Claim No K10CL172

**IN THE COUNTY COURT AT CENTRAL LONDON**

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

Date: 28 July 2023

**Before** :

**HIS HONOUR JUDGE MONTY KC**

- - - - - - - - - - - - - - - - - - - - -

**Between :**

**BMW (UK) LIMITED**

**Claimant**

**- and -**

**K GROUP HOLDINGS LIMITED**

**Defendant**

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**Mr Michael Pryor** (instructed by **Norton Rose Fulbright**) for the **Claimant**
**Mr Stephen Jourdan KC** and **Mr Thomas Jefferies** (instructed by **Payne Hicks Beach LLP**) for the **Defendant**

Hearing dates: 10-14 July 2023

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# Approved Judgment

## HHJ Monty KC:

## Introduction

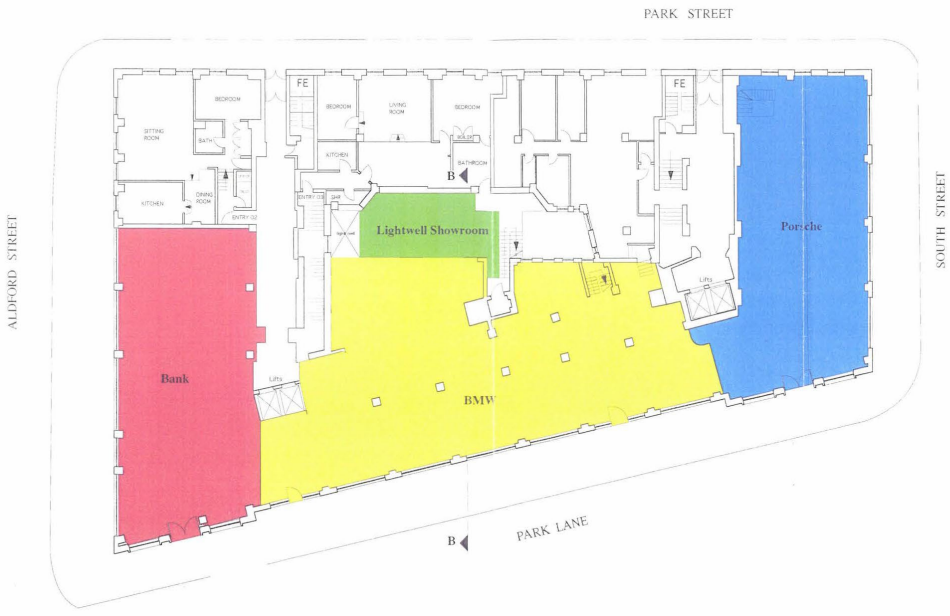
1. The Claimant has applied to renew four separate leases of which the Defendant is the landlord. The four leases are of different parts of Aldford House on Park Lane, London, and are occupied by the Claimant as a single car showroom with ancillary office space. The Defendant accepts the Claimant's right to renew the leases, but there are differences between the parties in respect of several terms of the new leases and the rent payable which I now have to resolve.

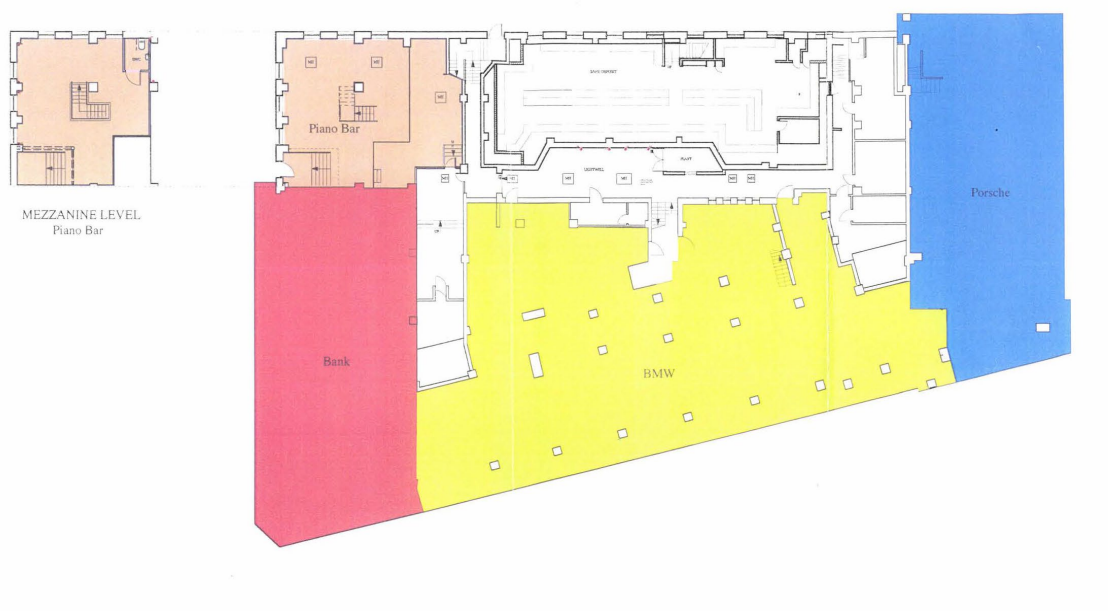
2. In this judgment, I will refer to the Claimant as BMW, and to the Defendant as KGH. Both parties were extremely ably represented; BMW by Mr Michael Pryor, instructed by Norton Rose Fulbright, and KGH by Mr Stephen Jourdan KC leading Mr Thomas Jefferies, instructed by Payne Hicks Beach LLP. The trial bundles were immaculately prepared, both in hard copy and as pdfs, and I have been greatly assisted by counsel's written submissions.

3. Those written submissions comprise some 87 pages (there was also a 14-page schedule produced for KGH setting out its submissions on the disputed lease terms, and a 5-page skeleton argument from BMW in connection with an application to adduce further evidence). They cover a multitude of points, some of which have fallen away by agreement, and whilst I have read them carefully, and taken them into account together with the evidence and the oral submissions, it is not necessary for me to deal with every single point raised in argument.

## The premises at 70 Park Lane

4. Aldford House is a large block at 63-72 Park Lane, Mayfair, London W1. The upper floors are residential. BMW occupies part of the ground floor and the basement under four separate leases as shown on the plans below (the first plan is the ground floor, followed by the basement/mezzanine plan).






5. Going from left to right as one looks at the front of Aldford House from Park Lane, the four leases/units are:

   (1) Bank: This is the area coloured red on the basement and ground floor plan, and was formerly occupied by Midland Bank and later HSBC. It is 1,753 $ft^2$ on the ground floor and 2,349 $ft^2$ in the basement, a total of 4,102 $ft^2$.

   (2) Central: This is coloured yellow in the basement and yellow and part green on the ground floor. It is 3,237 $ft^2$ on the ground floor, and 3,358 $ft^2$ in the basement, a total of 6,595 $ft^2$.

   (3) Porsche: This is coloured blue on the basement and ground floor, and was formerly a Porsche showroom. It is 1,788 $ft^2$ on the ground floor, and 1,800 $ft^2$ in the basement, a total of 3,588 $ft^2$.

   (4) Piano: This lease comprises office space coloured beige on the plan, and was originally designated to be a piano bar (hence the name), although it never operated as such. It comprises 551 $ft^2$ of space in the basement, and 798 $ft^2$ on the mezzanine.

6. The total size of the showroom and ancillary office space is thus 6,778 $ft^2$ on the ground floor, 8,058 $ft^2$ in the basement, and 798 $ft^2$ on the mezzanine floor, a total of 15,634 $ft^2$.

7. Although each lease has its own Park Lane street number, BMW's showroom address is 70 Park Lane, and I will refer to the BMW showroom as 70 PL.

8. KGH holds a long headlease of Aldford House (the headlease has also been held for a period by Park Lane Holdings Inc, an associated company). The headlease was originally granted by the freeholder Grosvenor (Mayfair) Estate (which was in 1999 to grant a long reversionary lease of Aldford House to Grosvenor West End Properties) on 14 August 1980 to a company called Grantfold Ltd for a term expiring on 24 December 2100. KGH is thus BMW's immediate landlord of all four units, and is the competent landlord under the Landlord and Tenant Act 1954 ("the Act").

9. BMW first moved into 70 PL in 1989 at a time when Central was divided into three units on the ground floor. BMW initially took a lease of the middle unit, and by March 1993 it occupied all of the then leases comprised in what is now Central. By 2003, HSBC had surrendered its lease of Bank, and planning permission for its use as a car showroom was granted in October 2003. In April 2004, an agreement for lease was entered into between BMW and KGH which provided for works to Central, Bank and Piano, with new leases for those units to be granted for terms expiring on 26 May 2019. The agreement also provided that KGH would try and recover possession of Porsche and then grant a lease of that unit to BMW. In the event, the leases of Bank, Central and Piano were granted in May and July 2004, and the lease of Porsche was granted in 2006. Further leases of each unit (referred to as reversionary underleases) were then granted on 21 February 2012, in each case demising the unit for a term expiring on 27 May 2022 at the same rent and on the same terms as the leases in 2004 and 2006. These are the leases which BMW has now applied to renew.

10. At various times, licences have been granted for alteration works at 70 PL.

11. The terms of each lease and the reversionary underleases are in the same terms (save of course for the extent of the respective unit and the rent). Each provides for rental increases on 24 June each year by reference to changes in the Consumer Price Index.

12. I also note at this point that BMW formerly occupied other premises on Park Lane, but in 2021 it decided to consolidate its operations into 70 PL, and in June 2022 it gave up those other premises (77 and 56-59 Park Lane), which are currently being marketed and are two of the comparables cited by the experts.

13. At the start of the trial, I refused BMW's application to adduce further witness evidence. My reasons for having done so are set out at paragraphs 166-178 below.

**The two main issues: break clause and rent**

14. As noted, there is no opposition to the grant of the new leases, and it is agreed that these should be for 10-year terms. The most significant issues to be determined are (i) whether the new lease of Central should have a landlord's break clause (it is now accepted that if there is to be a landlord's break clause for Central, the leases of Piano, Bank and Porsche should contain a reciprocal tenant's break clause); and (ii) what should be the rent payable for each unit.

15. Since it is agreed that the presence or absence of a break clause will significantly affect the rents payable, I will first deal with whether there should be a break clause.

**Should there be a landlord's break clause for the Central unit?**

16. KGH seeks the right to determine the lease of Central at any time on 6 months' notice from and including the second anniversary of the term up to and including the fifth anniversary of the term, with an ancillary obligation on BMW to reinstate Central as a separate self-contained unit (KGH's draft lease sets out additional exceptions and reservations as may become necessary).

17. In the event of a break clause being included and a break notice being served, it is accepted that KGH would have to prove a ground of opposition under section 30(1) of

the Act, the only relevant ground being section 30(1)(g), namely that on the termination of the tenancy, KGH intends to occupy the holding for the purpose of a business to be carried on by it therein. If that ground was to be proved at that time, BMW would be entitled to statutory compensation under section 37 of the Act of a sum equal to twice the rateable value.

18. A decision as to whether or not to include a landlord's break clause requires a balance being struck between granting a reasonable degree of security to the tenant on the one hand, and not preventing the landlord from recovering possession if one of the statutory grounds can be proved on the other:

> "In considering what would be proper leases in the circumstances of this case I think that the predominant considerations are two. First, that so far as reasonable the lease should not prevent the superior landlord from using the premises for the purposes of development. Secondly, that a reasonable degree of security of tenure should be provided for the tenants. Those considerations are to some degree in conflict. The function of the court is to strike a reasonable balance between them in all the circumstances of the case."

*JH Edwards & Son Ltd v Central London Commercial Estates Ltd* [1984] 2 EGLR 103 at 104M.

19. In that case, the test applied was whether there was a possibility that the landlords would wish to acquire the premises (see 104E – the first instance decision was overturned but the test applied was endorsed by the Court of Appeal):

> "On the evidence I think that the possibility exists that the landlords for the time being will wish to acquire nos 131 and 131A in order to improve the hotel. The judge, as I understand his judgment, accepted that. At p 30 of his judgment, he said:
>
> '... there is not, of course, any need for the landlords to show anything like a settled intention to redevelop as they would under section 30(1)(f) of the Act. They say, in essence, here that they wish to give the hotel the means to implement the best possible scheme for the future. It suffices, in my view, if they show, and indeed I find they have shown, a possibility of a *bona fide* decision to operate a break clause if one be granted.'"

20. In *Adams v Green* [1978] 2 EGLR 46, the test was expressed as follows:

> "It is, however, to be observed that the landlord would be entitled to object altogether to the grant of a new lease if he had the immediate intention of redeveloping the property – see section 30(1)(f) of the Act - and I would have thought it not inappropriate to include in the proposed new tenancy agreement a provision reflecting the probability or likelihood or possibility of development in the near future."

21. Other cases, such as *Amika Motors v Colebrook Holdings* [1981] 2 EGLR 62, refer to the need for a *bona fide* intention even if that intention is not immediately realisable (see 65A of that judgment).

22. In *National Car Parks Ltd v The Paternoster Consortium Ltd* [1990] 1 EGLR 99 at 101H it was said:

> "There is no dispute as to the relevant law applicable. In cases where a landlord is unable to show that he is immediately in a position to effect a desired reconstruction of the land comprised in the tenancy, if there is a real possibility (as opposed to a probability), that the premises in question will be required for reconstruction during the continuance of the proposed new tenancy, it is right to include in the terms of the new tenancy a break clause which will enable such reconstruction to take place. It is not the policy lying behind Part II of the 1954 Act to permit the rights of the tenant under the new tenancy to stand in the way of reconstruction and redevelopment of commercial property."

23. A break clause may be inserted by the court even if would cause financial hardship to the tenant if it were to be exercised (and the *JH Edwards* case is authority for the proposition that the fact that the statutory compensation would be inadequate is not a relevant consideration). The *Amika Motors* case shows that any financial hardship to the tenant in the event of the exercise of a break clause is one of the competing considerations which needs to be weighed in the balance:

> "Although the learned judge might have given more weight to the hardship likely to be suffered by the tenants, and might have striven to improve their bargaining position for a new lease for the whole of the frontage, the weight to be given to those considerations was a matter for him, and his solution seems to me to be in conformity with the scheme of the Act as a whole."

24. Mr Pryor submits that the test I should apply is whether KGH has established on the evidence that re-occupation of Central is "on the cards" or is "a real possibility". He reminds me that by clause 35 of the Act, the imposition of terms of a tenancy granted by the court (other than in respect of duration and rent)

> "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; and in determining those terms the court shall have regard to the terms of the current tenancy and to all relevant circumstances."

25. Mr Pryor took me to Reynolds & Clark, Renewal of Business Tenancies, 6th Edition, at paragraphs 8-049 for the following propositions (which I set out in the 12 sub-paragraphs taken from his skeleton argument):

    (1) The Court must 'have regard' to the terms of the current tenancy, there is an onus on anyone seeking a change to justify it;

    (2) It is insufficient justification that one party will thereby benefit greatly;

    (3) The Court would be unlikely to allow any change which prejudiced the security of tenure of the tenant in terms of the ability to carry out his business;

    (4) The Court is unlikely to agree to a change the sole purpose of which is designed to increase the rent, such as relaxing a user clause;

(5) The Court will recognise that the terms of the existing tenancy are the result of a free bargain between the parties (or a previous determination of the Court if material);

(6) The Court, not market forces, determines the terms of the tenancy – evidence that other tenants will agree to a term is not irrelevant, but only one factor in the overall consideration;

(7) The Court will not seek to 'petrify' the terms of the lease – if the terms are obsolete or deficient the court may consider this an adequate reason for a change;

(8) The incidence of inflation may justify introducing a rent review clause;

(9) The court will bear in mind all relevant circumstances, including that the tenant may be in a weak negotiating position;

(10) A landlord's proposal to introduce a redevelopment break gives rise to special additional considerations because of the overlap with the policy behind s.30(1)(f);

(11) The fact that one party might argue that the other is compensated for the change by a change to the rent does not justify the change of itself, particularly if the tenant is asked to bear a risk more appropriately borne by the freeholder – changes should not make either party an involuntary insurer of the other's risk;

(12) The overriding principle is whether the proposed change can be justified on the grounds of 'essential fairness' between landlord and tenant, and the relevant RICS Codes of Practice relating to commercial leases may be relevant, *Edwards & Walkden (Norfolk) Ltd v City of London* [2013] 1 P&CR 10 (Ch).

26. The evidence before the court on this issue is that of Mr Salim Khaireddine, who is the sole director and shareholder of Holmanag Ltd. That company runs and manages Aldford House on behalf of KGH, which is part of the K Group of companies. The K Group is a family-run company based in Lebanon, with investments in (mainly) Lebanon, Jordan, Panama and the United Kingdom. Mr Khaireddine made a witness statement in which he talked about KGH's business strategy. He described KGH as a diversified business, with different members of the Khaireddine family contributing their own skills and experience. He became concerned shortly before the COVID pandemic about what a commercial agent told him was BMW's decision to get rid of two of its three premises on Park Lane (in addition to 70 PL, BMW had leases of 56-59 Park Lane and 77 Park Lane, which had been used as a showroom for BMW's electric range of vehicles and as a MINI showroom respectively – I will deal with those other two premises in more detail later, as they are in the list of comparables compiled by the experts in this case), and he said, "That in itself was a red flag about the tenant's intentions and viability at the Building", as the agent was not able to say which of the three Park Lane premises BMW was intending to keep. He said:

> "From that moment, uncertainty and a sense of precariousness was created and the family and I started to suspect that BMW might leave and that the contact received was more about their process of working out which of the units they would let go. This caused us to start thinking what we would do if

> that actually happened, and it triggered a thought process of what we could do from those premises."

27. Mr Khaireddine goes on in his statement to complain about how BMW has been a difficult tenant to negotiate with (he says they have been "contentious and impersonal" and says how

> "BMW has not had one proper conversation or negotiation about terms … no-one has come forward … BMW seem absolutely fixated on litigating and going to Court to deal with what is ultimately a commercial matter, which of course causes me further to doubt where this is all going."

28. Mr Khaireddine says:

> "BMW's conduct is making itself a less desirable and less reliable tenant in terms of the way it is stepping back from the symbiotic relationship previously enjoyed and trying to beat down the rent to levels that are lower than ever before and commercially unrealistic for the Defendant. … This has led to K Group thinking not only more economically about the space, but it has reduced conceptual obstacles if it essentially has a reluctant tenant who has already closed down 2 businesses on the same road. K Group might well be better at running a business here ourselves to give us the greater prospect and certainty of revenue and income over time that does not reverse the income growth we have achieved previously. Accordingly, we requested the limited break clause in the Defendant's Acknowledgment document in November 2021."

29. Mr Khaireddine then goes on in his statement to explain KGH's idea for using the Central unit, and how they have a "concept of where we might start to run a car-related business from the centre showroom space":

> "One of my family has a heavy interest in cars, including classic cars, and is already involved in a motor-vehicle business in connection with American and Chinese vehicles, through which they have some understanding of the industry and connection to networks. We have been contemplating using this prime site for a car-based business ourselves therefore.
>
> …
>
> In the formative stages of our thinking, an intermediary has already introduced to me the interesting concept of an existing business that converts upscale and classic cars to electric and zero emission vehicles. They are a fast-growing and successful business. There are various options that we could contemplate, such as using that entity's know-how in supplying our business with the skills and technology required to develop that innovative market. As with Danesfield House [a hotel and spa business in Buckinghamshire], we will assemble an appropriate management team to operate the business. However, anything is possible as we plan, as we refine the best opportunities. For the Defendant there is no need to look anywhere else from which to conduct a car-based venture. The Defendant already owns valuable real estate

> on one of the best streets in London that has long been noted for car showrooms. It is a readymade opportunity.
>
> I appreciate that in order to implement the break clause the Defendant will have to serve a notice to terminate for the specific reason in that clause and follow certain English legal procedures and laws, so that we may need to give further evidence of our intention at that time in order to terminate the lease. That could be more than 5 years away, and I am confident of being able to show a full and evidenced specific intention to operate the family's own business at the relevant time, since by definition in order to exercise the break clause the Defendant will already have committed to pursue a project."

30. Mr Khaireddine was cross-examined about KGH's intentions.

31. He was taken to what the K Group says about its investments on its website, and he agreed that KGH's policy was to ensure that it knew about the businesses in which it invested, and that KGH was a serious company that likes to have a thorough understanding and a deep knowledge of the markets it invests in, but said that KGH might look outside its existing businesses for new investment opportunities (he referred to "any other area that could make money".) Mr Khaireddine described how he would report on matters to the other members of the family in Lebanon, and agreed that they would need to run through any analysis he provided and think about what to do, describing the company's plans as an "iterative process" (a phrase used in his witness statement) by which matters were discussed back and forth between him and the family in Lebanon. Mr Khaireddine agreed that a car business would be an entirely new business for KGH, and went on to give a bit more detail about the company's intentions:

> "… one of the family, one guy of the family he knows little bit about cars. He is reading a lot about electric cars. I told him when I was in China [before COVID] I met with two companies that were looking for agencies and we kept this in mind to see what's happening with BMW."

32. He referred to the electric car market, and said "we are [a] little bit inclined to have a study and see the possibilities." He then referenced his thoughts when BMW closed its operations at the other two Park Lane premises, and that BMW's rental offer for the new leases was "60% less than the existing rent … We have to – we have to pay the mortgage. We have to pay the expenses." Mr Khaireddine agreed that there was not one document he had or could now produce relating to any corporate discussions about running a car business from Aldford House, "because it's not a final decision that the – the company or the family would use – could be something else. But they would take the business – their own business because it's more producing we think than what we were offered." He agreed that these thoughts started in 2019, before COVID. He agreed with Mr Pryor that what he had described in his statement had no analysis behind it, but because of KGH's experience with lots of different businesses he thought it would not be difficult to make it work. Again, Mr Khaireddine emphasised how these thoughts built up because BMW were not contacting him. He accepted that there was nothing from the Chinese contact because he was waiting to see if KGH obtained a break clause. There was then the following exchange:

> "Q: But if you don't get the break clause, then you're not going to carry out any more work on this, you're not interested any more?
>
> A. Well, we will see, we will see. The family, what they say, if we get the business -- the break clause, or if we didn't get the break clause."

33. Mr Khaireddine said that no decisions had been made about precisely how or where the conversion of cars to electric vehicles would take place and accepted that no decisions had been made so far. He agreed that the new business "might need planning … that's why we said two years." He said that if the break clause was achieved, then the company could work on it. He denied the suggestion that the proposed timing of the break was calculated to cause problems for BMW and to negotiate a higher rent, and he did not accept that it was obvious that taking back the Central unit would cause the most harm and inconvenience to BMW.

34. Mr Khaireddine accepted that by the time BMW formally sought new leases for the units at 70 PL, any uncertainty about whether BMW would be staying at 70 PL effectively evaporated, but said that he remained concerned about the level of rent being offered: "That's why we thought our own business, generating our business, we can make up for the rent."

35. Mr Pryor submitted that the evidence shows that any car-related business would be a new area of investment for KGH and would not be a natural extension of its existing businesses. He emphasised that the evidence about KGH's intentions was all very vague – there was an unnamed relation who knows about the business and an unnamed company which was said to be interested in converting classic cars to electric power, no consideration of where these conversion works would take place, and not a single document to support any of this, which he described as extraordinary. Mr Pryor said that in all of the reported cases where a break has been granted, the landlord's plans have been well advanced, or documented, or supported by the surrounding circumstances. For example, in *Adams v Green*, the judge at first instance had said (emphasis added):

> "The terms must depend on all the facts. The most material is, how ripe the premises are for redevelopment. I find here that these premises are not ripe for redevelopment at present. It is more a thought for the future than something likely to come very soon. On the other hand, redevelopment is, in my judgment, sufficiently on the cards to make it unjust to saddle the landlords with a 14-year lease with no break clause."

36. In *Amika Motors*, by the time of the hearing the landlord had got back part of the building not let to the tenant and as part of its decision to develop the whole it had applied for permission.

37. In the *JH Edwards* case, there was a board resolution confirming that it would be necessary to obtain vacant possession in order to carry out works; there was evidence of a "present urgent intention", and a letter which the landlord's surveyor had written referring to the landlord's intentions.

38. In *Peter Millett & Sons Ltd v Salisbury Handbags Ltd* [1987] 2 EGLR 104, the landlord's intentions to take back possession for a subsidiary to run a sweets business

"was conceived late and the evidence of an effective intention to do so is sketchy", but nonetheless "the landlord should be given an opportunity to establish a genuine and workable intention to trade in the shop through [the subsidiary]". This contrasts with the present case, submitted Mr Pryor, because in Peter Millett there were board resolutions of the landlord and its subsidiary, and even this "late" and "sketchy" evidence was enough, whereas here there is not even one single document relied on by KGH.

39. By contrast, in the present case the evidence was no more than in Mr Pryor's submission "speculative musings that have not generated a single word, names, or any specifics." He described KGH's stance as "speculative and opportunistic kite-flying". Mr Pryor said that the effect on BMW of the exercise of a break clause would be extremely harmful, and he drew support for this from the evidence of Mr Learmonth, the manager of BMW Park Lane, who said that it would make it impossible for BMW to function from 70 PL without the Central unit. However, it is right to note that in 2022 BMW spent some £2m consolidating its units at 70 PL whilst already knowing that KGH was seeking a break clause (Mr Learmonth accepted that his evidence to the contrary was incorrect).

40. Mr Jourdan pointed out, in his submissions, that it was not put to Mr Khaireddine that he was not telling the truth about any of this, and that whether KGH's plans were speculative or unconvincing was not the test, emphasising that the proper question was whether there was a real possibility that KGH may be able to establish ground 30(1)(g) in the future, and whether the presently-held intention was genuine.

41. As was held in *Dolgellau Golf Club v Hett* [1998] 79 P&CR 526:

> " It is not an incident of the statutory formula, nor of the present judicial gloss on it, that a landlord, in seeking to satisfy the court of the reality of his intention, should be subjected to minute examination of his finances with a view to determining the financial viability and durability of the business he intends to establish. The court is not there to police a landlord's entitlement to recover possession of his own property by examining the financial wisdom of his genuinely held plans for it.
>
> Nor will it always be appropriate to test the reasonable practicability of a landlords intention to establish a business by reference to the presence or absence of detailed building plans, planning and licensing consents or indications and the like. As Balcombe L.J. observed in *Palisade Investments Ltd v Collin Estates Ltd* (1992) 2 EGLR 94, CA , at 97:
>
> '… the Act was intended to be construed sensibly, so as to hold a fair balance between landlord and tenant. It is not … to be construed so as to create a series of artificial hoops through which the landlord must jump before he must satisfy the necessary intention.'"

42. Mr Jourdan said that the lack of documents at this stage was not surprising, as any work on plans would be entirely wasted if the break clause was not achieved. There was no doubt that KGH had the financial capability of setting up and running a car business if it so wanted. He submitted that any risk to BMW of being left with only Bank and Porsche was removed by KGH's acceptance that if it achieved a break clause, there

should also be corresponding tenant's break clauses for the remaining units (including Piano).

43. Whilst I agree with Mr Jourdan that it was not suggested to Mr Khaireddine that he was not telling the truth in his evidence, I have no doubt that there is a difference between, on the one hand, a landlord's intention which is sketchy and relatively unformed but nonetheless genuine, and, on the other hand, a real intention but which is speculative and vague. It strikes me as a matter of evidence. Is there evidence that persuades me, on balance of probabilities, that the landlord's intention in relation to the business Mr Khaireddine describes is (to use some of the phrases from the authorities) "sufficiently on the cards" or "genuine and workable" such that it amounts to "a possibility of a bona fide decision to operate a break clause if one be granted"?

44. In my judgment, Mr Khaireddine's evidence about a new car business to be operated from the Central unit is, for the reasons set out by Mr Pryor, so vague and unsupported by anything other than his say-so (I remind myself that any decision of the landlord would have to be that of KGH and not merely made by Mr Khaireddine alone) that it does not satisfy that evidential test.

45. I have no doubt that thinking about running a business from the Central unit was prompted by Mr Khaireddine feeling slighted by BMW and by his concerns at the level of rent being offered, but imprecise and unclear possibilities not evidenced by anything other than some vaguely referenced meetings or discussions are not enough to persuade me that on balance KGH should be entitled to a break clause. I also find that there was an element of tactics about the proposed break clause, which was a reaction to BMW's proposed rent being perceived as far too low. This is not a matter of placing artificial obstacles in the way of KGH's intentions – it is a question of whether such an intention is more than just a mere thought which has not matured into a genuine and workable decision.

46. In my view, on the evidence, it is not, and for that reason, I reject KGH's contention that the Central lease should contain a landlord's break clause.

47. Mr Learmonth said in his statement:

> "If we lost the central section it would render the northern (former Bank premises) showroom and southern basement unusable as we would not be able to get vehicles into those areas to display."

48. He all but accepted in cross-examination that if necessary, the layout could be revised and cars could be brought in other than via South Street. However, his essential point was that without the Central unit, the showroom would not make practical or commercial sense, and I accept that evidence. Whilst it would be possible in the event of a break clause being exercised to have (say) MINI in the Bank unit (as now), and BMW Motorrad (motorbikes) in the Porsche unit (at present, there is a bike showroom in the basement, with cars on the ground floor), and that BMW cars could be relocated to new premises, I accept Mr Learmonth's evidence that this would be commercially very bad news for BMW and would not be reasonable for BMW's purposes. Certainly, it would rip the heart out of 70 PL as a flagship showroom for BMW if it could not display any BMW cars there.

49. Conducting the balancing exercise, it seems to me that when one weighs up the inadequate evidence of KGH's intentions with the dramatic effect the break clause would have on BMW, there is no doubt in my mind that this reinforces my decision that there should not be a landlord's break clause. I had reached that conclusion even without taking Mr Learmonth's evidence into account.

50. Had I reached the opposite conclusion, I would not have been persuaded to include a clause increasing the rent in the event the break clause was not exercised (in other words, removing the rental discount which would have been applied had there been a break clause, which is what Mr Jourdan sought). On that point, I agree with Mr Pryor that it would be unfair on BMW to have the possibility of a break clause being exercised hanging over it for 2-5 years with in addition the prospect of an increased rent if it were not so exercised. It seems to me that had I decided that the landlord was entitled to a break clause, the rent for the whole period of the lease ought to reflect that, without any increase if the break was not exercised. However, because of my decision on the break clause, this issue does not arise for decision, nor does the suggestion, made by Mr Pryor in closing but not before, that the break should only be at 5 years.

## Rent

51. The parties are a long way apart on the headline rent for the four units.

52. BMW contend for a rent somewhere in the bracket £76-£100 psf (per square foot).

53. KGH contend for a rent of £228 psf.

### *The principles*

54. There is no disagreement as to the principles to be applied, and I can take these from Mr Jourdan's skeleton argument.

55. The rent is to be determined by the court in accordance with section 34 of the Act:

> "(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…
>
> (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."

56. The valuation date is the date of commencement of the new tenancy, which is 4 months after the final determination of these proceedings including time allowed for any appeal: section 64 of the Act. The court must thus determine the rent as at the date of the hearing, giving any appropriate allowance for any changes that may occur between the hearing and the commencement of the new tenancy: *Lovely & Orchard Services Ltd v Daejan Investments (Grove Hall) Ltd* [1978] 1 EGLR 44 at 46-47.

57. The "reality principle" applies - save insofar as is specifically required by the disregards in section 34 of the Act, the holding under each lease is to be valued as it actually was at the valuation date. In a statutory open market valuation based on a hypothetical transaction: "…things are to be taken as they are in reality on the valuation date, except to the extent that the instrument postulating the hypothetical transaction requires a departure from reality". Counter-factual directions must be given effect to but "… no further than their terms make strictly necessary": see *Harbinger Capital Partners v Caldwell* [2013] EWCA Civ 492 at [23] and *Trustees of Sloane Stanley Estate v Mundy* [2018] 1 WLR 4751 at [32-34].

58. In an open market valuation, the willing buyer or willing tenant is an abstraction, a hypothetical person, but

> "… he also reflects reality in that he embodies whatever was actually the demand for that property at the relevant time. It cannot be too strongly emphasised that, although the sale is hypothetical, there is nothing hypothetical about the open market in which it is supposed to have taken place. The concept of the open market involves assuming that the whole world was free to bid, and then forming a view about what in those circumstances would in real life have been the best price reasonably obtainable"

See Hoffmann LJ in *Lady Fox's Executors v Commissioners of Inland Revenue* [1994] 2 EGLR 185.

59. Where in reality the real tenant occupies premises other than the holding being valued then that occupation must be taken into account, and if they would be a prospective lessee of the holding, on the assumption that it was vacant and to let, their bid must be taken into account: see *First Leisure Trading v. Dorita Properties* [1991] 1 EGLR 133, *British Airways Plc v. Heathrow Airport* [1992] 1 EGLR 141 and *J Murphy & Sons Ltd v Railtrack plc* [2002] 2 EGLR 48. If premises have particular value to the occupier of the adjoining property, so that they would pay more than anyone else, that additional

value must be reflected in an open market valuation: see *Inland Revenue Commissioners v Clay* [1914] 1 KB 339.

60. It follows that, in applying section 34 in the case of one unit, the statutory disregards only apply to that unit, not the other units.

61. Mr Jourdan gives the following example in his skeleton argument:

> "Accordingly, taking the Porsche Unit as an example, any effect on rent of the occupation of the Porsche Unit by BMW or of improvements made by BMW to the Porsche Unit falling within s.34(2) must be disregarded. But the same is not true in the case of the other three Units. The Porsche Unit must be valued by reference to reality as far as those Units are concerned. The valuation must be undertaken having regard to the actual physical condition and use of those Units.
>
> Further, by the valuation date, an order will have been made that BMW is to be granted a new lease of each of those Units, and therefore the valuation of the Porsche Unit should be on the basis that BMW will be the tenant of the other Units for the next 10 years, except in the case of the Central Showroom Unit if the landlord's break clause is included in the new lease".

62. This gives rise to the concept of BMW as a "special purchaser" when valuing another unit as BMW would be regarded for that purpose as already in occupation of the other units.

***My approach***

63. I need to decide the appropriate rent psf for each of the four units separately.

64. What I have decided to do is to form a view on an overall headline rent for the Bank, Central and Porsche units, and then decide whether that headline rent should be altered by any applicable factors. I then need to decide whether the Piano unit is to be valued as ancillary space, or as a standalone unit.

***The expert evidence***

65. For BMW, expert valuation evidence came from Mr Duncan Locke of McWhirter Locke. He has a BSc in Urban Estate Surveying and is a Fellow of the Royal Institution of Chartered Surveyors. He has been a property agent, consultant, and valuer since 1986 and has experience in many property sectors.

66. KGH's expert valuer was Mr Francesco Perri. He works for The Lorenz Consultancy, having passed the RICS's Assessment of Professional Competence in 2016. He started work with Lee Baron in 2014, dealing with all aspects of rent reviews, lease renewals, and lease restructurings, concentrating upon offices, retail and industrial, within the main UK cities, before joining his present firm in 2017. He holds a BSc in Business in Property and is a Member of the Royal Institution of Chartered Surveyors.

67. There are a number of car showrooms in Mayfair. These are either on Park Lane itself, or they are on or near Berkeley Square, an area referred to as the Berkeley cluster. There is no difficulty in identifying any of these comparables, and there is broad

agreement as to the size of those other showrooms and the rent being paid for them, but each side's expert valuer draws different conclusions about first the relative desirability of Park Lane and Berkeley Square and secondly the conclusions to be drawn from the comparable evidence.

68. I had the benefit of reading Mr Locke's report, his responses to questions put to him and his supplemental report. There were many appendices to the reports. Similarly, I had the benefit of reading Mr Perri's report, and his supplemental report. Mr Perri and Mr Locke also produced a joint report, and – most helpfully – a schedule giving details of the various properties which the experts have identified as comparables.

69. I think it fair to say that Mr Locke's oral evidence had something of a shaky start. At the outset, in examination in chief, Mr Locke said he wanted to increase his figures in his report to take account of BMW being a special purchaser and he gave various percentages of increase depending upon whether there was a landlord's break clause for the Central unit and a tenant's corresponding break for the other units. He was more than a bit uncertain about those figures, and revised them again after the short adjournment. I thought that Mr Locke seemed rather uncomfortable about this, and that his subsequent oral evidence never fully recovered.

70. In contrast, Mr Perri was very confident about his evidence, but this was to the point of self-satisfaction, and there were times when I thought he was less trying to help the court than assuming the mantle of an advocate for KGH.

71. Overall, I felt that Mr Locke was too critical of Park Lane, and Mr Perri talked up Park Lane too much. Mr Locke was prepared to move upwards in his valuations in the light of the special purchaser point (although without being able to give a real explanation of his figures), but Mr Perri was immovable and stuck rigidly to his valuation, which is at the very highest possible end, and I thought that was unrealistic.

72. In my judgment, by way of a general comment, it is clear that each of the comparables has its merits and demerits, its advantages and disadvantages, in terms of location and what each offers to a potential tenant, such that it has been relatively straightforward for me to decide – with the assistance of the expert evidence – which comparables are the best guide to what should be the correct rent for the units at 70 PL.

73. I have been greatly helped in my determination of the rent issue by the site visit on the morning of the second day of the trial. Accompanied by counsel on both sides as well as by Mr Locke and Mr Perri, we walked along Park Lane, seeing the outside of (but not inside) each of the comparables there (some of which are presently available to let and are boarded up). We also visited 70 PL where we did go inside and had a short tour of all four units. We then walked towards Berkeley Square and looked at (but not inside) the comparables there, as well as going to look at (but again not inside) Porsche on Piccadilly.

74. The general theme of Mr Locke's written and oral evidence was that Park Lane was not as prestigious as the Berkeley cluster, and attracts a lower rent, whereas Mr Perri's theme was that Park Lane was as good if not better (particularly as 70 PL is, amongst the other Park Lane showrooms, unique), and should attract a rent broadly equivalent to that being paid by Lotus in Berkeley Street/Piccadilly (which is the most recent car showroom transaction in Mayfair). Indeed, Mr Perri says that Lotus (as well as the

expected transaction which Aston Martin are thought to be about to complete in the Berkeley cluster) is in reality the only true comparable. Mr Locke says that there are other reasons for Lotus having agreed a transaction at the level it did, and he says it is not a true comparable for 70 PL. I recognise that what I saw and what was pointed out to me during the site visit is not evidence in the case, but I was assisted by the site view in assessing the expert's evidence.

75. In so doing, I have taken into account the RICS Professional Standard "Comparable evidence in real estate valuation", 1st Edition (October 2019), which at section 4.6 sets out guidance on "Hierarchy of evidence". These are listed in categories. Category A is direct comparables, Category B is general market data, and Category C is other sources (such as interest rates). Market evidence (that is, information derived from comparable market transactions) it is said will normally provide the best evidence of value and should be "recent, relevant and comprehensive. It may come from a variety of sources." Examples given are direct transactional evidence, publicly available information, published databases, asking prices and historic evidence. Some of the information about the comparables in the present case cross over a number of these different sources. I note the warning that asking prices should be treated with caution as they do not provide reliable evidence of value, but sometimes it may be the only evidence available, "and if interpreted carefully by an experienced valuer, asking prices can provide some guidance on current market conditions and trends in value". It is also noted that "historic out-of-date evidence can sometimes still be useful if combined with knowledge of market trends between the date of the comparable transaction and the valuation date".

76. I now need to say a few words about each of the comparables, as well as saying something about 70 PL itself.

***The Park Lane comparables***

77. ***Bob Forstner, 118-127 Park Lane***: This is an independent car showroom displaying a number of vehicles. It describes itself on its website as "the UK Brabus Flagship Store" (Brabus being a developer and builder of high-performance vehicles based on the Mercedes-Benz brand). Bob Forstner comprises 4,456 $ft^2$ and is held on a lease with a headline rent of £49.22 psf. Both Mr Locke and Mr Perri agree that Bob Forstner is not a good comparable for 70 PL for a number of reasons, principally because of its inferior location, and I agree. I have not taken it into account when determining the rent for 70 PL.

78. ***Aston Martin, 113 Park Lane***: These premises (run as a dealership, and not by the car company itself) comprise a total of 3,876 $ft^2$, of which 461 $ft^2$ is ancillary space and the rest is showroom space. Whilst there is no agreement between Mr Perri and Mr Locke as to the rent psf, it is said to be between £70.76 and £79.20 psf but there is an outstanding rent renewal from 2021. Mr Locke thinks that these premises (which I will refer to as 113 PL) are in a good location, being where Park Lane meets Upper Brook Street (which leads down to Grosvenor Square), and right next to the traffic lights (so that it is very visible to cars stopped at the lights along Park Lane and at Brook Gate (which is the entrance to Upper Brook Street – there, cars will be facing 113 PL and drive down the side of the showroom as they leave the lights and progress along Upper Street). Mr Perri thinks that the premises are not in such good location, particularly since cars passing it have only just navigated the Marble Arch junction. Whilst all of

these matters are somewhat subjective, it did seem to me that 113 PL is an attractive and good location, and the Aston Martin showroom looks impressive, albeit that it has a major issue in that it is in two parts, each being separated from the other by a central entrance to the upper floors of the building.

79. ***77 Park Lane***: These premises comprise 5,758 $ft^2$ of ground floor space and 3,498 $ft^2$ of basement space, a total of 9,256 $ft^2$. I will refer to it as 77 PL. It was formerly let to BMW and was operated as a MINI showroom (BMW later moved its MINI showroom to 70 PL, where it now occupies most of the Bank unit on the ground and basement floors). 77 PL is being marketed through Savills with a rent of £99.90 being quoted and so far as both Mr Locke and Mr Perri are aware, it has not yet been let. The problem with 77 PL is said by Mr Perri to be its location. As one approaches it along Park Lane, one sees a large Esso sign (for the petrol station on the corner with Mount Street) and next to the garage is a Londis supermarket. Mr Perri says that 77 PL is not "best in class" and in contrast to 70 PL would not provide a flagship location. I agree with Mr Perri that it is not as good a premises as 70 PL.

80. ***56-59 Park Lane***: This has a total of 6,571 $ft^2$, being 3,197 $ft^2$ on the ground floor and 3,374 $ft^2$ in the basement, and I will refer to it as 56 PL. BMW was again the former tenant of 56 PL, and used it as a showroom for its range of electric vehicles. It is presently vacant. The quoting rent is £375,000 per annum, which results in a figure of £76.78 psf. Both experts agreed that these premises were now under offer, but there was no agreement as to the rent which might have been agreed. Mr Perri expresses the view that 56 PL is not as prominent as 70 PL, and although I note it is being marketed as a flagship showroom, I agree.

***70 Park Lane***

81. 70 PL is of course the Aldford House premises which are the subject of these lease renewals. BMW operates 70 PL through a wholly-owned dealership company, Park Lane Limited. BMW describes 70 PL as "the flagship store in the UK for BMW and MINI products" and as "our iconic flagship store" (descriptions which Mr Learmonth, BMW's managing director of the 70 PL showroom, somewhat inexplicably either eschewed or played down), and I think it is clear that it is an impressive showroom and worthy of the "flagship" soubriquet.

82. In contrast to the other comparables on Park Lane (save to an extent 113 PL, the Aston Martin showroom, which is across the whole ground floor of the block but in two separate parts as I have described), 70 PL occupies the whole of the ground floor of Aldford House fronting Park Lane, Aldford Street and South Street, and although again these things are subjective I think it is rightly referred to as a flagship and as iconic. That is not to say that 70 PL does not have its own issues, although I was told it generates more sales than any other BMW dealership in the country (many of these are online sales).

83. First, as presently arranged, the only vehicular access is via the Porsche unit on South Street, which means that all vehicles going in and out must use that access (there are dropped kerbs also on Park Lane, but it is a red route, there is a double bus stop very near to the Bank unit, and as presently configured none of the doors on Park Lane will allow vehicular access). Secondly, inside the Central unit are a number of pillars which means that cars can only be parked parallel to Park Lane, which limits the way in which

cars can be displayed. Thirdly, the east side of Park Lane is the boundary for the Congestion Charge, and there is no customer parking at 70 PL. That means that anyone visiting the showroom by car must either park in the underground car park at Hyde Park, or pay the charge. Fourthly, there is no dedicated hand-over bay for new (or used) cars, and nowhere to display used cars; these are parked in the underground car park.

84. There are other points which seem to me again to be a matter of subjective opinion; first, Mr Locke says that the presence of the bus stop near the Bank unit on Park Lane and the railings near the side return on Aldford Street are a detriment, but for my part I think neither is a significant factor; and secondly, there is an internal raised area known as the lightwell (shown green on the lease plan at paragraph 4 above) which Mr Locke would devalue, but which seemed to me to be a rather striking area in which to display (as it does) a single M-Sport vehicle, emphasising BMW's motor-sport heritage and creating something of an aspirational viewing space for potential purchasers of other (less expensive) cars in the range.

***Park Lane and the Berkeley cluster***

85. Before leaving the Park Lane properties and moving on to those in the Berkeley Square cluster, I think I need to say something about the two areas, bearing in mind what each expert said about them and what I saw at the site visit.

86. In my view, the position was well summarised in an Independent Expert Determination by Mr Shaw BSc FRICS ACIArb from July 2018. Mr Shaw had been appointed to determine the open market rent for 77 PL with effect from 24 June 2017, at a time when BMW was the tenant of 77 PL. Mr Locke had acted as BMW's expert in that determination, and Mr Nash was the expert for the landlord.

87. At paragraph 12 of his determination, Mr Shaw said this:

> "12.2 At the heart of this case is the comparison of Park Lane and Berkeley Square as showroom locations. Mr Nash considers that there is effectively parity between the two while Mr Locke opines a significant difference.
>
> 12.3 Park Lane has historically been a flagship location but over the years, market sentiment is that attention has shifted to Berkeley Square and surrounds. Of course the locations are quite different. Park Lane has the branding potential given the throughput of traffic, principally travelling from north to south. It also has the historic prestige as well as proximity to some of the most well-known hotels and high value residential accommodation.
>
> 12.4 Berkeley Square, on the other hand, has the current prestige as well as proximity to significant office occupiers, high value retailing and high end dining. It also benefits from on-street parking around the square.
>
> 12.5 I note the competition for space in Berkeley Square as highlighted by Mr Nash both from car showroom operators and restauranteurs with the few units that have become available being taken by the restaurant operators. This has resulted in a lack of open market showroom evidence and while bids

> by showroom operators (subject to planning) is interesting and part of the dynamic of the current market, those bids cannot be considered empirical evidence of showroom lettings."

88. As one walks from Park Lane to Berkeley Square, there is certainly a different feel to the two areas. The Berkeley Square/Street area has a "buzz" about it, and in contrast to Park Lane has many more retail shops and restaurants or cafes, as well as a cluster of car showrooms, all of which might justifiably be called "up-market". Berkeley Street itself leads up to Piccadilly, just opposite the Ritz hotel. Mr Perri described the Piccadilly end of Berkeley Street as "a retail epicentre", and there is certainly something of a feel of allure about the Berkeley cluster which is absent from Park Lane. On the other hand, there is something about Park Lane's slightly understated elegance which enables it to rise metaphorically above the Park Lane traffic to a level of sophistication which the Berkeley Square area does not match (but which it makes up for in glamour).

89. I must stress again that this is all a matter of subjective opinion, and it may be that words such as "glamour" and "sophistication" may be said to be judicial hyperbole (I recognise that neither word was used by the experts), but since both sides insisted on a site visit for a number of reasons – one of which was to demonstrate each side's different views about the relative attractiveness of each area – it seems to me that I am entitled to have come to a view and to express it in this judgment.

90. In his report, Mr Locke says this:

> "Whilst Park Lane benefits from the international name, on the other hand it is a 'one side only' street with Hyde Park on the opposite side. As a result, Park Lane is very quiet from an on-foot shoppers and retail perspective with no noticeable improvement in the quality of ground floor retail or showroom occupiers in recent years. There has been little change from a retail perspective and the change from a car showroom perspective is the closure of no 77 Park Lane, the former MINI showroom next door and BMWi at 56-59 Park Lane in 2022. There has been little or no car showroom open market letting activity in Park Lane since the new open market letting of 56–59 Park Lane to BMWi some 10.5 years ago. BMW signed a new lease of these premises in December 2011 which expired in June 2022. The marketing of the showroom at 77 Park Lane and 56–59 Park Lane will be an important indicator of the strength of the Park Lane location, or otherwise."

91. The reasons given by Mr Locke for saying that the Berkeley Square cluster locations are "clearly superior" to Park Lane include greater footfall, proximity to restaurants, clubs, and retail shops, the high demand for such space in the Berkeley cluster, better transport links and the continued improvement in that area as a destination.

92. Mr Perri commented on the Park Lane location in his supplemental report, citing the benefits of Park Lane being outside of the congestion charge (I have already mentioned this, I think it of marginal benefit), and how the traffic volume (greater on Park Lane than Piccadilly, and certainly heavier than in Berkeley Square/Berkeley Street) would assist the operator on Park Lane. Mr Perri also referred to the footfall generated by the proximity to the hotels on Park Lane, which he said provide "a good pool of potential customers". Mr Perri went on to state:

> "Mr Locke refers to a decline in demand for Car Showrooms in Mayfair but in my opinion the only area of decline is for basic Car Showrooms and there is an increase in demand for 'best in class' showrooms. If we take Lotus as a prime example, at the time of their acquisition there were three former 'Car Showrooms' available, two on Park Lane and one on Berkeley Street. In my opinion none provided the grandeur or flagship consumer perception 73 Piccadilly does, which is akin to 70 Park Lane. Lotus had the option of the three showrooms at the time of acquiring 73 Piccadilly, which did not have planning consent for Car Showroom use (sui generis), which I have addressed earlier in my report, and were willing to make a compromise and acquire 73 Piccadilly under a retail use, with a view of gaining showroom use in the future solely for the fact that the unit provides the flagship opportunity they were seeking to represent their brand."

93. In my view, it is the relative ascendancy in popularity of the Berkeley cluster over Park Lane, particularly as a destination retail area, as identified by Mr Shaw, which has driven a desire to be associated with that area and with tenants such as Bentley, Ferrari and Rolls-Royce. To some extent, it seems to me that this is self-generating; the more up-market retailers move there, the more others who are or who aspire to be up-market want to be there. It is this, in my judgment, which explains why (as I shall go on to comment on in more detail) Lotus and Aston Martin are prepared to pay what in my judgment is well over the odds for premises in the Berkeley cluster. I therefore agree with Mr Locke about all of this, and prefer his evidence on the relative attractiveness to potential tenants of car showrooms of the Berkeley Square cluster over Park Lane.

94. It is also worth noting that there is what I believe to be a difference between BMW and the car brands which are sold from the other comparable sites. BMW's natural competitors are Mercedes and Audi, neither of whom have a presence in Central London (although Audi did have a showroom on Piccadilly for a short time). The other car brands operating from the comparable premises are Aston Martin, Bentley, Bugatti, Ferrari, Rolls-Royce (which happens to be a wholly owned subsidiary of BMW), Range Rover, Porsche and Lotus (leaving aside Bob Forstner/Brabus, but these are also very expensive cars – the main display in the showroom at the time of the site visit was a Brabus/Mercedes G-Wagen on offer at just shy of £500,000). These are all what one might call aspirational cars, and are certainly more expensive than the average more mainstream MINI or BMW (I accept that one could pay well in excess of £130,000 for a highly-specified M-Sport BMW, but I think I can take judicial notice of the fact that most BMW and MINI sales are at a far lower level than that). I mean no disrespect towards the cars made by BMW, but it does strike me that BMW looks to a different market and may have different potential buyers when compared to the others, and may well see sales at a higher volume (in numbers if not in £ per transaction) than the others. It is perhaps a pity that there was no expert evidence about any of this (some could possibly have been obtained from say a representative from the Society of Motor Manufacturers and Traders) which might have helped me assess whether BMW indeed is unique amongst the others as I rather suspect it is. As it is, I have to do my best on the evidence before me.

***The Berkeley Square cluster***

95. ***15-17 Berkeley Square – Bentley***: These premises comprise a total of 10,979 $ft^2$, with 6,250 $ft^2$ of ground floor space, and 4,459 $ft^2$ of basement space. They are operated as a

Bentley and Bugatti dealership by Jack Barclay, which has had a presence here for many years. The rent is £112 psf (following a lease renewal in January 2018). It is a prominent showroom, fronting onto Berkeley Square with return frontage on Bruton Street (the rear portion of which is branded Bugatti, where if so inclined one can purchase "The Ettore Shot", an espresso served in a Bugatti carbon fibre espresso cup, for £50, a price which includes access to the showroom lounge). The premises have a car lift from the ground floor to the basement level. It appears to be a very smart, up-market dealership.

96. ***Berkeley Square House – Ferrari***: This is a Ferrari dealership run by HR Owen. There is 3,600 $ft^2$ of showroom space on the ground floor only. The rent here is agreed at £123.83 psf from September 2019 with a 20-year lease. Again, it is a fine-looking showroom.

97. ***14 Berkeley Street – Range Rover***: This dealership is run by Pendragon Stratstone. There is 2,427 $ft^2$ of ground floor space and 2,555 $ft^2$ of basement space. The rent is £86.38 psf. It is agreed that there are issues with these premises, notably that it is a narrow and deep showroom which means only one car can be displayed near the entrance face on.

98. ***18 Berkeley Street – BYD***: Formerly run by Pendragon Stratstone trading as Jaguar, these premises are being fitted out for BYD, a Chinese electric car company. There is 2,455 $ft^2$ of ground floor space and 1,768 $ft^2$ of basement space and the rent is said to be between £75 and £85 psf. Perhaps that difference between the experts does not much matter, as again it is agreed that this is space with issues, as it is also a narrow and deep showroom.

99. ***50 Berkeley Street – Rolls-Royce***: This is a fairly newly developed dealership, run by HR Owen, built on part of the site formerly occupied by Sainsbury's as a supermarket (Sainsbury's still operate a supermarket next door, having sold part of the corner plot to allow for the construction of the showroom and they now run a Sainsbury's Local next door in the remaining part of the plot). There is not much between the experts on rent and they have agreed a figure of £123.97 psf. There is 4,930 $ft^2$ of ground floor space here. The Rolls-Royce showroom is impressive. As with the Lotus showroom, quite some time was spent looking at how this showroom was promoted at the time planning permission was applied for, and I will deal with this in more detail below.

100. ***1 Berkeley Street/73 Piccadilly – Lotus***: The rent for this newly created showroom (which was due to open the day after our site visit) is £228 psf for 2,650 $ft^2$ on the ground floor and 1,970 $ft^2$ in the basement (these are approximate and unconfirmed figures). Mr Perri relies on Lotus as the prime comparable; Mr Locke says that there are reasons why it is not. As with Rolls-Royce, I will look at Lotus in more detail below. The showroom was not open to visitors at the time of our site view, but it has been trailed online by Lotus, and looks high-tech and state-of-the-art.

101. ***83 Piccadilly – Porsche***: This showroom has 4,895 $ft^2$ on the ground floor and something between 3,671 $ft^2$ and 3,746 $ft^2$ in the basement (the experts are not agreed on the precise basement square footage). It was let in September 2019 and there is nothing of substance between the experts on the rent, £72.86 psf according to Mr Perri and £72.46 psf according to Mr Locke. The location is seen by the experts as not quite as good as the others in the Berkeley cluster, being further along Piccadilly away (and

the wrong way) from Green Park Underground station, with a lowered ground floor such that the cars on display are lower than the pavement level. I agree with them. Test driving of cars is not permitted from this site.

***Discussion***

102. As I have noted, a lot of time at the trial was spent considering the Lotus and the Rolls-Royce premises.

103. Originally, Mr Locke had discounted Lotus as a true comparable because he believed on the basis of what he had seen in some of the planning documentation that it was to be a retail store selling Lotus-branded merchandise but not cars (thus it was not a car showroom). This proved to be a wrong assumption, as Mr Locke accepted at the trial.

104. Lotus, as is fairly well known, is a British car company based in Norfolk (it is majority-owned by a Chinese company). Lotus has a strong Formula One racing heritage, and manufactures and sells a small range of sports cars. Lotus currently has a three-car range, the Emira, the Evija and the Eletre. The latter two are electric vehicles, and the Emira is said to be the last Lotus powered by a combustion engine. Lotus prices range from about £81,000 for the Emira up to a starting price of around £170,000 for the Eletre, with the Evija being a limited production "hypercar" which it is reported in the press will sell for around £2m. That is not a typographical error.

105. On 28 April 2022, Lotus issued a press release about its plans for a Piccadilly showroom:

> "Currently under construction, the all-new Lotus store's prime position makes it the perfect location to offer direct sales of Lotus cars to customers. As a brand beacon it will boast more than 450m$^2$ of stunning retail space over two floors and serve as the perfect shop window for the Eletre hyper-SUV, the Emira sports car and the Evija hypercar.
>
> The ground floor has space to show three Lotus cars in a spectacular environment and will include a full Lotus merchandise retail outlet. Below will be a VIP lounge for visiting customers – existing or future – and a full Lotus digital configuration suite. The store will also provide a discreet London home for clients of Lotus Advanced Performance, the bespoke and experiential division of the business launched earlier this year.
>
> The store will open in the autumn with a launch event, celebrating the latest milestone in the ongoing transformation of Lotus from a UK sports car company to a global performance business and brand."

106. The press release quoted Lotus's Executive Director as describing it as follows:

> "This flagship facility will allow anyone to see our exciting three-car range, understand our brand, speak with a Lotus Expert, configure a car using state-of-the-art digital e-commerce technology and even reserve it through our recently launched e-commerce platform."

107. DP9 Ltd acted for Lotus in connection with its planning application to Westminster; on 6 July 2022, Westminster approved a proposal *inter alia*:

> "to support the allowance of an experiential car retail showroom use (sui generis) within the commercial units".

108. At paragraph 10 of that letter, Westminster stated:

> "The accommodation at basement and ground floors fronting onto Piccadilly and Berkeley Street and Dover Street … shall be used for retail/commercial use (Class E9A), E(b), E(c) Sui Generis drinking establishment or car showroom Sui Generis purposes only as defined by the town and country planning use classes order 1987 provided that at least 930 sqm (GIA) of combined class A1 E(a) Sui Generis car retail showroom floorspace is provided at any one time."

109. Mr Locke accepted in his cross-examination that this was clearly permission for use as a car showroom, and not purely for retail space.

110. The phrase "experiential car retail showroom use" first appears in the letter from DP9 to Westminster supporting the amendment application to the planning permission dated 6 September 2021, and that letter including the following explanation:

> "*Proposed experiential car retail showroom*
>
> As part of the development's retail offer, the Applicant is proposing to introduce an experiential car retail use at the Site. The proposed car retail unit would be brand oriented rather than a traditional car showroom use and is expected to include a maximum of 2 to 3 electric vehicles for customers to view. The exact anticipated details are:
>
> - Visiting members of the public would freely enter the site during opening hours to learn about the brand and view the car models on show – no booking would be required;
>
> - The ground floor would contain the cars on display, a range of merchandise (e.g. clothing, trinkets etc.) for sale, a large screen and touch screen consoles to stand at;
>
> - The car 'selection' via the touch screens is where the consumer can view augmented images of their selected car/colour/finish combination on the big screen;
>
> - Any purchases would not normally be processed at the site, rather customers would generally be invited to return home and purchase cars online;
>
> - Likewise, there would be no test driving, car collection or servicing at the site; and
>
> - Much of the interaction by the instore advisors is related to the education of the consumer to the benefit and practical use of electric vehicles.

> The proposed experiential car retail use represents one facet of the future of town centre retail in the era where online retail has significantly impacted the vitality and viability of town centres."

111. It was also confirmed that the use would not include test driving, collection or servicing of vehicles.

112. In cross-examination, Mr Perri accepted that some of this did not sound like a standard or traditional car showroom, and that looking at the description in the DP9 letter, it did sound a bit like what Mr Locke had thought was going to take place there. Mr Perri agreed that the emphasis was on this being a type of retail property:

> "The letter is personal and tailored to Lotus's offer and they're re-emerging as a car brand in the UK. The vehicles they are selling are brand new so they won't have to their benefit used cars to test drive and so on, available readily, because the cars are yet to be made in terms of at that date. The second observation is that in the third bullet point the car selection via the touchscreen is where the consumer can view augmented images of their selected car, colour, finish combination. This is the new era of car showrooms. They want immersive experiences when they come to these premises and this is what Lotus is offering and again what they're offering is personal to Lotus but this is the demand of car showrooms today and this is what is driving them to take the best premises in Mayfair. To get consumers to there to use their immersive technology."

113. This was precisely Mr Pryor's point – that Lotus was looking to make a "splash" in the market, a real statement, by taking this prominent showroom for something completely new. Mr Perri did not agree with the suggestion that a similar showroom could not be set up in Park Lane, but I cannot accept that evidence, because as Mr Pryor put to him, "no-one's going to come in" because of the lower footfall in a non-retail centre. After all, Lotus might have been able to take either of the vacant Park Lane premises at a far lower rent, but chose to go to Berkeley Street (and adopt a Piccadilly address for the showroom) in my view to be associated with the other high-end brands with showrooms there. I think it fair to assume that Lotus chose to be associated with those rather than with BMW, and that the Berkeley cluster was thus the natural home for Lotus. There was no evidence that Lotus had to outbid another potential retailer for this space, but what is clear is that £228 psf is far more than any of the other comparables.

114. Lurking in the background here is the rent rumoured to have been agreed by Aston Martin (the manufacturer, rather than a dealer), which is thought to be the next occupant of a showroom in the Berkeley cluster. It is thought Aston Martin will be paying a rent in the region of that being paid by Lotus, £228 psf.

115. It would seem from documents in the trial bundle that Aston Martin have opened what has been described as "an ultra-luxury showroom" (The Times, 19 June 2023) in New York, and that Berkeley Square is next on its list:

> "The new Manhattan showroom has Aston's Q service, named after James Bond's quartermaster, as its centrepiece where customers dig deep to customise their vehicles. A 10.5m interactive screen wall responds when would-be buyers pick from an array of colour and material samples. Those

> using Q typically spend more and the service's revenues in the US grew by about 52 per cent last year, according to Marek Reichman, chief creative officer. 'And if we could accelerate that to 100 per cent more, then we're growing the average sales price of the product dramatically.'
>
> Previous showrooms were more like art galleries but Reichman said that Q New York marked a shift towards 'ultra luxury'. Executives hope that it will attract clients from far and wide. 'This isn't only to service New York; the world comes to New York,' [executive chairman] Stroll said. 'And this is one of the most famous corners, 57th and Park, in New York, to give us a window to the world."
>
> Another site was due to open in Berkeley Square, central London, next June, he said, and there would be more across the US, its largest market. He declined to say where, although Los Angeles is understood to be in the frame."

116. It is perhaps little surprise that the article in The Times notes that one of Aston Martin's backers is the same Chinese company behind Lotus.

117. In my judgment, it is clear that Aston Martin are to run an "ultra-luxury" showroom in a way which is different from more mainstream showrooms (and very different from BMW as a model), and for that they – like Lotus – see value in an association with Ferrari, Bentley, Rolls-Royce and others in the fashionable retail destination of the Berkeley cluster.

118. I have concluded that neither the rent paid by Lotus nor the anticipated rent to be paid by Aston Martin represent a true comparable for 70 PL. In my view, Mr Perri's insistence that the Lotus rent represents the best – indeed, the only real – comparable for 70 PL is misplaced. Even though 70 PL can rightly be described as a flagship showroom, it is clear to me on the evidence that over recent years the Berkeley cluster has become more popular amongst higher-end manufacturers (again, no disrespect to BMW is intended) and that new entrants there are prepared to pay well over the historic market price. By way of comparison, Porsche Piccadilly is paying around £73 psf (on a September 2019 letting, which is relatively recent) for premises which are just outside the best the Berkeley cluster has to offer (and which premises have a number of problems which I have already identified), which seems to me to show that Lotus is an outlier, and that Aston Martin would be too.

119. On the other hand, I do not think Mr Locke is right when he says the bracket is between £75 and £100 psf for 70 PL. This bracket is somewhat of an afterthought, it seems to me, because Mr Locke's reports contend for £75 psf, with the increase to form a bracket coming about because of Mr Locke's late and I thought a little uncertain proposal of variable percentage increases because of the special purchaser element. The other rents which are at that level are Range Rover at £86.38 psf, Porsche Piccadilly at c.£73 psf, BYD at £75-85 psf, and Aston Martin Park Lane at £75-79 psf. It is clear for the reasons I have set out above that 70 PL is superior to any of these in terms of layout (despite the problems with 70 PL) and that as a genuine flagship premises with a showroom along the whole of the ground floor of a single block it should attract a rent higher than any of those others. I also take the view that 70 PL is in a better location than any of those others for the type of showroom BMW wants to

operate, and that even if premises of equivalence were available in the Berkeley cluster, 70 PL offers what BMW really want (and there is no evidence of any desire to move to the Berkeley cluster). Further, the others are all transactions from some years ago.

120. Bentley, Ferrari and Rolls-Royce are in my view far better guides to the right rental level. Bentley is £112 psf from a January 2018 lease renewal, and Ferrari is at just under £129 psf following a March 2020 rent review (perhaps not the best time to have concluded a rent review for a landlord, but there was no evidence in that regard, so I must ignore it). Ferrari and Bentley benefit from the increased attractiveness of the Berkeley cluster, which attract higher rents than Park Lane (as is clear in my judgment from the fact that neither of 56-59 PL or 77 PL have been let despite being quoted at £77 psf and £106 psf respectively). Rolls-Royce is at c.£124 psf, and I think it worth looking now in a bit more detail at those premises.

121. Rolls-Royce was represented by Boyer Ltd at the planning stage, and some of the planning documentation is in the trial bundle. Rolls-Royce were formerly on Berkeley Square. 40-42 Berkeley Street was identified as a potential new showroom, and as Boyer said in their Planning Statement supporting the change of use application:

> "Rolls Royce's new luxury boutique concept, which takes design cues from other luxury retailers. The proposed boutique showroom use would be a celebration of the company's rich heritage and of the Rolls Royce brand. The unit would be open to visiting members of the public, and similar to a retail art gallery, visitors would be invited to view and appreciate the luxury cars on display. There would only be a maximum of six cars on the site at any time; generous spacing is required to allow a full appreciation of the form and aesthetics of the cars. In addition to the cars, the unit would have a complementary retail offer, providing a carefully chosen portfolio of products that embody the spirit of the brand."

122. Much of the emphasis in the Planning Statement is on the fact that Sainsbury's would continue to operate a supermarket from a smaller sales area, and so there would be no net loss of retail uses:

> "The premises will continue to operate in a manner akin to a retail unit and therefore will have no undue impact on the residential amenity of neighbouring occupiers within this central London location. … The proposed use will exhibit characteristics which are associated with retail units."

123. Boyer further stated:

> "This area of Mayfair is defined by retail units which offer unique and luxury products. The proposed luxury car retail offering aligns with this, and the new boutique showroom use will continue to enhance Mayfair's position as an internationally recognised centre for specialist luxury items. … The proposed car showroom is exactly the type of use that will continue to enhance Mayfair's position as an internationally recognised centre for specialist luxury items."

It would be easy to dismiss this as mere "puff", but this seems to me to echo my thoughts and findings about the Berkeley cluster.

124. Westminster's grant of conditional permission of 22 May 2019 identified that "The key issue is the loss of retail floorspace", referring to the reduction in size of the Sainsbury's supermarket:

> "Notwithstanding the requirements of the relevant land use policies, for the reasons outlined above, it is not considered that the proposed loss of retail floorspace would have an adverse impact on the character and function of the area. Furthermore, the proposal would introduce an appropriate use, with a more active street frontage than at present, and has the potential to create new jobs. Consequently, on balance, it is considered that there are exceptional circumstances to justify a departure from the Council's land use policies."

125. It is clear on the evidence that Rolls-Royce is closer in operation to a standard or traditional car showroom (such as that operated by Porsche or BMW) than to either Lotus or the Q-service of Aston Martin. I agree with the submissions of Mr Pryor that there really is a scale of rentals, with Lotus and Q-service Aston Martin at one end, followed a fair way behind in terms of £psf by Rolls-Royce, Ferrari and Bentley.

126. The central question is where does 70 PL sit in that scale? I find myself unable to accept that applying the test set out at paragraphs 55-62 above, and on the evidence, that it would command a rent in the order of £228 psf. That level of rent is reserved for the prime sites in the Berkeley cluster where a tenant is looking for the "wow factor" of being associated with the high-end retail sector there. In my judgment, Park Lane is just not as good a location, and does not command that sort of rent, nor has it done historically. Having said that, Park Lane is not some sort of shabby second cousin, and 70 PL is, as I have said, a genuine flagship premises (were it not of a high standard, I expect it would not attract BMW, nor would they describe it as iconic). But the rents for Park Lane are, historically, lower than those in the Berkeley cluster, and I see no reason to accept Mr Perri's evidence that the rent for 70 PL should be at the Lotus level. In my judgment, the right rent for the ground floor showroom space at 70 PL (the leases for the Bank, Central and Porsche units) is £126 psf, with basement space being agreed to be at 50% of that headline rate (thus £63 psf).

127. I have considered whether this is sufficient to take into account BMW as a special purchaser.

128. Each expert took a different view in relation to this.

129. Mr Perri's view, as articulated by Mr Jourdan in his closing submissions, was that if the units at 70 PL occupied together create something special, on a par with the Lotus unit, then the showroom rental values should therefore be on a par with that letting.

130. Mr Locke had not engaged with this issue until his examination in chief, during which he ventured a 5% uplift for the Piano unit and a 20% uplift for the other units, but as Mr Jourdan correctly observed, these percentages were not based on any comparable evidence and Mr Locke struggled to explain them in his oral evidence.

131. Mr Pryor criticised Mr Perri for sticking to the Lotus rent without assisting the court on what would be an appropriate figure to reflect BMW as a special purchaser if the Lotus rent was not accepted as the right figure. In my view, Mr Perri was wrong to value 70 PL by reference principally to the Lotus rent, for the reasons I have identified, but that

does not mean that I should accept Mr Locke's percentage uplifts. I agree with Mr Jourdan that it is wrong to assess value to an ordinary bidder and then add a special purchaser uplift. I was taken to *Gajapatiraju v The Revenue Divisional Officer, Vizagapatam* [1939] AC 303, and *IRC v Clay* [1914] 3 KB 466 for the principles to be followed where there is a special interest, but it seems to me that the real position is rather more prosaic.

132. This type of valuation is really a question of a negotiation between a willing landlord and a willing tenant, where the landlord wants the highest possible rent, and the tenant is a long way below, at the lowest possible rent. This is, as Mr Jourdan put it, a question of "higgling" (I would have said "haggling", as I always thought "higgling" inferred an element of sharp practice, but it does not much matter) between reasonable persons in the position of these parties where one unit is vacant and to let. There would be an agreement between the parties after the higgling – where the parties' agreement would be on the spectrum would depend on the strengths of their respective arguments.

133. In my view, there is no reason to add a further percentage to reflect BMW as special purchaser if the rent is at the right level as a result of this notional higgling. Mr Perri did not do so, and Mr Locke's percentages are unevidenced (although I do respect his opinion as an experienced valuer). In my judgment, there is no need to increase the headline rate further.

134. A headline rate of £126 psf reflects all the matters which in my view need to be reflected, in the same way as Mr Perri did (although I have rejected his reliance on the Lotus rent). It is marginally higher than the Rolls-Royce rent, which reflects the flagship nature of 70 PL, Park Lane as a location, BMW as special purchaser (in the sense advocated by Mr Perri), and the valuation date, and is in my judgment the right result following the notional higgling between these parties.

135. I emphasise that I have not decided the headline rent on the basis that the higher-end the cars are or the dealership is or aspires to be, the more the rent should be. I have based my decision on the evidence about location and the relative merits of 70 PL when considering the comparables.

***The "void"***

136. When the Bank unit was occupied and used as banking premises, there was a large safe enclosed in a reinforced strong-room in the basement, and when BMW took the lease, the safe was removed by breaking through the ground floor. This is said to have created what is known as the void. The ground floor was then covered over in glass, which at some point was partly filled in and there was a glass walkway over part of this area.

137. The issue is whether the filling in of the void was an improvement falling within section 34(2) of the Act and thus to be disregarded when determining the market rent.

138. It is common ground that if the work was carried out by BMW in a period beginning on 21 September 2000 at a time when it was the tenant of the Bank unit, and the work was not carried out in pursuance of an obligation to KGH, it would be an improvement which should be disregarded.

139. The burden is on the tenant to prove that it carried out an improvement.

140. There is no evidence as to whether the work was done before or after BMW became the tenant of the Bank unit on 27 May 2004 nor any evidence as to who did the work or who paid for it.

141. Having said that, I agree with Mr Jourdan that the need to fill in a void with a glass or other floor (in the event that the valuation is to be on the assumption that there is a void in the floor) this has no material effect on market rent, because as he says, all willing tenants of car showrooms will fit them out to their own requirements at great expense.

142. Mr Locke conceded this issue during his cross-examination.

143. I find that in my judgment the issue of the void has no effect on the rent payable.

***WCs***

144. The Piano unit has no separate WCs because it is used as offices together with the other units. Mr Locke says a notional incoming tenant would need to put in stairs and WCs.

145. In my judgment, Mr Jourdan is right about this. As BMW is the only potential tenant for the Piano Bar, there should be no discount.

146. As to the Bank unit, again there is no evidence as to when the WCs were removed (or by whom and at whose expense) and again I agree with Mr Jourdan that it has no effect on the valuation and that there should be no reduction in valuation to reflect the construction of WCs occupying 100 $ft^2$ of basement space because there is a sufficient number of WCs elsewhere, and as Mr Jourdan says, the valuation should reflect reality.

***The lightwell***

147. I have mentioned this area of the Central unit earlier in this judgment. Mr Locke values this area at 90% of the headline rate. I agree with Mr Perri that there should be no discount for the lightwell area, which as Mr Jourdan says is part of the interior of the Central unit and as I have said is used to display a single M-Sport vehicle in a way which does not justify any reduction.

***The Central unit***

148. I agree with Mr Perri that there should be no deduction for the width to depth ratio of the Central Unit. Mr Locke contends for a 5% deduction from the headline rate for this, but I can see no reason to do so on the evidence. As Mr Jourdan says, a wide narrow showroom is fine for displaying cars, with offices to the rear of the showroom area, and the fact that the zoning method resulted in the district valuer making a 9% deduction is not a reason for reducing the headline rate.

***Return frontages***

149. Mr Locke would add 2.5% to the value of the Bank and Porsche units because of their return frontages. My headline rate reflects the benefit of the frontages and is a rate to be applied across the board for the three main showroom units without any additions (or for that matter deductions).

***Piano unit***

150. BMW submit that this should be valued on a standalone basis, with a percentage uplift to reflect an overbid by BMW of 7.5%. Mr Locke puts the rental value of the Piano unit at £35,500 + uplift on that basis.

151. KGH submit that the valuation should be as ancillary office space, and thus half-headline ground floor rate. At a total of 1,349 $ft^2$ of space, with a headline rate of 50% x £126, the rent would be £84,987. If valued as standalone premises, KGH's figure is £40,000 (+ any applicable uplift).

152. In my judgment, this unit should be valued reflecting reality, as ancillary office space. Whilst it would be physically possible to reconfigure the Piano unit as a separate building, with its own entrance at the rear of Aldford House, to value it on that basis in the context of these lease renewals would in my judgment mean having to abandon common sense and ignore reality, which is that the only likely occupier of the Piano unit would be the occupier of the other units, to use the space as offices ancillary to the use of the other units.

**A "sense-check"**

153. I am attracted by Mr Jourdan's suggestion that having reached my conclusions on headline rent, I should stand back and compare those conclusions with the rents agreed in 2004 and 2012.

154. In 2004, the rents agreed, adjusted for inflation, were £1,820,261 per annum (£1,050,000 before the RPI-based increase).

155. BMW's proposed rent would, if I took a rate of £80 psf before any percentage increase, amount to:

Ground floor: 6,778 $ft^2$ x £80 = £542,240

Basement and mezzanine: 8,058 $ft^2$+ 798 $ft^2$ = 8,856 $ft^2$ x £40 = £354,240

Total rent: £542,240 + £354,240 = £896,480.

156. When looked at against Mr Locke's evidence that "rents have hardly changed in the last 18 years", BMW's proposed rent looks and feels too low, and there is no reason for the court to assume that rents have fallen since 2004 or 2012.

157. That does not mean that the rent now must be more than that previously agreed, particularly because the effect of the contractual CPI-linked increase has been to make the rent higher than it might otherwise have been had it reflected a marketplace "higgling".

158. The rent I have held to be appropriate is a headline rent of £126 psf. Thus:

Ground floor: 6,778 ft2 x £126 = £ 854,028

Basement and mezzanine: 8,058 ft2 + 798 ft2 = 8,856 ft2 x £63 = £557,928

Total rent: £ 854,028 + £557,928 = £ 1,411,956 A further check would be to use Mr Perri's figure of £228 psf.

Ground floor: 6,778 $ft^2$ x £228 = £1,545,384

Basement and mezzanine: 8,058 $ft^2$ + 798 $ft^2$ = 8,856 $ft^2$ x £114 = £1,009,584

Total rent: £1,545,384 + £1,009,584 = £2,554,968.

159. Perhaps it is not surprising that KGH did not ask me to carry out that last further check – in my view it shows that Mr Perri's figure is far too high, as there is no evidence to suggest that rents have more than doubled since 2004 (I have set out my reasons for rejecting Lotus as the true comparable, and looking at the rents of the other comparables, none of those have seen that sort of increase).

160. Having conducted that "sense-check", I remain satisfied that my headline rate of £126 psf is correct.

**Conclusions on rent**

161. **Bank lease** – the appropriate rent reflecting its special value to BMW, is £126 psf for the ground floor space and £63 psf for the basement space. There is to be no omission of any estimated or actual area representing the void, nor for any area occupied by the WCs which were historically present when this unit was used for banking purposes, nor should the valuation omit an estimated area for WCs to serve the Bank unit. There is to be no increase because of the return frontages.

162. **Central lease** – the appropriate rent reflecting its special value to BMW, is £126 psf for the ground floor space and £63 psf for the basement space. There is to be no discount for the lightwell area, and no discount for the width to depth ratio.

163. **Porsche lease** – the appropriate rent reflecting its special value to BMW, is £126 psf for the ground floor space and £63 psf for the basement space. There is to be no increase because of the return frontages.

164. **Piano lease** – the appropriate rent is half the headline rate of £126 psf, namely £63 psf.

**The evidence – BMW's application of 14 June 2023**

165. Before I conclude this judgment, I need to set out my reasons for refusing, at the outset of the trial, an application by BMW to adduce further factual evidence.

166. On 14 June 2023, BMW applied for permission to adduce the following further witness evidence:

    (1) A second witness statement of Mr Andrew Sell dated 31 May 2023. Mr Sell is the former head of asset management at Criterion Capital Limited, where he is now a consultant. One of the properties managed by Criterion is 77 PL, the former MINI showroom. Mr Sell made a statement on 29 November 2022 about

the marketing of 77 PL. In his second statement, Mr Sell provides some updated information about that, and makes a minor correction to his first statement.

(2) A second witness statement of Mr James Partridge dated 31 May 2023. Mr Partridge works for Hyde Park Residential Limited, which manages that company's property interests in (amongst other premises) 55-60 Park Lane. In his first statement, he gave evidence about the marketing of BMW's former premises there. In his second statement, he sought to update that information.

(3) A statement from Mr Nigel Glover, dated 9 June 2023. Mr Glover was BMW's head of corporate real estate from 2002 until he retired in 2022. His statement dealt with the "void" works at the Bank unit and works carried out at the Central unit as well as some related matters.

167. On 19 December 2022, HHJ Johns KC made an order when dealing with a number of applications by KGH as follows:

> "The makers of witness statements on which the parties intend to rely shall attend for cross-examination unless their attendance is dispensed with by agreement."

168. BMW made it clear in correspondence that they did not intend to call Mr Sell or Mr Partridge (whether that was because of their non-availability does not seem to me to make a difference), but KGH did not agree to dispense with their attendance.

169. Mr Pryor sought to persuade me that this meant that I should nonetheless read their evidence, and attach such weight to it as I saw fit bearing in mind that they were not being called and would not be cross-examined. He went on to submit that I should allow in their second statements, which were doing no more than updating their first statements, on the same basis.

170. Mr Jourdan opposed this course. He was right to do so. The order of 19 December 2022 is clear. Unless there is agreement between the parties that a witness need not attend, they must attend. It must follow in my view that if any witness does not attend trial, their evidence should not be admitted. The general rule is that any fact which needs to be proved by the evidence of witnesses is to be proved at trial by their oral evidence given in public: CPR 32.2. The order of 19 December 2022 underlines that requirement. The general rule is subject to any order of the court (CPR 32.2(2)(b)) but in my judgment it would not be right to permit a party to rely on evidence at trial where they are not calling that witness, the other side objects, and there has been a direction that they must attend for cross-examination.

171. That being so, there is no basis for allowing in the second statements of Mr Sell or Mr Partridge.

172. On 8 March 2022, Deputy District Judge Cheunviratsakul gave directions for witness statements of fact to be exchanged by 1 November 2022. This was extended by agreement to 1 December 2022. Mr Glover's statement was dated 9 June 2023 and was only provided to KGH on 14 June 2023, which was less than 4 weeks before the start of the trial.

173. This was a breach of the order in relation to witness statements, in respect of which relief from sanctions is required. Such an application is governed by CPR 3.9 and the three-stage test in *Denton v White* [2014] EWCA Civ 906. The court must (1) identify the seriousness or significance of the breach; (2) consider the reason for the breach; and (3) evaluate all the circumstances of the case, so as to enable the court to deal justly with the application, including CPR 3.9(1)(a) and (b).

174. The breach was clearly serious and significant. There was a failure to provide a witness statement in December 2022, and a delay of more than 6 months in doing so.

175. There is no good reason put forward for the breach. In the evidence in support of the application, it is said that Mr Glover had retired before witness statements were due to be exchanged and it was not anticipated that these matters would be contentious. However, I am not told when Mr Glover retired (the directions in respect of witness statements were made on 8 March 2022) nor what steps had been taken to contact him, if any.

176. As to all of the circumstances, I take into account the long delay and the fact that the statement was produced a short time before the trial in circumstances which did not give KGH sufficient time to deal with it (I accept Mr Jourdan's submissions on that point). The issue of the tenant's improvements has been in play for many months, as has the need for BMW to produce factual evidence in that regard. Not only was there no detail given about the steps taken to contact Mr Glover prior to December 2022, when statements ought to have been exchanged, I was told nothing about why it had taken until 9 June 2023 to produce his statement, and why no application was made until 14 June 2023.

177. In my judgment, it was far too late for BMW to introduce Mr Glover's evidence at this late stage, and I refused permission.

## Costs and other outstanding issues

178. Unless these can be agreed, I will need to deal not only with the costs of BMW's application of 14 June 2023 and the costs of the trial, but also with the costs of KGH's applications of 16 September 2022, 7 October 2022, 10 October 2022 and 17 October 2022 (as directed by HHJ Johns KC on 19 December 2022 – at present, I have been told next to nothing about those applications). In addition, although I have been told that the parties have been trying to reach agreement on all the other lease terms, there may in the event be other matters which I need to resolve. If these cannot all be agreed, I would like to hear from the parties as to whether we need a further hearing or if I can deal with all of the costs and other issues on paper (in which case, I would like to see a proposed timetable for written submissions).

*(End of judgment)*