Judgments

WH Smith Retail Holdings Ltd v Commerz Real Investmentgesellschaft mbH

[2021] Lexis Citation 44

Winchester County Court

Judge Richard Parkes QC

25 March 2021

Judgment

Greville Healey, instructed by TLT LLP, appeared for the claimant

Mark Wonnacott QC, instructed by DAC Beachcroft LLP, appeared for the defendant

JUDGMENT: APPROVED BY THE COURT FOR HANDING DOWN (SUBJECT TO EDITORIAL CORRECTIONS)

JUDGE RICHARD PARKES QC:

INTRODUCTION

1. This is my judgment following a four-day hearing of the claimant's unopposed application for a new tenancy of retail premises in the Westfield Centre, Shepherd's Bush.

2. The claimant (“the tenant”), is WH Smith Retail Holdings Ltd, and operates a large branch of its retail operations at units P201 and 1087/1088 of the Westfield Centre (“the premises”).

3. The defendant (“the landlord”) has a long leasehold interest in the premises, as well as in the whole, or substantially the whole, of the Westfield Centre.

4. The current lease, dated 8 December 2009, was for a term of 10 years commencing on 1 October 2008, and has continued under the Landlord and Tenant Act 1954 (the Act), at a passing rent of £953,000 pa, based on a rate of £327.50 Zone A, set by an arbitrator on the 2013 rent review. The tenant served its s26 request for a new tenancy on 23 March 2018. The current lease will expire 3 months and 21 days after judgment (s64).

5. Most of the terms of the new lease have been agreed between the parties, including its term (5 years), but some remain in issue. The matters in issue are the rent payable under the new tenancy, the list of services comprised by the service charge, the trigger for a pandemic rent suspension clause, and the interim rent

payable until the new tenancy is granted.

6. The court must determine the terms of the new tenancy under s35 of the Act before moving on to determine the rent payable, because those terms are likely to have an impact on the market rent to be ascertained under s34.

7. The parties each called one lay witness. Ms Belinda Burnstone, head of WH Smith property maintenance and estates, gave evidence for the tenant, and Mr Michael Catton, Rent Review and Lease Renewal Manager for Westfield Europe Ltd, the landlord's managing agent, for the landlord. The parties also relied on two highly experienced expert valuers of commercial property, Ms Catriona Campbell of Gerald Eve LLP (for the tenant) and Mr Joel Bancroft of Smith Young (for the landlord). The case was heard over 4 days from 17-20 November 2020.

TERMS OF THE NEW TENANCY

The Law

8. The legal framework is generally uncontroversial. The starting point is s35(1) of the Act, by which

> 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) ….. 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.

9. It is common ground that the court must begin by considering the terms of the current tenancy; that the burden of persuading the court to change the terms is on the party proposing the change; and that the change must be fair and reasonable in all the circumstances, which include the comparatively weak negotiating position of a sitting tenant requiring renewal (particularly in conditions of scarcity), and the general purpose of the Act, which is to protect the business interests of the tenant in so far as they are affected by the approaching termination of the current lease. Those principles are stated in the speech of Lord Hailsham LC in *O'May v City of London Real Property Ltd* [1983] 2 AC 726 at 740. Lord Hailsham went on at p741 to say this:

> "There must, in my view, be a good reason based in the absence of agreement on essential fairness for the court to impose a new term not in the current lease by either party on the other against his will."

Covid-19 rent suspension

10. The tenant proposes the addition of a pandemic rent suspension clause to form a new paragraph 10 of schedule 3 of the lease.

11. The effect of the tenant's proposal in its pre-trial form was that during any period ("the suspension period") in which a non-essential retailer would not open the premises due to (1) an epidemic, public health emergency or outbreak of communicable disease, (2) any Act of Parliament, statutory instrument, statutory

power or decree passed, issued or exercised by or on behalf of the UK government in relation to Covid-19 (or any subsequent strain), including compliance by the tenant with advice and/or guidance from the UK government, the National Health Service or other health or regulatory bodies in relation to Covid-19 (or any subsequent strain), the principal rent and 50% of the service charge would not be payable from and including the date when the suspension period began until it ended. The purpose of the proposed clause was (and is) to mitigate the effect of forced closures resulting from the pandemic.

12. The landlord rejected the tenant's proposal, proposing instead that clause 3.2 of the lease should be amended to provide that if, as a result of UK Government measures in response to any pandemic the tenant was compulsorily required to cease trading from the premises, then the principal rent due under the lease would be reduced by 50% for the closure period. All other sums due and payable by the tenant under the lease would continue to be payable during the closure period. The landlord also proposed that if the tenant received the benefit of any subsidy, rebate or other support package during the closure period, the tenant should pay to the landlord the monetary worth of such part of it as related to the principal rent.

13. At the start of the trial it became clear that not only were the parties agreed on the principle of a rent suspension clause, but also that if such a clause was triggered, the tenant's obligation would be to pay 50% of the rent and remain liable for the service charge, and that it would account for any sums received from HM Government by way of subsidy or support in respect of rent. In other words, the tenant accepted the landlord's proposals for what would happen if the clause was triggered.

14. The outstanding issue was the nature of the trigger.

15. Ms Belinda Burnstone gave evidence about the effect of the events of 2020 on the tenant's trading at Westfield and elsewhere. She made the valid point that its premises were not obliged to close during the Covid-19 lockdown, because they contain a Post Office and because the tenant is a newsagent. The shop was kept open, so customers were not limited to buying newspapers or Post Office items, but could buy anything that they wanted. As she understood the position, the tenant was obliged by its arrangement with the Post Office to keep the shop open in order to provide an essential postal and banking service. It had to employ staff to keep the shop open, with sales over 90% down, while shops that closed could enjoy the benefit of the Government furlough scheme and operating cost reductions. With the majority of the premises in the Westfield Centre closed, footfall to the store was severely reduced, making trading conditions very difficult. Even after the easing of restrictions during the summer of 2020, the tenant found that footfall had been worst affected in shopping centres, particularly in large cities. In the premises at Westfield, sales had shown a year on year decline of 16% between 1 September 2019 and late March 2020; 92% between late March and mid/late June 2020; and 41% between mid/late June and mid October 2020. In Ms Burnstone's view, shopping habits had changed during the lockdown period and the new trends were not yet fully understood; but even before the Covid-19 emergency, the increase in internet sales, the increase in sales of e-books and the trend for major outlets such as supermarkets to use greater amounts of space for non-food items, were factors which were fundamentally changing the retail landscape, especially in shopping centres.

16. It was against that background that Ms Burnstone urged the need for a clause in the new lease to accommodate the tenant's liabilities when its ability to trade was hindered as it had been. Her suggestion was that the trigger should be a situation in which a non-essential retailer would not open (I take it that she meant 'not be able to open') the premises.

17. Michael Catton, the landlord's lay witness, did not deal with the proposed clause in his witness statement. He confirmed in oral evidence that the defendant was pushing for full payment of rents, although he himself was not involved in the process.

18. In argument, Mr Healey's position was that since both parties were proposing a change to the new lease, the tenant bore no *O'May* burden of persuading the court to change the terms to accommodate its proposal. I did not hear Mr Wonnacott dissent from that submission, which seems in principle to be correct, because the principle of a rent suspension clause is not being imposed on the landlord against its will. But if that is wrong, I find that essential fairness demands it.

19. According to Mr Healey, the landlord's proposed trigger event (compulsory cessation of trading) was not appropriate, because under both the March regulations (the Health Protection (Coronavirus, Restrictions) (England) Regulations 2020 (SI 2020:350), and the regulations current as at 12 November 2020 (the Health Protection (Coronavirus, Restrictions) (England) (No.4) Regulations 2020 (SI 2020:1200), the claimant was one of those business not required to close, because it was a newsagent and because it contained a Post Office. I note that the position appears to be unchanged under the regulations as they stood before Christmas, by which the Westfield Centre fell within a Tier 4 area: see the Health Protection (Coronavirus, Restrictions) (All Tiers) (England) Regulations 2020 (SI 2020: 1374) Schedule 3A, para 17(d) and (l), or as they stand at the start of February 2021, when Tier 4 restrictions have been strengthened and extended over the whole of England (SI 2021:8).

20. Therefore both under the original lockdown, and under the restrictions current since, the claimant was not required to close. Nor would it be, Mr Healey suggested, under any likely future restrictions; and thus far, his prediction has been borne out by events. That meant that the defendant's proposal was empty, for it would not alleviate any of the claimant's loss in any currently foreseeable circumstances. Yet the impact on the claimant occurred despite the fact that it was not required to close, because the effect on the level of trade at the premises was linked to the level of trade at Westfield as a whole. The impact of the regulations seen during 2020 was to deprive the claimant of virtually the whole benefit of its occupation of the premises.

21. In his closing speech, Mr Healey suggested that the right trigger for the proposed Covid clause was the closure of non-essential retailers, because the burden on the claimant, in staying open, was actually more onerous than that on shops such as Waterstones, which (because non-essential) had to close.

22. Mr Wonnacott's position was that while non-essential retailers which were obliged to close were given assistance, for example with Government furlough schemes, the tenant had a competitive advantage over non-essential retailers in being able to continue to trade. He suggested a compromise position by which (for instance) the rent suspension was triggered four weeks after non-essential retailers were forced to close, or by which, if the trigger was the closure of non-essential retailers, the tenant should be obliged to pay two thirds rather than half of the principal rent. There was, he said, a broad judicial discretion. The discretion must, of course, be approached with a view to a determination which is fair and reasonable in all the circumstances.

23. It seems to me that the advantages to the tenant of being able to remain open when non-essential shops are closed, in what when I made a site visit in mid-November was a largely empty and echoing Westfield Centre, are more notional than real. I cannot imagine what competitive advantage the tenant could gain in circumstances of such restricted trading. Matters might be very different on the high street, but in my judgment the reality is that if the non-essential retailers which surround the tenant at Westfield, and which provide the necessary footfall, are closed, there is no advantage of any substance to the tenant in remaining open. I accept Mr Healey's submission that the landlord's proposal is effectively empty, because circumstances are most unlikely to arise in which the landlord's trigger would be activated.

24. In my judgment, the rent suspension clause should be activated in accordance with the tenant's proposal, namely the closure of nonessential retailers, and the consequences of that activation should accord with the landlord's original proposal as now agreed, namely an obligation to pay 50% of the principal rent and the

whole service charge, subject to an obligation to account for any Government assistance in accordance with paragraph 3.2.2.2 of the Schedule of Disputed Draft Lease Terms at p456f of Trial Bundle 1. I see no reason to take up Mr Wonnacott's suggestion of a delayed onset of rent suspension, or a smaller reduction in rent.

25. If there is any uncertainty or dispute about the wording of the lease in the light of my conclusion, it can if necessary be resolved by further submissions, preferably in writing.

Services to be provided under service charge

26. The Fourth Schedule of the current lease contains service charge provisions. The service charge is the cost to the landlord of providing the services which it is obliged to provide (Sch 4 part 1 para 9) and which are listed at Sch 4 part 2, subject to the exclusions listed at Sch 4 part 1 para 8.

27. The services to be provided include maintenance of the retained parts (as defined at clause 1(1) of the lease), keeping the retained parts within the interior of the Facility (as defined: in essence, the Westfield Centre) heated and cooled, staffing, cleaning and maintaining the car parks, operating and maintaining all electrical, mechanical and other plant, machinery and equipment in use or available for use by occupants or users of the Facility, providing security in the retained parts, expenditure incurred in respect of such matters as electricity, gas, oil and other fuels, telephone and water, providing security staff, paying staff employed in connection with the retained parts, and (by way of a 'sweep-up' clause at Part 2 para 11.24) 'the cost of any other service amenity or matter which the landlord's surveyor in its reasonable discretion shall think proper for the better or more efficient management and/or use of the retained parts or the comfort and convenience of the generality of the tenants or ('of' must be an error) the shoppers in using such retained parts'.

28. Excluded items embrace such matters as the costs incurred by the landlord of or incidental to the initial construction or redevelopment of the facility (other than by way of renewal or replacement), the costs incurred in the initial establishment at the facility of the systems, plant and equipment for the provision of the services, and environmental liabilities existing prior to the date of the lease whether relating to the premises or the facility. Also excluded (by 8.1.3.1 and 8.1.3.3) is expenditure incurred by the landlord directly relating to the letting or renewal of a letting of any shop unit, and to applications for and/or the grant of consents for assignments or sub-lettings of shop units, and (by 8.1.4.2) any future redevelopment of the facility (other than by way of renewal or replacement).

29. I have been caused some confusion by the inclusion in the bundles of different versions of the travelling draft lease. The version at Trial Bundle 1 divider 10 p383ff excludes the proposed terms, so I have found it more convenient to refer to the version exhibited to the witness statement of Mr Catton, at Trial Bundle 2, div 12, p464ff. In this judgment, when I refer to the draft travelling lease it will be to that version unless I expressly state the contrary. In that version, the new terms fall within sch 3 (not sch 2, as the Schedule of Disputed Draft Lease states).

30. The proposal is as follows. The landlord wishes to include expenditure incurred in respect of:

> 11.17 any or all of the following (provided that in doing so the Landlord shall act reasonably and in accordance with the principles of good estate management):
>
> 11.17.1 undertaking any environmental and/or emissions and/or energy audit in respect of the Premises and/or the Facility;

> 11.17.2 the carrying out of any works or doing anything else so as to increase the energy efficiency and/or reduction in carbon emissions from the Premises and/or the Facility;
>
> 11.17.3 the provision in the Facility of separate energy supplies or of sub-meters to record energy supplies;
>
> 11.24 commissioning, obtaining, preparing and/or providing any EPC, DEC or any ancillary documents and supporting data in relation to the Facility including the fees, costs, expenses and disbursements of any assessor engaged to prepare the EPC and/or DEC (provided that in so doing the Landlord shall act reasonably and in accordance with the principles of good estate management);
>
> 11.25 taking all steps deemed desirable or expedient by the Landlord to improve the energy efficiency of the Facility (including those required to implement any recommendations or requirements included in any EPC or DEC) (provided that in so doing the Landlord shall act reasonably and in accordance with the principles of good estate management).

31. The landlord's stated rationale is that the proposals 'represent reasonable modernisation as they reflect changes in law since the agreement for lease pursuant to which the existing lease was granted in November 2007'. That was the evidence of Mr Catton, who also stated that this wording reflected the latest form of precedent lease for the Westfield Centre and was wording that new tenants were required to sign. He pointed out that under para 11.3 of Part 2 of Sch 4 of the existing lease, the landlord could recover the expenditure incurred in relation to “taking all steps required or deemed desirable or expedient …. to comply with any Law relating to … the Facility”. He referred also to the “sweep-up” clause, para 11.24 of Part 2 of Sch 4 of the existing lease (para 11.29 of the travelling lease), and went on: “As it simply reflects the current position which the claimant has agreed to in any event there is no prejudice to it in updating the wording”. His argument was that by agreeing to an existing lease which contained para 11.3 and the “sweep-up” clause at para 11.24, the tenant had already agreed to the new proposals.

32. Mr Catton was asked why, if that was the case, it was necessary to introduce new wording. He said that it added clarity for the future. If – and he said that he was not qualified to express a view as to whether this was correct – if the proposed clause 11.17.2 was capable of permitting the landlord to introduce substantial new works, his answer was that it was all qualified by an obligation on the landlord to act reasonably and in accordance with good estate management principles.

33. I asked Mr Wonnacott what was meant by acting in accordance with the principles of good estate management. He told me that it meant having regard to the interests of everyone on the estate. If that expression has any clearly defined official meaning, for example as set by the RICS, then I was not told of it; although no doubt it must impose some obligation to act with a view to more than the landlord's own financial interests, and to take into account the interests of tenants also.

34. The tenant's response (stated, like the landlord's rationale, in the Schedule of Disputed Draft Lease Terms) is that 'The landlord is seeking to be able to recover costs of energy audits and works and other steps to improve energy efficiency, and obtaining EPCs. These are costs which the Tenant would expect the Landlord to cover. Procuring EPCs is something which the landlord undertakes as part of a letting or sale process and is not related to property maintenance. Any works to audit or improve energy efficiency are refurbishment/upgrade works which the landlord should cover, as the owner of the long term interest in the

property'.

35. Ms Burnstone's position on the proposed new term was encapsulated in the tenant's response in the Schedule of Disputed Draft Lease Terms, but in her witness statement she added that the requirement for works to audit and/or improve energy efficiency were refurbishment and/or upgrade works, which would enhance the value of the landlord's leasehold interest.

36. Mr Wonnacott, whose case addressed to Ms Burnstone was essentially that the new term was already covered by equivalent terms of the existing lease, focused in his cross-examination on the energy performance certificate (EPC) element of the proposed term. Ms Burnstone told the court that the tenant's objections were not just to EPCs, but to the whole of the proposed clause. She accepted that if the tenant needed to assign or underlet it would need an EPC, which entails obtaining information from the landlord at the tenant's cost, but did not accept that it was fair to add the costs of that process to the service charge, because not every tenant (and certainly not her employer) wished to assign or underlet, and she objected to the tenant having to pay for EPCs whenever the landlord was letting or renewing the lease of a unit. Mr Wonnacott's position was that the EPC clause (11.24) would cover the provision by the landlord of EPC information necessary for tenants who were assigning or sub-letting, but that was precisely what Ms Burnstone was objecting to as a head of service charge, because such expenditure was never likely to be required by the tenant for whom she acted, which therefore demurred at being required to fund it when it was required by others. It seemed to me that there was real uncertainty as to how clause 11.24 was intended to relate to clauses 8.1.3.1 and 8.1.3.3 of sch 3 part 1 of the draft travelling lease, which exclude from the service charge any expenditure incurred by the landlord relating directly to the letting or renewal of a letting of a shop unit, or to applications and/or the grant of consents for assignments and sub-lettings.

37. Mr Wonnacott submitted that the proposed term covered services that the landlord would perform for the benefit of the whole estate, that they were services which mattered to the tenant's customers, particularly the younger demographic (that seemed to me to be a matter of pure speculation), that the tenant was protected from having to pay for some environmental white elephant, or from paying for things that only benefited the landlord, by the 'good estate management' rubric, and that in any event all the proposed services were probably covered by the “sweep-up” clause at para 11.29 of the draft travelling lease, and spelling it out clearly was preferable to the risk of a later dispute.

38. Mr Healey focused particularly on the proposed clause 11.17.2, submitting that works designed to improve energy efficiency or reduction of carbon emissions were matters which related to the longer-term capital value of the landlord's asset: they related to the longer-term upgrading of the shopping centre to modern standards, and not to the beneficial occupation and enjoyment of the Westfield Centre by the current tenant. He submitted that the proposals fell outside the scope of the other services covered, because they were not provided for the better or more efficient management and/or use of the retained parts or the comfort and convenience of the generality of the tenants or shoppers, and that they fell foul of the exclusions at sch 3 part 1 para 8.1.4.2 of expenditure on any future development of the facility (other than by way of renewal or replacement) and (at 8.1.5) of expenditure on costs incurred in the initial establishment at the facility of the systems, plant and equipment for the provision of the services.

39. In closing, he insisted that the landlord should explain what might be caught by the proposed term. If there was nothing new, as Mr Wonnacott had argued, then the court should not re-write the lease. As for Mr Wonnacott's argument that the new term would make for clarity and serve to avoid disputes, Mr Healey argued that it would achieve nothing of the kind.

40. I propose to deal with these proposed terms shortly. I bear in mind the requirements of s35, Lord Hailsham's warning that there must be a good reason for the court to impose a new term not in the current

lease against the will of either party, and the fact that the burden of persuading the court to change the terms is on the party proposing the change. If, as the landlord argues, there is nothing in the new terms that is not already covered by the existing lease, then there is no point in the proposed addition of the new terms, unless they bring clarity and lessen the likelihood of dispute. It seems to me, in agreement with Mr Healey, that they do nothing of the kind. In my view they are opaque in their intent and their likely scope, and they are highly likely to lead to litigation. Matters are made worse by the failure of the landlord to explain to the tenant in detail just what the proposed changes are intended or envisaged to cover. Moreover, some of the proposed wording (clause 11.17.2 in particular) has the look of capital improvement, and appears likely to run up against the existing exclusion at 8.1.4.2.

41. It is not enough for a landlord, proposing to impose a new term on a tenant, to compensate for the vagueness of the wording and the uncertainty of what is intended by reliance on the uncertain mantra that everything will be conducted in accordance with the principles of good estate management. I have heard nothing to persuade me that the proposed change will be fair and reasonable in all the circumstances, and I decline to order its inclusion in the new lease.

ISSUES OF LAW

42. By s34(1) of the 1954 Act (the underlining is mine),

> 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…

43. Determination of the rent under s34 involves a process of valuation, supposedly by reference to the date of the new tenancy. However, given that the new tenancy will not begin until (at best) 3 months and 21 days after judgment (s64), the court has to do its best with the evidence available at the date of the hearing, including any evidence of likely changes in the market between the date of the hearing and the date of the start of the new tenancy.

44. The terms of s34, by contrast with s35, require that I should be considering the appropriate rental for an empty unit, not a unit occupied by WH Smith, and a hypothetical incoming tenant, not an incoming WH Smith. I must assume a willing lessor and (as counsel agreed) a willing lessee.

45. Two particular issues arise from that proposition, and it is convenient to deal with them now so that they can be put to one side.

The effect of Hewitt

46. One issue arises from the rating case of *Hewitt v Telereal Trillium* [2019] 1 WLR 3262 a decision of the Supreme Court on the rateable value of a commercial property, which (by the Local Government Finance Act 1988, Sched 6, para 2(1)), was taken to be an amount equal to the rent at which the property might reasonably be expected to be let from year to year. A property which was unoccupied merely because of a surplus of supply in the market would have a more than nominal rateable value: even in a saturated market, the rating hypothesis assumed a willing lessee sufficiently interested to enter into negotiations to agree a rent, and there was no reason why, in the absence of other material evidence, that rent should not be assessed by reference to levels of general demand derived from the occupation of other properties with similar characteristics. It is important, I think, to note the words 'in the absence of other material evidence'. The decision cannot compel the conclusion that the court should disregard evidence of changes in the market since the date of the valuations making up the comparables.

47. Mr Wonnacott QC argues from *Hewitt* that it is no part of the landlord's job to identify particular people who would be interested in taking the tenancy, in what he calls a counter-factual world in which the tenant wanted to leave. That seems correct as far as it goes. Demand is assumed, even in a saturated market. There is no incompatibility between assessing the rent with the assistance of evidence of general demand derived from comparable properties, and taking into account evidence that levels of general demand may have fallen, which may point to a rent lower than the valuations fixed in the comparables. That is no more than the parties themselves have done by agreeing a 20% reduction for the so-called Covid effect. As Mr Wonnacott suggested, the court should so far as possible look at comparables in the current market, rather than historic ones.

48. Mr Healey responded to Mr Wonnacott by dismissing *Hewitt* as a rating case and therefore not of assistance, which I found an unconvincing proposition, and by relying on Lord Briggs' dissenting judgment to show that there is no need for an assumption that the hypothetical tenant will pay more than a nominal rent. He referred also to the judgment of Neuberger J in *Craven (Builders) Ltd v Secretary of State for Health* (28 October 1999, unrep.), who (hearing a dilapidations claim) concluded that while it was fallacious to decide that the value of a building was nil because there was not likely to have been a buyer for it (given that the valuation hypothesis required the court to assume that there had to be a transaction) it did not follow that an opinion that the value of the building was nil must be wrong, because the hypothetical parties negotiating for the sale and purchase of the building must be taken to know the state of the market, and if that state was weak, it would be relied on by the parties in reaching a deal.

49. As I read Lord Carnwath's judgment in *Hewitt*, it does no more than insist that even in a saturated market, the statutory hypothesis assumes a willing tenant sufficiently interested to enter into negotiations to agree a rent on the statutory basis. Lord Carnwath states in terms that there is no reason why (in the absence of other material evidence) it should not be assessed by reference to general demand derived from occupation of other properties with similar characteristics. If the evidence of general demand showed that a nominal rent was appropriate, then presumably the rent could properly be valued at that level. But, as Lord Briggs said at [63], in the real world the existence of evidence of general demand for comparable properties in the locality will almost invariably lead to the conclusion that there will be someone prepared to pay at least some rent above the level of the nominal, even if the property is vacant. And in this case, no-one is arguing for a nominal rent.

50. So: I must assume a willing tenant sufficiently interested to enter into negotiations to agree a rent, and I must assess the rent by reference to evidence of general demand derived from other comparable properties, with such adjustment as may be necessary.

Rent-free period for fit-out

51. The second matter concerns whether or not to allow for rent-free periods for fit-out. Incoming tenants are normally offered a rent-free period, typically 3 months, as an inducement to allow for fit-out before trading can commence. To reflect that free first quarter, the actual rental over the term is 'devalued' from the headline rent.

52. Mr Healey urges that the same exercise should be applied to a renewal, because the open market rent which the premises can command is in fact reduced by the rent-free quarter, and the landlord can only avoid that by virtue of having a sitting tenant already in occupation. But, by s34, the court has to disregard any effect on rent of the fact that the tenant has been in occupation of the holding, on the footing that the aim of s34 is to put the parties in the same position as they would be if the new lease was being agreed without the tenant being in occupation (see *Reynolds & Clark*, *Renewal of Business Tenancies*, at 8-155). So the three month rent free period should be devalued along with all other incentives.

53. Mr Wonnacott regards that argument as a sophistry, the answer to which is that the s34 disregard is aimed at any overbid that a tenant might make to avoid the inconvenience of moving out or to prevent a competitor from occupying its premises. That is certainly part of it, as *Harewood v Harris* [1958] 1 WLR 108 (overbid to retain goodwill) and *Humber Oil v ABP* [2012] EWHC 1336 (Ch) (overbid to avoid disturbance) both show. But is that all that s34 achieves?

54. Mr Wonnacott argues that the fit-out is not a consequence of the tenant's occupation, but something that an incoming tenant has to do before occupation. Hence, unless the current lease obliges the tenant to remove its fit out at the end of the term, the premises will come fully fitted out, and there would be no reason for the landlord to offer any fitting out concession. I am not sure that is right. Fit-out is not something that a tenant does before occupation: it does it during occupation (often as a licensee, after agreement for lease) but before it can start trading. The premises are fitted out, and the rent-free period granted, because of the tenant's occupation. It seems to me that the fact that the premises are fitted out thanks to a rent free period is properly seen as an effect on rent of the fact that the tenant has been in occupation, and therefore is to be disregarded, so that an appropriate adjustment should be made to the comparables for the absence of a rent-free period. It is a curious fiction, certainly, and it may be an unintended effect, but it seems to me to be required by the clear words of s34.

55. In common with the editors of *Reynolds & Clark* at 8-155, I see nothing unfair in adjusting the comparables in that way. If, as they suggest, the aim of s34 is to put the parties in exactly the same position as they would be in the real world without the tenant being a sitting tenant, then on that hypothesis the landlord would be agreeing new terms in the open market with a new tenant, and those terms would include a rent-free period for fitting out.

THE RETAIL SECTOR AND THE WESTFIELD CENTRE

56. There is no doubt, and I think it is common ground, that the retail market was fragile even before the Covid-19 pandemic. The growth in online sales has had an increasing impact on traditional retail operations and patterns of retail trade generally.

57. At present, matters are greatly complicated by the Covid-19 lockdown, which has had a dramatic effect both on GDP, and by fears for what will happen to retail employment once furlough ends. There are many who believe that the massive shift to online buying, particularly pronounced during lockdown, will never be

reversed.

58. These are very troubled times, and (given the shortage of open market lettings and proper comparables) particularly difficult ones for rental valuation.

59. However, it is agreed between the parties that rents have fallen by 20% from pre-Covid levels because of the pandemic.

60. The Westfield Centre in Shepherd's Bush opened in October 2008. It is apparently the largest retail and leisure 'destination', as Mr Bancroft (the landlord's valuation expert) calls it, in Europe, and is generally regarded as the UK industry benchmark. It has very good transport connections, excellent parking, a 20 screen cinema, a bowling alley and no fewer than 80 places to eat, as well as some 450 retailers. I could see why Mr Bancroft calls it a 'destination', because it plainly offers very much more than a wide variety of retail shopping.

61. There is good reason to suppose that the opening in March 2018 of the Westfield extension, with its John Lewis flagship at its apex, drew retailers from the original Westfield (eg Adidas, Bershka, Monsoon, Pull & Bear, River Island and White Company) to the extension, leaving unlet units, some of which have still not been filled.

62. Matters were not helped by the fact that most original 10 year leases expired in 2018 (at which point some tenants left Westfield), nor by the number of retailer CVAs and administrations since that time, reflecting the fragility of the retail sector. Debenhams is a recent example, but there have been many others.

63. Westfield has of course been very badly hit by the Covid-19 pandemic, with all but eight of its retail outlets falling into the category of nonessential shops which have had to shut during lockdown.

64. There are currently a number of vacant premises at the Westfield Centre, and of premises let on temporary short-term leases, both to existing occupiers who have been unwilling to commit on a long-term basis at renewal and to new entrants. Ms Campbell suggests that this points to a lack of demand for standard leases, itself no doubt engendered by uncertainty about the future of the Centre and the future of retail trading. Of course, the lack of current demand tells us nothing about the future of the retail market. Mr Wonnacott himself accepted that the market is 'simply shut' at the moment, with a general preference for sitting on hands and avoiding five year commitments until the post-Covid position becomes clearer. That, he says, explains the current vogue for continuance of occupation under temporary arrangements.

THE PREMISES AND THEIR LOCATION

65. Westfield has six stores of particular importance, or 'anchors', namely Marks & Spencer, Next, Waitrose, House of Fraser and the Harrods Outlet (formerly Debenhams), and – above all – John Lewis, which is housed in the northern extension, completed in March 2018.

66. There are different concentrations of speciality shops in different areas, for Westfield is what Mr Wonnacott called a 'curated space', which distinguishes it from High Street shops. So, for instance, the 'Village', on the East Mall, is what Mr Bancroft terms a 'luxury precinct', with shops housing 40 'high end designer brands', among which are Burberry, Gucci, Jimmy Choo, Louis Vuitton, Prada and Tiffany.

67. Similarly, there is a concentration of children's shops immediately to the south of the subject premises, on the Lower West Mall. That includes The Entertainer, which adjoins the claimant's premises. I see no reason to doubt the evidence of Mr Bancroft, the landlord's expert valuer, that the Lower West Mall is intentionally dedicated to children's shops and children's fashion wear (although it appears that there is no written policy to that effect). Retailers in the area of children's goods operate off low margins in a market dominated by supermarkets, and the landlord is prepared to tolerate lower rents as part of its aim of playing to the wider family attraction of Westfield. Mr Healey submitted that there was no evidence of such a strict policy for the children's area, but that it is simply a *de facto* arrangement. That was not Mr Bancroft's evidence, and I accept it the more readily given that on the 2015 rent review both parties were agreed that the landlord had intentionally created and rigidly applied a specialist children's area. In view of the low margins of retailers in that area, that policy may well have involved foregoing the higher rents which might have been achieved had the landlord opened up the Lower West Mall to retailers of a different sort.

68. At the far end of the Lower West Mall from the subject premises, the anchor store since the demise of Debenhams is the Harrods Outlet, which is held on the basis of a temporary arrangement, and the future of the site is not clear. The landlord has obtained permission for change of use to offices for the House of Fraser 'anchor' site at the south-east of the Centre. In the light of the landlord's agent's acceptance that 'the ability for super- large retail spaces to anchor shopping centres is coming under threat', this may be more than a straw in the wind.

69. The claimant's premises are at the north-west corner, near the junction between the Lower North Mall and the Lower West Mall, close to one of the entrances to the centre, which is accessible from White City and Wood Lane Underground stations. Until the extension was built this was, I understand, the only entrance from the Wood Lane tube direction, but in 2018 the extension provided another, arguably more attractive, means of access, which is bound to have reduced the number of shoppers entering or leaving by the original route.

70. Immediately to the right of the premises, as seen from the Lower North Mall, is one of the anchor stores, Next. To its left is The Entertainer, the first of the children's stores. Opposite it, on the corner of the Lower North and West Malls, is a branch of the jewellery shop H Samuel.

71. The premises are on two levels, the lower of which has storage and provides access to the loading bay area. The upper level of the premises, opening onto the Lower West Mall, is a substantial shop with a large frontage to the Mall. Its internal width is a maximum of 58ft 9in, and its depth is 193ft 6in.

72. The ground floor size is 11,206 sq ft, and the lower area is some 4633 sq ft, making a total of 15,839 sq ft, or 2900 sq ft in terms of Zone A (ITZA). That is agreed.

73. The premises are significantly larger than anything in the immediate area apart from Next, and they are the only unit on the lower mall on two levels (ie sales on mall level and an ancillary area below) apart from the anchor stores (eg Next) and two smaller units with mezzanines (Footlocker and Holland & Barrett). Those factors make close comparables harder to find.

74. It is agreed that the zoning method should be employed in the process of valuation. The zoning method notionally divides a shop into parallel zones, usually of 20 feet, starting at the street frontage. The area nearest the street is Zone A, the area immediately behind it is Zone B, and so on; and for valuation purposes, Zone B is taken to be half the value of Zone A, Zone C half the value of Zone B, and so on. This process is known as 'halving back'. Or the area of Zone B may be divided by 2, that of Zone C by 4, and so on, resulting in an area expressed 'in terms of Zone A', or ITZA, to which a Zone A value per sq ft can be

applied. It appears that part at least of the rationale of this process is that a shop with a wider street frontage is regarded as more valuable than one of the same area but a narrower frontage.

75. Zoning methodology entails examination of the rents agreed for comparable properties in the past and adjustment of those rents by reference to market movements since that time, any special terms of the transaction, and differences in size, quality and location. It is common ground that the more adjustments that the valuer has to make, the less reliably applicable to the subject property is the zone A rent that he obtains from the comparable. That is because all adjustments are matters of judgment, and the more adjustments have to be made, the more scope there is for error. So the best comparables are those which require the fewest adjustments for the differences between them and the subject premises.

76. There is a descending order of weight to be attached to different methods of rent assessment. Expressed as a guide rather than a firm rule, the best evidence (all things being equal) is open market lettings; then arm's length agreements between valuers on lease renewal or rent review; then determination by an independent expert; then an arbitrator's award; and below that a determination by the court under Part II of the 1954 Act.

Evidence may emerge from other sources: for example, the failure to let a property may be evidence that the asking price is too high.

VALUATION EVIDENCE

77. Given the current lack of confidence in the direction of the retail market, it was perhaps not surprising that there was such a gulf between the valuations of the two experts.

78. Mr Bancroft adopted a rate of £255 zone A, producing a headline rent of £751,995, or £714,395 less 5% for 3 months rent-free amortised over 5 years, a decline of 25% on the figure determined at rent review in 2013. He suggested that his figure should be adjusted upwards for a pandemic rent suspension clause, although he regarded it as difficult to say by how much, which would depend on the future likelihood of the clause being triggered and for how long.

79. Ms Campbell's valuation changed between 7 September 2020 and 26 October 2020, the dates of her two reports. She started out at £447,292, based on £166.90 Zone A. She applied a 35% discount for location, 25% for quantum, 20% for Covid-19 and £10000 for the absence of a service charge cap, producing a rent of £177,500. By the time of her supplemental report in October, the void separating her from Mr Bancroft had grown. She now took a Zone A rate of £142.11, from which she made the same deductions apart from an increase to 40% for location, but left out an allowance for service charge on the footing that there would be a cap. In fact, it is now agreed that there should not be a cap. So she allowed £10,000 discount to take account of it. I shall return to this.

80. In very broad terms, Mr Bancroft took account of the impact that Covid- 19 had made on market activity, and he referred to CVAs and administrations during lockdown (as if they were solely Covid-related), but appeared not to make allowance for the other factors which in my judgment were plainly affecting the retail market, even in centres like Westfield, well before the pandemic reared its head. By contrast, Ms Campbell took account, in my view correctly, of the broader context, to which I have referred at [56] to [64] above.

81. Mr Bancroft considered comparables of 5000 sq ft or larger, let on 5 year leases or longer, valued on a

zoned basis, with rents that in general corresponded with the surrounding Zone A tone (so that no quantum discount was applied compared with smaller units). They were in different locations, but he felt that they provided a more rounded perspective than lettings confined to the immediate vicinity.

82. Mr Bancroft played down the usefulness of the Lower West Mall, taking the position that the units on the Lower West Mall were of limited value as comparables, for the reasons discussed at [67] above. The rents accepted by the landlord for the children's area on Lower West Mall did not represent 'open market rent' relative to the subject premises, and provided limited assistance in assessing a rent. That embraced all the units to the south of the premises, starting with The Entertainer, which fronted the escalators.

83. That, as I accept, was an intentional strategy, which in Mr Bancroft's view did not apply to the subject premises, which were on the north side of the escalators. His opinion was that the location and visibility of the premises, which were close to H Samuel (opposite the premises and on the corner of the North and West Malls), Three, Vodafone and EE, were much more closely aligned to the Lower North Mall than to the children's area.

84. I think that what Mr Bancroft meant was that the customer walking along the Lower North Mall is faced with the premises diagonally ahead of him as he reaches the western end of that mall, whereas the customer walking northwards along the Lower West Mall does not encounter the premises face on, but only sees them on his or her left hand side as he passes the escalator. That said, the premises are only visible from the Lower North Mall as the visitor nears the west end of that mall, because they do not lie opposite the end of the mall but off to the left (or south), and their visibility is to an extent dependent on H Samuel, the shop on the inside of the corner of the Lower North and Lower West Malls, being open (which, as a non-essential retailer, it was not on my site visit).

85. There is no doubt that there is a substantial difference in value between the Lower West Mall and the Lower North Mall. A number of lease renewals at the end of 2019 reflected a net devalued rent of £408.50 Zone A, by comparison with the passing rent for the premises of £327.50 Zone A, which illustrates the admittedly lower value of the subject premises in the Lower West Mall.

86. Mr Bancroft relied to a substantial extent on the 2013 rent review, concluded in 2015, which set a rent of £953,000, based on a rate of £327.50 Zone A, which compared at the time to a prime tone on the Lower North Mall of £414.40 Zone A (a 21% differential) and to figures of c£231-£234.50 Zone A in relation to two units in the children's area.

87. However, I am sceptical of Mr Bancroft's attempt to align the subject premises more closely to the Lower North Mall than the Lower West Mall, which seems to me a little wishful. It may be more accurate to regard it as to a degree *sui generis*, in lawyers' language, or out on its own. In any event, Ms Campbell's evidence shows that rents tail off towards the western end of the Lower North Mall.

88. Ms Campbell, by contrast, urged caution in reliance on the rent review. It is true that the weight to be attached to an arbitrator's findings depends greatly on the quality of the evidence and argument canvassed before the arbitrator.

89. She argued that there was reason to suppose that the 21% pitch differential found by the arbitrator might have changed. In 2013, the prime pitch was the Upper North Mall, which was fully let and commanded the highest rents. But when the Westfield extension opened in 2018, that became the prime pitch, and a number of tenants relocated there. It formed a central north-south corridor with the Atrium, and in Ms Campbell's

view, the malls running east-west from the Atrium, and in particular their extremities, became to a varying extent less attractive. Moreover, she says, the arbitrator regarded the premises' proximity to Next as an important factor, at a time when Next was the fourth of the anchor stores, but now it has effectively been demoted by the arrival of John Lewis; then it had 9.5 years of lease to run, but now its lease expires in two years. She suggests that there is no certainty that it will stay, given the demise of Debenhams and the precarious position of House of Fraser. Ms Campbell also argues that additional value cannot now be attached (as it was by the arbitrator) to visibility from Disney and H Samuel, both of which were strong comparables. However, neither, she says, is committed to its location, and Disney has been on short term agreements since 2018. (In fact, H Samuel is now re-fitting in the hope of improving its prospects).

90. It seems to me that Ms Campbell's arguments show the extension has altered the centre of gravity of the Westfield Centre, and made the Lower North Mall perhaps less central than it was. But they have more force in showing that the east-west malls may have suffered in relation to the central north-south axis, than in persuading me that the differential to be applied as between the Lower North Mall and the position of the subject premises has changed to anything like the degree that she would have the court accept. I shall return to this.

91. It is certainly the case that there are currently a number of vacant premises, or premises on short-term leases. Mr Catton confirmed the accuracy of Ms Campbell's list (bundle 5/1280) and plan (5/1085) of vacant premises or premises subject to short term leases as at September 2020. The vacant premises include one almost opposite the subject premises on the Lower West Mall, two fairly substantial units on the Lower North Mall, and six units close to the atrium on the far side of the Lower North Mall, beyond the extension. The unit diagonally opposite the subject premises, which was occupied by Russell & Bromley, is said to be likely to be occupied 'soon' by Polo Ralph Lauren Childrenswear, but no commitment seems to have been entered into. There appear also to have been difficulties for H Samuel, who occupy the unit opposite the subject premises on the corner of the West and North Malls, all or part of which was on the market pre-Covid without attracting serious interest, although, as I mentioned above, it is now off the market and re-fitting.

92. Ms Campbell referred to the availability of larger stores, which in her view demonstrated the absence of demand. She pointed to seven available units of between 5825 and 18705 sq ft (3504 to 9817 sq ft at Mall level, the remainder mezzanine: see 5/1278). In addition, there is a substantial and important 24507 sq ft Extension unit in a prime position near John Lewis, which was due to be occupied by New Look in March 2018 but has been vacant ever since. She was only aware of one entrant acquiring a unit of over 10000 sq ft in the last 3-4 years (Urban Revivo's agreement for a lease of 22000 sq ft in July 2017).

93. On her evidence, WH Smith would itself not take the subject premises if it was starting afresh at Westfield: it would want no more than around 7500 sq ft of sales space and 2000-3000 sq ft of back of house space, ideally on the ground floor only and on the Lower North Mall. It would not be in the market for the premises but for its goodwill and unamortised expenditure on fit out, both of which of course must be disregarded for lease renewal purposes. Nonetheless, WH Smith has not made enquiries about taking a smaller unit, probably because of the investment that it has made in the premises (particularly in installation of a lift).

94. Mr Bancroft referred initially to four lettings as helpful comparables. He regarded them all as open market lettings.

95. One of his comparables was the Genesis store, but if I understood him correctly he did not in the event place weight on it. The other three were Abercrombie & Fitch, Tudor and Kurt Geiger t/a Steve Madden.

Abercrombie & Fitch

96. Mr Bancroft described this as a twin level unit, let on a 10 year lease from April 2019 with tenant break at the end of year 6, situated on the upper level of the Atrium.

97. I do not think that Mr Bancroft was right to treat this as a true open market letting. It seems to have been a linked transaction whereby a lease on one unit for 15 years from July 2008 was surrendered, and two new leases were granted, both for 10 years with tenant breaks at the end of year 6. One (the original Hollister store) was on the upper level of the Atrium and the other (the new store) was on the Upper South Mall. The initial rent under both leases was the higher of £949,200 and 10% gross turnover, and the tenant received 4 months' rent free plus a capital contribution of £316,400. That, according to Mr Bancroft, devalued to £390.80 Zone A (without amortising 3 months of the rent free period).

98. Ms Campbell said that there was 20 weeks fit out rent free followed by 4 months additional rent free, but that is not borne out by the landlord's proforma. However, it does appear that landlord works were more extensive than would have been usual, which would have been a further incentive. She devalued the rent to £346.37 Zone A, without making any allowance for the turnover element of the rent.

99. In any event, the locations are wholly different to the subject premises.

Tudor

100. Tudor was a letting of a very small unit (755sqft) in a very good position, on the Lower North Mall opposite the Central Atrium. It was a 10 year lease from 1 April 2020 with a tenant break at the end of year 5 (subject to notice and penalty). The initial rent was £160,000 pa, with a £120,000 capital contribution, which devalues to £323.56 Zone A with a 5% allowance for size.

101. That, Mr Bancroft showed, represented a reduction of around 20.5% from the prevailing Lower North Mall tone of £408.50 Zone A agreed on the 3 lease renewals concluded before Covid in October and November 2019 (Three, EE, O2), and in his view illustrated the Covid effect. And it also pointed to a 21% differential for pitch as compared with his valuation of the subject premises at £255 Zone A, which in turn corresponded with the 21% differential for pitch at the April 2015 rent review (wef October 2013) as between the subject premises (£327.50) and the then agreed tone of the Lower North Mall (£414.50).

102. Ms Campbell suggested that the correct comparison was with pre- Covid Atrium values, not with values half way or more along the Lower North Mall. Taking the average of the 2017 Atrium open market evidence (Urban Decay £501 Zone A, and Tag Heuer & Breitling – next door to Tudor - at £470), Ms Campbell suggested that the decline in value shown by the Tudor deal was 33.3%, not 21%. Moreover, she noted that Mr Bancroft had taken the tone of Tudor's part of the Lower North Mall (on the Atrium) to be the same as that of the Lower North Mall generally, whereas in reality it should be considerably higher. Those criticisms, in my view, were well founded. The prime Atrium position of Tudor is not reasonably comparable with the mobile phone units to the west, some way down the Lower North Mall.

103. In fact, the Tudor deal was agreed in October 2019, but exchange was delayed because Tudor could not start fit out during lockdown. There was no binding commitment until the agreement for lease (15 June 2020), which I think must be taken as the valuation date. Mr Wonnacott is right to say that the tenant could have pulled out. He also says that it must have regarded the deal as a good one. But that does not follow.

According to Ms Campbell, Tudor had long lead-in times and had already commissioned and paid for its fit out, which had to be sent from Italy in March 2020. So there was a high degree of internal commitment, which would have deterred it from pulling out even if it had qualms about the price. I doubt, therefore, that it can be said to provide reliable post-pandemic evidence.

104. And there is a further factor. The tenant's opinion of the Tudor letting as a deal in itself will have been coloured by the fact that it was not a standalone but a linked transaction. The tenant received a rent reduction on another unit which it occupied under the trading name of Goldsmiths where, according to Ms Campbell's information, the shop was unprofitable. The landlord agreed to support the Goldsmiths rent, as long as Tudor acquired the small Lower North Mall/central Atrium unit. The reduction for Goldsmiths was from £440,000 to £340,000 to lease expiry in June 2023, with a turnover rent of 10% of net sales in excess of £2.25m, but the lease was taken outside the 1954 Act. The Tudor letting must plainly be seen through the lens of the substantial Goldsmith concessions. Mr Bancroft would not accept that the £100,000 reduction should be seen as a factor in the Tudor letting, but I agree with Mr Healey that it is artificial to see it as a distinct open market comparable. That very much limits its usefulness, and makes it an uncertain foundation on which to build a valuation.

Steve Madden

105. This letting is potentially valuable evidence because it was an open market deal at the Atrium end of the Lower North Mall, to a Westfield new entrant, with an agreement for lease exchanged in October 2019. It was for a 10 year term outside the 1954 Act with a mutual break at the end of year 6. The rent reserved in the lease was £380,000 pa, but that was reduced by side letter to the higher of £100,000 pa and 15% gross turnover, with a base rent after year 1 of the higher of £100,000, the turnover rent paid in year 1 and 15% of gross turnover in the current year. There was also 22 weeks rent free and a capital payment of £130,000.

106. The lease rent devalued to £375.30 psf, lower than the 2019 mobile phone lease renewals. The net base rent payable devalued to £81.40 psf. That was a very low rent for a prime position in the extension.

107. Mr Bancroft explained the rent as a one-off. This was the only UK Steve Madden store, which gave the tenant greater bargaining power, and they would only accept this structure, by way of personal concession. The landlord wanted them as a tenant: 'I think every landlord would want them', as Mr Bancroft put it. I see no reason not to accept that evidence.

108. But was it in reality a one-off? Ms Campbell did not agree that it was. She pointed to other pre-Covid open market valuations in the second half of 2019, Laura Ashley (in the extension, close to John Lewis), and Benetton, on the Lower East Mall. She devalued them to between £81.40 and £89.65 Zone A. She referred also to the Ann Summers lease renewal on the Lower North Mall (£109.05), which happened at the same time. In her view, the pre-Covid open market evidence showed a remarkable consistency, and suggested that the Steve Madden deal was not unique.

Rent reviews/lease renewals

The Entertainer

109. Mr Bancroft referred to The Entertainer, which he regarded as not directly comparable to the subject premises because located within the specialised children's wear section on the Lower West Mall, and not so

visible from the Lower North Mall. It is curiously artificial to treat The Entertainer, which is immediately next door to the subject premises and at the northern end of the Lower West Mall, as being so easily and neatly differentiated, but I accept that it falls into a distinct category.

110. The lease structure is certainly different, with a stepped base rent and a turnover provision, offered as a concession to the tenant. The lease renewal for a 10 year term runs from 1 July 2017, which makes it a doubtful guide to more recent market movements. The lease rent is £498,352 pa (£352.50 psf Zone A), but the concessionary stepped rent (presumably by side letter) is £322.50 or 10% of turnover if higher, devaluing to £219.50 Zone A.

The mobile telephone comparables

111. Mr Bancroft placed particular emphasis on a rent review involving the two Vodafone units on the Lower North Mall and lease renewals of premises occupied by three other mobile phone companies and Halifax. Vodafone (2018) was a rent review and Three, EE and O2 (October 2019) were lease renewals. They were all pre-Covid.

112. Vodafone is a little further west on the Lower North Mall than Halifax. It consists of two units, one of 2058 sqft and the other of 2009. They were both agreed at £430 sq ft Zone A with an assumed term of 10 years.

113. Three, EE and O2 are also all in the Lower North Mall. The lease renewals for the units, agreed pre-Covid for a notional 5 year term, were set at £408.50. The phone shops were used by the landlord to support a higher level of rent for Halifax (see below). It was suggested to Mr Bancroft that Halifax might have relied on the case of Steve Madden. He did not think that they could have done, given that they agreed a considerably higher rent.

114. Ms Campbell regarded all three figures as out of line with open market value, for which she said much better evidence was provided by the pre-Covid open market figures for Laura Ashley, Steve Madden and Benetton, and the Ann Summers lease renewal, to which I have referred above, all of which were agreed during the second half of 2019. She showed that even the lease rent agreed by Steve Madden in a good position near the Atrium devalued to a lower figure (£373.30 Zone A) than the mobile phone renewals.

Halifax

115. The Halifax unit is on the Lower North Mall, perhaps two thirds of the way down towards the subject premises. This was a lease renewal effective from 1 April 2020, which was concluded on 16 April 2020, at an early point of the first lockdown, when only 8 shops out of around 450 at Westfield were allowed to be open, and when there was in reality (although it may not have seemed like it) even less idea of what the future held than we must hope there is now.

116. A new 5 year lease was agreed, with 7.5 months' rent free (3 months was for rent-free fit out and 4.5 months to reflect Covid). The rent agreed was £444,000 pa, or £408.50 Zone A, for a considerably smaller unit than the subject premises (3,560 sq ft NIA as opposed to 11,206 sq ft ground floor, or 15,839 overall). I note that in his evidence on the renewal Mr Bancroft was seeking £467,000 pa, based on £408.50 Zone A, adjusted upwards by 5% to £430 to reflect A2 use. Halifax's expert was seeking £185,000 pa based on £200 psf Zone A, discounted by 5% for fit out and 10% for Covid-19.

117. However, as part of a commercial compromise of litigation between the landlord and Halifax, there was a personal concession to Halifax by way of a side letter, whereby the rent was reduced to £292,000 pa, reflecting a headline £268.63 Zone A.

118. Ms Campbell reports the Halifax expert as telling her that the side letter rent was provisionally agreed in March 2020, based on pre- pandemic evidence on the Lower North Mall. What remained in dispute in April 2020 was fit out rent free period and Covid adjustment. In the event, there was almost no Covid evidence, no doubt because this was at the start of the first lockdown. The parties agreed 3 months' rent free fit out and 4.5 months' rent free for Covid. The Covid rent free period is the equivalent of a 7.5% discount over the 5 year term.

119. Ms Campbell took out the 4.5 month Covid concession, but devalued the 3 months' rent free fit out, to produce a net pre-Covid rent of £277,400 pa, or £255.29 psf Zone A. If I understood her correctly, taking into account the 4.5 month Covid concession, the devalued Zone A figure was a net £235.05. In fact, of course, the appropriate post-Covid discount has been agreed between the present parties to be of the order of 20%, compared with the 7.5% optimistically agreed for Halifax.

120. When the £235.05 is compared to Mr Bancroft's own expert valuation of the rental in January 2020 of £430 psf Zone A, that is a 45% discount. The agreed figure, in Mr Bancroft's view, shows the dire state of the retail market ('rock-bottom' as he called it) in April 2020, and is not relevant to a valuation in November 2020 (or February 2021). That begs the question of whether the retail market is in a better state now.

121. Ms Campbell found it inconceivable that the landlord would have agreed a 45% discount to reflect what she says was then thought likely to be a temporary lockdown. In other words, if I understood her correctly, the discount does, contrary to Mr Bancroft's claim, still have relevance as a comparable. However, in accordance with the agreed position of the experts, she would still apply a Covid discount of 20% rather than 7.5%.

122. Moreover, she makes the point that the Halifax compromise was based on more limited contemporary open market evidence than is available now. In her view, the agreed Zone A rate was still too high.

Body Shop

123. Both experts referred to Body Shop in their supplementary reports. This was a post-Covid lease re-structure, which in Mr Bancroft's view was of less weight than the Tudor letting, which he regarded (but Ms Campbell did not) as an open market transaction.

124. Body Shop's premises are also in the Lower North Mall, but in a superior position perhaps one quarter of the way down the Mall, and closer to the central atrium than Halifax.

125. A new 5 year term was agreed from 2 October 2020 with no breaks. The tenant had previously held on a 10 year 1954 Act lease from 1 October 2015, with a tenant only break on 1 October 2020 which it exercised. The new 5 year lease was outside the Act, with 5 months rent free plus an extra 3 months conditional on completion of a refit of the shop. The rent agreed was £210,000 pa or 12% of gross sales if higher, which devalues to £284.55 Zone A headline and £260.84 Zone A net (amortising the 5 months' rent free over 5 years, but ignoring the extra 3 months). Ms Campbell amortised the entire 8 months' rent free

over 5 years, producing a rent of £182,000, or £253 psf. On her evidence, a rent for a tenancy within the Act is 2.5% higher, which would point to a comparable figure within the Act of around £259 psf.

126. No doubt it is right that, as Mr Bancroft said, the tenant's surrender of 1954 Act protection assisted it to negotiate a lower rent than would have been possible had the tenancy remained protected. But if, ignoring the surrender of 1954 Act protection, Mr Bancroft's £260.84 Zone A is simply reduced for a 21% differential with the subject premises, assuming that differential to be correct, that would point to a Zone A rate of £206 for the subject premises and a total rent of £577,119 pa. With Ms Campbell's 2.5% upwards adjustment to allow for the lease being within the Act, it would be about £211.

Lower West Mall units

127. Ms Campbell considered a number of units in the Lower West Mall, most of which were very small and bore no relation to a unit like the subject premises. One was The Entertainer, to which I have already referred. There is also a small unit diagonally opposite the subject

premises, formerly occupied by Bambinista, which has been vacant since March 2020 but has hoardings stating that Polo Ralph Lauren Childrenswear is 'coming soon'. Bambinista moved to Unit 1084, which I believe to be two units south of The Entertainer, on a 6 month lease with either side having an option to terminate on 30 days' notice, the rental being 10% of turnover above a fluctuating figure.

128. There are other units in the Lower West Mall on temporary leases. Most noteworthy is the former flagship Debenhams store, now occupied by Harrods on a temporary lease expiring 31 March 2021.

129. Base and Base Junior, Trotters and The Entertainer were all new leases agreed in 2017, and in my view are now of little value. The Entertainer is an early example of the new fashion for turnover rents, followed in 2018 by Kids Around, and in 2019 by PoP. The latter was a 10 year lease of a 3,167 sq ft unit, with a tenant's break in year 5 (rent at review to be 80% of market value), and a starting rental of £168,550 or 10% of turnover if higher, which with a large capital payment devalued to £221.50 Zone A.

130. As I have said, I accept Mr Bancroft's evidence about the distinct status of the children's area on the Lower West Mall, so it seems to me that examples such as the PoP lease should be seen as the pre-Covid floor for the purposes of comparison with the subject premises.

Lower North Mall: Disney, Superdrug, Ann Summers

131. In the Lower North Mall, Disney has entered into two short leases since its original 10 year lease expired in September 2018. The background, according to Ms Campbell, is that the liability for dilapidations was waived. The current base rent is £160,000, in lieu of the full dilapidations claim, with a provision for 10% of gross turnover above £3 million. It reduces to £80,000 pa on 1 April 2021. After that, the turnover percentage is 6% on all sales. The current lease is for two years from 1 October 2020, with a tenant's option to break on 1 October 2021 or at any time thereafter on 45 days' notice, and a landlord's option to break from 31 January 2022 or at any time thereafter, also on 45 days' notice. Ms Campbell devalues the stepped rent to the first landlord break (16 months) to produce a figure of £58.10 Zone A.

132. Ms Campbell regards that agreement as evidence that there is no demand from an occupier willing to take a permanent lease on better terms. What in my judgment it certainly does show is that many occupiers

want to hedge their bets in the current post-Covid climate.

133. Similarly, Superdrug, which has lately held on a tenancy at will, is said to have agreed a new contracted out lease for 3 years backdated to April 2020, with mutual options to break on 4 weeks' notice, which devalues to £165.74 Zone A. Mr Wonnacott argues that if Superdrug is prepared to pay £165 to trade through the worst of the Covid crisis, with no security of tenure if and when things get better, that shows that the rent for a new 5 year post-crisis lease could not possibly be lower. It sets the floor, without giving any indication of a ceiling.

134. Also on the Lower North Mall is Ann Summers, which renewed its lease from an effective date of 22 November 2019 on a contracted out short term of 3 years from July 2019 with mutual breaks from 1 July 2020 and thereafter on 3 months' notice. They remain in occupation, so presumably the landlord has not given notice to break. The rent is £100,000 or 8% of turnover if higher, devaluing to £109.10 psf Zone A.

Benetton

135. Ms Campbell also points to Benetton, in the Lower East Mall, where the parties entered into a contracted out lease in November 2019 for a 5 year term starting in October 2019, with a mutual option to break after 3 years and thereafter on 3 months' notice. The lease rent is £465,000 pa, but the parties entered into a side letter agreement recording a base rent of £100,000 pa or 8% of gross turnover if higher. In years 2-5 the base rent is the higher of £100,000 pa and 80% of the rent (including turnover) paid in the previous year. Ms Campbell devalued the rent to £89.65 psf Zone A. The value of Benetton as a comparable is reduced by the fact that a fashion retailer would not, as Ms Campbell accepted, want to take premises in the Lower West Mall. However, it must surely be evidence of slackening demand in late 2019.

Westfield Extension

136. Ms Campbell considered the Westfield extension, where she found important evidence of open market lettings of shops of over 5000 sq ft in Westfield's prime pitch. Mr Bancroft did not do so, because in his view the simultaneous marketing of a large amount of retail space in what he described as a 'relatively unproven' retail destination involved very different dynamics from those involved in valuation of the subject premises, and because, he maintained, the landlord was influenced by other considerations than rent alone, including the need to optimise tenant mix. Ms Campbell, however, was not deterred. She referred to a number of units in the Extension.

137. One was West Elm, which entered into an agreement for a lease in December 2017 on a unit of 9,661 sq ft. The net rent is £187,360 pa for a 15 year lease with tenant breaks at years 5 and 10, and a capped service charge. The tenant received 22 months' rent free. In her supplemental report, Ms Campbell devalued the rent to £92.85 psf Zone A.

138. Waterstones, a smaller unit of 5,700 sq ft, was let in October 2018 for a 10 year term with a tenant break at year 6, at a rent of £340,000 with 20 months' rent free. Devaluing 17 months to the tenant break, Ms Campbell in her supplemental report produced a net rent of £259,722 pa, or £177.16 psf Zone A. There was also a side letter dealing with the review at year 5, by which the rent will be the higher of the initial rent and 80% of market value, which in Ms Campbell's view illustrates the relative strength of the parties' bargaining positions in the open market as at October 2018, positions which in her view (given the decline in the retail market since October 2018) have now shifted further in favour of tenants.

139. Finally, Ms Campbell considered another open market transaction, Laura Ashley's lease of SU1232, a prime position at the John Lewis end of the Extension, in October 2019. As she says, the fact that Laura Ashley subsequently went into administration does not affect the weight to be given to the letting at the effective date. The lease was for a term of 10 years, outside the Act, with mutual breaks at year 5, with a stated rent of £275,000 but a side letter rent of £100,000 pa or 10% of gross turnover if higher. There was 8 weeks' rent free and a capital payment of £25,000, which Ms Campbell (again revising an earlier figure in her supplemental report) devalued to £82.40 Zone A.

An imbalance between supply and demand?

140. Ms Campbell's view is that there is a serious imbalance between supply and demand at Westfield, which started when the Extension opened in March 2018, has been exacerbated by the decline in the rental market, and then further aggravated by Covid-19. She accepts that valuation of the subject property is difficult because, she says, there is no market for stores of its size. Larger units continue to be available, and she pointed to the terms on which Disney holds its 5,202 sq ft in the Lower North Mall, and to the occupation by New Look of 24,507 sq ft (9,423 sq ft mall level sales space) on the Upper West Mall and mezzanine for nil rent since April 2019, which she suggested indicates a preference by the landlord to retain a struggling retailer paying no rent rather than to take the units back and add to the large voids at the centre.

141. She pointed to what she regards as a two tier market at Westfield, where letting evidence is generally at much lower levels than renewals, which in her view have been agreed at artificially high levels based on other lease renewals. She compared, by way of example, the 2019 mobile phone lease renewals on the Lower North Mall, with the open market letting to Steve Madden; the lease renewal agreed with The Entertainer in September 2018 (£219.47 psf Zone A), compared with the open market letting to Waterstones the following month in a far better location (£161.06 psf Zone A); and the very high February 2019 lease renewal agreed by Gap (Upper West Mall), which devalues to £407.65, with lettings in the Extension in 2018 and 2019 (Laura Ashley, Waterstones and others) at much lower figures.1

142. Post-Covid, she attached weight to Halifax (£255.29 Zone A, or £204.23 with 20% Covid discount) and Disney (£58.10 reducing to £40.67 after a 30% discount for location).

143. Ms Campbell candidly accepted that there was a wide divergence in Zone A rates, and to overcome that problem she adopted a blended rate. She left out of that blended rate Laura Ashley (because it dates back to July 2019), Ann Summers and Disney (because they are for very short terms, although in other respects of value), and Body Shop (because the agreed Zone A rate of £253 psf was an outlier in October 2020, if no Covid concession was agreed).

144. The rentals that she did put into the blend were Steve Madden (£81.40 Zone A), Benetton (£89.65) and Halifax (£255.29 before Covid discount). That produced a result of £142.11, which she then discounted 40% for location and 20% for Covid-19, reaching a valuation of £68.21 Zone A.

CONCLUSIONS ON NEW RENT

145. The gap between the experts' valuations is a most unusual one. Mr Wonnacott made some play of it in his cross-examination of Ms Campbell, suggesting that the void between the two entailed negligence which went beyond a non-negligent margin of error. In a more normal climate, that might have been right. But I do not think it fair as matters stand. It appears to me that the retail market generally is suffering from an acute crisis of confidence. I accept that, as Ms Campbell showed, a number of well known retailers entered

administration or entered CVAs even before the Covid-19 pandemic. There was a substantial shift to online buying even before the Covid-19 pandemic, and undoubtedly increased by the pandemic, which during lockdown has put non-essential retail stores off limits. It is uncertain how long Covid-19 restrictions will last, how far they will be relaxed when they are relaxed, and what the long-term effects of the pandemic upon people's shopping habits will be. It is not surprising, in this climate, that there are few good contemporary comparables. Nor is it surprising that we have seen many examples of temporary leases or leases at turnover rents. These are signs of a lack of market confidence and a lack of willingness to commit.

146. It is clear to me that the Westfield Centre is a curated space, and that it is important to the landlord to find the right tenant for the right place. I was able to see the sense of Mr Bancroft's contention that the landlord is concerned to optimise tenant mix in a new prime area like the extension, where he said that the simultaneous marketing of a large amount of retail space involved very different dynamics from those involved in valuation of the subject premises. That I can understand, although the state of the market remains a looming reality even in the extension. Because the centre is a curated space, it seems to me sensible to focus so far as possible, initially at least, on the area close to the subject premises, the Lower North Mall.

147. Pre-Covid, the significant Lower North Mall comparables are the Vodafone 2018 rent review (430 sq ft Zone A) and the lease renewals of O2, EE and Three in October 2019. The latter three were set at £408.50 on notional 5 year terms. Ms Campbell said they were set too high.

148. I think that the Halifax lease renewal tends to confirm that. It will be recalled that this was agreed on 16 April 2020, during the start of the first lockdown. Some allowance was made for Covid, but not (as hindsight shows) enough. The Zone A figure for Halifax without Covid allowance was £255.29. With a 20% Covid allowance, if my calculation is correct, it would be around £204.23. One must remember that this was a side letter agreement: the lease rental is £408.50 Zone A. That, as Mr Wonnacott argued, makes it effectively unassignable. Ms Campbell said that tenants of shopping centres rarely assign, and that their concern is with the rent, and not with passing on the lease. That may well be right, but part of the consideration for a low side letter rent, set against a high lease rent, must be the effective non-alienability of the lease. Just how much difference that makes is hard to say. I suspect that whatever strict valuation theory says, Ms Campbell is right to say that the market makes no adjustment for the size of the lease rent: these are simply inventive devices to obtain lettings and enable the landlord to hide the true value of the transaction.

149. Much time was spent on Tudor. This is not really a Lower North Mall location. It is a very small unit, opposite the central Atrium. It should, as Ms Campbell suggested, be compared with other Atrium values. Nor can it be seen entirely as a post-Covid valuation, because of the extent to which the tenant was committed to fit-out. I cannot accept that it was a true open market letting, because it cannot be divorced from the rent relief granted at the same time to the Goldsmiths unit. If Tudor is seen on its own, the devalued Zone A rent was £323.56, which suggests a 20.5% reduction from the late 2019 Lower North Mall tone of £408.50. But that is not comparing like with like. The true reduction in value as at April 2020 was (as Ms Campbell said) more like 33.3%, related to 2017 Atrium values. If it is seen as inseparable from the £100,000 rent relief granted for the Goldsmiths unit, and that relief were to be applied wholly to Tudor, the rent could be seen as £184 Zone A. That would be unrealistic, perhaps, but it does show that the letting must be treated with caution.

150. Body Shop is important, as a post-Covid lease re-structure in the Lower North Mall, albeit towards the Atrium end. The new 5 year term, outside the Act, was agreed in October 2020. The comparable 1954 Act Zone A figure was around £259 sq ft. That must incorporate a built-in Covid discount simply because of the date of agreement, but its size is not known.

151. I should refer to the three short term deals on the Lower North Mall since the Covid pandemic began. Disney took a two year lease from 1 October 2020 with a break option at any time after a year, which Ms Campbell valued at the extraordinarily low £58.10 Zone A. On any view, it is an outlier. Ann Summers was similarly shy of commitment, devaluing to £109.10 Zone A. Both include a turnover element, which in my judgment makes them particularly hard to value, given that no work has been done on the likely turnover figures in either case. Ann Summers' rent is £100,000 or 8% of turnover if higher. Ms Campbell simply discounts the turnover element: in her view tenants are only interested in the base rent. But without an analysis of what the turnover element might mean in real terms, some caution is required with these figures. Superdrug, by contrast, has agreed a 3 year lease backdated to April 2020 with mutual options to break on 4 weeks' notice, and is paying a devalued Zone A rent of £165.74. I agree with Mr Wonnacott's observation that if Superdrug is prepared to pay that amount to trade through the worst of the pandemic, with no security if things get better, that shows that the rent for a new 5 year lease could not possibly be lower. In my judgment he is right: it sets a floor.

152. Much time was spent on Steve Madden, which was an open market letting at the Atrium end of the Lower North Mall, agreed pre-Covid in October 2019. This was a side letter rent with an element of turnover after year 1. I accept that the landlord badly wanted this retailer. The net base rent of £81.40 Zone A was extremely low for the time, although the high turnover element after year 1 (15% of gross turnover) has not been valued. I cannot see that it is explicable in any terms save those advanced by Mr Bancroft: this was an unusual agreement to obtain a highly desirable tenant.

153. I accept that it was not a complete one-off, in the sense that there were other pre-Covid lettings at low rates (Laura Ashley and Benetton in the second half of 2019, for example, with side agreements and turnover rents). Yet in May 2019 the landlord entered into a new 10 year lease with PoP for a unit in the Lower West Mall children's offer, again with a base rent and turnover if higher, and a 5 year tenant's break plus a rent at review of 80% market value, which on Ms Campbell's calculations devalued to £221.50 Zone A. I do not see how Laura Ashley (in a prime position in the extension) or Benetton (Upper East Mall) can rationally be compared with PoP in its admittedly lower value children's area, except in terms of the landlord's preparedness to do deals to secure the right tenants for the locations which need them. The PoP letting must surely be seen as a pre-Covid floor for the subject premises.

154. The current retail market is, in a sense, as Mr Wonnacott says, shut down. No-one wants to enter into a long term commitment while the pandemic continues. Tenants prefer short-term deals, turnover-based. But the pandemic will not last forever. Vaccines have been developed and are being administered to large swathes of the population. Infection rates and hospital admissions are falling. There is talk of the lockdown being eased in such a way as to ensure that it never has to be re-imposed. Economists speak of a possible post-Covid boom, on the back of people's pent-up desire for normality and the money that they have saved through enforced lockdown. I have no crystal ball, but it does seem reasonable to suppose that the prospects for the summer of 2021, and the future thereafter, are likely to improve. That is not to say, of course, that the long-term decline of the retail sector will be reversed; and the risk of further lockdowns cannot be excluded.

155. In my judgment, the strongest evidence of the appropriate rent for the subject premises – subject to adjustments to which I shall now turn – remains the Halifax letting in April 2020, at £255.29 Zone A, without Covid discount, but devalued for 3 months rent-free fit out. It was indeed agreed towards the bottom of the market (although the low Covid discount shows that Halifax cannot have appreciated how long the pandemic would last), but in my judgment the market is in a very similar place now, and is likely to remain there for some time to come. I take comfort from the cross-check against the Body Shop effective figure of £259 Zone A, which must include a calculation (we do not know how much) for the effect of Covid, but which is also in a better location, closer to the Atrium, than Halifax. I therefore take as my starting point £255 Zone A.

Quantum

156. Ms Campbell urged a 25% discount for quantum, based on the difference between The Entertainer's Zone A rate and those agreed on smaller shops in the Lower West Mall, and on other shops of different sizes in the same pitch. She accepted that in the 2015 rent review she had not made any deduction for size. That was because the evidence did not support it. Now, however, it did.

157. The subject premises are significantly larger (nearly 16,000 sq ft, or c11,200 at Mall level) than anything in the vicinity apart from the Next anchor store. As I understood Mr Bancroft's reports, he valued his (smaller) comparables on a zoned basis, applying no discount for the (larger) subject premises compared with smaller units. In other words, as Mr Wonnacott put it in closing, the reduction for quantum was built into the zoned basis of valuation. Mr Bancroft's position, as stated in his answers to questions, was that an adjustment for size was appropriate if the demand for large shops was different from the demand for average sized shops. If there was more demand for large shops, the adjustment for quantum would be upwards; if less, then downwards.

158. Ms Campbell did produce comparisons of larger and smaller units. It was her evidence, as I have already said, that there is a lack of demand for larger units. Her Appendix 18 contained a table prepared by the landlord which listed three units (Burton, River Island, American Eagle) with total net internal areas of between 9,369 and 18,705 sq ft , and Mall level areas of between 5,016 and 9,817 sq ft, all on the Upper North Mall. All had been vacant in September 2019 or before and remained so a year later. The very large prime position unit on the first floor of the extension (SU2207: 11,933 sq ft on Mall level, 23,273 in total), which was to have been occupied by New Look, has been vacant since March 2018. It was her opinion that the long term availability of larger stores demonstrated an absence of demand, for two particular reasons: first, the extension soaked up demand from existing occupiers and new entrants, and second, the market for large stores had historically come from fashion. Fashion businesses that wanted to be in Westfield had existing stores, and, moreover, demand from the fashion sector had declined in recent years and had been almost extinguished by the pandemic.

159. Ms Campbell gave a number of examples of quantum adjustments of between 5-10% for larger units at other shopping centres, and to illustrate the impact of size and value she compared the lease renewals of The Entertainer and Kids Around, both of which were effective in September 2018. The Entertainer (5,941 sq ft plus small remote store) had a Zone A rate of £219.55 Zone A, about 15% below the £259 Zone A of Kids Around (1,196 sq ft). She also showed, by reference to an expert's opinion in relation to Boots in Tottenham Court Road, that size can be relevant to incentive packages.

160. As I have said, her adjustment for quantum was 25%. She did not explain why she opted for an adjustment so much larger than could be ascribed to The Entertainer, although she might have ascribed it to the size differential between The Entertainer and the subject premises. In cross-examination, she referred to that 25% adjustment in the context of the great difficulty of valuation at the moment: valuation, she said, was an art and not a science.

161. Questioned about the relationship between demand and quantum, Mr Bancroft did agree that a downward adjustment had to be made for larger units if the demand was less. He accepted that at the moment there was a lack of demand. Asked whether he had even considered adjustment for quantum, he said that he had taken it into consideration but not included it in his report. The Entertainer, he said, had a different lease structure, so comparison with Kids Around was not comparing like with like.

162. I found Ms Campbell's evidence on the quantum issue at least partially persuasive. It is quite clear that there is a shortage of demand for larger units at Westfield, and has been for possibly as long as two years.

But the evidence relates to empty fashion units. The bottom of the Lower North Mall is a high street, not a fashion village, and fashion businesses seem to me to be not of immediate relevance there. That to a degree limits the persuasiveness of the evidence of empty fashion units, although the fact that a fashion business would not come to the bottom of the Lower North Mall does not mean that another, non-fashion, business might not want to take a unit previously occupied by a fashion retailer. For whatever reason, there is a general lack of demand for larger units. Even Mr Bancroft accepted, with what seemed to me some reluctance, that a discount was required when demand fell.

163. However, I was unpersuaded by the size of the discount for which Ms Campbell argued. Even her Lower West Mall example of The Entertainer only suggested 15%, and (as Mr Bancroft contended) the comparison with Kids Around was not wholly convincing. I note also that in none of the examples which she produced from other shopping centres was the discount in excess of 10%. I am uneasy about the rationale of the 25% for which she opted, and I do not think that it was justified in strictly rational terms. Valuation is no doubt an art, but the court is bound to look for something more tangible than an expert's feel. I would allow 10%.

Location

164. As I have said, I accept that the Westfield Centre is a curated space. That is relevant to the Lower West Mall, most of which is given over to children-related shops, starting with The Entertainer, next door to the subject premises. I see no reason not to accept Mr Bancroft's evidence that there is a policy to maintain the Lower West Mall as what he called a “children's offer”. Indeed, as I have said, it was common ground between the parties in the 2015 arbitration that this was so. Retailers in that area operate off lower profit margins in an area dominated by supermarkets, and in consequence they are difficult to accommodate in a centre like the Westfield. The rents reflect that, and tend to be lower than a strict open market valuation would suggest. I accept that proposition, even if there is (as far as Mr Bancroft is aware) no written policy to that effect.

165. That has the consequence that comparisons with Lower West Mall shops to the south of the subject premises need to be qualified with that consideration in mind. That said, the premises are also in the Lower West Mall. For all that Mr Bancroft made much of what he regards as the premises' visibility from the Lower North Mall, and their greater 'alignment' with the Lower North Mall, they are not in fact visible until the shopper comes almost to the end of the Mall. The reality is, and this is common ground, that they are in a position which is inferior to that of the Lower North Mall itself. As I have said, the arbitrator in 2015 found the differential in value between the premises (passing rent £327.50 Zone A) and the tone of units in the Lower North Mall (Zone A tone £414.50) to be 21%. Mr Bancroft suggested that there is no reason to suppose that the relative differential has changed. But the arbitrator's finding – part of what Mr Wonnacott likes to call the 'wisdom of others' – is not of itself determinative. It is a considered snapshot of the position at the time on the evidence available at the time.

166. Ms Campbell disagreed with Mr Bancroft. In her main report she made a 35% adjustment for location in comparison with prime evidence. For that adjustment, she relied on a comparison between the Zone A rate of Kids Around (£259 Zone A) and Vodafone (£408.27) in September/ October 2018. The Kids Around rate is 36.6% lower than Vodafone. She could have relied on The Entertainer also, where the rent agreed at the same time was £219.55 psf Zone A, 15% less than Kids Around, but in her main report she suggests that Kids Around is more comparable with Vodafone in terms of size. In her supplemental report, she went further, noting a 45.8% differential between the lease renewal of PoP (Lower West Mall) in May 2019, at £221.50 psf Zone A, and that of Three in July 2019 (£408.50). She took the midpoint between the 2018 and 2019 differentials and rounded it down to 40%. She then applied that percentage to all the Zone A rates agreed in prime positions.

167. Mr Wonnacott suggested to Ms Campbell that she was proceeding on the footing that The Entertainer showed a 40% discount from Lower North Mall tone, and was arguing from that for a 40% discount for the subject premises. She denied that, saying that she was not using The Entertainer as a comparable. However, asked if it was common sense to posit a 40% discount for the subject premises compared with Halifax (he might have said Three, which is only just the other side of H Samuel), Ms Campbell said that the premises were in virtually the same position as The Entertainer, so it did make sense. Mr Wonnacott asked her what conclusion she would reach about the appropriate deduction if The Entertainer was stripped out, as part of the children's mall, and she said that her conclusion would be the same.

168. I would indeed strip out The Entertainer, as part of the children's offer, and therefore regard it (and other children's offer units) as unhelpful as an exemplar of the proper discount as between the two Malls. What is being compared in each case is a Lower North Mall unit and a children's offer unit, and the children's offer is not, I find, a basis for a comparison which is valid for the subject premises. Even if that were not so, it seems to me that Ms Campbell's conclusion, both as to 2018 and as to 2019, is built on very little evidence. In particular, I cannot see what rational basis there could be, other than whatever the bald comparison of two Zone A rates of two 2019 lease renewals signifies, for a finding that the relative worth of Lower West and Lower North Malls should so much greater in 2019 than in 2018. I can accept that the retail market as a whole was in a state of decline over that period, a decline that continues, but why should that produce a greater disparity between two almost neighbouring parts of the same centre in 2019 than held good in 2018 - or 2013? I have referred above (see [89]-[90]) to Ms Campbell's arguments for a greater local disparity, and I am persuaded by them to the extent that some factors relied on by the arbitrator (in particular the long-term proximity of Next and Disney) are now less cogent.

169. The difficulty is that good evidence is at a premium. On the one hand I have the arbitrator's opinion as to the differential in 2013; and on the other I have two widely varying snapshots from 2018 and 2019 which both rely on a comparator from the children's offer, which has to be treated with caution as a guide to the value of the subject premises. It can be dangerous to rely on so elusive a concept as common sense, but it does seem to me to be implausible to regard the subject premises as requiring a 45% or even a 35% discount for location as compared with a unit like Three, or Halifax, a matter of yards away. I would allow 24%.

Pandemic clause

170. A pandemic clause will be included, which will have the effect of halving the rent payable for the premises during any period in which nonessential shops are forced to close. In the first draft of my judgment, which was sent out to the parties on 19 February 2021 (but not seen by the defendant's advisers until 26 February, because of the court's use of an incorrect email address) I presumed that as a matter of valuation, it should result in an upwards adjustment in the rent payable. I provisionally proposed a rental uplift of 10%, while inviting brief written submissions on the topic.

171. On reflection and on consideration of written submissions, I have concluded that my provisional view was plainly wrong.

172. Mr Healey reminded me that there was evidence before the court from Ms Campbell about lease renewals between June and August 2020 which incorporated Covid discounts of over 20% and pandemic clauses, from which I agree it seems to follow that – with no pandemic clause – a further downward adjustment would have been required. It had been Ms Campbell's view in evidence that without a pandemic clause, a further 10% deduction would have been needed. However, in this case the landlord conceded a pandemic clause at the start of the trial, leaving only the trigger to be decided. Mr Healey submits that the rationale behind the pandemic rent suspension is to enable fair sharing of the burden, and that to apply an

uplift in return, for the term of the lease, would be to take away some of the agreed benefit of the Covid discount.

173. Mr Bancroft, for the landlord, said in the experts' joint statement that a lease without a pandemic rent suspension clause was worth less than a lease with such a clause (but he did not quantify the difference), and that none of the relevant comparables had such a clause. Ms Campbell's rejoinder was that pandemic clauses were not the norm when the Halifax and Tudor leases were agreed, but became standard in the course of the pandemic, and that the alternative to a pandemic clause was a pure turnover rent, which the landlord had recently agreed with a number of Westfield tenants. She expressed the view in cross-examination that while the omission of a pandemic clause would cause the tenant to discount its rental bid by 10%, the inclusion of such a clause would have no effect on the bid, because such clauses have become factored in by the market.

174. For the landlord, Mr Wonnacott submitted that since the relevant comparables did not contain pandemic clauses, since there is no open market evidence of the price that an existing solvent tenant would be willing to pay to vary his lease to get the benefit of one, and since there is no way of telling what a tenant who has taken on a lease with a pandemic clause would have been willing to pay for it without that clause, we have to fall back on logic, rather than market evidence.

175. So he made submissions by reference to Chicago school economic theory, by which we should posit a tenant who bids £100,000 pa for a 5 year lease, an offer already discounted by 20% for the Covid factor, 'because he thinks there is a high risk that non-essential retail shops will only be open for four years out of the five'. If he bids an extra 10% for a pandemics clause, Mr Wonnacott reasons, and the shops are open for the full five years, he will pay £550,000: but he is still up on the deal, because he has incorporated a 20% discount for the effects of Covid, and the risk has not materialised. So, in short, there is no downside for the tenant in bidding 10% for a pandemic clause, because he has already had a discount of 20% for Covid.

176. In my view, the flaw in that argument is Mr Wonnacott's assimilation of the Covid discount and the pandemic clause. They are not providing for the same thing. The Covid discount reflects a consensus about the general fall in the rental market because of the impact that the pandemic has had on retail activity; whereas the pandemic clause is an attempt to share the burden of the loss caused by the impact of compulsory closure of non-essential retailers, which is a loss beyond the general impact of Covid, and reduces the tenant's economic activity to a point well below the level of profitability. The risk for which the tenant has discounted his bid by 20%, namely the general decline in rentals caused by Covid, is not the same risk as that for which he has secured a pandemic clause (or at least it is far from a co-extensive risk), namely as an insurance policy against the extreme manifestation of the Covid effect represented by lockdown.

177. It seems to me that as a matter of pure valuation theory, Mr Bancroft must be right in saying that a lease without a pandemic suspension clause is worth less than one with one. But he did not quantify the difference, and was not asked to. It would have been a difficult task, and because he would have been dealing with a moving target, with the threat of further lockdown apparently reducing as vaccination takes effect. But it is now absolutely clear to me that any uplift that I might have felt able to apply would have had to be very much lower than my provisional 10%, given that with a 10% uplift the tenant would have been paying some £40,000 pa for five years for the benefit of a pandemic clause which so far as anyone can tell appears increasingly unlikely (*deo volente*) to be required.

178. I can see no reason why I should not rely on Ms Campbell's evidence, which is not incompatible with Mr Bancroft's position, to the effect that a pandemic clause has become something that all tenants want, and that the market has now priced it in. I do not think that there is any basis on which I can properly find that any

uplift should be made nor (had I taken a different view) on which I could with any confidence have quantified it.

Figure amended for Covid factors, quantum and location

179. On my findings, it is necessary to apply a discount of 54%, for the effect of Covid, quantum and pitch. I am grateful to Mr Wonnacott for his assistance with the calculations. The headline comparable ITZA is £255 f2 , less 20% for Covid = £204, less 10% for quantum = £183.60, less 24% for location = £139.54 f2 . The outcome is a new rent of £139.54 x 2900 f2 , namely £404,666 per annum.

Effect of no cap on service charge

180. Had there been a cap on the service charge, Mr Bancroft would have urged a rent increase of £4,500 to take account of that benefit; whereas Ms Campbell proposed a discount of £10,000 for its absence. I see no justification for a discount, since as far as I am aware none of the comparables (Halifax, in particular) included one.

INTERIM RENT

181. The interim rent is that payable from the 'appropriate date' (agreed to be 1 October 2018) until the new tenancy is granted. By s24C(2) of the 1954 Act, the interim rent is normally the same as the new rent. But by s24C(3)(a) that does not apply if the interim rent 'differs substantially' from the new rent. It is common ground, and I accept, that the retail market was much firmer in October 2018 than it is today, and that had the rent been agreed at that time, it would have differed substantially from the new rent. So by s24C(5), the interim rent is the 'relevant rent', namely the rent which the court would have determined under s34 to be payable under the new tenancy if the new tenancy had commenced on 1 October 2018. For the purposes of interim rent, the court must assess what the open market rent for the lease at that time would have been.

182. Mr Bancroft takes the Zone A rent for the premises in October 2018 to have been £291, or 21% below the Lower North Mall tone at the time. He bases that primarily on the mobile phone renewals (O2, EE, Three) at £408, and Vodafone's rent review (£430), together with the interim rent retrospectively agreed for Halifax in April 2020, which was £368 Zone A. By contrast, he points out that – as would be expected – rents for children's cluster units at the time were lower: he refers to Kids Around, where there was a ten year lease renewal at £266 Zone A in July 2018, and PoP, another ten year renewal, but at £236 Zone A.

183. Ms Campbell prefers a Zone A rent of £182, relying on Halifax (£368 Zone A, but she discounts it by 40% for pitch); the October 2018 open market letting of Waterstones' unit in the extension at £177 Zone A, which she discounts for location in the same way; and the renewal in September 2018 of the lease of The Entertainer, next door to the subject premises, which was £219 Zone A. She adopts a blended rate based on the three, taking into account her 40% discount for pitch in the case of Halifax and The Entertainer.

184. I find it unhelpful to rely on the Waterstones example, which seems to me to underline Mr Bancroft's point about the rather different factors that apply to valuation of the carefully curated extension. The Entertainer must surely set a floor, given the accepted disparity, whatever it may be, between the subject premises and the children's offer. My own preference would be to rely again on the Halifax agreement, which produced a figure of £368 Zone A for interim rent effective from 1 July 2018.

185. Discounted as to 21% for pitch (I see less reason to increase that discount as at 2018) and 10% for quantum, that suggests an interim rent of £261.65 Zone A, or £758,785 pa.

CONCLUSION

186. I would set the new rent at £139.54 Zone A, or £404,666 per annum. I would set the interim rent at £261.65 Zone A, or £758,785 pa.

187. There have been enough delays in this case. This judgment will be handed down at once without attendance. Any consequential orders should ideally be dealt with by written submissions, and I would ask for those by close of business on Friday 9 April, to make some allowance for the Easter holiday. If the parties feel that an oral hearing is unavoidable, then I would ask for the court to be given dates in April to avoid as soon as possible. In that event, brief skeleton arguments should be exchanged and filed by email at court 3 clear days ahead of the chosen date.

1 Having made that point about Gap, Ms Campbell returned to it in her supplemental report. She had found out that the deal was an unusual one because Gap wished to use a mall kiosk as an experimental site, advertising Gap's main store. The kiosk is in an absolutely prime position where the upper level of the Atrium joins the extension. Gap is permitted to use the kiosk 4 times pa for 4 weeks each time (just under 1/3 of the year) but apparently has in fact occupied it for longer, because other takers have not been found. On Ms Campbell's account, gleaned from Gap's Director of Real Estate, Gap would not have paid the same rent but for the kiosk. That being so, Ms Campbell suggested that it was impossible to place much weight on Gap's lease renewal.