

**IN THE COUNTY COURT AT GLOUCESTER AND CHELTENHAM**

**Claim No: H00GL002**

**Between:**

**STERLING HOUSE ESTATES LIMITED**

**Claimant**

**-and-**

**DUNELM (SOFT FURNISHINGS) LIMITED**

**Defendant**

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**Ms Camilla Lamont** (instructed by **Harrison Clark Rickerbys Solicitors**) for the **Claimant**  
**Mr. Jamal Demachkie** (instructed by **Knights LLP Solicitors**) for the **Defendant**

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**JUDGMENT**

1. This is the hearing of an application for a new lease of Unit 1, Westgate Retail Park, Gloucester, under Part II of the Landlord and Tenant Act 1954 ('the Act'). The sole issue remaining is the level of rent payable at the commencement of the new lease, under section 34 of the Act. Sterling House Estates Limited is the landlord and Dunelm (Soft Furnishings) Limited is the tenant. They agree that the level of interim rent payable will be the same as the new rent determined by the court, so that is the only substantive disagreement between them.
2. Miss Camilla Lamont represents Sterling House. Dunelm are represented by Mr. Jamal Demachkie. I am grateful to them both for their submissions, written and oral.

### The Property

3. Westgate Retail Park is a shopping and retail park situated about 500 metres to the west of Gloucester City Centre. It is an island site, surrounded by a significant road network. In effect it is situated in the middle of what might be considered to be a large roundabout, or gyratory system.
4. Planning permission was granted in the 1980s for the construction of a DIY store and garden centre with ancillary parking. It was occupied by Homebase. Dunelm took a 15-year lease of the property on 13 September 2005 at a rent which rose under the terms of the lease to £349,680 per annum or a valuation of £12 per square foot on the basis of the property's gross internal area as from 13 September 2010. A rent review was to take place in 2015 to the higher of the passing rent or the open market rental. In fact, the parties agreed that the rent should be agreed at a nil increase. The contractual term would have come to an end on 12 September 2020 had it not been continued by the statutory provisions of Part II of the Act.
5. The Property is a steel framed structure with a central row of stanchions and an eaves height of 5.54 metres. The property has a gross internal floor area of 29,143 square feet. The property was refurbished by the landlord in 2005 by stripping back the unit to its frame, providing a new roof and cladding and a new upgraded electricity supply. There is a mezzanine floor extending over about 13,000 square feet. One of the disputes between the experts relates to the effect on rent of the restricted height over the mezzanine at the eaves. Although the Agreed Issues between the parties provides that (inter alia) the installation of the mezzanine floor is a disregarded matter, the parties have both argued as to the effect on rent of the restricted eaves' height.
6. Also demised is a compound to the rear of the property of approximately 6,000 square feet.

### Planning Permission

7. The planning permission that applied to the Westgate Retail Park was varied in 2003 and 2004. The 2003 variation altered the permitted vehicular access and egress whilst

the 2004 variation widened the scope of the range of items as set out in a deed under section 106 Town and Country Planning Act 1990 between the Council, Sterling House and its mortgagee. It provided the following:

“Unit 1 may be used for the sale or display of all or any of the following categories of goods: furniture, floorcoverings, soft and hard furnishings, fabrics, hardware, homewares, household goods and decorative products and the ranges of goods set out in parts 1-3 of The Schedule and (notwithstanding the devotion of any other premises on the Property for the sale or display of any category of goods referred to in the Schedule) the provisions and requirements of clause 4 shall not limit in any way the use of Unit 1 (in whole or in part) for the sale or display of any goods falling within all or any of these categories referred to in this clause 5”

So, the planning consent for the property permits the sale of bulky goods. It does not permit the sale of food or clothing.

8. There are five units on the Park in total. The property is much the largest at 29,140 square feet. Units 2 and 3 are approximately 6,000 and 3,000 square feet respectively. In 2005 two further units known as the Lighthouse and the Link were constructed, at 3,295 and just over 2,000 square feet respectively. The units on Western Retail Park have a total size of 43,000 square feet.
9. The other units are all presently let, to a wine warehouse, carpet store, stationary store and pet shop respectively. The terms of the lets are reasonably lengthy at ten years or more, although most have break clauses.
10. There are 222 car parking spaces on the site, of which at least 188 are available for customers of the Park to use.
11. Section 34 of the 1954 Act provides:  
“34 Rent under new tenancy  
  
(1) The rent payable under a tenancy granted by order of the court under this Part of this Act shall be such as may be agreed between the landlord and the tenant or

as, in default of such agreement, may be determined by the court to be that at which, having regard to the terms of the tenancy (other than those relating to rent), the holding might reasonably be expected to be let in the open market by a willing lessor, there being disregarded—

(a) any effect on rent of the fact that the tenant has or his predecessors in title have been in occupation of the holding,

(b) any goodwill attached to the holding by reason of the carrying on thereat of the business of the tenant (whether by him or by a predecessor of his in that business),

(c) any effect on rent of an improvement to which this paragraph applies,

(d) in the case of a holding comprising licensed premises, any addition to its value attributable to the licence, if it appears to the court that having regard to the terms of the current tenancy and any other relevant circumstances the benefit of the licence belongs to the tenant.”

The rent payable under the new tenancy is payable from the commencement of the new tenancy, which occurs three months after the claim for a new tenancy is finally disposed of – section 64(2) *ibid*.

#### The agreed terms of the new lease

12. By the commencement of the hearing the parties had agreed to the grant of a new lease for a term of ten years with a tenant’s break after five years. The lease would contain a provision for rent review on the fifth anniversary of the term. Although a number of other terms relating to the rent and the payable service charge are specific to this lease, neither party or their expert contended that they were material to the rent payable under section 34.

13. The new lease contains the following provision as to the permitted use of the Property:

“Retail premises for the sale of fabric furniture soft and hard furnishings floor coverings household goods homewares decorative products and an ancillary café together with ancillary offices staff facilities and storage or such other

non-food retail use subject to prior written consent of the Landlord (such consent not to be unreasonably withheld or delayed) within Use Class A1 of the Town and Country Planning (Use Classes) Order 1987 as at 31 August 2020.”

#### The Parties’ Contentions

14. The landlord contends that on the terms agreed for the renewal the appropriate passing rent under section 34(1) should be assessed at £11.33 per square foot per annum, making an annual rental of £330,156.
15. The tenant contends by contrast that the rental should be assessed at £6.62 per square foot, for a total of £193,000 per annum.
16. The difference between the parties’ proposed rentals is striking, given that (save for a relatively small difference of approach resulting from a legal disagreement) the evidence adduced derives from two very well qualified and experienced experts who purport to follow the same methodology.
17. Both experts have adopted the valuation methodology of reference to comparables. Their differences substantially concern their respective views as to the effect of certain differences between the comparables and the subject property.
18. The use of comparables requires valuers to select lettings or other transactions that are similar in time, location and nature to the proposed letting, and to reason from these factual transactions by analogy to produce a rental value for the subject letting. Valuers use their expertise to assess the relevant characteristics of the comparable on the rent payable, the effect on the rental payable of that characteristic, and adjust the rental payable under the comparable to reflect the effect of any difference that the subject property bears in that characteristic from the comparable. The process was described by Lewison J (as he then was) in Marklands v Virgin Retail [2002] EWHC 3428 (Ch) at [9].

“9. Valuation essentially proceeds by analogy. The valuer looks for an analogue which is as close as possible to that which he has to value, and which has been the subject matter of a real transaction. He then works on the premise that if the subject matter of his valuation were to be the subject of a similar transaction, it would command the same value as the analogue. Since the analogue will never be identical to the subject matter of the valuation, the valuer will have to make adjustments to the value revealed by the analogue in order to reflect the differences between the analogue and the subject matter of his own valuation. In the case of a property valuation the analogues are usually called “comparables”. In the case of a property valuation typical adjustments will reflect differences between the comparables in location, terms of letting and so on. One obvious difference between different properties is that they will be of different sizes. As a first step towards eliminating the differences in size between a comparable and the subject matter of the valuation the valuer will not take the rent of the comparable and apply it to the subject property. Rather, he will divide the rent of the comparable by the area of the comparable to produce a rate per square foot. The area can be calculated in a variety of different ways, depending on the nature of the property. The RICS publish a Code of Measuring Practice to guide practitioners, and it is that Code that the lease refers to. This process of division is called “devaluation”. Having devalued the comparable, the valuer can then apply the rate per square foot to the subject property (if necessary, making adjustments for the factors I have mentioned). He will then multiply the rate per square foot by the area of the subject property and thus arrive at a rental value. Sometimes, however, the valuer will think it appropriate to make a further adjustment for size, over and above the process of devaluation. This is because the subject property may be considerably larger than the comparable (in which case an end allowance or discount for size may be appropriate); or because a particular comparable may be so small as to produce an extremely high rent if looked at as a rate per square foot (often known as “kiosk rents”). This is essentially the “overall” method of valuation.”

19. I make a few comments on this. First, the comparable need not be (but often is) an open market letting itself but may be some other form of transaction showing rental, such as an arbitration under a rent review clause. But it must be an actual transaction. Reference has been made in the present case to 'in principle' negotiations in respect of a particular property. Because those parties have not entered into a binding agreement, that is an inadmissible expression of opinion only.
20. Secondly, there is a recognised hierarchy of transactions where some are regarded as more compelling and weightier comparables than others. So an open market letting is (all other things being equal) regarded as weightier evidence than a rent review under a lease, even where that rent review stipulates a review at an open market rental.
21. Thirdly, not all lettings are comparable. It is a matter of judgment whether the differences in time place and nature are so great that they cannot be relied upon. This was described in the present case as 'stretching the elastic'. At some point it can be stretched no further, and the differences become so great that opinion evidence based upon it is either worthless, or positively misleading. Where the market has been subject to substantial changes in rental level then the age of the comparable may be particularly significant.
22. Fourthly, the alterations in Marklands concerned the size of the comparables. Other differences may need to be compensated for, such as the relative attractiveness of locations, the difference with the lease granted as to the length of term or its covenants, or the effect of the passage of time on the relevant market.
23. In the present case there is one legal difference, and a number of differences of expert assessment in the expert valuation.
24. The legal dispute relates to the effect on the comparables of the tenant having been given a rent-free period at the commencement of the term in respect of its either anticipated or notional fitting-out period. The landlord contends that insofar as the

rent free period is more than a disguised discount (which it accepts should be factored in so as to reduce the headline rent) but reflects a true discount to pay for the cost of fitting out, then this incentive granted to a tenant should be ignored when calculating the rent passing under the comparable, on the basis that it only relates to the position of a new incoming tenant, which Dunelm as a sitting tenant in this case is not (and any continuing tenant under Part II of the Act would not be). The tenant for its part contends that the Act requires rent to be assessed by reference to a notional letting to a notional incoming tenant, and that as the benefit of the rent-free period would be proffered to an in-coming tenant in such circumstances it falls to be taken into account in assessing the rent.

25. The valuation disputes are more diverse. The valuers fundamentally disagree as to the effect of location between the comparables. The landlord suggests that Westgate Retail Park is in a particularly advantageous location, particularly as regards the comparables situated on the retail parks at Eastern Avenue. The tenant says that these parks are more equivalent.
26. Secondly, there is a dispute as to the appropriate size of comparables. The tenant suggests that some proposed comparables are simply too large or too small for a proper comparison to be drawn, as compared to the property. The landlord (with I think the exception of a pair of lettings of small units at Westgate Retail Park, which he adduces for other reasons) disagrees, and maintains that all of the proffered comparables are suitable for comparison, with appropriate adjustment.
27. In the same vein the tenant contends that some of the comparables are too distant in time to be useful comparisons. The landlord disagrees. Both parties acknowledge that the onset of Covid-19 has had an effect on the market, although they differ as to its effect on this particular unit and retail park.
28. Next, they disagree as to the effect of the existence of permission for food use, both as concerns the planning position with comparables, and as regards the user provisions in comparable leases. The subject premises do not permit the sale of food

for consumption on or off the premises, whereas the comparables in a number of cases do. The landlord suggests that such differences lead to relatively minor adjustments in comparable rentals, the tenant suggests the difference should be greater.

29. Fifthly, there is a disagreement as to the effect of the eaves' height of the property on the effective lettable space on the mezzanine floor. The tenant contends that it reduces the potential usable space; the landlord contends it makes no effective difference.

30. Sixthly, there is a small difference between the parties as to the effect of specific terms where included in the comparable lease; for example, a provision capping increases in rents or service charge. There is a more significant difference concerning the effect on rent of the difference between ten- and fifteen-year terms as comparables, and the lease agreed between the parties of a ten-year term with a five-year break.

#### Evidence

31. On behalf of the landlord I heard from Mr. Nicholas Turk MRICS. He is a director of Colliers International and qualified as MRICS in 1995. He has a wide and lengthy experience of rent reviews and has worked primarily for landlords.

32. He provided three expert reports dated 6 August 2021, 11 October 2021, 14 September 2022, and two reports dated 11 November 2022 respectively. The report of 11 October 2021 corrected arithmetical errors in the report of 6 August 2021. The report of 14 September 2022 updated his evidence as to the market conditions and considered further comparables (Go Outdoors, Barton Street; Smyths Toys Eastern Avenue and MKM Building Supplies Quedgeley). The report of 11 November 2022 corrected some arithmetical errors, made an alteration as to the timing of the Home Bargains transaction and adjusted his evidence to reflect the terms of the lease as agreed between the parties. He co-authored a joint statement of agreement and disagreement. Mr. Turk gave oral evidence and was cross-examined.

33. On behalf of the tenant, I heard evidence from Mr. Anthony Baker MRICS. He is a director of SMART4 Limited, and has been qualified MRICS for over thirty years, specialising in landlord and tenant work. He works primarily for tenants and is presently instructed to act for Dunelm on other matters.
34. Mr. Baker produced reports dated 6 August 2021, 21 October 2021, 24 August 2022 and 11 November 2022. The report of 21 October 2021 considered rental on the footing of a ten-year lease with a five-year tenant's break, his original report having considered rental on ten- or five-year terms. It also considered further evidence, being the completion of a re-gearing transaction of Homebase on Eastern Avenue. The report of 24 August 2022 up-dated Mr. Baker's original report and considered the effect of lettings to the Furniture Recycling Project, Eastern Avenue, and Smyth's Toys, Eastern Avenue. The report of 11 November 2022 considered two transactions (Poundland Eastern Avenue and Halfords Eastern Avenue) which were described as pending, that is uncompleted transactions 'in solicitors' hands.'. He also took the opportunity to re-consider the effect on his valuation of the Smyths Toys letting (which he has previously considered not a good comparable, on the basis that the court might think otherwise) and the Homebase Eastern Avenue letting, and he also corrected an error in his assessment of the Home Bargains Eastern Avenue letting. He too co-authored the joint statement of agreement and disagreement. Like Mr. Turk, he gave oral evidence and was cross-examined.
35. To summarise Mr. Turk's evidence, he considered that Westgate Retail Park is in an excellent location to serve both Gloucester and wider areas. He stressed the demographics of the catchment area that the retail park serves, extending to Newport, Hereford and Cheltenham. It has good road connections in particular to the West, North and East. It is fully occupied with attractive tenants. The layout which separates access for deliveries to the property from customer parking is beneficial. The construction of the Lighthouse and Link units advertises the park's presence to traffic on the nearby A40. Customer parking is either directly in front of the Property, or adjacent to the Majestic Wine unit a short walk by. The vehicular exit is via a relatively long slip lane that very rarely clogs up even when busy. The access and

egress, via a gyratory system, and the provision of parking was excellent and better than many of the other schemes in Gloucester.

36. Mr. Turk asserted that although the mezzanine floor was installed by the tenant, and hence is to be disregarded for valuation purposes pursuant to section 34(1)(c) and 34(2) of the Act, the notional possibility of such a hypothetical construction should be included in the valuation given that planning permission exists for it.

37. He maintained that the service charge was relatively low, notwithstanding the good quality of the Park.

38. The parking is advantageous compared to the other retail parks in the city save for the Peel Centre (Gloucester Quays) although Mr. Turk contends that the Peel Centre suffers from usage by patrons of Gloucester Dock adjacent.

39. Describing the marketplace for retail parks, Mr. Turk described the market as expanding, with new entrants in particular keen on taking larger stores. The retail warehouse market had recovered from the effect of Covid-19 much more quickly and strongly than other retail sectors. He said that 'the retail warehouse market has recovered more quickly both in terms of footfall and in the capital markets, where demand for supermarkets and retail warehousing investments has been strong and as a result values have increased accordingly'. Those tenants who have failed in recent years he put down to poor management or specific difficulties. He suggested that units of the subject property type had not been so affected by the growth in on-line shopping or indeed the effect of Covid-19, devastating though that had been to the high street retail operations. He concluded that settlements reached in 2020 were depressed by the effect of Covid and should now be adjusted accordingly.

40. In effect he suggested that there had been a flight to quality, and the Westgate Retail Park and the property reflected that quality. The market conditions were improving. Mr. Turk was of the view that larger units have performed better compared to smaller ones. Newer shopping centres in general performed better than older ones. The 'bulky

goods' sector has been active, although Mr. Turk noted that they have in many cases taken advantage of reduced rents and/or increased incentives.

41. Mr. Turk compared Westgate Retail Park itself with the four other main areas of Gloucester that contain retail warehouse parks: the adjacent St Oswald's retail park; Eastern Avenue which forms part of the A38 inner ring road; Quedgeley, which is a group of three small parks to the South of Gloucester; and the Peel Centre, situated adjacent to Gloucester Docks.
42. Eastern Avenue comprises five parks and one solus (single) retail unit. It is the oldest retail warehouse location in Gloucester and is large at 300,000 square feet in total of which 10% is presently unoccupied. Discount retailers are the predominant occupiers. There are five retail parks in this location, and one single unit. Its access on to a dual carriageway is difficult. These sites suffer from difficulties with access and egress, being a left in, left out design facing on to a dual carriageway, the A417.
43. Quedgeley is smaller at 130,000 square feet. It is made up of three small retail parks at Quedgeley to the South of Bristol on or near the A38; a Wickes and Pets at Home on a junction with the A38, the Bristol Road and the A430; Quedgeley Retail Park itself, a half mile to the South, which is a neighbourhood location, with a good mix of retailers (Boots, Matalan, Home Bargains) and (according to Mr. Turk) not in a particularly prominent location; and to the further south of that Kingsway Retail Park with two units (B&M and Pure Gym) located on a suburban road that runs adjacent to the A38 and again not particularly prominent.
44. The Peel Centre is next to Gloucester Quays, which is a factory outlet. It is just under a mile to the South of the Westgate Retail Park. It has various retailers including Hobbycraft and Home Bargains in a total of 227,000 square feet, with 100,000 vacant. It has a problem with its car parking in that visitors to the Gloucester Quays outlet centre choose to park in the Peel Centre car park, which is free. Some of the car parking provided is too distant from the stores to be useful.

45. St. Oswald's he described as being the prime retail warehouse location in Gloucester comprising 225,000 square feet of mainly bulky use retailers, anchored by a 122,000 square feet B & Q and adjacent to Tesco supermarket. It is close to and to the north of Westgate Retail Park. He suggested that it had poorer car parking facilities than Westgate Retail Park, and the access was inclined to be congested. He also suggested that its proximity to Westgate Retail Park was a positive benefit to that park.
46. Turning to Mr. Baker's evidence, he stated that the distinguishing features between the property and the comparables were to be found in their respective location, prominence, accessibility, site layout and unit size. He identified the same five clusters of non-food retail warehousing in Gloucester as Mr. Turk.
47. As far as the demised property itself was concerned, Mr. Baker identified a number of shortcomings, as follows:
- (1) The distribution of parking spaces was considered by Mr. Baker as not ideal, not fronting the property in its entirety, and also being subject to charge after two hours' use.
  - (2) The row of stanchions that existed down the middle of the store restricted its use and flexibility.
  - (3) The eaves height of the building was 5.54 metres, which was less than the modern ideal of 6 to 6.5 metres, restricting the usage of part of any mezzanine floor that was installed. Mr. Baker noted that the property is valued as a shell, the mezzanine being a tenant's improvement.
  - (4) The planning permission limits the sale of goods to bulky goods with a non-food restriction.
48. Mr. Baker's view of the effect of the pandemic on the retail market generally and retail warehousing in particular was substantially less sanguine than Mr. Turk's. As he put it, 'Pandemic control measures on restrictions, social distancing and periods of enforced closure of non-essential retail since March 2020 have had a more dramatic effect on the retail climate in the UK than any other single event in living memory. Changes that were taking place slowly since the 2008 recession

and post-Brexit in 2016 accelerated considerably. The move to online sales for example.'

49. He considered that although there had been some return to trading levels with the end of lockdown, the market remains nervous, and the future was uncertain. Stores that included the ability to sell food (such as B&M Bargains and Homebase) benefited from being able to trade during lockdown; that type of store was found in the list of potential comparables, and a discount had to be made to reflect their perceived trading advantages. There was by comparison a reduced demand for new stores from non-food non-essential retailers. That was his view in 2021.

50. Mr. Turk gave evidence that the service charge on Westgate Retail Park amounts to approximately 55p psf from 2016 to 2020. He contended that tenants have found value in agreements with lessors to cap the service charge at between £1 and £1.50 psf, and that the service charge was kept low because the landlord had managed the property itself and in house. For my part, I do not consider that there is any evidence that the hypothetical tenant would react to an historically low service charge by agreeing to pay an increased rental, or that historically tenants of Westgate Retail Park or generally have taken such a view.

51. Mr. Turk considered the ratio of dedicated car parking spaces available to the demised premises. He analysed this at 1 space per 196 square feet and compared it favourably to St. Oswald's (1:325); and Gloucester Retail Park (1:343). Whilst Peel Centre has a nominal ratio of 1:182, Mr. Turk suggested that the parking was often in fact used by the adjacent property, and that the location of some of the car parking was in fact poor. Mr. Baker did not take issue with these figures.

52. Mr. Turk suggests that a lease that permits food use is typically more valuable than one without, or where the extent of the property from which food is sold is limited. He suggested that this differential was between 3 and 5% depending on the extent of the restriction. He supported this contention by reference to an arbitration award where the arbitrator allowed a 5% allowance. That arbitration award, as I read it,

appears to have been decided by way of concession or at least lack of opposition on the part of the tenant. Mr. Baker contended that the effect of a food use depended on the identity of the prospective tenant; some tenants were willing to take the risk of trading with a food use without planning consent. It was, he considered, nuanced.

53. Mr. Turk contended that as smaller units were in greater demand than larger, a quantum allowance for larger comparables should be applied. Considering the difference in rent payable for B&M at Kingsway Retail Park with that of the smaller Pure Gym unit next door, he considered that the appropriate allowance was 1.33% per 1,000 square feet. However, he also considered that there was less demand for 10,000 square foot units than for those in excess of 20,000 square foot, and because of this adjusted the allowance, reducing it to 1% per 1,000 square feet for comparing properties of above about 20,000 square feet. Mr. Baker accepted that where comparables could properly be argued, then 1% per 1,000 square feet was the correct allowance. But he maintained that Mr. Turk had relied on comparables that fell outside the scope of such proper adjustment.

54. As I have indicated, the experts disagreed as to the effect of the length of the term granted on the rent. The nature of the disagreement was surprising. Each agreed that a ten-year term with a tenant's five-year break was more desirable for a tenant than a ten-year term and would command a higher rent. They agreed that a ten-year term would command a higher rent than a fifteen-year term. Mr. Turk considered that a ten-year term would command a 2% higher rent than a fifteen-year term, and a ten-year term with a five-year break could command a further 3%, requiring an adjustment of 5% upwards on a fifteen-year comparable term. Mr. Baker for his part considered that there should be an upwards adjustment of 10% on a fifteen-year comparable term.

55. I turn next to the specific comparables referred to in the hearing, although not all of them were put forward as comparables.

B&M, Kingsway Retail Park, Quedgeley

56. This is a 25,000 square feet unit with an open market letting agreed in September 2017 on a 15-year lease at a net effective rent of £12.30. Mr. Turk suggests that the subject property benefits by 7.5% as to location, the retail park not being on the main road and not having the 'connectivity' that the subject property had. This had a food use for planning prompting an allowance of 5%. The fall in the market overall he would put at 7.5%. The rent was payable monthly, which he considered should be reflected in a 0.5% rental allowance. Putting all of his adjustments together, Mr. Turk considered that they should be:

- It was of a smaller size so – 4.19% which he subsequently amended to 4.14%
- In a poorer location + 7.5%
- Wider planning consent – 5%
- Service charge cap/rent review cap/monthly rents – 1.5% which he subsequently amended to –0.5% by reason of the monthly rental payment only
- Better market – 7.5%

The collective effect of these adjustments was a reduction of 9.64%, or £11.1 psf.

57. Mr. Baker contended that it was inappropriate to have regard to this agreement as a comparable as it was a pre-let deal which reflected the cost of building and return on finance to the lessor. He did not make specific reference to the variations and allowances put forward by Mr. Turk.

#### Currys, Eastern Avenue.

58. This was a re-gear transaction in November 2019 where a sitting tenant agreed to take a longer lease (a further 6 years on to an existing 4-year term) of a 31,000 sq. ft unit at a reduced rent with a five-year rent review. The rent review was capped at 2.5% per year and the service charge was capped at £1.10 psf with 2% pa uplifts thereafter. The tenant accepted a ten-year lease which Mr. Turk treated as a net effective rent of £13.88 psf. He did this by making allowance for a period of reduced rent and a 12 months' rent-free period. Mr. Baker calculated the net equivalent rent by also taking into account the saving that the tenant would make over the existing four years of the term. On this basis the net rent was reduced to £12.20 psf.

59. Mr. Turk adopted what he considered was a 'simplistic view' and looking at part of the terms only, being a 10-year term with 12 months' rent-free spread over the ten years. The effective date of the transaction was October 2019. Mr. Turk considered that this (£13.88) was higher than an open market letting would have produced, noting a letting to Proper Job in January 2017 on Eastern Avenue at a rent of just under £10 psf for a 10,000 square foot unit for a ten-year lease with a five-year break clause.

60. Mr. Baker contended that the letting was not a comparable because it was not an open market rental due to the re-gear. It also shortly pre-dated the pandemic lockdown. He suggested that a current re-gear under negotiation of alternative premises nearby would be a better exemplar suggesting that it would produce a new rent of £6.59 psf.

61. By the time of the Joint Statement the parties had agreed that this comparable was of little value, saying: 'Neither expert pursued detailed valuation adjustment as a re-gear is low on the hierarchy of evidence and therefore little weight was placed on it'. For my part, I was surprised that Mr. Turk had presented this transaction as a relevant comparable.

Home Bargains, 108 Eastern Avenue

62. This was an agreement for a new lease entered into in January 2020 for 15 years with an 18 months' rent-free period at a headline rent of £7.50 psf with five yearly rent reviews and a net effective rent of £6.75 psf. The building was of 20,000 square feet. The lease contained a service charge capped at 1%, and a 2% p.a. cap at review. Food consent extended to 30% of the property. The transaction was subject to planning permission which was not in fact granted.

63. Mr. Turk adjusted the rental for the unit as follows:

- Location - +54%
- Size - 9.14%
- Planning (Food use) – 3%

- Service charge cap/monthly rent/rent review cap – 1.5%; amended to nil in Mr. Turk’s third supplemental report because ‘we have no specific evidence that monthly rents were agreed’.

- Timing + 2.5%; amended to nil in Mr. Turk’s third supplemental report – because ‘the transaction was agreed at an earlier date than he had realised’;

In Mr. Turk’s view the difference between this letting and the letting of the Home Bargains unit at Quedgeley showed that the differential in favour of the letting at Quedgeley was 46.5%.

64. Mr. Baker's view of the comparable was somewhat delphic in his report. He commented that the building was of superior specification to the subject property. He noted that in 2004/5 the then Staples lessee agreed £15.75 psf at review, whereas the subject unit was let at a headline £10 psf. As he put it, ‘Relativities can change over time and the subject property may no longer be worth less than this former Staples’. That appears to be a concession that rental values have changed over time. His adjustments were as follows:

- Location + 2.5%

- Size – 9.14%

- Planning (Food use) – 10%

#### Home Bargains, Quedgeley Retail Park

65. This was a c.19,000 square foot unit which was agreed to be let in November 2021 at £11.05 psf for a 15-year term with five yearly rent reviews and an 18 months' rent-free period, producing a net effective rent of £9.87 psf. The lease caps the rent review at 2% per annum, and with a service charge cap at £1.00 psf linked to annual RPI increases. The lease permits full Class A1 use.

66. Mr. Turk considered that this was a very useful comparable. The allowances applied were as follows:

- Differential in size at 1%/1,000 sf - - 9.97% (However, this was Agreed at - 10% - by the experts’ Joint Statement).

- Planning (Food use) – 5%

- Location +7.5%
- Service Charge, rent review cap, monthly rent – 0.5% (by the time of the trial Mr. Turk maintained a 0.5% differential by reason of the payment of monthly rents only).
- Timing + 2.5%

This led to a reduction of 5.47% from the net rent, equating to £9.53 psf.

67. Mr. Baker dealt with this comparable first by assessing the difference between the letting of a unit by Dunelm on Westgate Retail Park in 2005 and a rent review he agreed for Matalan at Quedgeley in March 2006, considering them to be equivalent. He analysed the rental value of the Dunelm unit as 28% below the letting to Matalan, thus setting out the relevant letting value difference between the locations which he then applied to the Home Bargains letting to reach a figure of £7.10 and then further accounting for the smaller size of the Home Bargains letting and the difference in lease terms. He would also have devalued the rent by 10% to reflect the food use.

Summarising:

- Size – 10%
- Location -15%
- Planning –10%

He would make no variation as to timing, because there was no evidence of rent levels rising during the relevant period, and no variation as to other lease terms. This led to an overall reduction of 34.98%, or £6.41 psf.

#### Majestic Wine, Westgate Retail Park

68. This was a lease extension in August 2020 extending the lease for 9 years, reducing the rent from £17.83 to £13.05 with rent review on the fifth anniversary and tenant only breaks at the third and sixth year. The unit was 3,281 square feet.

69. Mr. Turk commented that while the transaction was important by reason of its date and location, it is much smaller than the subject property; reflected the effect of Covid; and has been superceded by the Poplar Carpets letting. He did not rely on it as a comparable.

70. Mr. Baker considered that the letting was not comparable due to the size and planning differences.

Poplar Carpets, Westgate Retail Park

71. This was a new 10-year lease dated June 2021 of a 2,000 square foot unit with a five-year break at a rent of £19.75 psf with a five yearly rent review, increase capped at 10%. There is a three-month rent-free period and a rental penalty on operation of the break of 3 months' rent. Mr. Turk and Mr. Baker both calculated the net effective rent at £19.75 psf.

72. Mr. Turk suggests that the contrast with the Majestic Wine letting shows the uplift in sentiment on the park between the two letting dates.

73. Mr. Baker commented that it was not a relevant comparable by reason of size, although he noted the rental growth achieved over the previously existing Carphone Warehouse letting. Again, neither expert relied on this letting as relevant comparables.

Homebase, Metz Way

74. This 38,000 square foot unit is adjacent to Eastern Avenue. The existing lease was re-gearred in July 2021. The lease was due to expire in June 2022 and was negotiated to a 10-year lease at a rent of £6.59 psf with a fifth-year rent review.

75. Mr. Turk made the following adjustments to the net effective rent

- Location -46.5% (by the time of the trial Mr. Turk amended this to 54%)

- Size + 8.82%

Amounting to an adjustment of + 62.8% and producing an equivalent rent of £10.73 psf. Mr. Turk's main point was that the location was a bad one.

76. Mr. Baker did not analyse this comparable as directly relevant in his report. He contended that it was sufficiently different in terms of its size as not to be a relevant comparable. He accepted in cross examination that it was background material and

said that he had considered it. He accepted that although it was a regear it was as close as a regear gets to a lease renewal. It appeared to me that he accepted that it was relevant and had some difficulty explaining as to why he had not devalued it appropriately as a comparable.

77. Mr. Turk referred in the Second Joint Supplemental Statement to three more recent comparables which he contended showed that the market for similar units was strengthening.

78. Mr. Baker in cross-examination said that 'we anticipated signs of post-covid optimism, but it didn't come to pass'. He denied that the more recent lettings demonstrated a strengthening market. It is to them I turn.

#### Furniture Recycling Project

79. This is the former Home Bargains, on Eastern Avenue. It is a 3-year term entered into in October 2021, outside the 1954 Act with a rolling 28-day break provision at nil rent. Mr. Turk relies on it to show the deficiencies of Eastern Avenue; Mr. Baker says it indicates weak demand generally. In my view it is likely that they are both to some extent right; these contentions are not inconsistent. It is of some but not of great assistance to the decision I must make.

#### Smyths Toys, Eastern Avenue

80. This was a 15-year lease renewal in October 2021 of a 15,800 sq. ft unit with a tenant only break at 10 years for a rent of £130,000 with 5 yearly reviews and increases capped at 4% pa., with 3 months' rent free. The parties agreed that the headline rent was £8.23 psf. Mr. Turk considered that the net effective rent should be £8.23 psf; Mr. Baker's net effective rent taking into account the full 3 months rent free allowance was £8.02 psf.

81. Mr. Turk would make the following adjustments:

- Location + 54%
- Size – 17.74%

Resulting in an overall allowance of + 36.2%, and a net effective rent of £10.93 psf.

82. Mr. Baker considered that this was not an appropriate comparable due to the difference in size with the subject unit. Alternatively, if it was to be taken into account, he considered it should be adjusted as follows:

- Location + 5%
- Size -13.76%

This leads to a reduction of 8.76%, with an adjusted rent of £7.32 psf.

#### Go Outdoors

83. This was an assignment of the residue of a lease for 41,610 square feet at a passing rent of £7.77 psf by a company in administration. Mr. Turk put this forward not as a comparable but to show that as this was a poorer location (Barton Street) and larger property than the subject property, the rent would necessarily be more than £7.77 psf. He accepted it was lower in the hierarchy of valuations.

84. Mr. Baker said that it was not relevant as it was not an open market transaction or consistent with weighting of evidence. The assignee appears to have taken over the business of the assignee in administration, or at least its goodwill which would have had value. The assignment was subject to a schedule of condition limiting liability.

#### MKM Building Supplies, Kingsway Park, Quedgeley

85. This was an agreement to lease a 1.6 acre site (20,000 sq. ft being 15,183 square feet on the ground floor and 5,800 square feet on the mezzanine floor) with an external yard for 20 years from completion at £240,000 pa, a 6-month rent free period, a rent review to RPI with 1% pa floor and 3% ceiling, B1 B2 and B8 use. The net effective rent was £12.49 psf.

86. Mr. Turk contended that whilst a different property, this showed a lack of supply for buildings of this type. He devalued the yard to provide a rent NER of £10.61. He adjusted the rent as follows:

- Location + 7.5%

- Size – 8.12%
- Use +2.5%
- Yard – 1%

This resulted in an overall adjustment of + 0.88% and produced an adjusted rent of £12.60.

87. Mr. Baker said this was all quite different; it requires an acre of yard space, and as it is a pre-letting it reflects build costs and financing to be taken into account and allowed for. He would also have disagreed with Mr. Turk as to the rental value that would be given to the mezzanine floor space.

#### General View of Comparables

88. Mr. Turk assessed his comparables as follows. Those relating to the lettings at the Westgate Retail Park, he considered that 'the size differential is probably too big'. Of the other four, the average was £10.05 psf. The strongest comparable was Home Bargains Quedgeley, as being not a re-gear, not on Eastern Avenue, and of a comparable size to the subject unit. He suggested the rental should be £11.33 psf, or £330,362 p.a. He reached this figure because the average of his comparables was £10-82. As the market was rising, he upped and rounded this to £11 psf. He added 3% for the five-year break. If extra deduction for rent free period, then he would have reduced his figure to £11.16 psf.

89. Mr. Baker's approach to his comparables was to take the Home Bargains lettings at Quedgeley and Eastern Avenue. He adopted the view that the subject location was now marginally above Home Bargains at Eastern Avenue, whilst he made a 15% discount from the rents at Quedgeley. There is no mathematical or analytical basis for this figure, save to say that the difference was 28% in 2005. He adopted the average of his adjusted valuations of £5.63 and £6.41 psf for Home Bargains and Eastern Avenue and Quedgeley respectively, which he then adjusted to take account of the term agreed to produce a figure of £6.62 psf or £193,000 pa.

90. Mr. Baker commented on the reliance on certain types of comparables. Re-gear deals between existing landlord and tenant were poor comparables as both parties were in the absence of agreement locked into a continuing lease, and the agreement reached would reflect the parties' particular positions. Pre-let deals such as the letting to B&M Bargains near Quedgeley were difficult because part of the deal involved the landlord constructing the store, which would not be a consideration when the letting was of a pre-existing building. By contrast an agreement for a lease was a good comparable, even if conditional on a grant of planning permission that was not satisfied. The Agreement for a lease at Home Bargains at Eastern Avenue fell into this category.

91. I approach this dispute in the following way. I shall first consider the approach to taking fit out incentives in the hypothetical open market into account. I shall then comment on the respective experts' evidence generally. Next, I shall consider which of the approaches to the elements of valuation I prefer (where there is difference). Then I will consider which of the comparables and other valuation evidence I find of assistance. Lastly, I will apply those valuation approaches to the relevant comparables.

#### Fitting out allowances

92. The comparables provided tend to show a new lease agreed at a specific headline rent which is to commence after a specified rent-free period. The experts agree that such a rent-free period may represent two things. First, it may be a notional quid pro quo agreed between landlord and tenant to reflect the cost that the tenant anticipates incurring on fitting-out the premises prior to moving into occupation of them. Secondly, it may represent a fictional situation, where the landlord is happy to formally agree the existence of a rent-free period as it has the effect of increasing the headline rent, and so giving the impression that the property is more valuable or desirable. In these circumstances the tenant is deferring his liability to pay rent, but the overall total liability remains the same.

93. Both parties are agreed that where comparables provide for this latter type of rent-free period it should be reflected in the headline rent, that is to say that the headline

rent should be reduced to take it into account when assessing the open market rent. The difference between them arises in the first type of rent-free allowance. The experts agree that in an open market letting of the sort of premises presently under consideration, at the present time, a landlord would allow an incoming tenant a three months' rent-free period for fitting out. They agree that any particular tenant may seek or require more or less than the equivalent of three months' rent for that purpose, but that is the conventional allowance that tenants require, and landlords give.

94. A true rent-free fitting out allowance may occur in a letting where the tenant is not already in occupation and trading from the premises. If the tenant is already trading and in occupation, then it would almost inevitably follow that he has already fitted out the premises for his purposes. This is the underlying reason for the different approaches taken by the parties. Mr Demachkie says that the basis of assessment of the new rent set out by section 34(1) requires the court to assess the rent on the basis of a notional hypothetical and new letting. On that basis the rent should reflect the benefit that a lessor would grant the lessee of a rent-free fitting out period, if, as here, that would be a benefit that a new tenant would in fact receive. Miss Lamont argues that such an approach is unrealistic and that where the tenant is remaining in occupation there is no good reason why he should receive what she described as a windfall. She says that the purpose of a statutory rent review is to find the continuing appropriate passing market rent as payment for the tenant's continuing right to possess the land, and that it is inappropriate to discount that level of rent because of a hypothetical discount that a landlord would allow to a tenant in fundamentally different circumstances.

95. I have been referred to a number of county court and high court judgments as well as learned texts and articles. The county court judgments do not speak with one voice, and are persuasive authority only, albeit welcome, whilst the High Court judgment to which I have been referred does not deal directly with the point at issue.

96. The authors of *Reynolds & Clark – The Renewal of Business Tenancies* (6<sup>th</sup>. Ed) referred to at paras. 9-072 to 9-074; to Max Mara Ltd v Pearl Assurance Plc (unrep. Central London County Court 16 May 1996; HHJ White) in support of disregarding the fitting out allowance, but the authorities of HMV Music v Mount Eden Land Ltd (unrep. Central London CC 2012; HHJ Bailey); Iceland Foods v Castlebrook Holdings [2014] PL SCS 95; Britel Fund Trustees Ltd v B&Q Plc (unrep. Central London CC 11 March 2016); Odey Asset Management v Telford Properties Ltd (unrep Central London CC 7 April 2016) and WHSmith Retail Holdings Ltd v Commerz Real Investmentgesellschaft MbH (unrep. 18 June 2021, Winchester CC; HHJ Richard Parkes QC) as in favour of taking it into account. They comment that in the real world the lessor would have to grant the rent-free period, so that the Act achieves that end by taking the rent-free period into account as it would be taken into on such a hypothetical letting. The contrary argument is that the statutory scheme deprives the lessor of that very liberty by forcing him to continue with a tenant in possession.

97. The relevant cases that have been cited to me start (in chronological order) with Max Mara v. Pearl Assurance Plc (unrep. Central London County Court 16 May 1996; HHJ Sir Frank White). That concerned the renewal of a lease of business premises in New Bond Street, London. HHJ White concluded (at 32B-G) that the genuine rent-free period is compensation for the actual cost of fitting out, and that to have reference to it in a lease renewal would be to give the tenant an unwarranted windfall. Further, the disregard contained in section 34(1)(a) related to the effect on rent of the tenant's occupation. To have regard to the de facto and existing fit-out of the premises does not fall within that disregard. And further, this would give effect to a fiction that does not exist, and the court should not do so.

98. Max Mara was then considered by HHJ Bailey sitting in the Central London County Court in HMV Music v Mount Eden Land Limited (unrep. 17 January 2012). HHJ Bailey did not have a transcript of the Max Mara judgment, but had been referred to an extract from it cited in the then current edition of *Reynolds & Clark*. HHJ Bailey considered that the consequence of the disregard of the tenant's occupation under section 34(1)(a) meant that the court could not bring into the determination exercise

the absence of the actual tenant's need for a rent-free period (at [58]). The court therefore took into account the rent-free periods that had in fact been allowed for in the comparables that it had considered.

99. In Humber Oil Terminals Trustee v Associated British Ports [2012] EWHC 1336 (Ch), a decision of Sales J (as he then was), the court had to consider an application for the payment of an interim rent under section 24A of the 1954 Act concerning the lease of an oil jetty in the Humber estuary. An issue concerned the effect of the tenant's contractual ability to remove pipework from the demised premises, being property it had installed on the premises at the end of the lease, and whether and how this fell to be disregarded under section 24D(2) in assessing the interim rent; it does not seem to have been in issue that some potential form of disregard applied, albeit that the nature of the disregard appears to have been relevant to the extent of its operation as a matter of fact (see paras. 165-6).

100. His Lordship considered that the reference in section 24D(2) to 'the whole of the property comprised in the tenancy' should be construed as meaning the whole of the property owned by the landlord which the tenant has no right to remove (at 168). His lordship then commented as follows:

"Having adopted this analysis, there is no relevant property in relation to which section 34(1)(c) applies. Nor are there any further disregards or adjustments appropriate under the other sub-paragraphs of section 34(1). In particular, although at certain points in the hearing Mr. Dowding referred to section 34(1)(a), I agree with Mr. Nugee that that provision is directed to removing the effect of what is sometimes called the 'sitting tenant overbid', the idea that a sitting tenant might be prepared to pay a premium to avoid the disturbance of having to move out. That is not a factor which affects the analysis of the open market rent which I have adopted."

101. Miss Lamont argued that this decision buttressed the approach that rent under the Act was to be assessed by reference to reality and fact, and not a false basis as to the presence or absence of fittings. I do not consider that such a general approach can

be drawn from the judgment, which is a binding decision on the scope of section 24D(2), and an obiter and accurate comment on the operation of section 34(1)(a).

102. Iceland Foods v Castlebrook Holdings Ltd. (unrep. 3 September 2013 Chester CC Recorder Clayton) related to a renewal of a lease of supermarket premises in Sandbach. Mr. Recorder Clayton dealt with the point shortly:

“90. I am prepared to accept [counsel for the landlord’s] point that it may be inappropriate to discount the rent on account of 3 months stripping out tenant’s existing fixtures and fittings by reason of the covenants in the reversionary lease, but on reflection I suspect this may be a slightly misleading description. In my judgment a hypothetical ingoing tenant would probably be well-placed to negotiate a discounted rent-free period of 3 months on account of fitting out. I have therefore adjusted the global rent by writing it down over 5 years....”

103. In Britel Fund Trustees Limited v B&Q Limited (unrep. 11 March 2016 Central London CC HHJ Mitchell) the judge noted the differences between the decisions in Max Mara and HMV Music, and concluded (at [19]) that the exercise of valuation had to be applied logically to the construct, which deemed the premises free from tenants’ fixtures. On that basis His Honour concluded that the fitting out discount fell to be taken into account.

104. In WHSmith Retail Holdings Ltd v Commerz Real Investmentgesellschaft MbH (unrep. 18 June 2021, Winchester CC; HHJ Richard Parkes QC) the court considered the terms of a new lease of commercial premises in the Westfield Centre, Shepherd’s Bush, and again the issue of a fitting-out allowance. The tenant argued for taking it into account and relied on the effect of section 34(1)(a); the landlord countered by arguing that section 34(1)(a) is there to prevent the tenant’s overbid, relying on Humber Oil. The judge analysed the effect of the fitting out period as follows:

“54.....It seems to me that the fact that the premises are fitted out thanks to a rent-free period is properly seen as an effect on rent of the fact that the tenant has been in occupation, and therefore is to be disregarded, so that an

appropriate adjustment should be made to the comparables for the absence of a rent-free period. It is a curious fiction, certainly, and it may be an unintended effect, but it seems to me required by the clear words of s.34.”

105. S. Franes Ltd v The Cavendish Hotel (London) Ltd (unrep. Central London County Court 18 June 2021; HHJ Parfitt) concerned the terms of a new lease of business premises within the Cavendish Hotel on Jermyn Street, London. The court allowed for a discount to include the fitting out period, and the principle does not appear to have been in dispute between the parties (at paras. 88-90). I note only that one of the two very experienced counsel was also an author of *Reynolds & Clark*, whose view I have noted.

106. HPUT Trustee No. 1 Ltd v Boots Ltd (unrep 24 February 2022 Central London CC HHJ Dight CBE) concerned lease renewal litigation in respect of a batch of claims within 123 claims between the opposing parties. One sub-issue concerned whether there should be an assumption of a rent-free fitting out period in the assessment of the new rent. The landlord argued for a finding based on reality, citing Humber Oil and the judgment of Lewison LJ in Harbinger Capital Partners v Caldwell [2013] EWCA Civ 492, where his lordship referred to the well-known presumption of reality in the context of valuation criteria. The tenant relied on the disregard of occupation in section 34(1)(a), the previous county court decisions (although the judge said (at 156) that: ‘I was reminded that all of County Court decisions point in the same direction’ which does not take account of Max Mara), and the commentary in *Reynolds & Clark*. HHJ Dight held that the Court should value on the basis that no rent-free period is to be allowed.

107. HPUT Trustees is the most detailed reasoning on the point, and it is appropriate to summarise the various reasons for the decision set out by the learned judge (at 157-162):

(1) Section 34(1) provides for a rent payable ‘from day one’. That is inconsistent with the court taking a rent-free period into account.

- (2) A hypothetical rent-free period is not expressly stipulated and could have been provided for. The disregard in section 34(1)(a) does not compel such a disregard.
- (3) There is no theoretical conflict between the hypothesis and the reality principle unless the requirements of the hypothesis specifically drive out of consideration the real situation.
- (4) The tenant seeking a renewal is unlikely to want (I think the judge meant 'seek') a rent-free period. The requirement in section 34 that the rent should be what the tenant might reasonably expect to be let for in the open market also drives the reference to reality.
- (5) Section 34(1)(a) is there to prevent the sitting tenant's overbid. It does not require the court to disregard the reality that the sitting tenant will not in fact require a fitting out period.
- (6) Whether a tenant requires an inducement to take a lease depends on all the circumstances. One is not in fact required here and it would be illogical to provide for it.

108. My decision is that Dunelm's contention is to be preferred, and the assessment of the open market rent should take into account the rent-free period that would be offered by a willing lessor to a hypothetical incoming tenant. I come to this view for the following reasons.

109. First, the court is required by statute to carry out a specific task of valuation. The way in which it carries out that task is that stipulated by statute. The meaning of the statute starts with a consideration of the words used in the Act.

110. The court is required to determine as the rent such sum as:  
...“having regard to the terms of the tenancy (other than those relating to rent), the holding might reasonably be expected to be let in the open market by a willing lessor, there being disregarded—  
(a) any effect on rent of the fact that the tenant has or his predecessors in title have been in occupation of the holding,

(b) any goodwill attached to the holding by reason of the carrying on thereat of the business of the tenant (whether by him or by a predecessor of his in that business) ...”

111. The hypothetical tenancy on which the new rental is based does not necessarily exclude the sitting tenant, but it reflects the property being offered in the market where every other possible tenant will, on the evidence, seek and be granted a rent-free fitting out period. That is a necessary factual consequence of the postulated legal hypothesis.

112. Secondly, the notional letting is a letting of the demised premises which excludes tenants' fixtures and fittings – see New Zealand Government Property Corpn v H M & S [1982] QB 1145. The rental hypothesis itself assumes that, at the least to that extent, an incoming tenant or even the sitting tenant will be obliged to fit out the premises, and that a lessor will be willing to make provision for that, by way of a rent-free period.

113. Thirdly, the disregard at Section 34(1)(a) requires the court to ignore the fact of the sitting tenant's occupation on rent. Although Sales J stated in Humber Oil that the purpose of the disregard was to exclude the possibility of a sitting tenant's overbid, and that is true so far as it goes, that comment was made in the context of assessing the extent of the property that was subject to a claim to an interim rent. His Lordship was not stating or asserting that the effect of the disregard was limited to that purpose. The lessor's contention in the present case appears in my view to do what the statute directs the court not to do, that is to have regard to the effect of the tenant's occupation on rent. In my view even if section 34(1)(a) was solely concerned with the tenant's overbid, that would not deal with the point that arises in this case, which is that the hypothetical tenant would demand and receive a fitting out rebate, whatever the state of the premises left by the outgoing tenant.

114. Fourthly, although there is much to be said for the general proposition that the tenant is (in these circumstances) obtaining a windfall in that he is obtaining the

benefit of a factor that does not and would not exist were the parties to negotiate an open market renewal, there are I think two proper responses to this. First, such inconsistencies with reality are the necessary price to be paid for the application of the familiar concept of the open market letting between hypothetical parties. I doubt whether the concept of the rent-free period for fitting out was generally recognised in 1954; but it appears to have become well known in the 1980s and subsequently, and that specific reference is not made to it does not mean that it is not inherent in the concept of an open market letting, where (as a matter of fact) the open market would require it. Secondly, as suggested in *Reynolds & Clark*, the purpose of the provision is to value not the tenant's right of occupation, but what has been lost to the landlord by his inability to go out into the market and to procure a new tenant; and if he were to do that he would have to give credit (in appropriate cases) for a fitting out period.

115. Fifthly, the reference to the terms on which the holding might 'reasonably' be expected to be let should not be taken as a reference to the state of the premises on fit out. This is a hypothetical letting on the open market that is being used to determine the rent, and the reference to a 'reasonable' letting buttresses that requirement. Moreover, if this were the case then the assumption would have to be that for each prospective tenant the premises would have to be considered to be in a hypothetical state that equated with their particular requirements. That could not be a presumption of reality but rather a further presumption of unreality. It would require the court to apply a further assumption that the premises were fitted out ready for the immediate occupation of the hypothetical tenant. The Act does not expressly require this, neither is it in my view implicit in the wording of the Act.

116. Sixthly, the fact that the rent is payable 'from day 1' does not indicate that a fitting out period should not be taken into account. The rental level that the court might in fact set could be a differential rent (see *Fawke v Viscount Chelsea* [1980] 1 QB 441), and the hypothetical tenancy may provide for such a differential or rent-free period. If so, the task of the valuers is to take that into account in assessing a rent

which runs from the first day of the new term. They do so by discounting the rent to take account of the notional rent-free period throughout the term.

### The Experts

117. Each has been cross-examined on the basis that they are 'hired guns' advocating, expressly or instinctively by reason of their familiarity with one side of such leasehold disputes only, a position that is not objective. I consider that each expert has sought to put forward his honest view of the market, where the reality is that we are in difficult and unprecedented times, the pandemic having had a very significant effect on business in general and lettings in particular. This is particularly consequential where experts give evidence by reference to historic comparables. Each expert has I think on occasion cast his net rather wider than he would normally have done in order to produce evidence that buttresses his case, in the absence of obvious equivalence.

### Differences in Approach (2) Matters of valuation

#### (1) Location

118. I found neither expert wholly compelling in his analysis of the merits of the differing locations of retail parks in Gloucester.

119. In his evidence Mr. Turk stressed the relative benefit of the Westgate Retail Park's location compared to other locations that comprised Dunelm stores in Cheltenham, Hereford, Worcester and Newport, with reference to the distribution of population living within a certain drive time of each. I found this analysis difficult to follow, given that neither Mr. Turk nor Mr. Baker were putting forward comparables from those locations. The dispute between them turned on the relative advantages of the different locations for retail parks within Gloucester itself. It was not seriously argued by Mr. Turk that one retail park in Gloucester was better than another by reference to proximity to large centres of population.

120. I doubt Mr. Turk's argument that the Westgate Retail Park and St Oswald's are in a privileged position because of their location to the west of Gloucester, and their

proximity to Hereford, Worcester and Newport. All of those towns and cities have their own shopping centres and specialist or destination stores. There is no good reason to consider that any visitor from those population centres, having travelled to Gloucester, either would not or could not visit any retail shop in Gloucester if they so chose. Mr. Baker accepted that Westgate Retail Park has a better connection to the West than the parks at Quedgeley or Eastern Avenue, but I think correctly noted that in terms of connecting with the local population, there was no difference.

121. Mr. Turk indicated that Westgate Retail Park benefited from having occupiers as a 'destination store', referencing Majestic Wine or the pet store on the site. As I understand it, a destination store is a type of retail store that is designed to be a destination in and of itself. It is more significant than a generic trading store (even if of a specialist type) and will attract a clientele who will continue to shop in the surrounding area. It is for that reason that it, and its reputation, enhances the value of the surrounding premises. Notwithstanding that the stores on Westgate Retail Park are well known and well regarded, I did not consider that either as a matter of perception or as a matter of evidence any of them amounted to 'destination stores' such as to have an effect on rental values.

122. Mr. Baker was not willing to take a valuation from 2017 (B&M Bargains) as an appropriate comparable by reason of its date but was willing to take valuations from 2004 and 2005 as being of assistance in fixing the relative values within limits of the shopping centres. Whilst that is not logically inconsistent, it being possible that relative values might stay the same albeit absolute costs have fluctuated, it does call for an explanation which I did not consider was forthcoming. The difficulty is that shopping habits have changed significantly over that period, whether by reason of macro-economic changes or alterations in technology. Mr. Baker himself has changed the respective valuations, but it is not clear why or how he now pegs the value of Westgate Retail Park lettings to those on Eastern Avenue. Under cross-examination he said that he had to come up with a figure and had erred on the side of caution by awarding a premium of 2.5% to Westgate Retail Park.

123. Mr. Turk was cross-examined on the relative accessibility of Western Retail Park and Eastern Avenue. His contention was that both were compromised in different ways; Eastern Avenue because of its 'left hand in, left hand out' configuration for vehicles on a dual carriageway, which requires cars to travel broadly in one direction only, and Westgate Retail Park because it had a difficult exit (on to a slip road). Mr. Baker referred to queuing traffic when he visited, and difficulties with lorries exiting the site. The truth seems to me to be that Eastern Avenue is an old-fashioned design, prompted by development off of an arterial road; whereas more modern layouts will contain closely grouped shops which are accessible having parked the car. Insofar as mobility between shops and their respective car parks are required, they will be relatively easy, whichever order the customer wishes to visit the shops. The impression is that a visitor is unlikely to visit more than one shop on Eastern Avenue at any one time, whereas on more modern parks he may well do that.

124. Mr. Turk also argued that the proximity of the Tesco store at St. Oswald's enhanced the location of Westgate Retail Park in general. It was suggested that shoppers might be inclined to shop at Tesco and then continue their shopping at Westgate Retail Park. Mr. Baker contended that they did not; the only location where a benefit arose from the presence of Tesco was at Quedgeley. In this regard and taking into account purely my own personal observation of the habits of shoppers on retail parks, I consider that Mr. Baker's view is the more realistic. We live in an era where shopping is done by car and shoppers tend to be lazy. They will park their car where they consider convenient for the shopping they wish to do, and there exists a desire not to move it if possible, or to shop within the perceived confines of a shopping centre. I am sure that some shoppers will visit Tesco and then walk to Westgate Retail Park, but I doubt that number will be significant for these purposes.

125. However, on the wider point as to the relative merits of the various shopping centres, and their effect on rental values, I have come to the firm view that in terms of the desirability of accommodation for large retail outlet of the type under consideration, the evidence of Mr. Turk is broadly to be accepted. It follows that I consider that the rental at the subject site at Westgate Retail Park equates broadly

with those of the retail parks at Quedgeley, and that those rentals are significantly in excess of that which can be obtained in the open market at Eastern Avenue. I come to this view for the following reasons:

- (1) Whatever the rental levels at Eastern Avenue historically, it is apparent that they are not closely relevant to current rental levels at St. Oswald's Quedgeley or Westgate Retail Park. The most apposite comparables are the lettings to Home Bargains on Eastern Avenue and at Quedgeley. Mr. Baker's analysis did not convincingly explain the difference in headline rental levels achieved between those respective lettings.
- (2) As I indicate below, I found it difficult to accept or indeed to follow Mr. Baker's analysis of the rental effect of food planning use. I was rather left with the impression that Mr. Baker had adopted an over-optimistic analysis in order to justify his more general thesis. I did not have that impression from Mr. Turk's evidence.
- (3) The visible voids, and the recent transactions at Eastern Avenue show signs of distress (see for example the letting to the Furniture Recycling Project). That is consistent with Mr. Turk's account of the respective merits of Eastern Avenue, Quedgeley and Westgate Retail Park.
- (4) Whilst there are no recent comparable transactions at Westgate Retail Park or St. Oswald's to indicate rental levels pertinent to those specific locations, one can conclude from the recent lettings of small units (Majestic Wine, Poplar Carpets) that there is fair demand at Westgate Retail Park for small units.
- (5) The vehicular access to Westgate Retail Park is significantly superior to that at the units at Eastern Avenue, and its associated traffic flow. Westgate Retail Park may be viewed as a more coherent whole.

126. I do not however accept the analysis of Mr. Turk in full. Mr. Turk's analysis is based in part on the advantages he asserts in the location of the Westgate Retail Park to centres of occupation to the west; and also to the benefit of St. Oswald's Retail Park, including a Tesco, nearby. For the reasons I have set out above I do not consider that Westgate Retail Park has the locational commercial benefit Mr. Turk suggests. I also consider that the benefit of having a Tesco in an adjacent retail park is of no

practical benefit given that the Westgate Retail Park is surrounded by a gyratory system, whereas the units in Quedgeley are likely to benefit to a degree from having a Tesco nearby. Lastly, I accept Mr. Baker's contention that the system of leaving Westgate Retail Park by vehicle is on occasion difficult. It follows that I do not accept Mr. Turk's contention that the rental levels on Westgate Retail Park are greater than those in respect of comparable units at Quedgeley.

127. Doing the best I can with the information before me I am of the view that all other things being equal, the rental level should be the same as at Quedgeley and significantly higher than that at Eastern Avenue. The relationship between the two Home Bargains transactions at Quedgeley and Eastern Avenue which were of roughly the same size shows the correlation between the two sites. To put it shortly, the rental value at Eastern Avenue is 68.39% of that at Quedgeley.

(ii) Food Use

128. In his August 2021 report Mr. Turk suggests that an ability to have a food use at the property would attract a premium of between 3 and 5% to the rental. He suggests that some traders are willing to risk enforcement action as long as they use less than 10% of the floor space for food use.

129. Mr. Baker dealt with the contrast between Home Bargains Quedgeley (which has a food use) by adjusting it downwards by 10%. He derived this percentage from an allowance made in an arbitration in 2010 on St. Oswald's Retail Park. Under cross examination he accepted that the finding in the 2010 arbitration was not directly relevant to the issue here. On the 10% difference on usage, he contended that there was no direct comparable that led him to a 10% differential. He was valuing outside of the range described by Mr. Turk because the figures are special. He maintained that his figure derived from experience, as well as from the arbitration.

130. I found the evidence of Mr. Turk to be preferable. On the evidence before me I consider that the provision of food use in respect of units and lettings of this sort is

worth about 3% -5% in rental value, the precise percentage varying depending on the circumstances.

(iii) Size

131. In his August 2021 report Mr. Turk suggests that larger units are likely have a quantum allowance as against smaller units where these are comparable and suggests that an allowance of £1.33 per 1,000 square feet is appropriate.

132. Mr. Baker suggests that the allowance varies from 1-3% per 1000 square feet difference, with the higher differential applying to high value locations. He applied 1% as a 'cautious approach'. In fact, the parties seem to agree that a reduction of 1% per 1000 square feet was appropriate, and I adopt that.

(iv) Eaves Height

133. Mr. Baker accepted that the difficulty with eaves height was marginal. The effect was to cause the area under the eaves on the mezzanine level to be used for storage rather than customer space. Mr. Baker acknowledged that although he had raised it, he had not made a valuation adjustment for it. I do consider that this has some effect on the value of the property, but it is pretty marginal. I do not consider that the prospective loss of use at the margins from a mezzanine floor if constructed is a factor that a hypothetical party would take into account in assessing rent.

(v) Term Length

134. Neither expert was cross-examined on their respective differences concerning the effect on rent of a term short than that of a comparable. Considering the difference between a fifteen-year term and a ten-year term with a five-year break I consider that I should take the difference between the two experts' views, namely that the rental with a fifteen-year term should be adjusted upwards by 7.5%.

Relevant comparables

135. Whilst the evidence put forward does show a flight to quality, as Mr. Turk suggests, I accept Mr. Baker's general approach to the market insofar as the effect of

the pandemic is concerned. I do not consider that the evidence that I have seen shows a great improvement recently, either generally or in respect of transactions relating to large retailers. Insofar as Mr. Turk has seen a recent improvement, that in my view is likely to be a rose-tinted view from a landlord's expert. The existence of the pandemic is the most significant single event in recent years that has had an effect on amongst other things, public spending habits and consumer behaviour. The consequence of large quality retail units doing relatively better, as Mr. Turk maintains, is that transactions relating to units that are not reasonably comparable in terms of size, location or timing are likely to be positively misleading, and attempts to adjust the net effective rent of those units is likely to produce an unhelpful comparable.

136. I consider the assistance that I can take from the transactions put before me as comparables as follows:

- B&M Quedgeley – I consider that this is not of assistance because of the date of the transaction (September 2017) and the fact that it was agreed as a pre-let deal.
- Home Bargains Eastern Avenue – This letting is of relevance, but needs to be substantially adjusted due to effect of its location on rental values.
- Home Bargains Quedgeley - I consider this to be relevant as a comparable transaction.
- Homebase Metz Way – In my view this is not an appropriately comparable transaction due to particularly large size, location and also nature of transaction. There are too many significant differences for it to assist in the assessment.
- Smyths Toys, Eastern Avenue - This is a relevant comparable, but needs to be substantially adjusted due to its size and location.
- MKM Building Supplies – This transaction I do not consider to be an appropriate comparable due to the nature of the transaction
- Poundland, Gloucester Retail Park – This is not an admissible comparable, comprising non-binding Heads of Terms only
- Currys Eastern Avenue – The parties' experts have agreed that this transaction is not an appropriate comparable'

137. I do not consider that the recent general economic background has led to an increase in rent generally – quite the contrary. Business levels and sentiment have been affected by the war in Ukraine, rising power and energy costs, and a more general rise in the cost of living. These are all factors that affect the range of tenants who might take the subject property on an open market letting. The main proffered comparables are in fact businesses that are known as discounters in the market. There is no evidence that the market has discounted these difficulties because professionals consider green shoots of recovery to have arisen.

#### Outcome

138. Applying the valuation approach to the comparables, I consider that the rent is best reflected by the net effective rental of the Home Bargains unit at Quedgeley in the sum of £ 9.87 psf, taking into account the full rent-free discount awarded. I make no adjustment for location. I deduct 10% to reflect the difference in size compared to the Dunelm unit, and 5% to reflect the absence of food permission. I make no deduction to reflect the timing of the transaction, nor do I make an allowance to reflect the differing lease terms. On this basis the adjusted rent is:

$$£9.87 \times (100\% - 10\% - 5\%) = 85\% = £8.38 \text{ psf.}$$

139. Considering the other comparables, Home Bargains Eastern Avenue net effective rent with full allowance for rent free discount is £6.75. It should be increased by 46.5% to reflect its location and reduced by 9.14% to reflect the difference in size. The availability of food use on this site also leads to a reduction of 3%. On this basis the adjusted rent would be:

$$£6.75 \times (100\% + 46.5\% - 9.14\% - 3\%) = 134.36\% = £9.07 \text{ psf}$$

140. Smyths Toys, Eastern Avenue net effective rent with a full rent-free discount is £8.02 and is to be adjusted by the same amount for location (+46.5%) and reduced by 17.4% for size. On this basis the adjusted rent would be:

$$£8.02 \times (100\% + 46.5\% - 17.4\%) = 129.1\% = £10.35 \text{ psf.}$$

141. Having regard to my views concerning the relative weights of these comparables, I consider the Home Bargains Quedgeley to be the strongest comparable, and I round the rent payable to £ 8.50psf. Adjusting that further by 1.075 to reflect the difference between the terms of the relevant comparables and the subject lease results in a figure of £9.14 psf. Given the relevant square footage of the demised premises is 29,143 square feet, the rent under section 34 is therefore £266,367 per annum.

142. If the parties are able to agree the order that they wish me to make consequential upon this determination could they please file a copy of the minute of order at the time for hand-down. If they are not agreed on the consequentials then I will adjourn the consideration of any matters arising from this judgment to a date to be fixed, and I direct that each party shall file and exchange written submissions in respect of the orders they seek by 4pm on 19 May 2023. I will then consider whether to deal with those matters on paper, or whether to direct a further hearing.

143. Lastly, can I apologise to the parties for the length of time that they have had to wait for this determination.

HHJ Leslie Blohm KC

9 May 2023