JUDGMENT : His Honour Judge Toulmin CMQ QC: TCC. 31st July 2008

1. This action between Business Environment Bow Lane Ltd (the Claimants) and Deanwater Estates Ltd (the Defendants) started as a relatively straightforward claim for breach of repairing covenants in a lease dated 18 January 2002.

2. In circumstances, which I shall describe, preliminary issues were ordered. The judgment on preliminary issues of Briggs J was successfully appealed to the Court of Appeal. The action was then transferred to this court. The matter came before me on 16 November 2007 when I gave directions for a trial on 5 May 2008 with a time estimate of three days. The matter came before me again in March 2008. On that occasion I made an order by consent that the Defendant should pay the Claimant the sum of £1,073.50 damages and interest in full and final settlement of the action. I also made orders to enable me to determine the only issue left in the action, namely the costs of the action (apart from the costs of the preliminary issue dealt with by the Court of Appeal) on which the parties are not agreed.

3. It is right to say at the outset that the parties take fundamentally different approaches to the award of costs in circumstances where the parties have otherwise compromised the action. This is the issue which I have to resolve.

4. First I shall set out the facts insofar as they are material. Then I shall set out the contentions of the parties and consider the law. Finally I reach my conclusions.

The Facts

5. I have been much assisted by the Statement of Agreed Facts which the parties were able to agree in the course of the oral hearing. The Claimant is the assignee of the cause of action pursuant to the deed of assignment dated 6 April 2005 in connection with its acquisition of a long lease of the property at 73 Watling Street, EC4, from the landlords.

6. The Defendant was the tenant under the 2002 lease granted by the Claimants predecessor in title which included a tenant's covenant to pay terminal dilapidations and a tenant's break clause. The technical date of the tenant's vacation of the premises was 25 December 2004 but in fact they had vacated some time before that date. The tenant did not receive a schedule of dilapidations or a request to reinstate the premises from their landlord at the time when it vacated the premises.

7. As I have said, on 6 April 2005 the Claimant took a long lease of the premises and was at the same time granted an express assignment of the right to sue the Defendant for terminal dilapidations.

8. On 14 April 2005 the Claimant served a schedule of dilapidations. These set out a claim which amounted to £557,483.97 plus other unliquidated mesne profits. The covering letter from the solicitors, Howard Kennedy, ended:

   "On behalf of our clients we require you to pay, by close of business on 28 April 2005, the sum set out in the Schedule of Dilapidations in order to settle your liability thereunder. Should our client not receive this sum by this time it reserves all its rights against you."

9. The claim was based on a schedule prepared by Mr Estrop of Donaldsons on 23 March 2005 pursuant to an inspection on 11 March 2005.

10. On 22 April 2005 the Defendant's solicitors wrote to the Claimant's solicitors saying that they assumed that the recommended pre-action protocol would be followed. They said:

    "We understand that your client has not carried out the work. Please advise as to whether [the claimant] has any intention of carrying out the work and if so when it intends to do the work and what steps it is taking to get the work done."

11. In a letter dated 23 June 2005 the Claimant's solicitors confirmed that the Claimant intended to carry out the work. The solicitors said specifically:

    "Specifications for the work are currently being prepared and will be sent out to tender shortly. These tenders will be returned within three weeks of 27 June 2005… We look forward to receiving your comments relating to the Schedule of Dilapidations in accordance with the time limits laid down in the dilapidations protocol."

    The tender period was subsequently extended to 23 July 2005.

12. By a letter dated 10 August 2005 the Defendant's solicitors raised the issue of a collateral contract, saying that the previous landlord had agreed at the end of the term that there would be no dilapidation liability. The letter went on to say that:

    "In those circumstances (my underlining) our clients do not regard themselves as being under any liability whatsoever in respect of the Schedule of Dilapidations and invite your clients to withdraw the same forthwith."

13. This letter was followed up with another letter dated 23 August 2005, raising the issue of promissory estoppel as an alternative to collateral contract and saying that put either way this would preclude a reliance on the dilapidations schedule. These matters formed the subject of the preliminary issue.

14. The letter dated 23 August 2005 went on to assert in general terms that the schedule of loss relating to the dilapidations claim was "*inflated and exaggerated*". It is suggested by Mr Goldstein, the Claimant's solicitor, that there were without prejudice discussions at this stage, although it is clear from Mr Copley, the Defendant's surveyor's evidence that he had not by then been instructed.

15. On 12 September 2005 Mr Estrop produced a revised schedule of dilapidations on the basis of tenders which had been received. They amounted to a claim for a total of £356,769.45 including VAT, but excluding a further claim to be made for service charges during the loss of rent period, loss of rates and insurance on the building during the loss of rent period. Mr Estrop asked the Defendant's surveyors to respond to the claim.

16. The Defendant instructed Mr Copley on 23 September 2005. He inspected the premises on 29 September 2005.

17. On the same day he wrote to Mr Estrop expressing fundamental reservations with the way in which the claim was being presented. He said at paragraph 5 of the letter:

    "However, it is clear that your clients are fully refurbishing the property (a point you openly acknowledged in our conversation and within your letter of 12 September). These actions clearly nullify the entirety of your claim for alleged internal breaches (toilets, circulation doors, light fittings, perimeter skirting, trunking and radiators etc. etc. have been stripped out)."

18. With regard to external conditions, Mr Copley expressed the view that:

    "The external condition must be similar to that at the commencement of the lease in 2002."

19. It appears that Mr Copley also took a number of photographs of the premises in the course of his inspection. This, of course, was at a very early stage of the work. Mr Copley did not re-visit the property until 2 November 2007.

20. On 1 November 2005 the Claimant served a revised terminal Schedule of Dilapidations dated 19 October 2005. This claimed the sum of £209,849.19 for the cost of the work. To this was added £41,160.87 for professional fees and £63,109.45 for VAT. The claim for loss of rent remained unchanged at £109,615.38. This made a total of £423,734.89.

21. It appears that faced with such a large claim and confident, (as it turned out, mistakenly) that in what became the preliminary issue, the Defendant had a complete answer to any claim for dilapidations, the Defendant concentrated on the preliminary issue.

22. Howard Kennedy finally responded to the Defendant's contention on what became the preliminary issue on 13 December 2005. In the same letter they imposed a deadline of 16 December 2005, by which time the Defendant was required to confirm that it accepted liability to pay damages under the terminal Schedule of Dilapidations.

23. On 18 January 2006 the Defendant's solicitors responded to points made by the Claimant's solicitors but made it clear that they did not propose to litigate by correspondence. They invited the Claimant to issue proceedings and seek a preliminary issue on liability.

24. On 12 February 2006 the Claimant issued proceedings. This occurred, of course, many weeks after the building works had commenced. Paragraphs 8, 9 and 10 of the Particulars of Claim state as follows:

    "8. By reason of the breaches [of covenant] the claimant has suffered damage and the value of its reversion has been diminished by an amount equal to the cost of repairing the premises in accordance with the covenants.

    PARTICULARS

    The cost of works £246,572.80

    9. Further, the claimant has suffered damage that he was unable to re-let the premises, the annual value whereof is £300,000 from 25 December 2004 until 13 May 2005, the period during which the said repairs were executed. The claimant's loss of rent of the premises is accordingly £115,384.62.

    Yet further, the claimant has suffered damage in that he has had to meet the professional costs incurred in connection with the preparation and service of the Schedule of Dilapidations and this claim. The value of this loss is currently £52,975.14."

25. The Particulars of Claim were drafted by the Claimant's solicitors, Howard Kennedy. The statement of truth both on the claim form and on the Particulars of Claim is signed by Scott Bradley Goldstein, an assistant solicitor in the firm. The total sum claimed was £414,932.00 plus court fees.

26. Had Mr Goldstein checked paragraph 9 of the Particulars of Claim he would have seen at once that the Schedule of Dilapidations was not served until 14 April 2005 and that within his own knowledge no works were executed between 25 December 2004 and 13 May 2005. Of greater importance was the representation that the works had been carried out as dilapidations and had cost £246,572.60 (an increase on the figure notified on 12 September 2005).

27. On 3 April 2006 a defence was filed, drafted by Jonathan Ferris of counsel. In paragraphs 2-12 of the defence it raised the defences of collateral contract and promissory estoppel. Although the Claimant makes much of the denials that follow, the subsequent paragraphs of the defence were put on the basis that (paragraph 15) the Defendant reserved the right to plead to particulars of disrepair if and when the Claimant served a Scott Schedule containing detailed allegations of disrepair. At paragraph 21 of the defence the Defendant asserted that if a Scott Schedule was served it would plead that demolition and/or reconstruction of the property had rendered nugatory the need to carry out some or all of the repairs and/or that the diminution of the value of the reversion attributable to the alleged disrepair was nil.

28. On 12 June 2006, Master Moncaster ordered the issues in paragraphs 2-12 of the defence to be tried as a preliminary issue. On 15 December 2006, Briggs J decided the preliminary issues in favour of the Defendant. On

17 June 2007 the Court of Appeal allowed the Claimant's appeal and dealt with the issue of costs in relation to the preliminary issue.

29. The claim was remitted to the Master for further directions. On 20 August 2007 the case was, by consent, transferred to this court.

30. On 2 November 2007 Mr Copley re-inspected the premises on behalf of the Defendant. He said in his witness statement (and I accept) that this was his first visit since 28 September 2005.

31. On 12 November 2007 the Defendant's solicitors wrote to the Claimant's solicitors on matters arising out of Mr Copley's inspection. They said:

"We have been advised by him (the Defendant's expert) that the Schedule of Dilapidations which has hitherto been relied on by your clients bears no relation to the work which appears to have been carried out in particular to the interior of the property. Indeed our expert's initial views are that the whole of the schedule has been superseded by the conversion of the property into a furnished office centre.

It therefore appears that in relation to the preparation of a Scott Schedule, your client's building surveyor will need to re-visit the Schedule of Dilapidations and ensure that the Scott schedule mirrors the works actually carried out by your clients."

32. On 13 November 2007 the Claimant's solicitors responded by saying that their client had re-inspected the building and was re-working the Schedule of Dilapidations.

33. Also on 13 November 2007 Mr Goldstein completed the case management information sheet on behalf of the Claimant and signed it. Under the list of proposed witnesses at trial he included a Mr Andy Emden, who was to give evidence about works carried out at the premises.

34. At what was for me a first Case Management Conference on 16 November 2007 I made a number of Orders. I ordered that the Claimant serve a new Scott Schedule under paragraph 8 of the Particulars of Claim by 4 p.m. on 7 December 2007 and that the Defendant should respond by 12 noon on 14 January 2008. I also ordered disclosure of all relevant documents by 4 p.m. on 14 December 2007. Finally, I ordered experts' issues to be agreed by 4 p.m. on 14 December 2007 and the experts (building surveyors and valuers) to hold without prejudice discussions by 4 p.m. on 18 January 2008.

35. At the hearing the Claimant's counsel, Mr Warwick, told me that the claim for the cost of the remedial work would be reduced to below £200,000. I was also told by Mr Warwick that the building had been in significant disrepair but that in fact much of the repair work had not been done.

36. The revised Scott Schedule, again prepared by Mr Estrop, was served on 7 December 2007 in accordance with my Order. It was stated to have been prepared following visits on 17 and 20 September 2007 and a further visit on 2 November 2007. The sum claimed (after further revision on 17 December 2007) was as follows:

"The sum claimed for the work was reduced to £83,802.63. To this was added a claim for £9,863.04 for loss of rent, fees for preparing the Schedule in the sum of £11,460. Together with a small item for VAT the total was reduced to £107,506.34."

It is suggested that the correct figure for mesne profits (loss of rent) to be extracted from the Scott Schedule was £69,230, i.e. twelve weeks and not twelve days.

37. On 11 January 2008 the Defendant served its response to the Scott Schedule. This indicated that in respect of two items it conceded that the total sum of £1,073.50 was due. This sum was substantially less than the £7,633.50 claimed for these two items in the Scott Schedule.

38. On 15 January 2008 a meeting took place between the respective building surveyors. On 24 January 2008 the Defendant's solicitors wrote that as a result

"We understand that there may very well be very significant alterations made to the Schedule and indeed that it may be necessary for a further amended Schedule to be prepared and served by your client, which will have the effect of substantially reducing your client's claim yet further."

39. On 1 February 2008 the Claimant's solicitors wrote that at the without prejudice meeting on 15 January 2008 between surveyors, Mr Copley, the Defendant's surveyor, produced between 50 and 70 photographs of the premises which he had taken at his initial inspection in 2005. These photographs had not been disclosed in December 2007 in accordance with the Order of 16 November 2007.

40. The letter effectively alleges that the Defendant had acted in bad faith in that on the evidence of the photographs, the Defendant knew that the claim was substantially less than the figure being claimed but failed to put its cards on the table when the preliminary issue was being considered. This seems to me to be harsh to say the least. After inspecting the premises on 29 September 2005 Mr Copley had written to the Claimant's expert expressing fundamental reservations with the way in which the dilapidations claim had been framed. If the Defendant had genuinely believed in September 2005, at the start of the building works, that the claim would be a trivial one they would no doubt have said so specifically and would not have contended that preliminary issues should be ordered.

41. Also on 1 February 2008 the Claimant's solicitor sent a without prejudice Part 36 offer letter in which they agreed on behalf of their client to accept a payment of £1,073.50 in final settlement of the claim provided that

their costs were paid. The letter made it clear that *"We consider that the claim is worth more than this but we do not think that it is cost effective to argue the point at trial."*

42. On 6 February 2008 the Defendant's solicitors answered in both open and without prejudice correspondence. In open correspondence the letter noted the failure of the Claimant to serve an amended Scott Schedule "which would have to reflect our client's building surveyor's assessment of your client's claim".

43. This letter dealt point by point with the Claimant's assertions in their open letter of 1 February 2008. It described the Claimant's suggestion that costs would have been saved if the photographs had been disclosed at an earlier date as "*audacious*".

44. With regard to the Part 36 offer, the Defendant's solicitors in a separate letter said that it was wholly unreasonable to give serious consideration to the proposals in the absence of a revised Schedule or an open letter setting out the quantum of the Claimant's claim.

45. There was further correspondence relating to the photographs and in a letter dated 22 February 2008 the Defendant's solicitors said that they were prepared to waive any privilege provided the Claimant's expert did the same in relation to any photographs which he may have taken.

46. On 27 February 2008 the Claimant's solicitors wrote to the Defendant in open correspondence referring to the Defendant's photographs as "*new evidence*". In relation to the photographs taken by the Claimant's expert, the letter said that no privilege had ever been claimed for them but *"we believe that most such photographs have been mislaid"*. In the letter the Claimant's solicitor offered to settle the claim by a payment by the Defendant to the Claimant of £1,073.50. The letter again said that the level at which the offer was made did not reflect the Claimant's belief that this was the correct figure, but it was put forward "*because it was not cost effective for our client to incur tens of thousands of pounds in legal fees taking the case to trial"*. The letter went on to say again that the offer was made on condition that the Defendant paid the Claimant's costs in relation to the quantum part of the claim to be assessed if not agreed.

47. In its response dated 5 March 2008, the Defendant's solicitors declined to pay the Claimant's costs. The letter went on:

    "*Now your client accepts that its claim is minimal and should never have been pursued at the quantum level pleaded. It would thus appear more appropriate that your client should bear our client's costs of the dilapidations claim …*"

48. On 11 March 2008 the Claimant's solicitors wrote to the Defendant's solicitors to say:

    "We don't accept that our client's claim is only worth £1,073.50."

49. The letter however acknowledged that:

    "*Our client's claim is less than it ought to be (having considered your client's schedule and the photographs belatedly produced by your expert)."*

50. The pre-trial review took place before me on 14 March 2008. The parties agreed that judgment should be entered against the Defendant in the sum of £1,073.50 in full and final settlement of the action apart from costs. I agreed to hear costs as a separate issue and set out a timetable for the hearing, which took place on 9 and 10 June 2008.

51. At that hearing the parties were ordered to serve detailed schedules of costs relating to these proceedings (apart from the costs already subject to the Order of the Court of Appeal). On the Claimant's side the costs include in addition to legal fees, £7,285 for the preparation of the March 2005 Dilapidations Schedule, £3,250 for advice to 16 November 2007 and £1,125 for the period to 11 January 2008, making a total of £11,660 out of a total bill of £47,217.50. Unfortunately the Defendant failed to file a comprehensive bill as ordered. The bill does not set out the times when the fees were incurred. It does include disbursements. The total is £36,552.19.

52. I have received witness statements from Mr Goldstein, solicitor for the Claimant, Mr Rose, solicitor for the Defendant, and Mr Copley, the Defendant's expert. I make no attempt to provide a comprehensive summary of what these witness statements contain but there are passages in each of them to which I must refer.

53. Mr Goldstein's witness statement concentrates on the assertion that as early as August 2005, the Defendant knew that the claim which Mr Goldstein's client was putting forward with the assistance of its solicitors and expert was *"inflated"* and "*exaggerated"*. He reinforces this contention by saying in paragraph 14 of his witness statement that there was compelling evidence that as early as September 2005, *"the Defendant knew that the level of claim was considerably less than was stated in the Schedule of Dilapidations"*.

54. Mr Goldstein says in paragraph 18 of his witness statement that he hoped to reach a settlement on the quantum aspect of the case but these hopes were "dashed" when he received a letter from the Defendant's solicitors on 3 November 2005 saying that they did not wish to incur any further expense on quantum since liability was denied.

55. Mr Goldstein says that in the circumstances the Claimant had little choice but to commence proceedings in February 2006. He fails to mention that the dilapidations claim was very substantial or to explain how he was able to sign the declaration of truth. If the claim for dilapidations (in contrast to refurbishment) had been properly valued, even if not at the settlement figure but at an appropriately modest figure, no doubt discussions would have ensued and the idea of a preliminary issue would have been abandoned.

56. Mr Goldstein goes on to say in his witness statement that in August 2007 Mr Estrop (who had become an Associate Director of CNP Ltd) re-inspected the premises. (He had for a short time been replaced at the Claimant's expert by Mr Bragg.) Mr Goldstein does not explain how the dilapidations claim could have been maintained in its inflated form (or effectively at all) except to say that "Mr Estrop had considerable difficulty in re-constructing the dilapidations claim regarding work they had carried out several years previously". Mr Goldstein says that it was not until Mr Estrop and Mr Copley met on 15 January 2008 and Mr Estrop saw Mr Copley's photographs that Mr Estrop realised that the brickwork in the lightwell which Mr Estrop saw in August 2007 was remarkably similar to that in Mr Copley's photographs and Mr Estrop realised that the work which the contractors had told him had been carried out, had not in fact been carried out.

57. Mr Goldstein said that it was this that prompted the offer that the Claimant would accept £1,073.50 damages provided that their costs were paid.

58. At paragraph 34 of his witness statement Mr Goldstein noted that the Claimant had never been the Defendant's landlord. "By the time this long lease was granted the Defendant had already terminated its lease and vacated the property, and the Claimant and the former landlord agreed that the benefit of the Defendant's dilapidations liability would be assigned from the former landlord to the Claimant." He said that the Defendant's decision to pursue the preliminary issue "sent a misleading message to the Claimant".

59. Mr Rose, solicitor for the Defendant, noted in his witness statement (paragraph 6) that the Claimant did not comply with the pre-action protocol. When proceedings were issued by the Claimant on 22 February 2006 the Claimant stated that the repair had been completed prior to the issue of the claim and that the sum justly due was £414,932.56 (paragraph 7). Mr Rose said in paragraph 9 that the claim appeared to be genuine and on that basis the preliminary issue was pursued.

60. Mr Rose also noted that Mr Copley re-inspected the premises on 2 November 2007. He pointed out in paragraph 12 that after that, as set out in his letter dated 12 November 2007, the view of the Defendant's expert was that the whole of the Scott Schedule had been superseded by the conversion of the property into a furnished office centre.

61. In paragraph 13 Mr Rose noted that the Claimant's solicitors had responded on 13 November 2007 saying that their Client, too, had re-inspected the premises and was in the process of re-working the Schedule of Dilapidations and that the amendments would "feed into the Scott Schedule". Mr Rose went on to say that after the without prejudice meeting between Mr Estrop and Mr Copley on 15 January 2008, Mr Rose repeatedly asked the Claimant's solicitors to say what their client's quantum claim really amounted to, or to serve a re-amended Scott Schedule. He said that he spoke to Mr Goldstein about the letter dated 27 February 2008 and was told by him that it could be treated as "open". Mr Rose contends that the Claimant has accepted the figure assessed by Mr Copley of £1,073.50 in settlement of the claim, albeit that the Claimant are seeking recovery of their costs.

62. Mr Rose went on to make the point that the Defendant has spent in the region of £60,000 in litigating the claim. *"It hardly needs to be said that the Defendant would not have argued a preliminary issue … if the Claimant had written a letter prior to the issue of proceedings to say that there were £1,037 worth of dilapidations"* (para 20).

63. Mr Rose goes on to note in relation to the photographs taken by Mr Copley, that Mr Estrop had also attended the Claimant's premises and made his own photographic record and that the Claimant's list of documents makes no mention of it, although it is hinted that Donaldsons, Mr Estrop's former firm, may have some of them.

64. Finally, Mr Rose notes in his witness statement that the sum recovered meant that the whole dispute would have been suitable for the Small Claims Court.

65. In response, Mr Goldstein says (paragraph 36) that whether or not the Schedule of Dilapidations complies with the protocol, it's "a disingenuous point to make". In paragraph 37 of his witness statement Mr Goldstein denies that the Statement of Truth to the Particulars of Claim was unequivocal in the sense that the repairs had been carried out. I shall return to this point later.

66. At paragraph 38 of his witness statement Mr Goldstein claims that:

    "The Defendant was so keen to pursue its collateral contract/estoppel argument that it clouded its judgment on the question of quantum and the overall commerciality of its position."

67. With regard to paragraph 45 of his witness statement, Mr Goldstein reiterates that Mr Copley was well aware as early as September 2005 that the claim was *"worth significantly less than the value that the Claimant believed, in good faith, that it was worth at the time"*.

68. Mr Goldstein also in his witness statement insists that the decision to settle for a payment of £1,037.50 did not amount to an admission that that was all that the Claimant thought the claim was worth.

69. Finally, at paragraph 51, Mr Goldstein argues that the claim was only commenced when the Defendant stopped negotiating and the Defendant threatened to bring its own proceedings to decide the preliminary issue. He says that had the negotiations proceeded doubtless a settlement would have been reached and this litigation could have been avoided.

70. In his witness statement, Mr Copley refers to Mr Goldstein's statement. He said that his understanding was that in 2005 Mr Estrop also took photographs of the premises for the purposes of his original schedules and that these photographs are still with Donaldsons.

71. He said at paragraph 5 of his witness statement that "it was apparent from my inspection in Autumn 2005 that building work was being carried out which tended to confirm the Claimant's intention to complete the repair work before re-letting the building". When he raised his concerns in 2005, Mr Estrop informed him that the Claimant intended to serve a revised schedule. That schedule was e-mailed on 1 November 2005.

72. Mr Copley said that he did not believe that Mr Estrop was taken by surprise when he saw the photographs in January 2008. He comments that the Claimant and Mr Estrop must have been aware of what work was done by the Claimant's own contractors. "*Mr Estrop must have liaised with the Claimant in preparing the schedules*". He also notes that the Claimant had access to the building at all relevant times throughout the period from 2005 to 2008.

73. In relation to paragraph 42 of Mr Goldstein's witness statement, Mr Copley responds that he finds it hard to understand how Mr Estrop and the Claimant could not have been aware of the true position with regard to the refurbishment works carried out to the premises.

74. Finally, at paragraph 14 of his witness statement, Mr Copley notes that the loss of rent claim continued to be made on the basis that the Claimant continued to assert that work had been done referable to the dilapidation repairs and that therefore the Claimant had lost rent and other outgoings which could properly be attributable to that repair work.

75. It is convenient at this stage to review the evidence. On 6 April 2005 the Claimant entered into possession of the property. They had the assistance at all material times of London solicitors and an expert surveyor. Although they were not the landlords at the commencement of the Defendant's lease they had access to, and were no doubt advised professionally, of their rights in relation to dilapidations. This would or should have included advice on whether they were entitled to recover the cost of dilapidations in circumstances where they were carrying out a complete refurbishment of the property.

76. The Claimant set out its claim in March 2005. The Defendant received it. In April 2005 the Defendant noted that the works had not yet been carried out.

77. In August 2005 in the face of a claim against the Defendant for over £500,000, the Defendant reasonably raised the preliminary issues.

78. Apparently the work started in September 2005. The Claimant maintained its claim and on 12 September 2005 produced a revised schedule which, taking into account a further claim to be made for service charges, loss of rent etc which was still to be quantified, would have amounted to a sum similar to that originally claimed.

79. Mr Copley inspected the property for the Defendant on 29 September 2005 and put on record on the same day his "fundamental reservations as to the way in which the claim was presented". He said in terms that since the Claimant was fully refurbishing the property that nullified the entirety of the claim for internal works and that the external condition appeared to be similar to the condition at the commencement of the lease.

80. In my view, nothing could be clearer. The Claimant was maintaining its large claim for dilapidations. The Defendant was saying in unequivocal terms that the Claimant was not entitled effectively to any substantial part of its claim.

81. It is a pity that the case did not then come before a judge of this court. Active case management, required under the CPR, would have necessitated a Case Management Conference at this stage. At that Conference the first Order to be made would have been that the experts should meet to seek to resolve this fundamental issue. It may well be that that meeting, which would have been without prejudice, would have provided an early resolution of the key issues in the case.

82. This did not happen. That fact does not absolve the Claimant and its team from reviewing its case to see whether there was any substance in the Defendant's contentions. Perhaps that did happen. The Defendant was entitled to assume that it had happened and that the Claimant was pressing on with its claim. In that case there was what looked like an unbridgeable gulf between the respective positions. The Defendant was not, as Mr Goldstein suggests, sending out misleading messages. It was responding to a situation where there appeared to be a stark difference between the parties which could only be resolved by expensive litigation. The preliminary issue was in those circumstances a reasonable and proportionate way forward.

83. The Defendant's assumption was no doubt reinforced by the Schedule which the Claimant served on 1 November 2005. The Claimant's solicitors imposed a deadline of 16 December 2005 by which the Defendant must confirm that it accepted liability to pay damages under the terminal Schedule of Dilapidations.

84. The Defendant did not accept liability and on 12 February 2006 the Claimant served its claim. In it, it claimed that it had suffered damage by reason of breach of covenant in the sum of £414,932.56. The truth of this assertion was attested to by the Claimant's solicitors. This was, no doubt, at least partially appropriate because the issue of whether in the circumstances of the wholesale refurbishment of the Claimant's premises the Claimant was entitled to claim damages by way of dilapidations, was a question for its expert and its lawyers.

85. Reviewing Mr Goldstein's witness statement to this point, I reject any assertion of his that the Defendant or their advisers behaved other than entirely properly. They were entitled to assume that the claim was being put

forward in good faith based on sound advice. On the issue of dilapidations there was, so it must have appeared to them, nothing to discuss, since the gulf between the parties was so wide.

86. Mr Goldstein says in his witness statement that the Claimant had little choice but to commence proceedings. In view of the eventual outcome, one cannot avoid noting that in relation to the internal refurbishment works, the evidence available to the Claimant in February 2006 was no different to that available to them in November 2007, namely that the works were the subject of renovation. In relation to the external works, limited appropriate enquiries would no doubt have made it clear that this work had not been carried out and was not proposed to be carried out.

87. It was clear that the claim had been grossly exaggerated when the matter came before me on 16 November 2007. It was also clear that the Claimant was in a state of considerable confusion. In fact, the claim was reduced to a fraction of its former sum, namely £107,506.34, in the new Schedule of Dilapidations which was served on 7 December 2007.

88. It appears that when the experts, Mr Copley and Mr Estrop finally met "*without prejudice*", all that was left of the claim was a small sum which was in the event agreed at £1,073.50.

89. The Claimant offered to accept this sum provided that the Defendant paid all its costs. The Defendant refused this offer. In my view it was entirely justified in doing so.

90. It is clear that the Defendant should have disclosed Mr Copley's 2005 photographs by 14 December 2007 and did not do so until the experts met on 15 January 2008, one month later. Mr Goldstein attempts to infer that it was only when Mr Estrop saw Mr Copley's photographs taken in 2005 that he could have realised that the brickwork in the lightwell was similar to what he had seen in his earlier inspection and he realised that the work which the contractors had told him had been carried out, had not in fact been carried out. Mr Estrop, so I am told by Mr Copley, took photographs himself at the commencement of the works, as one would expect a competent expert to have done. Secondly, Mr Copley comments that the Claimant must have known what work had been carried out. It must have known that this did not include the external works which were claimed for in the Dilapidation Schedules. Mr Copley said in his witness statement that he found it hard to understand how Mr Estrop and the Claimant could not have been aware of the true position with regard to the refurbishment works carried out to the premises. I also find it hard to understand, and I conclude that if they were not aware of the true position, they should have been.

The Contentions of the Parties

91. The Claimant submits that the proper approach in a case where the only unresolved issue is that of costs, is that set out by Mummery LJ in the Court of Appeal in ***BCT Software Solutions Ltd v Brewer*** [2003] EWCA Civ 939.

92. At paragraph 4 of his judgment, Mummery LJ said:

"The arguments advanced on this appeal have demonstrated the real difficulties inherent in asking a judge to exercise his discretion in respect of the costs of an action which he has not tried. There are no doubt straightforward cases in which it is reasonably clear from the settlement that there is a winner and a loser in the litigation. In most cases of that description the parties will realistically recognise the result and the costs will be agreed. There will be no need to involve the judge in a decision on costs. If he becomes involved because the parties cannot agree and ask him to resolve the dispute, the decision is not usually a difficult one for him to make.

There are more complex cases (and this is such a case) in which it will be difficult for the judge to decide who is the winner and who is the loser without embarking on a course which comes close to conducting a trial of the action that the parties intend to avoid by their compromise."

93. In the same case, Chadwick LJ in his judgment emphasises that the court must have regard to the need (if an order about costs is to be made) to have a proper basis of agreed or determined facts on which to decide what order should be made. He went on to say:

"As the arguments on the present appeal demonstrated, it does the parties no service if the judge in a laudable attempt to assist them to resolve their dispute, makes an order about costs which he is in no position to make."

94. These are, with respect, wise words from both learned judges. They must apply even if, as in this case, I, as the case managing judge, have acquired a considerable knowledge of the case.

95. The Claimant contends that this is a straightforward case and that it is the winner. It says that the Defendant was not misled by the Claimant. The Defendant realised the position at an early stage and could have made a Part 36 offer to safeguard its position. It did not do so and I should therefore make the normal order that the Defendant should pay the costs. The Claimant supports this argument by saying that it has recovered a sum which is not *de minimis*. This was a case allotted to the multi track and the Claimant should have its costs on that scale or some lesser scale. If I am against them on that, and I conclude that this is not a straightforward case, I should make no order as to costs. The Claimant notes that in ***Promar v Clarke*** [2006] EWCA Civ 332, the Court of Appeal said that the principles set out in ***BCT Software*** were of general application.

96. The Defendant's case is that the claim was commenced on 22 February 2006 for a claim of £414,933.56 plus statutory interest. This included a claim for breach of covenant on the basis that it had taken 20 weeks and cost £246,000 to carry out the work. The whole claim was supported by a professionally prepared Dilapidations Schedule. This is to be contrasted with the end result, where the Claimant accepted £1,073.50 in final settlement of the claim and agreed that costs should be at large.

97. In these circumstances the Defendant says that on any view it was the successful party and thus entitled to its costs. This submission was made by reference to cases decided many years before the CPR was introduced. I do not need to refer to them individually. The approach to be applied under the CPR is set out by Lord Woolf MR ***AEI Ltd v PPL*** [1999] 1 WLR 1507 at 1522 where he links the decided cases before the Rules came into force, with the CPR Rules.

98. The Defendant contends further that it should have its costs on an indemnity basis. It says that the Claimant's conduct of the litigation was such as to take the situation away from the norm – see ***Excelsior Commercial v Salisbury Ham*** [2002] EWCA Civ 879. It argues that the Claimant was at best reckless in its presentation of its claim, and at worse less than scrupulous and that the Claimant had no business to authorise its legal representative to sign inaccurate statements of truth on the claim form N1 and at the end of the Particulars of Claim. The result was that the claim was presented and persisted in on a wholly misleading basis. After the dismissal of the preliminary issue it is contended that the false and exaggerated presentation of the Claimant influenced the Defendant to agree to a transfer to the TCC and caused it to retain "top flight experts, a valuer, Mr Eric Shapiro and a surveyor, Mr James Copley".

The Law

99. CPR Part 44.3 gives the court a discretion whether to order costs to be payable by one party to another. However, if the court decides to make an order about costs –

"(2)(a) the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party, but
(b) the court may make a different order."

100. The CPR goes on to say

"(4) that in deciding what order to make the court must have regard to all the circumstances including
(a) the conduct of the parties
(b) whether a party has been successful on part of its case even if it has not been wholly successful ..."

101. Under (5), the conduct includes

"(c) the manner in which a party has pursued or defended his case or a particular allegation or issue; and
(d) whether a claimant who has succeeded in his claim in whole or in part exaggerated his claim."

102. To these Rules I must add, on the basis of the general guidance in ***BCT Software***, that in relation to cases which are settled

(a) the court must take fully into account the fact that the action has been compromised;
(b) it will normally not be possible to say in the light of the compromise that one or other party has been successful and in those cases the order will be no order as to costs;
(c) the court should not depart from the normal order unless it is in a clear position to do so on a proper basis of agreed or determined facts which enable the court to decide what other order should be made.

103. In ***AEI v PPL*** [1999] 1 WLR 1507 at 1522, Lord Woolf MR says:

"I draw attention to the new Rules (Part 44(2) and (4) because while they make it clear that the general rule remains that the successful party will normally be entitled to costs, they at the same time indicate the wide range of considerations which would result in the court making different orders as to costs. From 26 April 1999 the 'follow the event' principle still plays a significant role but it will be a starting point from which a court can readily depart."

104. I should add some general words about Part 44.3(5)(d) "*whether a party ... has exaggerated his claim*". The effect of exaggerating a claim may be to prevent parties having realistic discussions at an early stage to resolve a dispute or prevent a successful mediation. In such cases the result of the exaggeration may be to prevent a settlement of the dispute at an early stage. Similarly, if a case is not merely exaggerated but is put on a wholly unsustainable basis, it may prevent an early settlement. It may also prevent a defendant from being able to assess realistically the value of the Claimant's case and make an appropriate Part 36 offer. This will be particularly the case when only the Claimant is able in the first instance to evaluate its own losses. In appropriate cases the Defendant should not be left at such a disadvantage. The situation may, of course, be different if the Defendant is in a position at an early stage fully to evaluate the Claimant's case.

105. This case was put on the basis that the Defendant was liable to pay as dilapidations the cost of the very substantial internal remedial works carried out to the property under the terms of the lease. In the end, the Claimant was forced to concede that the work which was carried out was, except for a trivial sum, not referable to dilapidations but to the Claimant's wholesale refurbishment of the building as offices. Equally in relation to external works the Claimant claimed for very substantial works which were not in fact carried out. The Claimant's dilapidation schedules which were produced by their expert bore, therefore, no relation to the position which they were forced to concede shortly before the trial took place. It is clear therefore that the Claimant lost on the issue of dilapidations. I conclude that in this litigation there was a clear winner and loser and that the Claimant was the clear loser and should realistically have realised that this was the result.

106. The Defendant goes further and claims indemnity costs. Rule 44.4(1)(b) permits a court to award indemnity costs where the facts of the case and/or the conduct of the parties was such as to take the case out of the norm. (See ***Excelsior Commercial v Salisbury Ham*** above.

107. Before such an Order can be made there should normally be a significant level of unreasonableness or otherwise inappropriate conduct in that a party's pre-litigation dealings with the successful party at the pre-litigation stage or in relation to the institution and conduct of the litigation. Mr Ferris sets out a number of matters in his skeleton which he prays in aid. I take those into account, but only need to mention the two matters which he emphasises, (a) the strong impression that at best the Claimant was reckless in the presentation of its claim, and at worse less than scrupulous, and (b) the Claimant had no business authorising its legal representative to sign the inaccurate Statements of Truth in claim form N1 and the Particulars of Claim.

108. The Claimant denies that it has acted in a way to justify an order for indemnity costs. It says that at no stage was the Defendant misled by the size of the claim.

109. In my view the Claimant both before and after the institution of proceedings acted in a way which took this case out of the norm. It represented to the Defendant both before and after the start of the litigation that it had a very substantial dilapidations claim. The Claimant knew what work it intended to carry out from the time when it made its initial claim for over £500,000 for dilapidations. The scope of the work was no doubt refined in the summer of 2005 and during the tendering stage. This claim was persisted in at the time of the service of the Particulars of Claim. The Statement of Truth, made on its behalf on the claim form and in the Statement of Claim attested to the fact that this was a genuine claim for dilapidations and that the work claimed for had been carried out. Any proper investigation of this claim both before the Particulars of Claim were served and afterwards, would have revealed (a) that the external works had not been carried out, and (b) that this was indeed not a genuine claim for dilapidations. Even in the Schedule of Dilapidations served on 7 December 2007 the Claimant persisted in a substantial claim which it knew or ought to have known was unsustainable. In these circumstances the appropriate order is that the Claimant pay the Defendant's costs other than those subject of the order of the Court of Appeal on an indemnity basis.

Mr Mark Warwick (instructed by Howard Kennedy) for the Claimant
Mr Jonathan Ferris (instructed by Michael Conn Goldsobel) for the Defendant