A3/2000/3076

Neutral Citation Number: [2001] EWCA Civ 1334
IN THE SUPREME COURT OF JUDICATURE
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE CHANCERY DIVISION
(Mr Justice Neuberger)

Royal Courts of Justice
Strand
London WC2

Friday, 20th July 2001

B e f o r e:

LORD JUSTICE PETER GIBSON
LORD JUSTICE CLARKE
SIR MARTIN NOURSE

- - - - - -

HOLDING & BARNES PLC

Claimant/Appellant

- v -

HILL HOUSE HAMMOND LIMITED
Defendant/Respondent

- - - - - -

(Computer Aided Transcript of the Palantype Notes of
Smith Bernal Reporting Limited, 190 Fleet Street,
London EC4A 2AG
Tel: 0171 421 4040
Official Shorthand Writers to the Court)

- - - - - -

MR JOHN CHERRYMAN QC and MR RAJ SAHONTE (Instructed by Messrs Palmers, 19 Town Square, Basildon, Essex, SS14 1BD) appeared on behalf of the Appellant.

MR DEREK WOOD QC and MR PHILLIP GREEN (Instructed by Beachcroft Wansbroughs, 10-22 Victoria Street, Bristol BS 99 7UP) appeared on behalf of the Respondent.

- - - - - -

J U D G M E N T

Friday, 20th July 2001

LORD JUSTICE PETER GIBSON: I will ask Clarke LJ to give the first judgment.

LORD JUSTICE CLARKE:

Introduction

1. This is an appeal by the claimant ("the landlord") against a determination made by Neuberger J on the trial of a preliminary issue in proceedings in which the landlord claimed rent due under a lease and the respondent ("the tenant") counterclaimed damages for breach of the landlord's repairing covenant and an injunction requiring the landlord to comply with the covenant.

2. The preliminary issue involved the determination of the true construction of the landlord's repairing covenant in the lease. The judge rejected both the construction advanced by the landlord ("the first interpretation") and the primary construction advanced by the tenant ("the second interpretation") but accepted the tenant's alternative construction ("the third interpretation").

3. The judge gave both parties permission to appeal on the questions of construction. The landlord now invites this court to hold that the first interpretation is correct. On the other hand the tenant invites us to hold that the second interpretation is correct, but, if that is wrong, supports the third interpretation which was adopted by the judge.

The leases

4. The lease with which this appeal is concerned is of a property at 17 Longbridge Road, Barking ("the Barking lease"). It is one of seven leases all executed between the same parties on the same day, 25th May 1990. They were executed as part of the sale of an insurance services business by the landlord to the tenant. The business was carried on in seven different properties each of which was owned freehold by the landlord. Five of the leases are of parts of a building, whereas two are of a whole building. The Barking lease is of a whole building. The other lease of a whole building is 4 Beehive Lane, Ilford ("the Ilford lease").

5. The Barking lease includes these provisions:

> "2.IN exchange for the obligations undertaken by the Tenant:
>
> 2.1THE landlord lets the property described below (`the property') to the Tenant for Twenty-one years ...
>
> 2.2`THE property' is known as Number 17 Longbridge Road Barking as the same is edged Red on the plan ("Plan") annexed.
>
> 3.THE tenant agrees with the landlord:
>
> ...
>
> 3.4TO keep the property (including any additions after the date of this Lease) in good internal repair.
>
> ...

> 4.THE Landlord agrees with the Tenant:
>
> ...
>
> 4.3TO keep the foundations and the roof in good and tenantable repair and condition and to keep the structure and the exterior of the Building (other than those parts comprised in the property) in good and tenantable repair and condition."

6. The Ilford lease is also for 21 years and "the property" is described as number 4 Beehive Lane, Ilford as shown edged red on the plan annexed. Clause 3.4 of the Ilford lease is identical to clause 3.4 of the Barking lease, but clause 4.4 is not identical to clause 4.3 in the Barking lease. In the Ilford lease the landlord covenanted:

> "4.3TO keep the foundations and the roof in good and tenantable repair and condition and to keep the structure and the exterior of the property in good and tenantable repair and condition."

7. The five other leases are of parts of buildings. They are all for 21 years and are in substantially the same form. As the judge said, typical of them is the lease of the ground floor offices at 267 Ongar Road, Brentwood ("the Brentwood lease"). So far as relevant clause 2.1 is in the same form as clause 2.1 of the Barking lease. Clauses 2.2 and 2.3 provide:

> "2.2`THE property' is THE Ground Floor Office known as Number 267 Ongar Road Brentwood in the County of Essex as the same is edged Red on the plan (`Plan') annexed including one half in depth of the structures between the ceiling of the property and the First Floor Premises ...
>
> 2.3 `THE Building' of which the property forms part is 267 Ongar Road Brentwood Essex."

8. The tenant's repairing covenant, which is in clause 3.3, is in identical terms to clause 3.4 in the Barking and Ilford leases. The landlord's repairing covenant is in identical terms to the covenant in 4.3 of the Barking lease and thus is in different terms from clause 4.4 of the Ilford lease.

The issues.

9. Neither party seeks rectification of the Barking lease. The completing interpretations are these.

The first interpretation.

10. As I said earlier, this is the landlord's case. It is that, in accordance with the first part of clause 4.3, the landlord is obliged to keep the foundations and roof of the premises in good and tenantable repair and condition but that it is not obliged to carry out any other work. It is not obliged to keep the structure and exterior of the building in such condition because the structure and exterior are "comprised in the property" and are thus excluded by the words in brackets in the clause. Mr Cherryman submits that that interpretation gives the clause its ordinary and natural meaning.

The second interpretation.

11. This is that in addition to the foundations and the roof the landlord is obliged to keep the whole of the structure and the exterior of the property in good and tenantable repair even if that structure is inside the building. That is on the basis that the words in brackets are (as the judge put it) so plainly wrong that they must have been included in error so that they should be treated as deleted. The judge regarded this as the least attractive interpretation and said that the real choice lay between the first and third interpretations.

The third interpretation.

12. This is that in addition to the roof and foundations the landlord's obligation is to keep the structure and exterior in good and tenantable repair but only insofar as the tenant is not obliged to keep the property "in good internal repair". This is the judge's preferred interpretation as a result of which he granted a declaration in these terms:

> "Upon the true construction of the said clause 4.3 of the said lease imposes an obligation upon the lessor to keep the foundations and the roof in good and tenantable repair and condition and to keep the structure and exterior of the demised property save as to those parts comprised in the property and subject to the tenant's obligation to repair in clause 3.4 in good and tenantable repair and condition."

13. The question for decision in this appeal is: which interpretation is the true construction of the lease?

The correct approach.

14. It is of course well known that a number of cases in recent years have discussed the correct approach to the construction of contracts. They include in particular Mannai Investment Company Ltd v Eagle Star Life Assurance Company Ltd [1997] AC 749, Investors Compensation Scheme Ltd v West Bromwich Building Society [1998] 1 WLR 896, Jumbo King Ltd v Faithful Properties Ltd HKCFA 2.12.1999 and BCCI (SA) v Ali [2001] 2 WLR 735 [2001] UKHL/8.

15. The principles are concisely summarised by Lord Bingham in BCCI v Ali, which was concerned with the construction of a release, as follows:

> "8 I consider first the proper construction of this release. In construing this provision, as any other contractual provision, the object of the court is to give effect to what the contracting parties intended. To ascertain the intention of the parties the court reads the terms of the contract as a whole giving the words used their natural and ordinary meaning in the context of the agreement, the parties' relationship and all the relevant facts surrounding the transaction so far as known to the parties. To ascertain the parties' intentions the court does not of course inquire into the parties' subjective states of mind but makes an objective judgment based on the materials already identified. The general principles summarised by Lord Hoffmann in *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] I WLR 896, 912-913 apply in a case such as this."

16. In ICS Lord Hoffmann summarised the principles in this way at pages 912H-913E.

> "The result has been, subject to one important exception, to assimilate the way in which such documents are interpreted by judges to the common sense

principles by which any serious utterance would be interpreted in ordinary life. Almost all the old intellectual baggage of `legal' interpretation has been discarded. The principles may be summarised as follows.

> (1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.
>
> (2) The background was famously referred to by Lord Wilberforce as the `matrix of fact', but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.
>
> (3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them.
>
> (4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax: see *Mannai Investments Co. Ltd v. Eagle Star Life Assurance Co. Ltd* [1997] A.C. 749.
>
> (5) The rule that words should be given their `natural and ordinary meaning' reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had. Lord Diplock made this point more vigorously when he said in *Antaios Compania Naviera S.A. v Salen Rederierna A.B.* [1985] A.C. 191,201:

`if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must be made to yield to business commonsense."'

17. In BCCI v Ali Lord Hoffmann added a slight qualification to his speech in ICS: see paragraph 39 and see also the Jumbo King case, which was a decision of the court of final appeal in Hong Kong where Lord Hoffmann again summarised the principles. He concluded his summary with these two sentences:

> "But the overriding objective in construction is to give effect to what a reasonable person rather than a pedantic lawyer would have understood the parties to mean. Therefore, if in spite of linguistic problems the meaning is clear, it is that meaning which must prevail."

18. Those cases are to my mind of particular assistance here because they show that the question is what a reasonable person would understand the parties to mean by the words of the contract to be construed. It is important to note that that reasonable person must be taken to have knowledge of the surrounding circumstances or factual matrix. As appears below, that knowledge is of particular importance on the facts of the instant case.

19. I add a word about rectification. The relationship between rectification and construction was considered by this court in the context of a lease in East v Pantiles Plant Hire Ltd [1982] 2 EGLR 111, where the question was whether a landlord had served a rent review notice in time. Brightman LJ (with whom Lawton LJ and Oliver LJ agreed) said at page 112:

> "It is clear on the authorities that a mistake in a written instrument can, in certain limited circumstances, be corrected as a matter of construction without obtaining a decree in an action for rectification. Two conditions must be satisfied: first, there must be a clear mistake on the face of the instrument; secondly, it must be clear what correction ought to be made in order to cure the mistake. If those conditions are satisfied, then the correction is made as a matter of construction. If they are not satisfied then either the claimant must pursue an action for rectification or he must leave it to a court of construction to reach what answer it can on the basis that the uncorrected wording represents the manner in which the parties decided to express their intention. In *Snells Principles of Equity* 27th ed p 611 the principle of rectification by construction is said to apply only to obvious clerical blunders or grammatical mistakes. I agree with that approach. Perhaps it might be summarised by saying that the principle applies where a reader with sufficient experience of the sort of document in issue would inevitably say to himself, `Of course X is a mistake for Y.'"

20. Brightman LJ also referred to a passage from the speech of Lord St Leonards in Wilson v Wilson [1854] 5 HLC 40, where he said:

> "If you find a clear mistake and it admits of no other construction, a Court of Law, as well as a Court of Equity, without impugning any doctrine about correcting those things which can only be shown by parol evidence to be mistakes - without, I say, going into those cases at all, both Courts of Law and of Equity may correct an obvious mistake on the face of an instrument without the slightest difficulty."

21. Those principles must, of course, now be read in the light of the principles of construction set out in cases like the ICS case. However, Mr Cherryman correctly accepts that where it is obvious to a reasonable man with the relevant knowledge that there has been a mistake, it is appropriate to correct that mistake by a process of construction.

Discussion.

22. The parties agree that the expression "building" in clause 4.3 must have the same meaning as "property", because the property is entirely composed of a building or buildings. On this basis the clause can be rewritten as follows:

> "To keep the foundations and the roof in good and tenantable repair and condition and to keep the structure and the exterior of the property (other than those parts comprised in the property) in good and tenantable repair and condition."

23. The question is what that would mean in the context of the lease as a whole to a reasonable person with knowledge of the surrounding circumstances. That depends in part upon what the surrounding circumstances or factual matrix are. It is common ground that they include the other six leases. That is because the Barking lease and the six other leases were all part of one overall transaction, namely the sale of the insurance services business by the landlord to the tenant. In these circumstances it is not surprising that all the leases were for the same period or that all the leases of parts of buildings were in the same form. Thus all the tenants' and landlords' repairing covenants in those leases were in the same form. One might perhaps have expected the same to be true of the two leases of whole buildings. In fact, as already stated, the landlord's repairing covenant in the Ilford lease referred only to the property and makes perfect sense in a lease of a whole building.

24. It is not seriously in dispute that on the true construction of the Ilford lease, when the tenant's and the landlord's repairing obligations are read together, the tenant's obligation is to keep the property in good internal repair subject to the landlord's obligation, namely to keep the structure of the property, including the internal structure, in good and tenantable repair and condition.

25. Clause 4.3 of the Barking lease is not in the same form as clause 4.4 of the Ilford lease. Instead, the clause designed for the lease of parts of buildings has been used in the Barking lease where it makes no sense. Hence the difficulty which the judge has had in construing it and the necessity to read "Building" as if it meant property. Once that change is made it seems to me that the second of the three suggested interpretations is the correct one applying the principles to which I have referred.

26. The first interpretation depends upon reading the clause absolutely literally. However, it also involves giving it the same meaning as if it simply said,

> "To keep the foundations and the roof in good and tenantable repair."

27. I entirely agree with the judge that, as a matter of commercial commonsense, it would be a surprising result if the remainder of the clause containing what on the face of it the parties appear to have regarded as an important part had no effect whatsoever.

28. Mr Cherryman submits that it is clear from the Ilford lease that the parties expressly considered what the landlord's repairing obligations should be. He points to the differences between the Ilford and the Barking leases and submits that they are in different terms and must therefore have different meanings. He submits that the clause makes sense as drafted and should be given its ordinary and natural meaning. He submits that the clause cannot have the same meaning as the Ilford lease because if it did it would be in the same terms and that it cannot have the third meaning because that involves either doing violence to the words in brackets or implying a term for which there is no justification.

29. I have reached the conclusion that Mr Cherryman's argument proceeds on a false basis. It assumes that clause 4.3 was expressly negotiated in the context of the Barking lease. For my part I do not think that that can be so. If it had been there would have been no reference to "Building". The reference in clause 4.3 is the only reference to "Building" in the lease. It makes no sense in the context of a lease of a whole house. To my mind the only sensible conclusion is that while the parties no doubt negotiated the terms of the landlord's repairing obligations, they inadvertently used the same form of clause in the Barking lease as was used in the leases of part buildings where it was appropriate. I recognise that there is here no claim for rectification, but for the reasons which I have given I do not think that it is right to construe clause 4.3 on the basis that it was expressly negotiated for the purposes of the Barking lease. In short this is a case in which it is obvious to a reasonable man that there has been a mistake. As already stated, such a mistake can be corrected by a process of construction.

30. The question is what meaning the reasonable man would give to the clause having regard to all the relevant circumstances. I do not think that the reasonable man would conclude that the parties intended to nullify the whole of the second part of the clause by the words in brackets; such a conclusion would to my mind be contrary to common sense. If the parties had intended such a result, as I have already said, the clause would simply have said:

> "TO keep the foundations and the roof in good and tenantable condition".

31. In this regard there is, I think, some (albeit limited) force in the point that it is unlikely that the parties intended that neither party should have repairing obligations with regard to the exterior of the property, which would be the effect of the first interpretation. There has been some discussion during the argument with regard to the decisions of this court in Barratt v Lounova (1982) Ltd [1990] 1 QB 348 and Adami v Lincoln Grange Management Ltd [1998] 1 EGLR 58. But neither of those cases seems to me to be of particular assistance in determining the true construction of the Barking lease; so I say nothing more about them.

32. The judge preferred the third interpretation. He did so in part by rejecting the second interpretation at the outset and then choosing between the first and the third interpretations. I entirely agree with the judge that, if the choice is between the third and the third interpretations, it would be right to choose the third. However, the third interpretation involves reading the clause as if the words in brackets read, or at least meant, "other than those parts comprised in the property being the subject matter of the tenant's repairing covenant". The judge identified the advantage of that interpretation as having the advantage of (as he put it) leaving no gaps in the repairing obligations and of giving each part of clause 4.3 a meaning, although he recognised that it involves giving the words in brackets an unnatural meaning.

33. In the context of the choice between the first and third interpretations, the judge said this (at page 89):

> "In the end, however, it seems to me that it is an issue on which, however long one mulls it over, it is impossible to arrive at a satisfactory conclusion. The arguments against the first interpretation are not capable of being satisfactorily answered by the claimant. The arguments against the third interpretation are not capable of being satisfactorily answered by the defendant. This is because clause 4.3 of the Barking lease has been inartistically drafted, and the regrettable conclusion I reach is that, as a result, either construction is one which could find favour with the court."

34. To my mind there is nothing in the lease as a whole or the surrounding circumstances which points to the third interpretation. Moreover, there seems to me to be nothing in the wording of the clause which leads to it. It is only arrived at by choosing the less unsatisfactory of two choices, that is as between the first and third interpretations.

35. What then of the second interpretation? It involves deleting the words in brackets in their entirety. Of this interpretation the judge said this (at page 86G):

> "The disadvantage of this construction is threefold. First, it does not accord with the natural meaning of clause 4.3. Secondly, albeit to a lesser extent, it suffers from the same defect as the first interpretation; namely, it involves a significant part of clause 4.3, namely the bracketed words, having no meaning. Thirdly, it involves construing clause 4.3 of the Barking lease in such a way as to cut down the natural meaning of clause 3.4 of the Barking lease; namely, the tenant's repairing covenant. That is because, on the face of clause 3.4, the tenant covenants to keep the property in good internal repair, which would appear to extend to the internal structure, whereas clause 4.3 on this second interpretation involves the internal structure as well as the external structure being the landlord's responsibility.
>
> The second interpretation does have the advantage of providing a complete code."

36. I entirely see the force of those conclusions if one is focusing on the words of the clause alone. But the second and third interpretations both involve either omission of or an addition to the words in brackets, while the first interpretation makes no sense because it involves using the words in brackets to nullify the whole of the second part of the clause.

37. Once it is appreciated that the word "Building" should be read as if it said property, read literally the clause obliges the landlord to keep the structure and exterior of the property (other than those parts comprised in the property) in good and tenantable repair and condition. That makes no sense. It seems to me to make better sense to hold that the words in brackets should be deleted rather than to treat them as subject to an unstated qualification which is the effect of the third interpretation.

38. If the words in brackets are omitted, the clause makes perfect sense and gives the clause the same meaning as the landlord's covenant in the Ilford lease. They mean that, when the tenants and landlords covenants are read together, the tenant is responsible for repair of the interior but the landlord is responsible for repair of the roof, foundations, exterior and structure of the building including the structure of the interior, provided that it affects the structure of the whole property.

39. The surrounding circumstances, including in particular the form of the other leases, seem me to support this approach. Only two forms of clause were used for these leases, that appropriate for the lease of the whole building, which was used in the Ilford lease, and that appropriate for the lease of parts of the building, which was used in all the other cases. There is no suggestion that any other form of clause was agreed between the parties. It seems to me to be more likely than not that the same obligations were intended for both the leases of whole buildings just as the same obligations were intended for all the leases of parts of buildings.

40. As Lord Hoffmann observed in the Jumbo King case, the overriding objective is to give effect to what a reasonable person with knowledge of the relevant circumstances would have

understood the parties to mean. That reasonable person to my mind would have rejected the literal approach, because it makes no sense, and would have chosen the second interpretation in preference to the third, while no doubt recognising that it was not an easy choice.

41. For these reasons, I would dismiss the landlord's appeal but allow the tenant's cross-appeal, which will entail quashing the declaration and, subject to argument, replacing it with the declaration that 4.3 of the Barking lease should be construed as if it read:

> "TO keep the foundations and the roof in good and tenantable repair and condition and to keep the structure and the exterior of the property in good and tenantable repair and condition."

42. SIR MARTIN NOURSE: I have come to the same conclusion as Lord Justice Clarke, but I wish to explain in my own words the route by which I have got there.

43. I start with the agreement of the parties that the terms of each of the seven leases may be looked at in order to construe the terms of any of the others. Whether that would have been permissible without agreement is a question about which it is unnecessary to speculate. Approaching the matter on the basis of the agreement, I compare clause 4.3 of the Barking lease, first, with clause 4.4 of the Ilford lease and, secondly, with clause 4.3 of each of the other five leases.

44. The Ilford lease, like the Barking lease, is the lease of a whole building, whereas each of the other five leases is a lease of a part of a building. However, whereas one would expect clause 4.3 of the Barking lease to be in the same terms as clause 4.4 of the Ilford lease, it transpires that it is in the same terms as clause 4.3 of each of the other five leases. The Ilford lease is almost in the same form as the Barking lease except that it does not include in clause 4.3 the words in parenthesis:

> "other than those parts comprised in the property."

45. Those words appear both in the Barking lease and in each of the other five leases.

46. On those facts and applying the principle stated by Brightman LJ in East v Pantiles Plant Hire Ltd [1982] 2 EGLR 111 at 112A, I am satisfied, first, that there is a clear clerical error on the face of clause 4.3 of the Barking lease, namely the inclusion of the words in parenthesis (which make the provision nonsensical and unworkable); second, that it is clear what correction ought to be made in order to cure the error, namely the exclusion of those words. To my mind it is obvious that the parties intended that clause 4.3 of the Barking lease should be in the same form as clause 4.4 of the Ilford lease but that, by mistake, they incorporated the form appropriate to the five leases of parts of a building. Clause 4.4 of the Ilford lease is a perfectly clear and workable provision for the purposes of regulating a landlord's obligation to repair.

47. I arrive at this conclusion by seeking to ascertain the common intention of the parties from the words they have used in the Barking lease in the light of the material provisions of the other six leases. This is the classical process of construction, which owes nothing to any of the recent authorities cited by Lord Justice Clarke. It enables the court to correct an obvious clerical error in a document that it may conform with the obvious intention of the parties. Although in a loose sense the document is rectified, indeed the process is sometimes referred to as common law rectification, it is not rectification in the correct sense. It remains am exercise in construction.

48. For these reasons, I too would adopt the second interpretation, dismiss the landlord's appeal and allow the tenant's cross-appeal.

49. LORD JUSTICE PETER GIBSON: This case, like Investors Compensation Scheme Ltd v West Bromwich Building Society [1988] 1 WLR 896, is a case where the court is (in the words of Lord Hoffmann at page 914) engaged in choosing between competing unnatural meanings. Despite the argument by Mr Cherryman to the contrary in favour of the first interpretation, it seems to me unnatural to interpret clause 4.3 of the Barking lease as having the same meaning as if it stopped after the first 14 words, the effect of the rest of the clause being to cancel the obligation of the landlord out by the exclusion contained in the words in parenthesis. The second and third interpretations involve doing violence to the language of the clause.

50. The problem which arises is a good illustration of the dangers of the use of the word processor to produce a draft which is then copied to provide other drafts to be adapted for the purpose of other cases. We do not know which of the seven leases was the first draft, but it seems very likely, because of deletions which appear in the Barking lease, that that was not the first draft. Indeed it seems clear that the Barking lease was a badly adapted copy of another draft. Given the acceptance that the relevant matrix of fact which the court must take into account in construing the Barking lease includes the other leases, it can be seen by comparison of the Barking lease with the other leases that there was an obvious error. That error was in including as clause 4.3 the form of wording which one finds in the other leases of a part only of a building and not including the form of wording which one finds in the Ilford lease of a whole building for the landlord's repairing obligation. The clue to that in clause 4.3 of the Barking lease is the appearance of the words “the Building”, a defined term in the other leases of parts of buildings but not to be found in the Ilford lease of a whole building. What the parties plainly intended was a repairing covenant in the same form as that of the Ilford lease.

51. For these reasons, as well as those given by my Lords with which I am in agreement, I too would allow this appeal.

Order: Appeal dismissed, cross-appeal allowed. The successful respondent will have the costs of the appeal which we will summarily assess at £16,000 inclusive of VAT and the travelling costs of the solicitor for today. Application to appeal to the House of Lords refused.