Claim No G00BS391

IN THE COUNTY COURT AT CENTRAL LONDON

Thomas More Building
Royal Courts of Justice
Strand
London WC2A 2LL

Date: 24 September 2021

Before :

HIS HONOUR JUDGE MONTY QC

- -

Between :

WH SMITH RETAIL HOLDINGS LIMITED

Claimant

- and -

FORT PROPERTIES LIMITED

Defendant

- -

Mr Gary Cowen QC (instructed by **TLT LLP**) for the **Claimant**
Mr Wayne Clark (instructed by **Ronald Fletcher Baker LLP**) for the **Defendant**

Hearing date: 9 September 2021

- -

Approved Judgment

HHJ Monty QC:

1. By Application Notice dated 5 August 2021, the Defendant asks the court to strike out various passages in the Claimant's expert valuation report and in the experts' joint statement.

2. The Claimant is the former tenant of commercial premises in North London of which the Defendant was the landlord, under a lease dated 21 December 2012. When the 5-year term of the lease came to an end, the Claimant remained in occupation under the Landlord and Tenant Act 1954 ("the Act"), paying a rent of £63,000 per annum. The Defendant served a notice under section 25 of the Act on the Claimant in March 2017, giving Ground (f) as its ground of opposition (that, on the termination of the tenancy, the landlord intends to demolish or reconstruct the premises in the holding or a substantial part of those premises, or carry out substantial work on the holding and could not do so without obtaining possession of the holding). The Claimant commenced a claim for a new tenancy in June 2017, but that claim was discontinued on 21 February 2020, and section 64 of the Act meant that the tenancy came to an end on 21 May 2020. The Claimant then brought the present claim, seeking a determination of the interim rent to be payable between 25 December 2017 (the earliest date of determination which might have been specified in the section 25 notice) and 21 May 2020.

3. The interim rent falls to be determined under section 24D of the Act.

4. Section 24D(1) provides:

> "The interim rent in a case where section 24C of this Act does not apply is the rent which it is reasonable for the tenant to pay while the relevant tenancy continues by virtue of section 24 of this Act."

5. Section 24D(2) provides:

> "In determining the interim rent under section 24D, the court shall have regard
>
> (a) to the rent payable under the terms of the relevant tenancy; and
>
> (b) to the rent payable under any sub-tenancy of part of the property comprised in the relevant tenancy,
>
> but otherwise subsections (1) and (2) of section 34 of this Act shall apply to the determination as they would apply to the determination of a rent under that section if a new tenancy from year to year of the whole of the property comprised in the relevant tenancy were granted to the tenant by order of the court."

6. Section 34 provides:

> "(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.

(2) Paragraph (c) of the foregoing subsection applies to any improvement carried out by a person who at the time it was carried out was the tenant, but only if it was carried out otherwise than in pursuance of an obligation to his immediate landlord and either it was carried out during the current tenancy or the following conditions are satisfied, that is to say,—

(a) that it was completed not more than twenty-one years before the application to the court was made; and

(b) that the holding or any part of it affected by the improvement has at all times since the completion of the improvement been comprised in tenancies of the description specified in section 23(1) of this Act; and

(c) that at the termination of each of those tenancies the tenant did not quit."

7. A determination of the interim rent under section 24D is to be approached in accordance with the section and with the principles set out in *Humber Oil Terminals Trustee Ltd v Associated British Ports* [2012] EWHC 1336 (Ch), helpfully summarised in Reynolds & Clark, Renewal of Business Tenancies, 5th Edn ("R&C") at 9-34 (I have omitted the second "is contemplated" in (1) below, which appears to be an error in that paragraph of the textbook):

"A reasonable rent for the tenant to pay is determined

(1) By assessing it in a fair and practical way, having regard to the actual circumstances which it is contemplated at the start of the interim rent period will apply during the period for which the rent is to be paid.

(2) By assuming a notional tenancy on the terms of the relevant tenancy (i.e. the current tenancy).

(3) On the assumption that the notional tenancy is one from year to year.

(4) By reference to the provisions of s.34(1)and(2) as applicable to that notional tenancy.

(5) Having regard to:

(a) the rent payable under the terms of the relevant tenancy (i.e. current tenancy); and

(b) to the rent payable under any sub-tenancy of part of the property comprised in the relevant tenancy (i.e. current tenancy).

The current passing rent is not a limit on the amount which may be determined as an interim rent".

8. In the present case, directions were given for each side to rely upon expert valuation evidence. Both sides have accordingly served their respective expert's reports. The experts have met, and have produced a joint report.

9. The Claimant's expert is Ms Catriona Campbell of Gerald Eve LLP, and her report is dated 16 April 2021.

10. The Defendant's expert is Mr Paul Jenkins of Jenkins Law. His report is dated 15 April 2021.

11. The experts' joint report is dated 24 August 2021.

12. The interim rent is to be determined at a 2-day hearing before a Circuit Judge. It had been listed for trial on 9 September 2021, but that was adjourned to be relisted after the hearing of the Defendant's present application, which took place before me on 9 September 2021. The present application was not the reason for the adjournment.

13. The Defendant was represented at the hearing by Mr Wayne Clark, and the Claimant by Mr Gary Cowen QC.

14. The Defendant's application is supported by two witness statements of Mr Ramdarshan, the Defendant's solicitor, dated 6 and 27 August 2021.

15. Mr Ramdarshan states that the application is made pursuant to CPRs 3.1(2)(k), 32.1 and 32.2 and is based on three grounds:

    (1) First, that Ms Campbell has referred to inadmissible confidential or private PACT (Professional Arbitration on Court Terms) decisions, the inclusion of which may require the hearings to be held in private.

    (2) Secondly, that Ms Campbell has referred to material contrary to CPR 31.22, which provides that a party to whom a document has been disclosed may use that document only for the purposes of the proceedings for which it has been disclosed, subject to a number of exceptions (to which I shall refer below).

    (3) Thirdly, that Ms Campbell's report contains legal submissions.

16. In response, on 2 September 2021 the Claimant produced an Amended Report by Ms Campbell, removing references to some of the matters in respect of which complaint had been made, and served a witness statement from Ms Campbell dated 3 September 2021 (the contents of which I shall refer to below).

17. CPR 3.1(2)(k), which is part of the Rule dealing with the court's general powers of case management, provides that the court may exclude an issue from consideration.

18. CPR 32.1 sets out the power of the court to control evidence, by giving directions as to the issues on which it requires evidence and the nature of that evidence, and by excluding evidence that would otherwise be admissible.

19. CPR 32.2 is a general rule dealing with the evidence of witnesses.

20. Mr Clark did not make any distinction between the CPRs referred to in Mr Ramdarshan's statements, and although I am not certain precisely how it is said that CPR 32.1 and 32.2 are said to apply here, there is no real issue between the parties that the court has the power in a clear case to direct that passages in an expert's report be deleted.

21. That power has been considered in a number of cases, some of which I was taken to in the parties' written and oral submissions.

22. In *Rogers v Hoyle* [2014] EWCA Civ 257, it was held at [53] that

> "In so far as an expert's report does no more than opine on facts which require no expertise of his to evaluate, it is inadmissible and should be given no weight on that account. But, as the judge also observed, there is nothing to be gained, except in very clear cases, from excluding or excising opinions in this category."

The Court of Appeal endorsed what had been said by the first instance judge:

> "Such an exercise is unnecessary and disproportionate especially when such statements are intertwined with others which reflect genuine expertise and there is no clear dividing line between them. In such circumstances, the proper course is for the whole document to be before the court and for the judge at trial to take account of the report only to the extent that it reflects expertise and to disregard it in so far as it does not. As Thomas LJ trenchantly observed in *Secretary of State for Business Enterprise and Regulatory Reform v Aaron* [2009] Bus LR 809, para 39: 'It is my experience that many experts report views on matters on which it is for the court to make its decision and not for an expert to express a view. No modern or sensible management of a case requires putting the parties to the expense of excision; a judge simply ignores that which is inadmissible'."

Christopher Clarke LJ (as he then was) continued at [54]:

> "The judge concluded that the whole of the report was admissible, it being a matter for the trial judge to make use of the report as he or she thought fit. Even if he had concluded that it contained some inadmissible material he would not have thought it sensible to engage in an editing exercise. The trial judge should see the whole report and leave out of account any part of it that was inadmissible."

23. In *Moylett v Geldof* [2018] EWHC 893 (Ch) Carr J as she then was dealt with the admissibility of parts of the claimant's expert report and the objection that the report

went beyond what was permissible for an expert by expressing an opinion on the ultimate question in the proceedings. Referring to [52-55] of *Rogers v Hoyle*, Carr J said at [4]:

> "The ultimate message from that decision is that it is much preferable for the court, rather than picking through expert reports, seeking to excise individual sentences and engaging in an editing exercise, to allow the trial judge to consider the report in its entirety, assuming that it is genuine expert evidence, and to attach such weight as it sees fit at the trial to those passages in the report."

24. In *A v B* [2019] EWHC 275 Comm, Moulder J referred to both of these cases, and said at [18-20]:

> 18. I shall deal first with the submission for the defendant that *Rogers v Hoyle* was concerned with an expert report which was outside CPR 35 and was concerned with the rule in *Hollington*.
>
> 19. It seems to me clear from the passages cited above that the principle to be derived from *Rogers v Hoyle* is not limited to consideration of the rule in *Hollington* but clearly stated that there is nothing to be gained, except in very clear cases, from excluding or excising opinions where the expert's report opines on inadmissible matters; such an exercise is unnecessary and disproportionate.
>
> 20. As is also clear in my view from the judgment, the proper course is for the whole document to be before the court and for the judge at trial to take account of the report only to the extent that it reflects expertise and to disregard it in so far as it does not.

25. The rule in *Hollington* (*Hollington v F Hewthorn & Co Ltd* [1943] KB 587), referred to in *Rogers v Hoyle* and *A v B*, is a general rule that the findings of courts, tribunals and inquiries were inadmissible in subsequent proceedings. I will need to return later in this judgment to the rule in *Hollington* when considering the parties' submissions.

26. At [34], Moulder J went on to conclude:

> "However in my view, even if the relevant passages are not excised from the report, the defendant is not precluded from advancing its submissions in March and to the extent counsel is successful in persuading the judge at that hearing that the opinions of Professor Gaillard in this regard are inadmissible, that judge is well able to disregard such opinions in reaching his conclusion. To infer that the defendant is prejudiced by the inclusion of these particular opinions would be to infer that the judge at the March hearing was unable to put such opinions on one side and disregard them if in fact they are held to be inadmissible. There is no basis for this court to conclude that a judge in the Commercial Court cannot form a view on the evidence, having heard submissions and in so doing, disregard inadmissible evidence."

27. These authorities set out the approach which should be taken to the Defendant's application.

28. Mr Clark submits that the present application is one of those "clear cases" referred to in *Rogers v Hoyle* where the court should strike out various passages in Ms Campbell's report.

29. I will deal with each of the three bases upon which the Defendant seeks an order as follows.

(1) The report contains legal argument

30. It is not controversial that an expert may give evidence of their opinion, restricted to that which is reasonably required to resolve the proceedings.

31. Neither, I think, is it controversial that an expert must not seek to argue the case on behalf of the party instructing them; an expert's duty is to the court and to give impartial opinion evidence to assist in the resolution of the issue on which they have been instructed. In the same way as any witness of fact, the expert must not stray into the advocate's arena by arguing points of law. If a point of law is relevant to the expert's opinion, it is perfectly proper for the expert to express their opinion on the basis of a particular stated assumption or series of assumptions of law. What the expert cannot do is use their report to set out submissions of law or their opinion on legal issues.

32. Mr Clark refers to two sections of Ms Campbell's report in this regard.

33. At section 5.2, Ms Campbell sets out a number of paragraphs under the heading, "Differential interim rent under Section 24D." At 5.2.1, Ms Campbell refers to two attachments to her report, an extract from R&C dealing with differential interim rent, and an extract from *Fawke v Viscount Chelsea* [1980] QB 44. Ms Campbell says,

> "One of the issues the court has to consider was whether it has the power under section 24A to fix a 'differential' interim rent."

34. Ms Campbell sets out at 5.2.2 what she says the Court of Appeal held in the *Fawke* case.

35. At 5.2.3, Ms Campbell goes on to say,

> "The issue in this case is not repair but the change in the market during the interim period, December 2017 to May 2020. The guidance provided by [R&C] is as follows:"

36. Ms Campbell then sets out a paragraph from R&C which the learned authors (one of whom is Mr Clark) set out their views on this point with the following introductory sentence:

> "It is, therefore tentatively suggested that the correct position is as follows."

37. Mr Clark submits that Ms Campbell is, in these paragraphs, doing more than simply setting out an assumption. He says this:

(1) Whether or not a differential interim rent can be awarded and in what circumstances is an issue of law and is a matter of legal submission and does not properly form part of an expert valuation report.

(2) Referring to these legal issues in this manner is prejudicial to D and generates unnecessary costs.

(3) Ms Campbell has added to the cost by expanding her Report by including legal material which it is not for her to do. It is for the Claimant's legal team to put forward the legal case.

(4) Ms Campbell's approach puts the Defendant in an invidious position. It has to consider the extent to which Ms Campbell is required to be cross examined on these matters in respect of which she has no legal expertise or, if not, suffer the consequence that they are to be taken as admitted. Or adopt some half-way house. It is simpler to require the relevant passages to be removed.

38. The next section to which Mr Clark objects is 5.3 of the report, which is headed, "Analysis of inducements". The point about "inducements" is whether, as a valuation exercise, any rent-free fit-out periods should be stripped out for the purposes of a section 24D/section 34 valuation.

39. At 5.3.5, Ms Campbell says:

> "For lease renewals under the 1954 Act, when analysing comparable lettings, I am required to treat the whole of rent-free periods as an incentive. This approach is now widely accepted, following the County Court decisions referred to below."

40. Ms Campbell then refers to six County Court decisions, and in respect of each of these she sets out the name of the case, the year in which it was decided, and the conclusion which she says is to be drawn from each case (in her own words, and by quoting from the judgment in each case).

41. At 5.3.6, Ms Campbell refers to paragraph 8-155 of R&C, and says, "I agree with the conclusion."

42. At 5.3.7, Ms Campbell says:

> "I attach at Appendix 6 copies of the following recent retail expert determinations which support my approach in relation to treatment of rent free for fit out [*sic*]:"

43. Ms Campbell then refers to four such determinations (the reference to these expert determinations is the subject of a separate point on which the Defendant relies, and I will deal with it in due course).

44. Finally on this point, at 5.3.8 Ms Campbell refers to having recently agreed in PACT consent orders that the County Court decisions to which she has referred at 5.3.5 were to be followed by independent experts on the Claimant's properties (I assume she means leases) in Southend and Worcester.

45. Mr Clark says this part of the valuation exercise has two steps. First, as a matter of principle, should the rent-free period be stripped out. That is a legal issue. Secondly, as a matter of methodology, if as a matter of law the rent-free period should be stripped out, how does the valuer do that. That is a valuation issue. Mr Clark submits that what Ms Campbell has done by referring in 5.3 to the six County Court decisions, the paragraph in R&C, and to the expert determinations, is to have made legal submissions; these sections of the report should be struck out.

46. Mr Cowen QC says that all Ms Campbell is doing in these sections is valuing in accordance with assumptions, and that she is setting out those assumptions to explain to the court and to the Defendant how and why those assumptions have been made, so that the court may properly assess her evidence.

47. I will deal with each of the two sections of Ms Campbell's report in turn.

48. As to section 5.2, I have no doubt that Mr Cowen QC is right. Section 5.2 must be read as a whole. It is not possible to read what Mr Clark says are the offending paragraphs (5.2.1, 5.2.2 and 5.2.3) without also looking at what Ms Campbell has done, which is set out at 5.2.4. As I read section 5.2, it seems to me that what Ms Campbell is doing is to set up her approach to moves in the market (a fall in Zone A values, and the effect of COVID, which are then later dealt with at sections 7.1 and 7.4 of the report) and to explain why she has taken that approach. I do not agree with Mr Clark that Ms Campbell is seeking to argue the law; she is explaining why she has approached this valuation issue based upon the assumptions she has summarised by reference to *Fawke* and the extract from R&C. I see no basis upon which section 5.2 should be removed from the report. The Defendant can of course cross-examine Ms Campbell on whether her assumptions are sound, but I do not regard this as a case of an expert making legal submissions.

49. As to section 5.3, Mr Clark refers to 5.3.5 (I have set out that paragraph above), and says that had it simply said, "For lease renewals under the 1954 Act, when analysing comparable lettings, I am required to treat the whole of rent-free periods as an incentive" and stopped there, it would have been acceptable; however, he says that in saying, "This approach is now widely accepted, following the County Court decisions referred to below", and by setting out those decisions with a summary of each decision, Ms Campbell has crossed the line between assumption and argument.

50. Again, I do not agree. It seems to me that Ms Campbell is saying that she has approached this question on the basis of an assumption: she is treating the whole rent-free period as an incentive because of the case law and because of what is summarised to be the position in R&C, with which she expressly agrees; and that she has set out the case law and referred to R&C by way of explanation of that assumption. In my view Mr Cowen QC is right when he says that had such an explanation not been given, and had the assumption simply been stated without any justification being put forward for it, Ms Campbell would be criticised for having made an unsubstantiated assumption, and if she had referred to the case law (or her understanding of the case law) in response to such a point being put to her in cross-examination, she would have been criticised for not having spelled it out in the report.

51. As to the reference to the expert determinations at 5.3.7, and subject of course to my decision on Mr Clark's submissions on confidentiality which I deal with later in this

judgment, it seems to me that once again these should not be struck out as being legal submissions. I think that there is a distinction between what I understand Ms Campbell is saying here (which is that there are a number of expert determinations which have followed this approach, and that is a further reason why I also make that assumption here) and what I understand Mr Clark to be saying (which is that Ms Campbell is using those determinations to argue a legal point). I do not believe that Ms Campbell is doing the latter. Again, in my view, the references to the expert determinations is Ms Campbell explaining why she has made the assumption. Looked at overall, at section 5.3 Ms Campbell seems to me to be saying that she has made a particular assumption, for three reasons: first, because of the case law; secondly, because of a passage in R&C with which she agrees; and thirdly, because she is aware that the assumption is regularly made by expert valuers in PACT determinations. This is not legal argument; it is an explanation of the assumption. The same is in my judgment to be said in respect of 5.3.8.

52. Before leaving the "legal submissions" point, the Defendant's application also criticises some other passages in the report which it says fall into the same trap of being legal argument.

53. At 4.5.2, Ms Campbell says that she attaches no weight to Valuation Office assessments for rating purposes, and that this accords with what is said at paragraph 8-109 of R&C (a sentence of which Ms Campbell sets out). This is in my view not legal argument but an explanation.

(2) The references to various expert determinations

54. This is the second basis upon which sections of the report are said to require excision.

55. I have already referred to the references to four expert determinations which appear at 5.3.7 and to PACT consent orders at 5.3.8.

56. At 7.3.4, Ms Campbell sets out a table in which she sets out a number of valuations of other properties where a discount of between 10-25% has been applied for the rent-free period, one of which is an expert determination.

57. At 7.3.9, Ms Campbell refers to a PACT determination in which she acted for the tenant ("Unit 51").

58. At 7.4, there is a reference to a PACT determination ("49/51 Whitehall").

59. Mr Clark says that there is no place for these determinations to be referenced in Ms Campbell's report, for two reasons.

(a) Inadmissibility and irrelevance

60. First, and consistent with the rule in *Hollington* to which I have already referred, these determinations are inadmissible. It is for the trial judge to make up their own mind on the evidence at the trial, and not to base a decision on the conclusions of another expert who has carried out a determination in another unrelated case.

61. In *Land Securities plc v Westminster CC* [1993] 1 WLR 286 Ch, Hoffman J as he then was said this:

> "The issue in the arbitration is the rent at which the premises could reasonably have been let in the open market at the rent review date. Evidence of the rents at which comparable properties were actually let in the open market at about the same time is relevant and, if properly proved, admissible because the fact that someone was willing to pay a certain rent for a property can justify an inference that he or someone else would have been willing to pay a similar rent for a comparable property. A rent which is agreed between the parties at a rent review is admissible on similar grounds although it suffers from the disadvantage that such transactions are not in the open market. The parties are not free to refuse to deal. They bargain under the constraint that if they do not agree, a rent representing an arbitrator's or expert's view of the reasonable market rent will be imposed on them. But these matters go to the weight of the evidence rather than its admissibility. It is admissible because it shows what an actual landlord and tenant were willing to agree in a transaction in which real money was to change hands. An arbitration award, on the other hand, is an arbitrator's opinion, after hearing the evidence before him, of the rent at which the premises could reasonably have been let. The letting is hypothetical, not real. It is therefore not direct evidence of what was happening in the market. It is the arbitrator's opinion of what would have happened."

62. Hoffman J then referred to the rule in *Hollington*:

> "In principle the judgment, verdict or award of another tribunal is not admissible evidence to prove a fact in issue or a fact relevant to the issue in other proceedings between different parties."

63. Hoffman J concluded:

> "Even if Mr. Clark or someone else were in a position to give admissible evidence of the comparables that support his opinion, I think that his award would still be inadmissible on another ground. It would involve a collateral inquiry as to whether Mr. Clark came to the right decision in his own arbitration. The result of such an inquiry would, in my judgment, have insufficient relevance to the issue in the present arbitration to justify undertaking it. So far as the comparables relied on by Mr. Clark are relevant to the value of Westminster City Hall they could have been used as such by the landlord's experts. In so far as they would not have been relevant I do not think they can be smuggled in by using them to establish Mr. Clark's opinion of the value of a comparable property and then using that conclusion to support a valuation of Westminster City Hall.
>
> I therefore decide that Mr. Clark's award is inadmissible. This is not in my view a technical decision on outdated rules of evidence. Properly analysed I think that the arbitrator's award has in itself insufficient weight to justify the exploration of otherwise irrelevant issues which its admissibility would require."

64. In *Glenfield Motor Spares Ltd v Smith* [2011] EWHC 3130 (Ch), Newey J as he then was said although the Land Securities case was distinguishable, as the determination relied upon was that of an expert rather than an arbitrator,

> "…it seems to me that Hoffmann J's judgment in the *Land Securities* case has a resonance in the present one. The fact that evidence is hearsay is likely to affect its weight even if it does not nowadays render it inadmissible. Further, there continue to be objections to conducting a 'collateral inquiry' as to whether a previous decision-maker came to the right conclusion. One of the grounds on which Hoffmann J considered that the 'result of such an inquiry would … have insufficient relevance … to justify undertaking it' was that relevant comparables could have been used by the landlord's experts anyway. Similarly, in the present case Glenfield was able to rely on Mr Cattrell's views without any inquiry being conducted into the basis for Mr Simpson's determination."

65. In *Rogers v Hoyle* at [46] and [47], the Court of Appeal said that the basis for the inadmissibility was the potential for a collateral enquiry as to whether or not the expert came to the right decision.

66. Mr Cowen QC submits that all of this is irrelevant, because Ms Campbell has not referred to the expert determinations (only one of which is in fact an arbitration award) in order to rely on the conclusions in those decisions, but in order to explain why she has made her valuation assumptions.

67. In my judgment, the assumptions made by Ms Campbell are either good or bad, but the correctness or otherwise thereof does not require either reliance (as a valuation exercise) on the expert determinations or a collateral inquiry into their correctness. Ms Campbell – as I have said before – is to my mind explaining that she has referred to the determinations because in those there has been a certain approach to valuation which she has assumed to be correct.

68. In the case of the four determinations at 5.3.7, it does not seem to me that Ms Campbell is relying on them for valuation purposes (in other words, methodology, which is Mr Clark's step two – see paragraph 45 above) but for the point of principle (which is step one), in respect of which Ms Campbell is referring to them to explain her assumption. Again the same applies in my view to 5.3.8.

69. At 7.3.4, one of the seven valuation examples in the table to which Ms Campbell refers to justify a 10-25% adjustment for the rent-free fit-out period is an expert determination. In my judgment, this may be in a different category from the determinations referred to at 5.3.7. It seems to me arguable that it is irrelevant and inadmissible. It may be said to have no relevance because it pre-dates the relevant valuation date in the present case by more than 5 years (the same may be said for other valuations in this table), and it may be said to be inadmissible because it is relied on here not for principle, but for methodology (adopting the two steps suggested by Mr Clark).

70. However, I do not think that is a good reason to excise it from the report and to require the Claimant to serve a further version of the report. As Mr Cowen QC observed (in order to make a slightly different point), enough costs have already been spent on both sides on this exercise. Whilst I could order that the Claimant cannot rely on that determination (78/79 New Bond Street), it seems to me to be far better to leave it in and to let the trial judge determine its admissibility and weight. I do not regard it as appropriate to excise reference to that one determination at this interlocutory stage for

the first of the two reasons currently under consideration, as I do not think it is such a clear case as Mr Clark submits.

71. The reference to the PACT determination in relation to Unit 51 (paragraphs 7.3.10 to 7.3.14) has been removed in the Revised Report and at this stage I need say no more about it.

72. As to the reference to the PACT determination in 49/51 Whitehall, Mr Clark observes that the transaction date is said to be a lease renewal in March 2020 where the determination in fact preceded the COVID lockdown, and the valuation date was much earlier. He therefore says that this determination is irrelevant to the point being made (the effect of COVID) and again involves a collateral inquiry (what provoked the expert to decide that COVID had an effect such that there should be a rent-free period).

73. It seems to me that the position is substantially as it is in relation to the determination in 78/79 New Bond Street. While I can see the force of Mr Clark's submissions, in my view this is not a sufficiently clear case to merit a strike out.

(b) Confidentiality

74. The starting point is that PACT determinations are confidential. The RICS Guidance on PACT determinations so provides. I am prepared to assume this is the case, for the purpose of this application, in respect of the various determinations.

75. Ms Campbell explains, in her witness statement, how she obtained the various PACT determinations to which she refers. She says that expert determinations, although private to the parties, are "widely circulated among valuers engaged in lease renewals and rent reviews to the point that they have ceased to be private" and that the same applies to arbitration awards. She also says that awards and determinations are "widely referred to in expert reports and negotiation both by myself and other valuers". Finally, Ms Campbell says that a number of the determinations to which she has referred have been put before the court at lease renewal trials under the Act, and that "any confidentiality/privacy that may have applied to the documents has ceased to apply."

76. I found it somewhat incongruous (in the light of the clear criticisms made of her report) that in this statement, Ms Campbell has not only set out matters of fact, but she has also made assertions of law, namely that as a result of the circulation of these determinations, and the reliance by valuers on them, and the reference to the same in court, any confidentiality or privacy has been lost. This is plainly a legal submission.

77. Nonetheless, Ms Campbell's factual evidence was not challenged (I recognise that it was served only shortly before this hearing). The issue in the present case seems to me to be whether for the factual reasons Ms Campbell refers to in her statement, the determinations are plainly confidential and therefore cannot be referred to in her report.

78. Mr Clark's submissions were as follows.

    (1) The PACT process imposed a contractual obligation on both sides not to disclose or use any material used in the process or the determination itself without their express consent or an order of the court.

(2) There was no evidence that the parties to the various determinations had given their consent (nor even that they were aware of the use of the material or the determinations).

(3) The court should not (as Mr Clark puts it) "promote the dissemination of confidential information" and that it was for the Claimant "to show why the interests of justice justify Ms Campbell flouting a confidential obligation". The Claimant had not done so.

79. Mr Cowen QC made the written assertion – again, not supported by reference to authority – that these documents were now in the public domain and were no longer confidential.

80. I am prepared to accept Mr Clark's submission that there is much to be said for the court upholding confidentiality in a confidential document, and that the court should not condone any improper use of confidential documents in other contexts.

81. I had found it slightly odd that Mr Clark did not refer, in his skeleton argument, to any authorities on the loss of confidentiality or privacy. I pointed that out in the course of legal argument, and I asked whether Mr Clark intended to refer me to any cases on that point, such as the recent case of *SL Claimants v Tesco* [2019] EWHC 3315 Ch. I was told that Mr Clark had not brought any such cases to court and his submission was as I have summarised above.

82. In the absence of any further submissions, it seemed to me that it was not open for Mr Clark to assert – for the purposes of this application, so that I could be satisfied on balance that the point was correct – that confidentiality had not been lost and that therefore Ms Campbell could not refer to the various determinations. I do not see how, on an interlocutory basis, it would be appropriate to strike out parts of an expert report for this second reason where the applicant had not taken me to any authority on the preservation of confidentiality in documents which, as a matter of fact, are in the public domain and are openly referred to, as Ms Campbell has explained.

83. For that reason, I told Mr Cowen QC that he need not address me on the confidentiality issue. It must have been clear to both sides, by that indication, that I was against the Defendant on this second reason, in other words that I had not been persuaded that the documents were confidential.

84. At the conclusion of the hearing, due to lack of time, I had to reserve judgment. Before I had the opportunity of circulating a draft judgment, Mr Clark circulated a Note entitled "Loss of Confidentiality". I have to say that I was somewhat surprised to receive it. Mr Cowen QC objected to my considering this Note, but having reflected on what both parties said in an email exchange about further submissions on this point, I decided to allow time to Mr Cowen QC to respond to it in writing and for Mr Clark to reply thereto.

85. Having read the Note, the response and the reply, my view remains the same.

86. It is common ground that on the authorities referred to, principally *SL Claimants v Tesco* (*ante*) and *Serdar Mohammed v Ministry of Defence* [2013] EWHC 4478 (QB), confidentiality may be lost (a) where it has been given sufficient publicity so that it can

no longer be regarded as confidential for example by being read out in court or by some other means by which it had been brought into the public domain and/or (b) where the principle of open justice is engaged to entitle access by third parties to evidence placed before the court and referred to during the hearing so that the way and basis on which the matter had been decided can properly be understood.

87. Mr Clark has analysed the cases referred to by Ms Campbell in which this material was deployed, and says that it is not apparent that it was referred to in open court, nor is the open justice principle engaged here.

88. The written submissions on confidentiality are very detailed (and longer than the parties' original written submissions) but I take the view that the position as a matter of fact, for the purposes of the present application, is straightforward. It is that set out in Ms Campbell's evidence. The fact – which I accept for those purposes – that the material has been widely circulated and deployed in evidence means that I cannot be satisfied that the material remains confidential. I think it makes no difference whether the test for present purposes is whether the court can be satisfied that it is confidential or that it is not confidential (in other words, whether it is the Claimant or the Defendant which has the onus here). This is not a matter of A and B arguing over whether a document to which they were parties has ceased to be confidential; here, the argument is between X and Y, neither of whom have any locus to argue contractual confidentiality (and I do not accept Mr Clark's contention that this is an irrelevant consideration). Neither can I accept Mr Clark's submission that this is a case of the Claimant using material in respect of which no order has been made in its favour pursuant to CPR 5.4C (which are in play where a non-party applies to see documents from the court records). I agree with Mr Cowen QC that the position on the facts is that the determinations have been widely disseminated between valuers and have been used in various expert reports and so any confidentiality has been lost, and that even if the material had not (as Mr Clark contends) been adduced in evidence in open court, it would be wrong for me to exclude this material from the report in the light of that dissemination and use.

89. I also bear in mind that it is no part of the court's role on an interlocutory basis to be striking out passages from an expert's report save in the clearest of cases – as I have already observed – and in my judgment it is not clear that this material is confidential nor, putting it the other way round, is it clear that the material has not lost its confidentiality.

90. I do not intend to do any disservice to the considerable detail with which both counsel have addressed the confidentiality point by dealing with it in this way, and I have carefully read and considered both sides' detailed written submissions. However, I do not believe that these references should be struck out.

91. Mr Clark presses me to ask the question, "What is the potential value of this material?", and therefore to assess whether it has sufficient weight to justify its admission. I do not agree. I remind myself of Carr J's decision in *Moylett v Geldof*, and I think that where it is not clear that a part of an expert's report should be excised, the weight to be attributed to it is best left to the trial judge.

(3) Ms Campbell has referred to material contrary to CPR 31.22

92. CPR 31.22 has no application to the material referred to by Ms Campbell. That Rule only applies to documents disclosed by the parties. This means, in my view, documents which are disclosed as part of the disclosure exercise. This material was not disclosed in that way.

Conclusion

93. For all these reasons, I decline to strike out any part of Ms Campbell's report and the application is dismissed.

(End of judgment)