Case No: QBENF/00/0028/A2

Neutral Citation Number: [2001] EWCA Civ 535
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM CARDIFF DISTRICT REGISTRY
THE TECHNOLOGY AND CONSTRUCTION COURT
(His Honour Judge Moseley QC)

Royal Courts of Justice
Strand, London, WC2A 2LL

Wednesday 11th April 2001

B e f o r e :

LORD JUSTICE SCHIEMANN
LORD JUSTICE CHADWICK
and
LADY JUSTICE ARDEN

- -

JOHNSEY ESTATES (1990) LIMITED	Appellant
- and -	
THE SECRETARY OF STATE FOR THE ENVIRONMENT	Respondent

- -

(Transcript of the Handed Down Judgment of
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Official Shorthand Writers to the Court)

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Miss Shea (instructed by Messrs Edwards Geldard of Cardiff for the Appellant)
Mr Jonathan Gaunt QC (instructed by Hugh James Ford Simey of Cardiff for the Respondent)

- -

Judgment

LORD JUSTICE CHADWICK :

1. This is an appeal from an order as to costs made on 11 November 1999 by His Honour Judge Moseley QC, sitting in the Technology and Construction Court at Cardiff, in proceedings brought by Johnsey Estates (1990) Limited against the Secretary of State for the Environment. The appeal is brought with the permission of the judge.

2. The appellant is, or was at the material time, the owner of premises known as Brecon House, Mamhilad Park Estate, Pontypool. The premises had been let to the Secretary of State, under a lease dated 7 May 1995, for a term of twenty years from 24 June 1974. The landlord had served notice under part II of the Landlord and Tenant Act 1954; the Secretary of State was content to give up possession; and did so on or about 24 June 1994.

3. The lease had contained repairing covenants in a conventional form. The landlord was dissatisfied with the state of the building as yielded up by the tenant at the determination of the lease. On 13 December 1995 the landlord commenced these proceedings in the Cardiff District Registry of the Chancery Division of the High Court seeking damages for breach of covenant. A statement of claim was served on 19 January 1996.

4. *Prima facie,* the damages which can be recovered by a landlord in respect of breaches of repairing covenants in a lease are measured by the diminution in the value of the reversion attributable to the fact that the premises are out of repair. In any event damages for breach of a covenant to leave premises in repair at the termination of a lease cannot exceed the amount by which the value of the reversion is diminished owing to that breach - see section 18(1) of the Landlord and Tenant Act 1927.

5. The Secretary of State instructed an expert valuer, Mr Dickenson, to advise him as to the amount by which the value of the reversion had been diminished by the breaches of covenant for which he, as tenant, was liable. The advice received was that the diminution in the value of the reversion was £150,000 or thereabouts. The landlord, on the other hand, was advised that the diminution in the value of the reversion consequent upon the lack of repair was £1.25m. The unusually large difference in the two valuations is explained by the nature of the building (which, it was common ground, was difficult to value) and the differing perceptions of its potential. The gulf between the parties became apparent when, in September 1996, the valuers exchanged preliminary reports.

6. On 25 September 1996, the Secretary of State paid £200,000 into Court in satisfaction of the landlord's claim. Although not expressed to be in respect of any particular damage, it is a fair inference (and it is not in dispute) that the amount of that payment in was determined by the advice which the Secretary of State had received from Mr Dickenson. It reflected the figure of £150,000 which he had put on the diminution in the value of the reversion, with interest on that amount from 24 June 1994 to 25 September 1996, and with a small margin. Given the advice that the landlord had received from its valuer, Mr Lawley, it is a matter of no surprise that the payment in was not accepted by the landlord.

7. It is said that, after September 1996 and until February 1999, the parties proceeded on the basis of a common understanding that the cost of actually doing the works of repair necessary to remedy the breaches of covenant alleged would exceed the diminution in the value of the reversion; even if the diminution in value could be established at the figure for which the landlord was then contending (£1.25m). That may well be so; but (despite the service in May 1998 of a notice to admit) no formal admission that the cost of doing the works would be, at the least, no less than the diminution in the value of the reversion was

made by the Secretary of State until 15 October 1998. Until that date the position on the pleadings was that the landlord was required to establish the cost of actually doing the works as well as the amount by which the value of the reversion had been diminished.

8. On 14 January 1997 the £200,000 then in court was paid out to the landlord, by agreement, as an interim payment. That payment out was, subsequently, to affect the computation of interest awarded by the judge; but it is common ground that it could have no effect on the incidence of costs.

9. By the end of 1998 – and in preparation, no doubt, for an impending trial fixed to commence in April 1999 - those advising the Secretary of State gave further consideration to the particular elements of disrepair for which it might be accepted that he was liable under covenants in the lease. Particulars of the landlord's claim were sought in December 1998. Those particulars were provided in January 1999. In the light of those particulars – and, no doubt, after further consideration of the potential of the building - the expert valuers revised their reports. Mr Dickenson increased his assessment of the diminution in the value of the reversion from £150,000 to £200,000. Mr Lawley brought his figure down, from £1.25m to £1.025m. But there was still a substantial gulf between them.

10. The experts' reports, in their revised form, were exchanged on 11 February 1999. On 19 February 1999 the Secretary of State paid a further £250,000 into Court; bringing the total monies notionally in court up to £450,000. The notional amount in court was not accepted by the landlord.

11. On 26 February 1999 the parties were before the court on a pre-trial review. The Secretary of State obtained permission to withdraw his admission (made in October 1998) that the costs of actually carrying out the works of repair would necessarily exceed the diminution in the value of the reversion. It was explained to us that that admission was withdrawn because the Secretary of State had reached the view, in the light of the particulars provided by the landlord, that the works which needed to be done in order to put the building into the state of repair in which it should have been if the repairing covenants had been observed were not as extensive as he had first thought; and might not exceed the amount (£1.025m) of the diminution in the value of the reversion for which the landlord was then contending.

12. Also on 26 February 1999 the landlord obtained leave to amend its statement of claim. The amended statement of claim introduced a new claim, based on an alleged failure to comply with the provisions of clause 4(12) of the lease – which had required the tenant to comply with all health and safety regulations imposed by statute. The damages claimed in the amended statement of claim fall under three main heads: (i) the cost of the work needed to remedy the breaches of repairing covenants - £1,913,609; (ii) the loss of rent during the period needed to carry out the works of repair - £173,254; and (iii) costs associated with the preparation of a notice of disrepair served in June 1994 shortly before the termination of the lease, purportedly under section146 of the Law of Property Act 1925 - £12,846. The claim in respect of the costs of work (£1,913,609) included (a) £205,040 said to be attributable solely to painting or decoration and (b) £155,544 said to be the costs of works needed to comply with clause 4(12). The significance of those two items (together £360,584) is that it was said that they were not subject any cap imposed by section 18(1) of the Landlord and Tenant Act 1927; that is to say, that they were recoverable in addition to any amount in respect of the diminution to the value of the reversion. On the basis of the figures set out the amended statement of claim (and ignoring, as it does, the effect of section 18(1) of the Act) the landlord's total claim was for a sum in excess of £2.25m; and there was a claim for interest on top of that.

13. The action came on for trial on 12 April 1999. The trial extended over 7 days. Judgment on the claims in the action was handed down on 29 October 1999. The judge rejected the claim (£12,8746) in respect of the costs of preparing and serving the section 146 notice. He held that the circumstances in which the notice had been served led to the conclusion that it could not have been served for the proper purposes of that section. He rejected the claim based on alleged breach of clause 4(12) - the covenant to observe the health and safety regulations. He rejected, also, the contention that the claim for painting and redecoration was outside the scope of section 18(1) of the Landlord and Tenant Act 1927. He held that the cost of repairs needed to put the premises in the state in which they should have been in at the determination of the lease was £840,106. The judge allowed nothing for loss of rent - on the basis that the building would, anyway, have remained empty during the period over which it would have been reasonable for the works of repair to be carried out.

14. The judge then turned to the question: what was the diminution in the value of the reversion consequent upon the breaches of repairing covenants which he had found to be established. He assessed that at an amount of £200,000. That was, of course, the figure which had been advanced by Mr Dickenson on behalf of the Secretary of State. But, as the judge observed at paragraph 59.4 of the judgment which he handed down on 29 October 1999, that should be regarded as a coincidence; it was not the result of the judge adopting Mr Dickenson's valuation uncritically. The flavour of the judge's approach appears from his remark, at the end of that paragraph, that: "That [the criticism which he had set out] says nothing about whether Mr Dickenson's conclusion concerning the value of the property is right or wrong but only that the method by which he reaches the conclusion is wrong". It goes without saying that he also rejected Mr Lawley's methodology, which had led to a much higher valuation.

15. On the basis that diminution in the value of the reversion (£200,000) was less than the costs of repair (£840,106) the judge awarded the landlord damages of £200,000 with interest thereon at 8% from 24 June 1994 to 25 September 1996 (that being the date on which £200,000 had been paid into Court) He awarded interest also, from 25 September 1996 to 13 February 1997 (the date when, by agreement, the monies then in court were paid out to the landlord by way of interim payment) at the rate at which interest had accrued on the amount in court.

16. Interest at 8% p.a. for the period of 24 June 1994 to 25 September 1996 amounted to £36,000. The position, therefore, was that the landlord had recovered more than the £200,000 paid into Court on 25 September 1996. But the landlord had recovered less than the aggregate amount in Court (£450,000) following payment in of the further £250,000 on 19 February 1999.

17. When handing down his judgment on 29 October 1999 the judge invited submissions as to costs. In the light of those submissions he delivered a further judgment in relation to costs on 11 November 1999. The effect of that judgment appears from the order which is now under appeal. It was ordered that:

> "1. The Claimant shall be entitled to the costs incurred between 24 June 1994 and 25 September 1996.
>
> 2. Both parties shall bear their own costs of the common law claims incurred between 25 September 1996 and 19 February 1999.

> 3. The Defendant shall be entitled to his costs of the diminution in value issue incurred between 25 September 1996 and 19 February 1999.
>
> 4. The Defendant shall be entitled to his costs from the 19th February 1999 onwards."

In that context the "costs of the common law claims" means the costs of establishing the actual cost of works of repair; and the "costs of the diminution in value issue" means the costs of establishing the amount of the diminution in value of the reversion.

18. The judge gave the landlord permission to appeal against paragraphs 2, 3 and 4 of the order made on 11 November 1999. He gave the Secretary of State permission to appeal against paragraph 2 of the order. In the event there has been no appeal by the landlord against paragraph 4 of the order (that the landlord pay the Secretary of State's costs incurred after the second payment in on 19 February 1999). If I may say so, it is difficult to see any basis upon which that paragraph of the order could be said to be wrong. Nor has there been an appeal by the Secretary of State against paragraph 2 of the order. There are, therefore, two issues on this appeal: (i) should the landlord be deprived of the whole of its costs incurred between 25 September 1996 (the date of the first payment in) and 19 February 1999 (the date of the second payment in); and (ii) should the landlord be required to pay such part of the Secretary of State's costs incurred during that period as are attributable to establishing the amount of the diminution in the value of the reversion.

19. The landlord's contentions can be put simply. It succeeded in a claim which has been held to have had a value (with interest) of £236,000 as at the date of the first payment in (25th September 1996). It can be said, in the vernacular, to have beaten the first payment in. Costs should follow the event; and so the landlord should have all its costs from 25 September 1996 until the date of the second payment in (19 February 1999). There is no basis upon which the landlord, as the successful party in this context, should be deprived of its costs; *a fortiori*, there is no basis upon which the landlord, as the successful party, should be required to pay the costs of the unsuccessful party - which is the effect of the order made under paragraph 3 in relation to the diminution in value issue.

20. The jurisdiction to award costs is conferred by section 51 of the Supreme Court Act 1981 and is to be exercised in accordance with the rules of court in force from time to time. The Civil Procedure Rules 1998 were introduced on 26 April 1999; that is to say, just after the conclusion of the trial but before the judge had delivered his first judgment. In those circumstances it was common ground (as the judge recorded in his judgment on 11 November 1999) that the principles to be applied in relation to costs were those applicable in civil litigation prior to the introduction of the new civil procedure rules. But, as Lord Woolf, Master of the Rolls, observed in *Phonographic Performance Limited v AEI Rediffusion Music Limited* [1999] 2 All ER 299, at pages 313j-314a:

> "From 26 April 1999 the "follow the event principle" will still play a significant role, but it will be a starting point from which the Court can readily depart. This is also the position prior to the new rules coming into force. The most significant change of emphasis of the new rules is to require the courts to be more ready to make separate orders which reflect the outcome of different issues. In doing this the new rules are reflecting a change of practice which has already started."

21. The principles applicable in the present case may, I think, be summarised as follows: (i) costs cannot be recovered except under an order of the court; (ii) the question whether to make any order as to costs - and, if so, what order - is a matter entrusted to the discretion of the trial judge; (iii) the starting point for the exercise of discretion is that costs should follow the event; nevertheless, (iv) the judge may make different orders for costs in relation to discrete issues - and, in particular, should consider doing so where a party has been successful on one issue but unsuccessful on another issue and, in that event, may make an order for costs against the party who has been generally successful in the litigation; and (v) the judge may deprive a party of costs on an issue on which he has been successful if satisfied that the party has acted unreasonably in relation to that issue; (vi) an appellate court should not interfere with the judge's exercise of discretion merely because it takes the view that it would have exercised that discretion differently.

22. The last of those principles requires an appellate court to exercise a degree of self restraint. It must recognise the advantage which the trial judge enjoys as a result of his 'feel' for the case which he has tried. Indeed, as it seems to me, it is not for an appellate court even to consider whether it would have exercised the discretion differently unless it has first reached the conclusion that the judge's exercise of his discretion is flawed. That is to say, that he has erred in principle, taken into account matters which should have been left out account, left out of account matters which should have been taken into account; or reached a conclusion which is so plainly wrong that it can be described as perverse - see *Alltrans Express Limited v CVA Holdings Limited* [1984] 1 WLR 394, per Lord Justice Stephenson at 400C-F and Lord Justice Griffiths at page 403G-H.

23. I turn, therefore, to examine the basis upon which the judge reached the conclusion that he did. Unless it can be seen that that basis is flawed, this Court ought not to interfere with his order.

24. At paragraph 8 of his judgment the judge identifies what he describes as "the two broad issues" in the litigation before him. They were:

> "(i) what Counsel referred to during the hearing as "the common law claims", meaning principally the claim for damages for the cost of repairs but including also claims under the contract for (for example) the cost of the schedule of dilapidation; and
>
> (ii) the issue arising under the Landlord and Tenant Act 1927 section 18(1), being the diminution in value or valuation issue."

I accept, of course, that those were, indeed, the two broad issues in the litigation. But it is necessary to keep in mind that there is an important link between those two issues. The effect of section 18(1) of the Landlord and Tenant Act 1927 is not that the landlord automatically recovers an amount measured by reference to the reduction in future rental value. Section 18(1) of the 1927 Act provides a cap. The landlord has to establish the amount of his actual loss. If the cost of actually doing the repairs is less than the diminution in the value of the reversion (measured by reference to the reduction in the rent which could be obtained if the repairs were left undone) the damages will be equal to the cost of doing the repairs. To put the point another way: in such a case the diminution in value of the reversion will be measured by the cost of putting the property into repair. So, unless it is conceded by the tenant that, whatever the cost of repairs, they will exceed whatever amount is held to be the diminution in value of the reversion (measured by reference to reduced future rent) both issues are engaged. Further, it is, of course, necessary to establish that the factors which are

said to lead to a reduced rent are attributable to the tenant's failure to comply with its repairing covenants. It would be possible to have the two issues tried separately - and there may be occasions where that course will lead to a saving of costs- but that was not the course adopted in this case.

25. The judge addressed the two issues which he had identified in the following passage, at the end of paragraph 8 in his judgment:

> "...It seems to me that the only realistic course notwithstanding the new approach of the Court as outlined in Lord Woolf's judgment [in *R v Secretary of State for Transport ex parte Factortame Ltd* (6 July 1998, unreported)] is to consider the broad issues mentioned above. As to those, it seems to me (1) that the defendant was overwhelmingly successful in respect of the diminution in value issue. The claimant's case, based on Mr Lawley's opinion, was that the diminution in value exceeded £1,000,000. The diminution in value was held to be £200,000, precisely the figure for which the defendant argued. In those circumstances in my view I should exercise my discretion in respect of this second stage of the litigation by ordering the claimant to pay the defendant's costs of the diminution in value issue. As to (2) the common law issues, the position is less clear. Again the defendant was overwhelmingly successful, but it was necessary for the claimant to expend some costs in proving that the cost of repairs amounted to some £840,000 and it did recover damages and interest exceeding the payment in by £36,000. I do not accept Mr Gaunt [counsel for the Secretary of State]'s argument that the defendant's success in respect of the diminution in value issue made the common law claims irrelevant. On the contrary I accept Mr Dowding [counsel for the landlord]'s argument that it was necessary to establish the cost of repairs to recover anything. However, taking into account that the defendant successfully resisted an excessive claim, in my view the order I should make is that both parties should bear their own costs of the common law claims."

26. In that passage the judge described the defendant as "overwhelmingly successful" on each of the two broad issues which he had identified. In my view that is not a correct analysis of the position. Indeed, if it were, it would be difficult to reconcile with the result: the claimant obtained judgment for a sum of money which it could not have recovered (at any time before 19 February 1999 – the date of the second payment in) without proceeding towards judgment. The true position is that, in relation to the whole of the period before 19 February 1999, the claimant was the successful party. It obtained, by litigation, more than it could have obtained without litigation. And, in order to achieve that, it was necessary (at least until 15 October 1998 when the point was formally admitted) for the claimant to pursue both the common law claims and the diminution in value issue. In order to obtain the judgment which it did, the claimant had to establish both that the diminution in value was £200,000 and that the costs of actually carrying out the works of repair were not less than that figure. As I have said, the latter point was not formally admitted until 15 October 1998.

27. The fallacy in the judge's reasoning is, I think, exposed by the fourth sentence in the passage which I have set out: "*The diminution in value was held to be £200,000, precisely the figure for which the defendant argued*". The position at the relevant time – that is to say, at any time before the exchange of revised expert's reports on 11 February 1999 – was that the Secretary of State was contending that the amount by which the value of the reversion had been diminished was £150,000. The first payment in (£200,000 on 25 September 1996) after

discounting interest over the period of twenty seven months which had elapsed since the termination of the lease, had a value equivalent to £170,000 or thereabouts as at the date (24 June 1994) that the claim arose. It cannot be said that the outcome of the trial was that the Secretary of State succeeded in defending the position which had been adopted on his behalf prior to 11 February 1999. The most that can be said is that the outcome was much closer to that position than it was to the position which had been adopted on behalf of the landlord.

28. On a proper understanding of the position, the first payment in, on 25 September 1996, was irrelevant to a consideration of where the costs of the litigation should lie. It was irrelevant because it fell short of the amount (£236,000) to which the claimant has been held entitled as at that date by a margin (some 15%) which cannot be dismissed as *de minimis*. The judge was right when he observed, at paragraph 3 of his judgment, that he could see no logic in an order for costs which differentiated between what he described as the first stage of the litigation (the period before 25 September 1996) and the second stage (the period from 25 September 1996 and 19 February 1999). He should have gone on to appreciate that if (as the parties themselves had accepted) the claimant was to be treated as the successful party in relation to the first stage, logic required that it should be treated as the successful party in relation to the second stage also.

29. It follows, in my view, that the judge's approach was flawed. He ought to have recognised that, in relation to costs incurred before 19 February 1999, the landlord was the successful party; and that, accordingly, the starting point from which to approach the exercise of discretion in which he was engaged was that the landlord should have its costs down to that date. I accept, of course, that a party who has been successful overall may, nevertheless, be deprived of his costs – and may be ordered to pay the costs of the other party - in respect of issues which he has fought unsuccessfully. But an exercise of discretion on that basis cannot lead, in the present case, to an order that the claimant pay the defendant's costs of the diminution in value issue in respect of any period prior to 11 February 1999 (the date of the exchange of revised expert's reports); nor to an order that the claimant should be deprived of its costs of that issue prior to that date. That is because it cannot be said that the claimant failed to establish what, as matters stood prior to 11 February 1999, it had to establish in order to succeed on that issue – namely, that the diminution in the value of the reversion as at 24 June 1994 was greater than the equivalent value, as at that date, of the payment in. Nor can an exercise of discretion on that basis lead to an order that the claimant be deprived of its costs of all the common law claims in respect of any part of the period between 26 September 1996 and 15 October 1998. That is because it cannot be said that the claimant failed to establish what, as matters stood prior to 15 October 1998 (when the point was formally admitted), it had to establish in order to recover damages equal to the diminution in the value of the reversion – namely, that the cost of actually making good the disrepair was at least equal to the amount by which the value of the reversion was diminished (measured by reference to the reduced rent).

30. It follows that I would hold that it is for this Court to exercise the discretion as to costs which, for the reasons which I have sought to give, I am satisfied the judge failed to exercise in a manner which the law permits.

31. Mr Gaunt QC, as counsel for the Secretary of State, sought to persuade us that it was right, at the least, to deprive the landlord of all its costs between 26 September 1996 and 19 February 1999. His submission, in effect, was that the landlord was, throughout, seeking damages in amounts which were far in excess of the amount to which it was ultimately held entitled; and that it was the landlord's inflated and unrealistic valuation of its claims which had made it impossible to dispose of the action by agreement in 1996. He accepted, of

course, that the amount of the first payment in turned out to be less than the amount to which the landlord was entitled; but he submitted that that was irrelevant; when the Secretary of State increased the amount notionally in court to £450,000, the landlord would not accept it. The action went on because the landlord was not interested in any reasonable offer; and, in those circumstances, the landlord must bear its own costs.

32. The submission has some superficial attraction on the facts of the present case; but, for my part, I would reject it. It seems to me that a court should resist invitations to speculate whether offers to settle litigation which were not in fact made might or might not have been accepted if they had been made. There are, I think, at least two reasons why a court should not allow itself to be led down that road. First, the rules of court provide the means by which a party who thinks that his opponent is not open to reason can protect himself from costs. He can make a payment in; he can make a *Calderbank* offer; now, under the Civil Procedure Rules 1998, he can make a payment or an offer under CPR Pt 36. The advantage of the courses open under the rules is that they remove speculation. The court can see what offer was made, when it was made, and whether it was accepted. Second, speculation is likely to be a most unsatisfactory tool by which to determine questions of costs at the end of a trial. It is not, I think, suggested that each party would be required to disclose, at that stage, what advice it had received, from time to time, as to the strengths and weaknesses of its claim or defence. But without knowing that – and without a detailed knowledge of the financial and other pressures to which each party was subject from time to time - speculation would be hopelessly ill-informed. If Mr Gaunt's submission were to be accepted generally, there would, I think, be a serious danger that, at the end of each trial, the court (in order to decide what order for costs it should make) would be led into another, potentially lengthy, inquiry on incomplete material into 'what would have happened if . . .?' I am not persuaded that that could be compatible with the overriding objective to deal with cases justly.

33. In my view, the relevant factors in relation to an award of costs in the present case may be summarised as follows: (i) the question whether the amount by which the value of the reversion had been diminished by the failure of the tenant to comply with the repairing covenants in the lease exceeded the value (as at 24 June 1994) of the first payment in was in issue throughout the period from 26 September 1996 to 19 February 1999; (ii) the landlord was successful on that issue; (iii) unless it can be said that the landlord was unreasonable in pursuing that issue in the way that it did, the landlord should have its costs of that issue; (iv) there is nothing in the judgment of 29 October 1999 which suggests that the judge thought that it was unreasonable for the landlord to pursue that issue on the basis of the advice which it had received from Mr Lawley; the judge rejected Mr Lawley's view, but he seems to have accepted that it was a view which could properly be advanced; and it is plain from his judgment that he regarded the valuation exercise as one of some difficulty; (v) the question whether the cost of actually doing the works of repair would exceed the diminution in the value of the reversion (measured by reference to the reduction in rent) was a live issue on the pleadings until 15 October 1998; (vi) although we were told that the action proceeded after September 1996 on the basis that that question was not regarded as a live issue, it is pertinent that (notwithstanding a notice to admit served in May 1998) the Secretary of State did not formally concede the point until 15 October 1998; and the point was subsequently reopened in February 1999 and was fought at trial; (vii) the landlord was successful on that issue also; (viii) unless it can be said that the landlord was unreasonable in pursuing that issue in the way that it did, the landlord should have its costs of that issue, at least in so far as those costs were incurred prior to 15 October 1998; (ix) the landlord failed in its claim to recover the costs of the preparation and service of the section 146 notice; (x) the landlord failed in any separate claim for damages for breach of the covenant in clause 4(12) of the

lease; (xi) the landlord failed in its claim for lost rent in respect of the period which would have been needed to carry out the works of repair; and (xii) the landlord failed to persuade the judge that the costs of painting and decorating fell outside the cap imposed by section 18(1) of the 1927 Act.

34. I am satisfied that the landlord should have its costs of the diminution in value issue up to 19 February 1999; and that it should have its costs of the common law claims up to the date (15 October 1998) when those claims ceased (at least for the rest of the second stage) to be a live issue. It is necessary to consider whether to make separate orders in relation to any costs incurred before 19 February 1999 in relation to the issues on which the landlord failed. I think that it would be right to do so in relation to the costs of the preparation and service of the section 146 notice – which the judge described as a 'sham'. It is clear that the judge thought that that claim should never have been brought. The appropriate response is to require the landlord to pay the costs to which it gave rise. I would not make separate orders in relation to costs incurred before 19 February 1999 in respect of the other claims – clause 4(12), lost rent, and the inapplicability of the section 18(1) cap to painting and decorating. In so far as the costs in relation to those claims were incurred after 19 February 1999, they will be paid by the landlord under paragraph 4 of the order of 11 November 1999. Any separate costs incurred in relation to those claims before 19 February 1999 are, as it seems to me, likely to be small. In particular, the claim under clause 4(12) was not introduced until the landlord obtained leave, on 26 February 1999, to amend its statement of claim; the claim for lost rent was based on material which was, in any event, relevant to the diminution in value issue; and the inapplicability of the section 18(1) cap – in so far as the point had emerged before the statement of claim was amended in 1999 – was, essentially, a matter which turned on argument at the trial. In my view the separate costs (if any) incurred in relation to those claims before 19 February 1999 are likely to be so small as to make it disproportionate to make separate orders in respect of them.

35. For those reasons, I would allow this appeal. I would set aside paragraphs 2 and 3 of the order of 11 November 1999. In relation to the costs incurred in this litigation between 26 September 1996 and 19 February 1999 I would order: (a) that defendant pay to the claimant its costs other than (i) costs incurred after 15 October 1998 which are solely attributable to establishing the cost of doing works of repair and (ii) costs incurred in pursuing the claim in respect of the section 146 notice; and (b) that the claimant pay to the defendant its costs incurred in defending the claim in respect of the section 146 notice. I have considered whether it is practicable for this Court to make a "percentage" order, so as to avoid the need for separate assessment in respect of discrete issues (see CPR 44.3(7)); but I am satisfied that it is not practicable to adopt that course.

LADY JUSTICE ARDEN

36. I agree.

LORD JUSTICE SCHIEMANN

37. I also agree.

ORDER: Appeal allowed with costs at £16,000.

(Order does not form part of approved Judgment)