Claim No. HT-03-165

Neutral Citation Number: [2004] EWHC 3052 (TCC)

IN THE HIGH COURT OF JUSTICE
QUEENS BENCH DIVISON
TECHNOLOGY AND CONSTRUCTION COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date:8 December 2004

Before :

HIS HONOUR JUDGE PETER COULSON Q.C.

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Between :

RIVERSIDE PROPERTY INVESTMENTS LTD	**Claimant**
- and -	
BLACKHAWK AUTOMOTIVE	**Defendant**

- -
- -

Mr Mark Wonnacott (instructed by Davenport Lyons) for the Claimant
Mr Nicholas Dowding QC (instructed by Payne Hicks Beach) for the Defendant

Hearing dates : 1st, 2nd, 3rd, and 4th November 2004

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Judgment

HIS HONOUR JUDGE PETER COULSON Q.C :

[1] INTRODUCTION

1. Pursuant to an action commenced on 28th May 2003 by the Claimant, Riverside Property Investments Ltd. ("Riverside") against their former tenants, Blackhawk Automotive ("Blackhawk"), damages are sought for alleged breach of various covenants within a Lease relating to Unit No.4, Brookfield Industrial Estate, Leacon Road, Ashford in Kent ("the property"). The claim originally related to a lengthy list of disrepair items, but following a mediation, the vast majority of the individual complaints were compromised. The disputes that now remain between the parties comprise:

1.1 Riverside's claim for £87,522 in respect of the replacement of the roof carried out in late 2002;

1.2 Riverside's claim for £36,211.54 in respect of the fees and costs incurred in connection with their works to the roof.

2. The principal issue between the parties is the state of repair of the roof of the property when the Lease was surrendered by Blackhawk on 28th September 2002. Riverside say that the roof was delivered up in a dilapidated condition, necessitating the immediate stripping off of the existing roof and its replacement with an entirely new roof construction. Blackhawk say that, particularly given the extensive repair work which they carried out to the roof immediately prior to the surrender of the Lease, the roof was in proper repair on 28th September 2002. Whilst this dispute falls to be determined largely by reference to the evidence (both factual and expert) as to the condition of the roof on 28th September 2002, there is no doubt that, unusually for a dilapidations claim, the factual background is of some importance, and, in particular, my findings as to the condition of the roof before Blackhawk's repair works were carried out in August/September 2002. I therefore deal with the factual background in detail at paragraphs 12-35 below.

[2] THE PROPERTY

3. The property is a light industrial unit built in about 1977. It is one of four similar steel-framed units built at the same time. Units 3 and 4 are the two largest units and they share a common flank wall.

4. Like the other three units, the pitched roof of the property was made up of corrugated asbestos cement sheets ("the original sheets") and GRP roof lights. There were about 660 original sheets. They were attached by hook bolts to the 'Z' steel purlins which were themselves fixed to the top of the steel frame of the property. The hook bolts were installed from below and passed through pre-drilled holes in the two overlapping sheets. The hook bolts, which were in the form of a 'J', hooked over a flange in the purlin. At the top end of the bolt, there was a nut and sealing washer on the surface of the roof itself. There were about 2,500 such bolts on the roof. The construction was completed with plasterboard linings fixed to the underside of the purlins. The void between the original sheets and the linings was filled with insulation.

5. The roof was at a 22-degree pitch. There was a central ridge. On the eastern side, the roof ran down to the flank wall of the property, and there was a gutter that ran along the top of

that flank wall. On the western side, the roof ran down to a valley gutter over the flank wall that was shared with Unit 3.

6. Prior to August 2002, the property, along with the other three units, was owned by Firstpark Investments Ltd. ("Firstpark"). On 1st August 2002, the freehold of the property, along with those of the other three units, was transferred to Riverside. A separate entity, DKM, managed all four units for Firstpark, and this function was transferred to a new company, DKR, when Riverside took them over. However the directors of Firstpark and the partners of DKM were the same people, as were the directors of Riverside and partners of DKR. Mr David King was a director or partner of all four organisations, and was, to all intents and purposes, the Claimant in this action.

[3] THE LEASE

7. On 20.11.89, Firstpark granted Blackhawk a Lease of the property for a period of ten years from 29.9.87. On 13.10.89, a reversionary Lease was granted for a further term of 5 years, on the same terms as the original Lease. The reversionary Lease therefore expired on 28.9.02.

8. The Lease and reversionary Lease contained the following repairing obligations:

Clause 2(8)(a)

"From time to time and at all times during the said term (whether the Lessor shall or shall not have served notice requiring the Lessee so to do) well and substantially to repair, uphold, cleanse, support, maintain, amend and keep and when necessary rebuild, reconstruct, renew or replace the demised premises and every part thereof…."

Clause 2(24)

"To yield up the demised premises with the said Lessors' fixtures and fittings and additions thereto at the determination of the term hereby created in good and substantial repair and condition in accordance with the covenants hereinbefore contained".

9. The user provision of the Lease was set out at Clause 2(16)(a) as follows:-

"Not to use or suffer to be used the demised premises other than for the purpose of the manufacture of garage equipment or for the purpose of a light industrial building within Class B1 of the Town & Country Planning (Use Classes) Order 1987, including storage and office use ancillary thereto or as a warehouse within Class B8 of the Town & Country Planning (Use Classes) Order 1987."

10. There were additional provisions dealing with Blackhawk's liability to pay certain of the Lessor's costs and expenses, as follows:

Clause 2(22)(b)

"To pay all proper costs and expenses (including solicitors costs and surveyors fees) incurred by the Lessor in or incidental to the preparation and service of any notice or schedule relating to dilapidations and whether or not the same is served before or after the expiration or determination of the said term".

Clause 2(22)(c)

"To pay all costs and expenses incurred by the Lessor in or in connection with the enforcement of any of the Lessee's covenants and conditions herein contained whether during the currency of or after the termination of the said term."

[4] ISSUE 1: THE CONDITION OF THE ROOF PRIOR TO BLACKHAWK'S WORKS IN AUGUST/SEPTEMBER 2002.

11. In his Closing Submissions on behalf of Blackhawk, Mr Nicholas Dowding QC argued that, because of the way in which Riverside put their case on breach of covenant, an issue arose as to whether, immediately prior to the commencement of Blackhawk's repair works in August/September 2002, the roof was incapable of being put into the covenanted condition other than by complete replacement of the existing roof covering. Based on the arguments of both parties, and the evidence that I heard (particularly the expert evidence), I agree with that submission: it seems to me that, in order to deal properly with the central issue as to the condition of the roof on 28th September 2002, following the completion of Blackhawk's repair works and the surrender of the Lease, I need first to address the condition of the roof before those repair works were carried out. Accordingly, paragraphs 12-35 below concern that first issue, namely whether, by August 2002, the roof was in such a condition that only complete replacement of the roof covering could put the roof into the condition covenanted for by Blackhawk.

12. Although the circumstances of its commissioning are unclear, it appears that, in July 1998, BRC Industrial Roofing Specialists Ltd. were asked by Blackhawk to prepare a specification and quotation for the refurbishment of the factory roof. Their conclusion was as follows:

"RECOMMENDATIONS FOR TREATMENT

To order to make this roof watertight again for a realistic period of time (10 years +) we believe that it would be necessary to renew all sheet fixings and replace the existing translucent roof lights, with the exception of the previously replaced items. All cracked sheets would require replacement and the asbestos cement sheeting cleaned and sealed…..

Alternatively, an over-sheeting of this area with profiled steel sheeting, would effectively give all the benefits of a new roof without the expense and disruption of stripping the old roof. An over-sheeting specification would give a lifespan of approximately 40 years with minimal maintenance".

13. Even here, right at the beginning of the story, the essential uncertainty as to what could or should be done to the roof, which has eventually led to this litigation, can be discerned. The roof was in reasonable condition, although at least some repair work was plainly required. The first option recommended by BRC was very similar to the work which Blackhawk actually carried out in August/September 2002. The second option was similar to the work which Riverside carried out following the surrender of the Lease, just two months later, in the sense that it provided a much longer life span for the roof itself, although, as we shall see, when Riverside came to do the work themselves, they did not over-sheet the roof but stripped off the original sheets and put on an entirely new proprietary roof.

14. The following year, in about September 1999, Blackhawk raised with Firstpark the possibility of an early surrender of the Lease. Firstpark wanted to deal with and agree the issue of dilapidations at the same time as the negotiations concerning the possible surrender. Firstpark instructed TMD Building Consultancy Ltd. ("TMD") to prepare a Schedule of

Dilapidations. TMD in turn instructed Michael Kilbey Associates ("MKA") to report on the roof. However, before MKA produced any sort of report, TMD prepared the first of a number of draft Schedules of Dilapidations, calling it a "Preliminary Assessment". In relation to the roof, this first draft Schedule, dated 8th November 1999, provided as follows:

"Roof weathering sheets generally deteriorated and have reached end of useful life; Works:-

1. Replace all sheeting, weathering clips, washers, flashings, gutters and cappings with double skin profile metal roof.
2. Renew deteriorating translucent sheets.
3. Roof to be left in good and substantial repair."

15. If TMD had expected MKA unequivocally to confirm their conclusion that a new roof was required, they were to be disappointed. In the first MKA report, dated 21.12.99 and written by Michael Kilbey, the lack of a clear-cut solution to the problem posed by the roof is very apparent. Amongst the MKA conclusions are the following:

"[6] **RECOMMENDATIONS**

6.1 Recommendations for this roof are not easy to determine as whilst the life expectation of the sheeting may be in excess of 40 years, embrittlement, corrosion of fixings and failure of materials (such as translucent sheeting which has a lesser lifespan) all need to be considered.

6.2 Renewal of any element of the roof will also have a knock-on effect to the main roof covering – the asbestos cement sheeting.

6.3 Working over the roof coverings may cause damage to the sheeting, which has become less resistant to impact. Because the roof is considered fragile, great care must be taken both to protect against inadvertent damage and for reasons of safety for the operatives.

6.4 For this reason, I am of the opinion that further local repairs [a reference to the use of bitumastic paint] are no longer a viable option. The roof consists of some 700-750 sheets and approximately 2500 fixings. Each sheet requires careful examination and all fixings should be renewed, together with repairs to any damaged or broken roof sheets.

6.5 The profile of this roof sheeting is no longer available and therefore replacement is not an option, save overlaying with an alternative material such as GRP.

6.6 Access will be required, both internally and externally, to change the hook fixings which must be fed through the sheeting from the inside and will require removal of the underpurlin linings. The alternative, using a self-drilling fixing into the purlins may be too restrictive, preventing movement of the sheeting and therefore not recommended.

6.7 Alternative remedial works to be considered are:-

(i) Stripping off complete the external weather coverings, inclusive of translucent sheeting and renewing with metal profile system and new GRP translucent sheeting.

(ii) Oversheeting, leaving the existing roof coverings in place. However this would require an overview from a structural engineer to determine the load-bearing capacity of the structure and to ensure that the additional load could be accommodated.

(iii) To apply a coating over the whole of the roof coverings, including a clear coating to the translucent sheeting or, alternatively, renew them.

> 6.8 From my observations, I am of the opinion that the current roof coverings are generally still performing satisfactorily as a weathering, although they are reaching the end of their lifespan. Localised repairs which have been carried out are also failing due to the short-term nature of the repairs using bitumastic paint.
> 6.9 The choices suggested above in 6.7 provide alternative solutions from renewing the entire roof to extending the life of the existing. Certainly considerable maintenance/repairs are now required on this roof; the practicality is they are now not an option due to the fragility of the roof and non-availability of the roof sheets".

16. Two points need to be made about this first MKA report. First, it is agreed that MKA were wrong to advise that replacement of the roof sheeting was not an option because the profile of such sheeting was no longer available. In fact, fibre cement sheets of the same profile were and remained available for use in any partial or complete replacement scheme. It appears that MKA did not become aware of this until some time in 2001. Such sheets were in fact used by Blackhawk as part of their repair works in August/September 2002.

17. Secondly, in his evidence, Mr King said that he found the conclusions of the MJKA report, summarised above, to be "contradictory", and he wanted it "clarified". However, no letter was written by TMD, or Mr King, asking MKA to clarify or clear up any alleged inconsistency or contradiction in their report. Indeed, it does not appear that very much happened in respect of the MKA report at all until almost a year later when, on 17.11.00, TMD wrote to MKA to take up the point that "the roof coverings are nearing the end of their useful life". The letter went on:

> "In order to provide clear, firm advice I should be grateful if you would amend your report to eliminate reference to repair of the existing as this is not an option for the long term benefit of the building. In particular, under paragraph 6.8, you have referred to the fact that the current roof is performing satisfactorily although the weathering is reaching the end of its life span.
> I shall be grateful if you would review your report and consider the adaptions as noted above."

It does not appear that MKA amended the report in the manner suggested by TMD or at all. Again therefore, the MKA report confirmed the point previously noted in paragraph 13 above; that, in the absence of any evidence that there was too much seriously wrong with the roof, it was not overwhelmingly obvious that the only solution was to replace the existing with an entirely new roof.

18 The Preliminary Assessment of Dilapidations (referred to in paragraph 14 above) was sent to Blackhawk on 4th May 2000. The document was then revised on 21st November 2000 but it appears that the actual revisions were limited to the proposed costings of the work. The revised document showed that the estimated cost of re-roofing was now put at £113,150.

19. On 26th February 2001, Mr Brooker of Blackhawk wrote to DKM to say that:

> "Blackhawk are now faced with a commercial decision as to the best action to take on the building. … with regard to the interim dilapidation schedule already produced, we currently consider the content and cost levels of the report, to be not an acceptable basis for starting discussions".

Amongst the significant elements that Mr Brooker said required review was:

> "Roof – we have been advised that there is no obligation under our Terms to supply a new roof, the cost quoted is excessive."

It was unclear to what "advice" Mr Brooker was referring. Whilst it appears that at about this time, Blackhawk retained Grimleys to advise them, their written report, which was not disclosed in these proceedings, was apparently dated June/July 2001.

20. On the 4th April 2001, MKA produced a second report, this time written by Mr Guy Kilbey. This report confirmed that "since our report of 21st December 1999, this roof has continued to deteriorate…" The report effectively repeated the recommendations identified in paragraph 15 above. Accordingly, the second report neither took on board the "revision" required by TMD, nor resolved the "contradictions" identified by Mr King.

21. On 8th May 2001, Accurate Roofing Ltd. ("ARL") provided a quotation to Blackhawk for replacing the existing roof with a new Kingspan roof in the sum of £84,903.40. The following month, Grimleys were replaced by Mr Harding as Blackhawk's principal adviser. Mr Harding proposed replacing the original sheets with sheets in the same profile which, on his rough calculations, would have reduced the ARL quotation to about £54,000. By the summer of 2001, for reasons unconnected with the debate about the roof, Blackhawk had decided not to surrender the Lease early.

22. On 27th June 2001, TMD sought quotations from a roofing contractor called Rooftec 2000 ("Rooftec") for replacing the roofs of Units 3 and 4 with a Kingspan roof cladding system. Mr King said in evidence that Mr Sennett of TMD had undertaken research into roof coverings and had concluded that this was the best solution. As for the existing roof on Unit 4, Mr King said that, by this time, he had "little doubt" that replacement "was the inevitable conclusion I would reach." On 20.7.01 Rooftec responded, and quoted a price of £80,615 to install a Kingspan roof on Unit 4.

23. As noted above, Unit 3 was adjacent to Unit 4. The Units were built at the same time with identical asbestos sheeted roofs. However, (unlike in respect of Unit 4) TMD's Schedule of Dilapidations for Unit 3 did not require the replacement of the roof. Notwithstanding that, in 2001, Mr King decided that the roof of Unit 3 should be replaced with the Kingspan system, and this was put in hand. When that work was carried out, a certain amount of damage was caused to the roof of Unit 4. That damage was repaired by Rooftec using replacement sheets and a new type of topfix fastener which, as the name suggested, could be fixed from the top of the roof rather than from underneath. The installation of these fasteners, therefore, did not require the removal of any of the linings below the purlins.

24. On 17th July 2001, DKM wrote to Mr Harding, enclosing a copy of the second MKA report. Mr Harding noted the reference to the first MKA report, which had never been sent to Blackhawk, and requested a copy. This was sent to him on 25th July. At the same time, Mr Harding was still considering with ARL the condition of the roof and the likely remedial works. Following a meeting on 10th September, and an inspection of the roof, Mr Harding wrote to ARL on 13th September in these terms:

> "Ladders were available and I took the opportunity to inspect the roof and found it to be a corrugated asbestos roof covering with the majority of hook bolts deteriorating and a small percentage of cracked sheets".

He asked for budget costs for relining the valley gutter, replacing all the hook bolts, and two alternatives based on replacing 90% or 50% of the original sheets with new corrugated sheets. The quotation that was provided in response was dated 15.10.01. The cost of replacing all the hook bolts was £14,906. ARL's estimate for replacing all of the asbestos sheeting was £65,270. Their estimate for replacing 50% of the sheeting was £36,250. Although it was suggested to Mr Harding in cross-examination that the 50% figure was his estimate of the likely amount of damaged sheets, he rejected that, calling it "very much a worst case scenario."

25. On 10.10.01, TMD wrote to Mr King in respect of the preparation of a formal Schedule of Dilapidations. Mr Sennett of TMD said:-

> "I confirm that you would like the dilapidations schedule to include the new roof, all redecoration externally, stripping out of internal wood panelling to the office areas and re-plastering of the walls damaged by the removal of the cork tiles."

Following this, on 12.10.01, it appears that Mr King had a lengthy telephone conversation with Michael Kilbey. This concerned the roof and the options available to Mr King in respect of repair or replacement. One passage in the contemporaneous note that Mr King made of this telephone conversation stated:

> "Unexplored territory – no court rulings as to whether an overhauled asbestos roof might be in 'good repair."

Mr King said that he could well have discussed this point with Mr Kilbey during his telephone conversation.

26. On the same topic, on 15.10.01, TMD wrote to Mr King giving advice about whether or not the roof was in good repair and what work might be necessary to put it into repair, although Mr Sennett of TMD expressly admitted in his letter that "whether the roof is in repair or not is difficult to define." A useful insight into the approach of Mr King and TMD at this point can be obtained from the last two paragraphs on the first page of the letter:

> "The tenant's surveyor had indicated that it is possible to purchase non-asbestos corrugated roof sheets of the same dimension and profile than the existing sheeting. If these are of a different colour, it may be possible to argue that we will not accept a non-matching repair.
>
> Once we receive specialist comment concerning the roof, I suggest that all the relevant points are put to the tenant so that he is aware that there will be several risk factors that need to be taken into consideration if he decides to carry out the repair project rather than come to a sensible agreement concerning the renewal of the roof."

It seems to me clear that, by this time, Mr King and TMD had resolved that the only work to the roof which they would accept was the complete replacement of the original sheets, and

that they would be difficult about any lesser scheme, even down to taking points about the colour of the sheets used in any repair work. In cross-examination, Mr King said that, even though by this time he knew that replacement sheets were available, "I was concerned about using any form of corrugated sheets."

27. On 9.11.01, Firstpark, through Mr King, wrote to Mr Harding to say that "from our own extensive investigations, we have concluded that Kingspan sheeting is the most suitable, cost effective material and having received competitive quotes we are now proceeding with recovering Unit 3 with this by Rooftec 2000." On 23.11.01 Mr Harding responded:

> "My Client is comfortable with the proposition that repairs are undertaken to the roof using single non-insulated sheet material of suitable profile to match with the existing. Naturally, it may be found that extensive areas of roof sheet will have to be replaced but as you will appreciate, as it is a repair, there is not a requirement to upgrade the roof with insulated panels by Kingspan or others.
>
> With regard to the lining sheets, these naturally will have to be taken down, but since the area below has been completely cleared out now, including the mezzanine area, a powered hydraulic platform will be used to take down the linings, clean them with specialist system and reinstall. At the end of the day, whether the cleaning is adequate will be for the Courts to make an assessment of."

On 18.12.01 Mr Harding wrote again to Mr King to say:

> "It is appreciated that the repair solution may not be that which you had anticipated at the outset of the production of the draft schedule produced by your Surveyor but it is considered that the Lease cannot ask for improvements, such as installing an insulated roof albeit that it would be desirable for any incoming tenants.
>
> Repairs will be undertaken, in compliance with the Lease, to a satisfactory standard and handed back to you at the end of the term."

28. On 3.1.02, Mr King, (on behalf of DKM), wrote back to Mr Harding identifying, for the first time, a claim for 29 months' worth of fees from building surveyors, roofing consultants and the like. The letter goes on to say:

> "…We have received categoric advice from specialist roofing consultants that the roof of these premises will have to be replaced if it is to be put in good and substantial condition and moreover certainly if the premises are to be re-let on full repairing terms which we consider to be the ultimate test."

In fact, Mr King had not received such unequivocal advice from any of the consultants that he had engaged: as we have seen, MKA, the specialist roofing consultants, had effectively advised that a good case could be made for repairing rather than replacing this roof, save for the (incorrect) point about the absence of replacement sheeting to the same profile. Despite being expressly invited to produce a report that was much more categorical about the need for the replacement of the original sheets, MKA had not done so. At all events, Mr Harding wrote back on 7.1.02 to say that Blackhawk would provide Firstpark "with a roof covering which has been renewed or replaced, to the same standard as the original." At this stage, therefore, the central dispute between the parties had essentially crystallised. On 24.1.02, a

revised Preliminary Schedule of Dilapidations was sent to Mr Harding, which again purported to require a new roof. In his responses over the next few months on this point, Mr Booker of Blackhawk was emphatic that, as he put it on 15.4.02, "Blackhawk will repair in line with recommendations".

29. Mr Harding introduced Blackhawk to BrandClad, a specialist roofing company. Mr Nattress of BrandClad wrote to Mr Harding on 14.2.02 to identify four remedial options. The first, being the replacement of the existing roof with a completely new roof, was described in the letter by Mr Nattress as "wonderful, as an ideal from a roofing contractor's and landlord's standpoint, but not a tenant's, but hardly necessary I think …. I believe that the external roof sheet cannot be in that poor a condition, because, if it were, there would be much more obvious damage to the linings than I can see from below." Mr Nattress' second option, namely an over-roofing solution, he described as "on the face of it unnecessary from what I have seen so far." That left him with options 3 and 4, which were, respectively, a programme of systematic repair and the application of a coating of appropriate "goo" as a waterproof membrane.

30. On 21.2.02, Mr Nattress wrote again, having carried out a more detailed survey of the roof. He noted that:

> "Many of the old, original, hook-bolt type main fixings were noticed to be skewed over and not perpendicular to the sheet surface suggesting sheeting may have slipped/sagged/settled down the slope".

He confirmed that there were "very few" leaks and suggested as his recommended option the replacement of the cracked sheets and all fixing bolts, and the renewal of the roof lights. He also referred to other options, including an over-roof solution and a complete strip and re-sheeting. On 10th May 2002, Mr Nattress wrote again to Mr Harding, enclosing a quotation. In this covering letter, Mr Nattress repeated the point about the hook bolts being skewed over and the corrosion of the bolts but went on to say that "generally, there was little springiness observed in walking the roof and this could not be induced easily." With a 5% allowance to cover roof sheets that had not been previously identified as being damaged, he said that his quotation was based on 81 damaged sheets and 17 damaged ridges. With a further 10% allowance (which Mr Williamson, Riverside's roofing expert, said "sounded right for this roof") to reflect the fact that damage might be caused when old fixings were removed, he advised that a total allowance should be made for 90 sheets (about 14% of the total original sheets on the roof) and 20 ridges.

31. As to fixings, Mr Nattress said:

> "Renewing all fixings can sometimes be done using the newer type of self-drilling/tapping "top-fix" type screws, however, here I do not think this will be entirely possible and I think we will have to use a combination of hook-bolts and top-fixings and there are certain difficulties involved in the proposal. Using the new fixings in the replacement sheets is fine, but we will probably need to use hook-bolt fixings in the old sheets."

The point that Mr Nattress was concerned about was that the existing hook-bolt fixings were inserted through the sheets through pre-drilled holes, which were a little up-slope of the purlin, so to allow for the bolt to engage the flange of the purlin when it was tightened up.

This was to be contrasted with the topfix fasteners, which were intended to go through the centre of the purlin. Accordingly, there was a risk that the existing holes in the sheets would not be above the centre of the purlins, making the use of topfix fasteners a potential problem. As Mr Nattress put it in the letter:

> "The new fixing locations are then about 30mm or so down slope of the holes that already exist in the old sheet and this then creates the problem of sealing up the old holes."

32. However, in his quotation of the same day, although Mr Nattress did not expressly refer to topfix fasteners, it was apparent that BrandClad were intending to carry out the work using topfix fasteners throughout, with no hookbolts. This was because the quotation operated on the basis that the fixings would be put in from the top of the roof and that the internal linings would remain undisturbed. Mr Nattress dealt with this apparent discrepancy in his evidence. He said that, following his second inspection, "we were confident we could do it with topfix screws, just as we were confident as to the number of sheets we would have to replace." He said that he had no doubt that by the time of the quotation in May, BrandClad's intention was to use topfix fasteners and that the reference to hookbolts in the letter was "an error". He said he did not believe that his mistake caused any confusion, and said that neither Blackhawk nor Mr Harding raised the point with him. Mr Harding confirmed in his cross-examination that he was fully aware that the fixings installed by BrandClad would be topfix fasteners only, and that no new hookbolts would be used.

33. On 15th May 2002, Mr Harding wrote to Blackhawk to say that "it would seem that BrandClad are confident that they can thoroughly overhaul the roof, replacing all the perished and defective elements for a figure in the region of £40,000." On 11th June, Blackhawk instructed BrandClad to proceed with the works. Mr King, however, did not give up the possibility that he might be able to persuade Blackhawk to change their position. During July he had a number of telephone conversations with Mr Nattress. Mr King said in evidence that the purpose of the first telephone conversation on 17th July was to try and find out precisely what Mr Nattress was going to do on the roof. I do not entirely accept that explanation. It is clear from Mr King's handwritten note of this conversation, with its references to cost figures worked out on various permutations, that what Mr King was doing was seeking to explain to Mr Nattress that there was such a small saving to be made on repair rather than replacement, that it would be better for all concerned if the roof was replaced. They also had a discussion about whether or not there would be asbestos dust created by the works, a point which Mr King then made in his letter of 17th July to Mr Brooker of Blackhawk. In that same letter, Mr King again made the point that the repair works might cost £53,000 plus fees and additional expenditure to satisfy the requirements of the HSE whilst the total cost of a new roof was just £84,000 plus fees. Having said that Blackhawk seemed "hell bent on a course of disaster", Mr King concluded that letter by saying:

> "If we could agree a cash settlement now, it would obviously reduce the claim for loss of rent and costs"

34. In the same letter of 17th July, Mr King said to Mr Brooker that Mr Nattress had indicated to him that the proposed remedial work to be carried out by BrandClad was "problematical". This was not reflected in Mr King's manuscript note of the conversation; it was, of course, completely contrary to the advice that Mr Nattress had provided to Blackhawk since February 2002. When cross-examined on the point, Mr King appeared to accept that

Mr Nattress did not say any such thing, and that he was instead referring to Mr Nattress' view of the 'ideal' solution noted in paragraph 29 above. Regrettably, therefore, it seems that Mr King's attempts to prevent the repair work being carried out by Blackhawk now embraced the misrepresentation of the views of third parties, like Mr Nattress.

35. The following day, the 18th July, Mr King wrote again to Mr Brooker to say that what he called the overhaul works "will not be acceptable". At this point, things became a little heated. Mr Brooker replied on 19th July to say that "Blackhawk have been forced into a position to find a more realistic solution to your claims, only when we have done this have you taken a more realistic view. It seems this is also the position with regard to the major matter with the roof". Mr King then endeavoured to speak to Mr Brooker, and an argument ensued. Mr Brooker complained that Mr King had called him "a bastard" on the telephone and Mr King took the trouble to respond to Mr Brooker to say that, in the interests of accuracy, what he had actually called him was "a rude bastard". Mr King also endeavoured to contact Blackhawk's European parent company in a final, unsuccessful attempt to stop the repair works being carried out. The die was now cast; Blackhawk were about to embark on a remedial scheme which Mr King emphatically did not accept. The essential tension between the ideal solution for this roof, on the one hand, and the existence of less costly remedial options, on the other, which can be discerned throughout the documents and events noted above, remained apparent to the end.

[5] SUMMARY AND CONCLUSIONS ON ISSUE 1

36. I am in no doubt that, on the basis of the detailed documents and the evidence set out in paragraphs 12-35 above, the roof of the property could be put into the covenanted condition by the carrying out of works that did not involve the complete replacement of the existing roof. In particular, it seems to me that all the reports and advice obtained by both parties between 1998 and 2002 recognised that repair, rather than replacement, was, at the very least, a perfectly viable option for the roof of the property. Although in coming to that firm conclusion I rely on all of the material set out at paragraphs 12-35 above, it seems to me that the following are of particular significance:

36.1 The BRC report of July 1998, which offered either repair or a new covering as equally valid remedial options;

36.2 The two MKA reports of 1999 and 2001, both of which anticipate the possibility of either repair or replacement. Indeed, the fine judgment call as to which option might be capable of being justified in a Court was apparently discussed as part of the telephone conversation between Mr King and Mr Kilby on 12.10.01, as noted in Mr King's contemporaneous note (paragraph 25 above);

36.3 The detailed surveys carried out by Mr Harding and in particular Mr Nattress of BrandClad in 2002 which identified repair as a valid alternative to replacement. Mr Nattress said in evidence that his first survey showed that the condition of the roof "was not too bad" and that subsequent inspections did not change that original view;

36.4 The evidence of Mr Williamson, Riverside's roofing expert, who in cross-examination fairly accepted that this sort of choice, between repair and replacement, was a question of judgment, and different surveyors would have different views. As he put it "what it often comes to is cost; cost is often the driving feature."

37. If it were required, further confirmation for my conclusion that the roof of the property could be put into covenantable condition without complete replacement can be found in the experience of a number of the witnesses who gave evidence before me. Mr Harding and Mr Nattress had both regularly seen roofs of a similar type to Unit 4 which were capable of being properly repaired rather than having to be completely replaced. Indeed, it is noteworthy that Mr Williamson himself had worked for 16 years for a roofing contractor and, in that role, had plenty of experience of replacing a percentage of defective asbestos sheets with new fibre cement sheets, rather than replacing the whole of the existing roof. He also had experience of replacing old hook-bolts. In addition, I note that repairs of this type are expressly envisaged by British Standard 5247, Part 14, which talks about the use of walkways and roof boards for the carrying out of all inspection and maintenance work.

38. In essence, the only evidence to the effect that the roof of the property could not be put into proper condition by the carrying out of a repair scheme rather than complete replacement came from Mr Williamson, who suggested that the very act of carrying out repair work would inevitably cause further damage to the roof sheets that were not initially being replaced: see paragraph 6.5 of his Report. In my judgment, Mr Williamson's opinion, there expressed, is unsupportable and I reject it. Taken to its logical conclusion, it would mean that, as soon as a few scattered roof sheets were cracked or damaged, the only viable remedial option would be a completely new roof, because the carrying out of repair works would inevitably cause further damage to other sheets and, when they were replaced, that would cause yet further damage, and so on. I do not believe that Mr Williamson's approach is realistic; indeed, it seems to me that it is contrary to his own experience, and the experience of the other roofing practitioners who gave evidence during the trial. It is completely contrary to all of the reports and other advice that I have identified in paragraphs 12-35 above. Moreover, in his cross-examination, Mr Williamson again accepted that another surveyor might reasonably hold a completely contrary view to his own on this point. For all these reasons, therefore, I reject the suggestion that the Blackhawk repair works would inevitably cause irreparable damage to the roof simply by being carried out.

39. It therefore follows that, in answer to Issue 1, I am firmly of the view that the roof could have been put into the covenanted condition by the carrying out of repair works in 2002. The remaining major issue, therefore is: was the roof in fact put into such a condition by the works of August/September 2002? I deal with that issue by examining the works carried out by Blackhawk; Riverside's decision to demolish and rebuild the roof; evidence about the actual condition of the roof on 28th September 2002; the relevant principles of law; and an analysis of the detailed disputes between the experts.

[6] BLACKHAWK'S REMEDIAL WORKS (AUGUST/SEPTEMBER 2002)

40. On 5th August 2002, Mr Nattress wrote to Mr Harding to say that he had just taken a call from Mr King who had requested copies of his risk assessment and method statement in respect of the imminent work to the roof. This was one of numerous calls which Mr Nattress received from Mr King during this period in which, from Mr Nattress' contemporaneous letters, it appears that Mr King continued to be generally difficult about the carrying out of those works. By this stage, the scaffolding was being put up and Mr Nattress envisaged that the "roof works proper" would start very soon. The evidence was that access to the roof for the purposes of the BrandClad works was provided in a number of different ways. There was full scaffolding along the flank (eastern) wall of Unit 4. In addition, there were at least three access stagings, which were used on the two roof slopes themselves and from which at least some of the replacement work was carried out. In addition, the valley gutter between Units 3

and 4 was fully boarded so that there was additional access to the valley gutter (western) slope.

41. The principal elements of Blackhawk's remedial works concerned the roof sheeting, the roof lights and the fixings. Any damaged roof sheet was replaced with a new, fibre cement roof sheet of precisely the same profile as the existing. In total, said Mr Nattress, 122 sheets, including ridges, were replaced, just a few more then he had quoted for (paragraph 30 above). He said "we did not replace many more sheets than I thought we would have to." In addition, all of the translucent roof lights, which had a shorter life expectancy than the roof sheets themselves, were replaced. As for the fixings, it was clear that all the original hook bolt fixings had deteriorated beyond repair. They were therefore replaced with the topfix fasteners which were installed from the roof, thereby avoiding any disturbance of the internal roof linings. It appears from his second letter of 5th August 2002 that Mr Nattress explained to Mr King at length "the means of fixing the replacement new and old sheets".

42. Although the method statement was sent out on 7th August 2002, it does not appear that very much of the repair work was done during the first part of August. On the 15th August 2002, an inspection of the roof was carried out both by Mr Harding and, separately, by Mr Williamson, the third representative of MKA to inspect the roof of Unit 4. Prior to this inspection, as Mr King accepted in cross-examination, Mr Williamson knew that he, Mr King, was unhappy about the Blackhawk remedial scheme. The evidence was that relatively little work had been carried out by this stage. It appears that Mr Williamson had turned up without having made an appointment and, although he made an inspection, he did not regard it as complete. Notwithstanding that, he wrote a report dated 15th August 2002 based on what he had seen of the work to the parapet wall (eastern) slope. It does not appear that any work had commenced, at this stage, to the valley gutter (western) slope. The principal complaint in that report was that the roofers were walking directly on the roof sheets which increased the risk of cracking. The report also stated that "this risk is further added to by the new fixings being inserted at such an angle, from the perpendicular, to cause an uneven loading…"

43. Despite a clear request from Mr Harding that notice should be given of any pending visit by Mr Williamson, Mr Williamson again arrived at Unit 4 without prior notice on 20th of August. In those circumstances, he was refused access to the roof. Mr Williamson accepted in cross-examination that it was reasonable for Mr Harding to require prior notice from those who intended to visit the roof. Mr Harding himself visited the roof on 22nd August 2002. He said that not much of the re-roofing had been carried out on the valley gutter (western) side by this stage, but that he did not notice any particular problems with or deficiencies in the work (which was more advanced) on the parapet wall (eastern) side. Following that visit, Mr Harding wrote to Mr Nattress on 23rd August asking for a further team to be put on the roof works so as to enable completion "as early as possible".

44 The bulk of the work – something like 85% of it, according to Mr Williamson – had been carried out by 2nd September 2002, when Mr Williamson made a further inspection. Mr King was also present, but his inspection was limited because, as he put it, "I am not good with heights." Mr Harding was also on site that day, making "a quick visual inspection." Mr Williamson produced a report confirming what he had seen on that inspection on 5th September 2002. Mr Williamson concluded that short report by saying that "the works that have been carried out to this roof have not prolonged the life of the roof coverings but, have had the reverse effect, by reason of impairing the structural integrity of the weather tightness of the existing roof sheeting and the new roof lights". Generally, the points made in the

report were similar to those in the previous report produced by Mr Williamson. It does not appear that either of these reports were furnished to Blackhawk or Mr Harding or Mr Nattress of BrandClad. Neither were the contents of the reports discussed with any of these parties. I find it unfortunate, to say the least, that Riverside were obtaining information concerning what Mr Williamson said were ongoing poor practices, but were not seeking to use that material to prevent a repeat of such incidents or to improve the quality of BrandClad's work. The only conclusion I can draw is that, even at this stage, the purpose of Mr Williamson's reports was not to help to improve the actual condition of the roof, but to serve as ammunition to support a position, decided on by Mr King before the Blackhawk works even began, that such works were unacceptable.

45. Mr Williamson never made any further visits to inspect the roof after the 2nd September. When asked about that in cross-examination, he said that it was entirely a matter for Mr King as to whether or not Mr King instructed him to re-visit the roof: as he put it, "we take instructions; we do not give instructions". It does not appear that Mr Williamson advised Mr King that an inspection on completion, or later, during the stripping off work by Rooftec, was a good idea, an omission I find a little difficult to understand. Given that Mr Williamson knew that there was and would continue to be a dispute about the efficacy of the repair works being carried out by BrandClad, it seems to me axiomatic that he should have advised Mr King that he could only give a complete opinion on the success or failure of such works once they had been completed, snagged and formally handed over.

46. On 2nd September 2002 Mr Nattress wrote to Mr Brooker of Blackhawk to say:-
"I can though tell you that as of this morning we have deployed another gang and so works will be accelerated. Practical completion should then be achieved late this week but full/final completion of all site works and our own snagging and quality inspection will go into next week I think. I hope this deployment of additional labour is encouraging news for you."

It appears that the roof works were completed by 23.9.02 when Mr Harding made a further inspection of the roof. It was Mr Harding's evidence that "this inspection revealed no deficiencies and no deficiencies were reported to the works contract manager". It does, however, appear that, in early September, before completion, there was a leak through the repaired roof over the office area which was investigated and put right by BrandClad: see Mr Nattress' letters of 10th and 12th September 2002. In addition, it seems clear that BrandClad carried out general snagging inspections and associated works after 2nd September and before Mr Harding's inspection on 23.9.02. In this connection, Mr Nattress internal file note of 2.9.02 noted:

> "Do not want to give the landlord/ his surveyor any chance of querying our work via our client because of the 'bad blood' that undoubtedly does exist between our client and landlord.
>
> Suggest we need to go over job thoroughly as it nears completion to 'snag' etc."

Following completion of the works (including snagging) carried out by BrandClad, the property was surrendered to Riverside on 28th September 2002.

[7] RIVERSIDE'S DECISION TO DEMOLISH AND REBUILD THE ROOF

47. As set out in paragraphs 22 and 26 above, it is clear that Mr King had been convinced for at least a year, if not longer, that the property required a new roof and that, in reality, nothing else would do. As I have previously noted, he accepted in cross-examination that, by June 2001, he had "little doubt" that the installation of a new roof "was the inevitable conclusion" he would reach when he came to decide what to do when the Lease came to an end. Although, as he put it, he kept his options open thereafter, he admitted that he did not consider that any alternative solution "was possible".

48. However, as we have seen, by the time that the Lease was actually surrendered to Riverside at the end of September 2002, extensive remedial works had been carried out to the roof by BrandClad on Blackhawk's behalf with the express intention of complying with their repairing covenants. Accordingly, before he decided to demolish a roof that had been so recently repaired, one might reasonably have expected Mr King to consult with MKA on the actual condition of the roof on the completion of those repair works; to procure a detailed survey of the condition of the roof in its repaired state; and to see what, if anything, might be required by way of further work to the roof pursuant to BrandClad's continuing liability to put right any defects under their contract with Blackhawk. This last point had been expressly made to Mr King by Mr Brooker in his letter of 3rd October, which said:

> "As you are aware, Blackhawk have spent a substantial sum of money, leaving you with a newly painted and refurbished building. If you should have any points relating to this recent work that Blackhawk can claim as "snagging" with its contractors, please let us know and we will arrange to have this carried out at no cost to yourselves."

BrandClad's letter to Mr Harding of 10th October 2002 confirmed that BrandClad would observe a 12-month defects liability period under the contract: in other words, if there were defects within those 12 months, then BrandClad would come back and rectify them free of charge.

49 For reasons which were never explained, Mr King did none of these things. He had a meeting with Mr Williamson of MKA on 8th October 2002 but that meeting only lasted an hour and, according to Mr Williamson's invoice, was a meeting in respect of "Report finalisation". There was no note or minute of this meeting. It was Mr King's evidence however, that this was a critical meeting because he came away from that meeting "knowing I had no alternative but to replace the roof". As I have already noted (paragraph 45 above) Mr King did not instruct Mr Williamson to make an inspection of the completed roof. Neither, surprisingly, did Mr King procure a survey identifying what, if any, actual defects were apparent on the roof, and/or whether such defects were having an adverse effect on the property itself, whether by way of leaks or in some other way. He did not send either of Mr Williamson's reports to Blackhawk or Mr Harding and, when on 25.10.02 Mr. Williamson produced a third report, which largely repeated points from his previous two reports, Mr King did not send that report to Blackhawk or Mr Harding either. Mr King did not respond at all to Blackhawk's invitation of 3rd October 2002 in respect of snagging, which was a major omission given Mr Williamson's view, in cross-examination, that many (if not most) of the matters on which Riverside now rely in support of their case of breach of covenant could have been rectified during snagging. In any event, by the time of Mr Williamson's third report, the replacement works had already been let to Rooftec pursuant to a contract dated 24th October 2002, and practical completion was achieved on 18th December 2002, less than 3 months after surrender.

50. For all these reasons, therefore, it seems to me that Mr King's prompt decision to demolish and rebuild the roof in early October 2002 had, to all intents and purposes, been taken long before the Blackhawk remedial works were ever carried out. I find that it was what Mr King had resolved to do more than a year before, whatever the nature or quality of performance of those remedial works. The consequence of this approach was that – both before and after 28th September - Mr King (and, it seems, his advisors) largely dismissed in their own minds the efficacy of the Blackhawk repair works, and their actual effect on the condition of the roof. Inevitably, this in turn has meant an absence of clear and coherent evidence as to the actual (as opposed to the theoretical) state of the roof when the Lease was surrendered on 28th September 2002 and a tendency to concentrate on potential, rather than real problems with BrandClad's works. Within a few weeks of the surrender, that roof was stripped off and replaced by Rooftec with a new Kingspan roof. It seems from the documents that the incoming tenant, Hardigg UK Ltd, knew from the very beginning of their dealings with Riverside that Riverside intended to replace the roof of the property.

[8] THE EVIDENCE ABOUT THE ACTUAL CONDITION OF THE ROOF IN SEPTEMBER 2002.

51. For the reasons set out in paragraphs 47-50 above, the evidence as to the condition of the roof in September 2002 is limited. Indeed, it is confined to the following:

51.1. The three reports produced by Mr Williamson dated 15th August, 5th September, 24th October respectively, and, to the extent that it added anything to the reports, his recollection of his two inspections on 15th August and 2nd September 2002.

51.2. Mr King's very brief written and oral evidence as to what he saw on three occasions during August and up to 2nd September 2002, and a later visit in November.

51.3. The written and oral evidence of Mr Harding of his various inspections, including in particular his inspections on 15th and 22nd August 2002, 2nd September 2002, the 23rd September 2002, and 19th November 2002.

51.4 The written and oral evidence of Mr Nattress of his 3 inspections of the roof, including the last on 11th September 2002, 9 days after Mr Williamson's third inspection.

51.5. The written and oral evidence of Mr Rex Johnson, Blackhawk's roofing expert, as to his inspection on 19th November 2002.

51.6. The 13 photographs taken by Mr Williamson on 15th August and the 18 further photographs he took on 2nd September 2002.

51.7. The 38 photographs of the roof taken by Mr King in August 2002, very early on in the BrandClad works.

51.8. The 12 photographs taken by Mr Harding in August 2002, also early on in the BrandClad works.

51.9. The 22 photographs taken by Les Brooker of Blackhawk in September after the completion of BrandClad's works.

It will be seen at once that (other than a brief visit by Mr King in November) the only witnesses who saw the roof on completion of the BrandClad works were those called by Blackhawk, and the only photographs taken after completion were taken by Blackhawk's Mr Brooker.

52. In addition, I should mention two letters from Rooftec, who were of course the contractors involved in stripping off the repaired roof and putting on the new Kingspan roof. Those letters are dated 4.12.02 and 16.10.03. Nobody from Rooftec was called to give evidence and therefore they could not be cross-examined. The letters are brief summaries which, without the provision of drawings or other documents to assist their interpretation, seem to me to be of limited assistance. More importantly, the letters, written by two different people ten months apart, contain significant contradictions which, in the absence of oral evidence, I am quite unable to resolve. Very properly, Mr Wonnacott put one of these letters to Mr Nattress of BrandClad, who disputed much of its contents. Accordingly, whilst I do not dismiss these letters entirely, in all the circumstances, I cannot attach to them any significant weight, and, in areas of conflicting evidence, I prefer the evidence of Mr Nattress, who I considered to be an entirely honest and fair witness.

53. Those, then, are the only sources of the evidence relating to the roof in its repaired condition when the property was handed back to Riverside on 28th September 2002. Before analysing the disputes between the experts that arise out of that factual evidence, it is necessary first to consider the applicable principles of law.

[9] APPLICABLE PRINCIPLES OF LAW

54. Whilst I have to decide whether or not there was a breach of this covenant primarily by reference to the factual and expert evidence, it seems to me that I must take into account the following particular principles of law in reaching my conclusion:

54.1. A covenant "well and substantially" to repair does not require the tenant to put the property into perfect repair (Proudfoot v Hart [1890] 25 QB 42) or "pristine condition" (Commercial Union Life Assurance Co. v Label Ink [2001] L & TR 380).

54.2. The standard of repair is "that of an intending occupier of an industrial warehouse building, with modern construction, who judges repair reasonably by reference to his intended use of the premises": see Commercial Union, above. In that case, His Honour Judge Rich Q.C., sitting as a Deputy High Court Judge in the Chancery Division, rejected the landlord's surveyor's evidence because "his complaints were against a standard of perfection: what a pristine building should look like, not what was required by covenant to keep what had been a pristine building in good and substantial repair."

54.3. The objective test referred to above must take into account the reasonably minded incoming tenant taking a lease of Unit 4 on the same terms as the actual lease, including, in this case, a full repairing covenant: see paragraph 9-06 of Dowding & Reynolds on Dilapidations.

54.4. If there is a dispute between replacement, on the one hand, and repair, on the other, replacement will only be required if repair is not reasonably or sensibly possible: Ultraworth v General Accident Fire & Life Assurance Corporation [2000] 2 EGLR 115 and Dame Margaret Hungerford Charity Trustees v Beazeley [1993] 2 EGLR 143. In the latter case, the Court of Appeal upheld the decision by the trial judge that, whilst everyone was agreed that a

new roof was needed, the carrying out by the trustees of running repairs ensured that they complied with their repairing obligations in view of the age and character of the dwelling. I should add that, in this case, I do not consider that the words "where necessary" in the covenant either add or subtract from the principle identified above.

54.5. If there are two ways in which the covenant might properly be performed, the tenant is entitled to choose which method to utilise. Since the tenant is almost certainly going to choose the least expensive option, he cannot be criticised for so doing: see Ultraworth, above. That position is no different to the situation concerning a claim for defects under a building contract where proper remedial works can be carried out in one of two ways. All other things being equal, the cheapest option will be appropriate: see the judgment of His Honour Judge Hicks Q.C. in George Fischer v Multi Design and Others (1998) 61 CON LR.85.

With those principles in mind, I then turn to analyse the individual disputes between the experts.

[10] THE EXPERTS' DISPUTES – GENERAL

55. Various points were taken by each side about Mr Williamson (Riverside's expert) and Mr Johnson (Blackhawk's expert), in particular concerning their respective experience, qualifications and the like. With one important exception, I do not consider that those general points are of any real assistance: both men are extremely experienced in roofing matters and were at all times properly mindful of their duty to give objective opinion evidence for the assistance of the Court. The fact that, for instance, Mr Williamson did not inspect the works after the 2nd September is simply one of the factual matters that I will have to consider when looking at the individual defaults that are alleged.

56. The important exception to this general approach arises out of the point taken by Mr Dowding Q.C. in his Closing Submissions that, whilst Mr Johnson expressly addressed the question as to whether or not the roof was in good and substantial repair, Mr Williamson essentially embarked on a detailed critique of the design and performance of the BrandClad roofing work that led him to apply a much higher standard of criticism. In this way, Mr Dowding Q.C. argued, Mr Williamson did precisely what the landlord's surveyor did in Commercial Union, and wrongly set out his complaints against a standard of perfection. In my judgment, based on his reports and his answers in cross-examination, that important criticism is well-founded. I find that, from the outset, Mr Williamson was concerned to note each and every defect in the roofing works being carried out by BrandClad, no matter how theoretical, and that this approach led him not only to apply an unrealistic standard of perfection, but to make criticisms which were simply not fair or reasonable. In addition, I am in no doubt at all that the reason why Mr Williamson was obliged to adopt this approach was because of Mr King's decision, before they even started, that the BrandClad repair works were wholly unacceptable and the consequential lack of persuasive evidence of real problems with the repaired roof: see paragraphs 47-50 above.

57. One example given by Mr Dowding Q.C. of Mr Williamson's unreasonable criticisms was BrandClad's use of 'Fixfast' Fixings, which Mr Williamson criticised because they were not the 'SFS' type recommended by Eternit, the manufacturers of the replacement sheets. He maintained this complaint, even though the uncontroverted evidence was that Eternit had expressed itself to be entirely happy with the almost identical 'Fixfast' fixings that were actually used. Another example of what I consider to be Mr Williamson's unreasonable

approach was his complaint about the possibility of asbestos dust being created during the remedial works, by people walking on the roof, even if the roof sheets were not cracked or damaged. It was simply not explained how dust might be created if the sheets remained intact, and Mr Williamson admitted in cross-examination that this view was not supported by either the relevant HSE literature or Task Guidance Sheet A14. It was, in my view, an unreasonable criticism which arose because of Mr Williamson's application of an unwarranted standard of perfection to the BrandClad works.

58. Accordingly, whilst I set out below my analysis of the particular disputes between the experts and endeavour to deal with each on its own merits, it follows from the foregoing paragraph that, because I consider that Mr Williamson has not always applied the right test, whilst Mr Johnson has, there are certain instances where I am bound to conclude that Mr Johnson's evidence should be preferred.

[11] THE SHEETS THEMSELVES

59. It is clear that, from the beginning of this story in 1998, one of the particular concerns which Mr King had about the root was the fact that these sheets were made of asbestos cement and that such sheets are no longer manufactured or used for health and safety reasons. The contemporaneous documents show that Mr King wanted a new roof with new, asbestos-free sheets, and that was at least one of the reasons why the works at Unit 3 involved the stripping and replacement of a roof that was in apparently good repair. Mr King's concern about the asbestos in the sheeting carried over into his dealings with Mr Nattress before the BrandClad works were carried out: as set out at paragraph 33 above, Mr King was worried about asbestos dust being created as a result of the works.

60. Whilst Mr King may have been right to be concerned, as the owner of Unit 4, that the roof of the property was made up of panels of a type that were no longer manufactured or used, the mere fact that the sheets contained asbestos cement is, in respect of the dispute between the parties, neither here nor there. The fact that the sheets were made of asbestos cement cannot mean of itself that the roof was in disrepair. Neither was the fact that repair works were going to be carried out to the asbestos sheeting a reason to contend that those repair works would not put the roof into the covenanted condition. Mr Nattress explained how BrandClad would ensure that there would not be a problem with asbestos dust during the carrying out of the works. There is no evidence that there was in fact any such problem during or after the works: on the contrary, the asbestos survey carried out on 18th November 2002, after the original linings had been removed, found no asbestos in or around the property. Following the completion of the BrandClad works, there is nothing to suggest that the continued presence of asbestos in the original sheets which had not been replaced was, or could be, a reason for contending that Blackhawk were in breach of their repairing obligations. Accordingly, to the extent that it is said that the continued presence on the roof of the original asbestos cement roof sheets constituted a breach of covenant on the part of Blackhawk, I reject that allegation. I do, however, find that a desire to replace the original sheets was at least part of the reason why Riverside engaged Rooftec to carry out the stripping and replacement work in October 2002.

61. The only other point that arose in connection with the roof sheets themselves was Mr Williamson's suggestion that, despite the fact that the original sheets were only just over half way through their design life of 40 years, they were particularly fragile by 2002. However that is not what MKA said in the letter of 17.7.02, where they state that "the transverse strength of the asbestos cement sheeting actually improves" with age. That is consistent with

Mr Johnson's evidence, when he described them as "surprisingly robust". No tests had been carried out by Mr Williamson on the original sheets to support the contention that they were particularly fragile and certainly the Eternit literature does not indicate that they could be fairly so described. It is no part of any pleaded case that the retention of these original sheets meant that the roof was in disrepair because the sheets were particularly fragile, but to the extent that that is a suggestion advanced by Riverside, I reject it for the reasons set out above.

[12] THE WAY IN WHICH THE REPAIR WORKS WERE PERFORMED

62. Much of Mr Williamson's three contemporaneous reports, referred to above, concentrated on his criticisms of the way in which the works were being carried out. I have already made the point that I find it surprising that these matters were not drawn directly to the attention of Mr Nattress or BrandClad at the time, either by Mr Williamson himself or by Mr King. I set out below the eight individual criticisms made at paragraph 30 of Mr Wonnacott's helpful Closing Submissions, and deal with each in turn. What matters, of course, is not what the alleged bad practice was, but what its effect was or might have been on the actual condition of the roof.

62.1 Walking all over the roof

Everybody was agreed that it is good practice for the roofers, working on a roof of this sort, to work either from scaffolding, or on scaffold boards, or from access stagings which were placed on the roof. This was primarily a matter of health and safety. The photographs show occasions when that did not happen; when particular roofers from BrandClad were standing on the original roof sheets themselves, albeit with safety harnesses on. There was also evidence from both Mr Nattress and Mr Johnson, which I accept, that there are times when it is simply not possible to carry out the work without standing on the roof sheets. The principal reason why this practice is criticised is because it is extremely dangerous: roof sheets of this sort can give way without warning and standing on them can therefore lead to injury or death.

Mr Williamson took the point that, by walking on the roof sheets, the BrandClad employees would further damage those sheets. Whilst that is not the reason identified in the Codes of Practice for ensuring that the men do not walk on the roof sheets, I accept that that can happen. The relevant questions then become: were further roof sheets actually damaged here when the men walked on them and, if they were, were those damaged roof sheets replaced? There is no evidence that the foot traffic on the roof caused any additional damage. No cracking was heard or seen by anybody as a result of the foot traffic. Moreover, even if cracking had been caused as a result of such foot traffic, there was no evidence that BrandClad ignored the newly cracked sheets and did not replace them as part of the ongoing remedial exercise. There was one photograph of one very small crack taken on 2nd September, which was the entire extent of the evidence of cracking. There was no evidence of a single cracked sheet on this roof when the Lease was surrendered on 28.9.02, despite the fact that, as Mr Williamson admitted, he was deliberately looking for such cracks. Mr Harding said every damaged sheet was replaced by BrandClad. Accordingly, in my judgment, this is one of a number of occasions where Mr Williamson, and therefore Riverside, were obliged to concentrate on the potential for theoretical disrepair, rather than any evidence of actual disrepair itself. I therefore reject this criticism.

62.2 Using a screw gun without a depth gauge

It is clear that a depth gauge could have been attached to the screw gun and it was Mr Johnson's original evidence that he would be surprised if such a gauge had not been used in

this case. Mr Nattress accepted quite openly that such a gauge had not been used on this roof. The effect of this was that it increased the chances of screws being either over-tightened or under-tightened. There were two photographs, taken on the 2nd of September, which showed two screws which appeared under-tightened and one photograph of the same date showing a screw that had been over-tightened.

I accept that the absence of a depth gauge may well have led to a certain amount of under-tightening or over-tightening. However there was no evidence as to the extent of any such problem on this roof following the completion of BrandClad's work, and it is therefore impossible for me to find that actual disrepair resulted from the lack of use of a depth gauge. The 3 photographed examples from 2nd September are statistically insignificant, given that there were 2,500 such fixings on this roof. In addition, as I have already pointed out, Blackhawk invited Mr King to identify any items of snagging so that they could be carried out at no cost by BrandClad. Mr Williamson accepted that both over-tightening and under-tightening of the fasteners were precisely the sort of thing that one would expect to see remedied during snagging. Accordingly, I find that such works were either in fact carried out during the snagging period after Mr Williamson's inspection on 2nd September or could have been carried out if Mr King had accepted the invitation made by Blackhawk on 3rd October. Either way, there is no evidence of actual disrepair.

In his Opening, Mr Wonnacott suggested that the absence of a depth gauge might lead to the screws being driven in too hard, damaging the asbestos sheeting. There were two photographs which suggested that this may have occurred in two locations, both taken on 2nd September. Again, this was such a tiny proportion of the whole that I could not properly find that any significant disrepair resulted from this criticism.

62.3 Using an angle-grinder next to asbestos

One of Mr King's August photographs showed this occurrence. It is not a matter referred to in Mr Williamson's three reports. It does not appear to be alleged that any disrepair stemmed from this incident. It appears to be relied on by Riverside as demonstrating a lack of proper supervision of the BrandClad works. It may very well be that Riverside are right and that this particular grinding operation was not properly supervised but it does not seem to me that that could possibly be of any specific assistance to them in relation to their pleaded claim.

62.4 Using stagings that project over the purlin line

There was a dispute as to whether the stagings should properly be allowed to project over the purlin line. Mr Williamson's point was that if they did, there was an increased risk of cracking to the sheet on which the staging rested. Mr Nattress and Mr Johnson did not consider that having stagings projecting over the purlin line was anything out of the ordinary. This is one of those items where I believe that Mr Williamson's view was based on a counsel of perfection; it seems to me inevitable that, at least from time to time, stagings must go over the purlin line in order for the actual works to be carried out. In reality this point is linked to the criticism at paragraph 62.1 above, and to Mr Williamson's opinion, which I have already rejected, that any work on this roof would inevitably cause further damage to the roof sheets.

In any event, this point could only be relevant to the disrepair case if it could be shown that actual damage was caused to the roof as a result of the stagings projecting over the purlin line, and that such damage was not repaired before the Lease was surrendered. There was no such evidence. Mr Williamson accepted that he neither saw nor heard any such cracking when the stagings were being used. As previously identified under paragraph 62.1 above, there was no

evidence of any kind to indicate that roof sheets had been damaged as a result of the carrying out of these works or, if they had been damaged, that they had not then been replaced by BrandClad.

62.5 Installing new roof lights without the proper side stitching and fittings.
It was accepted that one roof light had been installed without the proper side stitchings and fixings, although there was a certain amount of debate – Mr Williamson called it "a dichotomy" - as to precisely how the installation should have been carried out. It was not at all clear whether this point could be extended to cover more than the roof light shown in Mr Williamson's photographs of 15th August 2002, and one photograph of 2nd September.

Mr Dowding Q.C. made the point that this was precisely the sort of thing which would be sorted out on snagging; to put it another way, if there were an inadequate number of fixings, additional fixings could easily be added. Mr Williamson accepted that. Since the problem was shown in photographs taken prior to completion, it is not known whether or not this problem was in fact rectified by BrandClad during their snagging work. Again, if it had not been, it could easily have been rectified pursuant to Blackhawk's offer of 3rd October 2002 and BrandClad's acceptance of a one-year defects liability period. The point does not, so it seems to me, add anything meaningful to the disrepair case.

62.6 Driving the old hook bolts into the roof using a hammer and screwdriver
Although there is no photograph of this, it is something which Mr Williamson said he saw happen on one occasion. Again, it does not appear to be suggested that this methodology was, of itself, evidence of disrepair, but it appears to be relied on as further evidence of the inadequate way in which BrandClad went about their works. I accept that the incident described by Mr Williamson constituted poor practice, but, once again, I cannot link that to any allegation of actual disrepair.

62.7 Laying new sheets without relaying the insulation below.
Mr Wonnacott realistically called this a "makeweight" point in Opening. As Mr Nattress made plain, roof insulation material was delivered to site and installed as part of the BrandClad works. However, it appears that, from one or two of Mr King's August photographs, there is at least one location where the old insulation had been swept up, revealing the lining below, and it does not look as if new insulation was going to be inserted prior to the installation of the replacement sheet.

It is impossible, on the basis of the evidence, for me to find that there was any extensive omission of insulation. Indeed, on the contrary, as a result of Mr Nattress' evidence, I find it probable that most of the replacement insulation was properly installed. There is no evidence for me to conclude that there was missing insulation such as to give rise to a breach of the repairing covenant.

62.8 Locking up the roof with an expansion joint fixed on both sides
Photograph I/90 shows one location where the expansion joint had been fixed on both sides. That was (and was accepted to be) an error: Mr Johnson called it "incompetent". There is no evidence that this was not sorted out during the BrandClad snagging work; again, if it had not been it could have been resolved in consequence of Blackhawk's offer of 3rd October 2002. In any event, there was no evidence that this caused actual disrepair. Accordingly, I reject this allegation as having anything to do with the essentials of Riverside's case on disrepair.

63. I have already made the point that there was a lack of clear evidence as to the actual condition of this roof on the 28th September 2002. I have also set out my conclusion that, in consequence of this, Mr Williamson was obliged to take a variety of theoretical points and to argue, on the basis of those, that disrepair was at least possible. In many ways, the unrealistic nature of the dilapidations claim which resulted can be illustrated by the eight complaints identified above. Even if Riverside could have proved each of these eight items as being breaches by BrandClad of their contract with Blackhawk, Riverside were wholly unable to identify any actual or significant disrepair caused by these breaches. In addition, since these items could have been cured during the snagging operation or the Defects Liability Period, at nobody's expense except BrandClad's, I conclude that the points can be safely categorised as theoretical criticisms unrelated to the reality of the physical condition of this roof on 28th September 2002. They do not support the allegation of breach of covenant.

[13] THE NEW FASTENERS

64. Introduction

Essentially, therefore, Riverside's case on disrepair came down to the use by BrandClad of topfix fasteners to replace the hook bolts all over the roof. This was Mr Williamson's principal point: that, for a variety of reasons analysed below, the topfix fasteners were a wholly inadequate replacement for the hook-bolts. It will be seen at once that this meant that Riverside's principal argument before me in support of their case that the roof should have been replaced, not repaired, was an event – BrandClad's choice of fixings - which had not even occurred when, in about June 2001, Mr King effectively decided that replacement of the roof was inevitable. To that extent, therefore, Riverside's case now is an *ex post facto* rationalisation of their long-held belief that the roof should have been replaced not repaired. Despite that, however, the question remains: did the use of topfix fasteners render the repaired roof in breach of covenant?

History

65. I have set out above some of the history in respect of the use of topfix fasteners on this roof. There is no doubt that there was a discrepancy in the documents concerning the precise fixings to be used, given Mr Nattress' letter of 10.5.02 which appeared to indicate that new hook-bolt fixings would be used in the old sheets, but whose quotation of the same date made it plain that the under-purlin plasterboard lining would remain in situ, thereby excluding the use of such hook-bolts, because they could only be installed from below. However, whatever the discrepancy, Mr Harding was clear that, before the work started, he was aware that BrandClad were going to use topfix fasteners for all the fixings on the roof and that he was entirely happy with that.

66. There was a suggestion in Mr Wonnacott's cross-examination of Mr Nattress on this point that, in some way, there was some advantage to Mr Nattress in indicating the use of hook bolts in his letter but actually using topfix fasteners in practice. However, the specifics of any such advantage were never made clear. There were, for instance, no comparative costings. In any event, it seems to me that, given the nature of Mr Nattress' correspondence and his quotation of 10th May 2002, he was positively specifying the type of fasteners to be installed by BrandClad on the roof, so that if they turned out to be inappropriate, BrandClad would have been in breach of their contract with Blackhawk, and would have been obliged to replace them with suitable fixings, at their own cost. In those circumstances, there would have been no advantage of any sort to BrandClad if the fasteners that they used had been unfit for their purpose; on the contrary, they would have been heavily penalised. The question then becomes: were the fasteners in fact unfit for their purpose?

The topfix fasteners themselves

67. It seems to me clear that the topfix fasteners that were used in the repair works were in themselves unremarkable. There was certainly nothing to indicate that they were in some way not of merchantable quality or, all other things being equal, unfit for their purpose. As noted above, Mr Williamson complained that the 'Fixfast' screws that were actually used were not precisely the type recommended by Eternit, the manufacturers of the replacement panels, but, as I have previously found, this was an example of Mr Williamson's counsel of perfection, given that the 'Fixfast' screws were effectively identical to the 'SFS' screw recommended by Eternit and given that Eternit themselves, in their letter of 18.11.02, made clear that they had no objection to the use of those particular fasteners. Accordingly, I do not find that the use of the topfix fasteners was, of itself, a decision which could be criticised.

The angle of the new fixings

68. Mr Williamson's principal criticism was that the topfix screws were designed to go into the centre of the purlin, whilst the holes in the original sheets were about 30mm up slope of the centre of the purlin, in order to accommodate the particular configuration of the original hook bolts. Accordingly, Mr Williamson was concerned that, in order to utilise these pre-existing holes, the topfix fasteners would have to be fixed at an angle (which had one set of adverse consequences) or would have missed the centre of the purlin (which would have had another set of adverse consequences). There appeared to be no dispute that, as a matter of theoretical calculation, for a topfix fastener to pass through existing holes in the sheets in precisely their original position, and engage the very centre of the purlin below, it would be necessary to incline the screw at an angle of 27 degrees. It was said on behalf of Riverside that such an angle would be unacceptable. I note that the calculation of the 27° angle was made, for the first time, by Mr Williamson in his oral evidence in chief: it was not set out in any of his 3 contemporaneous reports, nor in his Report prepared for this litigation. It is not, therefore, unfair to deem it as something of an after thought. In any event, in response to this point, Blackhawk advanced two broad defences: first, it was said that Mr Williamson had not taken into account the slippage of the roof panels over the years, which would have moved the holes closer to the centre of the purlins; and secondly, it was said that there were other matters which needed to be considered which meant that the 27 degree calculation was entirely theoretical, and bore little relationship to what happened in practice.

Slippage

69. Blackhawk's case was that, over the years, the roof sheets had slipped down the roof, meaning that the holes were inevitably closer to the centre of the purlins below. In my judgment, there can be no doubt that the roof sheeting had slipped during the 25 years it was in place. There was plenty of contemporaneous evidence of such slippage. It was a point made by Mr Nattress in his first report of 21.1.02; it was repeated in his letter of 10.5.02; and he made the point again in writing on 9.12.02. In his witness statement, he referred to a possible drop of about 30mm which, in his extensive experience, was not uncommon for a roof of this age. His evidence, that "most of the hook-bolts had rotated down the slope" was not challenged. In addition, I consider that it is plain from the photographs that some slippage has occurred.

70. Despite all this, Riverside contended that the sheets had not slipped and, to support this contention, Mr Wonnacott pointed to certain other photographs, which demonstrated that the original roof sheets were, generally speaking, in alignment. However, I consider that these photographs do not necessarily demonstrate that the roof sheets have not slipped; due to

the design and construction of the roof, it seems to me that, on the evidence I have heard, any slippage would be reasonably uniform. Furthermore, the amounts of slippage in question, namely 20 or 30 mm, are small and are therefore not easy to see in the photographs. Mr Williamson did not address the question of slippage in any of his reports, so there was very little material available to Riverside to counter Mr Nattress's evidence.

71. I therefore find on all the evidence, and in particular that of Mr Nattress, that the original roof had slipped and that the effect of such slippage was to move most of the existing holes in the sheets closer to the centre of the purlin. This would have had the effect of significantly reducing the angle of 27 degrees calculated by Mr Williamson during his oral evidence in chief.

Other matters

72. A variety of other points were taken by Mr Dowding Q.C. in support of his contention that the 27-degree calculation was, as he put it, "over-theoretical". They are set out at paragraph 18 of his Closing Submissions. It seems to me that the natural tolerances created in a roof that had been in situ for 25 years inevitably meant that the sort of calculation which produced the theoretical angle of 27° should be taken as a starting point, not as a conclusion. In particular, given the poor state of the original hook bolts, it seems to me very likely that some of the original sheets would have worked loose, enabling the holes to slip closer to the centre of the purlins without the sheets dropping.

73. Perhaps more importantly, I do not consider that, for the purposes of the dispute that I have to decide, it was somehow incumbent upon Blackhawk to ensure that every fastener went straight through the centre of every purlin. The purlin was 50mm wide. It seems to me that, provided that the screw fixings obtained sufficient purchase through the purlin, it matters not whether the screw was in the centre or slightly to one side or the other. I note exhibit DKN 6 to the statement of Mr Nattress which contained a sound fixing even in the location where the fastener did not pass through the centre of the purlin. If the topfix fastener passed through the upper half of the purlin, the 27° angle would again have been considerably reduced. Mr Williamson accepted in cross-examination that a good attachment was perfectly possible even if the fasteners were not in the middle of the purlin. He also admitted hat he had not taken any steps to test the extent to which the angle of the fastener might affect its performance. Furthermore, it is important to note that Mr Harding told me that topfix fasteners of this type were commonly used in conjunction with both asbestos-cement and cement-fibre roof sheets, which makes it inevitable that, on many occasions, they will have been installed at an angle: accordingly, it does not appear that the theoretical problems identified by Mr Williamson have operated elsewhere to prevent works identical to the Blackhawk scheme from being successfully carried out.

Configuration generally

74. The manufacturers' literature made it plain that fasteners of this type can go into the purlin at an angle of 15 degrees without adverse consequences. There was a suggestion from Mr Williamson that this did not relate to the particular type of fixings used here but I reject that. It seems clear to me that on the basis of the Drillfast literature and the Fixfast letter to Mr Johnson of 19.11.03, the 15-degree tolerance applies to both the fasteners and the FCW washers of the type used here. Given the facts and matters identified in paragraphs 68-73 above, and in particular the evidence of Mr Nattress, I conclude that the vast majority of the topfix fasteners would have been installed at an angle to the purlin of 15 degrees or less,

which was therefore an acceptable configuration. Again as Mr Williamson accepted in cross-examination, "in the real world, you do not get perpendicularity."

75. There was some evidence from Mr Williamson concerning the potential for water ingress if the fastener and washer were at an angle, because the washer would be over-compressed on one side and under-compressed on the other. He also indicated that the angle might cause the purlins to flex, which could lead to water penetration. Mr Johnson disputed these potential criticisms, emphasising that the neoprene washers were "enormously tough and flexible". Tellingly, in my judgment, Mr Johnson stressed that, in any event, there was no evidence of any actual water ingress following completion of the BrandClad repair works: again this demonstrated the theoretical (rather than actual) nature of M Williamson's complaints. This approach reached its apogee with the suggestion that fasteners installed at an angle would be vulnerable to bending and shear forces, for which they were not designed. In this respect, I accept Mr Johnson's evidence, that any such forces would be very small. I also note that, according to Fixfast, the fasteners and washers would be quite capable of functioning properly without any adverse consequences to the roof, provided that the angle was not greater than 15°. It appears from Mr Johnson's evidence that Fixfast did carry out some tests in this connection, although it is not clear precisely what they did. I have also reached a similar conclusion in respect of the suggestion that an angled fastener might compromise the normal expansion movement of the sheets. It was wholly unclear whether it was said that fasteners at 15° or below would have any adverse effect in this way; even if they might have done, I accept Mr Johnson's view that any effect would be "tiny". There was, again, no evidence of cracked sheets in consequence: there was, therefore, no evidence of disrepair. Mr Williamson's description of the result as "possible latent damage" only highlighted the absence of any evidence that any of these points had caused any actual damage to the roof.

Specific evidence of actual angle of fasteners

76. The limited specific evidence relating to the actual angle of the fasteners only supports the general conclusion that I have reached in paragraph 74 above, namely that the vast majority of the topfix fasteners actually went in to the purlin, at an angle of 15 degrees to the perpendicular or less, and were, therefore, entirely acceptable in any event. Mr Nattress said that "my inspections did not reveal fixings at incorrect angles." By 'incorrect', he confirmed he meant "in excess of 15°." As to the photographic evidence, Mr Wonnacott endeavoured to demonstrate misalignment by reference to two distant shots of the roof slopes which, he said, showed that the heads of the topfix fasteners were not aligned with the purlin below. This was an extremely unreliable guide since the photographs had not been taken with this point in mind and did not clearly show the alleged misalignment. The difficulties were compounded by the fact that the purlin itself was invisible, and Mr Wonnacott had to demonstrate the argument by reference to the dark filler material above the purlins under the roof lights, which filler strip was only half as wide as the purlin itself. For all these reasons, I do not consider that this exercise reliably demonstrated actual misalignment. Thus, the highest that Riverside can put it is that there are two photographs of two fasteners where the angles to the perpendicular are said to be 24° and 40° respectively. (The third is shown at 5° to the perpendicular, which is acceptable). There were 2,500 new fasteners on this roof. It is simply asking too much to expect the Court to conclude, on the basis of these two photographs, showing 0.1% of the total fasteners used by BrandClad, that there has been a wholesale failure to install them at 15 degrees or less. On the contrary, Mr Brooker's photographs taken in September and November 2002 – although not taken for this purpose - do not apparently demonstrate fasteners at angles <u>at all</u>.

77. There was a suggestion by Mr Williamson that many fasteners were not attached to the purlins at all. But in truth, the only evidence to support this is that there was one fastener (the one at 40°) which may not have been in contact with the purlin below. I find that there was no other reliable evidence of this alleged deficiency: as Mr Williamson admitted, it would always be obvious if the fastener was not attached at all. As Mr Johnson said, "it was not feasible that it [the fastener] went into thin air. It was too obvious. No fixing contractor would do it… you might get the odd one, but even that I would doubt." I accept that evidence, and reject the suggestion that, with the possible exception of the odd rogue fixing, this deficiency occurred on this roof.

78. Accordingly, on the evidence, the most that can be said is that, based on his inspections before the works had been completed and snagged, Mr Williamson was able to identify two fasteners which were at an unacceptable angle or which may not have made proper connection with the purlin below. As I have already noted, this is a tiny proportion of the total number of topfix fasteners installed by BrandClad. The evidence of the later photographs does not suggest that, on completion, this was a problem at all. Accordingly, it seems to me that whatever the theoretical position in respect of the works performed by BrandClad, in reality, the use of the topfix fasteners for this work did not create an actual problem on this roof. Their installation by specialist roofing contractors did not constitute a breach of covenant on the part of Blackhawk.

[14] CONCLUSION AS TO ACTUAL CONDITION OF THE ROOF

79. Accordingly, for all these reasons, I have concluded that there is no evidence that the roof was handed over to Riverside in breach of Blackhawk's covenants to repair. On the contrary, it seems to me that, in August 2002, the roof was capable of being repaired rather than wholly replaced, and the repair works carried out by BrandClad were sufficient to render the roof in substantial repair. It is not unfair to summarise the only evidence of real deficiencies in the BrandClad works, all shown in photographs taken prior to actual completion, as consisting of two fasteners at unacceptable angles, one tiny crack in one sheet, two fasteners undertightened, one overtightened and two sheets possibly damaged by overtightening. Such a miniscule number of properly evidenced problems with the BrandClad works only confirms the inevitable conclusion that I have reached that the vast bulk of the repair works in August/September 2002 were properly carried out. Furthermore, I find that any deficiencies following the completion of BrandClad's works were not only *de minimis*, but could, and would, have been rectified by BrandClad free of charge during the Defects Liability Period. It therefore follows that I find that the principal remaining item of the dilapidations claim against Blackhawk, for £87,522 in respect of the new roof, fails in its entirety.

[15] THE COSTS SCHEDULE

80. Although my findings set out above resolve the principal item of dispute between the parties, there is also a claim made by reference to various heads of cost incurred by Riverside. Mr Wonnacott contends, I think rightly, that, even if he was wrong on the principal roof item, it will not automatically mean that Riverside cannot recover at least some of the specific items of cost against Blackhawk. I therefore turn to deal with the items in the Schedule, setting out first three findings of principle in relation to these claims and then going on to address the individual claims, in four separate categories.

[16] PRINCIPLES RELEVANT TO COSTS CLAIMS

81. **Principle 1**

In order to be recoverable under Clause 22(b), the item of cost or expenditure must be incidental to the preparation and service of any notice or Dilapidations Schedule. If the reason why the item of cost or expense was incurred was unconnected with the preparation of a Dilapidations Schedule, such as the proposed early surrender of the Lease, then it does not seem to me that it can be recoverable under Clause 22(b) of the Lease.

82. **Principle 2**

The costs and expenses recoverable under Clause 22(c) are those incurred in connection with the enforcement of the repairing covenants. Accordingly, the work for which the cost or expense is claimed must be work which was connected to attempts by Riverside to compel Blackhawk to perform those covenants. That must mean in practice that the work related to the collection of information or advice which was then passed on to Blackhawk in an attempt to get them to comply with the covenants. Thus items of work which were performed on behalf of Riverside which went, say, to the preparation of reports which were never passed on to Blackhawk and about which they were therefore ignorant, cannot be costs incurred in connection with the enforcement of the covenant.

83. **Principle 3**

Mr Dowding Q.C. takes the point that the Consent Order of 18.9.03 limits the claims to claims "in respect of the roof works" which, he says, must mean the works carried out by Riverside following the surrender of the Lease. He therefore contends that any costs incurred prior to that date are not recoverable. I reject that submission. Firstly, it does not seem to me to be a fair reading of the Consent Order. But secondly, I do not consider that clauses 22(b) and (c) entitle Riverside to costs incurred in respect of Riverside's own works in any event, and therefore Mr Dowding's construction of the Consent Order would be tantamount to a finding that none of these fees and costs are recoverable in any event, which would be an absurd result, and plainly not what the Consent Order was intended to convey.

84. There are 15 separate invoices in the Schedule. However, they fall into four distinct categories: the claims made by MKA; the claims made by TMD; the claims made by DKM and DKR; and two miscellaneous claims.

85. **Category 1: The MKA Claims.**

85.1 **Invoice No. 1337 – 1.1.00**

This claim is for £680 plus £81 travelling expenses. It relates to the preparation of the very first MKA report. These costs are not recoverable under Principles 1 and 2 set out above. The content of the first MKA report was not used for the purposes of the Preliminary Schedule of Dilapidations that was being prepared at that time. Indeed, the Schedule was prepared before the report was completed. Neither was the report used to enforce the repairing covenants, since Blackhawk had taken advice the previous year from BRC and were, from then onwards, always aware that work was necessary to the roof. Furthermore, the report, having been prepared, was not sent to Blackhawk. In addition to all of this, I find that the reason for the commissioning of the first MKA report was the proposed early surrender by Blackhawk, a point which Mr King admitted in cross-examination. As he put it, "if Blackhawk had not approached us [about early surrender] we would not have commissioned this report". Costs incurred in connection with that proposed early surrender are therefore not recoverable under Clauses 22(b) and (c).

85.2 **Invoice No. 1601 – 17.4.01**

This claim is for £680 with £81.45 travelling expenses. It relates to the second MKA report. Prima facie, in accordance with the Principles set out above, it seems to me that these costs would not be recoverable. The second report was not used for the purposes of any Schedule of Dilapidations: indeed, its conclusions were too equivocal for TMD's requirements. Neither was it used to enforce the repairing covenants, since by the time it was produced to Blackhawk, Mr Harding had advised Blackhawk that some repair work to the roof was required. In addition, it seems to me that the only fair inference is that this report was being used for the purposes of the surrender negotiations. However, although these points would suggest that, prima facie, this item is not recoverable, there is a separate reason why, in all the circumstances, I allow the sums claimed under this item in full: see paragraph 85.4 below.

85.3 **Invoice No. 2221(23.7.02); Invoice No. 2247 (5.9.02); Invoice No. 2251(25.9.092); and Invoice No. 2264(29.10.02).**

These invoices are for varying amounts and relate entirely to the carrying out of the BrandClad works and the production by Mr Williamson of three reports, referred to above, in respect of those works. Such costs cannot be recoverable under Principle 1 above, because they do not relate to the Schedule of Dilapidations, and neither can they be recoverable under Principle 2 above, because they were not connected with any attempt by Riverside to get Blackhawk to comply with the repairing covenants. There are two separate reasons for this latter conclusion. First, the reports were not provided to Blackhawk and were not, therefore, used to get Blackhawk to comply with their repairing covenants. Secondly, since I have found that the Blackhawk works were, in all the circumstances, reasonable, I cannot find that these costs are recoverable since they were effectively incurred in an attempt to persuade Blackhawk that the works were unreasonable. I also note that Invoice No. 2221 of 23.7.02 is in respect of the MKA letter of 17.7.02 which I have referred to at paragraph 61 above.

85.4 **Reasonable allowance**

Having rejected the individual claims made in respect of the MKA invoices, I consider that Blackhawk must accept that it would, in other circumstances, have been reasonable for Riverside to have commissioned one report from MKA, at some time in 2002, to deal with the condition of the roof for the purposes of the Schedule of Dilapidations and/or to enforce the repairing covenant. I believe that such a position was inherent in some of Mr Dowding QC's cross-examination of Mr King and is admitted at paragraph 53 of his Closing Submission. Therefore, from all the MKA invoices, it would be reasonable to allow £680, and £81.45 travelling expenses (paragraph 85.2 above) to reflect this reasonable cost, making a total of £761.45. For the avoidance of doubt, I regard all other MKA costs as having been unreasonably incurred, which therefore constitutes a further reason why they are not recoverable.

86. **Category 2: The TMD Claims**

86.1 **Invoice No. 3321 (31.1.00).**

This claim is for £229.50. It relates to the early work done by TMD following Blackhawk's indication that they wished to surrender the lease early. I conclude on the evidence that the only reason for TMD's involvement at this stage was the early surrender of the lease and that these costs would not have been incurred but for that indication. Again, Mr King accepted that in cross-examination. The costs are therefore not recoverable pursuant to Principles 1 and 2 above.

86.2 **Invoice No. 4102 (1st Invoice of 30.9.02)**
This claim is for work done between January 2000 and January 2002. The sums claimed are £1,890 (being 14 hours at £135 per hour) and £110 by way of expenses. It is clear that most of the hours referred to here were spent in dealing with various aspects of the proposed surrender. Those elements are not therefore recoverable under Principles 1 and 2 above. However, it seems to me that at least a part of this cost would have been incurred in any event under Principle 1, namely the putting together of a Schedule of Dilapidations in anticipation of the expiry of the lease in September 2002. I assess a reasonable amount for that work (referable to the roof) at 4 hours. That would give rise to a recoverable amount of 4 x £135 = £540.

86.3 **Invoice No. 4103 (2nd Invoice of 30.9.02)**
This claim covers the period between January 2002 and 16th April 2002. It claims a total of £2,092.60 (being 15.5 hours at £135 per hour) and travelling expenses of £72. Again, it seems to me that the bulk of these costs are not recoverable under Principles 1 and 2 set out above. This is because much of the relevant work appears to be concerned with dealing with – and complaining about - the work to be carried out by Blackhawk. However, it seems to me that a proportion of this claim would be recoverable because it was incidental to the ongoing work on the Schedule of Dilapidations. I would therefore allow a further 4 hours at £135, namely £540, and I would allow the travelling costs of £48, making a total of £584 in respect of this item.

86.4 **Invoice No. 4158 (28.11.02)**
This claim covers the period between 16th April 2002 and 28th November 2002. The vast bulk of this work is in relation to the Blackhawk works and I do not see that those costs could be recoverable under either Principle 1 or Principle 2 above. Furthermore, I do not think that there is any further allowance to be made for work on the Schedule of Dilapidations in respect of the roof, since I have already made allowance for that work under paragraph 86.2 and 86.3 above. I therefore do not see that any part of this TMD invoice is recoverable under Clauses 22(b) or (c).

86.5 **Reasonable allowance**
Again for the avoidance of doubt, I consider that, apart from the items that I have allowed in paragraphs 86.2 and 86.3 above, the other TMD costs were unreasonably incurred and therefore not recoverable in any event.

87. **Category 3: The DKM/DKR Invoices**
General

87.1 As set out in paragraph 6 above, DKM and DKR were ostensibly the managing agents for Firstpark and Riverside respectively. However, their contracts were not in writing; precisely the same people were directors of both Firstpark/Riverside and DKM/DKR; and DKM and DKR were already being remunerated for their managing agent's function by reference to a percentage of the rent. In those circumstances, I approach these claims by DKM and DKR for additional fees with considerable caution.

87.2 Mr Dowding Q.C.'s first point was that the relevant clause of the Lease envisages actual expenditure and that, since there was no actual expenditure on DKM and DKR, these sums cannot be recovered. I do not agree with that submission: it seems to me that the claims

in respect of DKM and DKR are claims for in-house services which, subject to proper evidence of causation and loss, are recoverable in law as a matter of principle. In support of his submission that these costs were recoverable, Mr Wonnacott relied on Tate & Lyle Food & Distribution v GLC [1982] 1 WLR 149. That decision confirmed that, in a damages claim, the plaintiffs could recover damages for their managerial and supervisory expenses directly attributable to the defendant's default. I see no reason to distinguish between the rules relating to the recovery of damages and Riverside's claim for recovery under the express terms of the lease. However, in Tate & Lyle the claim failed because the plaintiffs had kept no records of the time expended and the claim could not therefore be quantified. As we shall see, I consider that the same deficiency applies to the DKM/DKR claims here.

87.3 **Invoice No. DKM/97256**

This claim is for £3,055. It relates to a period of 29 months between August 1999 to 15th January 2002. It is effectively Mr King invoicing himself, even though the invoice was of course sent to Firstpark, who shared an office with DKM. In my view no part of this invoice is recoverable against Blackhawk. There are three separate reasons for that. First, there are no time records whatsoever to support the 16 hours 40 minutes identified as having been expended over the 29-month period. Mr King admitted that he did not keep such records and to do so "would have taken a huge amount of time". The claim therefore fails to clear the obstacle identified in Tate & Lyle. Secondly, I have seen nothing to demonstrate how and why this claim could be recoverable in addition to DKM's percentage recovery as managing agents. The circumstantial evidence is that Mr King did not at the time consider that these sums were recoverable from Blackhawk; if he had, he would have not waited 29 months before making a claim. Thirdly, it seems clear to me that the reason for the incurring of these charges was the proposed early surrender by Blackhawk. These costs were not incurred, and are not said to have been incurred, in relation to a Schedule of Dilapidations or to enforce the repairing covenants. In any event, if they had been so incurred they would have duplicated the costs that I have allowed above. I therefore reject the claim in respect of this invoice in its entirety.

87.4 **Invoice No. DKM 97279 (16.4.02).**

This claim is for £2,467.50. It relates to the period between 15th January 2002 and 16th April 2002. It seems to me that, as a claim, it suffers from all the deficiencies noted under paragraph 87.3 above. It seems largely concerned with Mr King's attempts to prevent Riverside from carrying out the very works which in fact put this roof into proper condition. It has nothing to do with the preparation of a Schedule of Dilapidations or compelling Blackhawk to comply with their repairing covenants. In addition, there are no time records of the sort necessary if this sort of internal cost is to be recovered. I therefore reject this item of claim.

87.5 **Invoice No. 9038 (29.11.02)**

This invoice covers the period 16.4.02 to 29.11.02. Again, I find that these sums were not incurred in respect of a Schedule of Dilapidations or in an effort to enforce the repairing covenants; indeed, as previously noted, they were actually an attempt to prevent Blackhawk from carrying out appropriate repair works. They are therefore not recoverable. There are no proper records to allow recovery in any event. In addition, the calculation of the claim actually made, based on a percentage of the cost of all the works to be carried out, seems to me to be entirely arbitrary and far removed from the principle in Tate and Lyle.

88. **Miscellaneous Claims**

88.1 **Vincent Maintenance Services**
This invoice is dated 26.3.01. It is in the sum of £56.60. It is in respect of the provision and erection of a ladder to allow access to the roof of Unit 4 in March 2001. It seems to me that at some stage it would have been necessary for access to have been provided to the roof to allow TMD to carry out a Schedule of Dilapidations. In those circumstances, I allow this item in the sum of £56.60.

88.2 **Davenport Lyons**
This is the claim in respect of the remaining part of the Davenport Lyons invoice in the net sum of £2,750. It seems to me that in accordance with the Principles noted at 1 and 2 above, certain parts of the original invoice would have been recoverable. In this connection, I note that Blackhawk have in fact paid £500 in respect of those part of these costs that relate to a Schedule of Dilapidations and £2,500 in respect of legal advice relating to the actualities of disrepair. In addition, I have no doubt that some of the elements within the original invoice were not recoverable under Principles 1 and 2. Thus, given the fact that a substantial payment has already been made, and there being no evidence that would allow me to conclude that any claim within the Davenport Lyons invoice which was properly recoverable under Clauses 22(b) or (c) was not included or allowed for in that payment, I reject any further claim in respect of this invoice.

89. Accordingly, it will be seen that I reject all of the claims made in the Schedule with the exceptions of the sums referred to in paragraphs 85.4, 86.2, 86.3 and 88.1 above. The total of those four items – which relate principally to MKA and TMD - is £1,942.05. That is therefore the amount that I consider was due from Blackhawk to Riverside in respect of the Schedule of Costs. However, in April 2003, Blackhawk paid Riverside £500 in respect of MKA and £3000 in respect of TMD, and it is submitted that 50% of this figure (£1500) should be attributed to the roof claim. I consider that, on all the evidence that I have heard, that is a proper apportionment. Therefore, since Blackhawk have paid £2000 already in respect of MKA and TMD, no further sum can now be due to Riverside in respect of these items.

[17] CONCLUSIONS

90. For the reasons set out above, I dismiss Riverside's principal claim in respect of the roof works in its entirety. In relation to Riverside's claim based on the Schedule of fees and costs, I reject the majority of those items for the reasons previous noted. Although I consider that the total sum of £1,942.05 was due from Blackhawk to Riverside, this sum had effectively been paid by Blackhawk prior to the commencement of this action. I therefore dismiss the claim based on the Schedule of fees and costs, and give Judgment for the Defendants.