JUDGMENT : COLIN REESE Q.C. TCC. 8th May 2000.

INTRODUCTION

1. This is a dilapidations case. The premises in question are situated at 5, 7 and 9 Headstone Road in Harrow. They are now known as "*Cervantes House*" but prior to their recent refurbishment they were known as "*Inforex House*". At all material times Firle Investments Limited ("Firle") was the freehold owner and landlord. Firle is a family company and its core business is property investments. The two active shareholder/directors of Firle who were involved with this matter are Mr John Watson and Mr Nicholas Cervantes-Watson. They are cousins. The main factual history was given by Mr Cervantes-Watson whose witness statement was dated 14th January 2000. He explained the background and dealt with the events which had occurred from the Spring of 1997 onwards. In his oral evidence he said that, in the main, he dealt with Firle's financial and legal affairs.

2. The premises became known as Inforex House because, when newly constructed, they were let to Inforex Limited for a term of 25 years from 29th September 1973. At some stage during the term Datapoint International Limited ("Datapoint") became the tenant. Datapoint was the tenant when the term expired by effluxion of time on 28th September 1998. In these proceedings Datapoint resists Firle's claim for damages for breach of the repairing obligations which were contained in that lease.

3. It is common ground that Inforex House was delivered up to Firle at the end of the term in a poor state of repair. A considerable cost would have been incurred by Datapoint if it had undertaken the works required to bring the premises up to a proper standard of repair. However, a vacating tenant is only liable to compensate the landlord for losses actually occasioned by the breaches of the repairing covenant and the amount recoverable is limited/governed by Section 18(1) of the Landlord and Tenant Act 1927 ("the Act").

4. Section 18(1) of the Act is generally regarded as having two limbs. By the first limb the recoverable damages cannot exceed *"the amount (if any) by which the value of the reversion .... is diminished owing to the breach of [the repairing] covenant"*. By the second limb no damages are recoverable if *"the premises, in whatever state of repair they might be, would at or shortly after the termination of the tenancy"* be demolished or be made the subject of such *"structural alterations"* as would render valueless the undone repairs which, according to the terms of the covenant, ought to have been done.

5. Firle's claim was pleaded on the basis that the recoverable damages were the total of the estimated cost of carrying out an extensive schedule of remedial works (including associated professional fees) with the addition of lost rent and payable rates over the period needed to carry out those works. The pleaded total came to a little over £300,000. When opening the case on behalf of Firle, Mr Hutchings submitted that this was a case where the full repairing cost was the correct measure of damages (because the refurbishment works in fact carried out in 1999 had not been inevitable; they were the result of Datapoint's breaches of contract - see Opening, paragraph 40(a) to (d)). For reasons which will become apparent, in my Judgment this claim cannot succeed. In the alternative, and much more realistically, basing himself on Mr Altman's views in respect of his preferred hypothetical purchaser (purchaser "C" - see Mr Altman's Report A/2 at pages 50 to 52 and paragraphs 8.7 to 8.9 on pages 65 and 66), Mr Hutchings submitted that the diminution in the value of the reversion owing to the breach of the repairing covenant was £185,000 (a figure which reduced as a result of continuing discussions between expert witnesses during the course of the trial). This hypothetical purchaser was a purchaser "who would in addition to carrying out the repairs in the Schedule of Dilapidations also take the opportunity to create more floor space by converting the garage area into offices and to upgrade the facilities including air-conditioning (comfort cooling) before re-letting (see Mr Altman's Report A/2/50).

6. Datapoint's Defence admitted the generality of the allegation that the premises were delivered up in such a state that the repairing covenants had been breached but the extent of the breaches was disputed. Datapoint denied that Firle had suffered any loss and, alternatively relied on each limb of Section 18(1) of the Act. Although its pleaded position in relation to the first limb of Section 18(1) was to deny any diminution in value, the case moved on during the course of the trial. By the time that Miss McAllister came to make her closing speech on behalf of Datapoint, the essence of its defence can, I think, fairly be summarised in this way -

(a) **The second limb case**

7. By the autumn of 1998 Inforex House was a "dated" building. Even if the premises had been left in good and tenantable repair at the end of the term they would not have been marketable in that condition because of numerous shortcomings in the facilities offered. Being a knowledgeable and astute commercial landlord, Firle had been well aware of the position during the final years of the tenancy. It was considering and planning for the necessary substantial refurbishment works prior to 28th September 1998. Although the works were not begun for some months after the expiration of the term the necessary intention existed at the date when the lease expired, the works were in fact done "shortly after" and the nature/extent of the works was such that all or substantially all of the repairs covered by the covenant would have been rendered valueless.

(b) **The first limb case**

8. If the refurbishment works carried out by Firle in 1999 were not such that it could properly be said that **all or substantially all** of the repairs covered by the covenant would have been rendered valueless, it was obvious that most of them would have been. In Mr Trice's opinion works to the value of only a little over £15,000 would have survived.

9. When dealing with this "first limb" case, Firle submitted that if the Court was persuaded to consider the matter on the basis for which Datapoint was contending, then, in Mr Scarr's opinion, works to the value of just over £97,000 would have survived the refurbishment.

10. The method of calculation to be used to assess the value of the reversion was agreed during the course of the trial. The calculation began by taking the gross development value ("GDV") assessed by applying a 9% yield (deferred for 6 months) to the full rental value and then deducting therefrom estimated acquisition costs and reletting costs. This value was agreed at £1,079,000. From this figure the total of the anticipated refurbishment costs and the required developer's profit figure was to be deducted in order to arrive at the value of the reversion to Mr Altman's preferred hypothetical purchaser, Purchaser "C". The refurbishment cost assuming the existing disrepair was agreed at £321,975. The appropriate developer's profit figure was agreed at 25% of GDV ie. £269,500. It was also agreed that in calculating the refurbishment costs professional fees were to be assessed at 12½% of the construction costs, that VAT was to be taken as 15% of 17½% of the total of the construction costs plus professional fees (in line with Firle's own arrangements with H.M. Customs & Excise) and that financing costs were to be assessed on the VAT inclusive total for an 8 week period at a rate of 9% per annum. The only figure not agreed was the amount to be deducted from the refurbishment cost of £321,975 to reflect the value of repairs which, had Datapoint carried them out, could realistically have been expected to survive the refurbishment. If the rival figures of £97,141 (Mr Scarr for Firle) and £15,242 (Mr Trice for Datapoint) were fed into the agreed calculation it could be seen that the diminution in value of the reversion was £113,705 (Firle's position) or £17,875 (Datapoint's position)-

(i) Value of reversion - assuming disrepair at term date :	**£**
GDV	1,079,000
1. Cost of Refurbishment Works	321,975
Add 12½% fees 40,247	
2. Add VAT (15% of 17½%)	9,508
3. Add Financing (8 wks/9% p.a.) 5,147 376,877	702,132
4. deduct developer's profit (25% GDV) 269,750	£432,373

(ii) Value of reversion - assuming repair/survival as Datapoint	**£**
GDV	1,079,000
5. Cost of Refurbishment Works	321,975
6. Survival value 15,242	306,733
Add 12½% fees	38,342
Add VAT	9,058
Add Financing 4,869 359,002	719,998
deduct developer's profit	269,750
	£450,248

7. Datapoint's diminution in value £450,248 - £432,373 = £17,875

(iii) Value of reversion - assuming repair/survival as Firle	**£**
GDV	1,079,000
8. Cost of Refurbishment Works	321,975
9. Survival value 97,141	224,834

Add 12½% fees	28,104
Add VAT	6,640
Add Financing 3,594 263,172	815,828
deduct developer's profit	269,750
	£546,078

10. Firle's diminution in value £546,078 - £432,373 = £113,705.

11. Those calculated diminutions in value of the reversion left out of account any further adjustment to the figures which might be required to recognise loss of rent and/or possible liability to pay business rates as the significance of these matters was not agreed and left for my decision.

THE DISCLOSURE ISSUES

11. Firle applied for specific disclosure of certain documents under CPR 31.12. The application was supported by a witness statement of Mr A. R. Olins, the partner of Iliffes Booth Bennett who had conduct of the action on behalf of Firle (A/4/1 to 5). The witness statement was dated 10th February 2000. The application was considered by H.H. Judge Toulmin CMG, Q.C. on 10th March 2000 when he adjourned it for consideration by the trial judge. I dealt with this application at the end of Mr Hutchings' opening of the case, late on the afternoon of 20th March 2000. At the conclusion of the argument I ruled that the documents should be disclosed. I then gave brief oral reasons and said I would include them in the Judgment in due course. I do so at Appendix 1 to this Judgment.

12. The further documents were duly disclosed and included in the Court bundles as E/11/1 to 103. As the trial progressed Datapoint's advisers reconsidered their attitude to certain of Firle's disclosure on the basis that, in the light of my ruling, it seemed very possible that Firle had also wrongly claimed "litigation privilege" in respect of documents or parts of documents which had come into existence before litigation could properly be said to have been contemplated. The matter was specifically raised by Miss McAllister in her closing speech in respect of an edited version of the minutes of a meeting held on 3rd September 1997 (C/8/22). It was then left on the basis that an unexpurgated copy of the minutes would be supplied to Mr Hutchings. If, consistently with my ruling, it appeared to him that the whole document was disclosable he was to forward it to Miss McAllister. This was done.

13. On 28th March 2000 a full copy of the first page of the minutes of the meeting held on 3rd September 1997 was forwarded to me together with a covering letter from Miss McAllister. The letter stated that Mr Hutchings had confirmed that privilege could not be claimed, that Counsel were agreed that the minute spoke for itself and that there was nothing further that either wished to add to their respective submissions. The minute is set out in full at pages 21 to 23 below as part of my factual findings. What had been covered over in the disclosed copy was paragraph 3(a). When I read through the text of the full copy I must confess to having had difficulty in discerning any basis upon which that particular editorial decision could have been thought justifiable by anyone with any knowledge of a litigant's disclosure obligations. I agree with Counsel's comment in the covering letter which accompanied the unexpurgated copy when it was first sent to me viz. "*the minute speaks for itself*". It recognises an obvious point insofar as Datapoint's attitude to any dilapidations schedule which might be produced was inherently likely to be considerably influenced by knowledge that Firle was actively considering refurbishing and upgrading the premises.

14. By letter dated 6th April 2000 I was informed that the disclosure issue was still being considered. Counsel hoped that they would be able to resolve the position without the need for any further Court hearing and I invited them to ensure that agreement was reached, or the matter was re-listed so that it could be resolved, before the Easter vacation. In due course the matter was resolved by agreement. On 17th April 2000 copies of further documents and/or complete copies of minutes which had previously been disclosed in an edited version were forwarded to me together with (1) an affidavit of Mr Altman dated 10th April 2000 which dealt with some specific points arising from the complete versions of the minutes and (2) a bundle of the inter-partes correspondence which had been generated in dealing with this matter. In a covering letter from Mr Hutchings it was said that Counsel were agreed that I see these documents. On 18th April 2000 Datapoint's solicitors supplemented the further disclosure with a copy of a letter dated 10th July 1998 sent by Mr Scarr to Mr Altman and added two further items to the bundle of inter-partes correspondence. I have taken it that I am being invited to consider all the newly disclosed materials when deciding the issues

and that the inter-partes correspondence may be relied on by one or other of the parties as part of a costs argument.

15. Mr Altman's affidavit, the complete versions of the minutes and the further disclosed documents have been paginated as Bundle G, Section 13 of the trial bundles. A further copy of the minute of the meeting held on 3rd September 1997 is at G/13/5 and 6. I have added Mr Scarr's letter dated 10th July 1998 and given it the reference G/13/20A and 20B.

THE EVIDENCE

16. As I have already said in the Introduction, Firle's main factual witness was Mr Cervantes-Watson (witness statement A/2/1 to 13). Insofar as Mr Cervantes-Watson's statement refers to events described in contemporary documents and provides a linking commentary, I accept what is said. In the light of cross-examination and perusal of the whole of the contemporary documentary record (insofar as it has found its way into the trial bundles), I do not accept that the witness statement accurately recounts his (or Firle's) feelings or intentions with regard to the planned refurbishment of Inforex House over the period of approximately 12 months up to and including 28th September 1998. Leaving aside what appear to be simply minor chronological inaccuracies in paragraphs 13 and 24 (A/2/6 and 10), I draw particular attention to the following matters: I do not accept the emphasis or slant of paragraphs 3 and 4 of the witness statement (A/2/2); paragraphs 15 and 18 of the witness statement (A/2/7 and 8) give far from a complete picture; and, I do not accept the comments made in paragraphs 27 and 28 of the witness statement (A/2/11 and 12) in answer to the two specific matters put to Mr Cervantes-Watson by Firle's solicitors. My factual findings are given later in this judgment but, taking each of those particular points in turn.

161.1 **Paragraphs 3 and 4:** I do not accept the suggested linkage between the condition of Inforex House in about the Spring of 1997 - "a bad state of repair" - and the possible presentation of an opportunity to upgrade the property at the end of Datapoint's lease. At that time, apart possibly from the effectively unoccupied and neglected third floor, the property was not in a particularly bad state of repair for its age but it was a dated property which needed to be refurbished if it was intended to seek to attract a decent/reputable tenant requiring offices for a reasonable period from late 1998/early 1999 onwards.

16.1.2 **Paragraphs 15 and 18:** There is no reason to suppose that either of Firle's active shareholder/directors knew of Ryde College's possible interest in Inforex House prior to 28th Septemberber 1998. It appears that this was first made known at a meeting on 30th September 1998 (C/8/155). No offer was made until 6th October 1998 (C/8/163 and 164). Once received, the offer was not accepted and no counter-offer was made by Firle until 20th January 1999 (C8/206 and 207). By 27th January 1999, Firle was aware that Ryde College was very unlikely to want to go ahead with any letting and made plans accordingly (C/8/209 and 210).

16.1.3 **Paragraph 27:** When the relevant point was put by the solicitors (viz - whether Firle had any firm intention of carrying out structural alterations to Inforex House at or shortly after the term date) Mr Cervantes-Watson commented "I can state that Firle had no such intention **at the end of September 1998** or shortly after... Firle, **at this time,** was pursuing a dual approach" (my emphasis). The position immediately before and at the term date (ie. 28th September 1998) is not specifically addressed. The comment picks up the position as it was to develop from 30th September 1998.

16.1.4 **Paragraph 28:** The solicitors asked Mr Cervantes-Watson to comment on the position which would have obtained if prior to the term date Datapoint had complied with the repairing obligations. In response, he said "Firle would not have carried out any additional upgrading works apart from, possibly, the works to the ground floor". In cross-examination, Mr Cervantes-Watson was almost persuaded to abandon the word "possibly" when he said that the only circumstance in which the ground floor works would not have been done was "If Ryde [College] had jumped". In my judgment, the comment in the witness statement simply cannot stand when consideration is given to actions taken by Firle from September 1997 onwards and to what I consider to be basic commercial reality. In my judgment the comment in the witness statement represents ex-post facto wishful thinking rather than anything actually perceived at the time by the directors and shareholders of Firle. The idea of creating an attractive modern late 1990's style ground floor which would lead into repaired but obviously dated (i.e. early 1970's style) office space and residential

accommodation on the floors above, with the intention of bringing such a hybrid to the market is simply unreal.

17. The expert witnesses called on behalf of Firle were Mr M J Scarr BA FRICS (as building surveyor - report at A/2/185 to 200 with an appended quantity surveyor's report) and Mr N J Altman FRICS (as valuer - report at A/2/17 to 117). Since both of these gentlemen had been acting for Firle in connection with Inforex House prior to the expiration of Datapoint's lease in September 1998, in their reports and in supplemental oral evidence they also gave some (largely uncontroversial) factual evidence. In addition, Mr Altman was asked about Firle's intentions with regard to refurbishment in the months before Datapoint's lease expired and about the contact or contacts made by Ryde College with his firm in September 1998. Save to the extent (a) that he was not prepared to accept that Firle had made a firm decision to refurbish the building prior to the term date (although when asked about the minutes of the meeting held on 16th June 1998 - C/8/60 to 62 - he accepted that the contrary appeared to be shown) and (b) that he suggested that if Datapoint had carried out repairs Firle would have proceeded to re-let the building after carrying out works to the ground floor, I accept the factual parts of his evidence. So far as those particular parts of his evidence which I have not accepted are concerned, my reasons are, I think, sufficiently apparent from the specific observations already made in respect of Mr Cervantes-Watson's evidence.

18. The only factual witness called by Datapoint was Mr A J Trice Dip EM, FRICS, ACIArb, FBEng (witness statement A/2/14 to 16). He acted for Datapoint in 1996 when it was arranging a sub-tenancy of Inforex House and he visited the building in the Autumn of 1999 when refurbishment works were underway. This evidence was entirely uncontroversial. The expert witnesses called on behalf of Datapoint were Mr Trice (as building surveyor - report at A/2/257 to 279 and further report at E/11 after page 154) and Mr P J Ferrari B Land Econ (as valuer - report at A/2/118 to 184).

19. In discussions prior to the trial, the experts very considerably narrowed their differences and reached agreement on a number of issues. So far as the priced Schedule of Dilapidations was concerned, Mr Scarr and Mr Trice had produced a very helpful document entitled "Experts Joint Statement" prior to the trial from which their respective positions in respect of each alleged defect was already apparent (Appendix AJT3 included in the unpaginated part of E/11). Discussions between them continued during the trial. They were able to agree on pricing. They also achieved a considerable measure of agreement as to which of the scheduled items would and which would not have survived the refurbishment works carried out by Firle in 1999 (see Agreed Schedule dated 24th March 2000). So far as valuation issues were concerned, Mr Altman and Mr Ferrari had produced an *"agreed statement of facts"* together with a summary of comparables (see, final section of the unpaginated part of E/11). Differences between them were explored in cross-examination and it was clear that in different ways their respective opinions could be subjected to legitimate criticisms. However, happily, their discussions continued outside the Court and, at the end of the evidence the agreement in respect of a method of calculating the diminution in the value of the reversion which could fairly be applied in the circumstances of this case (if Datapoint's second limb case failed) was reached. This is the method of calculation to which I have already referred at the end of the Introduction. In view of that agreement it has not been necessary for me to spend time analysing and stating my conclusions in respect of the many differences between the valuers that are apparent from their respective reports and which, as I have said, were explored in cross-examination. All that I have needed to do is to set out (and explain insofar as it is not self-evident) the calculation.

THE FACTS

20. Inforex House had been built in about 1973. The building was a four storey "T"-shaped structure of reinforced concrete frame construction with flat roofs and brick infill. On the ground floor most of the area was given over to car parking bays many of which were leased out to the occupiers of other local premises. So far as the building itself was concerned, there was a small, unassuming entrance hall, some storage areas and three garages. The first and second floors of the building were office areas which had kitchens and toilet accommodation adjacent to a lift shaft/staircase which came up from the ground floor entrance hall. At the third floor level there were two two-bedroomed residential flats over part of the office area with access to a roof terrace which constituted a flat roof over the other part of the offices below.

21. The existence of residential accommodation was a planning requirement but neither Datapoint nor Greenhill appear to have put that part of the premises to any (or any legitimate) use. It was obvious that the third floor had been generally neglected for many years prior to September 1998. At some time during the term, the office accommodation had acquired partitioning and, it would seem, changes had been made to the suspended ceilings involving changes to the lighting and to the heating system.

22. By the terms of the lease dated 10th October 1973, Firle let the premises for a term of 25 years from 29th September 1973 at an initial rent of £36,000 per annum subject to five yearly upwards only rent reviews. The rent increased in 1978 to £45,000, in 1983 to £69,950 and in 1988 to £95,000. Unsurprisingly, given an upwards only rent review clause, there was no further increase in 1993 - by that date the annual rental value of the premises had fallen well below that figure. The lease contained repairing etc. covenants in the following terms:

"Clause 2(vi)(a)

At all times during the said term when and as often as need shall require well and substantially to cleanse repair support and uphold and from time to time when necessary rebuild to the satisfaction of the Landlord all present and future buildings forming part of the demised premises and all fixtures additions and improvements which may at any time be fastened or affixed to or erected or placed upon the demised premises. And it is hereby declared that the generality of this provision shall in no way be restricted by any of the subsequent paragraphs of this sub-clause

Clause 2(vi)(b)

Once in every three years of the said term and in the last year thereof (whether determined by effluxion of time or in any other way) to paint in a proper and workmanlike manner all the outside wood iron and stucco or cement work and other parts of the demised premises heretofore or usually painted with two coats good paint of the respective kinds and colours as may be approved by the Landlord

Clause 2(vi)(c)

Once in every five years of the said term and in the last year thereof (whether determined by effluxion of time or in any other way) to paint in a proper and workmanlike manner all the inside wood and iron work usually painted of the demised premises with two coats of good paint and so that such internal painting in the last year of the said term shall be of a tint of colour to be approved by the Landlord and also with every such internal painting to whitewash colour wash distemper grain varnish paper and otherwise decorate in a proper and workmanlike manner all such internal parts of the demised premises as have been or ought properly to be so treated and so that in the last year of the said term the tints colours and patterns of all such works of internal decoration shall be such as shall be approved by the Landlord

Clause 2(vi)(d)

As and when required by the Landlord to cleanse and repoint the external stone and brickwork of the demised premises

Clause 2(vii)

At the expiration or sooner determination of the said term quietly to yield up unto the Landlord the demised premises in such state of repair and condition as shall in all respects be consistent with a full and due performance by the Tenant of the covenants on the part of the Tenant contained in sub-clause (vi) of this clause."

23. The position which had been arrived at by the summer of 1995 was this. Datapoint had been the tenant for some considerable time but it itself had no use for the premises. Datapoint had instructed surveyors to market the premises at least two years earlier and at some stage internal redecorations had been carried out in order to improve the prospects of finding a commercial occupier. Notwithstanding the agents' best efforts, they had not been able to generate any interest in the premises. Datapoint was faced with a continuing liability to pay the annual rent of £95,000 plus approximately another £30,000 in rates. An offer to take the premises was then made by Greenhill College ("Greenhill") who considered them suitable for an examination centre (and perhaps also for certain other administrative functions). Greenhill was, so it was then thought, only prepared to pay an annual rent of £10,000 and to accept certain internal repairing obligations. However Greenhill's occupation would involve its assuming responsibility for rates with the result that Datapoint would be relieved of just over 30% of the liabilities otherwise falling on it. Greenhill's offer was accepted, subject to contract. Detailed negotiations followed. A schedule of conditions and a photographic record of the interior of the property were made. The question of possible dilapidations liabilities at the end of the term was already a matter of concern to Datapoint and, in that regard, its surveyors' opinion was given in the penultimate paragraph of a letter dated 17th August 1995 in these terms

- *"At the end of a lease, a Landlord can claim from a tenant who holds under a full repairing obligation, the lesser of either the cost of remedying the defects/dilapidations to the building or the diminution in the value of the reversionary interest. In other words Firle will be able to claim from you the cost of any external dilapidations (always assuming that Greenhill will deal with the interior), or the amount by which the value of the building has been diminished as a result of the dilapidations, whichever is the lesser. I would expect that in 1998, Firle will want to undertake a fairly major refurbishment to the building and therefore, that will automatically remedy many of the items of dilapidations and thus will mitigate your liability to dilapidations." (C/8/2)*

24. Negotiations with Greenhill continued for some months. An increased annual rent of £15,000 was agreed in return for Datapoint's accepting a repairing clause in the form suggested by Greenhill. In January 1996 Greenhill applied for Planning Permission to change to use of the building to "educational purposes for a temporary period until September 1998" (B/7/1). The statement in support of the application indicated that the use of the third floor as flats would remain unaltered with one of them possibly accommodating a residential caretaker and it concluded with this statement : *"The use of Inforex House as an examination centre is for a limited period until September 1998, when the lease expires and it is understood that the owners intend to refurbish the building." (B/7/8)*

25. The formal documentation was not completed until May 1996 after the Grant of Planning Permission (B/7/9 to 10) but the sub-term ran from 28th December 1995 until 25th September 1998.

26. At the same time as Datapoint was negotiating with Greenhill, Firle was considering the condition of the building and, in particular, the condition of one of the external walls. On 7th November 1995, a Section 146 Notice was served requiring work to be done to a wall which, according to Datapoint's surveyors' letter dated 17th December 1995 (C/8/9), had previously been protected by an adjoining building. This building had been demolished. Negotiations between surveyors continued for some time. In July 1996 (see C/8/15 and C/8/18) Datapoint agreed that Firle should accept a contractor's estimate of £3,192 plus VAT in respect of certain repair works. As the works were carried out, Firle's surveyors increased the extent of the work. The contractor's final account was for £7,789.75 plus VAT. When Datapoint had been notified of the increased work, its solicitors had written on 14th August 1996 to Firle's solicitors in these terms: *"Whilst our clients are happy to pay for the works based on the previous estimates supplied by you, they feel that the additional work is strictly not necessary, particularly bearing in mind that at the expiry of the term of our clients' Lease in approximately two years time the building is either going to be totally demolished and rebuilt or extensively refurbished." (C/8/14)*

    No direct answer to that letter is contained in the Court bundle but it is clear that responsibility for the cost of this work remained a matter of dispute, under active consideration, for some time (see C/8/15 to C/8/20). It is not apparent whether the dispute was ever resolved or if it was, on what terms it was resolved.

27. As I have said in the Introduction, in his witness statement dated 14th January 2000, Mr Cervantes-Watson explained what had occurred from the Spring of 1997 onwards. He stated that, by that time, he appreciated that Datapoint was unlikely to wish to negotiate a renewal of its lease; he thought Datapoint would be facing "a substantial dilapidations claim" at the end of the term (assuming repairs were not carried out); and he also thought it "more likely than not" that Datapoint would seek to negotiate a cash settlement on Firle's dilapidations claim rather than carry out repair works itself prior to the termination. (Witness Statement, paragraph 3 at A/2/2) Whilst I accept that evidence so far as it goes, I do not think it tells the full story or gives quite the right flavour. It does not deal with Firle's appreciation of the overall commercial position which it would be facing at the expiration of the term. There were, quite obviously, sensible commercial reasons why Datapoint would not want to retain the premises **with its existing facilities** at the end of the term even if it was put into good and tenantable repair. The need to upgrade the facilities if it was to be likely to attract new occupants after September 1998 was clear to Mr Cervantes-Watson and his fellow directors/shareholders. This is borne out by the contemporary documents. On 23rd April 1997 there was a meeting of the directors/shareholders of Firle. The minutes record that a meeting was to be convened "to discuss plans **for refurbishing** the building as soon as the lease expires" (C/8/21 - emphasis added). Once the refurbishment factor is acknowledged, Datapoint's likely resistance to any "substantial dilapidations claim" and its likely wish to negotiate a (relatively modest) cash settlement in respect of any such claim were obvious matters which any experienced commercial property holder would have

considered at that time. I am quite sure that Mr Cervantes-Watson and his fellow directors/shareholders did have these matters very much in mind, and, furthermore, they were well aware that Datapoint (and its professional advisers) were equally alive to these matters as the letter of 14th August 1996 (quoted above) and other correspondence had indicated.

28. A meeting took place on 3rd September 1997 at the premises. The minutes of the meeting (as edited) are at C/8/22 and 23 and unexpurgated copies are at G/13/5 and 6. To my mind this minute is a document of some significance and the text is reproduced below. Those present, in addition to Mr John Watson and Mr Cervantes-Watson were Mr Madan (the architect), Mr Scarr (the building surveyor), Mr Altman (a surveyor/valuer with Gibbs Gillespie) and Mr Blake-Wilson (another surveyor) -

1. INTRODUCTIONS ACTION BY:

Introductions were made.

a). Dilapidations are to be handled by Michael Scarr.

b). Planning and Building Regulation matters and the production of Working Drawings and Specifications are to be responsibility of Kan Madan.

c). Specification requirements, Letting strategy, Advertising and brochures are to the domain of David Wilson and Neil Altman.

d). Choice of contractors and tender preparation is to be carried out jointly by Kan Madan and Michael Scarr.

e). The works is to be supervised by Michael Scarr.

2. INFORMATION REQUESTED

a). Lease expiry date. J.W.

b). Copy of existing head-lease. J.W.

c). Copy of existing sub-lease. J.W.

d). Original building drawings. J.W.

3. SCHEDULE OF DELAPIDATIONS

a). It was agreed that it is important that there is K.M./M.S liaison between Architect and Surveyor. The object of this is to avoid unnecessary information leaking out regarding our proposals for the building which may prejudice dilapidation negotiations. KM would copy all drawings to MS.

b). A schedule of dilapidations is to be drawn up and served in the tenants. Access to the building to be N.J.C-W arranged with Greenhill College in their next half term week. M.S.

4. FEASIBILITY AND MARKETING.

a). Size of office units. - Flexibility is the key here and the building lends itself to this.

b). Both Air-conditioning and good cable trunking systems are required to modernise the building and make it attractive for a successful letting.

c). Thought should be given to Artist Impression, Brochure N.A./D.W. and Advertising Strategy.

5. NEW AREAS OR AREAS REQUIRING CHANGE OF USE

a). Proposed new Ground Floor Reception Area.

b). Proposed Third Floor Offices. Either complete and new coverage or refurbishment of the existing 'flats' area.

c). Planners to be approached and proposed scheme to be drawn up immediately. K.M.

d). Car parking requirements to be ascertained a.s.a.p. K.M.

e). Budget costings are to be obtained from 'friendly' contractor when all information available. Information required as to how the two flats are Rated; as offices or as flats. N.A.

6. PROGRAMME.

a). No comments were made about the draft programme tabled at the meeting.

b). The object of these meetings is ensure that everything is ready for the contractor to commence on site on the day after the lease expires.

7. OTHER CONSIDERATIONS

a). Disabled access. Is the lift of sufficient size for K.M. disabled access to all floors? The large amount of mechanical and electrical work All That is proposed means that a mechanical and electrical Consultant will be required. Recommendation practices are requested. Enquiries are to be made regarding the new safety M.S./K.M. Regulations regarding contacts lasting more than 30 Days.

8. NEXT MEETING

The next meeting is to be called when K.M. has seen the planners.

29. These minutes show Firle was concerned to progress two separate, but (in its mind) related, issues. Firle wished to progress dilapidations matters with Datapoint and to do so without its becoming aware of any "unnecessary information ..... regarding [Firle's] proposals for the building". Firle also wished to plan for the modernisation of the building after the lease expired. In particular the creation of a new ground floor reception area, proposals for converting the third floor into offices and the modernisation of the two existing office floors were considered.

30. After the meeting matters were progressed as intended. On 19th September 1997 an application was made for Planning Permission to create a ground floor reception area and to change the use of the third floor from "residential" to "office" (B/7/10a to 13). On 3rd October 1997 letters were written to put in hand arrangements for Mr Scarr to produce a Schedule of Dilapidations (C/8/26 and 27). Following through each of these matters in turn over the period up to 28th September 1998 (viz. the term date):

A. The "Proposed Development" Story

31. The Local Authority would not agree to what it considered to be a proposed "loss of usable residential accommodation" (B/7/14 and 15). Following the refusal, a further application was made on 15th November 1997 to demolish the third floor flats and to construct offices over the whole of that floor with a mansard type roof construction (B/7/33a to 36). Although this would, have "greatly enhanced the appearance of the building" (as the Architect said in his covering letter) it was refused for the same reason as the earlier application (B/7/37). The matter was then taken to appeal. The Grounds of Appeal dated 22nd January 1998 (B/7/20 and 21) may well have been drafted with a deliberate "spin" to exaggerate the asserted undesirability of the residential accommodation - in his evidence, Mr Cervantes-Watson accepted that a certain "poetic licence" was discernible - but the second paragraph and the greater part of the third paragraph of the Grounds of Appeal appear to be clear factual statements - *"This building was constructed in 1972 and is now showing its age. During the past 5 to 10 years there have been a large number of modern office buildings constructed in Harrow providing up to date facilities. [Firle] have to compete with these to attract tenants of substance.*

The rental lease of these offices is expiring in July this year 1998. This gives [Firle] an opportunity to improve this building. The 2 residential flats are a problem ... ." (B17/20)

13. The appeal was unsuccessful. In her decision dated 22 May 1998 the Inspector agreed with the Council that the proposals would lead to an unacceptable loss of two residential units which were capable of contributing to the housing stock in the town centre (B/7/32 and 33).

32. It is convenient at this point to complete the relevant planning history. Soon after receiving the Inspector's decision, on 12th June 1998 Firle submitted a further application which dealt solely with the proposed creation of a ground floor reception area. As Mr Cervantes-Watson said in evidence, this part of the proposals was never contentious so far as the planning officers were concerned and, after some negotiation on matters of detail and the submission of an amended drawing, it received approval under delegated powers on 18th September 1998 (B/7/41 and 42).

33. Pending the resolution of the planning position (and possibly also for other reasons related to the dilapidations issue) the surveyors did not prepare any marketing brochure but, as and when they received enquiries for office accommodation from persons who might be interested in a refurbished "Inforex House", details were supplied in the form of a letter. Relevant pages of such letters appear at C/8/44, C/8/55 and C/8/59. The first paragraph of what would appear to have been a standard text prepared for this purpose reads - *"I refer to our recent conversation regarding your office requirements. My clients, Firle Investments Limited, are about to take possession of the above property upon expiry of the current lease. The plan is to refurbish the building and to re-market it. At this stage therefore they are looking to achieve a pre-letting on the basis that the incoming tenant would have the ability to specify the standard of fitting out and any alterations which might suit their particular way of operating."*

34. Once the result of the planning appeal was known in late May 1998, Firle knew where it stood and, as Mr John Watson said in his letter dated 3rd June 1998 addressed to Mr Scarr - *"We ..... now wish to proceed with our alteration and refurbishment plans for the building as quickly as possible.*

We are having a meeting ..... on 16th June to further our readiness for when the building becomes vacant at the end of September ... ." (C/8/57)

14. That intended meeting went ahead. It is the first of a series of meetings where the subject-matter was described as "the proposed redevelopment of" the premises. I do not think it necessary to set out the minutes in full but the following extracts indicate the general understanding and intention with regard to refurbishment at this time - ".....

2. LETTING

a) [Mr Wilson] and [Mr Altman] stated that the market for office accommodation had strengthened since the last meeting, and that there are no other self-contained buildings of a comparable size available. Rather than looking at letting half floors, we should be attempting to find one tenant for the whole building, or as a fall back position letting whole floors.

b) current rent levels for our sort of building are:
£10 per sq. foot without air conditioning
£12 per sq. foot with air conditioning

c) The important factors are:
i) Presentation of ground floor
ii) Air Conditioning
iii) Computer trunking
iv) Treatment of front elevation

d) [Mr Wilson] will obtain quotes for a two sided brochure containing a digitally enhanced photo of the front elevation, including proposed changes to the entrance

e) The flats would be used as a marketing feature .....

3. Design matters .....

c) The flats to be redesigned so that they become single bedroom units, with small kitchen, shower/WC, and large living room.

4. Building matters .....

b) Three part trunking would be used on every office wall.

c) Lay in grid suspended ceilings would be used throughout. .....

e) It was stressed that we would like to commence work on site as soon as the building is vacated on 28 September, and that time is of the essence. .....

6. VAT

DW indicated that a decision as to whether to elect to tax the building should be delayed as it might deter one in five prospective tenants. [Mr Cervantes-Watson] to investigate whether an election could be made retrospectively, and the VAT on building works be recovered.

7. Schedule of Dilapidations

It was hoped that [Mr Scarr] would be able to give an update on his negotiations at the next meeting. .....

9. Meetings

(a) It was agreed that these should be held every four weeks [next 13th July 1998] (C/8/60 to 62)

35. Matters progressed. The surveyors discussed the marketing position and advised that the building should be "marketed actively from September onwards". In the meantime they would be trying to seek a tenant or tenants with a view to achieving a pre-letting (C/8/66 to 68 and see C/8/87 to 88 for another possible pre-letting). The preparation of a brochure was put in hand and consideration of the drafts can be seen in late August/early September (C/8/99 to 110 and 112 to 115). Another aspect of the matter which was progressed after the meeting of 16th June 1998 was the possible appointment of a firm with much greater resources than Mr Madan had available to prepare a detailed specification for the refurbishment works, to obtain tender prices and to supervise the works themselves. In this context, on 6th July 1998 Mr Altman wrote to Mr Fitton of DTZ Debenham Thorpe ("DTZ") - *"... further with the possibility of appointing your firm to act as*

supervising surveyors for the proposed refurbishment. An architect, Kan & Madan, has been appointed to draw up the proposed alterations and improvements and to produce a Schedule of Finishes. My client is looking for someone to prepare a detailed specification, to obtain tender prices and to supervise the work.

I enclose plans of the existing layout and the proposed layout of the building. As you will see, at third floor level there are two flats. Unfortunately planning has just been refused for conversion of these into offices and therefore they will have to retain something of a residential appearance and we will discount the rent on that floor accordingly." (C/8/74)

36. On 13th July 1998 the second of the series of "proposed redevelopment" meetings took place. Budget cost figures which had been obtained by the architect were discussed. Further consideration was given to the supervision of the works. Mr Cervantes-Watson reported on his discussions as to the extent to which the proposed works would be the subject of a capital allowance claim as opposed to being allowable for tax as repairs. The architect was to proceed with a detailed specification (with a view to going out to tender by 18th August 1998). The renaming of the building as "Cervantes House" was recorded (edited minutes at C/8/77 and 78; the full version of G/13/7 and 8). The main commercial matters discussed at this meeting were reported to a meeting of the directors and shareholders of (inter alia) Firle which was held on 16th July 1998 (C/8/70 to 82).

37. Mr Altman and Mr John Watson met with Mr Fitton of DTZ on 16th July 1998 to discuss that firm's possible involvement in the intended project. This meeting was followed by an exchange of letters. Mr Fitton wrote on 22nd July 1998 to Mr John Watson (C/8/83). In that letter he set out his understanding and, although in his evidence Mr Cervantes-Watson said that he (Mr Fitton) was describing rather more than Firle was envisaging, I note that, in his reply of 5th August 1998, Mr John Watson invited DTZ to carry out consultancy work as described in his (Mr Fitton's) letter without making any adverse comment on the contents of that letter. Furthermore, in his letter Mr John Watson referred to - *"The 25 Year Lease on the building is expiring at the end of September 1998 and it is our wish to get the premises refurbished cost effectively and re-let at a good commercial rent as soon as realistically possible after."* (C/8/90)

38. The third in the series of "proposed redevelopment" meetings was held on 18th August 1998. The minutes are at C/8/93 and 94. The main purpose of this meeting was to introduce the DTZ personnel and also representatives of Zisman Bowyer ("ZB"), an engineering consultancy whom DTZ intended should work in conjunction with them. At this meeting the recorded anticipation was for tenders to be obtained by the end of October 1998 so that work on site could commence by the beginning of November. DTZ confirmed its understanding in a letter dated 19th August 1998. The various aspects/areas of the intended refurbishing works were described before Mr Fitton stated - *"The full schedule of works will be available for our meeting arranged on site on Wednesday 16th September 1998 at 10.30am (venue to be confirmed) at which time we can review the impact of the total costings and discuss where a commensurate saving could be achieved, either through the tender period or through reduction in the quality of the specification.*

At the meeting on the 16th September 1998 we will also have prepared a brief specification to ask a couple of Contractors to provide costings for stripping out the accommodation once vacant possession is achieved on the 28th/29th September 1998.

We will not however issue this for tender unless advised to do so at the meeting on the 16th September 1998, bearing in mind the sensitivity of your dilapidations negotiations with the existing tenant.

Whether or not the early strip out contract is implemented, we would then, on confirmation of your instruction and the scope of specification, proceed with development of full design information in anticipation of tendering the contract during October 1998. Tenders would be requested for return during October enabling us to report to you in late October 1998 with a view to commencing construction on site in November 1998 which on a five month programme would allow for completion in March 1999." (C/8/96)

39. No answer to this letter is contained in the Court bundles. By 16th September 1998 DTZ had obtained fairly detailed cost estimates for the stripping out works and the building refurbishment options. These were discussed at the fourth in the series of "proposed redevelopment" meetings which was held that morning. The minutes of that meeting (C/8/143) read as follows -

"1. [Mr Fitton] circulated two reports, one a schedule of stripping out works, the other detailing building refurbishment options. He explained that the total cost of the works identified by DTZ and ZB came to £530,000

plus Vat plus fees, and acknowledged that this was substantially in excess of the client's expectations. He added that this only covered essential works and did not, for example, include the cost of comfort cooling. Page 52 of the report contained a list of optional works.

2. [Mr Robinson of DTZ] then took the meeting through the report and talked about the various elements of the building works. [Mr Mackay of ZB] did the same for the electrical and mechanical works. [Mr Fitton] then talked about possible savings, including omission of works to ground floor lobby - £15,000, mothballing of residential - £40,000, omission of carpeting to common areas - £5,000.

3. After discussion it was agreed that no decisions could be made until [Mr John Watson] and [Mr Cervantes-Watson] had the opportunity to examine a detailed breakdown of the costs. It was also agreed to delay any decision on stripping out. DTZ agreed to send the detailed breakdown to [Mr John Watson] the next day.

4. [Mr Altman] reported that no agreement had yet been reached on the dilapidations. At [Mr Fitton's] suggestion it was agreed that he would check on the amount included for essential works to the mechanical services. It was also agreed that he would arrange for still and video photographs of the building to be taken." (C/8/143)

40. The detailed cost breakdowns to which reference was made in item 3 of those minutes were duly forwarded to Firle (C/8/116 to 122 - M&E services; 123 to 134 - stripping out works; and 135 to 142 - refurbishment works). In his evidence Mr Cervantes-Watson explained that DTZ had produced a scheme which differed significantly from that which Firle had been envisaging. Furthermore, it was one which would cost far more than Firle had considered spending. By way of example, Mr Cervantes-Watson drew attention to the fact that DTZ's proposals involved a £40,000 total strip out of the building rather than "*making use of what was there insofar as it could be used"*. The directors/shareholders of Firle discussed DTZ's proposals and decided to dispense with them and with ZB. The architect (Mr Madan) was asked to produce a simplified "*Schedule of Works and Specification*" more in keeping with the understandings which had been reached by June/early July 1998 (before DTZ had become involved) and this he did. The document (which became the basis for the work that was actually done in 1999) was dated 29th September 1998 (C/8/151).

41.1 Datapoint's 25 year term expired on 28th September 1998. Although the contemporary documents show that Firle was planning to refurbish Inforex House immediately after regaining vacant possession, was this something which Firle "**intended**" at the term date ? Firle's case is that the company's position at the term date was similar to that of Lady Gabriella Cunliffe - see **Cunliffe v. Goodman** [1950] 2 KB 237. In that case the Court of Appeal drew attention to the difference between an "intention" or a "decision" (albeit the decision might be revocable) on the one hand and a "provisional" intention on the other hand - see per Cohen L.J. at page 250. The essence of the distinction was explained by Asquith L.J. at pages 253 and 254 - *"... If the Plaintiff did no more than entertain the idea of this demolition, if she got no further than to contemplate it as a (perhaps attractive) possibility, then one would have to say (and it matters not which way it is put) either that there was <u>no</u> evidence of positive "intention", or that the word "intention" was incapable as a matter of construction of applying to anything so tentative, and so indefinite .....*

..... This leads me to the second point bearing on the existence in this case of "intention" as opposed to mere contemplation. Not merely is the term "intention" unsatisfied if the person professing it has too many hurdles to overcome or too little control of events: it is equally inappropriate if at the date that person is in effect not deciding to proceed but feeling his way and reserving his decision until he shall be in possession of financial data sufficient to enable him to determine whether the project will be commercially worthwhile."

41.2 In that case the Court of Appeal concluded that although Lady Cunliffe was **disposed** to demolish and rebuild if she could do so on remunerative terms, the point was never reached where she was in a position to make and did make **a firm decision** to proceed. In the words of Asquith L.J. at page 254, the redevelopment proposals which she was considering did not move - *"**... out of the zone of contemplation - out of the sphere or the tentative, the provisional and the exploratory - into the valley of decision ... .**"*

41.3 In this case, Firle's planning of the proposed refurbishment had progressed much further than had Lady Cunliffe's proposed demolition and redevelopment by the term date. There were no regulatory uncertainties standing in Firle's way and there is no suggestion in any contemporary document of any perceived financial constraint (at least not in respect of the more limited refurbishment project which Firle

and Mr Madan had in mind as opposed to the more extensive project which DTZ had proposed). In his oral evidence Mr Altman said that on 16th September 1998 he was advising Firle not to "press the button on redevelopment until they had got a handle on cost". However, the discussion on that day was centred on DTZ's costings and, what was agreed by those present at the meeting was that no decision in respect of DTZ's proposals was to be made before the detailed breakdowns had been supplied to Mr John Watson and Mr Cervantes-Watson. In his evidence Mr Cervantes-Watson did not suggest that concern at the likely cost of the more limited refurbishment project was a concern at that meeting (or on any other occasion). What is suggested is that, at the end of September 1998 and for some months thereafter, Firle was pursuing what Mr Cervantes-Watson called "a dual approach" (see paragraphs 13, 15, 16, 18 and 27 of his witness statement at A/2/7, 8, 11 and 12). Firle, it was said, was pursuing negotiations with Ryde College ("Ryde") a prospective tenant as well as continuing to make preparation for the refurbishment option which was only to be implemented if the negotiations with Ryde fell through.

42. There is, as is apparent from my review of the contemporary documents, no mention of Ryde in any document prepared before the term date. The first mention of a "prospective tenant" comes in the minutes of the fifth in the series of "proposed redevelopment" meetings which was held on 29th and 30th September 1998. The minutes of that meeting read as follows -

"29th September

1. It was agreed that [Mr John Watson] would telephone Jon Fitton of DTZ to inform them that we did not propose to use their services any longer, and to ask him to inform Zisman Bowyer that the meeting planned for the following day was cancelled. [Mr Altman] undertook to inform [Mr Wilson].

30th September

1. [Mr Altman] reported that a prospective tenant [identified in evidence as "Ryde"] had been shown round the building who was interested in taking the building in its existing state at a rent of app. £10 per sq. ft. for a period of between 10 and 15 years. It was agreed that negotiations should take place by (sic) that at the same time we should seek tenders for the refurbishment works.

2. [Mr Madan] tabled a revised budget estimate from Zonebrook of £285,573.

3. [Mr Madan] reported that tender documents would be available by the evening of Thursday 1st October and promised to deliver them to [Mr Altman] who undertook to send out the documentation to contractors.

4. It was agreed to seek tenders from at least six contractors. .....

5. The tenders to be returned by the 23rd October.

6. The tender documentation would show provisional sums for the lift works, carpeting, reception desk, and air conditioning.

7. It was confirmed that there would be only one electric meter and one gas, but separate gas boilers.

8. [Mr John Watson] will be asking [Firle's Solicitors] to write to Inforex regarding the fact that there is still property in the building and that the keys have not been returned. He is to stress that any acceptance by us of the keys is without prejudice to the dilapidations claim.

9. [Mr Altman] advised that there has been no progress on the dilapidations negotiations and that in his opinion the only thing that is likely to accelerate these is the issue of a writ designed to get the time framework running. Questions were raised about Summers experience in handling a seriously contested claim and it was agreed that Mr Cervantes-Watson should discuss this with David Jackson. Irrespective of which solicitors were used, detailed instructions would be provided by Mr Altman. ....."

(edited minutes at C/8/155 to 156; full version at G/13/9 and 10)

After this meeting Firle might be said to have pursued the "dual approach" of exploring the possibility of achieving a satisfactory letting to Ryde whilst continuing with the preparations to place a refurbishment contract albeit, it is to be noted, from this time onwards, for reasons which were not explored in evidence, matters were allowed to proceed at a comparatively leisurely pace. However, what was the position at the term date ?

43. I have in mind that evidence of post termination events is generally inadmissible in relation to the Landlord's actual intention at the term date - see generally **Dowding and Reynolds**, "**Dilapidations, the Modern Law and Practice**" (1995) - paragraph 23-39 at pages 652 to 654 and in particular the citation from the judgment of Sellers L.J. in **Keats v. Graham** [1960] 1 WLR 30 which includes these words: *"I am inclined to think that in the majority of cases evidence of events after the material date for consideration would be immaterial and therefore inadmissible. Perhaps that ought to be qualified to this extent, that it may be that a future event may cast some light on an uncertain state of mind or an intention at a prior date. But that can very rarely happen... If one is looking at evidence at a later date it may well be that it indicates a change of intention and does very little, if anything, to assist the inquiry as to what were the probabilities at the time when the lease came to an end..."*

44. In my judgment, in a case such as this evidence of what was said/discussed within a short time of the term date may cast light on the state of mind or intention at that date. Is this a case where it could fairly be said that the landlord was in an "uncertain state of mind" at or prior to the term date ?

45. Although both Mr Cervantes-Watson and Mr Altman dealt with the meeting of 30th September 1998 in their evidence, neither had been directly involved in any dealing with Ryde prior to that date. Mr Altman said that one of his colleagues (Mr Keenan) had shown someone from Ryde over Inforex House on a couple of occasions during September 1998 - and, in cross-examination, he accepted that those occasions were after 16th September 1998. The first file note of which Mr Altman was aware was of a telephone conversation on 1st October 1998 (not a disclosed document). Mr Altman said this "interest" in the premises had been reported to Firle but it was not clear to whom any such report had been made (Mr Altman thought it would probably have been to Mr John Watson) or in what terms any such report was made or whether this was something which had occurred on (or before) 28th September 1998.

46. In the absence of any contemporary documentary reference to Ryde before the term date I have considered whether Firle's own minutes of the meeting on 30th September 1998 might indicate some earlier communication of Ryde's interest to one or more of the director/shareholders or whether the relevant section of the minutes was written as if something new was being communicated on that day. In my judgment the relevant section was indeed written as if something new was being communicated and, in the absence of any contrary indication elsewhere in the disclosed contemporary record and/or in the witness evidence (written and oral), the minute provides the best evidence of the time at which Ryde's interest first became known to Firle. Accordingly, in my judgment, Ryde's possible interest was not something known to Firle on (or before) the term date. At that date Firle was continuing to press ahead with what was in reality its long contemplated refurbishment plan. Unlike Lady Cunliffe who, prior to the term date, was contemplating an attractive possibility but simply feeling her way and reserving decision, Firle had made a firm decision to refurbish Inforex House; the detail of the scheme had been sufficiently thought through for the purposes of practical commercial decision-making; Firle's decision was naturally subject to possible review/revocation if something unexpected or untoward was to happen but, to borrow the words of Asquith L.J., Firle had moved out of the zone of contemplation into the valley of decision.

B. The Dilapidations Story

47. Once notified of Firle's intention that Mr Scarr should prepare a Schedule of Dilapidations, Datapoint informed Mr York Dawson of Sunwood Consultant Surveyors. He advised Datapoint in a letter dated 8th October 1997 in these terms - ***"... You and I have always anticipated dilapidations will be a problematical issue with Firle. Damages for breach of a repairing covenant is covered by the Landlord & Tenant Act 1927. The measure of the damages to the Landlord's reversionary interest is the lesser of either the cost of putting the premises into the repair standard required by the lease, or the diminution in the value of the Landlord's interest.***

This is a large and poor 1960s office building being of little interest to tenants. This is evidenced by the very long marketing period by both Speyhawk and subsequently Datapoint resulting in a fairly miserable letting to Greenhill. It was the best that could be achieved and spoke most clearly of how the market perceived Inforex House.

You cannot stop Firle undertaking a Schedule but it does seem a little strange that they are setting the ball in motion so much in advance. Of course it is speculation but this indicates to me that they would like to do a deal with you well

in advance of publicising their intentions to this building which again I would speculate would entail a major refurbishment.

I enclose a suggested reply to Firle which you may care to pass across to Jay for any comments he may have on what I foresee is likely to be a contentious matter."

48. He then wrote to Firle on 10th October 1997. The last two paragraphs of the letter read-

"The market evidence accumulated by both myself and Ferrari Dewe & Co, an active respected local agent, clearly demonstrates the almost total lack of interest in this building. I have advised Datapoint the measure of the landlord's claim for a breach of a repairing covenant is governed by the Landlord and Tenant Act which limits a landlord's claim to the cost of the remedial works or the diminution to the landlord's reversionary interest, whichever is the lesser.

Bearing in mind our marketing experience and the current state of the office market for this type of accommodation, it is clear the amount of damage you can claim, if any, as a result of any possible dilapidations is going to be severely restricted or even eliminated and will not be based upon the cost of implementing the Schedule of Dilapidations." (C/8/29)

This letter provided Firle with confirmation, if any confirmation was needed, that Datapoint would be resisting any substantial dilapidations claim. Although not expressed in the same clear terms as the solicitors' letter dated 14th August 1996, the message being conveyed was essentially the same viz. Datapoint expected that either extensive refurbishment (which would have the effect of severely restricting any dilapidations claim) or demolition (which would have the effect of eliminating any dilapidations claim) would be occurring after the expiration of the term. It does not seem that this letter received any substantive answer (G/13/13). Mr Scarr went ahead with the preparation of the Schedule of Dilapidations. Once prepared the Schedule was served together with a Section 146 Notice. It was initially served on the wrong Datapoint company in February 1998 (C/8/35 to 37). When responding and inviting service of a further notice on the correct company (if Firle wished to proceed), Datapoint's solicitors concluded their letter of 9th March 1998 with this paragraph - *"With regard to the section 146 Notice itself, please note that it is our client's contention that the alleged breach of covenant as referred to in the Notice does not in any way diminish the value of your client's reversionary interest, and in connection thereto our clients will be relying upon section 18 of [the Act]"*

At the same time Datapoint's solicitors gave formal notice under Part II of the Landlord & Tenant Act 1954 that Datapoint did not desire any continuation of the lease beyond the expiration of the contractual term (C/8/40).

49. On 12th March 1998 Firle's solicitors sent a revised Section 146 Notice addressed to the correct company (C/8/41 to 43) and this was followed up by Mr Altman. He wrote on 31st March 1998 to ascertain Datapoint's intentions with regard to the Schedule. He suggested that in view of the short time left on the lease it was "important that works started fairly shortly" (C/8/46). It was at this stage that Mr Trice was instructed to act on behalf of Datapoint (C8/48). He criticised the Schedule which had been issued. He met with Mr Altman and Mr Scarr in April 1998 and reported back to Mr York Dawson by letter dated 23rd April 1998. He said that Mr Altman seemed to adopt a fairly aggressive stance expressing the view that Datapoint should complete the main elements of the necessary repairs with the possibility of dealing with the more minor matters by way of cash settlement. He concluded his letter - *"I came away from the meeting convinced, in my own mind, that the Landlord has no intention to redevelop and is simply going to re-market the property as it is but on the basis that it will be put into good and tenantable repair. I will continue with the discussions and negotiations on behalf of Datapoint and, of course, keep you informed as the matter proceeds ."* (G/13/16)

A revised Schedule was prepared. It was forwarded on 26th May 1998 (C/8/56) and a further Section 146 Notice followed on 19th June 1998 (C8/63).

50. Mr Trice ascertained that this revised Schedule was to be treated as the terminal schedule and it then became the subject of serious inter-parties consideration (C/8/69). Notwithstanding the reality of Firle's intentions by June 1998 as shown by Mr John Watson's letter to Mr Scarr dated 3rd June 1998 (C/8/57) and by the minutes of the meeting held on 16th June 1998 (C/8/60 to 62) both cited by me above, from his contacts with Firle's representatives Mr Trice was unable "to establish any reasonable cause to think or establish an intention on the part of the landlord to refurbish the premises ..." and he so reported to Mr

York Dawson by letter dated 24th June 1998 (G/13/17). However, after giving the matter some thought and discussing it with Mr York Dawson Mr Trice explained his overall views in a letter dated 8th July 1998 in these terms - *"I refer to our discussions regarding your advice in connection with the diminution in value. My own feeling on this matter is that the property, even in good and tenantable repair, would not be marketable due to the substantial shortcomings in the facilities provided. Lighting levels are extremely poor. The electrical installation is limited and the heating installation appears to provide only background levels of heat. The whole building, even in good and tenantable repair, is really beyond its useful life by modern day standards. I suggest, therefore, that only a substantial refurbishment of the finishes, services and common parts would put the property into a marketable condition. Such a refurbishment would be beyond the scope of the tenants repairing liability.*

In summary, therefore, I suggest that the only real course of action for this building is for a comprehensive refurbishment. The existing facilities have passed their useful lifespan and the time has now come for a substantial review.

I will make the above points to the landlord's agents whilst still proceeding with the preparation of the Specification of Works. The Specification of Works establishes a backstop situation whereby we know the cost of repairing the building. I will then argue that such repairs are inappropriate and irrelevant in 1998. I look forward to hearing from you to see if you agree with my comments about the diminution in value, simply being a "notional loss". (E/11/7 to 8)

And shortly thereafter, on 10th July 1998 or possibly the day before, in the course of a telephone discussion with Mr Scarr, Mr Trice made it clear that he saw "*no point in doing the work*" because the "*building [had] passed its useful life*" (C/8/76). Mr Scarr wrote to Mr Altman reporting the conversation. He concluded his letter by stating that he had done no more than listen to Mr Trice and noted his comments "*but...I thought I should inform you as it may well be that the question of agreeing the damages for dilapidations will prove to be difficult and time-consuming .....*" (G/13/20A and 20B).

51. At the first of a series of "*proposed redevelopment*" meetings which was held on 16th June 1998 (C/8/62, cited at pages ... of this Judgment) it had been anticipated that Mr Scarr would be able to give an update on his negotiations with Datapoint at the second meeting scheduled for 13th July 1998. The full version of the minute of the meeting held on 13th July 1998 (G/13/8) shows Mr Altman reporting that no agreement had been achieved on the question of dilapidations. The minute then goes on to state - *"... Recent cases have not gone in landlord's favour and that the likely outcome would be a payment of between £30,000 and £50,000."*

52. In his recent Affidavit Mr Altman said this in relation to that part of the minutes -

> *"4. It was not until the minute was drawn to my attention a few days ago that I recalled having been asked to comment on the potential claim at this meeting. I still do not recall mentioning the figures there referred to. My memory is that, somewhat out of the blue, I was asked to comment by Nicholas Cervantes-Watson on what Firle could expect to recover. My remark was off the cuff and I stress that at that time I had made no calculation as to possible damage to the reversionary interest. Nor, of course, had the repair works even been costed at that stage - the meeting followed hard on the heels of Michael Scarr having been told definitely that the works would not be carried out by Datapoint.*
>
> *5. As Firle was no doubt aware, I was therefore in no position to give an informed view as to the quantum of its claim. I do not recall which legal cases I was referring to and I am sure Firle would have been aware that the figures I gave were not properly calculated figures."*

Given the importance of the dilapidations issue at the time, the fact that Mr Scarr had just reported his conversation with Mr Trice and the fact that Mr Trice was taking the line that Firle had long feared or expected Datapoint would be taking, I have difficulty in accepting the accuracy of Mr Altman's recollection as set out in the affidavit. The issue was not something which arose "out of the blue". It seems logical to me that after Mr Altman had reported he was asked for a view as to the amount likely to be recoverable as damages if the refurbishment point was firmly taken and pressed by Datapoint. I would accept that the figures given in response were likely to have been "*off the cuff*" rather than the product of calculations prepared prior to the meeting.

53. At the third of the meetings, on 18th August 1998 (C/8/93 and 94), dilapidations was simply minuted as "ongoing" but, it is clear from the terms of DTZ's follow up letter dated 19th August 1998 (C/8/96, cited at

page ... of this Judgment) that Mr Fitton had been made aware of "**the sensitivity of [Firle's] dilapidations negotiations ...**".

54. On 3rd September 1998 Mr Scarr wrote to Mr Trice in these terms - *"The lease of the above property terminates on the 29th of this month and, clearly, in practice there is now no possibly of the repairs detailed in the schedule of dilapidations being carried out before the end of the term. Under the circumstances, the Landlord will be looking for a cash settlement.*

I look forward to hearing from you as soon as possible with a view to a meeting in order to discuss and, hopefully, reach a settlement of the matter. (C/8/111)

It does not seem that Mr Trice sent any written response. At the fourth of the series of "proposed redevelopment" meetings held on 16th September 1998 (C/8/143) Mr Altman is recorded as advising that "no agreement had been reached on dilapidations" and that remained the position at the term date. At the fifth of the series of "*proposed redevelopment*" meetings held on 30th September 1998 (C/8/155 to 156) Mr Altman advised that there had been no progress on the dilapidations negotiations and he suggested that the only thing likely to accelerate matters was the issue of a writ.

Post Termination Events

55. The relevant date on which both the landlord's intention and the diminution in the value of the reversion fall to be assessed is the term date. When it comes to considering the diminution in the value of the reversion at the term date, post termination events may throw light on that value and evidence of them is therefore admissible - see generally **Dowding and Reynolds**, paragraphs 23-15 and 23-27 at pages 609 and 627 to 631. As the Learned Editors state on pages 630 to 631 - *"In practice, the steps taken by the actual landlord after the expiry of the lease in relation to disrepair may be compelling evidence of the extent to which the reversion has been damaged... in the ordinary case, it may afford cogent evidence of the way the hypothetical purchaser would have looked at the reversion on the term date ... the fact that the actual landlord relets the premises after the term date on terms that the works are done by the incoming tenant in return for a rent free period, or a discounted rent until the first review, may evidence how the market would have regarded the disrepair. If the notional purchaser would have done the same as the actual landlord, then he would have reduced his bid by an amount equal to the value of the rent foregone. The diminution in value of the reversion will therefore be the value of the lost rent. The same would apply in relation to any other type of transaction undertaken by the landlord after the term date..."*

With this in mind, I now come to consider the events which occurred from 29th September 1998 onwards. I have already mentioned that the fifth in the series of "proposed redevelopment" meetings took place on the 29th and 30th September 1998 (C/8/155 and 156). As I have said after this meeting Firle pursued the "dual approach" of exploring the possibility of achieving a satisfactory letting to Ryde whilst continuing with the preparations to place a refurbishment contract. However, for some unexplained reason or reasons, all the apparent urgency to take action immediately after the term date which the earlier meeting minutes and correspondence had indicated, suddenly evaporated. For the next few months matters were allowed to proceed at a comparatively leisurely pace.

56. On 6th October 1998 (C/8/163 and 164) Ryde put forward a subject to contract, subject to survey, subject to the grant of a further D1 planning permission offer to take the commercial floors for an unspecified period (but subject to a three year break clause) at an annual rental of £60,000. This offer was coupled with an offer from one of Mr Ryde's colleagues to take a separate lease of the residential accommodation for up to five years (but, again, subject to a three year break clause) at an annual rent of £11,000 (if kitchens and bathrooms were provided) or £10,000 (without kitchens and bathrooms). There were other terms which I see no need to detail.

57. On 7th October 1998 Mr Altman responded to an enquiry which his firm had received by letter dated 29th September 1998 (C/8/157) for office or educational accommodation within 5 miles from the centre of Northwood. In his letter he said - *"I enclose a brochure in respect of Cervantes House, Harrow which we have just commenced marketing on behalf of clients. We are just about to go out to tender with regard to refurbishment of the building and at this stage your clients requirements could be incorporated into the specification. Alternatively, it may be that your clients would consider taking the building as it stands ..... .*

We are instructed to market the building on the basis of £12 per sq. ft. rent overall although this is on the assumption that the building will be air-conditions (comfort cooling) and totally refurbished. ....." (C/8/166)

It does not seem that the recipient showed any interest in Inforex House.

58. On 13th October 1998 (C/8/167) Mr Keenan of Gibbs Gillespie responded to Ryde's offer. In his letter he stated that before considering that offer Firle wanted to have more background information, trading accounts and an indication that two directors would stand as guarantors. The separate offer for the residential accommodation was not mentioned. It is not clear whether and if so when Ryde responded to the requests made for accounts and in respect of guarantors.

59. On 16th October 1998 (C/8/180) the question of dilapidations was considered by Firle and its advisers. A meeting was held after a tour of the building. It was decided to produce a priced Schedule of Works, to send that to Datapoint and to commence legal proceedings if the claim was not then settled promptly. It was also decided to "... attempt to get offers from Ryde... indicating how much more rent they would be prepared to pay if the dilapidations works were carried out." So far as this last point is concerned there is no indication in the evidence that this was ever followed up with Ryde.

60. The sixth in the series of "proposed redevelopment" meetings was held on 26th October 1998 (C/8/181). By that date contractors' tenders had been obtained which, it was said, needed to be analysed so that negotiations could be commenced with one or more of the tenderers. On 27th October 1998 there was a meeting of the directors/shareholders of Firle (and other family companies). The minutes of that meeting dealt with the existing "Cervantes House" position in this way - *"... A specification had then been produced by K Madan (KM) and [Mr John Watson], and on the basis of that specification six tenders had been sought. Two tenders had been received, one from Zonebrook at £318,881, the other from DW Bevan Ltd at £299,477. A third tender from Carey PLC was still outstanding (note this was received later that day and was for £499,000). KM produced a comparative analysis of the two tenders - copy attached. He indicated that in his view the contract sum could be negotiated down to app. £260,000 to £270,000 but that with unforeseen extras the eventual sum would be in the region of £300,000. He indicated that at face value the tender from DW Bevan Ltd appeared to be the cheaper.*

The figures quoted are all subject to VAT, any decision as to whether the company would elect to charge VAT on the building would be delayed until a tenant was found. [Mr Cervantes-Watson] went on to say that in his opinion the majority of the expenditure on the building would be a charge against taxable profits, either as repair and maintenance or as capital allowances. It was agreed that negotiations should take place with both contractors.

After KM had left the meeting a discussion ensued regarding an approach by Ryde College to take the building in its existing state at a rental of £70,000 p.a. After discussion it was agreed that in principle this approach was worth pursuing, at the same time as the negotiations with the contractors, subject to the college:

a. being able to act quickly

b. only requiring minimum works to the building

c. agreeing to a rental deposit equivalent to six months rent....."

Notwithstanding the terms of the final part of the minute it does not seem that this was followed up with Ryde (save in unrecorded conversations) until the middle of January 1999.

61. By 7th December 1998 (C/8/190) Datapoint's solicitors were writing in response to Firle's claim for damages for alleged dilapidations. There was, as yet, no costed schedule and in the light of the events which I have already described the points made in that letter were predictable.

62. Firle's position at the end of 1998 in respect of each of the three matters which were being considered was this - **Ryde:** It was thought that Ryde must be considering other properties because Mr Altman's firm had been told they were still interested but no progress was being made. Firle and its advisers were not then aware that Ryde had made an offer on a different property on 13th October 1998 (C/8/179 and 180) **Refurbishment:** Mr Madan was in discussion with tendering contractors seeking to persuade them to reduce to about £250,000 - exclusive of VAT (see - C/8/204); **Dilapidations:** The pricing of the Schedule was being dealt with by Mr Ron Tucker (a quantity surveyor) who was attempting to obtain figures from specialist contractors (see - C/8/203).

63. On 15th January 1999 (C/8/203 and 204) the seventh in the series of "proposed redevelopment" meetings took place. It is not necessary to set out the minutes of this meeting. In addition to confirming points which I have dealt with in the previous paragraph, they show a decision that the position with Ryde should be brought to a head by making a counter-offer in response to the offer which Ryde had made on 6th October 1998. The counter-offer was sent by Mr Altman on 20th January 1999 (C/8/206 and 207). Firle asked for Ryde to accept a five year lease (with a three year break clause) at a rent of £75,000 for the whole building. Permission would be given to sub-let the flats to Mr Ryde's colleague. A six month rental deposit was requested. So far as the condition of the building was concerned Firle offered - *"6. ..... to reinstate the office central heating, lift and electrical services to a safe and satisfactory standard. In addition [Firle was] prepared to decorate the premises to a basic level. A schedule of works can be agreed with your surveyor.*

7. No reinstatement works will be carried out to the kitchens and bathrooms of the flats."

And so far as timing went the letter stated - *"9. As you will be aware, [Firle is] well advanced in preparing to refurbish the entire building including the installation of air-conditioning. Due to the lead in period required for such works [Firle is] insisting that a time limit be put on negotiations. [Firle] would require an in principle decision from you within 2 weeks from the date of this letter and for you to enter into a binding contract to take the lease within 6 weeks of today's date."* (C/8/206 and 207)

That letter provoked an unrecorded response from Ryde. Firle was told Ryde was interested in another building and not prepared to proceed until the position with regard to that other building was resolved.

64. On 27th January 1999 there was a meeting of the directors/shareholders of Firle (and other family companies). The minutes of that meeting dealt with the "Cervantes House" position. Mr John Watson and Mr Cervantes-Watson are recorded as reporting the matters minuted prior to a discussion of two options - *"Ryde College were interested in another property and were not prepared to say whether they would like to take our building - or on what terms - until they found out whether or not they could get planning permission for a change of use of that other building. This matter was being considered by the local planning committee on 16th February. Kan Madan had been in contact with both Zonebrook and DW Bevan Ltd and had provided them with more detailed drawings. He felt that the tender figures could be negotiated down to about £250,000 but had said that both contractors required a further week to finish their pricing. Zonebrook had indicated a likely 22 week contract period and DW Bevan Ltd 15 weeks. Both contractors would be able to commence work within 2 weeks of being told they were successful - but Zonebrook would not be able to start before the end of February. It was also reported that the priced dilapidations schedule had now been completed.*

The meeting discussed two options:

a. Await the result of Ryde's planning application and see whether they were still interested in proceedings.

b. Proceed with the refurbishment works as soon as possible.

After lengthy, but good humoured, discussion, it was agreed that:

a. David Jackson at Summers [i.e. Firle's solicitors] should be asked to seek counsel's opinion on all aspects of the dilapidations claim.

b. We proceed with the refurbishment works, subject only to counsel not giving advice that drastically changes the situation.

[Mr Cervantes-Watson] and [Mr John Watson] be authorised to select the successful tendered, the selection to be based on a combination of price and required contract period.

The priced dilapidations schedule (see B/6/40 to 61 - misleadingly dated May 1998) was sent out by Mr Scarr on 27th January 1999 (C/8/208) and acknowledged by Mr Trice on 2nd February 1999.

65. Mr Altman's marketing efforts for the proposed refurbished building continued. On 10th February 1999 he was in contact with Ferrari Dewe & Co. following up a conversation with Mr Chamberlain of that firm. He said - *"..... I enclose a further copy of our brochure. The floor area of 8,418 sq ft excludes the two apartments on the third floor. As you are probably aware planning permission has been refused for conversion into offices, mainly on political grounds. You will see however from the plans that we have done our best to make them look like offices because I am sure someone will take a view on this space. If your client wanted to use them as flats then we would*

refurbish them purely as flats. If your clients are interested I would be happy to show you and them over the building. At this stage, subject to a pre-letting agreement my clients are happy to discuss any requirements any individual tenant may wish to have incorporated. The major decision is at this stage whether or not to air condition the building. My clients plans are to air condition it but if your clients did not want air conditioned space then this might be a possibility." (C/8/212)

66. On 21st April 1999 there was a meeting of the directors/shareholders of Firle (and other family companies). On the matter of the refurbishment contract the minutes recorded - *"[Mr John Watson] reported that he and Kan Madan had further contact with both Zonebrook and DW Bevan Ltd and that both their prices were still in the region of £300,000 and that Bevan's had gone upon (sic) and Zonebrook's down. It was agreed that they should both be told that we were now in a position to place a contract, and asked to supply their final contract figure."*

67. On 22nd April 1999 (C/8/218) Firle notified its solicitors that it had agreed a short (two month) letting to Greenhill from 1st May 1999 at a rent of £6,500 per month Greenhill wished to have the premises available for examination purposes. There is no indication of the time when this possibility first came to be considered by Firle. I have assumed that the opportunity arose suddenly and unexpectedly and that Firle took a commercial view that delaying the refurbishment works for a further couple of months would not prejudice the company's interests. This transaction was duly completed and Greenhill occupied the premises until the end of June 1999.

68. On 10th May 1999 (C/8/221) Firle's solicitors sent a copy of the priced Schedule of Dilapidations to Datapoint's solicitors. It was acknowledged on 13th May 1999 (C/8/223) and an exchange of correspondence ensued (C/8/226, 228 and 268 to 272).

69. On 14th July 1999 Firle contracted with Zonebrook Building and Maintenance for the carrying out of the refurbishment works. The net contract sum was £303,720. Work was to commence on 19th July 1999 with completion 18 weeks later. The contract was in the JCT minor building works form (C/8/230 to 261). The Specification which formed part of the Contract was a priced version of the schedule which Mr Madan had produced dated 29th September 1998 (see C/8/258 to 261). The now agreed basis for the value of the reversion assumes that Mr Altman's hypothetical purchaser "C" would have done this same work and, in my judgment, this is indeed the proper assumption to make in the circumstances of this case.

70. There were some variations to the works during the course of the contract as detailed in letters from Zonebrook dated 7th September 1999 and 16th September 1999 (C/8 262 to 265). In particular, the existing felt roof covering over the two flats and the insulation to which it was bonded were renewed. At item 1.08 of the specification at C/8/258 the contractor had been asked to price for repairing an "asphalt roof". This was an incorrect description of the existing state of affairs. The final certificate of payment issued by Mr Madan and dated 15th February 2000 (E/11/114) showed the net value of additional work to be £30,158.00 giving a total net final contract value of £333,878.00. Some alleged period of delay in completion gave rise to a "liquidated damages" deduction of £2,500 (the period involved and the basis for this were not explored in evidence). All the payment certificates (E/11/104 to 114) indicate VAT being paid by Firle in addition to the net certified sum due for payment. In evidence Mr Cervantes-Watson stated that Firle had been VAT registered since September 1999 with the result that VAT had been recovered in respect of the works except for the works to the residential part of the building.

71. These proceedings were begun in August 1999.

72. A letting of the third floor of the refurbished property was negotiated by Mr Altman with Pan Global Solutions (UK) Limited in November 1999 (C/8/302 to 304). It would seem that there had been amicable discussions with the local authority planning department in respect of the intended extent of residential use but, as part of the arrangement, a break clause was to be included in the lease to cover the possibility of enforcement action being taken in respect of the actual use. This was done (Clause 5.16.2 - B/5/103). The lease was dated 17th January 2000 (B/5/87 to 129). The term was for 10 years from 10th December 1999 at a rent of £9,000 for the first year and £13,500 for years two to five. The lease contained a tenant's break clause at the end of the fifth year (Clause 5.16.1 - E/5/103) and provided for upwards only rent review at that time (Schedule VII - E/5/125).

73. A letting of the ground, first and second floors of the refurbished property was negotiated by Mr Altman with Travel Protection Group PLC in January 2000 (C/8/315 to 320). The lease was dated 15th February 2000 (B/5/137 to 181). The term was for 25 years from 8th February 2000. The rent for the first five years of the term was £95,000 per year plus VAT with the fifth quarter being rent free. The rent was subject to five year upwards only rent reviews. The tenant's break clause provided for possible termination in February 2007, February 2015 and February 2020. During the course of the trial the Travel Protection Group agreed, subject to contract, to sub-let part of the first floor of the building to Capsbury Ltd for a five year term (E/11/148 to 150).

74. The total rent achieved, disregarding the two short rent-free periods, was £108,500 per annum for the first five years of the terms. These figures were fully in line with Firle's expectations when the refurbishment was decided upon and no different from the assumptions which would have been made by Mr Altman's hypothetical purchaser "C". When assessing the GDV figure of £1,079,000 the valuers took that as the appropriate rental value of the building and applied a 9% yield, deferred for six months. Estimated acquisition and reletting costs were then deducted. The resultant figure, rounded to the nearest one thousand pounds was £1,079,000.

THE ISSUES

75. Firle's claim to be entitled to recover in full the estimated cost of carrying out the scheduled repair works (including associated professional fees) with the addition of lost rent and payable rates simply cannot succeed. I do not accept the submission made at paragraph 40(a) of Mr Hutchings' opening that "were it not for the fact that the building had been left in a state of bad disrepair, [Firle] would apparently not have carried out any refurbishment (as opposed to repairs) apart, perhaps, from the new design of the front entrance." That submission runs contrary to the facts as I have found them. In my judgment the refurbishment of Inforex House which was planned, and in due course implemented, affords cogent evidence of the way in which the only realistically contemplatable hypothetical purchaser would have looked at the realistic commercial possibilities of the building at the term date. This was something which Firle itself recognised although, when Ryde unexpectedly expressed an interest in the building, Firle was prepared to contemplate adopting a possible alternative strategy. However, Firle's unhurried response to Ryde's offer and the tentative nature of Ryde's interest suggest that the offer itself was not regarded as particularly attractive and that there was no real (or sufficiently strong) demand from this type of tenant for it to have had any influence on the open market value of the freehold reversion at the term date. It follows that I reject the submission made at paragraph 40(b) of Mr Hutchings' opening. Given my factual findings, the submission made at paragraph 40(c) - which in any event I regard as a somewhat adventurous submission in view of the need to have regard to Section 18(1) of the Act in all cases - does not need to be considered.

76. In his report, Mr Altman concluded that what he termed "hypothetical purchaser C" was the most likely type of person who would have been prepared to purchase the freehold interest at the term date. This purchaser was one who would have purchased the building with a view to doing more or less exactly what Firle themselves did by way of refurbishment (see A/2/50 to 52 and 65 to 66). Although Mr Altman reached his conclusion after considering six different possible hypothetical purchasers who might "conceivably have existed and been interested in the freehold" (A/2/44), in his view only two of these were worthy of serious consideration. In addition to hypothetical purchaser "C", there was also hypothetical purchaser "A" who would have been prepared to purchase the building with a view to carrying out the repairs required by the Schedule of Dilapidations (A/2/44). Although Mr Altman did not simply and unequivocally rule out the existence of any such a purchaser, I take the view that he should have done. I can see no basis for supposing that any rational individual or commercial organisation would have contemplated a purchase in the Autumn of 1998 with a view to expending time and money bringing a mainly office building with subsidiary residential accommodation back up to a good early 1970's standard with a view to marketing it in about the Spring of 1999. I take into account that, once Ryde came on the scene, Firle was apparently prepared to contemplate the possibility of undertaking very much less work with a view to achieving a comparatively short-term further D1 letting at a rental level of about 2/3 of that thought to be achievable for the accommodation after refurbishment but, as I have said, the matter was not pursued with any vigour and in the event nothing came of it. In my view, the reasoning which Mr Altman

applied in respect of his hypothetical purchaser "B" at paragraph 8.4 of his report (A/2/64) was equally applicable to his hypothetical purchaser "A".

77. Once it is accepted that hypothetical purchaser "C" was the only sort of person likely to have been interested in purchasing the freehold interest on 28th September 1998 and that Firle itself then intended that same refurbishment, what is the extent of Datapoint's liability in damages for breach of the repairing covenants. It seems to be obvious, as a matter of common sense, that consideration must be given to the extent to which it would have been worthwhile to have the repairs carried out viz. to what extent could the repairs realistically be expected to survive the refurbishment.

78. The position is explained in **Dowding and Reynolds**, paragraphs 23-16 and 23-24 on pages 610 to 612 and 620 to 621. Subject to the possible qualification stated below, I respectfully agree with and adopt the view of the learned authors on page 621 where they say: *"The second type of case is where the purchaser would be likely to update the building in such a way that its pre-existing state of repair would remain relevant, but only to a limited extent. An example might be the refurbishment of an office building to bring it back up to modern standards where only some of the work which the tenant should have carried out would survive the upgrading works. In such a case depending on the facts, the diminution in the value of the building might well be limited to the cost only of those repair works which would survive the refurbishment. In assessing the diminution on this basis it is necessary to bear in mind that the works of repair which are to be "subtracted" are only those which would have been made valueless by the refurbishment even if the premises had been kept in repair. ..... ."*

Expressing the essence of the general principle in my own words, I would put it in this way: If none of the repairs could realistically be expected to survive the refurbishment or if only such an insignificant proportion could be expected to survive as to fall within the "de minimis" concept, it is difficult to see how the value of the landlord's interest at the term date would have been in any way diminished by reason of the disrepair. Equally, whenever some not insignificant part or parts of the repairs could realistically be expected to survive the refurbishment, it seems fairly obvious (a) that the value of the landlord's interest at the term date is likely to be to some extent diminished by reason of the disrepair and (b) that the extent of the diminution is likely to be related to the value of the repairs that could realistically be expected to survive ("the survival items") and whatever (if any) reduction in the time required for refurbishment was to be expected if those repairs had been carried out by the tenant before the term date.

79. How is the **value** of the repairs that would survive the refurbishment to be assessed ? The learned authors of **Dowding and Reynolds** refer to the **cost** of the repair works but there are a number of different costs which might be considered. First, if a comprehensive Schedule of Dilapidations is costed the cost which the tenant would have had to incur to comply with the repairing covenants is ascertained. The proportion of that total cost which is fairly attributable to the survival items could be assessed. Secondly, if a schedule of only the survival items was to be prepared and costed the cost which the tenant would have had to incur in dealing with those items alone could be assessed. If that would involve a much lesser amount of work being priced, those costs of repairing the survival items might exceed a fair proportionate part of the costs of a contract to carry out all the identifiable repairs.

80. In any event, why should a potential hypothetical purchaser "C" be interested in the sum which the tenant has saved in not carrying out some or all of the covenanted repairs ? Such a purchaser would surely be much more interested in the sum which he has to expend on the refurbishment contract. Had the survival items existed in their repaired condition at the time that contract came to be priced the purchaser would have had to expend a lesser sum. In my judgment, logically, the potential saving to the purchaser is the relevant "cost". This is the sum which would influence his valuation of the property. Depending upon the facts, it might be a different figure from either of the possible cost savings achieved by the defaulting outgoing tenant, albeit each of these three cost figures would be less than the damages recoverable at common law prior to the coming into force of the Act - see **Dowding and Reynolds** paragraphs 27-03 to 23-06 at pages 592 to 598. Furthermore, choices made in respect of the refurbishment works might be influenced by the existing state of the building; if the tenant has not carried out the covenanted repairs, some of the details of the refurbishment works might vary from those which would have been worked out had the repairing covenants been fulfilled. In such cases, in my view, when balancing the competing interests of landlord and tenant and considering the extent to which the value of the reversion (at the term

date) was diminished by the breach or breaches of the repairing covenants, it is necessary to consider the extent of the repair works that could realistically have been expected to survive refurbishment works of the nature and extent contemplated had those repairs been done prior to the term date.

81. Depending on the facts of particular cases, there may be slight differences or considerable differences between the three different "costs" figures discussed above. Accordingly, in some cases valuers required to decide upon the price that could have been obtained for the reversion at the term date might, pragmatically, feel it appropriate to have regard to costing figures contained in an existing comprehensive Schedule of Dilapidations. If in their opinion these give a sufficiently accurate indication of the additional amount which a purchaser might reasonably have been expected to offer had the survival items in fact been repaired it is obviously convenient to utilise them and avoid incurring the costs of a further costing exercise. And, as I understand the valuer's agreement, that is the approach taken in this case.

82. I now turn to the question of loss of rent. It is well established that this may be awarded in appropriate cases but a proper causal connection must be demonstrated. If the landlord would not have been able to re-let the premises even if yielded up in repair or if, as here, the hypothetical purchaser would not have attempted to re-let until after the premises had been refurbished, no rental loss will have been caused by the breach of the repairing covenant unless the extent of the survival items was such that, had they been done, the period reasonably required to carry out the refurbishment would have been reduced. In such circumstances loss of rent over that period might well be a material factor to be taken into account when valuing the reversion. However, in this case, Mr Scarr's oral evidence in chief was that the refurbishment contract would have taken about the same time even if the repairs which, he contended would have survived, had been carried out. Accordingly, in my judgment, no loss of rent component needs to be considered in this case.

    [I should perhaps add that, in my view, if I had been prepared to accept Mr Scarr's opinions in respect of the suspended ceilings, the interior decorations and carpets, the degree of care and protection that would have been required on the part of the refurbishment contractor would have been such that in this case the overall contract period would more likely have been prolonged rather than reduced.]

83. One other specific issue which can conveniently be dealt with at this point is the significance of Firle's VAT registration in September 1999. It is obvious from the minutes that whether or not to register in respect of Inforex House had been under consideration for some time but eventually it was done. Mr Altman's calculations in respect of hypothetical purchaser "C" included the full VAT charge as if that was a cost which the purchaser would have to bear (A/2/50 to 52). When asked for his comments on the calculation Mr Ferrari expressed the view that the hypothetical purchaser could be expected to have registered for VAT and I agree with him. Given Firle did in fact register the building and recover VAT in respect of all but the value attributed to the residential as opposed to the commercial parts of the building, it seems to me that however the position is analysed, the only VAT amounts to be included in calculations made to demonstrate the diminution in the value of the reversion to Firle and/or any hypothetical purchaser are the unrecovered amounts. It seemed to me that in the course of his Closing Submissions, Mr Hutchings was prepared to concede this point and, in the Introductory Section of this judgment I have referred only to the agreed calculations which were made on this basis.

84. Having set out the basic principles and dealt with the two discrete topics of "Loss of Rent" and "VAT", I think it convenient next to consider Datapoint's submissions concerning the second limb of Section 18(1) of the Act. I have summarised these submissions at pages 3 to 4 in the Introductory Section of this judgment. By this route, Datapoint seeks to avoid all liability to Firle for damages for breach of the repairing covenants on the basis that "the premises, in whatever state of repair they might be, would at or shortly after the termination of the tenancy... [be made subject to]... such structural alterations... as would render valueless the repairs covered by the covenant..."

85. I have already dealt with the issue of Firle's intention at the term date at the end of the sub-section of this judgment entitled the "Proposed Development" Story. Nothing further needs to be said in that respect. In my judgment, at the term date Firle **intended** to carry out refurbishment works. The extent of the intended works was conveniently described in the schedule which Mr Madan had been asked to produce shortly

before the term date once it had been decided to dispense with the services of DTZ (C/8/151 to 154) and it was intended to carry out those works within a short time after the termination of the tenancy.

86. The term "structural alterations" as used in Section 18(1) of the Act is not defined. In my judgment, the discussion in **Dowding and Reynolds**, paragraph 23.36 at pages 648 and 649 is apposite and I respectfully adopt the concluding paragraph of that section which reads: *"Having regard to the policy underlying the second limb, it is thought that the court would be likely to give a relatively wide meaning to "structural alterations", so as to ensure that the tenant does not have to pay damages for disrepair which will not survive works to be carried out on or shortly after the term date."*

Applying that test, there can be no doubt that the works which Firle intended involved substantial structural alterations to each of the floors.

87. Accordingly, Datapoint can rely on the second limb of Section 18(1) of the Act provided that the refurbishment works which were intended would "render valueless the repairs covered by the covenant." It is at this point that Datapoint fails. On the basis of Datapoint's own evidence, repair works to the value of £15,242 would have survived the refurbishment. In comparison with the extent of the disrepair and with the full cost which would have been incurred had Datapoint carried out the repairs, this is obviously a modest figure. However, it is not an insignificant sum and I do not accept the suggestion that, from a practical point of view, most landlords or prospective tenants would have simply disregarded the disrepairs as being "de minimus" when compared with the overall need for a comprehensive refurbishment of this building (see Mr Trice at paragraph 4.02.2 on page A/2/270 - albeit, I accept that he was then contemplating lesser figures for the value of works that would have survived refurbishment). Accordingly, even if I were to accept Mr Trice's opinions in full, in my judgment, Datapoint cannot rely on the second limb of Section 18(1).

88. It follows from what I have said that, in this case, some recoverable diminution in the value of the reversion can be demonstrated because sufficiently significant parts of the repairs could realistically be expected to survive the refurbishment. Mr Scarr's figure was £97,141 whilst Mr Trice's figure was £15,242. The basis for those figures is apparent from the "Agreed Schedule" dated 24th March 2000 which must be read together with the Scott Schedule in order to appreciate the types of repairs and the areas concerned. The bulk of the difference is comprised in very few items and I propose to state my decisions as briefly as possible without extending this judgment with lengthy descriptions of the individual items together with the experts' respective arguments and counter-arguments in respect of them.

89.1 In general, I prefer Mr Trice's views to those of Mr Scarr in respect of the disputed internal repair items but, save for items 2 and 14, the opposite is the case in respect of external items. I accept Mr Scarr's evidence concerning the condition of the flat roof over the flats and the need for replacement of the felt covering (see A/2/191) - I also take note of what happened in fact after the specification error was discovered during the refurbishment contract which seems to me to support the view that patch repairs were not really a practicable option. I also accept Mr Scarr's evidence concerning the asphalt roof/terrace and I do not accept Mr Trice's view that no repairs were needed.

89.2 have reduced the sum for item 34 (external decorations) by 25% to reflect what seems to me the obvious point that some making good and/or cleaning would have been required as part of a refurbishment contract had the covenant been fulfilled so far as that item and item 35 were concerned but, I do not accept the view that what were largely internal refurbishment works would have caused so much damage to the external facades as to render any repair or redecoration done by Datapoint valueless. However, when it comes to considering the internal redecorations (item 146) I think it simply unrealistic to expect decorations to survive the refurbishment works in the absence of provisions for careful (and relatively speaking expensive) protective measures. The requirement for these protective measures would have needed to be specified as part of the refurbishment contract to allow the Contractor to price for it. Similarly, the concept of refurbishment contractors being expected to work on and protect newly replaced carpet is, to my mind as it was to Mr Trice's, quite simply unreal. Once again it would have had to have been priced into the job. The other main disputed internal item was the ceiling tiles. Here two issues arise - practicality and ambience. I agree with Mr Trice as to the illogicality and impracticality of the working methods that would have been required if a repaired suspended ceiling system was to be retained. Once again any such

requirement would have needed to be priced into the job. In my judgment this item in particular would have given rise to significant extra cost and, I ask rhetorically, for what purpose ? To produce an office space with an obviously dated feel as opposed to the "as new" ambience which a more modern suspended ceiling (fitted in after works above had been completed) would help to give the building.

89.3 In my judgment, the appropriate figures for each of the disputed items on the "Agreed Schedule" are:

Item No.	Amount	Comment
1	10,317	See above
2	Nil	Dated feature - not retained in fact when the residential accommodation was refurbished so as to give it, so far as possible, an "office feel" - I prefer and accept Mr Trice's view.
12	1,420	See above.
14	Nil	Dated feature - not retained in fact as part of refurbishment - I prefer and accept Mr Trice's views.
34	4,250	25% reduction on Mr Scarr's figure - see above
35	8,250	No separate reduction on this item - see comments on 34
38	Nil	Generally as Item 14
89	3,700	I prefer and accept Mr Trice's views.
96 and 117	500 (each)	As 89
97 and 143	Nil	See above.
98, 105, 119 and 127	Nil	See above.
107 and 129	900 (each)	Figure taken from Scott Schedule - the doors appear to have survived.
146	Nil	See above.
151	558	I accept Mr Scarr's figure in preference to Mr Trice's.

90. When the "Agreed Schedule" is recalculated using the figures listed above for the disputed items (with the total conveniently rounded), the total which falls to be deducted from the agreed sum of £321,975 is £39,375. When that figure is fed into the agreed basis for calculating the value of the Reversion the following result is obtained:

	£
GDV	1,079,000
Cost of Works	321,975
Less Survival 39,375	282,600
Add 12½ fees	35,325
Add VAT	8,346
Add Financing 4,518 330,789	748,211
deduct developer's profit	269,750
Value of Reversion	**£478,461**

If the agreed value of the reversion in its unrepaired state viz. £432,373 is then deducted, the resultant diminution in the value of the reversion becomes £46,088. In view of the artificial apparent precision which the calculation gives to what is in reality an assessment, I think it appropriate to round the result to the nearest thousand and I award the sum of £46,000 to Firle in respect of this head of claim.

THE SECTION 146 CLAIM

91. In the course of "the dilapidations story" at pages 40 to 41 above, I explained that the Schedule of Dilapidations (prepared by Mr Scarr) was served together with a Section 146 Notice. Firle claims the sum

of £1,762.50 being the total of the amounts paid to Mr Scarr and its solicitors in connection with this matter. Mr Hutchings submitted that this sum was due pursuant to the covenant contained in the lease and I agree with him. I do not accept Miss McAllister's argument that it was inappropriate to prepare the Schedule and/or to serve such a Notice in the dying months of the term. I do not accept Miss McAllister's submission that it was necessary for Firle's solicitors to raise a specific invoice for the services they provided in connection with the preparation and service of the Section 146 Notice. It is quite clear that they did provide professional services and the amount claimed is, in my view, a modest and obviously reasonable sum.

INTEREST

92. Having considered Counsel's Submissions on the issue when the draft Judgment was handed down, I ruled that the sum of £46,000 awarded in respect of the diminution in value of the reversion should carry interest from the term date and the sum of £1,762.50 awarded in respect of the Section 146 claim should carry interest from the end of April 1998. Obviously statutory interest was payable up to and including 8th May 2000. Mr Hutchings submitted that interest should be awarded at the judgment rate (viz 8%). Miss McAllister submitted that interest should be awarded at 1% over base rate. In my view, the more appropriate rate to award a company of Firle's type was 2% over base rate.

93. After I gave that ruling, the parties agreed that the interest inclusive figure for which judgment should be entered was £53,695.25.

COSTS

94. The parties' respective submissions on costs were these - Mr Hutchings should be awarded its costs of the proceedings. It had recovered more than the amount which Datapoint had offered in settlement by way of Part 36 payments into Court. Miss McAllister submitted that Datapoint should be awarded its costs of the proceedings or alternatively its costs of the proceedings from 10th March 2000 onwards. Datapoint, it was said, had made sensible and realistic offers to settle the litigation but was faced with an intractible opponent which held firmly to unrealistic expectations of the amount which might be recovered.

95. In my judgment, neither of the parties' positions can be sustained. The approach now to be adopted by the Court is set out in Part 44 of the CPR and, in particular in Rule 44.3. The approach of the Court to the assessment of costs has been re-written with a new emphasis in the CPR. As Lord Woolf M.R. said in **Phonographic Performance Limited v. AES Rediffusion Music Limited** [1999] 2 AER 299 at pages 313 to 314: *"The most to significant change of emphasis of the new rules is to require courts to be more ready to make separate orders which reflect the outcome of different issues. In doing this the new rules are reflecting a change of practice which has already started. It is now clear that a too robust application of the 'follow the event principle' encourages litigants to increase the costs of litigation, since it discourages litigants from being selective as to the points they take. If you recover all your costs as long as you win, you are encouraged to leave no stone unturned in your effort to do so."*

I have also noted the observations of Lightman J in **BCCI SA (in liquidation) v. ACI (No. 4)** which were cited by Neuberger J in **Harrison v. Bloom Camillin** (4th February 2000) and the observations of Neuberger J himself in that case which echo the views of Lord Woolf and emphasise that under the CPR partial orders for costs which reflect the level of success achieved by the party in whose favour the costs order is made are to be expected.

96. In this case, Firle has succeeded in establishing an entitlement to damages but when compared to its pleaded aspirations the degree of success is modest. Firle's failure to acknowledge the reality of the intended refurbishment (both before and during the litigation) made the case more complex than it needed to be. The valuation evidence was, to my mind, far more complicated than necessary but, for the reasons given at pages 13 to 14 above, it was not necessary for me to deal fully with many of the points in the Judgment. There is the further factor that on 10th March 2000, Datapoint made what should clearly have been regarded as a realistic settlement offer which, in my view, reserved to receive a constructive and conciliatory reaction. In the result, Firle has achieved a better result but it is indeed a slim victory.

97. Turning now to look at the matter from Datapoint's perspective, its persistence with the second limb defence and its failure to acknowledge that there was legitimate claims for the Section 146 Notice and, more significantly, for damages of the order (when interest was added) of £50,000 until 10th March 2000,

seem to me factors to be borne in mind. Datapoint can also be criticised for producing valuation evidence that was far more complicated that necessary. In short, to my mind, Datapoint cannot realistically suggest that it has acted in such a way that justice requires that, notwithstanding the degree of success which Firle has actually achieved, justice requires that it (Datapoint) recover costs from Firle.

98. In my judgment, in this case broad justice is best achieved by ordering Datapoint to pay only a relatively modest contribution to Firle's costs and by reducing the contribution in respect of the period after 10th March 2000 (viz the date of the realistic settlement offer). The figure which I consider appropriate in the circumstances of this case are 33⅓% of standard costs up to and including 10th March 2000 and 15% of such costs thereafter. I gave my decision in Court at the end of the lengthy argument on the afternoon 8th May 2000.

And my reasons are now given above.

APPENDIX 1

THE RULING GIVEN ON 20TH MARCH 2000

99. I do not propose to deal with this aspect of the case at any great length. What Firle sought was disclosure of two categories of documents. They were -

(1) A draft specification prepared at or around 24th June 1998 by Mr Trice (Datapoint's building surveyor); and

(2) Mr Trice's documents, including communications with contractors, concerning the works identified in the Schedule of Dilapidations (which had been served in May 1998) to which he was referring in his letter dated 24th June 1998.

100. In inter-solicitor correspondence Datapoint's solicitors had asserted privilege on the basis that these documents had come into existence "for the purpose of obtaining legal advice in anticipated proceedings" (A/4/16). The position was further explained in a witness statement of Mr S. A. Taylor, the partner in Sheridans who had the conduct of the action on behalf of Datapoint (A/4/18 to 22). He stated that the dominant purpose of the documents was to enable solicitors to advise Datapoint whether, and to what extent, it should continue to resist Firle's claim for dilapidations.

101. On behalf of Firle Mr Olins (in his witness statement) and Mr Hutchings (in his submissions) disputed the fact that litigation was in prospect some three months prior to the termination of the lease. At that time, so it was said, Firle believed that Datapoint was intending to reach agreement upon and/or to carry out some or all of the repair works identified in a recently served dilapidations schedule.

102. In ruling in Firle's favour on this application I reminded myself of the legal principles stated by the House of Lords in **Waugh v. British Railways** [1980] A.C. 521 and by the Court of Appeal in **Guinness Peat Properties Ltd v. Fitzroy Robinson Partnership** [1987] 1 WLR 1027 at pages 1035 to 1037.

103. In this case there was no doubt that, in the Summer of 1998, both parties were conscious that the condition of the premises was such that Datapoint was in breach of the repairing covenants. Both parties were equally conscious that the damages recoverable by Firle were likely to be significantly less if, at the expiration of the term, a comprehensive refurbishment of the building was to be undertaken. The possibility of Firle's wishing to refurbish the building had been something which Datapoint had contemplated from 1995 onwards (this is now dealt with later in this Judgment - see pages 17 to 38). However by the Summer of 1997 Datapoint had received a Schedule of Dilapidations together with a Section 146 Notice. Datapoint felt it needed a building surveyor to act on its behalf in connection with the dilapidations claim. Mr Trice was appointed. He had discussions with Mr Scarr (Firle's building surveyor) as a result of which a revised schedule was prepared and served under cover of a letter dated 26th May 1998 (A/4/7 and C/8/56). It was Mr Trice's reply to this letter which had given rise to the specific discovery application. The letter dated 24th June 1998 reads - *"Thank you for your letter of the 26 May 1998, received in my office on 27 May, enclosing the Schedule of Dilapidations relating to the above property. I confirm that I have commenced checking the Schedule of Dilapidations and the preparation of a Specification of Works. I have also contacted contractors and specialist contractors in connection with the works.*

I confirm that you have told me that the revised Schedule of Dilapidations is served upon my client as a Terminal Schedule.

I will forward a copy of the Specification of Works to you as soon as it is prepared for your approval."(A/4/8 and C/8/69)

Taken at face value, the letter represented that Mr Trice was giving serious consideration to the Schedule of Dilapidations and was in the process of producing a specification of works (inferentially, works for which Datapoint would be or might be prepared to accept responsibility otherwise the exercise would be pointless). Viewed objectively, what was contemplated at that time was a negotiated settlement of Datapoint's liabilities for breach of covenant. There was no existing dispute and no dispute was "in reasonable prospect" at that time - the position here was quite different from that in the **Guinness Peat** case where the disputed document, the so-called "McLeish letter" was written after receipt of formal notification to the architects that the employer considered them liable in respect of the costs which would be incurred in remedying an allegedly unsatisfactory state of work. The most that could be said in this case was that both parties were very well aware of their respective competing economic interests and each believed that the other was likely to adopt a "tough stance" in negotiations. Accordingly, future litigation was a possibility because there was no certainty that negotiations would be successful. However, to my mind, that did not mean that litigation could be said to be "in reasonable prospect" so as to allow the assertion of a "litigation privilege". On that basis I ruled in favour of Firle. I added, without going into any detail, that I was not persuaded that either the Schedule of Works or any of the other documents would satisfy the "dominant purpose" test even if litigation was considered to be "in reasonable prospect". However, since both parties had consulted solicitors in connection with the dilapidations issues, I invited Miss McAllister to review the documents, before disclosure, to satisfy herself that there were no references to any matters in respect of which a claim of legal professional privilege might be made. I also commented on the possible significance of the final sentence of Mr Trice's letter so far as the disclosure of any Specification of Works (which had in fact been prepared) was concerned.

104. When this matter was argued on 20th March 2000 I was, I confess, somewhat surprised that an experienced litigation solicitor had apparently equated a mere possibility of litigation in the event that negotiations, which had yet to commence, might fail with the concept of litigation being "in reasonable prospect". Since reviewing the further disclosed documents two things have become clear. First, in their dealings with each other neither party thought it either necessary or desirable to communicate its real intentions. Secondly, as a consequence, by the Summer of 1998 there was a very real prospect that the matter would end up before the Court. However, in my judgment, whether litigation is "*in reasonable prospect*" is something which must be considered on an objective basis taking into account what the parties are saying to each other. If one party (by itself or by an authorised agent) represents to the other party that it is prepared to entertain a claim and to negotiate (in good faith) in respect of that claim, it cannot be said that **at that time** litigation is *"in reasonable prospect"*. If, later, a dispute crystallises, because there is a change of mind and a refusal to negotiate or because the negotiations break down, a period when litigation is *"in reasonable prospect*" may well commence. In this case it appears that on or just before 10th July 1998 Mr Trice spoke with Mr Scarr and he told him that he (Mr Trice) had prepared specifications of works but he did not think that the cost of the works equated to the diminution in value of the landlord's reversion (G/13/20A and 20B). Mr Scarr reported the matter to Mr Altman saying - *"At this stage, I have done no more than listen and note his comments but I thought that I should inform you as it may well be that the question of agreeing the damages for dilapidations will prove to be difficult and time-consuming and that the final settlement may possibly be considerably less than the cost of the repairs."*

Even if it could be said that litigation was "*in reasonable prospect*" from this time onwards (which I doubt because there was no suggestion from Mr Trice that he was no longer prepared to negotiate - simply an indication of the stance he was likely to take in the negotiations), if the letter is reliable as to basic fact, the specification of works had been prepared before this date.

MARTIN HUTCHINGS appeared for the Claimant instructed by ILIFFES BOOTH BENNETT of 271 High Street, Uxbridge, Middlesex UB8 1LQ.
ANN McALLISTER appeared for the Defendant instructed by SHERIDANS of 14 Red Lion Square, London, WC1R 4QL.