JUDGMENT : His Honour Judge Peter Coulson QC: TCC. 9th December 2005

A) **INTRODUCTION**

1. By a claim form dated the 30th of June 2004, the Claimant, Bella Casa Ltd ('BCL'), a company registered in the Isle of Man, commenced proceedings against three Defendants in respect of alleged defects in the design and construction of refurbishment works at Flat 5, 21 Dean Street, in Soho ('the property'). The freehold owners of the property were the Soho Theatre Company ('STC'). The First Defendants, Vinestone Ltd ('Vinestone') were the head lessors of the property. By a contract dated 14/10/98, Vinestone agreed to grant a long lease to BCL in respect of the property and also agreed to procure the carrying out of the refurbishment works. The Second Defendants, Paxton Locher Architects Ltd ('PLA') were the architects employed by both STC and Vinestone to design, inspect and administer the refurbishment works. The Third Defendants, Duffy Construction Ltd ('Duffy') were employed by STC to carry out the refurbishment works.

2. There are also a number of Part 20 claims. For present purposes, it is only necessary to refer to the Part 20 proceedings commenced by Duffy on the 28th of February 2005, against Faberdex (Installations) Ltd ('Faberdex'), the sub-contractor who carried out the design, manufacture, supply and installation of the glazing at the property.

3. BCL's principal complaint against each of the Defendants is to the effect that the refurbishment works were incomplete and defective. In consequence, they claim damages for breach of contract and/or for breach of statutory duty pursuant to the Defective Premises Act 1972 against Vinestone, in the total sum of £961,220.65. Against PLA, BCL claim damages for breach of duty at common law and/or for breach of statutory duty pursuant to the Defective Premises Act 1972, in the total sum of £921,680.74. Against Duffy, BCL claim damages for breach of statutory duty pursuant to the Defective Premises Act 1972, in the total sum of £763,010.40. That is the claim which Duffy then pass on to Faberdex.

4. Although, as I have noted, the quantum of BCL's claims varies from Defendant to Defendant, there is one important constant: a claim, said to be for loss of use, which is expressed in these same terms at paragraphs 40.2, 42.2 and 44.2 of the Particulars of Claim:

   "BCL's consequential costs:

   (A) Loss of use. As a result of the defects set out above, in particular the defective gas installation, the water ingress, inadequate heating, electrical faults and inadequate safety provision, BCL was unable to use the Property for human occupation until the completion of the remedial works. BCL has therefore been deprived of the use of the Property and claims:

   (i) Interest on the balance of the purchase price and other costs paid on or about completion (£1,232,387.26 set out in Appendix 12) from 16 July 1999 until 18 December 2002 when the Property became fit for human habitation apart from the defects to the common parts, £341,962.14.
   Particulars:
   (a) Balance of purchase price £1,034,000 from 16 July 1999 to 18 December 2002 at 8%.
   (£82,720 per annum) £283,291.18
   (b) Other costs paid following completion, £198,387.20 as set out in Appendix 12 hereto at 8%.
   (£15,870.98 per annum) £58,670.96
   Total: £341,962.14.

   (ii) Service charge for the property from 1st August 1999 to 18th December 2002:
   Particulars:

1/8/99 – 31/7/00	£2,382.98
1/8/00 – 31/7/01	£5,882.38
1/8/01 – 31/702	£7,943.60
1/8/02 – 18/12/02	£2,238.81
	TOTAL: 18,447.77

5. The claim for interest at 8% was the subject of a request for further information by PLA. The request, and the answer, were as follows:

   "Of: Paragraph 42.2 sub-paragraph(1)
   Request
   8. Please explain how the figure of 8% for interest has been arrived at and set all facts and matters relied upon in support of such figure as the loss consequent upon the alleged breaches.
   Reply
   8. The interest rate of 8% was based on the Judgment Rate of interest for the relevant period."

6. In addition to the two express loss of use claims set out at Paragraph 4 above, the pleaded claims against each of the three Defendants contain, at Paragraphs 40.6, 42.5 and 44.5 of the Particulars of Claim respectively, a further claim for £5,348.35 in respect of *"the expenses incurred by the Claimant when it was unable to occupy the property as particularised in Appendix 14."* These charges are made up of utilities bills, for water, electricity and the like, and sundry other charges for services like satellite television.

7. It is these three claims, set out at Paragraphs 4-6 above, which form the subject matter of this Judgment. I have referred to them generically in this Judgment as BCL's loss of use claims.

8. After a rather leisurely start to the proceedings, the parties started to focus on the real issues between them and, at a Case Management Conference on the 23rd of September 2005, I was asked by the Defendants to order the trial of certain preliminary issues. These applications, made late and with little notice, were opposed by BCL. I concluded that, with one exception, the hearing of the proposed Preliminary Issues would not save time and/or costs and thus did not fall within the guidelines set out in Sections 8.1-8.4 of the second edition of the TCC Guide. I therefore refused the bulk of the Defendants' applications.

9. The exception to this concerned BCL's loss of use claims outlined in Paragraphs 4-6 above. The Defendants' contention was that, even assuming the correctness of all the facts pleaded by BCL, these claims could not succeed as a matter of law. Given the size of the loss of use claims, especially when compared to the overall value of BCL's claims against the Defendants, it seemed to me that this issue could usefully be taken as a Preliminary Issue. I therefore made that order. In doing so, I had in mind the words of David Steel J in ***McLoughlin v Jones*** [2002] 2 WLR 1279 at 1298 when he said:
"In my judgement, the right approach to preliminary issues should be as follows:
(a) Only issues which are decisive or potentially decisive should be identified.
(b) The questions should usually be questions of law.
(c) They should be decided on the basis of a schedule of agreed or assumed facts.
(d) They should be triable without significant delay, making full allowance for the implications of a possible appeal.
(e) Any order should be made by the court following a case management conference."

10. I ordered that the parties should provide written submissions on the Preliminary Issue by 14/10/05, with short reply submissions to be provided by 28/10/05. No oral hearing was requested or required. I indicated that Judgment would be provided about a month or so after the reply submissions in order to ensure that the resolution of the point of law relating to the loss of use claims would not cause delay to the action as a whole.

11. Written submissions on the preliminary issue were provided by 14/10/05 on behalf of BCL (Ms Finola O'Farrell QC), PLA (Mr Stephen Walker), Duffy (Ms Rachel Ansell), and Faberdex (Mr Justin Mort). Short submissions in reply were provided by BCL, PLA and Duffy. BCL and Duffy also produced short notes on one specific point that arose out of my researches on the law, such notes being provided on 6/12/05. Vinestone have indicated by letter that they rely on the submissions made by the other Defendants. I am extremely grateful to all Counsel for their clear and concise guidance on the points of principle which have arisen between the parties concerning the loss of use claim. I set out the Preliminary Issue and the assumed facts in **Section B** below and I analyse the nature of BCL's claim for loss of use in **Section C** below. Thereafter, at **Section D**, I analyse the court's treatment of loss of use claims in building cases before, at **Section E** below, reviewing the loss of use claims in other kinds of civil/commercial litigation. My conclusions are set out in **Section F** below.

B) **THE PRELIMINARY ISSUE AND THE ASSUMED FACTS**

12. The Preliminary Issue was defined as follows: *"Assuming the facts pleaded in the Claimant's Particulars of Claim are correct, are the points in Paragraph 101 of the Second Defendant's Defence correct and do they provide a complete defence to the claims made in Paragraphs 40.2, 40.6, 42.2, 42.5, 44.2 and 44.5 of the Particulars of Claim?"*

13. I have already set out the relevant paragraphs of the Particular s of Claim in Paragraphs 4 and 6 above. Paragraph 101 of PLA's defence reads as follows: *"Further and without prejudice to the forgoing, it is specifically denied that BCL is entitled to recover the sums claimed in sub-paragraphs 42.2 and 42.5 or any similar sums contained elsewhere. BCL alleges that the said sums represent 'loss of use' by which PLA understand BCL to refer to loss of use of the Property. PLA deny that such sums are a consequence of any loss of the Property. The claim is for loss of the use of the money necessary to complete the purchase of the property and to continue to own the Property. It is denied that such costs represent a recoverable loss because:*
(i) The costs do not represent consequential loss. These costs would have been incurred in any event.
(ii) It is denied that such costs are recoverable for breach of Section 1 of the Defective Premises Act 1972."

14. For the purposes of the Preliminary Issue, it seems to me that the following facts, taken from the pleadings and/or agreed, must be assumed:
a) The design, specification and detailing of the work were inadequate;
b) The works were not carried out in a good and workmanlike manner, using good and proper materials suitable for their purpose;
c) The works were not properly inspected, tested or commissioned;
d) As a result of the above, the works when completed did not provide a property that was fit for human habitation;
e) The property was unfit for habitation from the 16th of July 1999 to the 18th of December 2002, this being the period for which BCL pursue their loss of use claims;
f) The purchase price for the property (about £1.2 million) would have been incurred in any event, whether the works were defective or not.

15. For the purposes of the Preliminary Issue, it should also be noted, as all the Defendants have correctly pointed out, that there is <u>no</u> pleaded claim:
a) That BCL bought the property for any particular purpose (either residential occupation or investment);

b) That BCL would have occupied the property for all or even part of the period between the 16th of July 1999 and the 18th of December 2002;

c) For the cost of alternative accommodation for any part of the period between 16th of July 1999 and the 18th of December 2002;

d) That the property would have been rented out for all or any part of this period; thus there is no claim for lost rent during the period when, on BCL's case, the property was unfit for human habitation;

e) For any <u>actual</u> interest charges incurred by BCL.

16. Ms O'Farrell QC's first set of written submissions expressly accept, at Paragraph 22, that BCL had no intention of occupying the property on a full-time basis. This is confirmed by a statement dated 5.10.01 sworn by Mr Ferszt, the relevant director of BCL, which indicates that the property was purchased for his occasional use and that he was not resident in the UK for tax reasons. That seems to me to be entirely consistent with the careful way that the claim is pleaded: see, in particular, Paragraphs 4 and 15 above.

C) THE NATURE OF BCL'S CLAIMS FOR LOSS OF USE

17. It is important at the outset to understand the nature of BCL's three claims for loss of use, set out in Paragraphs 4-6 above, which form the subject matter of the Preliminary Issue.

18. First, there is the claim against each of the Defendants for £5,348.35, made at Paragraphs 40.6, 42.5 and 44.5 of the Particulars of Claim, and outlined in Paragraph 6 above. That is a claim for special damages. BCL contend that, because they were unable to use the property for the period from the 16th of July 1999 to the 18th of December 2002, they incurred these costs but received no value for them. The Defendants' simple riposte to that is to argue that these costs would have been incurred in any event and that, therefore, these costs do not represent loss caused by any breach of contract/duty on their part.

19. Secondly, there is the related claim for the service charge during the relevant period, at Paragraphs 40.2(Aii), 42.2(Aii) and 44.2(Aii) of the Particulars of Claim. Although the position is not entirely clear from the parties' written submissions, it seems to me that the same point must also apply to this claim, said to amount to £18,447.77. Again, this is a claim for special damages, based on the assumption that BCL had to pay these charges but obtained no benefit from them as a result of the breaches of contract/duty on the part of the Defendants. Again, the Defendants' answer would appear to be the same, namely that these costs would have been incurred in any event.

20. It is clear from my analysis of the claims at Paragraphs 4-6 above that it is the third element of the claim for loss of use, for £341,962.14, which lies at the heart of the Preliminary Issue. In contrast to the two smaller elements of the loss of use claim, this much larger claim is a claim for general damages. That seems to me to be the inevitable consequence of BCL's reply to the request for further information, and the explanation that the 8% claimed is the judgment rate on the balance of the purchase price. BCL have not said, and are not saying, that they have actually paid interest on the balance of the purchase price at 8% per annum.

21. The fact that this main element of the loss of use claim is a claim for general damages is confirmed by two other points. First, Paragraph 5 of BCL's Supplemental Note for the CMC on the 23rd of September explained this element of the loss of use claim in the following terms: *"Counsel for PLA has misunderstood the damages claimed under this head. BCL does not claim the cost of purchase and ownership of the apartment, which it is accepted would have been incurred in any event. BCL claims the interest on the capital costs for the period during which the apartment was uninhabitable and the service charge payable for the period during which the apartment was uninhabitable. Such costs are claimed as compensation for the fact that BCL was unable to use the asset that had been purchased."*

22. Secondly, each of the Defendants has separately made plain, in their written submissions of 14/10/05, that, for these and other reasons, they considered that the interest claim was a claim for general damages only. That was not a point with which BCL disagreed or disputed in their submissions in reply: on the contrary, they appear expressly to accept it. Accordingly, I agree with Paragraph 15 of PLA's written submissions, which states: *"PLA notes that the interest figure is not alleged to be a sum that BCL in fact incurred. The interest claim is not, therefore, a claim for 'special damages' in the pleading sense (i.e. a claim for actual pecuniary loss) but a claim for general damages for loss of use of the apartment."*

In the following paragraph, Mr Walker, on behalf of PLA, contrasts the interest claim with the two smaller claims in respect of service charges and the sums paid to utilities and the like which, he says, appear to be sums that have been incurred and which therefore form claims for special damages. Again, I agree with that distinction.

23. In one sense, the fact that BCL's principal loss of use claim is a claim for general damages should be unsurprising. That ties in with the fact that there is no pleaded claim by BCL for specific incidents of loss of use, or particular sums ascribable to the loss of use of the property (paragraph 15 above). Instead BCL make a general claim for the loss of use of the property during the relevant period.

24. A claim such as this, for a large sum by way of general damages, calculated by applying the judgment rate of interest to the balance of the purchase price of the property, might be fairly described as unusual. After all, the capital sum (the balance of the purchase price of the property) would have been incurred in any event, regardless of whether or not there were defects and/or the need for remedial work. BCL did not 'lose' the balance of the purchase price for any period, let alone the period between 16/7/99 and 18/12/02.

25. As a result, it seems to me that the principal question that arises in respect of the claim for general damages is this: against the background of the matters set out in Paragraphs 14-16 above, can a theoretical calculation of this kind be used by BCL as the basis for a claim for general damages for loss of use of the property due to defects and/or the need to carry out remedial work? In my judgment, as a matter of general principle, and by reference to the authorities, as well as on the factual basis identified in Paragraphs 14-16 above, the answer to this question is emphatically in the negative. The detailed analysis giving rise to that conclusion is set out below.

26. As for the two smaller claims for special damages for loss of use, referred to at Paragraphs 18 and 19 above, I consider that, subject to all the usual questions of causation and proof, as well as possible arguments as to mitigation, those sums may be recoverable in law. Again, the reasons for my conclusions are set out below,

D) **LOSS OF USE CLAIMS IN BUILDING CASES**

27. What is a loss of use claim in a building case? It seems to me that it is a claim founded on the inability of a claimant to occupy his property as a result either of defects in the property, or of the carrying out of remedial works to rectify such defects, or both. A claim for special damages for loss of use requires detailed evidence of alternative accommodation, lost rent and the like. A claim for general damages for loss of use has traditionally been seen as part of the general compensation awarded by the court for the claimant's loss of enjoyment of his property and, as such, could only be recoverable by a natural person. On any view, a loss of use claim in a building case is not (and has never been treated by the courts as being) a claim for the loss of use of the purchase price of the property, or for the loss of the consideration received for that purchase price.

28. Claims for general damages for loss of use in building cases have traditionally been allowed in relatively modest amounts: sums usually measured in hundreds, not thousands, of pounds. Such an award is intended to compensate the occupier who has to move out of his property or cannot occupy it because of the existence of building defects and the need for consequential remedial work. Indeed, the loss of use element of the claim for general damages has often been dealt with as part of an overall claim for inconvenience and distress. In the past, typical awards have varied from £500 (His Honour Judge Newey QC in ***Fryer v Bunney*** [1982] 263 E.G.158; His Honour Judge Smout QC in ***Wilson v Baxter Payne*** [1985] 273 E.G. 406) to £1,250 (His Honour Judge Davies QC in ***James McKinnon v County Metropolitan Developments*** [1985] C.I.L.L.225).

29. A more recent example of this approach is ***Bayoumi v Protim Services Ltd*** (1996) 30 HLR 785. In that case, the county court judge held that the claimant, who owned a property which suffered from persistent water penetration, was entitled to recover, as general damages for breach of the Defective Premises Act 1972, the sum of £1,500 a year for the four years during which the problems lasted, making a total of £6,000 in all. The judge made it clear that this was an award of general damages for loss of use and enjoyment.

30. The Court of Appeal upheld the judge's award of general damages. Swinton Thomas LJ held that such damages were recoverable for breach of Section 1 of the Defective Premises Act. Having held that the loss of use claims had been properly pleaded he went on: *"The Judge allowed a figure of £1,500 per year for four years making a total of £6,000. In my view that item of damages is clearly allowable under the provisions of the Defective Premises Act, and I do not myself think that it has been shown that his assessment, either in terms of the annual value or the period of time, was excessive."*

This case is therefore authority for the proposition that general damages for loss of use are recoverable under section 1 of the Defective Premises Act 1972.

31. In the absence of claims for alternative accommodation on the one hand, or lost rental income on the other, the authorities demonstrate that claims for loss of use of a property have been confined to the sort of general damages award made in ***Bayoumi***. The only reported case in which the claiming party endeavoured to adopt a different approach was ***Calabar Properties Ltd v Stitcher*** [1984] 1 WLR 287. There, the defendant tenants counterclaimed for damages pursuant to breaches by the landlord of his repairing obligation. Although he allowed some of their counterclaims, the trial judge, Sir William Stabb QC (then the senior Official Referee) refused to award them the rates, rent and running costs (including the service charges) of the flat. He also rejected the claim for *'consequential loss of use'* during the period when the flat was uninhabitable. This loss of use claim was *'based on the capital value of the flat or alternatively based on the rack rental of the flat'*. The tenants appealed the judge's dismissal of these two items of their counterclaim.

32. As to the claim for the running costs, Stephenson LJ said: *"The running costs or outgoings in respect of the defendant's flat are not, in my judgment, recoverable. It is true that while the defendant was not living in the flat because of the plaintiffs' breach of contract she was not getting anything for the rates which were payable under the lease. But she had not terminated the lease and had to pay outgoings on some property, and I would regard the costs of the property which she rented as alternative accommodation for herself and her husband in the Isle of Man as prima facie the loss suffered by being kept out of her flat for the period of the plaintiffs' continuing breach of covenant, subject to the renting of that alternative accommodation being reasonable.*

33. Pausing there, it seems to me that the claim for the running costs in ***Calabar*** was similar to the two lesser claims made in this case for the service charges, utilities, satellite television bills etc, referred to in Paragraphs 18 and 19 above. In ***Calabar***, those claims were dismissed. However, they were dismissed because the tenants had pleaded a claim for alternative accommodation and it was that claim that was regarded as, prima facie, representing the loss suffered by the tenants in being kept out of their flat. As I have already explained, the absence of a claim for the cost of alternative accommodation is one of the features of the present case.

Therefore, the particular ground for the refusal of the running costs claim in ***Calabar*** does not exist in the present case. Moreover, Stephenson LJ's remark that "while the defendant was not living in the flat because of the plaintiffs' breach of contract she was not getting anything for the rates etc which were payable under the lease" seems to me to be directly applicable to BCL's situation in the present case.

34. Accordingly, I consider that BCL may, as a matter of principle, and subject to all questions of causation, proof, mitigation etc, seek to recover those two claims for special damages for loss of use. There is nothing in the authorities which suggests that, in some way, there is any principle of law which would operate to bar such a claim. Indeed, for the reasons which I have outlined, I regard ***Calabar*** as authority for the proposition that, depending on the facts, such claims may be recoverable in law.

35. Of course, the other head of claim which was the subject of the appeal in ***Calabar*** was the loss of use claim, calculated by reference to the capital value or rental value of the flat. At page 293 Stephenson LJ said: *"The second objection is that to submit that what the defendant has lost by the plaintiffs' breach of covenant is the consequent diminution in the value of the flat as a marketable asset is to ask the court to take a wholly unreal view of the facts. The reality of the defendant's loss is the temporary loss of the home where she would have lived with her husband permanently if the plaintiffs had performed their covenant. She cannot increase her loss by deciding not to return after the covenant has been performed and she does not seek to do so. But she can claim, as it seems to me, to be put in as good a position as she would have been if the plaintiffs had performed their covenant, at least as early as they had notice that the main structure was out of repair instead of years later. If she had bought the lease as a speculation intending to assign it, to the knowledge of the plaintiffs, the alleged diminution in rental (or capital) value might be the true measure of her damage. But she did not; she bought it for a home, not a saleable asset, and it would be deplorable if the court were bound to leave the real world for the complicated underworld of expert evidence on comparable properties and values, on the fictitious assumption that what the flat would have fetched had anything to do with its value to her or her husband."*

36. It seems to me that the claim for loss of use in ***Calabar*** is directly analogous to BCL's general damages claim for loss of use in the present case. Both claims are based, in one way or another, on the worth of the property in question: the fact that, in the present case, BCL use the purchase price, rather than market value as such, seems to me to be irrelevant to the point of principle in issue. On completion of the repairs to the property, just as in ***Calabar***, no loss of capital value due to the defects was, or could have been, suffered. Accordingly, I consider that this passage in the judgment of Stephenson LJ is applicable to BCL's claim for general damages in the present case. It provides one reason why, in my judgment, such a claim is not well-founded. Moreover, although I accept that the cases cited by Ms O'Farrell QC in her written submissions to me were not apparently cited or referred to in ***Calabar***, I consider that it remains a decision which is binding on me. I note that it was followed more recently by the Court of Appeal in ***Wallace v Manchester City Council*** [1998] 41 EG 223.

37. Thus far, I have identified some of the many authorities in which claims for general damages for loss of use in building cases have been assessed by reference to a modest allowance, and I have identified one case (***Calabar***) in which an unusual claim for loss of use, calculated by reference to the value of the property, was expressly rejected by the Court of Appeal. This analysis therefore supports the common position adopted by the Defendants here, to the effect that the general damages claim is misconceived in principle. The next question is whether there are any other authorities dealing with buildings or property which adopt a different approach, and on which BCL can rely in support of their claim that the damages should be assessed by reference to the capital value/purchase price of the property?

38. At Paragraph 21 of her submissions on behalf of BCL, Ms O'Farrell QC relies on Paragraph 26-014 of **McGregor on Damages** (17th Edition). The learned editors say this: *"Recoverable consequential losses should include such items as loss of use of the building during the repairs and also loss of profits in appropriate circumstances."*

However, it does not seem to be that this passage is of any particular assistance in the present case. Contrary to Ms O'Farrell QC's submissions, I consider that there is no dispute in the present case that damages for loss of use might be recoverable as a head of general damage or, as the case may be, a head of special damage: the point made by the Defendants here is that the particular claim for general damages made by BCL in the Particulars of Claim, by reference to interest at 8% on the purchase price, is not sustainable in law, or on the assumed facts.

39. However, perhaps of greater significance is the case referred to in the footnotes as supporting the conclusion in **McGregor**. That authority is the Court of Appeal decision in ***Applegate v Moss*** [1971] 1 QB 406. This was also a case which Ms O'Farrell QC relied on heavily in her submissions in reply. However, on my analysis, it is neither an authority for the proposition for which it is cited in **McGregor**, nor is it relevant to the present dispute.

40. ***Applegate v Moss*** was a case about a pair of houses with defective foundations. The houses had been built in 1957 and had cost the plaintiff £1,900. When, in late 1965, the plaintiff came to sell the houses, it transpired that the foundations were so defective that the houses were unsaleable, irreparable and unsafe to live in. The principal dispute before Paull J was in connection with the defendant's defence of limitation and the arguments concerning deliberate concealment. Paull J found that the actions were not statute-barred because of the deliberate concealment and he went on to award damages on the basis of the cost in 1957 (£1,900), to which was added a sum for interest over the intervening eight years, producing a total of £3,700.

41. The majority of the judgments in the Court of Appeal are concerned with the deliberate concealment point on which Paull J was upheld. The issue as to the correct measure of damage was a much less important aspect of the appeal. On that point, Lord Denning MR simply said this: *"Mr Field-Fisher for Mr Moss argues that that measure is wrong, because Mr Archer and Mr Applegate were in occupation of the houses from 1957 until 1966. They should not recover both interest on the £1,900 and also the benefit of occupation; for that would be having it both ways. I think that criticism is to some extent justified. But the right method gives about the same total. It is this: if the defects had not been so serious, and the house could have been repaired at reasonable cost, the damages would be the cost of repair at the date when in 1965 the breach was discovered… But in 1965 it was not an economical proposition to repair the house. It would have cost too much to underpin it. The only thing was to pull it down. In these circumstances it seems to me that we should apply the general principle that the party injured by the breach should put into as good a position, as far as money can do it, as he would have been if there had been no breach. If this house had been properly built it would have been worth £2,900 in 1965 when the breach was discovered. That is the proper figure of damage. As to interest on it, Mr Applegate and Mr Archer did not go out until January 1966. In these circumstances, interest should be at 7¼% on £2,900 from January 1966. The total is some £200 more than the total awarded by the judge."*

42. I do not consider that ***Applegate v Moss*** is really a case about loss of use at all. It is a case about the measure of loss in circumstances where a building cannot be economically repaired. In such cases, the Court of Appeal held that the right approach was to take the value of the property that would have been recovered by the owners but for the existence of the defects, and add interest on that value from when the owners moved out until judgment. It is not dealing, as all the other cases to which I have referred expressly deal, with a temporary loss of use of a property due to defects and/or necessary remedial works. Accordingly, I do not consider that ***Applegate v Moss*** is authority for the proposition set out in **McGregor**, because it is not a case about repairs at all. Perhaps more importantly, I do not regard it as an authority which is of any assistance on the Preliminary Issue which I have to decide.

43. The only other property case to which I was referred was ***Electricity Supply Nominees v National Magazine Co*** [1999] 1 EGLR, a case about the correct measure of loss in circumstances where the landlord failed to provide all the services he was obliged to provide under the lease. Ms O'Farrell QC contends at paragraph 18 of her submissions in reply that it is a case *"which supports BCL's claim for the award of substantial damages for loss of use"*. I respectfully disagree with that submission. Again, like ***Applegate v Moss***, ***Electricity Supply*** was not concerned with loss of use at all: the tenant was never deprived of the use of the premises, and remained in occupation throughout. The case was simply concerned with the measure of the tenant's loss, and whether that could be calculated by reference to the diminution in value to the tenant of its occupation of the premises. It is therefore of no relevance to or assistance on the point which I have to decide.

44. Accordingly, on an analysis of the building and property cases in which claims for loss of use have been considered by the courts, I conclude that:
   a) There are no building or property cases in which claims for general damages of the kind now maintained by BCL have been advanced or held to be successful;
   b) There is at least one case (***Calabar***) in which a claim similar to (although not precisely the same as) that now maintained by BCL was expressly rejected by the Court of Appeal;
   c) The BCL claim for general damages is not in accordance with the usual situation where a natural claimant is awarded a modest amount to reflect loss of use, such as the £1,500 per year awarded to the claimant in ***Bayoumi***.

45. As to the two smaller items of the loss of use claim, although a similar claim failed in ***Calabar***, I consider that that failure was based on the specific facts of that case, rather than as a matter of general principle. Indeed, the general point made by Stephenson LJ is, in my judgment, of assistance to BCL in arguing that these claims for special damage may, subject to important questions as to causation, proof and mitigation, be recoverable.

46. Accordingly, the remaining issue for me to consider is whether there are other authorities which, although they do not concern buildings or properties generally, may be of assistance to BCL in supporting their claim for general damages for loss of use calculated by reference to interest at the judgment rate on the purchase price of the property.

LOSS OF USE CLAIMS RELATING TO OTHER ASSETS

47. The starting point for this exercise is perhaps Paragraph 8-52 of **Keating on Building Contracts**, 7th Edition. In a paragraph dealing with delay on the part of the contractor, the learned authors say: *"If he is building houses of blocks of flats for letting, then on analogy with shipping cases he is probably liable for loss of rent. It may be that in cases where works, such as those for public buildings, would not produce rent or profits, the contractor would be liable for loss of interest on capital lying idle."*

The two cases in the footnote relied on in support of this proposition are ***The Hebridean Coast*** [1961] AC545 and ***Birmingham Corporation v Sowsbery*** [1969] 113 SJ 877. The only reported citation/approval of the passage in **Keating** which I could find was that of His Honour Judge Thornton QC *in* ***Earl's Terrace Properties v Nilsson Design*** (2004) 94 Con L R 118.

47. ***Earl's Terrace*** was a claim by a commercial developer for the losses caused by delay, and in particular the alleged loss of use of development funds. It was, moreover, a claim for special damages, and the judge

emphasised that "the developer must show that he did lose the use of the funds in the sense that he must show that he would have put the funds to commercial use by investment, by reducing overdrafts or other borrowing costs or by investing in the business to obtain capital development." That is a completely different type of claim to the one being made here, as Ms O'Farrell QC apparently accepts in her most recent note. It is therefore unnecessary to look at the specifics of that decision further. It is, however, appropriate to look a little closer at the passage and the footnote in **Keating**, since BCL do now rely on its citation and approval in ***Earl's Terrace*** in support of their claim.

48. The first point to make, of course, is that neither of the cases referred to in the footnote in **Keating,** as supporting the proposition, are building/property cases. Moreover they are themselves dependant on earlier authority. Despite these points, the passage in **Keating** is perhaps the closest that BCL can get to support for their contention that the claim for general damages, based on interest applied to the purchase price of the property, is recoverable in law. Indeed, BCL go on to point to a number of shipping cases, where the claiming party successfully recovered damages calculated by reference to the capital value of the asset in question, to reflect the loss of use of that asset. Accordingly, these cases require some analysis.

(a) **Shipping Cases**

49. The starting point for this analysis is ***The Greta Holme*** [1897] AC 596. In that case a steam dredger was damaged due to a collision with a ship, which collision was the ship's fault. As a result the owners were deprived of the use of the dredger. However, they could not make a claim for loss of profit, because they were trustees charged with the duty of maintaining a harbour and waterway, and they derived their funds from the rates. They were not entitled to distribute profits. The House of Lords, reversing the Court of Appeal, held that although the trustees were not out of pocket by any significant sum, they were entitled to recover damages for the loss of the use of the dredger. Such damages were calculated by reference to a figure of £100 per week for the 15 weeks of the repair period, the £100 being the rent that would have been paid on a similar dredger to the one that was damaged.

50. In his speech, Lord Halsbury, the Lord Chancellor, said: *"It is a sufficiently familiar head of damages between individuals that, if one person injured the property of another, damages may be recovered, not only for the amount which it may be necessary to spend in repairs, but also for the loss of the use of the article injured during the period that the repairing may occupy… Why are not the appellants entitled to recover damages for the loss thus sustained? The answer given is that, although their dredging operations were delayed, the appellants sustained no tangible pecuniary loss. I'm not quite sure I understand what is meant by the use of the word 'tangible'. If by that is meant in order to entitle a plaintiff to recover, you must be able to show that during the period of repair to his vessel, or his cart, or his horse, some specific money has been lost by the period of time during which the article has not been susceptible of being used. The principle so affirmed would, as it appears to me, go very far beyond the particular case now before your Lordships. But to my mind it is a principle for which there is no authority whatever. This public body has to pay money like other people for the conduct of its operations, and if it is deprived of the use of part of its machinery, which deprivation delays or impairs the progress of their work, I know no reason why they are not entitled to the ordinary rights, which other people possess, of obtaining damages by the loss occasioned by the negligence of the wrongdoer."*

51. Lord Herschell delivered a concurring speech. At page 605 he said: *"If the appellants had hired a dredger instead of purchasing one, and had during the months they were deprived of its use been bound to pay for its hire, it cannot be doubted that the sums so paid could have been recovered. How can they the less be entitled to damages because, instead of hiring a dredger, they invested their money in its purchase? The money so invested was out of their pockets and they were deprived of the use of the dredger, to obtain which they had sacrificed the interest on the money spent on its purchase. As some equivalent to this, at least, they must surely be entitled to."*

52. This approach was followed by the House of Lords in a number of subsequent cases. In ***The Mediana*** [1900] AC 113, Lord Halsbury, dealing with arguments about actual loss, famously asked: *"Supposing a person took away a chair out of my room and kept it for twelve months, could anybody say you had a right to diminish the damages by showing that I did not usually sit in that chair, or that there were plenty of other chairs in the room ?"*

However, in my view, this passage needs to be read in context. In ***The Mediana*** quantum was agreed. Moreover, Lord Halsbury was not only dealing with what he called a "broad principle", but he expressly went on to find that *"in many cases a jury would say there really has been no damage at all"* and would therefore award *"a trifling amount"*.

53. In ***The Liesbosch*** [1933] A.C.449, an award of interest on capital value was not made. In ***The Hebridean Coast*** [1961] A.C.545, the first of the two cases referred to in the relevant footnote in **Keating**, Lord Reid said: *"I do not proceed on any supposed distinction in principle between a profit-earning ship and a non-profit-earning ship. The task of assessing damages is easier with a profit-earning ship and depends on the probability that she would have earned so much money if her owner could have used her. With a non-profit-earning ship there is no direct financial loss and one must ask what harm was done to the owner by him being deprived of the use of his ship. Then comes what may be a very difficult task, to put a value in money on the harm which the owner has suffered. But you must first prove the harm. If no harm is proved beyond the mere fact that owner is deprived of the services of that ship during the period of repairs, the opinion Lord Herschell in **The Greta Holme** appears to have given rise to the practice of awarding damages based on interest on the value of the ship."*

54. Lord Reid's remarks in his speech seem to me to betray a distinct uneasiness about the method of measuring loss in circumstances where 'no harm is proved beyond the mere fact that the owner is deprived of the services of the ship'. Indeed, in ***The Hebridean Coast***, there was an argument that damage should instead be measured by reference to the cost of additional chartered tonnage instead. Only when it became apparent that the owners could not prove how much additional chartered tonnage had been used did the House of Lords conclude that interest on the value of the vessel was the appropriate basis for calculating damages. Indeed such was his reluctance to follow this approach that Lord Reid referred to this methodology as bringing with it 'all its disadvantages'. Furthermore, all of their Lordships stressed the importance of ensuring that the particular facts of the case made such an award appropriate.

55. Indeed, it seems clear that there is no general rule of law that entitles the owner of a vessel lost or damaged at sea to recover interest on the value of the vessel by way of general damages for loss of use. That is clear from the decision of the House of Lords in ***Admiralty Commissioners v Owners of Steamship Chekiang*** [1926] AC637. Again, Lord Sumner stressed that each case depended on its own facts. He said: *"Interest is, in any case, a thing that has little to do with non-commercial transaction and, apart from cases of contract, is always a highly fictitious factor in calculations. Further, a calculation based on the cost of the construction of a ship, written down to the date of the collision is, of course, much more appropriate to the case of a total loss than to demurrage during repair and although, by manipulating the percentage of depreciation, and the percentage assumed for annual value, a flexibility is obtained, which theoretically is almost infinite, the calculation must be a very uncertain test of the true daily value of the user lost."*

56. Lord Sumner went on the say that Lord Herschell's proposition in ***The Greta Holme***: *"…was not really a statement of anything that the Mersey Docks and Harbour Board had actually sacrificed but was rather directed to he position of a private firm, trading for profit with its own capital. I think, however, that when one gets away from personal trading this assumption may quickly become unsound… there is no presumption that ships of war are worth to the state what was spent on building them or that their daily user is worth the cost of running them, for outlay on the Navy is not a matter of commercial investment of money but of state policy… much depends on the kind of ship: more on the existence of profound peace or the imminence of the outbreak of war. In the last event the value of the time, when collision makes a man-of-war unavailable, may truly be at once vast and inestimable; in some of the others the value of the user may really be no more than that of floating accommodation for officers and crew, who have among other things to be kept under discipline and busy. To all these matters in the appropriate case the registrar would have to direct his mind. No formula can fit them all and no formula could fail to vary in regard to its factors from time to time."*

57. All the Defendants in the present case contend that the principle, to the extent that it can be called such, derivable from ***The Greta Holme*** and the other shipping cases, is of no application to BCL's claim for general damages. They say that the particular rationale for awarding interest on the capital value of non-profit-making vessels in admiralty cases has no application whatsoever to BCL's claim. I consider that there is considerable force in those submissions.

58. There are, so it seems to me, two particular points of difference. In **The Greta Holme** and the other shipping cases, the vessel in question was in continuous use and would, but for the accident, have continued to be so. That is not the case with the property in the present case, the use of which was going to be occasional at best. More importantly, I consider that the admiralty cases to which I have previously referred are expressly concerned with the loss of use of a depreciating asset. The speeches in the cases referred to above assume that the purchase price paid for the vessel in question must be earned through the service that that vessel provides during its existence. Such an assumption is obviously appropriate in a commercial situation because, as Lord Halsbury made plain in ***The Greta Holme***, the purchase of a capital asset was made to generate income and was an alternative to the hire of the same asset.

59. The present case is entirely different. The property was not a commercial asset in the same way. It was not purchased to generate income during its lifetime; therefore it could not be said that its value would be recovered during that lifetime by reference to the income that it generated. Furthermore, it could not fairly be said, to use Lord Herschell's word, that BCL had "sacrificed" their capital in the same way as the purchaser of, say, a dredger. Indeed, unlike the vessels which are the subject matter of the cases identified above, the property was not a depreciating asset. On one view, given the movement in the London residential property market over the last 35 years, the property should be regarded as an investment whose value was likely, over time at least, only to increase. Even if that were wrong, and the value of the property might rise and fall, it could still not be said that the property was a depreciating asset in the same way as the vessels under consideration in the shipping cases so obviously were.

60. Ms O'Farrell QC deals with this argument at paragraphs 15 and 16 of her submissions in reply, contending that neither the chair referred to by Lord Halsbury, nor the horse identified by Lord Shaw in ***Watson, Laidlaw & Co Ltd v Pott, Cassels and Williamson*** (1914) 31 RPC 104, 119, were depreciating assets. But it seems to me that that ignores the fact that the chair and the horse were simply being used, as hypothetical examples, to explain a very broad principle concerning the recovery of general damages. On the other hand, the commercial reality of a depreciating asset was a vital ingredient that justified the particular method of calculation of damages adopted in ***The Greta Holme*** and some of the other shipping cases, on which BCL now seek to rely. I do not, therefore, consider that Ms O'Farrell QC can avoid this central difficulty: that the general damages which BCL seek in this

case are calculated in a way which is only appropriate for a depreciating asset. For the reasons I have given, BCL's property is not a depreciating asset.

61. I also note that the passage in Lord Shaw's speech in ***Watson, Laidlaw*** was cited by Lord Nicholls of Birkenhead in ***A-G v Blake*** [2001] 1 AC 268, at 278, in a passage concerned with the question of financial recompense for interference with rights of property. He concluded that, where damages cannot be measured by reference to the claimant's loss, they will instead be measured by the defendant's gain, and that, in such circumstances, "the damages recoverable will be, in short, the price a reasonable person would pay for the right of user." It is in that context that Lord Shaw's observations are cited. It seems to me that, not only is all this somewhat removed from the sort of loss of use claim commonly arising in respect of defective building works, but it is also impossible to present BCL's general damages claim for £ 341,962.14, based on a capital sum that would have been incurred anyway, and the Judgment rate of interest, as constituting "the price a reasonable person would pay for the right of user." The fact that any actual user by BCL would have been occasional in any event (Paragraphs 14-16 above) simply confirms my view that, as a matter of both fact and principle, this method of damages calculation is not available to BCL.

62. In summary, therefore, it seems to me that the shipping cases on which BCL rely are not of any real assistance to them. First, it is clear from the comments of Lord Sumner in ***Chekiang*** and Lord Reid in ***The Hebridean Coast*** that claims for the loss of use of vessels, calculated by reference to the interest on their capital value, will always depend on their own facts. They have not always been regarded with judicial enthusiasm. They do not encapsulate any rule of law or principle of recoverability. Secondly, and more importantly, the justification for damages calculated in such a way can only be by reference to the depreciating nature of the non-profit-making asset in question. In my judgment such considerations have no applicability to the property which is the subject matter of the present dispute.

(b) **Other Commercial Cases**

63. The other case referred to in the footnote in **Keating** (Paragraph 46 above) was ***Birmingham Corporation v Sowsbery*** [1969] 113 SJ 877. In that case the plaintiff claimed for the loss of use of a bus due to the defendant's negligence. Lane J (as he then was) allowed the claim by reference to the shipping cases referred to above. It is interesting to note that Lane J held that the method of calculation involving interest on capital and depreciation was not *'entirely satisfactory… [this] method will produce unduly differing results according to the age of the vehicle and the amount by which it is depreciated at the time of the accident. In the case of a long-lived chattel such as a ship this may not be important. In the case of an omnibus, which depreciates rapidly, it may produce results both illogical and unfair to the owner'.*

64. It seems to me clear that, although Lane J applied the shipping cases to the loss of use of a non-profit making bus, he did so precisely because it, too, was a depreciating asset; the corporation was entitled to be compensated for the loss of that depreciating asset, and, despite his reservations, Lane J concluded that this methodology was as good a way as any at arriving at an appropriate figure. For the reasons which I have already given, such a situation cannot apply to BCL's loss of use of the property in the present case.

65. The final commercial case which I consider to be of some relevance to the present dispute is ***Alexander v Alpe Jack and Rolls Royce*** [1996] RTR 95. That was a case about a Corniche Rolls Royce which suffered from defects and which the judge at first instance found to be unmerchantable. The plaintiff was awarded damages for breach of warranty but he appealed because he failed to recover damages for loss of use of the car. It appears that this was calculated by reference to the cost of maintenance of the car during the period of repair, and was therefore similar to the claims, calculated by reference to interest, in the shipping cases to which I have referred.

66. The Court of Appeal dismissed the appeal. In explaining why the loss of use claim was rightly rejected by the judge, Beldam LJ said:

*"On the evidence [the appellant] did not use the Rolls Royce for his ordinary day-to-day travel. He apparently had two other cars. There was no claim for hiring an alternative vehicle, nor was it suggested that he had suffered the inconvenience of having to travel on foot or by other means. Thus, the basis of his claim was for a nominal award based on the observation of Lord Halsbury in **The Mediana** [1900] AC113… the principle has been applied in claims for damage to a dredger or light ship causing the plaintiff owner to be deprived of its use. It has also been applied to a corporation bus in **Birmingham Corporation v Sowsbery** [1970] RTR84. In these instances damages have sometimes been calculated upon the maintenance costs of the interest on the capital value of the property damaged. In cases of private motor cars the approach has generally been different. Notwithstanding that no substitute vehicle had been hired, judges have awarded compensation for loss of use of a vehicle while it is being repaired where it has been shown that inconvenience has been caused or, for example, that the owner has had to use public transport or walk or that a family have been deprived of the advantage of a family car where otherwise they would have used the car which had been damaged…*

In the present case there was no basis to found an award for inconvenience or for the cost of maintenance of the plaintiff's car; such use as he made of it was slight and the fact that he failed to collect it in September 1985 when it was ready but waited some weeks before doing so, does not suggest that he suffered any real deprivation from loss of use."

67. It seems to me that this decision, and the passage from the judgment of Beldam LJ, is of relevance to the present case in four ways. First, he refers to a claim for loss of use as being one for a nominal award. In the present case,

BCL's loss of use claim is not what anyone could fairly regard as nominal: although it is an item of general damages, it is calculated in a sum in excess of £300,000. Secondly, his judgment demonstrates that claims for general damages for loss of use will always depend on their particular facts. In the present case, there are no facts which would justify awarding general damages on the basis claimed: see Paragraphs 14-16 above. Thirdly, and on a related point, Beldam LJ emphasised that, in ***Alexander,*** the loss of use claim had not been proved in what might be called the normal way; the claimant had not demonstrated any particular inconveniences because he had been deprived of the use of the car whilst it was being repaired. The assumed facts in the present case are similarly devoid of such features, doubtless because, for the reasons I have already identified, BCL's use of the property was always going to be slight. Fourthly, Beldam LJ made the point that I have already made, namely that the cases where interest has been allowed to reflect a loss of use were shipping cases involving depreciating assets.

c) Conclusions on non-buiding cases

68. Accordingly, I derive the following principles from the shipping and other commercial cases referred to above:
  a) It may sometimes be appropriate to assess a claim for loss of use of a non-profit-making asset by reference to interest on the capital value of the asset itself (***The Greta Holme***);
  b) Such a claim does not arise automatically and has not always been regarded with enthusiasm by the courts (***The Hebridean Coast, The Chekiang***);
  c) Such a claim will always depend on its facts (Lord Halsbury in ***The Mediana***) and will usually require particular evidence of the type referred to by Beldam LJ in ***Alexander***;
  d) Such a claim has only ever been recovered in respect of wasting or depreciating assets (such as the dredger in ***The Greta Holme***, and the bus in ***Birmingham Corporation***), because such awards are intended to compensate the owner for the period when the asset in question is not generating income or saving other expenditure.

69. For the reasons which I have given, I do not regard the shipping cases, and/or the other commercial cases to which I have been referred, as having any direct relevance to BCL's claim for general damages. As a result of the assumed facts, and also as a matter of principle in any event, I do not consider that the methodology used for calculating general damages in ***The Greta Holme*** and the cases which followed it is, or can be, applicable to BCL's claim in the present case.

F) CONCLUSIONS

70. I consider that the two smaller claims for special damages, which are the subject of this Preliminary Issue, namely those for the service charge, and those for the utilities and the like at paragraphs 40.6, 42.5 and 42.5 of the Particulars of Claim, are not irrecoverable in principle. They are costs which, on BCL's case, have been incurred without any tangible benefit because the property was not fit for human habitation during the relevant period. The fact that these charges would have been incurred in any event does not, of itself, constitute a defence to those claims. They **may** still represent a recoverable head of special damage. They are, however, subject to all arguments of causation, proof and mitigation.

71. A subsidiary point was raised as to whether these smaller claims were recoverable as damages for breach of the Defective Premises Act, as opposed to, say, damages for breach of contract. It is not clear why or how different considerations might apply, given my conclusion that, on the assumed facts, and subject to the caveats set out above, these losses arose because the property was unfit for habitation. If proved, that would make them recoverable in principle for breach of Section 1 of the Act.

72. I regard the claim for general damages for loss of use set out in Paragraphs 40.2(Ai), 42.2(Ai) and 44.2(Ai) of the Particular of Claim as invalid and irrecoverable, both in principle and on the assumed facts. The traditional method by which claims for general damages for loss of use in building/property cases have been valued by the courts has been by the making of a relatively modest allowance for loss of use/loss of enjoyment. Such claims have always been measured in relatively small sums. A claim of this sort, however, is not open to BCL because it is a limited company, not a natural person.

73. This claim for general damages, calculated by reference to interest on the balance of the purchase price of the property, is contrary to the usual approach in building/property cases. A similar claim was expressly rejected by the Court of Appeal in ***Calabar Properties***. Furthermore, whilst such claims have, sometimes, been successful in respect of damaged vessels and (in one case) a bus, such cases are easily distinguished on the facts. In particular, they can only be justified on the basis that the asset in question is a depreciating asset, a point which simply does not apply to BCL's property in Soho.

74. Accordingly, I rule that the claims for general damages for loss of use at Paragraphs 40.2(Ai), 42.2(Ai) and 44.2(Ai) of the Particulars of Claim, are invalid in principle and, on the assumed facts and as pleaded, have no realistic prospect of success.