B2/2005/2477

Neutral Citation Number: [2006] EWCA Civ 403
IN THE SUPREME COURT OF JUDICATURE
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE QUEENS BENCH DIVISION
(MR JUSTICE BEAN)

Royal Courts of Justice
Strand
London, WC2

Wednesday, 22nd March 2006

B E F O R E:

LORD JUSTICE PILL
LORD JUSTICE SCOTT BAKER
LORD JUSTICE NEUBERGER

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EDLINGTON PROPERTIES LIMITED
CLAIMANT/RESPONDENT

- v -

J H FENNER & CO LIMITED
DEFENDANT/APPLICANT

- - - - - - -

(DAR Transcript of
Smith Bernal Wordwave Limited
190 Fleet Street, London EC4A 2AG
Tel No: 020 7404 1400 Fax No: 020 7831 8838
Official Shorthand Writers to the Court)

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MR C LUNDIE (instructed by Messrs Rollits, Wilberforce Chambers, High Street, Hull HU1 1YJ) appeared on behalf of the Appellant

MR T FANCOURT QC and MR E PETERS (instructed by Messrs Mishcon de Reya, London WC1R 4QD) appeared on behalf of the Respondent

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J U D G M E N T

LORD JUSTICE NEUBERGER:

Introduction

1. This is an appeal brought with the permission of the judge by J H Fenner & Company Ltd ("Fenner"), the tenant under the lease of a substantial factory, against the decision of Bean J on what amounted to three preliminary issues arising from its dispute with its landlord, Edlington Properties Ltd ("Edlington").

2. The relevant basic facts are helpfully set out in the judgment below and they are as follows:

> "2. Maerdy Colliery, known in its heyday as 'Little Moscow', closed in 1990. The Welsh Development Agency ('WDA') came into possession of the site and on 8th February 1996 concluded a written agreement ['the building agreement'] with [Fenner]. The agreement obliged the WDA to construct a factory on the site and Fenner to take a lease of the premises once the factory was built. The obligation to grant the lease accrued when the WDA's architect certified practical completion of the factory. [The lease was duly granted on 24 October 1997 and it is for a term of 25 years from 4 August.]
>
> "3. Fenner contends that the WDA was in breach of its building obligations in the [building] agreement by constructing a factory that was seriously defective and inadequate for Fenner's purposes. Fenner has issued proceedings in the Technology and Construction Court against the WDA claiming more than £52 million in damages.
>
> "4. The reversion was assigned by the WDA to Bradbury Corporation Ltd on 19th October 1998, and then further assigned by Bradbury to the Claimant, Edlington ... on 15th July 2003. It is common ground that the interposing of Bradbury between the WDA and Edlington makes no difference to the point of law. ... [Both assignments were, it would appear, normal commercial transactions.]
>
> "5. The rack rent payable under the lease is now £581,192 per year plus VAT. The present claim, issued on 16th November 2004, is for the quarter's rent due on 29th September 2004 and insurance premiums due under the terms of the lease for the year beginning 24th June 2004. There are separate issues concerning the insurance premiums but it is admitted that the rack rent would be payable subject to [Fenner's] claim of set-off.
>
> "6. It is no part of my task to assess the strength and weaknesses of Fenner's claim for damages against the WDA, which is due to be tried in October 2006. The parties are agreed that for present purposes it should be assumed to be valid at least to the extent of the full amount of Edlington's

claim.

> "7. At a case management conference on 16th August 2005 Master Yoxall ordered that [the following] questions be tried as preliminary issues. As amended by consent they are as follows:
>
> "a) Whether Fenner has a right to set off its damages claim against the WDA against Edlington's claim for ... rent and insurance rent made in these proceedings;
>
> "b) If Fenner does have such a right to set-off, whether that right of set-off is excluded by clause 16.2 of the [building] agreement and/or clause 6.1.1 of the Lease;
>
> "c) Whether on a proper construction of clause 1.16 of the Lease the sum of £108,804.04 or £40,537.50 is due from Fenner to Edlington in respect of insurance rent; …"

3. The first issue raises a point of general principle which is not by any means free of relevant authority, although it is fair to say that not all judicial observations on the topic are entirely consistent with each other. The second and third issues turn very much on the particular terms of the lease, although the second issue does involve consideration of one particular authority.

Can Fenner's claim against the WDA under the building agreement be set off against rent due under the lease to Edlington?

4. Where there has been no transfer of the reversion, it is clear that the tenant can in principle set off against its liability for rent, a claim for damages arising from a breach by the landlord of a term of the agreement from the lease, as well as any claim against the landlord for a breach of the provision of the lease itself. That point has been regarded as conclusively determined by the judgment of Forbes J in British Anzani (Felixstowe) Limited v International Marine Management (UK) Ltd [1977] 1 QB 137, a decision which has been approved on a number of occasions in this court, for example Connaught Restaurants v Indoor Leisure [1994] 1 WLR 501 at 505C and 511C, Mortgage Corporation v Ubah [1996] 73 P&CR at 500 and 507, and Muscat v Smith [2003] 1 WLR 2853 paragraph 9. Accordingly, it is common ground in this case that, had the WDA not assigned the reversion to the lease to Edlington, Fenner would be able to settle this claim for damages under the building agreement against its liability for rent.

5. The question is therefore whether that right of setoff has effectively been lost in respect of rent which accrued due after the transfer of the reversion by the WDA. I express the issue in those terms because, as the judge rightly pointed out, there is a difference in this connection between rent which had fallen due and was not paid at the time the WDA transferred away its reversion, and rent which fell due

after that date.

6. It is not uninstructive to consider the issue in its commercial context before turning to address the principles and the authorities which bear on the issue. It does not require much thought to see that the problem is difficult because, as the facts of this case show, both Fenner and Edlington have strong practical arguments. It would seem arbitrary and unfair to Fenner if its obviously valuable right to set off against rent its claim for damages under the building agreement was lost as a result of an action wholly out of its control, and wholly within the control of the very person against whom the right to set off could be claimed, namely the landlord, the WDA, by the WDA simply transferring the reversion away. On the other hand one can equally well see that a purchaser of the reversion, such as Edlington, would regard it as illogical and unfair if Fenner could invoke such a right of set-off against a successor landlord. Illogical because the set-off would be in respect of a claim which self-evidently could not be maintained against Edlington, who could in no way be bound by building agreement; unfair because Edlington would by no means necessarily know or have the means of knowing that a claim could be mounted under the building agreement.

7. In paragraph 28 of his judgment, Bean J expressed the view that, if the matter had been free of authority, he would have found in favour of Fenner on this issue. That was essentially because he regarded it as more unfair on Fenner that its right of set-off was lost by an assignment of the reversion than it would be on Edlington if the right of set-off was preserved. I see the force of that point, not least because Edlington acquired its interest substantially after Fenner took the lease.

8. On the other hand it can be said that it was open to Fenner to insist, albeit subject to the WDA agreeing, that the lease to be granted pursuant to the building agreement should contain a reddendum which effectively provided it with the right of set-off which it now claims could be invoked against the landlord for the time being. If the lease had contained such a term then, as against a transferee of the reversion, the tenant would have been able to invoke a term of the lease, indeed of the reddendum, rather than relying on a right of equitable set-off as Fenner is doing here.

9. The argument that a tenant is entitled to invoke, by way of set-off against the rent due to a transferee of the reversion, a claim against the original landlord for unliquidated damages for a breach of the term of the contract pursuant to which the lease was granted, is said on behalf of Fenner to be based on two alternative propositions, namely (1) the transferee of the reversion takes subject to the equities which as at the date of the transfer should have been invoked against the transferor; and (2) the tenant's right of equitable set-off against the original landlord is a right which runs with the land and is therefore enforceable against a transferee of the reversion.

10. In my view, neither proposition is correct – at least where the transfer is an arm's length sale.

11. So far as the first proposition is concerned, the effect of a transfer of the reversion to the lease is governed by section 141 of the Law of Property Act 1925 ("section 141") in relation to leases granted before 1 January 1996, and, in relation to leases granted after that date, by section 3 of the Landlord and Tenant Covenants Act 1995 ("section 3"). The law in this connection can be traced back via section 8 of the Conveyancing Act 1881 to the Grantees of the Reversion Act 1540. Section 141, which applies to leases granted before 1 January 1996, provides:

> "(1) Rent reserved by a lease, and the benefit of every covenant or provision therein contained, having reference to the subject-matter thereof, and on the lessee's part to be observed or performed, and every condition of re-entry and other condition therein contained, shall be annexed and incident to and shall go with the reversionary estate in the land …
>
> "(2) Any such rent, covenant or provision shall be capable of being recovered, received, enforced, and taken advantage of, by the person from time to time entitled, subject to the term, to the income of the whole or any part, as the case may require, of the land leased".

12. Section 3, which applies to leases granted after 1 January 1996 and accordingly applies to this lease, is, so far as relevant, in these terms:

> "(1) The benefit and burden of all landlord and tenant covenants of a tenancy –
>
> (a) shall be annexed and incident to the whole, and to each and every part, of the premises demised by the tenancy and of the reversion in them, and
>
> (b) shall in accordance with this section pass on an assignment of the whole or any part of those premises or of the reversion in them."

13. There can be no question but that the covenant to pay rent is within the ambit of each of the two sections. Accordingly, whichever of those statutory provisions apply, when the reversion to a lease is transferred the transferee, that is the new landlord, has the right to recover the rent under the lease in his own right, and does not need to claim through the transferor, that is the original landlord. The position in this connection should be contrasted with an assignment of a right to recover a debt or other chose in action. In such a case the common law courts did not recognise the assignment, so that the assignee had to sue in the name of the assignor. The courts of equity, on the other hand, did permit the assignee to sue, but only on the basis that the debtor could raise equitable defences which would have been available as against the assignor provided that they arose before the

debtor had notice of the assignment.

14. The effect of section 136 of the Law of Property Act 1925 ("section 136"), which reenacted with some amendments section 25(6) of the Supreme Court of Judicative Act 1873, was to do away with the common law requirement that the assignee of the right to recover the debt or of any other chose in action would have to sue in the assignor's name, provided that the assignment satisfied certain conditions. Section 136, like its statutory predecessor, by its terms preserves the equitable rule that the debtor can rely on any rights of set-off which arose before he had notice of assignment – see per Phillips J in Pfeiffer GmbH v Arbuthnot Factors Limited [1988] 1WLR 150 (1623).

15. However, the right of a transferee of the reversion to recover rent is, both in common law and under statute, an incident of the ownership of the reversion – see, e.g., per Lord Templeman in City of London Corporation v Fell [1994] 1 AC 458 at 464B to 465E. It is thus different from the right of an assignee of an ordinary debt or other chose in action. Unlike section 136, neither section 141 nor section 3 incorporate any reference to the right given by the old courts of equity to a debtor in relation to rights of set-off accrued before he had notice of the assignment.

16. As I see it, that cannot be said to be an anomaly arising from the difference between the two statutory provisions enacted to codify or unify or modernise the law in 1875 and 1881 (i.e. section 26 of the 1875 Act and section 10 of the Conveyancing Act 1881), or in 1925 (i.e. sections 136 and 141). In the first place, the notion that the right to recover the rent under a lease runs in law with the reversion, and that the common law courts would thus enforce the rights of a transferee of the reversion to recover rent under the lease, goes back to 1540 in statute, and at least 1583, when the Spencers Case, 5 Co Rep 16a was decided, in common law. Secondly, while it is fair to say that the contractual character of a lease has tended to become more prominent over the past 50 years, it remains a fact that it is also an interest in land, and it is not hard to see that the right to recover the rent should be an incident of the reversion, and that accordingly it may have different features from the right to recover a debt unassociated with any interest in land.

17. As to the second proposition relied on by Fenner, the claim which the tenant wishes to set off against rent is a claim for damages against a predecessor in title of its current landlord. A tenant's right to claim damages against a predecessor in title of the present landlord, whether or not it arises under a covenant in the lease, is a personal right, which is not an interest in land. The fact that it is being invoked for the purpose of impeaching the right to recover the rent under the lease cannot, despite Mr Lundie's argument on the contrary on behalf of Fenner, convert it into an interest in land. The notion that the benefit or burden of the covenant may run with the term or with the reversion is familiar and well established.

18. However, as Mr Fancourt QC, who appears with Mr Peters for Edlington argues, the contention that a liability to pay damages from the accrued breach of covenant runs with the reversion (or with the term) is an entirely different notion, and it is one which appears to me to be contrary to principle. Indeed the contention is difficult to reconcile with the decision of Garland J in Duncliffe v Caerfelin Properties Ltd [1989] 2 EGLR 38. That decision, which is rightly accepted as correctly decided by Mr Lundie, and was also so treated by Buxton LJ in paragraphs 28 and 41 of Muscat, was to the effect that a transferee of the reversion could not be held liable by the tenant for breaches of a landlord's covenant committed by the transferor, even though the covenant in question bound the transferee, who would of course be liable for any breach of the covenant after the transfer. The decision was based on section 141 and 142 of the 1925 Act, but it applies equally in a case such as this where the relevant provisions are sections 3 and 23 of the 1995 Act.

19. Although I do not think that it makes any defence to the outcome, there is the further point that the claim raised by the tenant in the present case does not arise under the lease, but under the building agreement pursuant to which it was granted. Accordingly, over and above what I have said, it appears to be a claim against the original landlord in his capacity of the builder of the demised premises, not that of the landlord under the lease.

20. Accordingly, although it is true that this claim is being invoked to impeach a liability which undoubtedly does arise under the lease, namely a liability to pay rent, it is not a claim which can be said to be in any way propriety in character. The very nature of an equitable set-off is that it is personal in nature, in that it is a claim raised against the claimant which impeaches his right to sue and does not run against third parties – see Buxton LJ's illuminating discussion in paragraphs 37 to 46 of Muscat.

21. High authority suggests that a purchaser of land and in particular for present purposes a reversion to a lease, will take an interest subject to an equitable right only (a) where he has notice, including of course a deemed notice, of the right; and (b) where that right is "such that it creates a legal or equitable estate or interest in [that] land" – per Lord Upjohn in National Provincial Bank Limited v Ainsworth [1965] AC 1175 at 1238 and also per Lord Wilberforce in the same case at 1253 to 1254. As is clear from that case, a purchaser of a legal estate in land is not bound by any personal obligation of the vendor even though it may fairly be said that the personal obligation relates to the land in question. By parity of reasoning, in the present case the right to claim a set-off against rent, while it can be said to relate to the lease in the sense that it is being invoked to impeach the tenant's liability to pay rent, is in reality a "mere" claim for money, not a right which can be said to be in anyway proprietary. Additionally, although not essential for present purposes, it is a claim which arises from a mere contractual right against the original landlord under an obligation which cannot, after the

transfer of the reversion, be invoked against the successor of that landlord.

22. So much for the principle. What of the authorities? There appear to me to be three decisions of this court in the past 100 years which support this analysis, although it is fair to say that not all the judgments are expressed in an entirely mutually consistent way. First there is Reeves v Pope [1914] 2 KB 284. To all intents and purposes, the basic facts of the case were indistinguishable from the present, save that it was not a contractual transferee of the original landlord's interest who was suing for the rent, but a mortgagee (in possession) of the original landlord's interest, the mortgage having been entered into three days after the lease was granted (see at 285).

23. The Court of Appeal seems to have had little difficulty in rejecting the tenant's argument that she was entitled to set off against rent a claim for damages against the landlord under the prior building agreement, because the rent was being claimed by a mortgagee of the landlord's interest in possession. The mortgage in that case was granted before 1925 and therefore took effect under the common law as a conveyance, subject to the mortgagee's obligation to reconvey once the mortgage debt was paid off, so the mortgagee effectively had the legal title to the land. Accordingly, at least as it seems to me, the one potential point of difference between the facts of that case and the facts of this case is ultimately illusory because the mortgagees in that case were effectively the transferees of the reversion, in the same way as Edlington is the transferee of the reversion in the present case.

24. In his judgment Lord Reading CJ said at 287:

> "It is perfectly plain that we are not dealing here with the right to set off against the assignment of a chose in action, in which event quite different principles apply."

(He returned to re-emphasise that point at the end of his judgment at 289). He then went on as follows:

> "But that is not the real question in this case. The whole point depends upon whether or not Mr Crawford is right in saying that his client would be entitled to set off this claim, notwithstanding that it is not an interest in land. That is the whole matter in dispute. If what his client had was an interest in land which he desired to set off against the mortgagees in possession, no doubt the cases which he has quoted are in point as authorities for that proposition; but the moment it is ascertained that in this case the claim is not an interest in land, if established is merely a right to damages against the mortgagor for breach of an agreement made in respect of, or in connection with, the land, it becomes apparent that those cases have no application."

At 289 Buckley LJ said this:

> "The mortgagees were entitled, as mortgagees, to the reversion expectant on the determination of the lease under which the defendant held, and as such mortgagees they were entitled in their own right to enforce payment of the arrears of rent. They were not assignees of the rent; they were persons claiming to enforce payment of rent as entitled thereto as mortgagees; they could have distrained for the rent."

He then observed:

> "Then it was said that there was a right of set-off by reason of the fact that the damages in question were damages arising from a breach of contract to do something upon the land within a time.
>
> "Now that, I conceive, is wholly a misconception. The doctrine is this – that whether there be a purchaser or mortgagee (it does not matter which) and the purchaser or mortgagee finds a tenant in possession, he is bound to assume that the tenant in possession has some interest in the land … [The damages gained under the building agreement] were not any incumbrance on the land, and the right to them was no estate or interest in any way in the land. The damages in question, therefore, are not within the principle which is to be found in and perfectly indisputably established by the cases which have been cited to us".

25. Phillimore LJ was "of the same opinion" (see at 290).

26. In my view, that case establishes that each of the two propositions upon which Fenner's case is based in misconceived. The first passage I have quoted from each of the two reasoned judgments focuses on the point that a transferee of the reversion is entitled to recover the rent in his own right, and therefore an equitable right of set-off which could have been raised in the case of a normal equitable assignment of a chose in action (including one which would now be recognised as a legal assignment by virtue of section 136) cannot be invoked. The second quotation from each reasoned judgment explains that the nature of the right invoked by the tenant is a personal right which, while it could be said to be connected with the land in some way, cannot be said to amount in any sense to an interest in land.

27. Mr Lundie argues that the right of the tenant in Reeves was not capable of being set off in equity against the rent, even when the reversion to the lease was vested in the original landlord. That cannot be right. It is quite clear that both Lord Reading and Buckley LJ approached the arguments on the assumption that there was assumed to be a right of set-off had there been no transfer of the reversion. The point is, if anything, even clearer from the judgment below of Bankes J (see at [1913] 1 QB 637 and 642), with which Buckley LJ agreed in terms at the end

of his judgment.

28. Mr Lundie also contends that the decision in Reeves is no longer good law. His argument is not assisted by the fact that there has, as he fairly concedes, been no relevant change in the law as a result of any intervening statute, e.g. the 1925 Act or the 1995 Act. His point is further weakened by the ringing endorsement to much of the reasoning in Reeves by the House of Lords in Ainsworth (see at 1225, 1238 and 1260 per Lords Hobson, Upjohn and Wilberforce).

29. Mr Lundie's contention that Reeves is no longer good law following British Anzani received a late body blow when, at the prompting of Scott Baker LJ, Mr Fancourt referred to Re Arrows Ltd (No. 3) [1992] BCLC 555, a decision of Hoffmann J. At 559b he referred with obvious approval to the fact that "all counsel are agreed that the case of Reeves v Pope … is presently the governing law. Hoffmann J explained the effect of the decision in these terms at 559c-d:

> "The reasoning of the Court of Appeal was that a mortgagee or transferee of a property subject to a lease does not become entitled to the rents … as an assignee [of] a chose in action by the original owner. What the original owner transfers to his mortgagee or to his transferee is not simply a right to receive the rent, which if it were an ordinary debt might be set-off against a cross-indebtedness by the transferor. It is the land itself. The mortgagee becomes entitled to collect the rent not as assignee of the rent but by virtue of having an interest in the land".

30. Hoffmann J then went on to mention that Reeves had been referred to with approval (which, in the speech of Lord Wilberforce, he went on to describe as "unqualified") in Ainsworth. At 559g Hoffmann J observed that the decision in Reeves would have been relied on in conveyancing transactions, and that it was "virtually impossible to contemplate that the House of Lords would now overrule it". He concluded by saying that neither he, nor the very experienced counsel before him, could see any "grounds upon which it might be overruled".

31. The second decision of this court to which I should refer is Mortgage Corporation v Ubah. In that case the respondent mortgagee had obtained an order for possession against the mortgagor freeholder, referred to in the judgment as "the Chief", who had, prior to the mortgage, granted a tenancy to the appellant. Millett LJ said this:

> "The appellant's evidence was that in 1987, that is before the mortgage was granted to the respondents, the appellant arranged for work to be carried out on the flat. The Chief later agreed with him that he would pay £13,873 towards the cost of those repairs and in the words of the appellant 'the Chief told me to set my rent against what he owed me'. That agreement was effective between the parties, but it did not confirm upon the appellant an interest in land capable of binding successors in title to the

> Chief whether with or without notice of the arrangements unless the right the right of deduction which was given to the appellant fell within one of the two established rights of deduction which are capable of binding successors in title".

32. He then identified those exceptions. The first was where the money had been spent on carrying out necessary repairs which were the landlord's responsibility under the lease, as discussed in Lee-Parker v Izzet [1971] 1 WLR 1688. The second was described by Millett LJ at 508 as being:

> "the ordinary equitable right of set-off which arises whenever the defendant's claim is so closely connected to the plaintiff's as to impeach the plaintiff's demand."

33. He went on to say that:

> "As against the Chief in my opinion the appellant may well be entitled to deduct the amount which the Chief owes him from payments of rent which are due to the Chief. But the money judgment below is entirely in respect of rent to due the respondents after the date that they had notified the appellant that they had taken possession. The appellant has no right of set-off capable of binding successors in title such as the respondents. It is, of course, settled law that an interest which is not capable of binding successors in title cannot be an over-riding interest within section 70(1)(g) of the Land Registration Act 1925."

34. Bean J said of those passages, in paragraph 23 of his judgment, that:

> "Millett LJ, with the enthusiasm of an in inquisitor rooting out heresy, devoted the whole of his judgment to the set-off issue, which had not been argued on appeal."

Nonetheless, as he went on to say, although the judgment was "obiter … it comes from the source of the greatest distinction." In particular it appears to me to undermine the second of the two propositions upon which Fenner's case rests. The Land Registration Act 1925 to which Millett LJ made reference has, of course, now been replaced by the Land Registration Act 2000, but, rightly in my view, it is not suggested on behalf of Fenner that that makes any difference to the authority of that case.

35. The third of the three decisions of this court to which I must refer is Muscat, which is not entirely easy to analyse. First, it does not appear that Reeves, Ainsworth, Arrows or Ubah were cited to the court. Secondly, as Bean J observed, there is a difference between the two reasoned judgments of Sedley and Buxton LJJ, but I agree with the judge and with Mr Fancourt that they ultimately came to the same conclusion for the same reason. That is illustrated by the fact

that Ward LJ agreed, in paragraph 57, with both judgments.

36. I also agree with Bean J that, if there is a difference between the two judgments, that of Buxton LJ is to be preferred. Sedley LJ expressly adopted:

> "the fuller account of the law contained in the judgment of Buxton LJ at paragraph 31".

And Ward LJ began his brief judgment at paragraph 56 by saying that:

> "Buxton LJ's illuminating judgment upon the nature of equitable set-off explains why the rules relating to assignment determine the outcome of this appeal."

37. Muscat involved a claim brought by a landlord of purchase against a statutory tenant for arrears of rent and possession. The statutory tenant succeeded in his appeal, to the extent that it was accepted that he was entitled to set off unliquidated damages arising from his claim for breach of covenant against his previous landlord against the rent which had fallen due during the time that the reversion was vested in the previous landlord. His present landlord, the transferee of the reversion, was seeking to recover arrears of rent which had already accrued at the date of the transfer of the reversion, and that it was held that his claim to that rent was impeached by the statutory tenant's claim for damages suffered before the transfer.

38. After an analysis of the nature of equitable set-off and third parties (at paragraphs 34 to 46), Buxton LJ explained the normal rule was that an equitable assignee of a chose in action took subject to the debtor's existing rights of set-off and that that was not changed by section 136. At paragraph 51 he said that:

> "The reversion itself is not, however, a chose in action, and Mr Muscat's claim for past rent is not asserted simply under a covenant that he succeeded to when he succeeded the reversion. Rather, the claim for *previously accrued* arrears that he asserts against Mr Smith is specifically transferred to him by his assignor by the operation of section 141 of the 1925 Act".

He then went on to say in paragraph 54 that he saw:

> "no reason for thinking that section 141 of the 1925 Act was intended to exclude that rule of equity, confirmed by statute, from a case where the landlord asserts a claim as an assigned chose in action.

It is clear that that observation was apt to apply to the rent which had accrued due before the transfer of the reversion, but not to the rent which accrued due after the transfer of the reversion.

39. Although it appears from paragraphs 28 to 30 of his judgment that Sedley LJ went further than Buxton LJ, and held that the tenant's right of set-off extended to rent which had accrued due after the transfer of the reversion, I consider that in light of the fact that he expressed his conclusion in paragraph 31 on the basis of his agreement with Buxton LJ, Sedley LJ was limiting his observations to the rent which had accrued due before the assignment.

40. In paragraph 31 he concluded that:

> "Mr Smith is entitled to set off against Mr Muscat's claim for assigned rent arrears any damages due to him for the assignor's breach of his repairing obligations because the debt, a chose in action, vests in Mr Muscat as assignee subject to all equities which were available to Mr Smith against the assignor".

41. In any event, in so far as Sedley LJ went further and held the conclusion applied to rent accruing due after the transfer of the reversion, his remarks were obiter, a little Delphic (see the opening words of paragraph 30), inconsistent with two Court of Appeal decisions not cited to him, and in conflict with the views expressed on the topic in the leading textbooks.

42. So far as that latter aspect is concerned, leading textbooks on set-off (Derham on The Law of Set-off, 3rd edition, at paragraph 17.63 and 17.66); on equity (Snell's Equity, 31st edition paragraph 38-27); on landlord and tenant law (Woodfall on Landlord and Tenant, current loose-leaf edition, Volume 1 paragraph 16-044); and on real property (Megarry & Wade's Law of Real Property, 6th edition at paragraph 6-050) all take the view that a transferee of the reversion is not bound by any rights of equitable set-off which the tenant could have raised against his predecessor in title.

43. In these circumstances, it appears to me Edlington's case on this point is supported by a principle, specific authority in this court and leading textbooks on the topic. However, as is not unusual on difficult points of this sort, it is argued on behalf of Fenner that neither principle, nor the authorities, nor the textbooks point all one way.

44. So far as principle is concerned, it can be said that equitable set-off is ultimately based on considerations of justice, as illustrated by what Lord Denning MR said in Federal Commerce and Navigation Co Ltd v Molena Alpha Inc [1978] QB 927 at 975A, as cited at paragraph 34 by Buxton LJ in Muscat, and that it would be unjust if a tenant's rights of set-off could be lost when the landlord unilaterally transferring the reversion as he is undoubtedly entitled to do.

45. I see the force of that argument, as did Bean J, but there are two points that can be made about it. First, as already mentioned, while one can well see that the result

is "manifestly unjust" from the tenant's point of view, it seems to me it could equally well be said to be unjust from the viewpoint of the transferee of the reversion if it found that the claim for damages to which it was a complete stranger and of which he had no actual notice, should nonetheless in practice be made his liability by being capable of being set off against the rent. When one finds competing injustices, and where the perceived balance of injustice may vary from case to case and from judge to judge in a particular case, it seems to me that one is not on safe ground in invoking injustice on a guide to principle.

46. Secondly, and quite apart from this, although the type of set-off with which this case is concerned is equitable, that does not mean that one can depart from principle. The fact that the particular type of right or relief is equitable does not, pace some judicial observations to the contrary, operate as a green light to invent new general or specific rules in order to achieve what one judge might regard as a fair result in a particular case or, to put it another way, to achieve "a form of palm-tree justice" (per Buxton LJ in paragraph 45 in Muscat). This case is also concerned with property law where clarity and consistency have a particularly important part to play, as Hoffmann J made clear in Arrows.

47. It can also be said that the decision in Muscat means that section 141 has a slightly inconsistent effect if Edlington's argument is correct. Although the section provides that the right to recover the rent accrued before transfer, as well as the right to recover the rent accruing after the transfer, is vested in the transferee of the reversion, the former rent is subject to any right of set-off which the tenant had at the date of the transfer, whereas the latter is not. I see the force of that argument, but the answer is to be found in Muscat itself. The right to recover the accrued rent, although it goes with the reversion, is a chose in action, whereas the right to recover future rent is not: it is simply an incident of the reversion. The distinction is readily understandable in terms of principle and it is easily reconcilable with commercial common sense. When the rent accruing due before the transfer actually fell due it can be said to have been impeached by the right of set-off because the person then entitled to recover the rent was the immediate landlord, whereas the same point cannot be made in relation to the rent accruing due after the transfer.

48. It is perhaps parenthetically worth noting that, as pointed out by Mr Fancourt, section 3 has, in this connection, effected a change in the law. The effect of section 141, as interpreted in Muscat, is to effect an automatic assignment of the arrears which had accrued due by the date of the transfer of the reversion to the transferee as a chose in action. However, section 3 does not have that effect, in the light of the provisions of section 23(1) of the 1995 Act. Accordingly, if there had been an assignment of the previously accrued arrears in this case it would have been by an assignment falling within section 136, and the conclusion reached in Muscat's case would have applied without argument.

49. On behalf of Fenner, Mr Lundie relied on dicta in a number of cases which could

be said to suggest that a tenant's rights of set-off against his original landlord should be enforceable against the successor landlord. As the judge acknowledged, there are undoubtedly some judicial observations which, taken at face value at any rate, can be said to support Fenner's case. In Government of Newfoundland v Newfoundland Railway Company [1888] 13 AC 199 at 212, Lord Hobhouse said:

> "It would be a lamentable thing if it were found to be the law that a party to a contract may assign a portion of it, perhaps a beneficial portion, so that the assignee shall take the benefit, wholly discharged of any counter-claim by the other party in respect of the rest of the contract, which may be burdensome. There is no universal rule that claims arising out of the same contract may be set against one another in all circumstances."

50. In Green v Rheinberg (1911) 104 LT 149, Vaughan Williams LJ, with whom Farwell and Kennedy LJJ agreed, said this:

> "I take the law as stated in 1853 by Lord Kinsgdown (then Mr Pemberton Leigh) in Barnhart v Greenshields 99 Moore, P.C.18, 32): 'With respect to the effect of possession merely, we take the law to be, that if there be a tenant in possession of land, a purchaser is bound by all the equities which the tenant could enforce against the vendor, and that the equity of the tenant extends not only to interests connected with his tenancy, as in Taylor v Stibbert (2 Ves. Jun. 437), but also to interests under collateral agreements, as in Daniels v Davison (16 Ves. 249; 17 id. 433) and Allen v Anthony (21 Mer. 282), the principle being the same in both classes of cases – namely, that the possession of the tenant is notice that he has some interest in the land, and that a purchaser having notice of that fact is bound, according to the ordinary rule, either to inquire what that interest is or to give effect to it, whatever it may be."

51. These sorts of general observations, even coming from high authority, have to be read in context. Indeed I note that all these cases were cited in the Court of Appeal in Reeves and Lord Reading CJ said this about them at 288:

> "It is perfectly true, as is shewn by a reference to the judgments, that there are some expressions which, taken by themselves, and leaving out altogether the matter with which the court was dealing, might be wide enough to cover the proposition for which [counsel for the tenant] has contended, but a little examination shews perfectly plainly that the Court, in laying down the proposition in those cases, never intended to go so far as [he] now suggests."

I would also refer to what Hoffmann J said in this connection in Arrows at 559c-d:

52. Green is said by Mr Lundie to give rise to a further anomaly if there is no set-off in a case such as this. That anomaly is also said to arise in the light of Lee-Parker. In Green the tenant paid a sum to the original landlord on account of the rent for the whole term of the lease, and it was held that a transferee of the reversion was bound by the arrangement, and accordingly could not claim for rent which would otherwise have fallen due after the transfer. In other words, unlike in the present case, the tenant had actually paid, albeit to a previous landlord, the rent which had been claimed from him, a very different situation from the present. In Lee-Parker the tenant defeated a claim for rent by a transferee of the reversion on the basis that the tenant had necessarily spent money on carrying out repairs, remedying a breach of the landlord's repairing covenant, before the reversion had been transferred to his present landlord.

53. However, neither of those cases is really in point here. In Green's case the rent which the successor landlord was paid had already been paid, albeit early, and that was the end of any claim for it. In Lee-Parker, Goff J was following Taylor v Beale (1591) Cro Eliz 222, which established (albeit obiter) that where a tenant is required to spend money on remedying the breach of the landlord's covenant to repair, the money so spent could be invoked to abate the rent even if it thereafter falls due to a successor landlord. The sum in question must be a liquidated sum, as emphasised by Millett LJ in Ubah. Even more importantly, Lee-Parker invokes the common law right of recoupment established or affirmed more than 400 years ago, and I note that Derham (op cit), at paragraph 17-68, suggests that the expenditure effected by the tenant in such a case is not a set-off against rent, but is better regarded as a payment of the rent. In other words the case is like Green.

54. Given the nature of this principle and its common law origin, the fact that the tenant will have spent money on the landlord's account to perform a necessary obligation imposed by the lease on the landlord for the benefit of the tenant, I see no warrant, pace Sedley LJ in paragraph 29 in Muscat, for concluding that the fact that a tenant's common law right of recoupment can be invoked against rent due to a transferee of the reversion justifies a similar result in relation to a tenant's claim to set off, against rent due to such a transferee, a claim for liquidated damages against a predecessor landlord.

55. A recent authority which does appear to assist Fenner's case is that of Lightman J, in Lotteryking Ltd v AMEC Properties Ltd [1995] 2 EGLR 13. At 15B he said this:

> "A tenant's right to set off (against any liability to make payment to the landlord due under the lease) his claim for damages for breach of a provision in a collateral contract which runs with the reversion is exercisable (equally with his right to set off a claim for damages for breach of such a covenant contained in the lease) not merely against the

> person entitled to the reversion at the date of breach, but also against any successor in title. The successor in title acquires the reversion and the benefit of all covenants contained in the lease subject to all equities existing at the date of his acquisition. The much debated decision in Reeves v Pope [1914] 2 KB 284 in nowise stands in the way of this conclusion".

In his judgment in Muscat, Sedley LJ at paragraphs 17 and 29 approved the view taken by Lightman J in Lotteryking, and indeed quoted, with apparent unqualified approval, that very passage in Lightman J's judgment (with the exception of the last sentence I have quoted).

56. I have already said that, if that was Sedley LJ's view, I disagree with it. Unfortunately Lightman J was not referred to Duncliffe; nor was he shown the clear approval of Reeves by the House of Lords in Ainsworth or Hoffmann J's ringing endorsement of it in Arrows. The party detrimentally affected by the decision in Lotteryking on the point, namely the future transferee of the reversion, was not actually represented before Lightman J. Further, his remarks were not dispositive of the issue before him (see at 15B-E). Finally, the matter came before him in a great hurry, (see at 14F-G) and read in that context his judgment is impressive.

57. Quite apart from this, it seems to me that the basis upon which Lightman LJ went on to distinguish Reeves undermines the whole basis upon which Mr Lundie's reliance on the reasoning in Lotteryking rests. Reeves was distinguished by Lightman J on this basis:

> "The Court of Appeal held that a tenant could not set off against a successor in title to the reversion a claim for damages for breach of his contract with the original landlord for the grant of the lease. The Court of Appeal categorised this a claim for damages for breach of a purely personal obligation as distinguished from an obligation which touched and concerned land, i.e. ran with the reversion."

58. In other words, even if Lotteryking is correct on this point, it seems the effect of Lightman J's reasoning is that a tenant can invoke the right of set-off in respect of breaches by the original landlord in relation to rent that accrues due after the transfer of the reversion, if the landlord's breach is of a provision in the lease, or a collateral contract subsequently entered into between landlord and tenant, the terms of which effectively run with the lease, but not if the claim is essentially a personal claim for damages arising out of a contract, even if that contract was one pursuant to which the lease was granted.

59. Accordingly it could be fairly said, and Mr Fancourt does say, that the one case which appears to assist the tenant's arguments here is not only a decision at first instance, which is difficult to reconcile with reasoning in two subsequent Court of

Appeal cases, but is one which distinguishes another Court of Appeal case on grounds which anyway do not assist the tenant in this case.

60. However, I do not consider that this last point is either a principled or a helpful basis for distinguishing Lotteryking on this point, as opposed to overruling it. The principles have been discussed. It is not a helpful basis, because Mr Lundie has another argument, which I have not so far mentioned, for contending that Reeves does not apply and that the reasoning in Lotteryking does. He argues that Fenner can enforce the terms of the building agreement against Edlington in its capacity as successor in title to the WDA in light of the definition of "the landlord" in clause 1, and the provisions in clause 16(1), of the building agreement. The latter clause is a non-merger provision in familiar terms, and, in its absence, the building agreement might not survive the grant of the lease. At least to that extent, it may be said to be a necessary provision for the argument of the terms of the building agreement are enforceable against the successor in title to the landlord under the lease, but it is certainly not a sufficient provision for that purpose.

61. Clause 1(1) of the building agreement defines the WDA as "the landlord" and extends the term to its successors in title. As Mr Fancourt rightly observes, the building agreement is not itself a lease. In a sense it is the antithesis of a lease, because it specifically contemplates that there will be no lease unless and until the very works which, on Mr Lundie's argument, have become the obligation of a transferee of the reversion of the lease have been completed. Save where either the common law or statue permits, it is not of course normally possible to impose an obligation under a contract involuntarily on the third party. The exception upon which Mr Lundie relies is that a transfer of reversion will impose upon the transferee the obligations of the landlord under the lease to which the reversion is subject. As a matter of non-statutory law, that principle cannot assist his case. However, he contends that the effect of section 3 is to impose on Edlington the WDA's obligations under the building agreement. Section 3 in this connection applies to "the … burden of all landlord … covenants", and such covenants are to be found in section 28(1) of the 1995 Act as being covenants "falling to be complied with by the landlord of premises demised by the tenancy" with the expression "landlord" in relation to any tenancy being defined in turn as "the person for the time being entitled to reversion expectant on the term of the tenancy".

62. It seems to me, in agreement with Mr Fancourt, that that argument brings Mr Lundie straight back to where he started. The covenant in the building agreement is not a covenant which falls into the statutorily defined expression, because it is self-evidently not a covenant which is to be complied with by the WDA in the capacity described in section 28(1) of the 1995 Act. It is to be complied with by the WDA in its capacity as a party to the building agreement, albeit I accept that the building agreement contemplates that, once the WDA has satisfied its obligation to build, it will indeed become the landlord under the lease.

63. So far as the books are concerned, Wood on English and International Set-off 1989 expresses its doubts about the notion that a transferee of the reversion is not bound by the tenant's right of set-off against the transferor, but it does not cite Reeves, and the view is shortly expressed. Similar doubts were voiced in an article by Waite in 1983, The Conveyancer, 373 at 384-6; once again Reeves was not cited. Neither writer could have had the benefit of Duncliffe or Arrows or of the two more recent Court of Appeal decisions to which I have referred, nor, it is fair to say, of the decision of Lightman J.

64. In all these circumstances, it appears to me that the weight of principle, authority and textbooks all point firmly in the same direction. Where the reversion to a lease is transferred, a tenant cannot set off, against rent falling due after the transfer, a claim for damages he has arising out of a breach by his original landlord of the lease, let alone of the agreement pursuant to which the lease was granted, unless of course the lease specifically provides that he should have that right.

65. It follows from this that the second point to be which falls to be considered is strictly irrelevant. If Fenner has no right of set-off in principle, then the question whether the terms of the lease or building agreement excluded rights of set-off is hypothetical. However, it is a relatively short and not insignificant point, and it has been fully argued and dealt with by the judge, so I will not deal with it.

Would set-off have been excluded in this case in any event?

66. Edlington rely on a provision in the lease, or in the alternative, a provision in the building agreement, to justify its contention that if, contrary to the view of the judge (with which I agree), it was open in principle to Fenner to set off a claim for damages under the building agreement against rent, that right had been excluded by agreement.

67. The provision of the lease relied on is clause 6(1)(1) under which the tenant covenanted to pay the rent on the usual quarter days in advance "without deduction or abatement". The relevant provisions of the building agreement are clauses 16(1) and 16(2). Clause 16(1) provided the rights and obligations under the building agreement should continue, notwithstanding the execution of the lease. That was to avoid any risk of the provisions of that agreement merging with the lease, as I have said. Clause 16(2) provided that, subject to certain irrelevant exceptions:

> "… no defect in the Works or the Premises at the date on which the Lease is granted shall in any way lessen or affect the obligations of the Landlord or the Tenant under the Lease.

68. There is no doubt that it is possible as a matter of law for a landlord and a tenant,

like any other contracting parties, to agree to exclude the rights of equitable set-off, generally or in certain respects. However it is apparent from the decision of the Court of Appeal in Connaught that clear words are needed before the court will impute to the parties an intention to exclude the rights of set-off. In that case the lease provided the tenant would pay the rent "without any deduction", disapproving an earlier decision of Steyn J in Famous Army Stores v Meehan [1993] 1 EGLR 73, the Court of Appeal unanimously held that the words were insufficient to deprive the tenant of what would otherwise be his right to raise an equitable set-off against rent.

69. In the leading judgment, Waite LJ said at 510A-C that "clear words are needed to exclude a tenant's remedy of an equitable right of set-off" and that the term "deduction" is a "useful and flexible word but heavily dependent upon the context in which it is used, for an accurate understanding of the sense in which it is being employed" and that it followed that "the simple expression 'without any deduction' was insufficient by itself, in the absence of any context suggesting the contrary, to operate by implication as an exclusion of the lessee's right to set off". As he went on to say at 510D-E, the reference to a deduction was "insufficiently clear to carry the implication of an intention to exclude the tenant's equitable rights of set-off.

70. In his shorter judgment, Neill LJ came to the same conclusion, adding at 511F-G his agreement with the Court of Appeal, New Zealand, that "the word 'deduction' does not in its natural sense embrace a set-off" (see Grant v NZMC Ltd [1989] 1 NZLR 8 at 13). Simon Brown LJ agreed with both judgments.

71. The lease in the present case refers to a deduction, as in Connaught, and it also refers to abatement. So far as the word "deduction " is concerned there is no doubt that it could be interpreted so as to extend to a right of set-off, and it is also true, as was pointed out by Waite LJ, that the meaning of the word must depend upon its context. Accordingly it is conceivable that, as used in a provision such as clause 6(1) of this lease, the word could be interpreted as extending to a right of set-off. However, in the context of commercial leases it is clearly desirable that as clear and consistent an approach is adopted to common words and provisions as is compatible with a principled approach to construction. It is fair also to bear in mind that the words "without deduction" have been held in the context of a purely commercial contract to exclude the right of set-off (see for instance Marubeni Corporation v Sea Containers Ltd, (unreported), 17 May 1995 and BOC plc v Centeon Inc [1999] 1 All ER (Comm) 970, 979-80.

72. Nonetheless I see no reason not to follow the Connaught case here; indeed I see every reason to do so in terms of the interests of certainty at least so far as the word "deduction" is concerned. As to the effect of the word "abatement", it seems to me that as a matter of strict law that word does not have the same meaning as, or naturally refer to, equitable set-off. That point is made out by the decision of this court in Mellowes Archital Limited v Bell Projects Limited

[1997] 87 BLR 26, where Hobhouse LJ referred at 38E to "the distinction between the common law defence of abatement and the defence of equitable set-off", and both he and (more fully) Buxton LJ considered the distinction between the legal history of the two concepts. For a more summary explanation see paragraphs 405 and 406 of Halsbury's Laws, 4th edition Vol. 42, 1999 reissue.

73. Mr Fancourt points out that the concept of abatement in this technical, legal sense is inappropriate in the context of this lease. That seems to me to be right. However particularly in the light of the approach of this court in Connaught I do not think that it would be appropriate to conclude that a word which, if understood in its non technical sense might cover set-off, should be given that effect, unless it is clear that the parties intended it. The observations of Waite LJ as to the "ambiguity", or imprecision, of the word "deduction" appear to me to be equally applicable to the word "abatement" once it is not given its technical legal meaning.

74. As to the contention that clause 16.2 of the agreement precludes the right of set-off against rent, it seems to me that once again the reasoning in this court in Connaught renders that argument difficult to maintain. As I have mentioned, the essence of the reasoning in Connaught was that clear and specific words are needed before the court will hold the parties have excluded the tenant's right of equitable set-off, and I cannot find such clear and specific words in clause 16.2 particularly as one must read that clause in the context of the agreement as a whole and that agreement had the lease with clause 6.1.1 attached.

75. The point is a difficult one and I am not sure that I would have decided it the same way as the judge in the absence of the decision in Connaught. However I consider it would be wrong for this court to depart from the strict approach it adopted in that case, that approach being to hold that the right of set-off against rent in a lease is not to be excluded except by words which cannot sensibly be interpreted as not extending to set-off. In my judgment the effect of the decision of the court in Connaught was almost this: that at least in the absence of any clear indication to the contrary in the lease, a covenant or other provision relating to the payment of rent will not exclude the tenant's normal right to claim equitable set-off, save where the word "set-off" is specifically used.

The insurance rent issue

76. This issue is entirely discrete. By the reddendum in the lease, the tenant is to pay "the insurance rent" annually in advance. The other relevant facts can again be taken from the judge's judgment:

> "34. Clause 1.16 of the Lease defines the Insurance Rent as:-
>
> > '… the sum or sums equal to the amount which the Landlord may expend in effecting and maintaining the insurance of the demised

> premises in accordance with its obligations herein against loss damage or destruction by the insured risks in their full value and also for insuring two years rent of the demised premises; provided that in the event that the Tenant shall demonstrate that it can obtain a bona fide quotation from a reputable insurer, for not less than the same risks insured for by the Landlord during the previous period of twelve months, at a premium which is less than that quoted by the Landlord's insurers for the same risks for the following period of twelve months, then the Insurance Rent for such following twelve months shall be reduced by the difference between such quotations.'

"35. The Lease placed the obligation to insure the premises on the Landlord. The first insurance policy covering the premises was taken out on 15 July 2003 for the period ending 23 June 2004. From 2004 onwards the annual renewal date was 24 June. Clause 8.8 provided:-

> 'Landlord's insurance covenants.
>
> The Landlord covenants with the Tenant in relation to the policy of insurance effected by the Landlord pursuant to its obligations contained in this Lease to produce to the Tenant upon request particulars of any policy of insurance effected under this Lease sufficient to enable the Tenant to know the full extent of the property covered the risks and sums insured and any exception exclusions conditions or limitations to which the policy is subject and to provide evidence of payment of each year's premium'

"36. On 23 July 2003 Edlington invoiced Fenner for the premium for the period 15 July 2003 to 23 June 2004. Two days later Fenner wrote to Edlington's agent asking for 'a copy of the policy details and schedule relating to the All Risks Property Insurance'. On 4 August 2003 Edlington's agent replied 'please find enclosed as requested a copy of the insurance policy and schedule'. It is now accepted that this letter was received and copied to two or three people within Fenner's organisation and that it indicated what risks were insured.

"37. There was then a pause until 2 June 2004 (22 days before the renewal date) when Fenner wrote to Edlington's agent asking for 'a copy of the policy details and schedule as requested last July'. Evidently the writer of the letter had mislaid or was unaware of the August 2003 communication. By a further letter of 7 June Fenner asked for the identity of the insurance company and details of the cover provided. Edlington's agent did not reply giving this information until 28 June. On 19 August 2004 Fenner wrote to Edlington's agent enclosing what was described as 'a bona fide quotation for the property insurance' at a premium of £34,500."

77. The issue between the parties is whether, in light of the provisions of clauses 1.16

and 8.8 of the lease, if the tenant is to rely on the proviso of clause 1.16 it must, as Edlington contends, "demonstrate" what is stipulated in that requirement before the expiry date of the "previous period" or, to put the point another way, before the beginning of "the following period". In relation to the facts of the present case Fenner has, at least on the face of it, obtained an insurance quotation for the period from 31 August 2004 to 31 August 2005 on 19 August 2004. It was significantly lower than the insurance premium which had been quoted to Edlington by its insurers in respect of the period of a year from 24 June 2004 (being "the following period of 12 months").

78. In these circumstances, if Edlington is correct Fenner acted too late (and arguably in respect of the wrong period) to be able to rely on the proviso. However, it is contended on behalf of Fenner that there is no such time limit in the machinery embodied in the proviso to clause 1.16 of the lease. Indeed, as I understand it, it is Fenner's case that no time limit whatever is to be implied into that proviso. In reaching his conclusion favourable to Edlington, the judge expressed himself in these terms:

> "38. The scheme of Clauses 1.16 and 8.8 of the Lease is clear. The landlord has the obligation to insure and must do so by the due date for renewal so that the insurance is "maintained". If the tenant furnishes a satisfactory alternative quotation in advance of 24 June, and the landlord decides nevertheless (as it is entitled to do) to make its own arrangements, the tenant's liability for Insurance Rent for the year beginning 24 June is reduced by the difference between the quotations."

79. I have come to the conclusion that the judge was right on this issue as well. There are two possibilities. The first is that the tenant is entitled to investigate the market after the landlord has insured for the "following period", and can obtain a reduction if the landlord has not accepted as low a quotation as the tenant has found. The second is that the landlord is to be put on notice, before he insures for that year, of any quotation on which the tenant wishes to rely, so that the landlord can opt for a higher quotation at his own expense with his eyes open. Neither interpretation can be characterised as unrealistic, at least on the face of it, although the latter appears to me a little unlikely. If Mr Lundie is correct, the tenant could get an exceptionally keen quotation before the landlord has committed itself and keep it up his sleeve until the landlord has insured.

80. Mr Lundie says that if Edlington is right, the tenant has to investigate the insurance market without knowing whether it is worth doing so. That does not carry much force in my view. Although it would cost something, it would not be much in the context of the rent and the insurance rent. I can see no unfair prejudice to the tenant in having to take that course; it would be neither compulsory nor particularly onerous.

81. In my view there is a clue to the solution to this conundrum in the reference to the

quotation the tenant is to obtain, that being to cover the risks insured against during "the previous period". If Mr Lundie's submission is correct, the tenant's quotation would surely be expected to be in respect of the same risks as the landlord insured against for "the following period". It would be absurd if it were otherwise, especially as under clause 8.8 the tenant has the express right of knowing the precise extent of the risks against which the landlord had insured for the following year. In my view, the reason the tenant's quotation relates to the risks covered during the previous period is that it is to be obtained before the landlord has insured for the following period.

82. Mr Lundie argues that the judge's construction involves implying something into the proviso to clause 1.17, but if his case is right, the tenant can produce a quotation after the beginning of the following period, as indeed Fenner did in this case. That would mean that the tenant would be able to get a quotation for the period in question after it had started. It is unlikely that can have been intended. If the tenant were to wait only a couple of months into a period (especially one during which no claims had arisen), the quotation would inevitably be lower, and unfairly lower, than that which the landlord would have obtained before the period started. Further, if the tenant is able to invoke the proviso to clause 1.16 after the start of the following period he must, as Mr Lundie says, be able to claim repayment of part of the insurance rent, which will have been paid before the start of the period, as it is payable in "advance". However, the proviso has no provision for repayment. It is merely concerned with quantifying the insurance rent, and it would be absurd if that rent was not quantified until after it had been paid.

83. The answer to these points has to be that there must be a date by which the proviso becomes inoperable. That cut off date is probably the date on which the landlord effectively insures for the relevant "following period", subject to the landlord acting in good faith and possibly reasonably. On any view, it appears to me that the cut off date cannot be later than the date of payment of the insurance rent.

Conclusion

84. In the event, for the reasons given, I would dismiss the appeal and the cross-appeal.

85. LORD JUSTICE PILL: I agree.

86. LORD JUSTICE SCOTT BAKER: I also agree.

Order: Appeal dismissed.