidence establishing a prima facie case, then it will be for the landlord to meet those allegations and ultimately the court will reach its decisions. The question of a reasonable charge arises in claims for a *quantum meruit,* and the courts over the years have not been hampered by problems about the burden of proof."

29. In the more recent decision of the Upper Tribunal in *Enterprise Home Developments LLP v Adam* [2020] UKUT 151 (LC), another case on service charges, Martin Rodger QC, Deputy President, quoted the extract above, and continued:

> "28. Much has changed since the Court of Appeal's decision in *Yorkbrook v Batten* but one important principle remains applicable, namely that it is for the party disputing the reasonableness of sums claimed to establish a *prima facie* case. Where, as in this case, the sums claimed do not appear unreasonable and there is only very limited evidence that the same services could have been provided more cheaply, the FTT is not required to adopt a sceptical approach. In this case it might quite reasonably have taken the view that Mr Adam had failed to establish any ground for thinking the sums claimed had not been incurred or were not reasonable, which would have left only the question whether any item of expenditure was outside the charging provisions."

30. The defendants relied on the decision of the House of Lords in *Nimmo v Alexander Cowan & Sons Ltd* [1968] AC 107. This was a Scottish appeal, but concerned with the construction of the Factories Act 1961, section 29, which applied in England as in Scotland. This section required an employer to make and keep safe every place of work "so far as is reasonably practicable". The House held, by a majority of three to two, that, where an employee was suing his employer under this provision for injury suffered at his place of work, the burden of showing that it was not reasonably practicable to make and keep the place of work safe lay on the employer. It was not for the employee to show that it was reasonably practicable for the employer to do so.

31. Lord Upjohn (in the majority) said that the employee in that case

> "avers that the place at which he had to work was not made and kept safe for him to work there. He has deliberately refrained from averring that it was reasonably practicable for the respondent company to make and keep the place of work safe for any person working there. The question at this stage is one of relevancy. Is it essential for the pursuer to make that averment and, if he fails to do so, does his action fail for irrelevancy? The question of onus of proof will of course also arise at the trial.

> The question is one of some general importance, for if the pursuer has to aver that the respondent company must make and keep the working place safe so far as is reasonably practicable, the pursuer must specify with the necessary particularity the manner in which the respondent company could and should have discharged that obligation. Much the same situation would arise in England, for if the obligation is upon the plaintiff to allege that the place could be made and kept safe so far as is reasonably practicable, he would, no doubt, be asked for some particulars of that allegation…
>
> […]
>
> I cannot believe that Parliament intended to impose upon the injured workman or, if dead, his widow or other personal representative, the obligation to aver with the necessary particularity the manner in which the employer should have employed reasonably practicable means to make and keep the place safe for him.
>
> […]
>
> In my opinion, Parliament intended to impose upon the occupier the obligation of averring and proving at the trial that it was not reasonably practicable to make and keep the place of work safe, so that the pursuer's averments cannot be dismissed as irrelevant."

32. Lord Wilberforce (in the minority, as was Lord Reid) said, at 128:

> "Parliament, when enacting safety legislation, has various choices open to it. It may impose an absolute duty to take precautions, or to produce a condition of safety, or it may impose a qualified duty. In this subsection of the Factories Act it has imposed a qualified duty—there is no dispute about this, only as to the nature of the qualification.
>
> When a qualified duty is imposed, again there are alternatives. The qualification may be made an integral part of the definition: or the duty may be stated in unqualified terms followed by a proviso, exemption or exception which, if satisfied or demonstrated, takes the case out of the section. In either case—and I shall return to this point—there is a qualification of the duty.
>
> Each of these types of legislation can be exemplified: each has its appropriate terminology. I shall not repeat the examples given by my noble and learned friend, Lord Reid. Our task must be to ascertain which choice has been made and, if we find that language appropriate to one alternative has been used, we should not readily be persuaded that the real intention was in favour of the other. These are well-known tools, and Parliament's selection should be assumed to be deliberate and intelligent.
>
> The language used in section 29 (1) of the Factories Act, 1961, has been acutely analysed in the Inner House. Their Lordships, unanimously affirming the Lord Ordinary, found that the qualification of reasonable practicability is 'woven into the verb.' I find this analysis convincing and I shall not expand the argument."

33. In my judgment this is a decision on the true construction of that statutory provision (as both Lord Upjohn and Lord Wilberforce make clear), and does not assist me in the present context, where I have to construe the provisions of the underlease. I did wonder whether the same thing was true of *Yorkbrook*, that it was simply a decision on section 91A of the Housing Finance Act 1972. But I am persuaded that it was not, and that it expressed a more general proposition about the way in which claims for service charge are made and defended. Whereas reasonableness was in issue in that case (and in *Enterprise Homes*, which followed it), in the present case it is the "due proportion" of the costs of the services and expenses specified. But the principle is the same. As Mr Trompeter said (day 5, page 8), if it were not so,

> "it would mean that a landlord who brings a claim for arrears of service charge would need, … in advance of any defence being filed, to address any possible number of potential reasons or disputes as to why the service charge shouldn't be payable. Litigation could only become manageable in this situation if it's the tenant, the party disputing the charge in question, who identifies the grounds for the dispute."

34. Accordingly, in my judgment the defendants must establish a prima facie case that the first defendant has been charged more than a "due proportion" of the cost, and therefore the service charges claimed are not payable, otherwise the claimant succeeds. The claimant does not have at this stage to prove that it has charged the "due proportion". I therefore go on to consider the question whether the defendants have established such a prima facie case.

Discussion

35. On the evidence before me, I find that, during the time of the claimant's predecessors in title, their then managing agents Jones Lang Lasalle devised and operated a six-schedule system of apportionment. In 2014, managing agents Orbit (acting for the claimant's immediate predecessor in title) reconsidered the matter, and decided to introduce a simpler, two-schedule system. That has been maintained to the present day. Although the two-schedule system was challenged by the defendants in their statements of case, paragraph 29 of the defendants' skeleton argument for trial says that they

> "accept that the decision to use the two-schedule system based on floor areas was permissible".

That position was maintained in the defendants' closing submissions.

36. In 2009, Ms Hammond of the first defendant instructed the well-known surveyors Savills to conduct a review of the service charges at that time. In evidence she called this a "desktop review", by which I understand that she meant that it was superficial. But it is clear that Savills looked at the service charge expenditure line by line and made comparisons with service charge costs in similar accommodation elsewhere in central London. It may not have involved measuring the demise, but I see no reason to conclude that it was in any way superficial.

37. Like the earlier six-schedule system, the current two-schedule system is based on floor areas, and allocates percentages of the total floor area to each tenant. Schedule 1 divides the total service charge for most services between all the tenants in the building, and schedule 2 divides it (for mechanical and electrical plant services) between them all except Lillywhites (which maintains its own such plant). The percentages allocated in schedule 1 of the two-schedule system are the same as under schedule 1 of the six-schedule system. Under that schedule, the defendants are allocated 54.42%, the Criterion Theatre is allocated 3.33%, and the Criterion Restaurant 2.64%. However, the defendants say that 54.42% does not represent their share of the floor areas in the building. They say it should be in the region of 46.74% (which is the average of a number of measurement figures), and that the Criterion Theatre and Restaurant taken together should be in the region of 17%.

38. The evidence as to exactly why there is this disparity was limited. But what there was satisfied me that the answer lies in the nature of the space occupied by the theatre. Most of this is the auditorium and stage area, which extend over several floors, but are fully occupied only at the bottom level. The higher levels are balconies round the edges and the flies over the stage. Although there was no direct evidence from Jones Lang Lasalle (who devised the original six schedule system), I infer from the available evidence that a reduction was made to the service charge proportion of the theatre to reflect the more limited use of the space demised. This necessarily had the effect of increasing the burden on other tenants beyond the proportions that would be produced by making them rateable to the floor areas demised.

39. According to the lease, the question of what is a "fair" proportion is to be determined by *the landlord*, taking into account use made and benefit received by the tenant concerned. It is not for the court to determine it. The court's role is simply to see that the terms of the lease are observed. The previous landlord determined a "fair" proportion in this way on account of the use made and the benefit received by the theatre. Whether this was a straightforward discount on what would otherwise be the space demised, or whether the surveyors notionally reduced the space demised to exclude voids, does not matter for this purpose. In my judgment, they could properly take this into account on either basis. What matters is that the previous landlord's managing agents determined what they considered to be a fair proportion taking into account the matters mentioned. That decision was not challenged by the defendants during the time of the previous landlord. The present landlord, the claimant, has adopted the same approach. The defendants do not allege that the claimant or its predecessor has failed to take into account any of the matters referred to in the lease.

40. The defendants submitted that "a fair proportion" was an objective standard, albeit to be determined by the landlord. They said that this was more commercial, in that, in such a case, a failure to produce a fair proportion would allow the court to intervene, whereas a subjective approach would not. They referred to *Sudbrook Trading Estate Limited v Eggleton* [1983] AC444, in particular at 483G-H, where Lord Fraser of Tullybelton (in the majority) said:

> "The true distinction is between those cases where the mode of ascertaining the price is an essential term of the contract, and those cases where the mode

> of ascertainment, although indicated in the contract, is subsidiary and non-essential."

The defendants submitted that the present was a case of the second kind, and that the court would be able to intervene if the 'machinery' set out in the lease broke down.

41. The claimant submits that the decision as to a "fair" proportion is subjective, just like (for example) a lender's power to vary the interest rate charged on a loan. It relies on *Pendra Loweth Management v North* [2015] UKUT 91 (LC), a decision of Martin Rodger QC, Deputy President of the Lands Chamber of the Upper Tribunal. That case concerned a dispute about service charges in relation to cottages in a holiday village in Cornwall. The definition of "Estimated Service Charge" was contained in clause 7 of the lease:

> "Such sum demanded on account of the Service Charge in respect of each Service Charge Period as the Management Company shall specify by notice in writing at its discretion to be a fair and reasonable interim payment having regard to the Service Expenditure estimated by the Management Company under clause 29".

42. The tribunal said this:

> "41. I accept Mr Seitler's submission that the lease does not require as a pre-condition of liability to pay the Estimated Service Charge that the estimate must have been prepared by reference to a budget which follows strictly the categories of expenditure listed as Service Expenditure in the Ninth Schedule and excludes from consideration any other items. The sum itself is in the discretion of the Management Company. If the Company considers that the budget it has prepared for its own activities in the forthcoming year is a suitable approximation of its likely expenditure on service charge items in the same period, I can see no reason to interpret the lease as requiring some process of stripping out items of expenditure which may not fall strictly within Service Expenditure.
>
> 42. There was no allegation in this case of bad faith or deliberate overcharging by the Management Company and the FTT made a point of stating that nobody had "acted in an untoward manner". Where parties agree that one of them is to be trusted to make an estimate which the other is required to pay, subject to an account being taken at a later date, and the estimate is made in good faith, there seems to me to be little or no scope to challenge the estimate except by relying on s. 19(2) of the 1985 Act. Where a service charge is payable before the relevant costs are incurred, s.19(1) provides that no greater amount than is reasonable is so payable; there is therefore a statutory limit on estimated charges, even where they have been estimated in good faith. Where a deliberately inflated estimate has been submitted in bad faith or an entirely arbitrary figure has been chosen the contractual position is likely to be different, and it may be possible to say that, even without regard to the statutory cap on advance payments, the estimate is not payable in full; but that is not this case."

43. The defendants make the fair point that the language of the clause in that case was different from that in this. There was an express statement that the decision of the company was "at its discretion", and paragraph 42 of the decision had to be read in light of that fact and indeed the facts of the case. That paragraph tells us nothing as to whether the landlord in the present case has been trusted by the tenant to make an estimate of what the tenant is required to pay, much less what the consequences are. The defendants also say that the decision is inconsistent with *Braganza* (the decision in which of course postdated that in *Pendra Loweth*), in that the *Braganza* implied term goes beyond mere good faith to taking into account only relevant factors, and not reaching a perverse decision.

44. The claimant accepts that the landlord's decision must be *rational*: see *eg Hayes v Willoughby* [2013] 1 WLR 935, [14], [23], where the concept of rationality is explained, by way of distinction from reasonableness. The claimant further says that this decision *was* rational. For my part, I readily accept that the lease before the court does not contain the same words as are found in the *Pendra Loweth* case. It is simply an example of what can be agreed. I have to look at the meaning of the words used in the present case.

45. In my judgment, where there are several tenants amongst whom the service charge must be divided, and it makes no financial difference to the landlord how it is done, it is not sensible to see this as an objective standard, so that any tenant can simply reject the decision as "unfair". Instead the provision works most efficiently if the landlord makes a decision which is subjective. The landlord can be trusted, because it has no axe to grind. Reading the lease as a whole, therefore, the decision given in the present case to the landlord is subjective rather than objective, albeit subject to rationality and (in a case where it is pleaded) the *Braganza* implied term (which does not import the objective standard of reasonableness).

46. Thus, the evidential burden is on the defendants to raise an issue as to its rationality. In my judgment, they have not done this. But even if it were an objective decision, it would still lie on the defendants to raise an issue as to the objective wrongness of the decision to vary the proportions so as to take account of the voids in the theatre. In my judgment the defendants have not done this either. Moreover, I note that the claimant's process for ascertaining the figures for schedule 2 of its two-schedule system produces a figure of 78.23% for the defendants, whereas that produced by the defendant's own advisers produces a figure for them of 79.79%. Since the defendant's own figures for schedule 2 are higher, they can hardly complain that the proportion is more "fair" than that determined by the claimant.

47. The defendants also argued that the claimant did not make a "determination" within the meaning of the lease unless and until it was communicated to the defendants. But here the claimant did not explain to the defendants how the decision was made, perhaps because it did not know, and simply relied on what its predecessor had done, without knowing what the predecessor took into account. I reject the submission that there is no determination unless the landlord explains how the decision was arrived at. I see no reason why a "determination" within the lease cannot be come to by the landlord even without giving reasons for it (at least where there is no *Braganza* implied term, and maybe not even then), and before being communicated to the

defendants (although of course it will have to be communicated if there is to be a demand for payment).

48. For the sake of completeness, I add that, although the defendants' skeleton argument referred to the "principles of good estate management" as relevant to the question of the "fair proportion", I have difficulty in seeing how that can affect this question in any meaningful way. First of all, that concept appears in the latter part of the clause only, concerned with subsequent adjustments, and not in the earlier part where the proportion is originally determined. Secondly, and more importantly, the landlord is expressly directed to take into account the tenant's use and benefit from the services and expenses, and in my judgment the "principles of good estate management" cannot require the landlord to ignore that. In my judgment, therefore, the claimant succeeds on the apportionment issue.

The sinking/reserve fund issue

Introduction

49. As I have already said, paragraph 1.1 of Section 1 of Part IV of the schedule defines the service charge as "the total cost … to the Landlord in any service charge period … of the services and expenses specified in this Part of the Schedule". Section 2 of Part IV sets out a list of services, and Section 3 of Part IV sets out a list of expenses. Paragraph 3 of Section 1 requires the tenants to discharge the obligation to pay service charge "by means of advance payments", the amount of which is "as the Landlord may reasonably determine is likely to be equal in the aggregate to the due proportion of the service charge for the relevant service charge period".

50. In addition to this provision, the lease also provides for payments to be made as part of the service charge to build up sinking funds and reserve funds. Paragraph 6.1 of Section 1 provides that "the Landlord shall be entitled to include in the service charge an amount which the Landlord reasonably determines is appropriate to build up and maintain a sinking fund and a reserve fund." By paragraph 6.2, a sinking fund is to be used "for the renewal and replacement of lifts plant machinery and equipment in or upon the Building." By paragraph 6.3 a reserve fund is to be used "to cover prospective and contingent costs of carrying out repair decoration maintenance and renewals and of complying with" legal requirements and those of insurers in relation to the use of the building. So, sinking funds and reserve funds do not extend to *all* the elements which go to make up the service charge, but only those which are stated in the relevant subparagraphs.

51. It is relevant also for me to refer at this point also to paragraph 12 of Section 3 of Part IV, which specifies as an "expense" for the purposes of this Part of the Schedule

> "Establishing and maintaining reasonable financial reserves to meet the future costs (as from time to time estimated by the Landlord) of performing its obligations referred to in this Part of the Schedule."

52. Paragraph 7 of Section 1 imposes certain requirements as to the treatment of money paid by the tenants by way of service charge which for the time being has not been spent in payment of costs and expenses. This will obviously include advance

payments under paragraph 3, but also monies contained in a sinking fund or a reserve fund under paragraph 6. Such monies must be held by the landlord in an interest-bearing account, for the benefit of the persons so contributing, until the monies are actually spent (paragraph 7.4). Accordingly. there is a trust binding the landlord to use the funds for the relevant purposes, but subject thereto to hold them for the benefit of the tenants to the extent of their respective contributions. For a reason that I will return to in due course, I should say that this in substance replicates for this business property the effect of section 42 of the Landlord and Tenant Act 1987 applicable to residential properties.

The parties' contentions

53. The dispute here is whether the claimant properly operated these provisions so as to entitle it to charge significant amounts of money to the first defendant as contributions to sinking and reserve funds, and therefore part of the service charge. The claimant says that it did. It relies not only on the provisions of paragraph 6 of Section 1, but also paragraph 12 of Section 3. The defendants say that, to a considerable extent, the claimant did not properly operate the lease provisions. They also say that in any event paragraph 12 of Section 3 does not assist the claimant. The defendants claim that, in each of the service charge years ended June 2015 through to June 2019, the first defendant has been overcharged, because some of the payments sought by the claimant as contributions to a sinking or reserve fund were not contractually due under the lease, amounting to a total over those years of £1,505,782.75. However, it is right to make clear that the defendants accept that costs actually spent on services or works but included in sinking fund or reserve fund costs can be included in the service charge. In other words, the defendants resist liability to pay service charge so far as it comprises contributions to any sinking fund or reserve fund that have not actually been spent on services or works. They do not claim to resist liability completely.

54. The Amended Defence by paragraph [9](7) asserts that the claimant failed to distinguish between a sinking fund and a reserve fund (as required by paragraphs 6.2 and 6.3 of Section 1 of Part IV of the Schedule) and also failed to identify accumulating liabilities and what would be proper for the first defendant to contribute, bearing in mind its interest under the lease. The defendants also complain, by paragraph [9](8), that the claimant has funded "routine service charge expenditure through demands for … a contribution to a sinking fund". (The claimant in its reply says these allegations are "too vaguely pleaded," but denies them all the same.) The defence also pleads the overcharge in the sum of £1,505,782.75 in the service charge years ended June 2015 through to June 2019. Despite a request for further information, the defendants have not supplied any details of the calculations which lead to that sum, saying it was a matter for expert evidence (although none was relied on at the trial).

55. In the defendants' rejoinder, paragraph [15], they accept the claimant is entitled to recover service charge expenditure from the first defendant without recourse to a sinking or reserve fund, but assert that "routine service charge expenditure" refers to costs and expenses relating to the provision of services specified in Section 2 and Section 3 of Part IV, as distinct from a contribution to a sinking or reserve fund

properly constituted under the lease. They deny that the claimant required contributions to such funds in accordance with paragraphs 6 and 7 of Section 1, and deny that the claimants made any attempt to identify the sums necessary to build up or maintain such funds.

56. In their skeleton argument for trial, the defendants put forward two further arguments. The first is that the end of year statement to tenants required by paragraph 4 of Section 1 must give full details of which fund is being established or maintained, and how the contributions required have been calculated. For this purpose, the defendants refer to the decision of the Court of Appeal in *St Mary's Mansions Ltd v Limegate Investment Co Ltd* [2003] HLR 24 (to which I shall return). Secondly, they say that the claimant is not permitted to include a sum of money as a contribution to a sinking or reserve fund in service charge year 1 which the landlord anticipated spending in service charge year 2. The claimant (correctly) points out that neither argument is pleaded, and in particular that the first of them was not put to the claimant's witnesses in cross-examination.

57. The defendants say that the claimant has never established either a sinking fund or a reserve fund in accordance with the terms of the lease. This (they say) would involve estimating future costs, dividing them over a period of time and claiming equal contributions in each year, with the service charge accounts providing sufficient information to the tenants. They rely on two emails from Mr Powell, dated 4 February 2015 and 19 March 2015, as accepting on behalf of the claimant that no such funds have ever been properly established. I shall come back to these. In addition, the defendants deny that the claimant is entitled to rely on paragraph 12 of Section 3 in this connection. They say that this is either a simple reference back to paragraph 6 of Section 1, and adds nothing to it, or it is intended to cover the *costs* of establishing a sinking fund or reserve fund, rather than the contributions to it.

58. The claimant accepts that it must comply with the contractual provisions in the lease, and submits that it has done so. It also submits that the *St Mary's Mansions* case was very different from the present. In particular, the lease in that case (of a residential property in a block of flats) provided for the payment of service charges by the tenant, but required the provision of a certificate of the amount of the service charge as follows:

> "The certificate shall contain a summary of the lessor's said expenses and outgoings incurred by the lessor during the lessor's financial year to which it relates together with a summary of the relevant details and figures forming the basis of the service charge and other charges hereinbefore covenanted to be paid and the certificate … shall be conclusive evidence."

59. The lease also provided that:

> "The expression 'the expenses and outgoings incurred by the lessor' as hereinbefore used shall be deemed to include not only *those expenses, outgoings and other expenditure hereinbefore described which have been actually disbursed, incurred or made* by the lessor *during the year in question* but also such reasonable part of all such expenses, outgoings and other

> expenditure hereinbefore described which are of a periodically recurring nature (whether recurring by regular or irregular periods) whenever disbursed, incurred or made and whether prior to the commencement of the said term or otherwise *including a sum or sums of money by way of reasonable provision for anticipated expenditure in respect thereof as the lessor or its accountants or managing agents (as the case may be) may in their discretion allocate to the year in question as being fair and reasonable in the circumstances* and relates pro rata to the demised premises" (emphasis supplied).

60. So the lease in that case distinguished two different elements of the service charge: the expenses *paid* in a given year, and such part of the estimated *future* expenses as may reasonably be allocated to the same year. The latter concept could cover both advances on expenditure in the same year and contributions to a sinking/reserve fund for the future. The Court of Appeal decided that these provisions permitted the landlord to establish a reserve fund, by following the contractual requirements. However, the court held that it was not open to the landlord to keep back any overpayment in respect of *paid* expenses in a given year and set it off against *future* expenses not yet allocated to that year by the landlord.

61. Ward LJ (with whom Mummery and Jonathan Parker LJJ agreed), quoted section 42 of the Landlord and Tenant Act 1987, and said:

> "35. […] As I understand this provision [*ie* section 42], money received for a relevant service charge must be used to defray the cost of that service charge. Thus an overpayment in respect of expenses actually incurred cannot be taken into a reserve account for future expenses which have not been identified and designated as such in the certificate, having first been specifically allocated by the lessor with reference to the project to be undertaken and the amount allocated to it as reasonable provision."

(As I have already observed, the effect of section 42 is in substance replicated in this lease, as paragraph 7.4 of Section 1 of Part IV of the Schedule.)

62. In *St Mary's Mansions* the sums sought to be charged had not been certified as *future* expenses and allocated to that year, in accordance with the terms of the lease. The terms of the present lease are different. Paragraph 6.1 allows the landlord to include in the service charge an amount reasonably determined to be appropriate to build up and maintain a sinking or reserve fund. There is no requirement to certify or allocate the sum at the time the demand is made. The landlord must certify the service charge after the year end (under paragraph 4) but by then the demands for advance payment will have been made (under paragraph 3), and liability will have attached.

63. What I have to look at is what the landlord actually did, and whether it complies with the requirements of the present lease. In each of the years that are challenged, the landlord's managing agents, Orbit Property Management Ltd, during each service charge year sent out quarterly demands for rent and advance payments on account of service charge. After the end of each service charge year, it sent to each of the tenants a letter with several attachments, containing details of the service charge accounts for the year ended 30th June. These attachments included the following: (1) a statement of

costs certified by Mr Powell of Orbit, as a certified corporate executive accountant; (2) a sinking fund statement, again certified by Mr Powell; (3) a "Tenants Apportionment Certificate"; and (4) a demand/credit note for any balance due.

64. The statement of costs was divided into two schedules, in accordance with the agents' current approach to service charges (referred to already above). Each of these two schedules contained an item referred to as "Sinking Fund Provision." The figures referred to in these two items were carried forward into the "Sinking Fund Statement", which made clear what was the sinking fund provision made for that year and what was the expenditure out of the sinking fund in the same year. It also stated how that sinking fund was represented, that is, amounts held by Orbit in stated bank accounts, and how much was represented by requests for sinking fund provisions not yet paid by tenants.

65. These documents, using the numbering already used above, show (1) the total cost to the claimant of the services and expenses incurred during the service charge period in question, (2) the balance brought forward, the expenditure during the period, and the balance carried forward, in respect of reserve and sinking funds, (3) the first defendant's proportion of the total service charge, and (4) the amount by which the first defendant is in credit or debit overall. Paragraph 4.1 of Section 1 of Part IV of the Schedule requires "an itemised statement … of the service charge for the service charge … giving a proper and full summary of the service charge for the service charge period just ended…"

66. In my judgment, these certificates make a clear statement that sums are required as contributions to a sinking fund or reserve fund, as appropriate. Moreover, in my judgment, there is no requirement in paragraph 4.1 for the landlord in its certificates to give full details of how the contributions required for a sinking fund or a reserve fund have been calculated. On the basis of the contractual provisions in paragraph 4.1 and paragraph 6, it is enough to state what the sums concerned actually are. The landlord is only obliged to state *the amount* that it "reasonably determines is appropriate to build up and maintain" the relevant fund. It is not obliged in my judgment to give any more reasoning than that, and in particular how the landlord has arrived at that sum. As it happens, the claimant had prepared and served a budget extending over several years, and its figures were based on that. Of course, the tenant is entitled to challenge the landlord's determination, but the burden will lie on the tenant to show that that determination was not reasonable.

67. The defendants rely on two emails sent by Mr Powell of Orbit to Keith Douglas of PSL (retained by the defendants to advise them). The first is dated 4 February 2015. It covers a number of service charge queries raised by the defendants. Under the heading "Sinking/Reserve Fund" Mr Powell said:

> "A Sinking Fund should have been established many years ago to deal with all of the major works which are now so urgently required at the Building; regrettably, for some reason that we are not aware of, this was never done. Consequently, when the major BMS and other works were required a few years ago, large charges needed to be incorporated into the budgets for 2010 and 2011 to provide funds to cover these costs.

> However, when the budget was prepared for 2012 and 2013, in error, no such provision was included in the works still remaining to be carried out in the immediate future. When we initially submitted the accounts for 2012 and 2013, we attempted to rectify this by incorporating provisions for a further £1M to be raised (£500K in each year) but these charges were subsequently rejected by Lilywhites on the grounds that they had not been included within the budgets. The Landlord agreed to remove those provisions for that reason and agreement was reached with Lilywhites for the accounts to be revised and to push those provisions forward into 2014 and 2015; and this is what we have done.
>
> Upon receipt of the balancing charges for 2014 from your client, we will then be in funds to carry out those items scheduled within the 20 year PPM for this service charge year and the same will apply for subsequent years. Once the initial major works are completed over the next few years, a proper Sinking Fund will be put in place to cover the long-term requirements and those advance funds will be properly held in a separate, interest-bearing account, and accounted for annually to the tenants."

68. The second email is dated 19 March 2015. It inserts comments and answers to points made by Mr Douglas in an email to Mr Powell earlier the same day. In that earlier email, after dealing with the question of apportionment, Mr Douglas had said this in relation to the reserve and sinking funds:

> "As previously stated, the service charge with holdings applied referred to the Reserve/Sinking fund(s) and not the underlying service charge. If our client is to make any contribution towards either type of fund, they must be satisfied that the funds are being administered in accordance with the Lease and principles of good estate management. Please will you therefore be of assistance with the following points:
>
> 1) Please clearly specify what types of fund are being administered and what works fall under each type.
>
> a. A fund has been defined as a Reserve in all certificates up to June 2013 and as a Sinking fund thereafter.
>
> 2) Please clearly specify the purpose of the fund/basis of sums collected.
>
> a. We understand the 20 year plan in some way supports the sums demanded. However the timing and amounts demanded do not appear to coincide with the plan.
>
> b. It remains unclear which items within the 20 year plan are outstanding/intended.
>
> 3) Confirm the projected dates for expenditure of sums collected.

a. The lease provisions do not state that any fund relates to works beyond term. It follows, particularly in respect of the Reserve fund (but not exclusively), that the sums relate to projected expenditure during the term.

4. The accounting and administration of the fund(s) need to be agreed.

a. Confirm the funds are now held in a separate, interest-bearing account (as required by the Lease).

b. Arrange for the funds to be held in trust to the occupiers that contribute towards it.

c. There is a need to validate McKinsey's contribution towards each item in terms of apportionment (historical and ongoing)."

69. Mr Powell's replies were inserted (in red) directly after the specific points to which they related. Here I set them out in the same way and order, but in bold italics:

"1) Please clearly specify what types of fund are being administered and what works fall under each type.

a. A fund has been defined as a Reserve in all certificates up to June 2013 and as a Sinking fund thereafter. ***Under the strict interpretation of RICS definitions, it is not a Sinking Fund….merely Reserves to cover essential major works in the forthcoming year to enable those works to be carried out in accordance with the timetable laid down in the 20 year PMP.***

2) Please clearly specify the purpose of the fund/basis of sums collected.

a. We understand the 20 year plan in some way supports the sums demanded. However the timing and amounts demanded do not appear to coincide with the plan. ***The sums reserved in the accounts for 2014 and Budget for 2015 are exactly the amounts required to meet the costs planned under the PMP for the ensuing service charge year***.

b. It remains unclear which items within the 20 year plan are outstanding/intended. ***The PMP clearly shows which items are planned for each service charge year… what do you find "unclear?"***

3) Confirm the projected dates for expenditure of sums collected.

a. The lease provisions do not state that any fund relates to works beyond term. It follows, particularly in respect of the Reserve fund (but not exclusively), that the sums relate to projected expenditure during the term. ***Your client is not being charged for any works that are to be carried out beyond the term of their lease.***

4. The accounting and administration of the fund(s) need to be agreed.

a. Confirm the funds are now held in a separate, interest-bearing account (as required by the Lease). ***I can confirm that upon receipt of the funds from***

> ***your client, they will be placed in a separate interest-bearing account, albeit they will not be there for long……your client's continued delay in settling their liabilities under their Lease is seriously delaying these urgent works.***
>
> b. Arrange for the funds to be held in trust to the occupiers that contribute towards it. ***All service charge funds, whether general costs or major works, are held in trust for the occupiers.***
>
> c. There is a need to validate McKinsey's contribution towards each item in terms of apportionment (historical and ongoing). ***Already covered above.***"

70. The first of these two emails refers to a failure by the previous managing agents to provide for a sinking fund. It states that in 2012-13 the present agents tried to collect £1 million for works to be done, but were challenged by Lillywhites on the basis that they were not in the budget. They therefore pushed those costs forward into 2014 and 2015. The subsequent reference in the email to a "proper sinking fund" does not amount in my judgment to an admission that funds had not been correctly sought under the terms of the lease for what *the lease* refers to as a "sinking fund".

71. The second email refers to the definition of 'sinking fund' applied by the Royal Institute of Chartered Surveyors. The defendants say that if the sinking fund established is not within that definition, it is not "established and maintained on normal commercial principles". I reject that submission. What matters here is not the RICS definition, but rather what the lease says. It distinguishes what it calls a 'sinking fund' and a 'reserve fund', which are to be used for different purposes. As long as the landlord follows the contractual procedure to seek funds for either fund, the landlord is entitled to charge those sums as part of the service charge and to recover them from the tenants. Whether the landlord then uses them for the correct purposes of a 'sinking fund' and a 'reserve fund', as defined by the lease, is a quite different matter. But that is not relevant to this case, which concerns liability to pay, and (if the sums were correctly demanded) the first defendant's liability is already engaged. In my judgment neither email assists the defendants. Accordingly, the argument that paragraph 4 of Section 1 of Part IV of the lease has not been complied with fails.

72. The next argument put forward by the defendants, as originally stated in their skeleton argument for trial (at [54]), was "that C was seeking to include in the service charge costs for one service charge year money which it anticipated spending in the next service charge year. This is not permitted under the lease". It was not originally clear to me how this argument worked. However, in the defendants' helpful written 'roadmap' for closing submissions, the point is explained this way. In the table at paragraph [38] it refers to the sums of £65,000 (for schedule 1) and £535,000 (for schedule 2) being included in the service charge for the year ended 30 June 2014, "being money that the Original PPM said was to be spent in the S/C year ending 30.6.2015".

73. In paragraphs [39] and [40] of the 'roadmap' the defendants then say:

> "39. … Taking 2014 as an example, C was perfectly entitled to include £65k and £535k in the estimated service charge costs for the y/e 30.6.2015, when the money was intended to be spent. In that case, D1 would have had to

> contribute to those costs by way of advance payments over year 2. But if C did not then do the works, the end of year service charge statement would have excluded the works and D1 would have received a credit or repayment for the on account payments. C was not entitled to allocate the costs to the previous s/c year and call them 'sinking fund provision' and so get around the provisions for on account payments and balancing payments/credits in the Lease.
>
> 40. C could have established a sinking fund, or a reserve fund, or both. In that case, C would need to have estimated future costs it considered would be incurred – not costs for the current service charge year, but future costs. It would then have needed to divide those costs over the period until it was likely that they would be expended, and claim an equal contribution each year to those anticipated future costs. The service charge accounts would need to have provided sufficient information to ensure that D1 understood what the estimated future costs were and how the annual contribution to them was calculated."

74. So the defendants say that the claimant could have done one of two things. First, it could have sought on account payments in advance for the sums of £65,000 and £535,000 during *the same year* that those sums were intended to be spent, that is, the year ended 30 June *2015*. If it had done that, and received the money but not spent it, there would have had to be a credit or repayment to the first defendant. However, they say, the claimant would not be entitled to treat it as a service charge for the *previous* year (ended 30 June *2014*) attributable to a sinking or reserve fund. Alternatively, the claimant could in a service charge year *earlier* than that ended 30 June 2015 have established a sinking or reserve fund, by following the contractual requirements set out in the lease. I have already held that I do not agree with the defendants' view of the extent of those contractual requirements. But I do agree that the claimant had those two courses open to it.

75. As to the second possibility, it would appear that the defendants' objection to the claimant's claim to have correctly operated the lease provisions so as to require contributions to a sinking or reserve fund is based on the argument that such contributions cannot be sought from the tenant temporally in the *actual* service charge year in which the anticipated expenditure for which the contributions are sought is intended to be spent, even though they are included in the service charge accounts for the previous service charge year (which *ex hypothesi* can only be produced after the end of the service charge year). In other words, contributions to a sinking/reserve fund *can* be sought *during* service charge year 1 for expenditure to take place during service charge year 2, but *not* by way of inclusion in the accounts for that year, produced *after* the end of service charge year 1. The reasons assigned by the defendants for this are that it is the date of the certificate (in the accounts) that matters, and the landlord cannot "get around the provisions for on account payments and balancing payments/credits in the Lease".

76. I reject this submission. There is nothing in the terms of the lease which expressly or impliedly prevents the landlord from making demands to operate what it refers to as the sinking/reserve fund provisions in respect of expenditure in the same year as the

demands are made. Moreover, paragraph 4.1 of Section 1 of Part IV of the Schedule to the lease makes clear that the certified and itemised statement of the service charge can only be given to the tenants *after* the end of the service charge year in question. In any event, advance payments under paragraph 3 can be sought in respect of the *whole* of the service charge, and contributions under paragraph 6 to sinking/reserve funds are included in the service charge: see paragraph 6.1.

77. As for the point made that unspent *advance payments* (*ie* under paragraph 3) are to be returned or credited, the scheme of this lease is that payments into a sinking/reserve fund under paragraph 6 are treated (from the tenants' point of view) as spent from that moment, and the subsequent disbursement (or, indeed, non-disbursement) from those funds is of no consequence to the tenants, because the relevant fund is subject to a trust to be spent on certain kinds of expenditure, and only subject to that for the contributing tenants. Indeed, the defendants accepted in closing submissions that money expended from the paragraph 6 fund did not form part of the service charge in the year when it was expended. In my judgment, there is no basis for any obligation (contractual or otherwise) for the claimant to return or credit a sinking fund or reserve fund payment, unless of course the primary trust to spend the money fails (but that is not argued to be the case here)..

78. In any event, on the material before me I find that the claimant included contributions to sinking/reserve funds under paragraph 6 in the estimated service charge for a given year, and made demands for advance payments which included such contributions in the same year, for expenditure in *subsequent* years. The defendants in their 'roadmap' referred to the figures for the year ended 30 June 2014. So far as I can see, however, the demands for service charge in respect of that year are not contained in the trial bundle, and so it is more difficult to test the position by reference to that year. On the other hand, the relevant demands are available for the year ended 30 June 2017, which (as I have already noted) was used as an example by the claimant.

79. The service charge accounts for the whole building for the year ended 30 June 2017 show a total of £1,231,794.94 for schedule 1 (including £407,084 for "sinking fund provision"), and £478,807.66 for schedule 2 (including £78,372.37 for "sinking fund provision"), a grand total of £1,710,602.60. The sinking fund statement for the same year shows the annual provision for "sinking fund" for the year in the two sums already mentioned, making a total of £485,456.37 in that year. Those figures correspond with those shown in the table in the defendants' closing 'roadmap' at paragraph [38]. Those, of course, were the totals divisible amongst all the tenants. The "Tenants Apportionment Certificate" for the same year shows that the first defendant's proportion of schedule 1 was £670,342.81, and of schedule 2 was £374,571.23, making a total of £1,044,914.04. That certificate also shows the total demanded on account from the first defendant was £1,108,378.68. But that figure is one *net* of VAT, as shown by the addition of VAT in the bottom line of the certificate. If the VAT (at 20%, £221,675.74) is added to the sums demanded on account, it comes to £1,330,054.42.

80. According to the documents in the bundle, the four quarterly demands in fact made to the first defendant in respect of advance payments for service charge, respectively on 7 June 2016, 1 September 2016, 1 December 2016 and 6 March 2017, were each in

the sum of £332,513.60, and accordingly amount in total to £1,330,054.40. I am therefore satisfied that, during the service charge year ended 30 June 2017, the claimant made demands under paragraph 3 for advance payments on service charge, where that service charge included contributions to sinking/reserve funds to be spent in the *following* year or years.

81. I have looked at the equivalent documents in the bundle in respect of years 2013-14 to 2015-16 and 2017-18, and it is clear that the same is true of those other years. (As I have said, I do not have the individual demands from 2013-14, but the total appears from other documents, and the pattern is exactly the same.) So in fact it is not the case that the claimant demanded contributions to sinking/reserve funds during the year in which the sums demanded were intended to be spent. The service charge accounts for the year (produced in the following service charge year) showed the correct position, *ie* what had happened during that earlier year. The defendants' argument is therefore without foundation.

82. There was an argument about the effect of paragraph 8.3 of section 1 of part IV of the Schedule one of the so-called "landlord's protection" provisions, which I set out earlier. The defendants say that this provision is confined to decisions as to the amount estimated to be needed, and does not extend to the decision to ask at all. I reject this view. The words "disagreement with any estimate of future expenditure for which the landlord requires to make provision" are wide enough to include the decision to ask for future provision at all, as well as the landlord's quantification of the amount. I see no commercial reason for restricting it to the mere quantification. The protection is in any event limited to reasonable decisions in the absence of manifest error. Thus, even if I were wrong about the sinking funds, I would hold that the defendants have not shown that the claimant's decisions were unreasonable or in manifest error. They are therefore protected from challenge.

83. So far as concerns paragraph 12 of Section 3 of Part IV of the Schedule, I agree with the defendants that this provision does not materially assist the claimant. It is possible (as the defendants say) that it simply refers back to paragraph 6 of Section 1. But I accept that, given the express (and specialist) provision in paragraph 6 there is no need to construe paragraph 12 of Section 3 as covering the same ground. I therefore think it is more likely that it covers *the costs* of establishing and maintaining a sinking or reserve fund as the defendants also suggest.

The goods lifts

84. I turn now to the question of the goods lifts. There are two goods lifts serving that part of the building demised to the first defendant. They are known as goods lift 9 and goods lift 10. They were installed in 1990, and have been in normal service since 1992. The question is whether the claimant was justified in demanding contributions to a sinking fund for the modernisation or replacement of those goods lifts in the service charge year 2017-18, by which time they had been in normal service for over 25 years. In their closing 'roadmap' the defendants made clear that there was no issue with the *quantum* of the sums included in the budget. The issue was whether any figures should be there at all.

85. I remind myself that paragraph 6.1 of Section 1 of Part IV of the lease provides that the Landlord is "entitled to include in the service charge for any service charge period an amount which the Landlord reasonably determines is appropriate to build up and maintain a sinking fund … in accordance with the principles of good estate management". Paragraph 6.2 provides that such a sinking fund is established and maintained "for the renewal and replacement of lifts … in or upon the Building".

86. In April 2014 Stephen Marsh of O & M Lift Consultancy Services Ltd was instructed by the claimant to report on the condition of (amongst other things) the lifts. He reported in April 2014 that the major components of the goods lifts were "obsolete and … of a design where the available knowledge to keep these operational/reliable from a servicing and fault-finding perspective [was] limited." He stated that they had been "subjected to a very high level of service", so that "expected levels of operational reliability from retaining [key] components [was] very limited". In other words, the lack of spare parts and industry knowledge meant that the lifts could not be relied on much longer, whatever their current condition. He recommended "a major refurbishment specification based around retaining the lift guide rails and car sling," with an anticipated total budget (exclusive of VAT and professional fees) of £320,000. It is to be noted that this report was prepared at a time well before there was litigation between the parties. Mr Marsh had no reason to give other than his honest professional opinion.

87. In August 2014 the claimant sent to the first defendant a copy of the original 20 year Planned and Preventative Maintenance programme ("PPM"), for the years 2014-2034. This included provision of £335,000 for both lifts (£160,000 for GL 9 and £175,000 for GL 10) in year ending 2016. It appears that the on account payment for the September-December 2015 quarter, requested on 28 August 2015 included part of this. The total requested under schedule 2 was £452,752.90.

88. On 25 June 2015, there was a meeting between Mr Marsh (for the claimant) and Mr Cooke (of Hoare Lea) for the defendants, accompanied by Mr Morley and Mr Douglas (of PSL). Mr Marsh was an engineer (as was Mr Cooke) and Mr Douglas was a service charge consultant retained by the defendants. The meeting discussed the condition of the goods lifts. Both Mr Marsh and Mr Douglas made notes of the meeting. They differ significantly. Mr Marsh was called to give evidence, and was cross-examined about his note. The written note by Mr Douglas was not supported by any live evidence. In particular, neither Mr Morley not Mr Douglas himself (who were both at the meeting) was called to give evidence. The absence of the first was unexplained. The absence of the second was explained by the fact that an attempt was made to rely on a witness statement from Mr Douglas out of time, and this was refused by Chief Master Marsh on 19 August 2020.

89. I prefer the note of the meeting prepared by Mr Marsh, primarily because the meeting was about engineering matters, *ie* the condition of the lifts, and he is an engineer, whereas Mr Douglas is a service charge consultant, concerned to argue his clients' case on service charges, and is not qualified to express views on engineering matters. But I take into account also that Mr Marsh's note was tested in cross-examination, whereas Mr Douglas's was not.

90. The claimant refers to *Wisniewski v Central Manchester Health Authority* [1998] PIQR 324, CA, where Brooke LJ (with whom Roch and Aldous LJJ agreed) said:

> "(1) In certain circumstances a court may be entitled to draw adverse inferences from the absence or silence of a witness who might be expected to have material evidence to give on an issue in an action.
>
> (2) If a court is willing to draw such inferences they may go to strengthen the evidence adduced on that issue by the other party or to weaken the evidence, if any, adduced by the party who might reasonably have been expected to call the witness.
>
> (3) There must, however, have been some evidence, however weak, adduced by the former on the matter in question before the court is entitled to draw the desired inference: in other words, there must be a case to answer on that issue.
>
> (4) If the reason for the witness's absence or silence satisfies the court then no such adverse inference may be drawn. If, on the other hand, there is some credible explanation given, even if it is not wholly satisfactory, the potentially detrimental effect of his/her absence or silence may be reduced or nullified."

91. In these circumstances I consider that the failure to call Mr Douglas entitles (but does not oblige) me to draw an inference adverse to the defendants. I would do so if it were necessary, but as I say I prefer Mr Marsh's note in any event, irrespective of any inference to be drawn. That note makes clear that Mr Cooke had considered the matter from the perspective of a tenant expecting to leave the premises within the next few years, and that was why he thought that "ultimately necessary" works could be delayed by up to five years. It also makes clear that Mr Cooke agreed that the "underlying age and obsolescence of the control/drive system" was a concern, but referred to other lifts of the same age still working, supplied by "unofficial" spare parts retained by engineers. Mr Marsh said a partial upgrade was a false economy, and Mr Cooke agreed that it was not a simple case of "swapping out parts in isolation...". Mr Marsh said that, as matters stood, the tenants were exposed to an unacceptable risk of a deterioration in lift service and reliability. Mr Morley agreed that there was a risk, but said it was acceptable *from his clients' point of view*.

92. A Planned and Preventative Maintenance Review was commissioned by the claimant and undertaken by Tuffin Ferraby Taylor in October 2015. This considered the lifts "to be at the end of their economic life expectancy", and recommended a plan "to replace … the two goods lifts". It further recommended that the works be carried out "imminently" and that the goods lifts were "a priority due to their poor condition". The Schindler call-out schedule in the period 2014-16 shows that the goods lifts suffered some 33 operational failures (including at least three incidents involving trapped passengers) during this time. Considering the importance of goods lifts for commercial premises, and considering also that each of the two lifts served different floors, I find that this is a significant number.

93. A further report by JJ Disney Ltd on the condition of the goods lifts in October 2016 identified defects which affected "the safe working and use of the equipment". Then,

in March 2017, Colin Edgar of Malcolm Hollis inspected the goods lifts and prepared a further report, in which he said in part:

> "As the lifts are demonstrably at the end of life and in generally poor condition, to encompass as far as possible, countering obsolescence and upgrading to modern safety and accessible standards, we recommend a major modernisation (or complete renewal) of the installations to encompass renewal of the drive gear, bidirectional safety gear, controllers, wiring, entrances, door operators, passenger interfaces and a full bespoke car reline. These works should be scheduled without delay…"

94. As a result, the claimant made an allowance of £257,210 in the revised PPM for refurbishment of the goods lifts in the service charge year 2017-18. The claimant also demanded the sum of £250,000 from all the tenants as a contribution towards the future costs of doing these works. In the service charge account certificate for that year it was described as "forward funding". Within the sinking fund statement it was described as "annual provision", *ie* towards the sinking fund. Since this all fell into Schedule 2, the defendant was required to pay 78.23% of this. I make this £195,575. Before the trial, the claimant had contracted with Schindler, and had already spent some of this money (£68,881.76) on the works to the goods lifts. (This was after the lease end, but the defendants did not take any point on it.)

95. In the amended defence, the defendants say that the sums demanded in relation to carrying out works on the goods lifts amounted to £338,628, and that the first defendant was required to contribute £171,215.20. The main point however was that the defendant said "the lifts do not presently require replacement and the work is therefore unnecessary and premature". They amplified this in four subparagraphs. In the first, they refer to instructing Hoare Lea on their behalf to carry out an inspection. In the second, they allege that it was agreed between the representative of Hoare Lea and Mr Marsh of O & M "that there was no evidence of disrepair to the lifts which required major works to be carried out". In the third they say that a further inspection in November 2016 "confirmed that there was still no requirement for major works", and that "Hoare Lea's opinion was that the lifts would continue to function properly … for at least another five years…" In the fourth, the defendants say that the claimant's demand is "unjustified".

96. In its reply to the defendants' amended defence, the claimant takes a number of points, including the point that, since the defendants are objecting to an exercise of discretion by the claimant, there needs to be an allegation of acting unreasonably or in bad faith or in circumstances of manifest error, but that there is none. (It also denied any agreement between Hoare Lea and Malcolm Hollis as to the lack of evidence of disrepair.) The defendants' rejoinder submits that the allegations in the amended defence amount to an implied allegation that the claimant is acting unreasonably. I am inclined to think that there is no such implied allegation from the allegations actually made in the amended defence, and that therefore the defendants have no basis on the pleadings for opposing the contractual claim of the claimant. But, in my judgment, in all the circumstances this does not matter.

97. This is because I am satisfied that the claimant *was* acting reasonably in making a determination in reliance on the Marsh report in April 2014, the JJ Disney review in October 2016, and Mr Edgar's report in March 2017. It is not strictly necessary for me to reach a view as to whether they were right and Hoare Lea (in the persons of Messrs Cook and Russett) were wrong. The contractual wording is "reasonably determines is appropriate". The defendants however say that there is an objective standard which does not import any discretion. They say the claimant must prove both that the lifts *needed* to be replaced, and that in the interests of good estate management they should be replaced as at 28 August 2015 rather than January 2020. I do not accept this submission. On the wording of the lease, the landlord could have required contributions to a sinking fund to replace the lifts from the outset, building up a fund to replace the lifts from a time when such replacement was not necessary. That is part of what a sinking fund is for, as well as smoothing costs over the length of the lease.

98. It is therefore sufficient for me to say that the claimant as landlord under the lease had a discretion to exercise (reasonably) in the building up of a sinking fund to cover future works to (amongst other things) the lifts, and that, given the reports I have referred to, it was acting reasonably in exercising that discretion in determining that it was appropriate to build up a fund for the refurbishment of the goods lifts, despite the reports to the contrary of Mr Cooke and Mr Russett of Hoare Lea. The landlord was entitled to take the view that, even if the lifts were still operational day to day, lack of knowhow among current lift engineers, and a lack of genuine parts to ensure uninterrupted service, meant that it was better to refurbish or replace. In my judgment, it is not enough to say that "good estate management" would have justified taking a different view. It was the landlord's decision, and not the tenant's.

99. However, in case the matter goes further, I have already made clear that in general I prefer Mr Edgar's expert evidence to that of Mr Russett, and that I find that the works recommended by Mr Edgar were indeed necessary. (In saying that, I accept that Mr Edgar was wrong about two matters. One was that he ascribed a problem with the car doors at level -2 to the door skate, when in fact it was the result of corrosion, due to water ingress from elsewhere. The other was about whether a lift brake drum was out of round. He had not seen it for himself, and had misinterpreted a document that in fact did not say this. But I think that he was right about other things, and they are sufficient.) I find that the lifts needed to be refurbished or replaced by the time of Mr Marsh's report of April 2014, the thrust of which was reinforced by the TFT report of October 15. In my judgment remedial works, up to and including replacement, were needed certainly by August 2015. This is consistent with the view that not much changed between then and 2020, by which time the defendants accepted the need for the work. In particular, I do not accept Ms Hammond's (written) evidence that the goods lifts were "in reasonable operational condition throughout our occupation (save perhaps the last few months)". In my judgment, on the evidence before me, the condition of the lifts was poor, including obsolete machinery and equipment, oil leaks, excessive heat production, tripping thermistors, defective landing doors and corrosion, amongst other things.

100. The defendants make a further argument, that it is for the claimant to prove that any money paid to Schindler under the contract to replace or modernise the lifts is

properly within the scope of the service charge. They say the terms of the contract have not been disclosed, nor any other details of what the payments were for and therefore the claimant has failed to discharge the burden of proof in relation to those sums. I do not accept this argument. When sums are properly demanded as a contribution to a sinking or reserve fund, that creates an immediate liability from the point of view of the tenant. Payment out of the sinking fund (here to Schindler) is not a further spending which has to be justified by reference to the *service charge* provisions. No doubt, if monies are spent on purposes outside the scope of the sinking fund, complaint can be made that there has been a breach of trust. But that is not the complaint here.

101. I therefore conclude the goods lift issue in favour of the claimant.

The set-off issue

102. The set-off issue arises out of clause 2.2 of the deed of variation of 21 December 2005. I have already set out the terms of this clause above (see at [10]). In substance, it provides for the reimbursement of the first defendant by the claimant of certain costs of "Tenant's Works" carried out by 31 December 2010. "Tenant's Works" are defined in clause 1.1 as "such of the works identified … in the Third Schedule as the Tenant chooses to carry out". The Third Schedule refers to "Work from time to time to … escalators lifts mechanical and electrical services…". The right of reimbursement is subject to a number of conditions, apart from having to fall within the definition of "Tenant's Works". The landlord must be satisfied that the works have been carried out, and must receive a receipted invoice issued by the contractor by 30 June 2011 (with an exception for the case where the tenant is in dispute with the contractor, not relevant here). The maximum total reimbursement under this provision is capped at £2.5 million plus VAT.

103. In addition, clause 2.2 and the Second Schedule of the deed of variation varied the terms of the lease, so as to add the following provision:

> "3.1.3. Notwithstanding clause 3.1.1 hereof the Tenant shall be entitled to deduct or set off from the yearly rent reserved by this Lease … any monies due to the Tenant pursuant to clause 2.2 of [the deed of variation] in the event and to the extent that the Landlord shall have failed to comply with its obligation to pay the Tenant such monies on the due date".

This corresponded to a similar provision to be found in the supplemental lease (as clause 3.2), which was entered into at the same time as the deed of variation.

104. In their amended defence, the defendants refer to and set out part of these provisions ([16A], [16B]), and refer to clause 3.2 of the supplemental lease ([16E]). They then plead ([16C]) that the first defendant carried out "Tenant's Works" and submitted 33 applications for payment, which in aggregate would have exceeded the £2.5 million cap, but were not reimbursed for applications to the value of £1,126,630.25 ([16D]). They further plead ([16F]) that the first defendant is entitled to set off the unreimbursed expenditure "against the yearly rent reserved by the Lease and/or the Supplemental Lease". They then refer ([16G]) to correspondence from the claimant's solicitors which they say admits the validity of the first defendant's claim "save for

the sum of £180,843.20, which remains in dispute". Next, they repeat their claim that the first defendant has not been fully reimbursed for the whole of the sums claimed and that it is entitled to set it off against rent due under both the lease and the supplemental lease ([16H]). Finally, there is a further claim to set off against the rent due on 25 December 2017 the sum of £445,749.28 (net of VAT) in respect of service charge contributions demanded by the claimant. ([16I]).

105. In its reply, the claimant admits that claims were made for reimbursement under clause 2.2, and that some of them were paid, but denies any breach of clause 2.2 in failing to pay the rest ([81], [82]). In addition, it denies that the first defendant is entitled to set off unreimbursed expenditure against the rent reserved by the Lease and the Supplemental Lease ([84] ff). It pleads that a number of the invoices submitted by the first defendant were from EMCOR Facilities Services Ltd ("EMCOR"), amounting in value to £224,035.08, and related to "planned preventative maintenance" over the period December 2009 – November 2010. It denies that any of these invoices is a "receipted invoice" under clause 2.2 of the deed of variation, and alleges a sequence of events which (it says) left the first defendant with rental arrears of £91,493.46 plus VAT, rather than the figure of £180,843.20 alleged by the defendants ([85]). It further pleads ([87]) that the defendants are not entitled to be reimbursed the cost of the EMCOR invoices for various reasons, including that they fall outside the definition of "Tenant's Works", that even if they did fall within that definition they did not require the landlord's consent (and hence fall outside clause 2.2), and in any event were not receipted (and also fall outside clause 2.2).

106. In their rejoinder, the defendants (amongst other things) deny that none of the EMCOR invoices was a "receipted invoice", and aver that, if they are entitled to set off the full amount of those invoices, then they are entitled to a further credit of £180,843.20 ([46](1), (4)). They admit that, if they are so entitled, they could not also claim reimbursement of a further invoice for £55,563.20 in respect of works carried out by Select Office Services Ltd, because then the £2.5 million cap would be exceeded. However, to the extent that they fail in relation to the EMCOR invoices, they claim to set off the Select Office Services invoice instead ([46](5)).

107. There is a pleading question, which I should mention briefly. It arises in this way. As has been seen, this claim largely concerns service charges, but, at the outset of the claim, the claimant said that a sum of *rent* totalling £91,493.46 (plus VAT) was in arrears. During the course of the litigation, the claimant applied for summary judgment in respect of that sum. That application was dealt with by consent in an order made by Chief Master Marsh on 15 October 2019. It recited that the defendants had agreed to pay the sum of £91,493.46 together with VAT plus interest, in cleared funds by 1 November 2019, and on that basis there was no order made on the application for summary judgment. However, it appears that the defendants still claim to be entitled to a credit against their service charge account for a sum equivalent to the amount of the discharged rent arrears. There is no pleading to that effect. The defendants nevertheless make the claim, either by reason of the rules of equitable set off, or because of what they say were the terms of the agreement which led to the £91,493.46 being paid.

108. In my judgment, if there is an equitable set off, there is no need for a pleading that says so, because whether there is a set off is determined as a matter of law, and it is not necessary to plead matters of law, only matters of fact: see *Hanak v Green* [1958] 2 QB 9, at 26, per Morris LJ (with whom Hodson LJ agreed). The claimant says that the covenant in the lease to pay service charges "clear of all deductions whatsoever" excludes the defence of equitable set off. Whether such language is apt to do so is a matter on which the authorities do not speak with one voice. In view of the other conclusions to which I come to on this issue, this question of law does not arise for decision and I prefer not to deal with it.

109. As to the terms of the agreement which led to the rent arrears being paid there is an initial question whether I am entitled to look at the without prejudice correspondence that led to the agreement. Because an agreement was reached, this correspondence is admissible to prove its terms: see *Oceanbulk Shipping & Trading v TMT Asia* [2010] 1 AC 662, SC. The defendants say that the offer to settle the arrears was made on the basis that "if our client is successful then it will be entitled to a further credit against any sums to which your client is found to be entitled". I am inclined to think that this does allow the defendants to claim a set off even if equitable set off is not otherwise available to them, but, as with equitable set off, it is not necessary to resolve the matter in light of the conclusions to which I come below.

110. As to the relevant facts, I find that none of the EMCOR invoices produced was receipted by anyone, least of all EMCOR, although there was some (entirely separate) evidence from the *first defendant* (but not from EMCOR) that at least one of the EMCOR invoices appeared to have been approved by the first defendant for payment (although at least one other was not, being stated to be 'negotiable'), and two others appeared to have been both approved and (according to the first defendant) paid. But there was no evidence to show that *EMCOR* ever acknowledged receipt of any payments in respect of any of them. I also find that the Select Office Services invoice related to works which required the consent of the landlord. There is no evidence that the first defendant either sought or obtained such consent.

111. The defendants argue that the requirement for a "receipted invoice" was for documentary evidence establishing the amount due, what for, and that it was paid. However, in my judgment, the phrase "receipted invoice" in clause 2.2 of the deed of variation in the plain and ordinary meaning of the words used refers to an *invoice* which has been endorsed *by or on behalf of the invoicing party* so as to acknowledge that the invoice has been paid. This is not that case, as Ms Hammond accepted in evidence. The purpose of the requirement for a receipted invoice is to avoid arguments about whether costs have been paid to a third party. Evidence put forward *by the tenant* that the tenant has paid is accordingly not enough. If it were, there would be no need for the exception in clause 2.2 for the case where the tenant and the contractor are in dispute. (In any event, the evidence put forward to show that there had been payment relates only to some of the payments, and not all of them.)

112. The claimant says that clause 2.2 requires that any works whose cost is to be reimbursed must be works that require landlord's consent and have received it. The defendants say that this is an absurd construction. They say that the true construction is that, *if* the landlord's consent is required to any of the work which the tenant wishes

to do, that consent must be obtained before the landlord becomes obliged to reimburse the tenant for the cost. They point out that a large proportion of the matters specifically listed as "Tenant's Works" in the deed of variation could be carried out under the lease without the landlord's consent, but on the claimant's construction could never be reimbursed.

113. In my judgment, it is not a condition precedent under clause 2.2 for the tenant to obtain reimbursement of expenditure on "Tenant's Works" that the works concerned should have required the landlord's consent, and should have been obtained. The claimant's view makes no commercial sense. Why should the claimant agree to reimburse expenditure by the tenant for works for which landlord's consent was required, yet not agree to do so for more minor work (still falling within the definition of "Tenant's Works") for which it was not? If the point was to require landlord's consent in *every* case before reimbursement could be obtained, that could have been done far more easily by saying something like "Where the Landlord consents to the works…"

114. In these circumstances, it is not necessary for me to go further into the complex accounting dispute between the parties which appears on the statements of case. Nor is it necessary for me to decide whether the EMCOR works were "Tenant's Works". It is clear to me that none of the EMCOR invoices qualifies under clause 2.2 for reimbursement, because none is a "receipted invoice". It is equally clear to me that the Select Office Services invoice does not qualify under clause 2.2 either, because the defendants have not proved that the works did not require or if required had the landlord's consent. In their closing roadmap, the defendants accept this point, and therefore do not contend that the amount of this invoice was due. Accordingly, the set off issue must be resolved in favour of the claimant.

CONCLUSION

115. In my judgment, the defendants fail on all the points that they raised by way of defence to this claim, and the claim itself succeeds.