Case No: H10CL015

IN THE COUNTY COURT AT CENTRAL LONDON
BUSINESS AND PROPERTY LIST

Thomas More Building
Royal Courts of Justice

Date: 18/06/2021

Before :

HHJ PARFITT

- -

Between :

S. FRANSES LIMITED	**Claimant**
- and -	
THE CAVENDISH HOTEL (LONDON) LIMITED	**Defendant**

- -
- -

Joanne Wicks QC (instructed by **David Cooper & Co**) for the **Claimant**
Wayne Clark (instructed by **Maples Teesdale llp**) for the **Defendant**

Hearing dates: 24 to 27 May 2021

- -

Approved Judgment

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

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HHJ PARFITT

HHJ Parfitt :

1. The Claimant is a textile dealership and consultancy specialising in antique tapestries and textile art whose premises are at 80 Jermyn Street, London SW1 ("the Property"). The Property is on the south east corner of Jermyn Street and Duke Street and is part of the Cavendish Hotel building. The Defendant is the Claimant's landlord and owns and runs the hotel. The Claimant holds the Property under two separate leases whose contractual expiry date was 2 January 2016. The Claimant sought new leases under Part II of the Landlord and Tenant Act 1954 ("the 1954 Act") by notice dated 16 March 2015. In these proceedings, the Claimant seeks to obtain those new leases. The Claimant's right to such leases was dealt with as a preliminary issue and was resolved by the Supreme Court in favour of the Claimant (S. Franses v The Cavendish Hotel (London) Ltd [2018] UKSC 62). This judgment addresses the remaining issues between the parties.

2. Those issues are: (a) four disputed lease terms; (b) the new rent; (c) the interim rent.

3. I have had the benefit of written skeletons and closing notes and compelling advocacy from two excellent counsel, Ms Wicks QC for the Claimant and Mr Clark for the Defendant.

4. Counsel also took me on a site visit to the Property during which we walked down Jermyn Street and saw a number of the properties referred to by the expert valuers, Mr John Buckingham for the Claimant and Mr Luke Holland for the Defendant.

5. I also heard evidence from Mr Simon Franses, a director of the Claimant and Mr Christian Desira, a vice president of the Ascott Group, of which the Defendant is part and who has overall responsibility for business development and investment performance of the European division of the Ascott Group. In so far as their evidence was relevant I address it when dealing with the issues below.

6. This judgment contains the following sections:

   i) A general factual background relevant to all issues.

   ii) The Law.

   iii) The Lease Issues.

   iv) The Rent Issue.

   v) The Interim Rent Issue.

   vi) Conclusion.

Factual Background

7. The Property has a *sui generis* planning restriction: *mixed use comprising retail, depository, research centre, archive library, consultancy, publishing and conservation for historic tapestries, textile art and carpets*. This *sui generis* grant is explained by Mr Franses in his witness statement as consequent upon the St James's area having been designated a Special Policy Area so that the unique combination of

private members' clubs, art galleries and niche retailers can be protected. The *sui generis* grant also reflects the nature of the Claimant's business which is also explained by Mr Franses in his witness statement. In summary, the Claimant offers expertise of the highest level in a niche area of the art market – fine and historic textile art.

8. The Property consists of a ground floor and basement. The Jermyn Street frontage is level but the Duke Street frontage runs downhill. The entrance door is on the corner and leads to a reception area running parallel to the Jermyn Street frontage with substantial exhibition / showroom space through a doorway off to the right. There is a stairway down to the basement area which is subdivided into a number of rooms used variously for storage, as office space and a smaller showroom area. The basement area is well over half of the total space occupied and the Zone A space agreed upon by the experts (that with the best retail value) represents some 14% of the whole.

9. The Property is split across two leases, referred to by the parties as the Principal Underlease and the Supplemental Underlease. The Principal Underlease covers most of the ground floor (1357/1418 sqf) and just over half of the basement (1507/2767 sqf).

10. The disputes in this case relate to those two leases separately. However, the Principal Underlease is the main battleground. The Supplemental Lease is in agreed terms and the level of its rent and interim rent will be far below that of the Principal Underlease.

11. The context within which the decisions on rent and interim rent are taken in this case include the impact of the Covid 19 pandemic. It is common ground between the experts that Covid 19 has impacted the Jermyn Street rental market so that both experts, in supplementary reports, have made a substantial reduction on their rent estimates for the new lease. This difficult market is demonstrated by the some 11 or 12 vacant retail premises in Jermyn Street at this time.

12. In addition the Claimant's expert considers that Covid 19 has accelerated changes in the market for Jermyn Street type properties which was already falling from a peak in 2016. I consider these market factors in more detail when discussing the expert evidence relevant to the rent dispute.

13. It has been agreed that the leases are to be for 15 year terms (the maximum term under the 1954 Act) with 5 year rent reviews and no break clauses.

The Law

14. The law and principles set out in this section were common ground between counsel.

The Law: (1) Terms

15. Section 35 of the 1954 Act states:

> "Other terms of new tenancy.
> (1)The terms of a tenancy granted by order of the court under this Part of this Act (other than terms as to the duration thereof and as to the rent payable thereunder),

including, where different persons own interests which fulfil the conditions specified in section 44(1) of this Act in different parts of it, terms as to the apportionment of the rent, shall be such as may be agreed between the landlord and the tenant or as, in default of such agreement, may be determined by the court; and in determining those terms the court shall have regard to the terms of the current tenancy and to all relevant circumstances.

(2) In subsection (1) of this section the reference to all relevant circumstances includes (without prejudice to the generality of that reference) a reference to the operation of the provisions of the Landlord and Tenant (Covenants) Act 1995. "

16. The operation of this section was addressed in O'May v City of London Real Property Ltd [1983] AC 726. Mr Clark summarised the guidance given by the House of Lords as follows (save that I have removed a sentence from Mr Clark's second bullet point) and I agree with this summary:

"The House of Lords made it clear that, inter alia:

(i) To "*have regard to the terms of the current tenancy*" within s.35 indicated that there was an onus on the party seeking change from the terms to justify the change. Lord Wilberforce stated that the reasons had to be sufficient, relying on the words Denning LJ in ***Gold v Brighton Corporation*** [1956] 1 WLR 1291 at 1294 that there had to be "strong and cogent evidence". (747G – H)
(ii) A mere increase or reduction in the rent payable does not of itself justify the change.
(iii) It is the court not market forces which determines the terms of the tenancy. As Lord Wilberforce stated "… *There is no inherent necessity why the terms on which existing leases are to be renewed should be dictated by those of fresh bargains which tenants may feel themselves obliged to accept*." (748 G – H) As Lord Hailsham made clear, subject to having regard to the terms of the current lease, "*the discretion of the court is of the widest possible kind, having regard to the almost infinitely varying circumstances of individual leases, properties, businesses and parties involved in business tenancies all over the country*." (741D – E).
(iv) However, this did not mean that the court would "petrify" the terms of the lease. If the terms of the current tenancy were obsolete or deficient, the court would consider that an adequate reason for change.
(v) Ultimately the issue was one of essential fairness as between landlord and tenant (Lord Hailsham at 741D; Lord Wilberforce at 747H).

But the reasons for change must be justified. As Lord Hailsham said:

"*But I do believe that the court must begin by considering the terms of the current tenancy, that the burden of persuading the court to impose a change in those terms against the will of either party must rest on the party proposing the change*….."(at 740G)"

17. Ms Wicks emphasised by reference to Charles Clements (London) Ltd v Rank City Wall Ltd [1978] 1 EGLR 47, Goulding J at 49 that a proposed change to the lease by the landlord, said to be of benefit to the tenant but likely to increase the market rent,

would be outside of the fairness requirement since it would impose an additional financial burden on the tenant's business.

18. In short the court's powers will generally fall to be exercised, as here, on terms which the parties have been unable to agree. Absent such agreement, the court should only make a change to the bargain represented by the existing lease if it is satisfied that fairness requires it.

The Law (2): The New Rent

19. Section 34 of the 1954 Act states:

> "The rent payable under a tenancy granted by order of the court under this Part of this Act shall be such as may be agreed between the landlord and the tenant or as, in default of such agreement, may be determined by the court to be that at which, having regard to the terms of the tenancy (other than those relating to rent), the holding might reasonably be expected to be let in the open market by a willing lessor, there being disregarded—
>
> (a) any effect on rent of the fact that the tenant has or his predecessors in title have been in occupation of the holding,
> (b) any goodwill attached to the holding by reason of the carrying on thereat of the business of the tenant (whether by him or by a predecessor of his in that business),
> (c) any effect on rent of an improvement to which this paragraph applies…"

20. The valuation date is 3 months and 21 days after the final disposal of the issues, which the parties agree is likely to mean a date in September or October 2021. As a matter of settled practicality the court will determine the rent at the date of the hearing but having regard to evidence pointing toward relevant market changes likely to occur by the valuation date (Lovely & Orchard Services Ltd v Daejan Investments (Grove Hall) Ltd [1978] 1 EGLR 44).

21. The willing lessor and willing lessee envisaged by the 1954 Act are hypothetical abstractions and do not share characteristics or personal circumstances with the actual landlord and tenant or any actual landlord and tenant (FR Evans (Leeds) Ltd v English Electric Co Ltd (1978) P & CR 185, 189). This process addresses the disputed rent issue by taking the subject property, the actual market (a matter of evidence) and the actual new lease terms (as agreed between the parties or decided by the court) and so determining a market rent for the lease for the property rather than a rent which flexes because of a particular characteristic of any actual landlord or tenant. Subject to the disregards stated in section 34, it is the characteristics of the property and the lease which determine where in the market the rent falls, not imagined characteristics of the hypothetical participants in the process by which the court determines the figure.

The Law (3) Interim Rent

22. The relevant section of the 1954 Act is section 24D. This states:

> "24D(1) The interim rent…is a rent which it is reasonable for the tenant to pay while the relevant tenancy continues by reason of section 24 of this Act.

> (2) In determining the interim rent under subsection (1) above the court shall have regard –
> (a) to the rent payable under the terms of the relevant tenancy; and
> (b) …[irrelevant]…
> but otherwise subsections (1) and (2) of section 34 of this Act shall apply to the determination as they would apply to the determination of a rent under that section if a new tenancy from year to year of the whole of the property comprised in the relevant tenancy were granted to the tenant by order of the court.

23. The operation of this section was discussed and explained in Humber Oil Terminals Trustee Ltd v Associated British Ports [2012] EWHC 1336 (Ch), Sales J at [153] to [159] and [181]. Both counsel have summarised the consequences of this decision as meaning (in my logical order): the court must (1) identify the rent for a tenancy from year to year using the section 34 method (2) consider whether any modification might be required because of the rent level under the prior tenancy (most often but not exclusively where a tenant should be protected from a sudden substantial increase in rent by "cushioning") and (3) ensure that the determined rent is one that is reasonable for the tenant to pay bearing in mind the benefit conferred.

24. It was common ground that so far as (1) is concerned the relevant date to determine the "from year to year" valuation is the date following the expiry of the existing tenancies (here 3 January 2016) and that only circumstances within the contemplation of the hypothetical parties at that time can be taken into account (Humber Oil at [181]).

25. It was also common ground that in considering the overarching question of the rent which it is reasonable for the tenant to pay while the tenancy continues, the scope of the court's enquiry would not be limited in time to the notional contractual date.

26. It is disputed between the parties as to whether or not any adjustment is required to the interim rent determination to take account of the limited use the Claimant was able to make of the Property during the lockdown (an expensive storage facility) and otherwise the impact of Covid 19 on the "benefit conferred" aspect of the Humber Oil analysis.

The Lease Issues

27. Clause 1 The Defendant, for the sake of eliminating uncertainty, wishes to include within the description of the grant under the lease the words I underline: "…all that…shop…which includes…all Alterations and additions (whether undertaken prior to or during the term) to….the demise). The Claimant says that this is unimportant but there is no good reason for making the change and so it should not be done. I agree with the Claimant. "alterations and additions" presuppose matters which will have been added to the grant after the demise (which is the grant under the new lease) and so the Defendant's change in the wording is both unnecessary and confusing.

28. Clause 2.6 This was a late entry which I allowed the Defendant to raise at trial. The Defendant wants to remove from clause 2.6 the right of the landlord to enter the premises to make improvements. This was supported by Mr Desira's evidence that the landlord had no intention of carrying out such improvements during the 15 year term and so it would benefit the tenant if it was removed. The variation of the clause

is likely to increase the rent payable under section 34 (albeit not by much). I am told by Ms Wicks that this provision had some traction during the preliminary issue dispute because Mr Justice Jay's order would have sent the case back to the County Court for consideration of whether the landlord's proposed works could be carried out within this permission. Mr Clark says the Claimant's concerns are misplaced because following the Supreme Court's decision little short of demolition would assist the Defendant. I see no good reason for the change and agree with the Claimant's reasons for concern.

29. Clauses 4.2 and 6.1(a) The Defendant wants to make the following additions to the insurance arrangements otherwise agreed between the parties. I will take each in turn:

i) *…or payment of the policy monies refused in whole or in part on account of…*I refuse this because I do not see the need for the exception. This part of the clause is dealing with circumstances in which the landlord would not be in breach of its insurance obligation. The existing exception is where the policy otherwise instigated by the landlord is vitiated by an act of the tenant. The proposed wording extends this to circumstances where payment is refused but unless the policy is vitiated the relevant contract of insurance is still in place and the landlord is not in breach of the obligation to insure.

ii) *…or cover cannot reasonably be placed on the London Insurance Market with a reputable insurer at reasonably commercial rates or on reasonably commercial conditions or because such cover is not available at all…* I agree with the Defendant that this addition is appropriate. It makes the clause consistent with the agreed definition of "uninsured risk" at clause 6.2 which uses the same language. If the agreed lease envisages circumstances in which the landlord withdraws cover because it is not reasonably available then I cannot see why it is not fair (not least because it removes a possible ambiguity) to make express that possibility within clause 4.2. This does not qualify the landlord's obligation any further than is already recognised within the lease.

iii) *…75% or more of…*The Defendant wants to limit the concept of the demised premises being "unfit for occupation and use" to only 75% or more of the demised premises being unfit for occupation and use. I was sceptical of this during Mr Clark's oral submissions because it struck me as adding confusion and potential dispute into the new lease. The advantage with the existing drafting is that it enables the assessment of unfitness to flex with the particular circumstances which occur. This is consistent with clause 6.3(a) which enables "a fair and just proportion…[of the rent]…according to the nature and extent of the damage…" to be suspended. The problems with putting a line in the sand in circumstances of this kind include (i) arguments as to whether the 75% limit is reached; (ii) the lack of any logical justification for 75% rather than any other particular % such as 65% or 80% etc.; (iii) the necessary unfairness of the situation which falls just below the line drawn (e.g. 74%) without any concomitant advantage by having such a line; (iv) the various examples discussed in argument – Ms Wicks' being the best: what if only the door was damaged so that nobody could access the premises – which would likely render the premises unfit for occupation and use but would not meet the 75% threshold. I agree with the Claimant that this change should be refused.

30. Clause 7.1(c) The Defendant seeks to add to the disregards on any rent review any works done by the Claimant during the term of the previous lease. This appears peculiar to me because the agreed terms of the rent review include an agreed zoning of the current space. It would seem to follow that so far as the existing premises are concerned the parties have agreed a valuation method which would preclude any diminution arising out of work done prior to 3 January 2016 save for the theoretical only possibility – such works playing no part in the current rent valuation dispute – of it being argued there needs to be a below the ITZA line adjustment notwithstanding the agreed zoning because of works already done. This seems too speculative to make it a fair addition to the otherwise agreed wording and would appear to cut across the commercial benefit in agreeing the zoning in Appendix A.

31. Mr Clark argues that it is right to bring the rent review in line with section 34 of the 1954 Act. I disagree. Improvements are dealt with at clause 7.1(e) of the proposed lease but also I do not follow the need or benefit of aligning the rent review provisions with section 34. It does not appear to me to be relevant to whether it would be fair to include this provision in the lease. I reject this proposed addition.

The Rent Issue

32. The court needs to fix rents for the Principal Underlease and the Supplemental Underlease. I have kept that distinction in mind but for ease of comparison in certain instances have used aggregate figures.

33. I have had the benefit of expert reports from Mr Buckingham of 28 September 2020 ("JB1") and Mr Holland of 29 September 2020 ("LH1"). Mr Buckingham provided a supplemental report of 16 December 2020 ("JB2") and both experts provided supplemental reports dated 7 May 2021 ("JB3" and "LH2"). Both counsel made valid criticisms of the other side's expert evidence in their closing submissions, which I address in detail below, but it is right to recognise that the court's task has been made much easier by the experts' work agreeing the zoning for the Property (both the allocation of actual space to zones and the divisors) and in providing the court with a spreadsheet identifying the disputed issues and structured so that the court's resolution of those issues can produce the relevant rental figure.

34. It is common ground that the rent assessment is to be based on the zoning methodology described by Lewison J in Marklands Ltd v Virgin Retail Ltd [2004] 2 EGLR 43, Ch [10] to [11].

35. I start with a summary of the valuers' evidence in so far as it is material to the rent issues between them and then address the systematic criticisms that are made about both experts before turning to the particular valuation issues.

John Buckingham Evidence Summary

36. JB1 sets the Covid scene for the valuation and then identifies the lack of any comparable transactions to evidence that impact of direct relevance to the Property. The pre-Covid position is illustrated by four 2019 comparables (with a Zone A range of £356 to £318 and an average of £325) but these are said to be unhelpful. JB1 identifies 77 Jermyn Street ("77JS") as a similar property to the Property – it is on the same junction on the South West side and is also ground floor and basement with long

double frontage. 77JS has been on the market for two years quoting £595,000 pa but has not been let. JB1 assumes that a market rent for 77JS in 2019 would have been £450,000 pa (i.e. some 75% of the asking rent) and on that basis calculates a zone A rate for 77JS of £220. That £220 is then adjusted upwards to make it more comparable with the Property to £240. The £240 zone A figure is then used as the starting point to produce a pre-Covid valuation of the Property, which after discounting for restricted user, alienation and landlord entry rights (i.e. particular lease terms), provided a pre-Covid total rent figure of £174,000 which was then given a 30% Covid discount to produce a final figure of £122,000 pa but which did not take into account a rent free period (addressed in paragraphs 148 to 155 of JB1) estimated at 18 months.

37. JB2 was concerned only to address an error regarding the valuation date for the year to year tenancy relevant to the interim rent issue.

38. JB3 started by providing a general Covid retail market update which, it said, was reflected in the 11 / 57 vacant premises on Jermyn Street, which included the 9 units identified in JB1. A generally negative view on Jermyn Street retail was also said to be reflected in the redevelopment plans for the plot including the North West corner of the same junction as the Property – losing one retail unit to office related space. JB3 refers to 3 vacant Jermyn Street properties where the current quoting rent is between 22% and 33% lower than pre-Covid actual rents. Since the first report there had been a lease renewal at 95 Jermyn Street ("95JS"). The agreed rent for 95JS was the higher of £69,000 pa or 15% of net turnover (a drop of 32% on the previous rent – which was set in 2012 as no change from 2007; or 46% on what Mr Buckingham estimates a rent review might have reached in 2017 had the landlord not missed a notice date). JB3 analyses 95JS as having a zone A rate of £183.85. At paragraph 45 of JB3 this zone A figure is uplifted to £200 for comparison purposes because of the possibility of turnover producing a higher rental at 95JS and then at paragraph 46, JB3 posits a £200 zone A figure as the likely achievable rental figure for the available units in Jermyn Street. The £200 psf zone A figure is then brought into the analysis of the Property with various adjustments leading to rental figure of £96,500 pa.

39. I note, because I consider it relevant to my conclusions about Mr Clark's criticisms of Mr Buckingham's analysis set out below, that the categories of adjustment used in JB1 (with its starting point of a pre-Covid zone A of £240) are about adjusting relative to 77JS and that the categories of adjustment used in JB3 (a post-Covid starting point zone A of £200) adjust relative to 95JS.

40. I also note that if the concluded figure in JB1 is given the same rent free adjustment as used in JB3 then the difference in the two reports is only £1,100 pa.

Luke Holland Evidence Summary

41. LH1 identifies Jermyn Street comparables over the period from 29 January 2016 to 25 December 2019. The zone A range is £351 to £321 (which are also the earliest and latest figures respectively). From paragraph 8.40 there is a discussion about the current market, starting with 9/66 units being available. LH1 puts forward an open market zone A rate for the Property of £331 because this is at the higher end of the figures for the last quarter of 2019. LH1 then discusses various discounts to be applied because of the Property and/or the intended lease. In order to deal with

Covid, LH1 proposed a total rent free period of 18 months (inclusive of the 3 month rent free period to be applied outside of Covid issues) spread over 10/15 years of the term. This produced a final figure of £226,500. The overall Covid discount was about 15%.

42. LH2 starts with general and inconclusive commentary about the current market and then commented on the decision in a 1954 Act rent dispute case regarding a WH Smith site in Westfield and gave an update about 77JS, which included part of that premises being subject to an offer with a zone A region of £200 which was said to be of limited assistance but showing some tenant demand and of a similar level to 95JS. Mr Holland's firm had been instructed on 103/105 Jermyn Street which the report said had attracted "good interest" at a rate which was between 25% and 35% less than pre-Covid levels. A similar figure was identified for the marketing of a property at 75a Jermyn Street, with an adjusted zone A figure of £239 which at paragraph 2.70, Mr Holland adjusts down to £215.19 to reflect the terms which 75a Jermyn Street might be let at. From paragraph 2.72 LH discusses 95JS and analyses it as having a zone A of £229.74 which after discounts leads to a figure of £66,294 pa. LB3 makes reference to a letting at 6 Duke Street and then balances various factors to arrive at a post-Covid zone A relevant market range of £200 to £230 and then adopts £230 as the appropriate starting point in line with the 95JS analysis. This, with Mr Holland's adjustments and discounts, leads to a revised annual rent figure of £174,750.

The Experts Undermined

43. Mr Clark established through cross-examination and submission that Mr Buckingham's approach in JB1 was flawed. I can summarise what were a range of criticisms by identifying that JB1 addressed the problem of there not being an appropriate post-Covid comparable by identifying 77JS as an unlet property which could have been such a comparable and then without any evidence other than Mr Buckingham's feel for what was appropriate attributing a pre-Covid rental value to 77JS. I agree with Mr Clark that this is an essentially worthless approach or perhaps that it is no better in terms of evidential weight than the expert saying that given there is no comparable evidence I will tell you what my gut instinct tells me is the right rental figure for the disputed property. The sleight of hand within JB1 is that this "gut instinct" approach is made to look like a comparable and therefore gives apparent credibility to the analysis of the Property. In reality no such credit can be obtained for the subjective valuation of 77JS. It is worth nothing more than an unreasoned guess for a figure that feels right. In the context of determining the new rent I give that analysis no weight.

44. In closing submissions Mr Clark said that this fatal flaw in JB1 created in Mr Buckingham's mind a magnetic pull for a zone A figure of about £200 and that the JB3 analysis was no more than muddled thinking, demonstrated by an inconsistency in applying frontage to depth discounts, working backwards to justify a similar conclusion to that in JB1 but hopelessly undermined by the problems within JB1. I do not accept this criticism as fair of JB3. Notwithstanding Mr Buckingham saying during cross-examination that he did not abandon his reliance on 77JS, I do consider that JB3 provides a distinct and at least more justifiable route to a valuation figure based on 95JS. This is not a surprising conclusion. It is common ground that 95JS is an appropriate comparable, albeit the experts disagree about what the comparable figure is and how it needs to be adjusted to make it useful.

45. In summary, in looking at the particular items of dispute that I address below, I take no account of the JB1 analysis based on 77JS but I do give more weight to the JB3 analysis based on 95JS. For completeness, I do consider that 77JS is relevant to the overall impression to be gained from the evidence about the market in Jermyn Street but this is context rather than as a comparable.

46. Ms Wicks' attack on Mr Holland was at a more general level: essentially that Mr Holland by background and experience was a landlord-favouring expert and that throughout his reports he overplayed his hand for the Defendant's benefit. I agree with this criticism.

47. Mr Holland's position within his firm is on the landlord side – his job is to maximise the returns for landlords and has been for many years and likewise his more recent and relevant expert experience is on the landlord's side of rent disputes. These background factors would be irrelevant if the evidence from Mr Holland in general demonstrated balance and reasoned support for the various conclusions being put forward. In fact, Mr Holland's evidence and reports took the contrary approach. I draw this conclusion from the following illustrative examples:

    i) In LH2 Mr Holland referred to his firm's market report of December 2020 as supporting, along with other materials, a conclusion of a positive outlook and a "recovery to pre-pandemic levels in 2022". In fact the report when addressing retail – the relevant sector for present purposes – presents the opposite picture: "savaged an already weak UK high street"; "the retail real estate market has arguably been suffering the most"; "the resulting shift towards shorter, more flexible lease structures and turnover leases will fundamentally change retail real estate"; "excess retail space coupled with falling values will create opportunities in the medium and long term with retail assets being repositioned to include alternative uses…". It is notable that these generalities are reflected in some of the specific evidence in this case – for example, the 95JS lease renewal and the development plans for the opposite corner to the Property.

    ii) LH2 at paragraphs 2.52 to 2.55 described "good interest" from potential tenants for 103/105 Jermyn Street being marketed by Mr Holland's firm. The firm's own lead sheet dated 6 May 2021, however, showed this to be a groundless exaggeration. The firm had noted some 39 prospects of which only 8 were included in the "interest" section but of those only one had viewed (on 24 March and was having to be chased for feedback) and none of the other 7 had demonstrated any actual interest at all with comments ranging from "considering options", "maybe too far down street", "long term requirement for the street…concern about sustaining rental level", "looking at larger format options" and "unlikely to be suitable". There was, it seems to me, no particular interest in the property at all – apart from possibly the party that viewed on 24 March – but some general interest in the Jermyn Street area shown by take-away retailers who, on the common oral evidence of the experts, were not likely tenants for Jermyn Street because of planning restrictions and the general policy of the Crown Estate. In short, the anecdotal evidence from the lead sheet is consistent with the high level of vacancies on Jermyn Street – negative and a challenging market.

48. Mr Holland was more realistic in his oral evidence when he said that the market was challenging and that he was worried looking forward 12 to 24 months but in general more confident over 5 to 10 years.

49. A related problem was demonstrated by Mr Holland's production of various articles from Retail Gazette giving bland assurances about the recovery of the retail sector. Mr Holland explained that his firm kept a database of relevant market related material but when he was asked if the particular material being handed up as evidence had been given him by the Defendant or its lawyers rather than taken from his firm's database, he avoided the question saying only that he had been made aware of the material and read it. This was unfortunate – there was no reason for Mr Holland to be so defensive. In any event the material appeared to have little or no relevance to the approach to be taken to the Jermyn Street market. I do not place too much weight on this aspect beyond noting that it is at least of a piece with Mr Holland's willingness to approach his role with landlord-tinted spectacles.

50. In summary, both counsel successfully undermined the evidence of the other side's expert. Mr Clark established that the conclusions of JB1 do not merit any weight and Ms Wicks established that Mr Holland's general approach was partial and unbalanced. However, I emphasise that these criticisms only go so far in the circumstances of this case. This is for a number of reasons. The first is that both experts in their first reports had to struggle with how to address a Covid-dominated rent assessment when there were no comparables. Neither approach was successful but I recognise the difficulty the experts were in. The second is that there is common ground, at least, that 95JS is the most relevant comparable available and so the particular evidence from the experts about that needs to be looked at in detail. Finally, the range of issues between the experts is relatively limited, the best examples being a zone A disagreement between £205 and £230 and a user discount disagreement between 18.5% and 25%.

51. There has been no dispute between the parties that the method by which the court should determine the rent is by resolving the particular areas of dispute between the experts and so arriving at a figure that is most consistent with the court's conclusions as to the expert evidence available. So that although the rent issue under section 34 of the 1954 Act is for the court to determine, counsel's approach, rightly and I suspect necessarily, requires that determination to take place within methodological assumptions common to the experts.

The Rental Issues

52. I was provided with an agreed Excel spreadsheet in order to calculate the results of my findings into rental figures for the disputed leases. I will pick up the order of the rental issues contained within that document. I have not separately addressed those relevant to the Supplemental Lease calculation but have carried my findings addressed below into the spreadsheet.

53. *Zone A* Mr Buckingham's figure is £205. Mr Holland's figure is £230. The starting point for their disagreement is the valuation of 95JS.

54. In persuading me that the Retail Gazette material should at least be admissible, Mr Clark referred me to English Exporters (London) Ltd v Eldonwall Ltd [1973] Ch 415,

Megarry J at 420F as to experts informing their opinions from various sources of information, such as journals. Later in the same case, Megarry J explained that the only comparables that would be admissible without infringing the rule against hearsay would be those the facts of which the expert could prove of his own knowledge or which were proven by someone who did have such knowledge. Of course, the rule against hearsay in civil cases is no longer applicable (Civil Evidence Act 1995 s. 1(1)) but Mr Justice Megarry's concerns are reflected in the uncertainty that both experts have in the present case about the actual facts of 95JS. In particular neither expert has been able to measure 95JS and neither expert knew if the ITZA figure provided in emails included an allowance for masking. There are other examples of uncertain facts related to 95JS.

55. It is reasonably obvious to me that one way the experts could have dealt with this uncertainty would have been to cooperate with each other and work out reasonable margins of error within which their calculations could take place – after all 95JS is only a comparable. This did not happen but rather both experts have made assumptions which have the consequence of minimising or maximising the comparable figure. Given the starting point of factual uncertainty this is unhelpful.

56. In addition a spat arose after the trial finished as to whether Mr Holland had agreed with Mr Buckingham how to treat the 3 month rent free period allowed for in the 95JS evaluation so as to arrive at a net effective rent figure. I have considered the emails and I do not find an agreement to anything other than the mathematical calculation assuming a break at 27 months, which gives a net effective rental of £61,333. There remains a dispute about whether, as Mr Holland accepted in cross-examination, 27 months is the appropriate figure or 51 months, the difference being the length of the term or the earliest time the landlord might bring it to an end. I repeat the point I made to counsel by email: the impact of CPR 35.12(5) means that it matters less whether the experts have agreed than what the right approach should be.

57. Given the uncertainties in relation to the detail of 95JS and the unhelpfully partisan approach taken by the experts in this respect, I will do the best I can on the evidence applying a balance of probability.

58. The best evidence, albeit untested by cross-examination, is that contained in email exchanges that the experts had with those involved with 95JS renewal. On 11 September 2020 Mr Buckingham was given information about the 2012 renewal. This included a zone A rate of £270 and an ITZA of 357.345 for the shop and different figures for the basement. On 22 March 2021 and in an undated email but which must have been after 21 April 2021, both experts were given the same information from an individual on the tenant side about the new lease: a 51 month term; outside the 1954 Act; no alienation; turnover rent but with a £69,000 base; 3 months' rent free; and a potential landlord break at earliest at the end of December 2022. I find all of that information to be accurate and reliable.

59. A particular issue arose about whether the 2012 ITZA figure should be used because Mr Holland had not been able to confirm whether it took into account the correct and/or current zoning that would be required for the masked element of the shop premises at 95JS. On that basis Mr Holland chose to use valuation office figures, which he seemed to accept in cross-examination would not be reliable, to carry out his analysis. I disagree with this approach. It seems to me to answer a potential

uncertainty with a definite uncertainty and for that reason alone has less chance of being accurate. A more reasonable assumption to make is that made by Mr Buckingham, which is that the ITZA figures given to him and relevant to 2012 did take into account at least such masking as there was in the shop at that time. However, it is also important when carrying the comparable over to the evaluation of the Property to take account of the risk of error. I do this not by pretending to more accuracy than there is – which is the overall impression I get of Mr Holland's approach to this comparable – but by making an allowance for the potential inaccuracy when reaching my conclusion as to the appropriate zone A figure for the Property.

60. Mr Buckingham's JB3 calculation assessed the 95JS zone A rate at £183.85 to which he applied an uplift to £200 to take account of the turnover rent and which, he said, brought it into line with his general expectations of the existing market. In cross-examination Mr Buckingham accepted that the £183.85 needed to be increased by 2.5%. In submissions this became the increase from £200 to £205 I have referred to above but for now I will treat it as an adjustment to the 95JS side of the comparable exercise.

61. I agree with Mr Clark that the 95JS rate should also be increased by 2.5% to reflect the contracted out nature of the new tenancy.

62. I do not consider it necessary to make any adjustment in respect of the 3 month rent free period before carrying over the zone A rate. There is evidence from the tenant side that as part of the overall agreement there was a writing off of rent arrears but also I am conscious that the actual rent agreed upon was dependent on turnover in any event and so the zone A figure has uncertainty built into it. Mr Buckingham's JB3 increase to £200 reflected that. This has the benefit that when I am considering a downwards "rent free" adjustment to the Property I know that this has formed no part of the zone A assessment.

63. I do not consider any further adjustment to the 5% increase I am minded to make to the 95JS zone A rate is necessary to take account of the landlord rolling break.

64. It follows that my starting point for the comparable is a zone A, disregarding the prospect of turnover rent being in excess of base rent, of £193. JB3 gave a 9% uplift to reflect the chance of turnover rent being higher to the unadjusted figure. Mr Buckingham explained this by referring to the chance of sales increasing once the lockdown is over and so on. It is necessarily a somewhat arbitrary increase.

65. In my view the better approach is to take a 10% increase to the base figure to reflect not just the imponderable regarding possible turnover rent but also the general uncertainty of the status of the comparable. This gives a figure of £212 which I find is the appropriate zone A starting point for the Property.

66. As a very rough check regarding this figure I note that Mr Holland accepted in cross-examination that the estimate he made at paragraph 3.10 of LH2 of a general reduction of 15% to 30% in rents post-Covid was wrong and that it would be better to say probably in excess of 30%. A zone A of £212 is about 64% of Mr Holland's LH1 zone A suggested rate. If I take into account Ms Wicks' submissions about the particular pressures on the Jermyn Street market at the moment, illustrated in

particular by the circumstances of the other retail corner properties in the same immediate area as the Property and my lack of confidence in Mr Holland's choice at the very top of his range in LH1 between £321 and £331, then in light of all the relevant evidence I have, that £212 figure seems reasonably robust for present purposes.

67. *Return Frontage* Although it is for me to fill in on the spreadsheet I understood this to be agreed at 5%.

68. *Bar on external alterations* I agree with Ms Wicks that some discount to reflect this restriction is appropriate and that the possibility of a Landlord and Tenant Act 1927 application does not ameliorate that need. I reach this view bearing in mind Mr Buckingham's answer in cross examination about the 1927 Act because regardless of whether it is possible to have a court relax the restriction, the need to make such an application will inhibit all but those with an enthusiasm for litigation from doing so and I also bear in mind that the frontage is contiguous with and aesthetically in keeping with the overall exterior of the Cavendish Hotel. I will however reduce Mr Buckingham's figure of 2.5% to 2% to recognise the possibility under the 1927 Act.

69. *Frontage to Depth* Mr Buckingham makes a 20% reduction. Mr Holland says the better figure is 5%. It is common ground between the experts that in particular cases the nature of the zonal valuation process can overvalue retail spaces which have a long frontage relative to their depth. It is also common ground, demonstrated by the figures set out here, that such a discount is required for the Property. If I can quote from LH1: "The relationship of the internal width to the shop depth is unusually high and as a result this produces a high ITZA area which in turn produces a higher rent than a more regularly configured unit would. It is market practice to adjust the rent…".

70. Mr Clark makes a superficially attractive forensic point based on JB1 and JB3 and Mr Buckingham's answer in cross-examination that he was not giving up on 77JS. In bald summary, if Mr Buckingham continues to rely on 77JS as supporting his circa £200 psf zone A figure, then since that figure in JB1 required no discount for frontage to depth (because such a discount was built in by the zone A figure attributed to 77JS) then so it must continue to be unnecessary to make any such discount, certainly not as large as 20%. Although an available interpretation of the evidence, it is unfair to Mr Buckingham. For the reasons set out above, the conclusions in JB3 are not dependent on 77JS but on 95JS.

71. A further and different forensic point made by Mr Clark was to create a comparison chart including the Property and 95JS and other Jermyn Street properties based on area. This demonstrated that 95JS was the property most impacted by having a greater zone A relative to its area than any others. Mr Buckingham's reaction to this was instructive – he was, it seemed to me, nonplussed and reiterated that the linear approach was the relevant determinant. My impression was that Mr Buckingham's confusion was based on his knowledge and experience telling him that the Property (like 77JS) required a frontage to depth discount but that 95JS did not require such a discount and wondering why the area analysis did not reflect this reality (for what it is worth having seen all three properties, at least from the outside, I can understand why the experts have both assumed that 95JS would not be given a discount but the Property and 77JS would).

72. Both experts considered that a frontage to depth adjustment was required in respect of the Property but would not be required in respect of 95JS and so for whatever reason Mr Clark's comparison of various comparables based on area can be given no weight in this case.

73. Mr Holland supports his 5% figure in LH1 by reference to 112 Jermyn Street (Jones the Bootmaker) where a 5% discount was provided because the shop was predominantly zone A with only a small zone B and Mr Holland applies the same discount in LH2 without further explanation.

74. Mr Buckingham in JB1 explained how the Property had a particular problem in this respect because of the relationship between both zone A / zone B and zones C / D: "there is insufficient lower value accommodation…to offset the high value space…". Mr Buckingham considered this general problem was one shared by 77JS and was a further reason why 77JS was unattractive as a single unit. In JB3 Mr Buckingham added to these comments and stressed his view that given the particular layout of the Property a substantial discount for frontage to depth was required to keep the Property affordable and he provided anecdotal comment that a 7.5% discount on a New Bond Street property was inadequate and led to that property being over-rented.

75. Ms Wicks submitted that while the discount was particularly subjective for the valuers – what did any particular valuer think the market would require as a frontage / depth discount – it was at core about affordability: a hypothetical tenant would not pay for a property whose value assessed by zoning was out of proportion to its earning potential.

76. I bear in mind Mr Holland's general preference to taking the route most favourable to the landlord's position and the greater explanation provided in Mr Buckingham's reports about the particular problem suffered by the Property. This seems to me to go much further than the zone A vs zone B comparison which Mr Holland takes from the 112 Jermyn Street comparable. I do think the non-letting of 77JS is relevant and do not accept that Mr Holland's answer in cross-examination that it was "under offer" for a substantial period means it can be ignored – under offer or not, the point is that it has not been let.

77. On balance, I prefer and find in favour of Mr Buckingham's 20%.

78. There is a danger in playing with the various data in the evidence and using it to come up with illustrative arguments (e.g. see above re area). But I have as nothing more than a gentle check on my preference for Mr Buckingham's 20%, considered JB1's pre-Covid uplifted zone A rate for the Property of £240 which incorporates a frontage to depth discount. If I assume a basic 30% drop in the market post-Covid (Mr Holland's oral evidence was that it was greater than this) then that zone A starting point in the JB1 analysis would be £168 (I realise that it is rents that have fallen rather than zone A rates but the two are interdependent). If I then increase that by 20% to put back in the frontage to depth discount for comparison purposes I get to £210 which is within the ball-park of the zone A figure I have found appropriate above and which also contains no frontage to depth discount (the same point can be made by increasing the £240 to £288 and then reducing it by 30% to £202). For what it is worth, and I am not putting any weight on it beyond a check on a conclusion already reached, the 20% figure passes at least this statistical illustration.

79. *Less 15 year term without breaks* Mr Holland considered a 5% discount was appropriate and Mr Buckingham took into account that the Claimant wanted 15 years and so did not think a discount was required. Mr Holland was right and this is not disputed by counsel.

80. *Less Restrictive User* JB1 identified three potential comparables. In one the landlord considered that in December 2008 a 25% discount had been agreed on a renewal. In the other two, at reviews during 2014 and 2019, a discount of just over 18% was applicable. Mr Buckingham says the higher figure is suitable for the Property, pointing to press reports that one of the 18% users had said the rent – in New Bond Street - was unsustainable. Mr Holland says that 18.5% is suitable.

81. Mr Clark rightly points out that the 25% figure is undermined by the analysis not being agreed with the tenant (the landlord can be expected to want to keep the base zone A rate higher and so attribute more to the particular discount). Mr Clark says I should accept Mr Holland's figure or pick a figure between the two.

82. Ms Wicks says that Mr Holland does not explain why he simply opts for the lower figure and Mr Buckingham's evidence in cross examination was that the differential between general retail rental rates and art use rates has increased rather than decreased in the relevant period.

83. It is obvious and agreed that a substantial discount is appropriate. The potential attraction of the Property, given its location, to an art market tenant is relevant but so is the cluster of vacancies within the immediate vicinity of the Property at this time (bearing in mind the influence that this latter general market relevant factor already has had in setting the base zone A rate). Weighing the evidence and submissions, I will adopt Mr Clark's suggestion of going somewhere in the middle and opt for a 20% discount.

84. *Alienation* Mr Buckingham gives a 5% discount. Mr Holland gives no discount because he says that the hypothetical tenant would not require such a discount when reaching the market rent. This arises because the lease prevents sub-letting in part.

85. Mr Clark argues that the potential for partial sub-letting, while there as a hypothetical, is not sufficiently likely for it to make a market relevant difference to the rental calculation. Ms Wicks points out that even in relation to a much shorter term, Mr Holland included alienation as one of the factors which contributed to his 15% discount in his 95JS analysis and I agree with Ms Wicks' further point about the ability to sub-let being something which provides possibilities in the context of upward only rent reviews across a long term.

86. On balance, I accept Mr Buckingham's 5%. I have considered whether the Principal Lease and the Supplemental Lease need separate treatment in this respect – the practicalities of potential sub-lettings are different – but I do not consider that is necessary.

87. *Landlord Entry Rights* It is agreed by counsel that a discount of 2.5% should be given unless I agreed to the Defendant's proposed change to the terms of the lease. I refused that proposal and so find that a discount of 2.5% is appropriate.

88. *Rent Free Reduction* Both counsel and experts agree that the hypothetical negotiation in the present case would include a discount to the final rent attributable to a rent free period. Mr Buckingham allows for an 12 month discount which breaks down between a conventional 3 month fitting out discount plus an 9 month incentive discount and Mr Holland allows for a 6 month period. It is agreed that it is appropriate to spread the discount over the first 5 years of the term.

89. Mr Clark's submissions are that although there is evidence of 12 month rent free periods being given the evidence does not establish that this is a "norm" within the market. Ms Wicks submits that the evidence establishes that 12 month rent free periods are being given. Both are correct but the question for the court is what period, 6 or 12 or somewhere between the two, of additional incentive discount would be included within the route to agreement in respect of the hypothetical negotiation envisaged by section 34.

90. I agree with Mr Buckingham that 12 months is appropriate. The significant factors include the length of the term, the current state of the market and how the Property fits in to that market within the Jermyn Street and St James area and my overall impression that Mr Holland's instinct is to pitch in the most favourable way possible for the Defendant.

91. *Standing Back* Mr Clark's submissions on this issue conclude by asking the court to stand back as suggested by the RICS guidance for valuers and make sure that the final rent figure "feels right". Mr Clark posits the just under 32% reduction on 95JS and points out that if that is compared to the previous passing rent for the Property of £220,000 it would suggest a feeling right point of about £150,000. Mr Clark points out that Mr Buckingham's £96,500 is just too low.

92. I do not disagree that the final rent figure is one that the court must be satisfied is consistent with the s. 34 requirement of "reasonably expected to be let in the open market". The zoning methodology engaged by the experts is a means to that end. But while zoning remains the means commonly used in the relevant market by actual landlords and tenants to negotiate rents, zoning has an inbuilt bias towards the type of real world outcome Mr Clark's standing back plea is designed to achieve. It is also important to make the comparison meaningful. For a number of reasons I think it likely that Mr Clark has stood back with an apple in one hand and a pear in the other. It seems to me, with the same caveat about statistics / data manipulation that I made above, that the new rent figure for the Property needs to be adjusted to add back the user and alienation clauses (since these wasn't taken into account on the 2011 rent review) and probably the rent free period as well. If these elements are taken into account even a 30% post-Covid reduction produces a figure well below that suggested by Mr Buckingham.

93. In any event, standing back and taking into account all the evidence that I have read and heard and bearing in mind the unique circumstances which provide the market context for this valuation, my £102,000 figure meets Mr Clark's posited test.

The Interim Rent

94. Picking up my summary of the relevant law above, there are three questions: (a) the s. 34 determined rent for a tenancy from year to year as at 3 January 2016; (b) adjusting

or not because of the difference between that rent and the rent of the prior tenancy; (c) any other adjustment to ensure the rent is reasonable for the tenant to pay.

95. *The market year to year rent* There is little between the experts on the relevant zone A rate: Mr Buckingham identifies a range of £340 to £350 and opts for £345. Mr Holland says £350. I think it more likely that Mr Buckingham's analysis is the more reliable and £345 is the better figure. In passing I note that the experts agreed in their joint statement that a zone A difference between them of £318 and £321.50 over 112 Jermyn Street was nominal. That percentage difference is fractionally greater than that between £345 and £350.

96. The big difference between the experts is whether the zone A figure should be reduced and if so by how much because the subject of valuation is a tenancy from year to year. Mr Buckingham, by reference to such comparables as he has found, suggests a 55% reduction. Mr Holland, in his reports, took the approach that since the Claimant's actual occupation has been for at least 5 years then it was irrelevant.

97. It is common ground between counsel that Mr Holland's approach took him outside section 34 of the 1954 Act. In cross examination Mr Holland suggested a 10% discount but this was not evidenced or explained and could not be the subject of forensic analysis on the part of the Claimant. I give it no weight. Mr Clark tried to bolster Mr Holland's 10% by reference to the 10% discount allowed for in Humber Oil but that was based on the expert evidence before the court in that case and I must found my decision on the expert evidence in this case. The court does not know what Mr Watson's evidence would have been about the Property and Ms Wicks did not have the opportunity to cross examine him. Mr Watson was the relevant expert in Humber Oil.

98. Mr Buckingham's 55% is derived from a comparison between two properties in Sloane Street. In one, 50A, an inclusive rent of £480,000 pa was agreed for a short term let of just under a year with a mutual one months' notice break option after the 7th month. After discounts to exclude the non-rent elements of the rent, Mr Buckingham arrived at a zone A figure of £470.60. In the other, 37/41, a 25.2.20 rent review had been based on a zone A figure of £1,050. As the properties were equivalent, Mr Buckingham, in JB1, took the difference between those two zone A figures as the basis for a general conclusion that a 55% reduction would be appropriate. This led to a section 34 year to year total figure in JB1 for the Property of £126,500. Subsequently, Mr Buckingham accepted further revisions were necessary and produced an update to the relevant page of JB1 producing a figure of £140,650 based on a discounted rate of about 50% (see the updated paragraphs 168 and 170).

99. While I have some immediate sympathy with Mr Clark's closing submission that the 55% reduction is "extraordinarily high", the difficulty for the court is the lack of any credible alternative given the approach taken by Mr Holland. At least with Mr Buckingham's updated JB1, the final difference between the previous rent (lower than the likely January 2016 market as I understand it) and Mr Buckingham's view of a year to year rent is not quite so stark. This difference can be reduced further by bearing in mind the prior rent figure did not take into account the user discount which would impact the s.34 market rent.

100. On the evidence I accept Mr Buckingham's final figure of £140,650 as representing the market rent for the Property for a tenancy from year to year as at 3 January 2016[1].

101. *Adjustments having regard to rent payable under the terms of the existing tenancy* Neither counsel has argued for any "cushioning" or similar.

102. *Reasonable for the tenant to pay* Under this limb, Ms Wicks argues that the court should take into account the Covid 19 crisis and ensure that the overall rent is commensurate with the benefit obtained by the tenant and/or the detriment incurred by the landlord arising out of the occupation for the relevant period. Mr Clark does not consider that a Covid 19 specific reduction is required but on the contrary suggests that the court should increase the rent from Mr Buckingham's discounted year to year figure to ensure that the final figure arrived at for the interim period should be proportionate to the occupation benefit received.

103. I note, without particular complaint, that neither counsel has suggested to the court any actual figure which they argue would reasonably reflect the factors they wish the court to take into account.

104. Guided by Humber Oil, in particular between [155] and [158], I take as my starting point the language of section 24D(1) of the 1954 Act and ask what is it reasonable for the Claimant to pay while the Claimant has occupied the Property because of the deemed extension of the prior tenancy under section 24 of the 1954 Act? I consider this asks the court to look at the period of occupation and ensure that the rent is reasonable. It is obvious but worth stating that "reasonable" looks both ways – balancing the interests of the landlord and the tenant.

105. The period in the present case is between 3 January 2016 when according to the experts rentals in Jermyn Street were near their relevant market peak and a date in the Autumn of 2021 when rents will be very much lower (a reasonable proxy being the determined rent for the new tenancy of £102,500). Mr Buckingham and Mr Holland's firm's analysis and Mr Holland's table of pre-Covid comparables all suggest some softening of the Jermyn Street market by the late 2019. The impact of Covid from about March 2020 and throughout the rest of the period is obvious. It is an impact which relates both to the Claimant's use of the Property (less valuable because it could not trade as normal) and also the Defendant's loss by the fact of the Claimant occupying the Property (less valuable because of the lockdown market or lack of it). In approximate terms the period is likely to be just over 5.5 years of which about 22-25% (18/69 or 15/69 months) have been or will be subject to Covid problems.

[1] In response to the draft judgment Mr Clark pointed out that this figure incorporated a 25% user discount and that since the court's rent analysis reduced user discount to 20%, the same figure should be applied in relation to interim rent. Ms Wicks referred to the lack of any frontage to depth discount in Mr Buckingham's figure. Mr Clark said this was seeking to open up the evidence again. In my view the new rent figures are based on the evidence about new rent and the interim rent figures are based on the evidence about interim rent. I do not consider there is any reason to change the figures I arrived at in the draft judgment. I had noticed the lack of frontage to depth discount and assumed that for whatever reason it was not considered necessary (which could simply be that Mr Buckingham considered circa £140k was an appropriate figure and so no further discounting was required). In any event on the evidence about interim rent, for the reasons given, the £140,650 figure is the finding I make.

106. It is necessary to have regard to the previous rent, here £220,000 pa and to my conclusions based on the expert evidence about a year to year market tenancy which is set at £140,650.

107. I bear in mind that the previous rent was set in 2011 and that it represented a greater value than the actual occupation because of the rent review hypothesis in the prior lease. Against this the market in 2016 was towards its peak but appears to have come off that substantially by the end of 2019 (just looking at Mr Holland's zone A comparable table in LH1 and Mr Buckingham's more general evidence about this in his reports and oral evidence).

108. I have not found this easy. In part this is because while both counsel have recognised and relied on the approach taken in Humber Oil, which is to value the benefit conferred, in the particular circumstances of this case this involves an extended period during which the market has both had its usual fluctuations (the 2016 to 2019 period) and suffered exceptional downward pressures (the Covid-19 period).

109. Although both counsel have agreed that in considering the determinative question about "reasonable to pay" the court is not limited to matters that might have been in the reasonable contemplation of the parties at the relevant date (such a limitation is agreed to apply to the s34 year to year market rent assessment), it does not seem to me that the relevance of subsequent events is open-ended. In particular and based on Humber Oil, I consider that the analysis is akin to a contractual type quantum meruit and not an unjust enrichment type quantum meruit (Benedetti v Sawiris [2013] UKSC 50 at [9]). So that the assessment is approached from within the contractual structure rather than an open question of objective market value. This appears clearly the approach taken in Humber Oil.

110. I do consider the court should retain its focus on the 3 January 2016 date and start from the premise that the search, given the evidence in this case, is for a reasonable per annum interim rental figure and in doing that it is both conventional and principled to make use of such annual figures as are within the evidence or derived from the conclusions reached as a result of argument about that evidence.

111. In the present case I consider the best approach consistent with Humber Oil and on the evidence is as follows. It is necessarily broad brush but it aims to value the period and arrive at an interim rent which can be expressed on a per annum basis. I consider that the annual rent for the period from 3 January 2016 to the start of the new tenancy should be £160,000 per annum.

112. I reach this conclusion applying the following reasoning which is broad brush and is not intended to represent findings about a changing rent over the period (I consider that impermissible) but rather an explanation as to the basis upon which the £160,000 is reasonable:

    i) The market year to year tenancy rent on the evidence would be at £140,650 per annum;

    ii) However on a quantum meruit basis, I consider this too low for at least the first 3.5 years of the occupation both because of the difference between it and the passing rent at the end of the existing tenancy but also because of the

evidence about the market value of Jermyn Street properties over that time. The possible proxy that I have to account for those factors is the passing rent of £220,000 per annum, which is what the parties' agreement provided for immediately prior to the valuation date.

iii) But £220,000 per annum is too high for the whole period and would not be a reasonable sum for the Defendant to have to pay because it would ignore to too great an extent the court's conclusions about the appropriate rent on a year to year basis. Ms Wicks submitted, and I accept based on Mr Franses' evidence, that the period from 3 January 2016 was difficult and impossible to plan in a business context because of the uncertainty created by the disputed renewal. This needs to be reflected in the reasonable rental – hence, in part, Mr Buckingham's interim rent analysis.

iv) Another possible proxy is the new rent of £102,000 per annum but while this could be said to be an overvaluation during the lockdown, it is plainly far too low for the normal trading period prior to March 2020.

v) Doing the best I can on the evidence, as I would do faced with a "reasonable sum" damages problem, £160,000 per annum is the appropriate figure for the interim rent. This is equivalent to at least a market value without the user restriction of £200,000 per annum. Both of these figures satisfy, for me at least, the standing back and feels about right test, based on the evidence I have received, the submissions I have read and listened to and the time spent with the papers while writing this judgment.

Conclusion

113. I reach the following conclusions:

i) The lease shall be amended as provided above.

ii) The rent under the new lease shall by £102,000 per annum.

iii) The interim rent shall be £160,000 per annum.

114. I would ask counsel to draw an appropriate order. I will send a copy of the updated Excel spreadsheet with the word version of this judgment.