



IN THE COUNTY COURT AT CENTRAL LONDON

Case No: G02CL960

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

Date: 18/11/2022

Before :

HHJ RICHARD ROBERTS

Between :

**(1) OLD STREET RETAIL TRUSTEE (JERSEY) 1
LIMITED
(2) OLD STREET RETAIL TRUSTEE (JERSEY) 2
LIMITED
- and -
GB HEALTHCARE LIMITED**

Claimants

Defendant

Mr Stephen Jourdan KC (instructed by Dewar Hogan) for the Claimants
Ms Brie Stevens-Hoare KC (instructed by Adams & Remers LLP) for the Defendant

Hearing dates: 1, 2 September 2022, 18 November 2022

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....
HHJ RICHARD ROBERTS

HIS HONOUR JUDGE RICHARD ROBERTS :

Introduction

1. This is the hearing of an application by the Claimant (the Landlords) under s.24 of the Landlord and Tenant Act 1954 (the 1954 Act) for the grant to the Defendant (the Tenant) of a new tenancy of a retail unit at 199 Old Street, London (199 Old Street) and the determination of the interim rent payable, effective from 19 August 2020. The Tenant trades at 199 Old Street as Apex Pharmacy.
2. The terms of the new lease are agreed, but not the rent and interim rent¹. The Parties' expert surveyors agree that the interim rent should be the same as the rent payable under the new lease². It is agreed that the new lease will be for 10 years, with an upwards only rent review after 5 years.
3. I am grateful to Mr Jourdan of King's Counsel, who appears on behalf of the Landlords, for his:
 - i) Skeleton argument, dated 30 August 2022;
 - ii) Claimant's written submissions on the interpretation of s.34(1), dated 29 September 2022 and his authorities bundle.
4. I am grateful to Ms Stevens-Hoare of King's Counsel who appears on behalf of the Tenant for her:
 - i) Skeleton argument, dated 30 August 2022;
 - ii) Dramatis personae;
 - iii) Abbreviations;
 - iv) Supplemental skeleton argument, dated 25 September 2022, including Appendices 2 and 3;
 - v) Email to the Court, dated 5 October 2022.
5. There are seven trial bundles of documents before the Court:
 - i) Bundle A;
 - ii) Bundle B of appendices, volume 1;
 - iii) Bundle C of appendices, volume 2;
 - iv) Supplemental trial bundle D³.

¹ A, 12, 73-138

² Experts' joint statement, A, 18, 250

³ This bundle contains expert evidence relating to an Argos arbitration award. I ruled that the Argos arbitration award was inadmissible and therefore I have not had regard to this material.

199 Old Street

11. 199 Old Street is located on Old Street in the London Borough of Islington. Old Street runs from the junction with Clerkenwell Road in the west, to Shoreditch High Street in the east, covering approximately one mile. Old Street Roundabout divides the street approximately half way, forming a junction with City Road, which runs north to south. 199 Old Street forms part of a Parade between 185 and 205 Old Street, on the north side of the street. Immediately outside the parade is public seating and a tree-planted promenade. 199 Old Street is approximately 120 metres to the east of Old Street Roundabout and Old Street London Underground and National Rail stations, from where the Northern Line and the Northern City Line run. The location is also served by several bus routes: the 243 to Waterloo, the 55 and N55 to Oxford Circus, the 205 to Bow Church DLR Station, the 242 to Aldgate, the 271 to Moorgate and the 214 to Liverpool Street.
12. 199 Old Street is located mid-Parade and arranged over ground floor only. There is a double-height display frontage to Old Street with a floor to ceiling height of 5.97m, and high level signage. It is rectangular in shape, and approximately 6.49m wide by 31.92m deep. The majority of the space is a shop, with a dispensing pharmacy with consulting rooms, storage and staff areas towards the rear, along with a WC. In the rear left hand corner of the premises are double doors leading to a rear service corridor. The service corridor leads to Bath Street at the western end, and at the eastern end to a 24-hour loading yard at lower ground level.
13. Mr Purnell has provided photographs of 199 Old Street and the Parade before and after it was redeveloped¹². Mr Scott has annexed up-to-date photographs of 199 Old Street to his report¹³. Mr Purnell and Mr Scott have both exhibited plans showing the Parade¹⁴.
14. In the Parade are the following retailers, from West to East: The Co-operative and the Post Office (the Post Office being at the rear of the unit), Argos, Apex Pharmacy, Gymbox, Marks and Spencer, and Aldi.

History of 199 Old Street

15. 199 Old Street is held on a lease dated 24 May 2011¹⁵ between the Landlords and the Tenant for a term of ten years from 22 March 2010 to 21 March 2020. In the bundle are HM Land Registry Office Copy entries for 199 Old Street¹⁶.
16. The Tenant served a notice under s.26 of the 1954 Act, dated 18 February 2020¹⁷, which terminated the statutory period on 17 February 2021. The Landlords did not oppose the grant of a new tenancy.

¹² B, 5, 113-116 and B, 19, 214-215

¹³ C, 3, 68-69

¹⁴ B, 2, 107-108 and B, 2, 3-4

¹⁵ A, 11, 34-72

¹⁶ A, 15, 151-154

¹⁷ A, 13, 139-142

17. On 23 November 2020 the Landlords issued proceedings for a new lease of 199 Old Street¹⁸. The Tenant filed an acknowledgment of service on 20 January 2021.

Issues agreed by the Parties

18. Prior to trial, the Parties agreed the following issues for determination:
- i) Is the rental award dated 12 May 2020 of a surveyor arbitrator in an arbitration between the Landlords and Argos Limited of the lease of the ground and lower grounds floors at 185-197 Old Street as at 27 March 2020 admissible in evidence?
 - ii) Should a rent assessed under s.34 of the 1954 Act be reduced to reflect the absence of a fitting out rent-free period?
 - iii) Should an exclusivity adjustment of 2.5% be added to the rent assessed pursuant to s.34 of the 1954 Act?
 - iv) Should the Remainder of the area of 199 Old Street be assessed under the zoning method of valuation at A/10 or A/12?
 - v) What are the most appropriate comparable properties for assessing the rent under s.34 of the 1954 Act?
 - vi) What is the amount of the interim rent and the rent payable under the new lease?

Confidential information

19. Mr Scott is employed by Nash Bond, a retail and leisure agency, specialising in Central London. Nash Bond are acting for the landlords of the Bezier Building, who have recently entered into an agreement to lease one retail unit (Unit 1) in the building, and who have agreed terms (subject to contract) to let another (Unit 2). The information relating to Units 1 and 2 is said to be commercially highly confidential. An order was made by District Judge Avent to protect the confidentiality of the information relating to Units 1 and 2 of the Bezier Building on 19 August 2022¹⁹.
20. I agreed at the outset of the case to sit in private for any parts of the hearing in which reference was being made to the confidential information. In fact, no member of the public sought to come into the court room when evidence as to the confidential information was being discussed.

Argos rental arbitration award - 185-197 Old Street

21. The Tenant wishes to put in evidence an award dated 12 May 2020 made by a surveyor-arbitrator of the rental value under the lease of the ground and lower ground floors of 185-197 Old Street (Argos), as at 27 March 2020.

¹⁸ A, 1, 1-4

¹⁹ A, 9, 25-27

22. Mr Jourdan submitted that the Argos arbitration award was not admissible in evidence. He relied upon *Land Securities plc v Westminster City Council* [1993] 1 WLR 286²⁰, in which Hoffmann J said,

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

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

23. Mr Jourdan sets out at paragraphs 14 to 21 of his skeleton argument to the reasons given in the authorities why the judgment, verdict or award of an arbitrator is not admissible evidence to prove a fact in issue or a fact relevant to the issue in other proceedings between different parties. I will not lengthen this judgment by repeating them here.
24. Mr Jourdan submits that the Argos Award could only be relevant to the Court’s determination of the rent payable on 199 Old Street under s.34 of the 1954 Act if the Court gave weight to the arbitrator’s own assessment of the evidence which she considered. He says that there are, however, two problems with doing that. First, it would require a collateral enquiry into the correctness of the award. Second, it would involve this Court abrogating its responsibility for assessing the evidence and determining the rent in part in reliance on the assessment made by the arbitrator.

²⁰ Authorities bundle, 16

25. Although Ms Stevens-Hoare argued that the Argos arbitration award was admissible, she accepted that the weight of authority was against her.

Decision as to admissibility of Argos award

26. On the first day of the hearing, I ruled that it would not be appropriate for the Court to give weight to the arbitrator's own assessment of the evidence because it is for this Court to decide the case based upon the evidence placed before it. I concluded that it was clear law that an arbitration award was not admissible evidence to prove the rent payable under s.34(1) of the 1954 Act. As a consequence I have not considered the Argos arbitral award.

Assessment of the s.34 rent

27. S.34 of the 1954 Act²¹ provides:

“Rent under new tenancy

(1) The rent payable under a tenancy granted by order of the court under this Part of this Act shall be such as may be agreed between the landlord and the tenant or as, in default of such agreement, may be determined by the court to be that at which, having regard to the terms of the tenancy (other than those relating to rent), the holding might reasonably be expected to be let in the open market by a willing lessor, there being disregarded-

- (a) any effect on rent of the fact that the tenant has or his predecessors in title have been in occupation of the holding,
- (b) any goodwill attached to the holding by reason of the carrying on thereat of the business of the tenant (whether by him or by a predecessor of his in that business),
- (c) any effect on rent of an improvement to which this paragraph applies,
- (d) in the case of a holding comprising licensed premises, any addition to its value attributable to the licence, if it appears to the court that having regard to the terms of the current tenancy and any other relevant circumstances the benefit of the licence belongs to the tenant.”

28. It is common ground that:

- i) There are no relevant improvements, so s.34(1)(c) is not relevant;
- ii) The existing tenancy will terminate and the new tenancy will commence 3 months after the final disposal of the claim under ss.29 and 64 of the 1954 Act. Therefore the Court must determine the open market rent by reference to the state of the market at the date of the hearing subject to any evidence that indicates that changes will occur between that date and the date of the commencement of the new tenancy: *Lovely & Orchard Services Ltd v Daejan Investments (Grove Hall) Ltd* [1978] 1 EGLR 44 at paragraphs 46-47²².

²¹ Joint authorities bundle, tab 1

²² Joint authorities bundle, 17

Comparable method of valuation

29. When determining rent for the purposes of s34 of the 1954 Act, it is commonly accepted between experts that the appropriate valuation method is the comparable method of valuation. As Lewison J explained in *Marklands Ltd v Virgin Retail Ltd* [2003] EWHC 3428 (Ch),

“9. Valuation essentially proceeds by analogy. The valuer looks for an analogue which is as close as possible to that which he has to value, and which has been the subject matter of a real transaction. He then works on the premise that if the subject matter of his valuation were to be the subject of a similar transaction, it would command the same value as the analogue. Since the analogue will never be identical to the subject matter of the valuation, the valuer will have to make adjustments to the value revealed by the analogue in order to reflect the differences between the analogue and the subject matter of his own valuation. In the case of a property valuation the analogues are usually called ‘comparables’. In the case of a property valuation typical adjustments will reflect differences between the comparables in location, terms of letting and so on. One obvious difference between different properties is that they will be of different sizes.”

Zoning method

30. Both the Landlords’ and the Tenant’s experts agree that the appropriate method of valuing 199 Old Street is the zoning method. This method of valuation divides the ground floor area into sections, or zones, each zone having a standard depth measurement of 20 feet (6.1m approximately). Once the individual areas of each zone have been calculated, they are added together to calculate the Net Internal Area (NIA).
31. The “halving back” method is then applied. It is assumed that if each square of Zone A is worth the most (being the area at the front of the premises), then each square of Zone B is worth half the appropriate Zone A rate, each square of Zone C is worth half of Zone B (and therefore a quarter of Zone A) and each square of Zone D is worth one eighth of Zone A, expressed as $A/8$. The remainder of the premises is considered at a single rate relative to Zone A.
32. In their joint statement, dated 13 December 2021, Mr Purnell and Mr Scott say at paragraph 3.0²³,

“The experts have agreed the floor areas and individual zones.”

33. I set out below the agreed floor areas and individual zones:

Imperial

Metric

²³ A, 18, 241

Zone A	373 sq ft	34.65 sq m
Zone B	426 sq ft	39.58 sq m
Zone C	415 sq ft	38.55 sq m
Zone D	425 sq ft	39.48 sq m
Remainder	<u>458 sq ft</u>	<u>42.55 sq m</u>
Ground Floor NIA	2,097 sq ft	194.81 sq m

34. In his report, Mr Purnell values the comparable properties upon which he relies on a zoned basis.
35. Mr Purnell says that convenience food stores are not comparable properties. Further, he says in the joint statement that Aldi Stores Limited, Marks and Spencer and the Co-operative should be analysed on an overall basis because they are much larger food stores²⁴.
36. Mr Scott has valued all of the comparable properties on a zoned basis. He says at paragraph 7.16²⁵ of his report,

“Thus I have been consistent in my devaluation of the comparables and valuation of the Premises.”

Should s.34 rent be reduced to reflect the absence of a fitting out rent-free period?

37. The Parties’ agreed draft lease²⁶ makes no provision for a rent-free period.
38. In his report, Mr Purnell says at paragraph 6.8²⁷ that s.34(1)(a) of the 1954 Act requires the rent to be reduced to reflect the absence of a fitting out rent-free period. He says,

“6.8 It is my opinion, supported by a number of recent Court Judgements, that all of the rent-free period on comparables should be amortised.

There is nothing within the s34 assumption and evaluation definition (as set out above) that requires the rent-free to be disregarded. These assumptions are meant to replicate a letting, and if a letting is agreed with a rent-free period, then it should be considered.

Consequently, I consider it necessary for all of the rent-free to be amortised over the lease term. I enclose in Appendix 7, for

²⁴ A, 18, 247

²⁵ A, 16, 173

²⁶ A, 12, 73-138

²⁷ A, 17, 216-217

the benefit of the Court, a paper that sets out the arguments and reasoning in relation to this point.”

39. In his report, Mr Scott states that the period of fitting out should not be deducted from the rent but a rent-free period as an incentive over and above the fitting out period should be taken into account. For example, Mr Scott says in his report in relation to 201-203 Old Street, left hand unit (Marks & Spencer) at paragraph 9.11²⁸,

“I consider a six-month rent-free period for fitting out appropriate for the size of the premises and amortize the remaining five of the total eleven months’ rent-free granted as an incentive over the first 5 years of the term. This provides a net effective rent of £371,250 per annum.”

40. In the experts’ joint statement Mr Scott agreed with Mr Purnell²⁹ that an allowance should be made for a three-month rent-free fitting out period. He said,

“AS applies a -5% end allowance equivalent to 3 months’ rent free amortized over the first 5 years of the term. This produces a revised interim rent of £140,500 per annum.”

41. However, in his supplemental report³⁰, Mr Scott withdrew his concession, saying³¹,

“6.05 I have since been instructed that this is a point of law and not valuation, and that the Claimants’ position is, as a matter of law, that the rent payable under s.34 should not be adjusted to reflect the absence of a rent-free period for fitting out. I am instructed that in the most recent case on this subject, that was the conclusion of the court. Accordingly, I retract the concession which I previously made on this subject.”

Landlords’ submissions

42. In Mr Jourdan’s first skeleton argument for trial, he submitted,

“It is not appropriate for the issue to be debated again in this case. Rather, the Court should follow HHJ Dight’s decision, applying the principle explained by Nourse J in Colchester Estates (Cardiff) v Carlton Industries Plc [1986] Ch. 80 at 85:

‘... There must come a time when a point is normally to be treated as having been settled at first instance. I think that that should be when the earlier decision has been fully considered, but not followed, in a later one.’

²⁸ A, 16, 178

²⁹ A, 18, 250

³⁰ A, 19, 259-264

³¹ A, 19, 287

That point has now been reached in the County Court.”

43. Mr Jourdan referred the Court to the recent decision of the Supreme Court in *Cornerstone v Compton Beauchamp* [2022] UKSC 18³², in which the Court was concerned with the meaning of the word “occupier” in paragraph 20 of the Electronic Communications Code. Lady Rose said at paragraphs 103-107 that the correct approach to this question was to work out how the statutory scheme was intended to work and to consider what meaning should be given to the word “occupier” so as best to achieve that goal. At paragraph 107 her Ladyship quoted with approval from the judgment of Lord Mance in an earlier case:

“In matters of statutory construction, the statutory purpose and the general scheme by which it is to be put into effect are of central importance. They represent the context in which individual words are to be understood...”

44. In his written submissions on the interpretation of s.34(1) of the 1954 Act, Mr Jourdan submits,

“3. The purpose of s.34 was to ensure that the rent payable under a new tenancy granted under the 1954 Act, would be a fair market rent of the kind that would be agreed between a fair, reasonable landlord and a sitting tenant.”

45. Mr Jourdan argues that the disregards in s.34(1) are there to ensure that the tenant does not pay a higher rent due to additional rental value attributable to their own efforts. He says that nothing in the drafting or purpose of s.34(1) supports the argument that the rent should be artificially depressed to reflect the absence of a fitting out rent-free period that the tenant does not need.

46. Mr Jourdan submits that although any effect on rent of the tenant’s occupation must be disregarded, there is no need to disregard the tenant as a potential tenant for the letting of the Property. He says that before the 1954 Act was enacted, the Landlord and Tenant Act 1927 provided that a business tenant could, in limited circumstances, obtain a new tenancy, and s.5(2) of the 1927 Act³³ stated that the rent should be that “... which a willing lessee other than the tenant would agree to give and a willing lessor would agree to accept for the premises”. That language is not repeated in s.34(1) of the 1954 Act.

47. Further, Mr Jourdan says at paragraph 56 of his skeleton argument,

“In rating, where it is necessary to “the rent at which the same might reasonably be expected to let from year to year...” on stated assumptions, the actual occupier is treated as a potential tenant for the premises: see Ryde on Rating and the Council Tax (looseleaf ed.) section E chapter 3 paras 154-6³⁴; L.C.C. v. Erith

³² Joint authorities bundle, 10

³³ Joint authorities bundle 3, 35

³⁴ Joint authorities bundle 6,

Parish (Churchwardens) [1893] A.C. 562³⁵. There is no reason for any different conclusion in the case of s.34 of the 1954 Act.”

48. Mr Jourdan relies upon *HPUT Trustee No. 1 v Boots UK* (24 May 2001)³⁶. HHJ Dight CBE said³⁷,

“151. The Landlord says there should be no discount for a rent-free period and it is not its practice to agree them for business lease renewals. The tenant says that there should be an assumed rent-free period spread over the term of the lease up to the first break date. The resolution of that question turns, in part, on construction of section 34 of the 1954 Act in respect of which I have been referred to a number of decisions of the County Court, none of which is binding on me, but all of which point in the same direction, namely that the court should assume that the 1954 Act protected tenant is entitled to a rent-free period.”

49. HHJ Dight CBE found that there should be no discount for a rent-free fitting out period, and gave six reasons³⁸:

“157. ... First, the rent payable under section 34(1) is the rent which is payable from day one. ...

158. Secondly, there is nothing in section 34(1) which specifically requires the hypothetical model to include an assumption of a rent-free period. It would have been possible for the draftsman to say that it should be assumed that there would be a rent-free period. ...

159. Third, it seems to me there is no theoretical conflict in principle between valuing a hypothetical model and taking into account the principle of reality unless the requirements of the hypothesis specifically drive out consideration of the real situation. As Lewison said in the *Harbinger* case³⁹, the principle of reality requires one to stick with reality as closely as possible but, of course, the parties in the case of a rent review in a lease, or Parliament in the case of a rent review equivalent under a statute can specify what facts are to be assumed and what facts are to be disregarded.

160. Fourth, the reality in this situation is that the Tenant, which is seeking a renewal of its business lease, is unlikely to want a rent-free period to enable it to fit the premises out. The word reasonable, in my judgment, also drives the reference to reality.

³⁵ Joint authorities bundle 16

³⁶ Joint authorities bundle, 13

³⁷ Joint authorities bundle, 13, 218

³⁸ Joint authorities bundle, 13, 220

³⁹ *Harbinger Capital Partners v Caldwell & Anor* [2013] EWCA Civ 492

161. Fifth, it seems to me that the disregard in subparagraph (a) is, having regard to what Sales J said in *Humber Oil*⁴⁰, aimed at preventing a sitting tenant overbid. The fact that a sitting tenant is disregarded for working out the rent that is payable does not mean that you need disregard the reality of whether the successful bidder will need a fitting-out period. It seems to me that the use of the words “predecessor in title” in the disregard in subparagraph (a) indicates that what is to be disregarded is the status of the tenant as a sitting or protected tenant under the Act, rather than the assumed fact that they will be going back into the premises to use them as they did before, having notionally been out of occupation of the premises for the purposes of the bidding.

162. Sixth, standing back, in the market the requirement for some sort of inducement to the tenant to take the lease depends on all the circumstances. It is a commercial negotiation. The reality here is that the Tenant does not need an inducement in this case and specifically does not need a rent-free period and, in my judgment, it would be illogical for one to be built into the calculation.”

50. In his skeleton argument, Mr Jourdon relies upon a further argument at paragraph 15 of Appendix 1. He says,

“T is to be treated as a potential tenant ... So even if someone other than T would need time to fit out the Property that is not the case with T.”

Tenant’s submissions

51. In her skeleton argument, dated 30 August 2022, Ms Stevens-Hoare submits,

“27. Further HPUT does not address the treatment of rent-free period that form part of the actual, real world comparable transactions. HPUT is only concerned not making an assumption of a rent-free period in the calculation of rent for the litigant tenant when there is not one being given. It does not address the reality that the comparable transactions as a matter of fact involved rent-free periods which must be taken into account when working out what the actual open market rent being paid is. C’s expert and it would seem C accept that actual rent-free periods should be taken into account unless they relate to a fit out. C’s expert has proceeded to ignore actual rent-free periods introducing a hypothetical or assumed position in relation to the evidence of actual transactions. On any view the distinction drawn between rent-free for fit out and rent-free for other

⁴⁰ *Humber Oil Terminals Trustee Ltd (HOTT) v Associated British Ports (ABP)* [2012] EWHC 1336 (Ch)⁴⁰,

incentives cannot be justified under the Act or any authorities. Indeed, it is contrary to HHJ Dight’s driving principle that

“the hypothesis is only a mechanism for enabling one to arrive at a value of a particular property for a particular purpose. It does not entitle the valuer to depart from the real world further than the hypothesis compels.”

28. The Act requires the Court to determine the open market rental for the subject property and the way the experts assist with that is giving evidence of their opinion as to the open market rental value based on actual comparable transactions, not an assumption about that transaction which is contrary to the facts.”

52. In her supplemental skeleton, Ms Stevens-Hoare says,

“32. Taking a purposive approach to statutory interpretation the purpose of s34(1) is to ensure the rent payable reflects the real market value of the subject property in a hypothetical transaction where the landlord is willing and the tenant has no prior connection to the property (as tenant or as a business). The hypothesis is confined the tenant and the landlord of the subject property not the market and the rental value it would generate.

...

39. The correct analysis is there is nothing in s34(1) which requires:

- a. the new letting to provide the tenant of the subject property with a rent-free period;
- b. the ignoring of any rent-free period when evaluating the true rental value of the comparables;
- c. the treatment of rent-free periods tied to either actual or assumed fit out periods to be treated any differently from other parts of a rent-free period given;
- d. the characterisation of rent-free period matching an actual or assumed fit out period as not being an incentive when they are a negotiated but voluntary contribution by a landlord to reduce the tenant’s cost of establishing itself in the property given in order to attract the tenant to the deal;
- e. the court to make assumptions or adopt the markets assumptions about the generic length of fit out periods rather than it being for the parties to evidence actual fit out periods and/or agreements as to rent-free period for that specific purpose.”

Findings as to rent-free period

53. It is common ground that there is no binding authority as to whether the whole of a rent-free period, including when part of this is assessed as a fitting out period, should be deducted from an annual rent for the purposes of s.34(1)(a) of the 1954 Act. There are a number of County Court decisions, which are not binding upon me and which are conflicting, although most of them found that when assessing comparable properties, the whole of the rent-free period, including the fitting out period, should be deducted from the headline rent to arrive at the net effective rent.
54. Mr Jourdan submits in his skeleton argument at paragraph 35 that it is not appropriate for the Court to debate the issue of a fitting out rent-free period because the point became settled by *HPUT Trustee No 1 v Boots UK* (supra). I reject that submission and find that the matter has not become settled. Indeed, Mr Jourdan recognises this himself when he says at paragraph 32 of his skeleton argument,
- “As to the legal position, there are conflicting decisions of Judges of this court, none of which were appealed.”
55. Both parties have referred to the law in relation to rent review cases. I find that this case law is of very limited assistance, bearing in mind that the Court is construing a statutory provision, namely s.34(1) of the 1954 Act, and not a contractual provision.
56. Prior to trial, the Parties agreed the issues for determination, and they included: should a rent assessed under s.34(1) of the 1954 Act be adjusted to reflect the absence of a fitting out rent-free period in the new lease?
57. On the second day of trial, I directed that both parties file with the Court written submissions as to the issue relating to rent-free periods. Mr Jourdan provided written submissions which for the first time formulate two different questions to the question the Parties had agreed prior to trial (see paragraph 18 ii) above). These involve two new terms, a Pre-Fitting Out Rent and a Post-Fitting Out Rent, neither of which were used by the Claimant’s or Defendant’s experts or Counsel during the trial. Mr Jourdan says at paragraph 1 of his written submissions that the question for the Court is whether the rent to be assessed should be:
- “(1) the rent that would be paid by a tenant who needs to fit out the holding before they can start using it for the purposes of their business, and therefore cannot carry on business from the holding immediately the lease is granted – a ‘Pre-Fitting Out Rent’; or
- (2) the rent that would be paid by a tenant who has already had the opportunity of fitting out the holding before the rent become payable, and who can therefore start using the holding for the purposes of their business from the day the lease is granted – a ‘Post-Fitting Out Rent’.”
58. I reject Mr Jourdan’s formulation of the questions for the Court in these written submissions, dated 29 September 2022. In my judgment, the question is not whether

the rent should be assessed by deciding whether a “Pre-Fitting Out Rent” or a “Post-Fitting Out Rent” is applicable. These terms have never been used in evidence in this case and would lead a Court astray from what is the real issue. I find that the issue for the Court when considering comparable properties is whether the whole of a rent-free period, including a fitting out period, should be deducted from the headline rent in order to arrive at the net effective rent, or whether only a rent incentive period should be deducted.

59. I reject Mr Jourdan’s submission at paragraph 55 of his written submissions, dated 29 September 2022, that Ms Stevens-Hoare does not rely on s.34(1)(a) in her supplemental skeleton. I find that Ms Stevens-Hoare plainly does rely on s.34(1)(a) in her supplemental skeleton, and by way of example would refer to paragraphs 39 and 52.
60. I find that the statutory purpose or aim of s.34(1)(a) of the 1954 Act is to ensure that the rent payable reflects the real market value of the subject property in a hypothetical transaction where the landlord is willing and the tenant is not a sitting tenant, and has no connection to the property. I find that this construction is supported by the plain words of s.34(1)(a), which provides there be disregarded, “any effect on rent of the fact that the tenant has ... been in occupation of the holding” (my emphasis). Further, this construction is supported by:
- i) “Reynolds and Clark: Renewal of Business Tenancies”, 6th edition, 2020 at paragraph 9-074:

“The aim of s.34 of the 1954 Act is to put the parties in exactly the same position that they would be in if the new lease was being agreed in the real world, without the tenant being a sitting tenant. In the real world, absent the tenant’s security of tenure under the 1954 Act, the landlord would have to agree new terms in the open market with a new tenant. If it is standard practice at the valuation date to grant, e.g. a three-month rent-free period for fitting out, the landlord would have to grant this.”
 - ii) In *WH Smith Retail Holdings Ltd Commerz Real Investmentgesellschaft MBH* (unreported) [25 March 2021]⁴¹, HHJ Richard Parkes QC said,

“55. In common with the editors of Reynolds & Clark at 8-155, I see nothing unfair in adjusting the comparables in that way. If, as they suggest, the aim of s34 is to put the parties in exactly the same position as they would be in the real world without the tenant being a sitting tenant, then on that hypothesis the landlord would be agreeing new terms in the open market with a new tenant, and those terms would include a rent-free period for fitting out.”

⁴¹ Landlords’ authorities bundle on the s.34(1) point, tab 11

- iii) In *Britel Fund Trustees Limited v B & Q Plc* [2016] (unreported)⁴², HHJ John Mitchell was dealing with the issue of whether an allowance should be made for a 3-month fitting out rental holiday and said,

“19. This issue like the second issue arises from the artificiality of the section 34 exercise. As Sales J said in *Humber Oil Terminals Trustee v Associated British Ports* [2012] EWHC 1336 (Ch), [2012] 2 P & CR D27 ‘there is a strong air of unreality about all of this.’ However the exercise has to be applied logically to the construct. The rent is to be ascertained for a lease to be taken by a prospective lessee who is not already in occupation. It follows from the disregard at s 34(1) (a) that the tenant is assumed to have vacated the subject premises.”

61. S.34(1)(a) provides that the premises have to be envisaged as empty premises in the market. To put the matter another way, the tenant is assumed to have vacated the subject premises. In *Harewood Hotels v Harris* [1958] 1 WLR 108, Lord Evershed MR said,

“In the course of his reply, Mr. King-Hamilton referred us to a passage in *Woodfall on Landlord and Tenant*, second permanent supplement, 1957, Vol. 1, at p. 71, where the author, having cited this paragraph, says:

‘This seems to dispose equally of any accretion to the rent attributable to such occupation (the premises have to be envisaged as empty premises in the market) and of the ‘sitting tenant’ concession which was sometimes allowed for in assessing a ‘reasonable’ rent under the Act 1951.’

I am entirely willing to accept that passage.”

62. I note that the passage from *Woodfall on Landlord and Tenant* is replicated in the current edition in volume 2, at paragraph 22.150.
63. I find that the disregard in s.34(1)(a) is not limited to a sitting tenant overbid but “any effect on rent of the fact that the tenant has or his predecessors in title have been in occupation of the holding” (my emphasis). This interpretation is supported by:

- i) HHJ Richard Parkes QC in *WH Smith Retail Holdings plc* (supra),

“34. ... It seems to me that the fact that the premises are fitted out thanks to a rent-free period is properly seen as an effect on rent of the fact that the tenant has been in occupation, and therefore is to be disregarded, so that an appropriate adjustment should be made to the comparables for the absence of a rent-free period.”

- ii) *Reynolds and Clarke* (supra) at paragraph 9-075,

⁴² Landlords’ authorities bundle on the s.34(1) point, tab 9

“The difference between paras (a) and (b) is that under (a) one is required to disregard not merely the ‘sitting tenant’s overbid’ but also the fact that the tenant has been in occupation of the premises and has carried on business there.”

64. I accept Ms Stevens-Hoare’s submission in her supplemental skeleton argument, where she says,

“Rent-free periods and the comparable evidence

24. Both experts in this matter have agreed that negotiations for new leases involve the agreement to give rent-free periods for two purposes namely incentives and fit out periods. That is borne out by the comparable evidence where with only one exception the details of the comparable transactions or offers include a rent-free period. In each case the direct evidence of the transactions or offers does not distinguish between allowance for actual fit out periods and incentive. See the summary in Appendix 2⁴³. The amount of the rent-free period allocated to fit out represent Scott’s figures. The 6 months for No 154 and/or restaurants was not in evidence but has been added by Scott during the production of the table. Although, Purnell agreed in evidence that the market assumption is generally 3 months rent-free for fit out and 6 months for food stores, there is no agreement that the rent-free periods were in fact allocated as Scott contends.

25. ...The Court has no evidence of the actual periods required for the fit outs at the comparable properties before it.”

65. In the present case, all but one of the comparable properties have involved rent-free periods, which Mr Scott, with the agreement of Mr Purnell, has apportioned as a fitting out period and a rent incentive period. I find that as a consequence, to comply with s.34(1)(a) and compare like with like, the Court must adjust the determined rent to take into account the rent-free period (i.e. the fitting out and incentive periods) to arrive at the proper result. It is true that there is nothing in s.34(1)(a) which specifically requires the hypothetical model to include an assumption of a rent-free period. However, the disregard in s.34(1)(a) means that the Court must assess the open market value of the rent with a new tenant, and the experts in this case agree that the terms agreed with such a tenant would include a rent-free period, which they apportion into fitting out and incentive periods. I respectfully adopt the reasoning of HHJ Bailey in *HMV Music v Mount Eden Land* [17 January 2012]⁴⁴:

“57. ... Of course the tenant who has been in occupation during the term of a previous lease is most unlikely to undertake any shopfitting. He will almost invariably be able to continue trading without any pause. Because the fact that the tenant has been in

⁴³ Appendix 2 was provided by the Defendant after the conclusion of the trial

⁴⁴ Joint authorities bundle, 12, 175-189

occupation has to be disregarded by the terms of the statute, the absence of the need for a rent-free period cannot be brought into the court's determination. This might suggest a windfall to one party or the other, but if the determination exercise is carried out properly, there should be no question of a bonus to the tenant or a windfall to the landlord.

58. What the court must not do is determine a new rent by reference to rent-free period comparables and then omit to adjust the new rent to take account of the absence of a rent-free period in the new lease. Equally, where the court determines the new rent by reference to whole period comparables, it must not then adjust the rent on the basis that it is standard in any particular area for the tenant to have a fitting out rent-free period. The first will provide the landlord with a windfall, the second gives the tenant a bonus. ...

59. In the present case we have been working with rent-free comparables. Having arrived at a rent-free period rent, the court must then adjust the determined rent to arrive at the proper result.”

66. This reasoning was also adopted by:

i) HHJ John Mitchell in *Britel Fund Trustees Limited v B & Q Plc* (supra):

“21. ... Second, as HHJ Bailey said in *HMV Music* care must be taken to ensure that when considering comparables, like are compared with like. If the rent in this case is determined by reference to an unadjusted comparable of a ten year lease with a rent free holiday, no discount would be applied to the rent so determined. If the comparable was for a different term, the rent in that comparable would need to be adjusted to strip out the discount and the rent determined in this case would then have to be discounted.”

ii) HHJ Richard Parkes QC in *WH Smith Retail Holdings* (supra):

“54. ... It seems to me that the fact that the premises are fitted out thanks to a rent-free period is properly seen as an effect on rent of the fact that the tenant has been in occupation, and therefore is to be disregarded, so that an appropriate adjustment should be made to the comparables for the absence of a rent-free period. It is a curious fiction, certainly, and it may be an unintended effect, but it seems to me to be required by the clear words of s34.”

- iii) In *Iceland Foods Limited v Castle Brook Holdings Limited* 3 September 2013, unreported⁴⁵, Recorder Clayton said,

“90. ... In my judgment a hypothetical ingoing tenant would probably be well-placed to negotiate a discounted rent-free period of 3 months on account of fitting out. I have therefore adjusted the global rent by writing it down over 5 years in accordance with the convention adopted by Mr Blount-Powell.”

- iv) In *Odey Asset Management Group Limited v Telford Properties Limited* B00CL745 [7 April 2016]⁴⁶ HHJ Lochrane dealt with a submission that the Court may draw an inference based on the terms of the lease that the hypothetical tenant is more likely than not to have taken up residence on the date from which the rent is to be paid under the agreed terms of the lease. HHJ Lochrane said,

“84. This argument seems to me to fall foul of the provisions of s.34(1)(a) as Mr Clark suggests. To make an assumption as to the occupation by the hypothetical tenant prior to the valuation date which would have an impact on the rent to be determined would, in simple terms, be taking into account for the purposes of the calculation the fact that the tenant has been in occupation.”

67. I find that Mr Jourdan’s further point (see paragraph 50 above) falls foul of the provisions of s.34(1)(a), which states in terms that the Court should not take into account for the purposes of the calculation the fact that the Tenant has been in occupation.
68. I find that when considering the rent-free period, the Court should be focusing on the comparable properties and not the subject property. If one focuses on the comparable properties, the issue of whether the Tenant of 199 Old Street would in fact have to fit out the subject property is irrelevant. For this reason I reject Mr Jourdan’s submission that it would be anomalous to deduct the whole of a rent-free period because different comparables have different fitting out periods.
69. In my judgment, the words ‘the holding might reasonably be expected to be let in the open market’ in s.34(1) make it clear that the assessment of the rent for a subject property must be objective and balanced. If the comparable properties involve, as in the present case, rent-free fit-out periods, it would be unreasonable not to adjust the rent of the comparable property to take this into account, having regard to the disregard in s.34(1)(a).
70. I find that by taking into account the whole of the rent-free period (including the fitting out period), the Court is not importing a fiction or unreality but, to the contrary, putting the Parties in exactly the same position as they would be in if the new lease was being agreed in the real world without the tenant being a sitting tenant. The evidence in this case is that the Tenant would have received a six-month rent-free period, which the

⁴⁵ Landlords’ authorities bundle on the s.34(1) point, tab 8

⁴⁶ Landlords’ authorities bundle on the s.34(1) point, tab 10

experts in this case split into fitting out and incentive periods. In the real world, absent the Tenant's security of tenure under the 1954 Act, the Landlords would have to agree new terms in the open market, where a rent-free period (which would include a fitting out period) would be agreed with the new tenant.

71. The rent payable under s.34(1) is the rent which is payable from day one. I find that if the comparables are of rents payable by tenants who have rent-free periods, the determination by the Court will be of a rent which is to be paid from day one of the term by reference to those comparables, but taking into account the fact that the tenant will not have a rent-free period under the new lease.
72. The expert surveyors in this case are very experienced at the valuation of commercial property in central London and are very familiar with valuations under s.34 of the 1954 Act. The Claimants' expert, Mr Scott, agreed with the Defendant's expert, Mr Purnell, in their joint statement that credit should be given for the whole of a rent-free period, including a fitting out period, when assessing the rent of comparable properties. The Claimants' solicitors then instructed Mr Scott that this was a matter of law and he withdrew his admission. Whilst it is correct that this question is a matter of law, I find that it is not of no significance that two experienced experts, when discussing the case for the joint statement, agreed that the whole of a rent-free period, including a fitting out period, should be taken into account.

Conclusion as to fitting out period

73. I conclude that as a matter of construction of s.34(1)(a) of the 1954 Act, the interim rent and new rent must be adjusted to take into account the whole of a rent-free period of six months, including the three months which the Parties' experts apportion as a fitting out period.

Valuation of Remainder of 199 Old Street

74. In his report⁴⁷, Mr Scott says,

“10.08 As ground floor only premises, consideration for ancillary accommodation is required. Standard practice for a retail store like the Premises is to assume 20% of the NIA is used for storage or ancillary purposes. The Remainder of the Premises is 22% of the NIA, which is not significant overage and I therefore apply A/10 to the whole of the Remainder of the Premises.”

75. In his report Mr Purnell sets out his calculation of the ITZA, using A/12 for the Remainder, at Appendix 4⁴⁸. On this basis the ITZA units would be 781, not 788.86 units as contended for by Mr Scott.
76. In cross-examination, Mr Scott was referred to the following:

⁴⁷ A, 16, 193

⁴⁸ B, 25, 112

- i) Paragraph 7.12 of his report⁴⁹, where when describing the zoning method, he said the Remainder is assessed by dividing by 12.
 - ii) Paragraph 9.29 of his report⁵⁰, which is his zoning of Costa's bid for 201-203 Old Street, where he assesses the Remainder at A/10 and the square footage at 431.
 - iii) Paragraph 9.14 of his report⁵¹. He values 201-203 Old Street (Marks and Spencer), valuing the Remainder at A/12.
 - iv) Paragraph 9.26⁵² of his report. He was referred to his zoning valuation for Superdrug, where he values the remainder at A/12.
 - v) Paragraph 9.45⁵³, which is his valuation of 185-187 Old Street (The Co-operative), where he carries out a zoning valuation⁵⁴, again valuing the remainder at A/12.
77. I note that the Landlords and the Tenants agreed that the Remainder should be calculated at A/12 at the previous rent review in 2015, as said by Mr Purnell at paragraph 5.8 of his report⁵⁵.

Finding as to valuation of remainder

78. Mr Scott did not contest that the Parties agreed for the purposes of the arbitration of 199 Old Street in 2015 that A/12 be applied to the Remainder.
79. Moreover, in valuing comparable properties in his report, Mr Scott has valued the Remainder at A/12:
- i) 201-203 Old Street, left hand unit (Marks & Spencer), at paragraph 9.14⁵⁶;
 - ii) 201-203 Old Street, right hand unit (Superdrug) at paragraph 9.26⁵⁷;
 - iii) 185-187 Old Street (Co-operative) at paragraph 9.5⁵⁸.
80. I find that the Remainder should be calculated using A/12, having regard to the fact that:
- i) Mr Scott's evidence is inconsistent:

⁴⁹ A, 16, 172

⁵⁰ A, 16, 182

⁵¹ A, 16, 179

⁵² A, 16, 181

⁵³ A, 16, 184

⁵⁴ A, 16, 184

⁵⁵ A, 17, 214

⁵⁶ A, 16, 179

⁵⁷ A, 16, 181

⁵⁸ A, 16, 184

- a) He says in his report at paragraph 7.12 that the Remainder is assessed by dividing by 12.
 - b) He has assessed the Remainder at A12 when assessing other properties in the Parade, Marks and Spencer, Superdrug and the Co-Operative, and when zoning Costa’s bid for 201-203 Old Street, as detailed at paragraph 76 above.
- ii) The Parties agreed that the Remainder be assessed at A/12 for the purposes of the arbitration in March 2015;

81. If the Remainder is calculated at A/12, the ITZA units of 199 Old Street are as follows:

	Imperial	ITZA Units
Zone A	373 sq ft	373.00
Zone B	426 sq ft	213.00
Zone C	415 sq ft	103.75
Zone D	425 sq ft	53.13
Remainder	<u>458 sq ft</u>	<u>38.17</u>
Ground Floor NIA	2,097 sq ft	781.05

Exclusivity Adjustment

82. In the new lease it is said in the definitions and interpretation⁵⁹,

“1.1 Definitions

‘Authorised Use’ means use as a retail and dispensing chemist and dealer in photographic goods ... or any other use within Class A1 of the 1987 Order as the Landlord may approve in writing (such approval not to be unreasonably withheld or delayed).

...

3.7 Authorised and prohibited uses and keep open

(a) The Tenant shall not:

(i) use the Premises for any purpose other than the Authorised Use;

...

⁵⁹ A, 12, 80, 89 and 101-102

4.3 Restrictive Covenants

The Landlord covenants that is (sic) shall not at any time after the date of this Lease, until the expiration or sooner determination of the Term;

(a) grant a lease of the premises numbered 183/199 (inclusive) Old Street, London (being part of the Building) the terms of which permit the tenant to use the premises as a retail chemist; or

(b) consent to or permit any change of user of the premises number 201/205 (inclusive) Old Street, London (being part of the Building) to that of a retail chemist;

provided that nothing contained in Clauses 4.3 (a) or (b) shall prevent any of the premises referred to from being used for the sale by retail of goods habitually and usually sold by chemists as distinct from those items which, may by law only be sold from the premises of a registered pharmacy or by or under the personal supervision of a registered pharmacist.”

83. The Landlords submit that the Tenant would not have asked for an exclusivity adjustment in the new lease unless it was of benefit to them. As a consequence they submit that 2.5% should be added to the annual rent for the fact that the Landlords have covenanted in the Tenant’s new lease and in the leases of the other tenants in the Parade that the other tenants cannot trade from their premises as a dispensing chemist.

Evidence

84. In his supplemental report, Mr Scott says⁶⁰,

4.26 At paragraph 10.11 to 10.12 of my initial report, I commented on the prohibition of the trade as a registered chemist present in the leases of other units in the subject parade. I applied a 2.5% addition for the benefit of this. The subject premises have a protected or exclusive use available. Reviewing the NHS find a pharmacy service, the nearest competition would be 0.3 miles away on Whitecross Street.”

85. In Appendix ASSR 5⁶¹, Mr Scott lists the pharmacies within 1.3 miles of 119 Old Street.
86. I repeat paragraphs 46 and 47 herein.
87. In cross-examination, Mr Scott agreed that the value of exclusivity was in preventing the realistic threat of competition from neighbouring properties, when this was a negative. He agreed that in some cases there was a value in businesses trading in the same goods being grouped together. He agreed that in some businesses, whether there

⁶⁰ A, 19, 269

⁶¹ C, 5, 87-103

would be competition is skewed by regulatory controls, such as planning or legal controls limiting the amount of that business in an area.

88. Mr Scott agreed that the only comparable he relied upon to support his claim for an exclusivity adjustment was a recent lease renewal of Harley's Chemist, 35-37 Old Brompton Road⁶². There was a rent review on 25 December 2010, at which an arbitrator included a 2.5% exclusivity adjustment. Mr Scott said that a colleague told him that when this lease was reviewed in 2015, the parties agreed the same exclusivity adjustment, and it was upon that agreement that he relied. He said it was the only specific piece of evidence he had been able to locate in Messrs Nash Bond's files. He agreed that the parties agreed the exclusivity against the backdrop of an arbitration. It was put to him that this was very weak evidence on which to assert that a chemist taking a lease in the open market would pay an exclusivity adjustment of 2.5%. He agreed it was a single piece of evidence.
89. Mr Scott admitted that he was not a specialist dealing in the valuation of dispensing chemists, but said that he had had a few dealings with other negotiations involving chemists, such as Boots. He agreed that in those negotiations there had been no exclusivity adjustment.
90. Mr Scott agreed that a tenant who wished to practise as a chemist would have to apply to the NHS for a contract, and the NHS would consider whether there were sufficient chemists in the tenant's area. He admitted that until provided with this evidence by Ms Stevens-Hoare at the beginning of the trial, he did not know that a chemist has to apply for an NHS contract, which is unlikely to be granted unless there is a need in the area for another chemist. He said he had not had dealings with private pharmacies operating without an NHS contract and did not know if this was very rare. He said that he would expect a hypothetical tenant would negotiate with the NHS to obtain a contract at the same time as negotiating with the landlord.
91. In the experts' joint statement, Mr Purnell says at point 8⁶³,
- “CP considers that an upward adjustment is incorrect. Any exclusivity in a user clause must be linked to the ability for the hypothetical tenant to secure the appropriate pharmaceutical license. The current license is owned by the Defendant, where there is no guarantee that the willing lessee would be able to secure this. See s34(d).”
92. In cross-examination, Mr Purnell said that the value of the exclusivity was personal and he considered that this was a disregard under s.34(1)(d) of the 1954 Act.
93. He said he dealt with a lot of chemists' valuations and had never paid a premium for exclusivity, nor had he ever been asked to include one.

⁶² B, 24, 101-102

⁶³ A, 18, 249

94. Mr Purnell was referred to the proposed lease, dated August 2021, for 199 Old Street at paragraph 4.3⁶⁴. He agreed that the exclusivity clause had been put in at the request of the Tenant.

Landlords' submissions

95. Mr Jourdan says in his skeleton argument,

“53. Mr Purnell says that there is no value in the right to trade as a dispensing chemist, because in order to trade as a dispensing chemist, a new tenant would need a licence under Part IV of the Medicines Act 1968. He says that T’s licence to do that is personal to T, relying on s.34(1)(d) of the 1954 Act: see A/t18/249 second row.

54. It is far from clear whether s.34(1)(d) applies here. But even if it does, the conditions for obtaining a licence under sections 74-74E of the 1968 Act are undemanding and there is no evidence that there would be any difficulty in obtaining one. There is a distinct lack of dispensing chemists in the area, apart from T (as to which see C/t19.5/87). So there would be obvious attractions for the Property for Boots, or Lloyds or an independent to open a pharmacy in the Property.”

96. Regarding s.34(1)(d), Mr Jourdan submits that there is no need to disregard the Tenant as a potential tenant for the letting of 199 Old Street. He accepts that in rent review cases, the willing tenant does not have the characteristics of the real tenant. However, he argues that in rating cases, the actual occupier is treated as a potential tenant for the premises. He submitted that this point had not been decided in relation to the 1954 Act but he said that the position adopted in rating law should apply to s.34(1)(d) and that an exclusivity adjustment should be applied.

Tenant's submissions

97. Ms Stevens-Hoare says in her skeleton argument,

“36. In any event D can operate as a registered chemist because D has an NHS contract to do so at the SB. Without such a contract the exclusion in other leases is without value. The market generally would not see a value in that exclusion. The hypothetical tenant is not the actual tenant, and is not a tenant with an NHS contract just because D has one. In arriving at the open market value, the Court cannot assume the hypothetical tenant has an NHS contract entitling it to operate as a registered chemist out of the SB. To do so would be contrary to s34 of the Act. It is the process of NHS contracting that confers any benefit not the exclusion of the ability to do that which they could not do anyway from other tenant’s leases and the benefit belongs to

⁶⁴ A, 12, 101

and travels with the pharmacist not the shop. In those circumstances the exclusivity by reason of the other leases cannot be relevant to the assessment of the open market rent under s34 of the Act.”

98. Ms Stevens-Hoare provided the Court with a supplemental trial bundle, which contained Camden and Islington’s Pharmaceutical Needs Assessment 2018 and Islington’s draft Pharmaceutical Needs Assessment 2022.
99. Regarding the Pharmaceutical Needs Assessment 2018, she drew the Court’s attention to:
- i) Paragraph 1.2⁶⁵,
“With 46 pharmacies overall in Islington, and 20 pharmacies per 100,000 residents in the borough, Islington has a similar rate of community pharmacies per 100,000 residents compared to the London average (22 pharmacies). There is no defined ideal rate available. ... There is at least one pharmacy in most of the borough’s wards, and three of Islington’s four localities have a late opening pharmacy.”
 - ii) Paragraph 5.8⁶⁶
“Conclusion on the provision of services

The provision of pharmaceutical services in Islington is assessed as being sufficient, and there are no identified gaps. The current service provision is deemed adequate to support the changing needs and population growth in Islington. This includes assessment of the proposed developments and population expansion.”
100. Regarding the Pharmaceutical Needs Assessment 2022, Ms Stevens-Hoare drew the Court’s attention to the assessment of the current provision of necessary services, which concluded that:
- i) There was “No current gap in the provision of Necessary Services ... across Islington to meet the needs of the population”:
 - a) During normal working hours⁶⁷
 - b) Outside of normal working hours⁶⁸
 - c) In specified future circumstances across Islington⁶⁹

⁶⁵ Supplemental trial bundle, t1, 11

⁶⁶ Supplemental trial bundle, 1, 154

⁶⁷ Supplemental trial bundle, 3, 214

⁶⁸ Supplemental trial bundle, 3, 214

⁶⁹ Supplemental trial bundle, 3, 214

- d) For South locality⁷⁰
 - e) For Central locality⁷¹.
- ii) “No gaps have been identified that if provided either now or in the future would secure improvements or better access to Advanced Services ...”
- a) Across the North locality⁷²;
 - b) Across the South locality⁷³;
 - c) Across the Central locality⁷⁴.

Findings as to exclusivity adjustment

101. I find that as a matter of construction s.34(1) of the 1954 Act tasks the Court with assessing the market rent for the property which a hypothetical tenant would pay. The four disregards in s.34(1) mean that factors which could lead the actual tenant to pay a higher rent are not considered when assessing the market rent. I find that as a consequence of the disregards, which mean that the characteristics of the actual Tenant fall away, the tenant for the purposes of valuing the rent under s.34 is a hypothetical tenant.
102. I find that under s.34(1)(d), the licence which permits the Tenant to trade as a dispensing chemist is to be disregarded. A hypothetical tenant, who may not even be a chemist, would not pay an additional sum for an exclusivity clause preventing other tenants in the Parade from trading as a dispensing chemist. I therefore find that s.34(1)(d) prohibits the addition of an exclusivity adjustment of 2.5% or any other sum.
103. Even if I was wrong in my interpretation of s.34(1)(d), I find that on the evidence in the present case the Landlords have not proved on the balance of probabilities that the Tenant would pay an exclusivity adjustment of 2.5%, or any other increase, because:
- i) The evidence adduced by the Landlords that a dispensing chemist would pay for an exclusivity clause is unconvincing and fails to discharge the burden upon them. Mr Scott admitted in cross-examination that he was not a specialist in dealing with the valuation of leases to dispensing chemists. Nash Bond is a leading specialist retail property practice, providing agency and lease advisory advice and expertise to a wide range of landlords and tenants. Mr Scott had investigated all of Nash Bond’s files yet had only found one example of an exclusivity adjustment being agreed in the valuation of a dispensing chemist’s. His evidence was based on what he had been told by a colleague in respect of an agreement in 2015, which followed a rent review of a chemist in 2010, in which the arbitrator had included a 2.5% exclusivity adjustment. I accept Mr

⁷⁰ Supplemental trial bundle, 3, 288

⁷¹ Supplemental trial bundle, 3, 289

⁷² Supplemental trial bundle, 3, 287

⁷³ Supplemental trial bundle, 3, 288

⁷⁴ Supplemental trial bundle, 3, 290

Purnell's evidence that he has carried out many valuations of dispensing chemists, and in none of them was an exclusivity adjustment agreed.

- ii) Mr Scott was unaware prior to receiving the Tenant's evidence from Camden and Islington's Pharmaceutical Needs Assessment 2018 and Islington's draft Pharmaceutical Needs Assessment 2022 that a chemist had to apply for an NHS contract and unless there was a gap, an NHS contract would not be given. This in itself is evidence of Mr Scott's inexperience in this area.
- iii) Contrary to Mr Jourdan's submission in his skeleton argument at paragraph 54 that, "There is a distinct lack of dispensing chemists in the area, apart from T", the pharmaceutical needs assessments carried out by the Health and Wellbeing board of the London Borough of Islington in 2018 and 2022 (see paragraphs 99 and 100 above) show that there are no gaps in the provision of pharmacies in the area of the subject Property; therefore it is unlikely that the London Borough of Islington would grant any further licences for dispensing chemists. Consequently, I find as a fact that a tenant who was a dispensing chemist would be unlikely to pay for an exclusivity adjustment because there would be no nearby competition in any event.

Comparables – Location

104. At paragraph 3.15 of his supplemental report⁷⁵, Mr Scott contrasts the historic situation of the Parade and its surroundings, as found by the arbitrator carrying out the arbitration of 199 Old Street in March 2015, and the current situation and his own assessment in August 2022. He says that whereas in 2015 the southern section of City Road and the eastern section of Old Street were busier, in 2022 the northern section of City Road and the western section of Old Street were busier, including in terms of footfall. He says that in 2015 the northern and southern sections of City Road were a stronger pitch than the Parade on Old Street, while in 2022 the Parade was the stronger pitch, as could be seen from the lettings to Marks and Spencer in 2018, to Superdrug and the Co-operative in 2019 and to Aldi in 2021. He says the Parade was fully let and had the best retail adjacencies, for example Marks and Spencer and Gymbox, whereas premises in City Road had been let to for example German Donner Kebab, which is not a premium operator.
105. Mr Scott says that in 2015, Old Street was geared to the needs of the housing population who were living above and behind it, and who were not affluent workers and residents. He says that the Parade comprised a "secondary parade" of low end fashion, convenience goods and a range of services. The arbitrator of 199 Old Street said at paragraph 8.23 of their decision that it was possible that the Parade,
- "will be gentrified in time [but] the differences between this section of Old Street and the northern and southern sections of City Road are worlds apart".
106. Mr Scott says that by 2022, the Parade had been gentrified. The left hand unit at 201 – 203 Old Street which had been occupied by Peacocks had been redeveloped and let to

⁷⁵ A, 19, 262-264

Marks and Spencer. Gymbox, with its membership fee of £124 per month, was not a gym targeting council tenants. Money has been invested in developing and improving the shopfronts in the Parade.

107. In cross-examination, Mr Scott, when asked about the Bezier Building on the roundabout, said he did not know what had been there before but in general all developments in the area were improvements. He agreed that the changes to the Parade since 2015 were that the Post Office had gone to the other end of the Parade and Marks and Spencer had replaced Peacocks. He agreed that in 2015 the Parade was serving the local authority housing in the blocks behind and above it, and the wider area.
108. Mr Scott agreed that the arrival of Marks and Spencer changed the tone of the Parade and fitted in with the Landlords' intention to redevelop the Parade and capitalise on changes in the area with the redevelopment of office and residential buildings around the roundabout. He agreed that the replacement of Peacocks by Marks and Spencer was a significant upgrade. He agreed that Marks and Spencer, an upmarket convenience store, would be more attractive to those in a higher income bracket. It was put to him that the Parade was a Parade of two halves. The quality tenants were near the roundabout and Wagamama. At the Bath Street end were the remnants of what was originally the Parade, with the longer standing tenants who served the dwellings above and behind the Parade. Mr Scott said that the difference was between properties which had become available for the Landlords to re-let and long-standing tenants who were protected by the 1954 Act or long-standing occupancy.
109. Mr Scott agreed that the tenants in the Parade knew that they were dealing with Landlords who were trying to improve the Parade and using any legal and negotiation tools which they could do so.
110. In his report, Mr Purnell says,

“11.2 I consider Old Street to be a secondary trading position in this fringe City location, particularly when compared with some of the more established retail locations referred to in this report. I acknowledge that some improvements have been made given the introduction of an M&S Foodhall and that another food store is understood to be taking a unit on the former Post Office site. I consider that the loss of a full Post Office branch to be detrimental. However, I maintain this further emphasises the convenience nature of this location which primarily services the housing population living above and behind the subject.

11.3 The visibility of the whole of this parade is affected by the trees which line this section of Old Street. The subject itself also lacks prominence due to its limited frontage and dead frontage to either side. Whilst the Claimant extended the ground floor by moving the shop frontage forward in 2019, this in my opinion has done nothing to enhance prominence. Indeed, this reconfigured frontage now limits retail signage and thus reduces presence.”

March 2015 arbitration award of 199 Old Street

111. The initial rent for 199 Old Street under the existing lease set on 22 March 2010 was £28,250. This rent was reviewed by an Arbitrator and set at £40,250, with effect from 22 March 2015. The rent was awarded based on £50 for Zone A. A copy of the arbitration award is provided at Appendix ASSR 1⁷⁶.
112. The Landlords' expert, Mr Scott, says in his supplemental report⁷⁷ that the rent payable under the existing lease was set in March 2015 by an Arbitrator's award at a time when there was no open market letting evidence at all in the Parade. Further, he says that the Parade has radically improved in tone and value since March 2015 and is now the strongest pitch in the area. He says for these reasons no weight can be placed on the historic arbitration award.
113. As I have stated at paragraph 26 above, it is clear law that an arbitration award is not admissible evidence to prove the rent payable under s.34(1) of the 1954 Act.

Landlords' comparables

114. Mr Scott's opinion is that the best guide to the rental value of 199 Old Street is the lettings of other units in the same parade. He submits that these comparables have the enormous advantage of being lettings in the same location as 199 Old Street, and therefore do not require the application of what is inevitably a highly subjective judgment about whether other locations are better, worse or about the same as that of 199 Old Street.

203 Old Street (Superdrug)

115. 203 Old Street has been occupied by Superdrug since 2007. In 2016, following Superdrug's request for a new lease via a s.26 notice, the Landlords opposed a new lease under s.30(f)⁷⁸.
116. The Landlords were successful in opposing the new lease. Superdrug vacated the premises in early 2018.
117. The premises at 203 Old Street were redeveloped, which involved installing and bringing the shop front forward and increasing the size of the ground floor. The premises were marketed by CWM on the basis of a new lease being granted on the redeveloped premises in shell condition with capped services.
118. The re-developed premises at 203 Old Street are arranged over ground and basement floors, totalling 2,928 feet square. The ground floor is 2,021 feet square and the remote basement area 907 feet square. Mr Scott has annexed to his report photographs of 201 – 203 Old Street⁷⁹ and a copy of the lease plan⁸⁰.

⁷⁶ C, 1, 1-22

⁷⁷ A, 19, 259-264

⁷⁸ B, 8, 20

⁷⁹ C, 3, 66

⁸⁰ B, 11, 28

119. In September 2017, the Acquisitions Team at Costa made an offer for 203 Old Street of £165,000 per annum⁸¹, which Mr Scott analyses at £200 Zone A. Costa requested a six-month rent-free period, to be amortised over the first five years of the term, which would give a net effective rent of £148,500 and a Zone A of £180.
120. The offer was rejected by the Board of Costa in January 2018. The email confirming the rejection⁸² provides no reason for it by the Board.
121. Superdrug were out of possession of 203 Old Street for 18 months. They then took a new lease for ten years from 5 July 2019. Mr Scott has provided a copy of the signed proforma for the transaction⁸³, which records the headline terms of the lease. The lease was outside the 1954 Act and the rent was £182,500 p.a., with a rent-free period of six months. There would be a rent review in the fifth year upward only in line with RPI, compounded annually, collar of 2% and cap of 4%.
122. At paragraph 9.24 of his report⁸⁴, Mr Scott says,
- “I consider a three-month rent-free period for fitting out appropriate for a shop of this size and amortise the remaining three months’ rent free as an incentive over the first 5 years of the term. This provides a net effective rent of £173,373 per annum.”
123. Mr Scott calculates a Zone A of £213.43.
124. I comment that if the whole of the six-month rent-free period is amortised, the net effective rent would have been £164,250, which would give a Zone A of £202.20.
125. Mr Scott says in his report at paragraph 10.20⁸⁵ that the letting to Superdrug is the most relevant evidence in terms of location, size and configuration.
126. Mr Purnell says in his report⁸⁶,
- “Superdrug had no option but to reoccupy on the Claimant’s terms.
- Superdrug has traded from this unit since 2007 and thus had built up a considerable amount of trade and goodwill.
- This would have attracted redundancy and dilapidation costs (subject s18 relief on the latter) had Superdrug decided to close.
- The terms were thus not concluded at arms-length and is contrary to the s34 assumptions.”

⁸¹ B, 9, 22

⁸² C, 19, 282

⁸³ B, 10, 26

⁸⁴ A, 16, 181

⁸⁵ A, 16, 196

⁸⁶ A, 17, 226

127. Mr Purnell has obtained an email from Mr Fitzsimmons, Superdrug’s Regional Estates Manager, dated 20 September 2021⁸⁷, in which the latter says,

“In April 2016 we served a s26 requesting a new tenancy from 17 Jan 2017. In June 2016, the landlord served us with a hostile Counter-Notice on ground (f) redevelopment. The landlord’s proposals included pulling forward the shopfront. Eventually we were forced to vacate in Jan 2018 to enable the landlord to carry out their works. This was a good performing store for Superdrug, having traded here since 2007. The business was keen to get back in, and so Masons were instructed to agree a deal to reoccupy our former store. The landlord had us over a barrel, and either we accepted their proposals, or we lost out. We chose to accept the terms on offer, which included a very bullish rent in my view.”

205 Old Street (Aldi Stores Limited)

128. An agreement for a lease of 205 Old Street was exchanged by the Landlords and Aldi Stores Limited on 1 October 2021 for a new 15-year lease inside the 1954 Act at an initial rent of £485,000 per annum, with a 12 months’ rent-free period. Mr Scott has obtained a signed proforma setting out the details of the transaction⁸⁸ and annexed to his report colour photographs⁸⁹ of the unit.
129. These premises were previously occupied by the Post Office and were re-developed by the Landlords. The shell construction works extended the existing building with a new single-storey extension at ground floor. The new shop front is in line with other units in the Parade.
130. The demise under the lease is over ground and basement floors only. There is a copy of the lease demise plan⁹⁰. The ground floor is 7,628 sq ft. The basement loading area is taken up by a goods lift, circulation space and stairs. Mr Scott has annexed to his report colour photographs of 205 Old Street⁹¹.
131. Mr Scott says in his report⁹²,

“9.61 Based on the target date and assumption of the parties reflected in the agreement Aldi is projected to benefit from a 6 months’ rent free for fitting out following delivery of the shell unit. I consider a 6-month rent-free period for fitting out for such a large store, and the net effective rent is therefore £485,000 per annum.

⁸⁷ B, 17, 206

⁸⁸ B, 16, 53-55

⁸⁹ C, 3, 65-66

⁹⁰ B, 17, 57-60

⁹¹ C, 3, 65-66

⁹² A, 16, 187

...

9.66 My analysis therefore reflects £183.30 Zone A ...”.

132. Mr Scott says in his supplemental report at paragraph 7.12⁹³ that the Zone A rent represents a fall of approximately 15% from the pre-Covid values.
133. It can be seen from the proforma that the landlord is obligated to carry out enabling works within six months of the date of the agreement for the lease at its own cost. Aldi Stores Limited are to carry out the shell construction works. There is a payment from the landlord to Aldi Stores Limited on completion of the works of £1,987,820 + VAT instead of the landlord carrying them out. The shell construction works have a target date of six months from the handover of the site, and the lease is to complete ten business days following completion of the shell construction works. The rent-free period commences from handover of the site, not completion of the lease. If Aldi Stores Limited complete the works within twelve months, then the balance of the rent-free period applies under the lease. In the event that the works take more than twelve months, there is no rent-free period and Aldi Stores Limited pays a licence fee equivalent to the rent plus insurance.
134. Mr Scott says in his report at paragraph 9.61⁹⁴,
- “Based on the target date and assumption of the parties reflected in the agreement, Aldi is projected to benefit from a 6 months’ rent free for fitting out following delivery of the shell unit. I consider a 6-month rent-free period for fitting out for such a large store, and the net effective rent is therefore £485,000 per annum.”
135. In the Defendant’s Appendix 2, it is stated that the annual rent with the rent-free period, less the fit-out element amortised, is £485,000, according to Mr Scott, or £436,500 according to Mr Purnell. There is a note stating,
- “Up to 12 months’ rent free from handover of site while tenant executes the shell construction works. Any part of the 12 months not used for shell construction works included as a rent-free period on commencement of lease term.”
136. In her email dated 5 October 2022, Ms Stevens-Hoare says,
- “The table as it came through from Mr Scott had 12 months shown as the fit out period in the table. It was not confined to 6 months for a reasonable fit out period as paragraphs 9.5 to 9.61 of Mr Scott’s report and paragraph 64 of the further submissions suggest. The inclusion of 12 months as a fit out period did not reflect the documentary evidence at [B/16.16/54]. There was an

⁹³ A, 19, 290

⁹⁴ A, 16 187

accompanying narrative that went some way to clarifying the position

‘6 months of the rent free while the shell construction works are carried out by the tenant, given the agreed target dates, with the remaining 6 months’ rent free for fitting out following completion of the shell construction work- see paragraphs 9.58 to 9.61 of AS Initial Report.’

Unfortunately that narrative made no reference to the fact that the period of shell construction work would take place before the grant of the lease, so it give the impression the whole 12 months was a period during the term which was rent free. The change made to show a sliding possibility from 0-12 and refer to the position in the documentary evidence seemed the most neutral resolution.”

137. Mr Purnell says in experts’ joint statement⁹⁵ that he did not specifically refer to 205 Old Street in his report as it is a much larger food store and he considers that it is not comparable. He says that the store has a NIA of 7,628 sq ft and considers that it should be analysed on an overall basis.

201-203 Old Street (Marks and Spencer)

138. 201-203 Old Street was formerly occupied by Peacocks at a rent of £90,000 p.a.
139. 201-203 Old Street was redeveloped, with the shop front extended and brought forward. The redeveloped premises are arranged over ground (4,850 sq ft) and basement (3,117 sq ft) floors, totalling 7,967 sq ft. There is a copy of the lease plan⁹⁶. Mr Scott has annexed to his report colour photographs of 201-203 Old Street⁹⁷.
140. An agreement for lease was exchanged on 27 December 2018 with Marks and Spencer for a new twenty-year lease outside the 1954 Act from 16 September 2019, with a tenant break at the fifteenth year of the term. The initial rent was £405,000 per annum, subject to RPI reviews, with an 11 months’ rent-free period granted. The transaction completed in November 2019. Mr Scott has produced a signed proforma⁹⁸.
141. Mr Purnell has produced:
- i) the heads of terms for an agreement for lease, dated 5 March 2018⁹⁹;
 - ii) an email from the Marks and Spencer’s agent, Mr Howard Quigley, dated 6 October 2021¹⁰⁰, in which he says that the rent was calculated on an overall rate per square foot of £49.21.

⁹⁵ A, 18, 247

⁹⁶ B, 7, 16-17

⁹⁷ C, 3, 67

⁹⁸ B, 6, 12-13

⁹⁹ C, 23, 304-313

¹⁰⁰ C, 23, 21, 314

142. Mr Scott says in his report at paragraph 9.11¹⁰¹,
“I consider a six-month rent-free period for fitting out appropriate for the size of the premises and amortize the remaining five of the total eleven months’ rent free granted as an incentive over the first 5 years of the term. This provides a net effective rent of £371,250 per annum.”
143. Mr Scott calculates the Zone A at £215.44.
144. I comment that if the whole of the eleven-month rent-free period had been amortised, the net effective rent would have been £330,750, which would have given a Zone A of £191.74.
145. Mr Purnell says in the experts’ joint statement¹⁰² that he did not specifically refer to 201-203 Old Street as it is a much larger food store and he considers that it is not comparable.

185-197 Old Street (The Co-Operative)

146. The Co-operative held a lease of 185-197 Old Street, dated 14 November 2003, made originally between Somerfield as tenant and Citymain Investment as landlord of premises totalling approximately 33,000 feet square.
147. The Co-operative occupied 185-187 Old Street, and 189-197 Old Street was underlet to Argos under a lease dated 26 October 2012.
148. The Co-operative served a s.26 Notice dated 13 February 2018¹⁰³ requesting a new tenancy to commence 12 February 2019 for a term of 15 years, at a commencing rent of £525,000. The landlord served a counternotice, dated 14 March 2018¹⁰⁴, opposing the grant of a new lease under redevelopment grounds. The protected renewal process continued, with a trial listed for 5 October 2020.
149. The Co-operative entered into an agreement with the Landlords for a new lease in August 2019 for a new 15-year lease of 185-187 Old Street, inside the 1954 Act, from 8 January 2019. The initial rent reserved was £625,000 p.a., subject to RPI reviews with 12 months’ rent free granted. There is a copy of the signed proforma¹⁰⁵.
150. The terms agreed included the Co-operative accommodating the Post Office, which was re-located from 205 Old Street in the same Parade.

¹⁰¹ A, 16, 178

¹⁰² A, 18, 246

¹⁰³ B, 12, 33-36

¹⁰⁴ B, 12, 39

¹⁰⁵ B, 13, 42-43

151. The Co-operative's premises are arranged over ground (6,319 sq ft) and basement (6,221 sq ft) floors, totalling 12,540 sq ft. Mr Scott has provided a copy of the lease plans¹⁰⁶ and colour photographs of 185-197 Old Street¹⁰⁷.
152. Mr Scott says at paragraph 9.44 of his report that the premises are much larger than 199 Old Street and makes an adjustment for size, or quantum, of -7.5%. He applies a standard storage rate of A/20 to the whole of the basement.
153. At paragraph 9.45 of his report, he calculates a Zone A rate of £215.25.
154. The Landlords granted the Co-operative a twelve-month rent-free period, which would have been reduced to six months if the Co-operative had not agreed to accommodate the Post Office. At paragraph 9.43, Mr Scott says,

“The proforma records the landlord granted an additional 6-month rent-free period for accommodating the Post Office which is operated by the Co-operative. I therefore amortize 6 months' rent free as an incentive over the first 5 years of the term which provides a net effective rent of £562,500 per annum.”

155. I comment that if the whole of the twelve-month rent-free period had been amortised, the net effective rent would have been £500,000, which would have given a Zone A of £191.34.
156. Mr Purnell says in the joint statement¹⁰⁸ that he did not refer to 185-187 Old Street as it is a much larger food store and he considers that it is not comparable.
157. A Mr Berrevoets of Retail and Leisure acted on behalf of the Co-op in the negotiations with the Landlords. Mr Purnell exhibits to his report an email dated 9 November 2021¹⁰⁹ in which Mr Berrevoets says,

“There are further omissions and misrepresentation of facts within the comments section of Ms Zakaria's signed proforma. It appears to have been presented to your tribunal as if the Co-op's lease renewal was freely negotiated in accordance with S.34 assumptions contained within the 1954 Act.

It most certainly was not.

The landlord's redevelopment intentions were made very clear to the Co-op from the outset of negotiations. I have attached an email dated 9th March 2017 from Jonathan Watson of SWM which clearly states the only criteria upon which the landlord was prepared to treat with the Co-op for a new lease - a reduced ground floor sales area, loss of the basement and a non-

¹⁰⁶ B, 14

¹⁰⁷ C, 3, 71-72

¹⁰⁸ A, 18, 246

¹⁰⁹ C, 21, 286-288

negotiable obligation to incorporate the relocated Post Office (also in the landlord's ownership) within their demise.

...

Protracted negotiations continued throughout 2018 and 2019 on a Without Prejudice basis and terms for a lease renewal of the Co-op's trading demise were eventually agreed in August 2019. However, I can assure you the renewal negotiations were not at arm's length as they were undertaken against the backdrop of the landlord's repeatedly stated - and perfectly valid- alternatives to redevelop the property. The quantum of net effective rental agreed was ultimately a reflection of the capitalisation (after costs) of the landlord's redevelopment alternatives, which the Co-op was obliged to pay to maintain their trading presence.

...

The entire 12-month rent-free period received by the Co-op was a lease incentive and there was no agreement of this being reduced to 6 months in the event of Co-op not agreeing to accommodate the Post Office. There was never any option to decline the incorporation of the Post Office, despite the Co-op's reluctance to forego more valuable retail sales space."

158. Mr Scott has provided emails between Mr Watson, who acted on behalf of the Landlords and Mr Berrevoets, who acted on behalf of the Co-operative. Mr Scott says in his supplementary report¹¹⁰,

"5.56 Ms Zakaria also challenges the statements made by Mr Berrevoets relating to the rent-free period and accommodation of the Post Office. An email exchange is included dated 14th May 2018 from CWM, setting out terms proposed by the Co-operative, saying

'Rent-free – six months if they do not take in the Post Office, 12 months if they do reach an agreement to take in the Post Office operation.'

5.57 This suggests the negotiations were that the Co-operative prepared six months' rent free if the Post Office were not accommodated, but sought an additional six months (12 total), if the Co-operative reached an agreement with the Post Office for them to relocate.

5.58 Further email correspondence is in a long email chain that includes Mr Berrevoets, Mr Watson, and Ms Zakaria, between 24th May 2018 and 13th April 2018. In an email dated 15th of

¹¹⁰ A, 19, 283-284

May 2018 Jon Watson of CWM confirmed the landlord would agree 12 months' rent free, on the basis the Post Office was taken in. This correspondence identifies the 6 of the 12 months' rent free was agreed to accommodate the Post Office.

...

5.60 Mr Berrevoets's claim that all of the rent-free period was all incentive is inconsistent with the fact that fitting out works by two occupiers were required....

5.61 The Co-operative were under no obligation to take a new lease of the premises. The Co-operative chose to enter an AfL in August 2019 at an initial rent of £625,000 per annum."

Unit 1, 91 City Road, Bezier Building – Letting confidential

159. Unit 1, 91 City Road, Bezier Building is arranged over ground and basement floors totalling 2,906 sq. ft (NIA). The ground floor is 1,934 sq ft and the basement is 927 sq ft. The square footage is similar to that of 201-203 Old Street (Superdrug), which is 2,928 sq ft and has a similar sized ground floor to 199 Old Street.
160. Mr Scott says in his supplemental report:
- i) at paragraph 4.10¹¹¹,

“On the southeast side of Old Street Roundabout, the units under the Bezier Building, Unit 1 (91 City Road; former EAT), Unit 1a (75 City Road, Oliver Bonas) and Unit 2 (81 City Road, former Coco di Mama), are all vacant or not trading. The only tenant trading at the time of my inspection was Sainsbury's.”
 - ii) at paragraph 5.23¹¹² that terms have been agreed and an agreement for a lease exchanged for a grant of a ten-year term inside the 1954 Act, subject to a tenant-only break option at the fifth anniversary of the term and at an initial rent of £125,000 p.a. exclusive with 10.5 months' rent free granted.
161. Mr Scott provides a proforma signed by the agent of the Landlord on 11 August 2022¹¹³ and photographs of Unit 1¹¹⁴.
162. Mr Scott says¹¹⁵,
- “5.31 I consider a three-month rent-free period for fitting out appropriate for a shop of this size and amortise the remaining 7

¹¹¹ A, 19, 267

¹¹² A, 19, 276

¹¹³ C, 15, 171-173

¹¹⁴ C, 15, 174 and C, 3, 43

¹¹⁵ A, 19, 278

1/2 months' rent-free as an incentive over the first 5 years of the term. This provides a net effective rent of £109,375 per annum.

5.32 My analysis of the transaction therefore reflects £79.50 Zone A, as follows.”

163. I comment that working on Mr Scott's figures, amortizing the rent-free period of 10.5 months over the first five years of the term gives an effective rent of £103,125 and a Zone A of £74.96.

164. In Mr Scott's opinion, the Bezier Building is in a weaker location. He says in his supplemental report at paragraph 5.34¹¹⁶,

“This unit forms part of the Bezier Buildings, located on the south-eastern side of Old Street Roundabout. This location is currently noticeably less busy than the north section of City Road, and Old Street.”

165. Mr Purnell says in his supplemental report at paragraph 4.6.1¹¹⁷ that the proposed lease is subject to a planning condition and it remains to be seen if this condition is met and the lease completes. Further, he contends that this was a closed transaction, which was agreed off market. He also says that there is an issue relating to an external seating area which needs to be clarified, as this might affect the analysis. He says,

“I acknowledge that it is however an indication of what a retailer has offered albeit in a stronger, more prominent location. I believe that the net effective rent reflects no more than £64.70 Zone A, though less if the external seating area is demised. The tenant will also benefit from having a break option in year 5.”

Unit 2, 81 City Road Bezier Building – Letting confidential

166. The unit is arranged over ground and basement floors, totalling 4,525 sq ft (NIA). The ground floor is 2,157 sq ft, with a larger basement of 2,368 sq ft. There is a £10,000 difference in rent between Units 1 and 2, which have similar sized ground floors but Unit 2 has a basement that is 1,396 sq ft. larger.

167. Mr Scott says in his supplemental report at paragraph 5.35¹¹⁸ that terms have been agreed for a grant of a fifteen-year term outside the 1954 Act, subject to a tenant-only break option at the tenth anniversary of the term and at an initial rent of £135,000 p.a. exclusive, with 8 months' rent free granted. There is no agreement for a lease. Mr Scott has provided a proforma signed by the agent of the Landlord on 11 August 2022¹¹⁹ and photographs of Unit 2¹²⁰.

¹¹⁶ A, 19, 279

¹¹⁷ A, 20, 310

¹¹⁸ A, 19, 279

¹¹⁹ C, 17, 271-273

¹²⁰ C, 17, 274 – 275 and C, 3, 42

168. Mr Scott amortises five months' rent free as an incentive over the first five years of the term. He says this reflects an effective rent of £123,750 p.a. His analysis of the transaction reflects £98.80 Zone A.
169. I comment that utilising Mr Scott's figurers, if the eight months' rent-free period is amortised over the first five years of the term, the effective rent is £117,000. On this basis, Zone A would amount to £93.41.
170. Mr Purnell says in his supplemental report at paragraph 4.6.2¹²¹ that it appears that Unit 2 is under offer only and as a consequence it needs to be weighted accordingly. He says that as with Unit 1, he considers this is an off market deal. He acknowledges that it is an indication of what a restaurateur in this case has offered, although he considers this to be a more prominent location. He considers the net effective rent to reflect no more than £77.45 Zone A.
171. Ms Stevens-Hoare says in her skeleton in the confidential section,

“The CP properties are located in a 2010 mixed-use development. There are 13 floors of high-end residential properties above them. They are also surrounded by more recent substantial developments on the roundabout which have increased the office space in the vicinity dramatically. They also benefit from larger shop fronts both literally and a proportion of the space. Accordingly, they are properties that would be expected to command a higher open market rent than the subject property.

It would appear the transactions are not in fact market transactions there being no evidence of them being marketed. One is under offer with no contract and the other is a conditional contract with some elements redacted. Accordingly, they should be treated with considerable caution save as an indication of a ceiling which the subject property should sit noticeably below.”

104 - 122 City Road, Units 1 & 2 Imperial Hall (letting: Starbucks)

172. Mr Scott says in his report¹²²,

“9.75 Unit 1 & 2, Imperial Hall (Starbucks) was subject to a rent review in November 2017, settled at a revised rent of £74,000 per annum, an increase from £47,500 per annum. The analysis of the landlord's agent is £88.50 Zone A with a -15% allowance applied for lack of storage and shape; I presume -5% for the former, and -10% for frontage to depth/shape of the unit being mostly in Zone A. Confirmation and floorplans are attached at Appendix ASCR 22¹²³.

¹²¹ A, 20, 310

¹²² A, 16, 190

¹²³ B, 22, 96-98

9.76 An underbid received in the subject parade from Costa in September 2017, demonstrating approximately £200 Zone A (see paragraph 9.29), provides a comparison with this rent review settlement on Starbucks in November 2017 at £88.50 Zone A.”

173. Mr Purnell agrees in the joint statement that the 2017 rent review was settled at £74,000 per annum¹²⁴.

Unit 3 Imperial Hall (German Donner Kebab)

174. Mr Scott says that Unit 3 Imperial Hall, City Road was let in July 2021 for a term of 20 years outside the 1954 Act on a stepped rent to German Donner Kebab. The terms of the lease are summarised in Appendix ASCR 21¹²⁵, along with floor plans¹²⁶. There is a photograph of the premises¹²⁷. In his supplemental report, Mr Scott says at paragraph 5.53¹²⁸ that he analyses Zone A to be £96.69.

175. Mr Purnell has provided a proforma, which shows that the rent is £66,750 p.a.¹²⁹.

124 – 128 City Road (Ladbrokes)

176. In his report, Mr Scott says at paragraphs 9.77-9.81¹³⁰ that further north of Imperial Hall is an office building known as Ferguson House, with a single retail unit on the ground floor, 124-128 City Road, which is let to Ladbrokes. In June 2021, the lease of these premises was re-gearred. The previous lease to Ladbrokes was to expire 23 June 2022 at a passing rent of £87,000 p.a.

177. A new lease was granted from June 2021, to expire in June 2022 at a lower rent of £70,000. Mr Scott produces a signed proforma¹³¹. He says that based on the ITZA figure of 882 units stated on the proforma, the new rent reflects £79.36 Zone A, with no allowances known to be applied.

178. On the same basis, the previous rent would reflect £98.63 Zone A, so an approximate 20% fall in value was crystallised by the landlord in June 2021, who was unrepresented. The betting office use is prohibited under the subject lease.

179. In the joint statement of the experts at number 7¹³², Mr Purnell analyses the Zone A rent at £76.06.

¹²⁴ A, 18, 248

¹²⁵ B, 21, 85-95

¹²⁶ B, 21, 86

¹²⁷ C, 3, 60

¹²⁸ A, 19, 283

¹²⁹ C, 20, 283-284

¹³⁰ A, 16, 189-190

¹³¹ C, 23, 99-100

¹³² A, 18, 243

Tenant's comparable properties

180. Mr Purnell argues that the lettings in the Parade are either unreliable or irrelevant. He considers smaller, non-convenience food premises not in the Parade to be more relevant comparables.

154 Old Street (Robata Restaurant)

181. 154 Old Street is on the opposite side of the road from 199 Old Street. The floor area is stated in proformas¹³³ to be 1,894 sq ft but it is not specified whether this is gross or net.
182. From 30 June 2022, a lease was granted to Robata Restaurant of £75,000 p.a. There was a 12-month rent-free period. The tenant, Robata, is a Japanese restaurant cooking with open flames. Robata cannot trade with a Class A1 planning consent.
183. Mr Scott has provided historic marketing particulars of 154 Old Street¹³⁴. 154 Old Street was formerly let to Flamboree Limited¹³⁵ in January 2019. The first year's rent was £75,000, and the rent averaged £79,000 per annum over the first five years of the term¹³⁶. The rent to Robata of £75,000 p.a. amounted to a 5% reduction.
184. Mr Scott does not provide a Zone A figure. He says in his supplementary report¹³⁷,

“5.19 This unit was formerly Flamboree restaurant, let in January 2019. The other occupiers in the particulars are Tayer (cocktail bar and restaurant), Officina 00 (restaurant) and Trade (coffee and sandwich bar). This is not a retail environment.

...

5.22 The floor areas provided do not support an overall weighted GIA analysis for a restaurant, nor zoned approach. As a restaurant with extraction in a poorer location to the premises, which could not trade in Class A1, I do not consider the letting to be of relevance to the subject premises.

...

7.08 I consider 154 Old Street to be in a poorer location on the street compared to the subject premises. It is further from Old Street roundabout, not located in a retail environment, and additionally as a restaurant operator with extraction required I do not consider it comparable. The tenant, Robata, could not trade in the subject premises in Class A1.”

¹³³ B, 12, 182-185 and C, 20.1, 319-323

¹³⁴ C, 19.13, 141-164

¹³⁵ C, 19.14, 165

¹³⁶ C, 19.14, 165-169

¹³⁷ A, 19, 275, 276 and 289

185. On the basis of a rent of £75,000 with a 12-month rent-free period, I comment that if the 12-month rent-free period is amortised over the first five years, the effective rent is £60,000.
186. Mr Purnell says in his supplemental report that the net effective rent reflects £55.35 Zone A. He says¹³⁸,

“4.2.1. I consider that the subject is in a slightly better pitch though both units are located to the west of the Old Street roundabout/station.

...

4.8 In conclusion, the June 2022 letting at 154 Old Street at £55.35 Zone A provides the clearest guide to open market value at the date of this SR. As stated in 4.2.1 above, I consider that some adjustment is required to reflect the differences in retail pitch. 169 Old Street is in a slightly weaker pitch and under offer at £47.16 Zone A. ...

4.9 ... The subject is in closer proximity to 154 Old Street which is the only recent completed unconditional letting at the date of this SR. I consider that there should be a bias to this unit/Zone A rate. As the subject is in a slightly better pitch, I believe that this should be valued at £57.57 Zone A. This is approximately 5% higher than 154 Old Street ...

4.10 ... The leases agreed by Superdrug and the Co-op were contested renewals and not conducted at arm’s length. The other deals were lettings of much larger units to food store operators.”

169 Old Street

187. 169 Old Street is vacant and under offer. Mr Scott annexes to his report the letting particulars¹³⁹, from which it can be seen that the premises comprise 1,770 square feet and were marketed in May 2019 for £65,000 per annum. He also annexes colour photographs showing 169 Old Street¹⁴⁰.
188. Mr Purnell’s analysis of the quoting rent of £64,000 is at paragraphs 10.7 to 10.7.2 of his report¹⁴¹. He calculates the Zone A value at £53.24.
189. Mr Scott disagrees with this valuation of Zone A because he says at paragraphs 5.07 and 5.08 of his supplemental report¹⁴² that Mr Purnell has valued the entire unit as sales accommodation, at rates of A/1 (Zone A), A/2 (Zone B) and A/4 (Zone C), with no

¹³⁸ A, 20, 309 and 311

¹³⁹ C, 7, 113-114

¹⁴⁰ C, 3, 73-74

¹⁴¹ A, 17, 228

¹⁴² A, 19, 273

sales or ancillary accommodation. He says that if a standard storage rate of A/10 was applied to 20% of the NIA, the Zone A rate would be £58.50.

190. Mr Purnell has obtained an email from John Morell, Surveyor, Commercial Agency, dated 18 August 2022¹⁴³, which sets out heads of terms for 169 Old Street. This states the rent to be £68,000 p.a. with 10-month rent-free period.

191. Mr Purnell says in his supplemental report at paragraph 4.3.1¹⁴⁴,

“At the date of this SR, I am advised this has been in solicitors’ hands since March 2022, but contracts have yet to exchange. The net effective rent will reflect £47.16 Zone A. I acknowledge that I must place less weight on this given that it is yet to contract, though I maintain that it is of value as evidence of the level that a retailer has bid in the open market in the immediate location.”

192. Mr Scott says at paragraphs 5.11-5.12 of his supplemental report¹⁴⁵,

“I consider a three-month rent-free period for fitting out appropriate for a shop of this size and amortize the remaining seven months’ rent free as an incentive over the first five years of the term. This provides a net effective rent of £60,067 per annum.

Following the same basis set out at paragraph 5.08, without applying any other allowances for unknown factors to the potential transaction, the net effective rent would reflect £55.02 Zone A.”

193. Mr Scott continues at paragraph 7.09¹⁴⁶,

“169 Old Street I consider a poorer location compared to the subject premises for the reasons set out above. It is an island site, with no beneficial adjacencies. Neither the Post Office, nor Superdrug, chose to relocate to this unit when it was available at a low quoting rent of £64,000 per annum. Neither did any of the parties that secured premises elsewhere on Old Street (T4, Dappermore / Smart Dry Cleaning smash / Le Bab) or City Road (Units 1 & 2 Bezier, “grab and go“ operators). I do not rely on the Zone A rate shown by terms being agreed at £68,000 per annum and consider the subject premises must attract a much higher rent if available and to let.”

¹⁴³ C, 8, 117

¹⁴⁴ A, 20, 309

¹⁴⁵ A, 19, 274

¹⁴⁶ A, 19, 289

194. I comment that on the basis of an asking rent of £68,000 p.a., if the whole of the ten-month rent-free period was amortised over the first five years of the term, the effective rent would be £56,667 and the Zone A would be £51.91.

Comparables no longer relied upon by parties

195. In his report, Mr Scott refers at 9.69 to 9.71¹⁴⁷ to four units (221, 223, 229 and 231 Old Street) on the opposite side of the Old Street roundabout from the subject Parade, to the east section of Old Street. Mr Purnell says in his supplemental report at paragraph 3.8.2¹⁴⁸,

“It is widely accepted that kiosks are not comparable to more standard sized shops.”

196. Mr Scott and Mr Purnell agree that these properties are not relevant, and therefore I say no more about them.
197. In his report, Mr Purnell deals at paragraphs 10.10 to 10.12 with properties at 126 Whitechapel High Street, 13/15 Eastcheap and 74 Goswell Road¹⁴⁹. In File C¹⁵⁰ is a plan showing the location of the above properties and 199 Old Street, from which it can be seen that the three properties are in very different areas from 199 Old Street.
198. Mr Purnell did not pursue 126 Whitechapel High Street, 13/15 Eastcheap and 74 Goswell Road in his evidence. In any event, I would have accepted Mr Jourdan’s submissions that these comparables are in very different geographical areas, 1½ miles away from Old Street, and are not relevant in the assessment of the market rent of 199 Old Street.

Mr Scott’s oral evidence

199. Mr Scott was referred to the arbitration award for 199 Old Street¹⁵¹ in 2016, and to paragraph 7.4 where it is said in relation to the Co-operative,

“This property is not comparable to the subject and as neither party places any weight on this evidence, nor do I.”

200. He was referred to paragraphs 7.7 to 7.8¹⁵² of the arbitration award, dealing with 201 Old Street, which was then Peacocks.
201. He was also referred to paragraphs 7.9 to 7.11¹⁵³, where the arbitrator deals with a 2012 rent review for 203 Old Street (Superdrug), and says that he can place only limited weight on this as evidence of rental value assistance at March 2015. The rent review

¹⁴⁷ A, 16, 189

¹⁴⁸ A, 20, 308

¹⁴⁹ A, 17, 229

¹⁵⁰ C, 6, 108

¹⁵¹ C, 1, 11

¹⁵² C, 1, 12

¹⁵³ C, 1, 12

was agreed at a nil increase, the passing rent of £50,000 p.a. reflected a rate of £60.50 Zone A.

202. He was referred to an email from Howard Quigley to Craig Purnell, dated 6 October 2021¹⁵⁴, which says that the Marks and Spencer letting was assessed on an overall rate per square foot. He agreed that the rent for the Co-operative and Aldi was also assessed on an overall rate per square foot.
203. He did not agree that using a zoned approach for evaluating a convenience store gave a higher figure than when using a GIA basis. He said he had looked at all the properties in the Parade and the Zone A was the same.
204. He agreed that the Landlords served a development notice on the Co-operative. Superdrug's lease came up for renewal. That was successfully opposed by the Landlords and Superdrug vacated for over a year. There was an offer from Costa which stayed on the table between September 2018 and January 2019. The Costa Board rejected the letting on reasons which are unknown, although the local acquisition team wanted to proceed. The Co-operative's contested renewal started against the background of Superdrug fighting unsuccessfully and ultimately the Co-operative had to compromise and agree to the Post Office moving into their premises at the opposite end of the Parade.
205. Mr Scott said that in the Argos arbitration, he attempted to agree floor areas with the tenant's representative. He agreed that he had spoken to Mr Bond, who acted on behalf of the Landlord in the arbitration. He said he saw Mr Bond's report. He agreed Mr Bond put forward a valuation on a zoned and an NIA (net internal area) basis. It was put to him that the difference between the zoned and NIA bases was in excess of £40,000, which was 7-8%, and this was typical of what happened when a zoned basis was used. He agreed, unless there was a reason to make adjustments. It was put to him that Mr Bond valued the Co-operative on a zoned basis at £191.34 and Marks and Spencer at £207.30. He took the Zone A across the Co-operative and Marks and Spencer as £205 and then adjusted by 7.5% for a quantum adjustment. It was put to him that his figure was high in comparison with Mr Bond as well as with Mr Purnell.
206. He agreed that he relied on the lettings to Superdrug, Marks & Spencer, Aldi and the Co-operative. He said that the tone of the Parade was above that of the Bezier Building. He agreed that Marks & Spencer, Aldi and the Co-operative were much larger but said he had given an allowance for their size.
207. He agreed that the Marks & Spencer transaction was in December 2018 and therefore a few years ago. He said he considered the Parade block as a whole and drew no distinction between the different units in the block. He did not accept that zoning was an inappropriate valuation approach for food and beverage convenience stores.
208. He said that the Co-operative was a contested lease renewal. He said that he considered Superdrug to be an open market letting. Superdrug vacated for 18 months and he considered the letting to them to be an open market letting.

¹⁵⁴ B, 18, 259

209. It was put to him that Superdrug unsuccessfully contested the Landlords' notice, which was on development grounds. He said that Superdrug came back into a store which had been enlarged on the ground floor and basement. He agreed they were not a new tenant in that they had been in the block 18 months before.
210. He agreed that Superdrug would have had historic trading figures, which would have supported the level of rent they were prepared to pay.
211. Regarding the Co-operative, he was referred to an email of 24 May 2018 from the Co-operative's representative in the letting renewal¹⁵⁵. He agreed this was a contested lease renewal, not an open market letting, however the Zone A rate was the same as that of the other tenants in the Parade. He agreed that he assumed that the Landlords' strategy was to improve the Parade and drive up the headline rent.
212. He agreed that 169 Old Street was not ready to accommodate the Post Office. He was referred to the Letting Particulars for 169 Old Street¹⁵⁶, which showed that Unit 2 was not due for completion until February 2020.
213. He was referred to 154 Old Street, the restaurant on the other side of Old Street. It sits in a smart office building. It was put to him that he said in his report it was not appropriate to zone this property because it was a restaurant that could not trade within A1. He referred to paragraph 5.22 of his report¹⁵⁷, where he says he does not consider the letting to be of relevance to 199 Old Street. He said he had not given this property a value as he did not consider it of relevance. Mr Purnell zones the property at £64.58 and zone A at £55.35.
214. 199 Old Street is classed A1 which does not permit trading as a restaurant.
215. He said that the Bezier Building properties were not the same as 154 Old Street because they were national multiple grab and go operators in the same vein as Pret a Manger.
216. He was referred to Nash Bond's summary of rental evidence in relation to Unit 2 of the Bezier Building¹⁵⁸. He said that this unit had a user clause, which said it could be used as a high-class restaurant within class EB or other use within class EA or EB. He said he did not know what the user clause for 154 Old Street, says, the proforma simply says class EB. He said the previous user of Unit 2 was also a grab and go food operator and there was no permission for restaurant use.
217. He agreed there were residential units above Units 1 and 2 of the Bezier Building. The tube entrance was just to the north of Unit 2. It was put to him that the top end of City Road, where it joins the roundabout on the south, had a lot of restaurants and a pub. There was a lot that was drawing custom to that area. He said it was similar to the location of 199 Old Street.
218. He said the Bezier Building had four units, only one of which was trading, namely Sainsburys. Proceeding down City Road to the south, there were several restaurants. It

¹⁵⁵ C, 21, 286-288 and 22, 296

¹⁵⁶ C, 7, 113-114

¹⁵⁷ A, 19, 276

¹⁵⁸ C, 20.5, 338

was put to him that when one looked at Units 1 and 2 and what they had to offer, they represented a much better quality commercial prospect, and better quality footfall than 199 Old Street. Mr Scott did not agree and said 199 Old Street had the benefit of the adjacencies and proximity to the Bower Buildings and Old Street roundabout and the underground. In contrast regarding the two units in the Bezier Building, in respect of one there is an agreement for a lease, negotiated against a background of three of the four units being vacant and only one trading, with substantial roadworks outside.

219. He said that the kiosks on the east side of Old Street were in the main between 350 and 500 square feet. He agreed the fit out costs were lower for a small unit, and the running costs are generally lower. He said all of the comparable leases in the kiosk parade have a landlord development break in them. He said he was not relying on the kiosk properties.
220. In re-examination, Mr Scott said that adjacencies mattered. Taking east Old Street as an example, the current line up is two kebab shops, a dry cleaners and a bubble tea shop. Taking 199 Old Street, the adjacencies are Marks and Spencer, the Co-operative, Aldi, Gymbox and Superdrug. If the Parade is compared with east Old Street or the northern section of Old Street, where the tenants are German Doner Kebab, KFC and other takeaway eaters and independents, a tenant would rather be in the Parade with adjacencies that draw footfall to the area. The benefit of adjacencies is that they make a location more attractive to retailers.

Mr Purnell

221. Mr Purnell agreed the size and shape of the Superdrug premises were virtually identical to 199 Old Street. He agreed that Superdrug was 2,021 sq ft and 199 Old Street was 2,097 sq ft. He agreed that under the previous lease, which expired in 2017, the rent for Superdrug was £50,000 and the Zone A was £60.50. He agreed that his assessment of the Zone A now was £57.50. He agreed that Superdrug served a notice in April 2016 seeking a new lease. In June 2016 the Landlords served a counter notice opposing the grant of a new tenancy. He was then referred to an email from Mr Fitzsimmons, Superdrug's representative, dated 20 September 2021¹⁵⁹. He agreed he would be well-placed to obtain further information from Superdrug as they were his client but he did not do so. He was referred to the summary of rental evidence for Superdrug. He said Superdrug were probably paid statutory compensation when they vacated. He agreed they were out of the property for 1.5 years.
222. He agreed Superdrug were under no obligation to take a lease of the enlarged premises. He agreed that Superdrug would have needed to have fitted out. He agreed that it was valuable for Superdrug not to have to use the back of their store for storage and to have a basement – the rent of £182,500 include £12,500 for a remote basement area.
223. He was referred to Costa's bid for this property¹⁶⁰. He agreed there was no reference to the basement when the terms of the proposed lease were set out. The £165,000 was referable to the £170,000 that Superdrug agreed to pay without the basement. He did

¹⁵⁹ B, 17, 207

¹⁶⁰ B, 9, 22

not accept that this was good evidence that the market value of the Superdrug premises was £165,000 - £170,000 after a six-month rent-free period.

224. He said that because of the circumstances set out in his report, he did not consider the letting to Superdrug to be good evidence because it was not at arm's length. Superdrug had the ability to draw on trading experience, albeit before a 18-month absence. He said this was quite different from an open market value, where a potential tenant does not actually have trading figures from the proposed property but a business model.
225. Mr Purnell said that he did not believe that there was any evidence that there should have been any increase in the rental value of Superdrug in July 2019.
226. It was put to Mr Purnell that the rent in 2007 was £50,000 and there was a nil increase at the review date of 17 January 2012. He said there was no evidence that the rent would have increased in 2017 either. It was put to him that that was inconsistent with Costa offering £165,000, albeit that the Costa Board did not proceed with the negotiations, and Superdrug agreeing £170,000. He said that Superdrug had a fragile, non-existent negotiating position. He was referred to his report¹⁶¹. It was put to him that it was not true that Superdrug had no option but to reoccupy on the Landlords' terms. It was put to him that any goodwill Superdrug had would have been lost by their 18-month absence from the site. He said he did not think goodwill disappeared that quickly. It was put to him that Mr Fitzsimmons did not say that Superdrug had goodwill at the site but that it was a good performing store for them. He said that was one and the same thing.
227. He was asked where the evidence was to support his assertion that "this would have attracted redundancy and dilapidation costs". He said he thought this was an obvious statement. He then agreed that it did not make sense to say that employees who had been kept on the payroll for 18 months after Superdrug left the premises would have to be made redundant. He agreed that the Landlords could not claim dilapidations if they were going to redevelop by reason of s.18 of the Landlord and Tenant Act 1927. He said it was an oversight to say that Superdrug would have had to pay redundancies and dilapidation. He denied that he was looking for reasons to rubbish the comparable of Superdrug.
228. Mr Purnell said that the letting to Superdrug was not at arm's length because the tenant did not have any renewal rights. He said that his position was that Superdrug were in a fragile negotiating position and their position was compromised.
229. He was referred to his report at paragraph 10.3¹⁶², where when discussing the letting to Superdrug, he refers to "the hostile proceedings instigated by the Claimant". He said that by 'hostile' he meant serving a negative s.25 notice and seeking to re-develop. He said it was a loose word and he apologised.
230. He was referred to 11.6.2¹⁶³ of his report. When discussing the new lease agreed by the Co-operative, he said that it,

¹⁶¹ A, 17, 226

¹⁶² A, 17, 222

¹⁶³ A, 17, 234

“does highlight the aggressive approach that has been adopted by the Claimant”.

231. He said that this was a strong use of language and he apologised. He denied that there was a ‘degree of bias in his heart’ against the Claimant.
232. He agreed that his suggested rent of £45,000 for Superdrug was lower than Superdrug agreed in 2007 and a quarter of what Superdrug were prepared to pay for the ground floor in 2017. It was put to him that if his opinion was correct, Superdrug paid three times the market rent. Mr Purnell said that Superdrug agreed to a rent in excess of the market rate because they did not have a negotiating position and were in a fallible position.
233. He was referred to an email from Richard Brown to Catriona Campbell, dated 30 September 2021¹⁶⁴.
234. The Board of Costa rejected the proposed acquisition. There is no evidence as to the reasons for this. Mr Purnell said it was unsafe to rely on the Costa Acquisition Team offer.
235. He denied that Superdrug could have waited until February 2019 and taken a lease of 169, Old Street. He said that 169 Old Street was not available until February 2020. He said that Superdrug were offered possession in July 2019. He said that Superdrug would be prepared to pay two thirds more rent because of the goodwill that they had. They could rely upon their trading record at 201-203 Old Street. He said that they could not assume that another location would be as advantageous as the retail trade is fickle and shoppers are fussy.
236. He was asked about paragraph 9.24 of Mr Scott’s report¹⁶⁵. He agreed that if one was carrying out a rent review, one would amortise a rent-free period as an incentive but not a rent-free period for fitting out. He agreed with Mr Scott’s apportionment of the six-month rent-free period for 210-203 Old Street into a three-month fitting out period and a three-month incentive period.
237. Mr Purnell said that if all of the rent-free period was to be taken into account, he would deduct this from the comparable and then apply it to the subject property from day one. He said that the division of rent-free periods into a fitting out period and an incentive period was a well-established convention, although no-one had established this apportionment by research. He said it was a ‘practitioner’ thing.
238. He was referred to Mr Scott’s workings showing how he calculates the Zone A floor area of £213.43¹⁶⁶. He was referred to his report at paragraph 10.13.2¹⁶⁷, where he says the Zone A would be £208.87 and the remote store Zone A £6.96. He said that his assessment of 800 units was based on a measurement he had agreed with the Landlords’ agent prior to the refurbishment. He said he did not remeasure for the present case but made some assumptions about the extension to the frontage. He said he accepted that

¹⁶⁴ C,19, 282

¹⁶⁵ A, 16, 181

¹⁶⁶ A, 16, 181

¹⁶⁷ A, 17, 231

Mr Scott had been more scientific in calculating the area of 201-203 Old Street. He said he could live with Mr Scott's £213 Zone A rather than his £209.

239. It was put to him that Mr Scott says that if one looked at the rent for Marks and Spencer and the rent for Aldi, there had been a reduction in the rent of 15%. Marks and Spencer was an open market letting. He agreed this was correct if one was analysing on a zoned basis.
240. He was asked about Marks and Spencer. He agreed that this was previously rented by Peacocks, a low-cost fashion store. He agreed that the move from Peacocks to Marks and Spencer was a move upmarket. This was a letting in December 2018. Peacocks were paying £90,000 per year. In the March 2015 arbitration award it is said at paragraph 8.37¹⁶⁸, "Mr Purnell's devaluation of Peacock's current rent of £90,00 p.a. is at around £50 Zone A". At paragraph 7.7 of the arbitration award he refers to Mr Purnell calculating the Zone A to be either £48.78 or £51.23 if a 5% allowance is made for quantum. He said that if the new tenant of the Marks and Spencer unit had been a clothing retailer, he would have made a 5% reduction for quantum, but he did not for a food store. It was put to him that that did not make sense. He said that in his considerable experience, food stores were acquired and negotiated on an overall basis, not on a zoned basis. It was put to him that even if the rent was calculated on a square footage basis, you would still get a rent for Marks and Spencer of £405,000.
241. It was put to Mr Purnell that he thought that the Marks and Spencer premises at 201 Old Street was a comparable property when he was carrying out the rent review for 199 Old Street in 2015. He said that was because 201 Old Street was then being used as a clothes retailer and not a food store. He said that the Landlords never based their valuation on zoning and discounts for quantum when dealing with Aldi or Marks and Spencer. Mr Jourdan accepted that the rent would be a little higher if a property was valued on a zoned basis.
242. Mr Purnell said that if the Co-operative's premises were on renewal, they would ask him to consider as evidence the overall rates that have been derived from two lettings of food stores. He said that valuing food stores was 50% of his work, he had valued several Co-operative stores in the area of 199 Old Street and by and large they were not valued on a zoned basis. It was put to him that the rent paid by Marks and Spencer had gone up four times from the rent paid by Peacocks. He said that the rent had changed dramatically because Peacocks was low-end, ladies' fashion, largish units which were zoned. However, it was no longer a fashion unit but a food store, which was the difference. He said again that a food store was valued by the overall square footage, not zoning. He said that the convenience food store sector was the most competitive in the retail letting sector and bears no relation to what a willing tenant would pay today for 2000 feet square. He said that food stores would bid more when offering rent. Valuations for retail food stores are carried out on a gross internal basis. He said that quantum discounts for size are generally fair but not in the food store market. He agreed that whatever method of analysis you apply, the rents paid by Marks and Spencer and Superdrug were much the same. He said that the rents paid by Marks and Spencer and

¹⁶⁸ B, 21, 247

Aldi were not based upon zoning. They base their acquisitions process on other food stores in the area, without looking at zoning.

243. Mr Purnell was referred to the letting to Aldi Stores Limited in October 2021, for £485,000, all on the ground floor, 7,628 square feet. This was the former Post Office unit, which was then redeveloped. He said that the market for food stores in the Parade remained strong. He said that convenience food stores, which are largely 5,000 – 10,000 square feet were the one sector that benefitted from Covid-19 lockdowns because people stayed local to shop. He agreed that Aldi Stores Limited were keen to take the unit, and would do so today, but this had no bearing on the 2,000 square foot unit next door. With the downturn in the economy, all other sectors did badly.
244. He agreed that since his first report, 169 Old Street had gone under offer after three years. 154 Old Street and the kiosk at 221 Old Street had been let. One of the Bezier Building units was under offer and the other had an agreement for a lease.
245. He was referred to paragraph 9.67 of Mr Scott's report¹⁶⁹, where the Zone A of the other retail outlets in the Parade is summarised. Mr Purnell said he did not argue with the Zone A for Costa being £200.13, but said it should be ignored because the acquisition was rejected by the Costa Board. Marks and Spencer is zoned at £215. Mr Purnell said it should not be zoned but accepted £215 was reasonable if it was zoned. He agreed zoning for Superdrug at £213 Zone A. Mr Jourdan accepted the Co-operative weighting was less weighty because they were fitting to stay in the same unit. Mr Purnell said the circumstances of the letting to the Co-operative were similar to those of Superdrug. Mr Jourdan said they were not similar because the Co-operative stayed in their premises whereas Superdrug were paid statutory compensation and left for 18 months before deciding to accept a new lease. He accepted that if the letting to Aldi Stores Limited should be zoned, £183 for Zone A was reasonable. He said that he accepted that if the table at 9.67 of Mr Scott's report¹⁷⁰ was correct, his proposed rent of £50,000 was wrong, but the table was not correct.
246. It was put to him that if Superdrug was a reliable comparable, his argument that food stores were different and paid more than any other retail outlet was blown up.
247. He was referred to his report at paragraph 4¹⁷¹. He agreed that Old Street has a lot of residential units in addition to retail and leisure. He repeated that the trees and street furniture hamper visibility of the shop frontages on the Parade. He said that shoppers meander on the Parade, whereas in other areas they are channelled and therefore get closer to the stores. This was a negative, and the arbitrator dealing with the rent review in March 2015 accepted this argument. He said there were no pedestrian flow studies showing it had changed since March 2015.
248. He said that he believed that the Bezier section and the southern section of City Road were strong locations.

¹⁶⁹ A, 16, 188

¹⁷⁰ A, 16, 188

¹⁷¹ A, 17, 212

249. He denied that he had been led badly astray by his negative view of the attractiveness of the Parade. He accepted that he and Mr Scott could have obtained footfall information for the shops on the Parade.
250. He was referred to 169 Old Street, which has been on the market for three years, part of this being due to Covid-19. It came on the market in May 2019, nine months before the first Covid lockdown, when letting properties was impossible. He was referred to an email setting out the terms of an offer¹⁷² for 169 Old Street, at a rent of £68,000 p.a. He said there was a plan of the layout of the inside of 169 Old Street¹⁷³ in his first report. He had zoned it into A, B and C on the plan, with no ancillary. He agreed that it would be less valuable than 199 Old Street. It is on a broken pitch, being separated by Bath Road from the Parade. He did not accept that there was a cliff face on the Parade and this property was at the bottom of the cliff, while 199 Old Street was at the top. He said it was marginally off pitch in surveyor speak because it is twenty yards from the Co-operative corner, across a road, and as a consequence not as good. He said he recognised that 199 Old Street is in a better location.
251. Mr Jourdan said that German Doner Kebab could have leased 169 Old Street for a lower rent. Bubble Tea had leased a much smaller unit on the east arm for £60,000. Mr Purnell said they wanted a much smaller unit and would not have leased 169 Old Street because it was too large. He agreed that the ‘grab and go’ businesses (such as e.g. Pret a Manger) interested in the Bezier Building could have leased 169 Old Street at half the rent.
252. He was referred to the particulars of 154 Old Street¹⁷⁴. This had been prepared by Shelley Sandzer, who specialise in restaurant lettings. He agreed it was being marketed as a restaurant or bar, as could also be seen in the previous particulars¹⁷⁵. They were looking for a restaurant in a row of restaurants. He agreed this was more of a restaurant location. He said he had zoned this rent because it was reasonable practice for the rent for places like Pizza Express, McDonalds and KFC to be calculated on a zoned basis. Small restaurants in High Street locations are zoned.
253. Regarding the Bezier Building, he said he had only heard one side of the story. He did not accept that valuing a restaurant in a row of restaurants was not relevant to assessing rent for retail units.
254. He said 154 and 169 Old Street were geographically closer to 199 Old Street than many of the other comparables. He agreed Robata, who were to rent 154 Old Street, could not trade from 199 Old Street.
255. He was taken to Mr Scott’s supplemental report, at paragraph 5.20 and 5.22¹⁷⁶. He said he did not understand the comment at 5.22. He said the difference between net and gross square footage on a property like 154 Old Street (a ground-floor lock up property) would be negligible as there would not be corridors. It was in multi-let properties that there was a difference between gross and net square footage.

¹⁷² C, 8, 117

¹⁷³ B, 11, 181

¹⁷⁴ C, 11,135

¹⁷⁵ C, 13, 142

¹⁷⁶ A, 19, 276

256. He was referred to the east side of the roundabout, where there are smaller units. The most recently let was 500 square feet, let in March 2022 for £60,000. He said these very small units commanded their own very specific market. He said there was no text on this; their value was set by practitioners. The rent of these kiosks bore no resemblance to the tone of Zone A for regular-sized retail units. He said that the Zone A rate for these kiosks is £150-£180.
257. He said that Mr Scott referred to the German Doner Kebab letting, which was also a grab and go unit. He said that the German Doner Kebab was just under £100 Zone A. At the same time these very small units were attracting Zone A rates of £150.
258. He was referred to the confirmation for 221 Old Street¹⁷⁷, a very small unit, where the Zone A is £170. He contrasted this with Unit 1 Bezier Building, which has been contracted for £72.50 Zone A (£65 according to his calculations and £80 according to Mr Scott). He said this proved his point that kiosk properties were a different market.
259. He was referred to the letting particulars for 221 Old Street¹⁷⁸. He agreed that the rateable value of £22,250 from 2015 was no longer valuable.
260. In the northern stretch of City Road, he said he was no longer relying on the Ladbrokes deal. He said the German Doner Kebab deal in July 2021 was an open letting so it would be wrong not to rely upon it. He said he would not disagree with Mr Scott's analysis of the Zone A at approximately £97. It was put to him that when contrasting the Starbucks letting in 2017 with the Costa offer for 203 Old Street, one could see that the northern stretch of City Road was much less valuable than the Parade. Mr Purnell did not agree with this and said the better comparable was the Japanese restaurant Robata at 154 Old Street, which was less than £100 Zone A.
261. He said that he was not aware that the two confidential properties in the Bezier Building were marketed, although he had searched for all available material. He said that they were closed market deals, which were not bad deals but not as persuasive as open market lettings. He was referred to Mr Scott's supplementary report at paragraph 5.32¹⁷⁹ and his analysis of the transaction at paragraph 5.32. He said he did not agree with Mr Scott's figure for Zone A for Unit 1, Bezier Building of £79.50 and said he had calculated it at £65. He said there was a difference between them at frontage to depth, which Mr Scott assessed at -20% and Mr Purnell at -15%. Mr Scott allows -5% for the columns. Mr Purnell said that the columns in this Unit were as awkward as those in Unit 2. He was referred to the plan of the inside of Unit 1¹⁸⁰. He did not concede that the columns would impede a tenant and did not concede a 5% reduction, although he said that he would make such a reduction for Unit 2.
262. Mr Scott also allowed 2.5% for alienation because the tenant could not do anything with the property for three years. Mr Purnell did not agree that this was unusual. He says he did not think he would be able to obtain a discount for this for a tenant. The lease of Unit 2 has a tenant-only option to break on the five-year anniversary of the lease, whereas 199 Old Street has a ten-year break, which provides the landlord with

¹⁷⁷ C, 10, 127

¹⁷⁸ C, 10, 130-132

¹⁷⁹ A, 19, 278

¹⁸⁰ C, 20.4, 334

more security. Unit 1 let for £125,000 after a rent-free period of 10.5 months. The net rent is £109,000.

263. He said that Robata at 154 Old Street could be zoned.
264. He was asked about Unit 2 Bezier Building, where the rent is £135,00 after a rent-free period of eight months¹⁸¹. He said that Mr Scott had assessed zone A at £100 and he had assessed it at £75. He said it was not unusual for landlord and tenant surveyors to be that far apart. He also said that Unit 2 was only under offer, it was not contracted.
265. He said the net effective rent of 164 Old Street, if it happened was around £56,000.
266. Mr Purnell said that in his experience long, deep shops like the subject property tended not to attract the discount that Mr Scott had applied, and in 2015 the Landlord and Tenant agreed that A/12 was fair for assessing the Remainder for 199 Old Street.
267. In re-examination, Mr Purnell said that in his opinion Superdrug was not a reliable comparable in 2019 when the rent was agreed and this remained the position. He said he would also not rely on the Superdrug valuation now because there were current open market valuations in the area that he could rely on.
268. He was referred to Mr Scott's supplementary report at paragraph 4.06¹⁸² and the table showing the reduction in rents since Covid in March 2020. I note that the table shows Unit 1 of the Bezier Building as having a previous rent of £125,000 and a current rent of £135,000 – the figures have been erroneously inverted. He said that Mr Scott had referred in the confidential properties to 8% and 5% drops. Mr Scott refers at paragraph 5.35 of his supplementary report¹⁸³ to the initial rent for Unit 2 being £135,000. It was put to Mr Purnell that what had been used by Mr Scott in the table at paragraph 4.06 of his supplementary report¹⁸⁴ were gross and not net figures for rent. At paragraph 5.45 of his supplementary report¹⁸⁵ Mr Scott says that the net effective rent for Unit 2 Bezier Building after amortising five months' rent free as an incentive over the first five years of the term was £123,750 and at paragraph 5.31¹⁸⁶ he says the net effective rent for Unit 1 was £109,375.
269. Mr Purnell said that one could not transfer the 15% drop between Marks and Spencer and Aldi Stores Limited, which were in the food convenience store sector, to other sectors because they work differently.

¹⁸¹ C, 24.5, 337-342

¹⁸² A, 19, 266

¹⁸³ A, 19, 279

¹⁸⁴ A, 19, 266

¹⁸⁵ A, 19, 281

¹⁸⁶ A, 19, 278

Findings as to comparable properties

Experience of experts

270. Whilst I accept Ms Stevens-Hoare's submission that Mr Purnell is more experienced than Mr Scott in valuing retail property, my findings as to the appropriate comparable properties must be based on a detailed assessment of the experts' arguments.

Location

271. Having considered the comparable property evidence in this case and the experts' submissions, and having visited the Parade and other comparables that are relied upon, I accept the Landlords' evidence that:

- i) The northern section of City Road is currently visibly busier than the southern section.
- ii) The Parade has the better adjacencies in the area, including Marks and Spencer, Superdrug, the Co-operative, Aldi and Gymbox.
- iii) The Parade has radically improved in tone and value since March 2015 and is now the strongest pitch in the area.
- iv) The busiest sections in terms of footfall are in the northern section of City Road and the western section of Old Street, closest to the underground station.
- v) All of the properties in the Parade are let. In contrast, three of the four units under the Bezier Building are vacant or not trading.
- vi) The letting values in the Parade in 2018 (Marks and Spencer), 2019 (Superdrug and the Co-operative) and 2021 (Aldi) are higher than those seen on the north or south section of City Road.

272. As to Mr Purnell's comments that the Parade is noticeably set back from the roadside pavement, that visibility is further hampered by the presence of numerous trees and street furniture which line the area between Old Street and the shop frontages, and that the unusual pavement width dilutes pedestrian flow¹⁸⁷, I find that:

- i) These factors, if of any significance, are already taken into account by the market by the agreed rental values of the properties in the Parade and no further reduction to rental value needs to be made.
- ii) Having visited the Parade:
 - a) I agree that it is the most desirable retail location in the vicinity;
 - b) I find it unlikely that the width of the pavement, trees and street furniture would dilute the pedestrian flow into the shops.

¹⁸⁷A, 17, 212

The Parade

273. I accept the evidence of Mr Scott in his supplemental report that¹⁸⁸,

“4.24 The subject parade is fully let and occupied by a number of well recognised national multiple brands such as Marks & Spencer, Co-operative, Aldi, the Post Office, Superdrug, and Gymbox (a premium London gym operator with 10 sites). These are beneficial adjacencies and amenity uses, which drive footfall to the subject Parade.

4.25 In March 2015, the calibre of occupier was lower, including Peacocks, rather than Marks & Spencer. Nearby development bringing further improvement since 2015 include the Bower Buildings (complete 2018) and the White Collar Factory (2017) mentioned above.

274. I find that the most appropriate comparables to 199 Old Street are the adjacent properties in the Parade. I accept Mr Scott’s evidence that in the last three to four years, there have been multiple lettings and lease renewals in the subject Parade which demonstrate true rental values of retail outlets in the Parade.

Zoning of comparable properties

275. Mr Scott has zoned 199 Old Street and all of the comparable properties.

276. In cross-examination Mr Scott agreed that zoning was particularly used for retail units, especially in High Streets, because of the particular value of the window frontage. It was not used in the same way for industrial and office buildings. He said that not all retail was assessed on a zoning basis; for example a department store would not be. He said that supermarkets and convenience stores were valued on both zoning and overall square footage bases.

277. Mr Purnell agreed that 199 Old Street should be zoned. He says that food stores should not be zoned because the front of the shop is not more valuable than the back of the shop.

278. I prefer Mr Scott’s analysis of zoning 199 Old Street and all the comparable properties, including Marks and Spencer, Aldi and the Co-operative, because:

- i) As Mr Scott says, his approach of zoning 199 Old Street and the comparable properties is consistent.
- ii) I find that if one zones the food stores in the Parade and the non-food store, Superdrug, one finds that all of the comparables provide a very consistent rental tone between £191 and £202 from December 2018 to late 2019.

¹⁸⁸ A, 19, 269

201-203 Old Street (Marks and Spencer)

279. Although 201-203 Old Street is a much larger premises than 199 Old Street, Mr Scott makes a deduction of 5% at paragraph 9.3 of his report for size or quantum. In his report, Mr Scott says¹⁸⁹,

“9.13 At 7,967 sq ft the unit is much larger than the Premises, and I consider an adjustment for size or quantum of -5% is appropriate to apply. I apply A/20 to the whole of the basement which is a standard storage rate.”

280. I find that the lease to Marks and Spencer, completed in November 2019, is relevant because:

- i) It is in the same Parade as 199 Old Street;
- ii) It was let on the open market;
- iii) The effective rent, which I have found to be £330,750 with a Zone A of £191.74, is consistent with the experts’ agreed Zone As for the other retail outlets in the Parade.

203 Old Street (Superdrug)

281. I find that the comparable most relevant in size, location and configuration is the letting of 203 Old Street to Superdrug, effective July 2019. The NIA of 203 Old Street is 2,097 sq ft, the same as the NIA of 199 Old Street.

282. I reject Mr Purnell’s submissions in his report¹⁹⁰ that Superdrug had no option but to reoccupy on the Claimant’s terms. Prior to entering into the new lease in July 2019, Superdrug had been out of possession of 201 – 203 Old Street for 18 months and therefore did have an option not to reoccupy. In cross-examination, Mr Purnell retracted his evidence that Superdrug would have incurred redundancy and dilapidation costs if they had not entered into a new lease. In his report he described the Landlords’ approach as aggressive, which again he retracted. I conclude that while Mr Purnell has undoubted expertise and experience, his wish to undermine the rent that Superdrug agreed to pay has undermined his independence, and he has made unsustainable assertions in respect of the Landlord and Superdrug, which he has had to withdraw. This has reduced the weight I can place upon his evidence.

283. At the same time, I bear in mind that Superdrug had occupied 203 Old Street since 2007 and, as Mr Fitzsimmons, Superdrug’s Regional Estates Manager, said in his email dated 20 September 2021¹⁹¹, it was “a good performing store for Superdrug” and Superdrug “was keen to get back in”. I note that Mr Fitzsimmons says that Superdrug considered

¹⁸⁹ A, 16, 178

¹⁹⁰ A, 17, 226

¹⁹¹ B, 17, 206

that the rent was “very bullish”¹⁹². In the circumstances, I find that Superdrug would have been prepared to pay slightly above the market value in order to secure the letting.

284. I have found that the Zone A for Marks and Spencer is £191.74. I note that the Acquisitions Team at Costa made an offer for 203 Old Street in September 2017 of £165,000 per annum with a six-month rent-free period. After six months’ rent free is amortised, the net effective rent is £148,500 p.a. and the Zone A is £180. That offer was rejected by the Board of Costa in January 2018. The email confirming the rejection¹⁹³ provides no reason for the rejection by the Board. Whilst the offer by the Acquisitions Team at Costa is weaker evidence than an open market letting, it does suggest that the open market letting agreed by Superdrug of £164,250 p.a., giving a Zone A of £202.20, after amortizing the six-month rent-free period, was in the correct ballpark but slightly above the open market value. I find that the starting point for assessing Zone A in the present case should be slightly lower than the Zone A for Superdrug.

205 Old Street (Aldi Stores Limited)

285. I find that the agreement for a lease of 205 Old Street to Aldi Stores Limited, which was exchanged on 1 October 2021, is a relevant comparable because:
- i) It is in the same Parade as 199 Old Street;
 - ii) It was made on the open market;
 - iii) The rental value is consistent with those of Superdrug, Marks and Spencer and the Co-operative in the Parade, taking into account the impact on the rent of retail units caused by the Covid-19 pandemic.
286. I note that Mr Scott says at paragraph 9.61 of his report¹⁹⁴,
- “I consider a 6-month rent-free period for fitting out for such a large store”
287. The proforma states that the expected build period for Aldi Stores Limited to carry out structural works is six months, after which Aldi Stores Limited will receive a rent-free period of six months. If Aldi Stores Limited completed the structural works in four months, the lease will show an eight-month rent-free period. I find that it is reasonable to assume completion of the structural works within six months, as assumed in the proforma.
288. The rent of Aldi Stores Limited is £485,000 per annum. I find that after amortising a 6-month rent-free period, the effective rent is £436,500, which gives a Zone A of £164.97 (i.e. 90% of the Zone A figure calculated by Mr Scott at paragraph 9.66 of his report).

¹⁹² B, 17, 207

¹⁹³ C, 19, 282

¹⁹⁴ A, 16, 187

289. In his supplemental report, Mr Scott says at paragraph 7.12¹⁹⁵ that this rent represents an approximate 15% fall from pre-Covid values. This rent therefore equates to a pre-Covid Zone A of £194.08.
290. I conclude that the agreement for a lease of 205 Old Street to Aldi Stores Limited is entirely consistent with and supports the other rental values in the Parade.

185 – 197 Old Street (The Co-operative)

291. The Co-operative entered into a lease renewal of 185-198 Old Street inside the 1954 Act from 8 January 2019.
292. Mr Purnell has exhibited to his report an email, dated 9 November 2021, in which Mr Berrevoets, who acted on behalf of the Co-operative, says that the lease to the Co-operative was not conducted at arm's length as the renewal negotiations were undertaken against the background of the possibility that the Landlords would instead redevelop the premises. Mr Berrevoets says in the email that the entire twelve months' rent-free period received by the Co-operative was a lease incentive and there was no agreement of this being reduced to six months in the event of the Co-operative not agreeing to accommodate the Post Office. He says that the Co-operative had no option to decline the incorporation of the Post Office in the demised premises.
293. In rebuttal, Mr Scott has disclosed emails from Mr Watson, who acted on behalf of the Landlords. In an email dated 14 May 2018 from Mr Watson to Ms Zakaria¹⁹⁶ he says,
- “Rent free – 6 months if they do not take in the Post Office, 12 months if they do reach an agreement to take in the Post Office operation.”
294. I find Mr Berrevoets' recent email of 9 November 2021 saying that the 12-month rent-free period was a lease incentive is contradicted by the contemporaneous email of Mr Watson of 14 May 2018.
295. I conclude that the lease to the Co-operative of 185-197 Old Street was a lease renewal and not an open market letting, and as Mr Jourdan concedes, I can place much less weight upon it. That said, the rent agreed is entirely consistent with the other open market lettings in the Parade to Marks and Spencer, Superdrug and Aldi Stores Limited.

Conclusion as to comparable properties in the Parade

296. As stated above, I find that the most appropriate comparable properties are those in the Parade. Looking at the lettings to Aldi Stores Limited (Zone A without 15% Covid-19 discount £194.08), Marks and Spencer (Zone A £191.74), Superdrug (Zone A £202) and the Co-operative (Zone A £191.34), I find that the appropriate Zone A for 199 Old Street is £192.

¹⁹⁵ A, 19, 290

¹⁹⁶ C, 22, 296

Unit 1 and Unit 2, City Road Bezier Building – Letting confidential

297. Having seen Units 1 and 2, City Road Bezier Building and having heard the experts, I accept Mr Scott's analysis that these locations are less desirable than 199 Old Street for the following reasons:
- i) The South Eastern side of Old Street roundabout is noticeably less busy than Old Street.
 - ii) Units 1 and 2 do not have the beneficial adjacencies and amenity uses which drive footfall to the subject Parade.
 - iii) All of the comparables in the Parade have a very consistent rental tone, after amortising all of the rent-free periods, between £164.97 to £202.20 Zone A, from December 2018 to October 2021.
 - iv) Three of the four units under the Bezier Building are vacant or not trading. In contrast all of the properties in the Parade are let.
298. I accept Mr Purnell's opinion that Unit 2 is under offer only and as a consequence needs to be weighted accordingly.

104 - 128 City Road, Units 1 & 2 Imperial Hall (Starbucks), Unit 3 (German Donner Kebab) and 124 - 128 City Road (Ladbrokes)

299. Having seen 104 - 128 City Road, I find that it is a less busy and less desirable location than the Parade. There are poorer adjacencies, which are dominated by independents and takeaways, such as German Donner Kebab.
300. I note Mr Scott's observation that Costa made a bid in September 2017 for 203 Old Street of £200 Zone A, which I calculate at £180 Zone A after a rent-free period of six months is amortised. This provides a direct comparison with the rent review settlement on Units 1 & 2 Imperial Hall (Starbucks) two months later, in November 2017, of £88.50 Zone A. I accept Mr Scott's submission that this shows 104-128 City Road to be a far inferior location to the Parade.

154 Old Street (Robata Restaurant)

301. Having seen the Parade and 154 Old Street, I prefer Mr Scott's evidence that 154 Old Street is a poorer location on the street, compared to the subject Premises. It is further from Old Street roundabout and is not located in a retail environment with desirable adjacencies. Further, it is a restaurant operator, with extraction required, which is very different from a retail operator. Robata could not trade in the subject premises in Class A1. For all these reasons I find that this letting is not a relevant comparable.

169 Old Street

302. Having seen 169 Old Street and considered the expert evidence, I accept Mr Scott's evidence that 169 Old Street is in a poorer location, compared to 199 Old Street, and is not a relevant comparable for the following reasons:

- i) It is an island site;
- ii) It has no beneficial adjacencies;
- iii) Neither the Post Office, Superdrug, T4, Dappermore, Smart Dry Cleaning or Le Bab, or the proposed tenants of City Road Units 1 and 2 Bezier Building chose to relocate to 169 Old Street;

303. I find that in any event, less weight must be placed upon 169 Old Street because, although it has been in solicitors' hands since March 2022, contracts have not yet been exchanged. For these reasons I find that this letting is less relevant than open market lettings in the Parade.

Conclusion as to comparables

304. I conclude that the most relevant comparables to assess the open market value of 199 Old Street are the lettings to other retail units in the same Parade, namely Aldi Stores Limited, Marks and Spencer and Superdrug, I have found that the appropriate figure for Zone A is £192.00.

Reduction in rental values due to Covid-19 and economic downturn

305. It is common ground that there should be a reduction in the rental value to reflect the economic effects of the Covid-19 pandemic and the significant worsening of the economy.
306. Mr Purnell has provided a number of articles from well-regarded sources, such as The Guardian and Deloitte, on the UK retail decline¹⁹⁷. He has also provided articles from the Guardian and BBC News dealing with the impact of the Covid-19 epidemic¹⁹⁸. For example, an article by MarketLine, published on the Retail Insight Network on 2 August 2021¹⁹⁹, says,

“The pandemic has taken its toll on the UK high street, further accelerating store closures.

According to a report from the British Retail Consortium (BRC) and Local Data Company, the vacancy rate across high streets, retail parks and shopping centres rose to 14.5% in the second quarter [i.e. to June 2021]. It was up from 14.1% in the first quarter and 12.4% in the second quarter a year ago.”

From these articles it is clear that as at September 2021, when the rent for Aldi Stores Limited was being decided, the main driver reducing rents was the impact of the Covid-19 epidemic. As at September 2021, inflation in the UK was at 3.1%²⁰⁰. I find that the 15% reduction in the rent agreed for Aldi Stores Limited, compared with the rents for Superdrug, Marks and Spencer and the Co-operative, can therefore be attributed to the impact of the Covid-19 pandemic. Since

¹⁹⁷ B, 8, 133-164

¹⁹⁸ B, 9, 165-174

¹⁹⁹ B, 8, 156

²⁰⁰ <https://www.ons.gov.uk/economy/inflationandpriceindices/timeseries/d7g7/mm23>

then, the economic situation in the United Kingdom has worsened significantly, with inflation in August 2022 at 9.9%, and predicted to continue rising throughout 2022 by the Bank of England²⁰¹, and widespread discussion of the cost of living crisis, which the Institute of Government says the UK has experienced since late 2021²⁰².

307. In his supplemental report Mr Purnell says²⁰³,

“2.7.2 As at the date of this SR, the economy faces considerable challenges. This includes the largest interest rate rise in 27 years, inflation set to hit 13%, with the UK being predicted to fall into recession this year. With the predicted substantial rises in food and energy prices, consumer spend will be squeezed which will affect spending on the ‘high street’. These are relatively recent economic changes which were not prevalent at the date of my ER in November 2021. The full impact of these changes and their likely duration are another cause of uncertainty and caution for the market.

2.7.3 These issues would not be lost on the willing lessee which would in my opinion affect the tenant bid. The impact of these issues on tenant bids is also not lost on landlords when active in this market.”

308. In his supplemental report, Mr Scott says at paragraph 4.06,

“The different catchments appear to be reflected in the nearly -47% fall in rent at 13-15 Eastcheap (Superdrug), and -30% fall at 126 Whitechapel High Street (Costa). By comparison, the evidence in close proximity to Old Street Roundabout, which has a more diverse catchment than the City, appears to show smaller falls in value of -5% to -20%.”

Address	Previous rent/new rent	% change
13-15 Eastcheap (Superdrug)	£217,900 / £115,000	-47%
126 Whitechapel High Street (Costa)	£81,500 / £57,000	-30%
124/128 City Road (Confidential)	£87,000 / £70,000	-20%
Unit 2, 81 City Road (Confidential)	£148,600 / £135,000	-10%
Unit 3, Imperial Hall (German Doner Kebab)	£75,000 / £66,750	-10%
Unit 1, 91 City Road (Confidential)	£125,000 / £135,000	-8%

²⁰¹ <https://www.bankofengland.co.uk/knowledgebank/will-inflation-in-the-uk-keep-rising>

²⁰² <https://www.instituteforgovernment.org.uk/explainers/cost-living-crisis>

²⁰³ A, 20, 299

154 Old Street (Robata Restaurant)	£79,000 / £75,000	-5%
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Finding as to reduction for rental values due to covid 19 and economic downturn

309. The Landlords submit that there should be a reduction in the rent to reflect the impacts of Covid and the economic circumstances of 15%. This was based on the reduction of 15% in rent paid by Aldi when compared with Marks and Spencer. In his closing submissions Mr Jourdan conceded that the appropriate reduction may be 20%, given that food retailers had done better than other retailers during the pandemic. The tenant says the discount should be much greater than 15%. The table provided by Mr Scott, referred to at paragraph 308 above, shows reductions between -47% and -5%.
310. I accept Mr Purnell's evidence, which I quote at paragraph 307 above, that the effects of Covid-19 are still impacting the retail market and the economy is facing severe challenges, with the highest interest rate rise in 27 years, inflation set to hit 13% and the United Kingdom predicted to fall into recession this year.
311. I accept Mr Scott's evidence at paragraph 10.21 of his report²⁰⁴ that the most recent transaction in the Parade to Aldi Stores Limited, with an effective date of 1 October 2021, implies a fall in Zone A values of approximately 15% from the tone in 2019.
312. However, I accept Mr Purnell's evidence that the impacts of Covid-19 on convenience food stores were far less severe than on other sectors of the retail market. Food stores were able to remain open while non-essential shops were closed and people shopped more locally. As Ms Stevens-Hoare said, convenience food stores represent a thriving market: three of the units in the Parade, occupying approximately 80% of its overall area, are now convenience food stores. In contrast, other sectors are struggling. 199 Old Street is too small to serve as a convenience food retailer and would therefore only be rented on the open market by a retailer from another sector, and other sectors have been impacted much more severely by Covid-19. I also bear in mind the very significantly worsening economic situation since Autumn 2021, when the Aldi rent was agreed, the very sharp increase in inflation, the increase in interest rates and the cost of living crisis. Having regard to all of these matters, I conclude that a reduction of 25% is appropriate.

Summary of calculation of interim rent and new rent under s.34 of the 1954 Act

313. Mr Scott and Mr Purnell agree that the net internal floor area of 199 Old Street is 2,097 sq ft, i.e. 194.81 square metres.
314. I have found that:
- i) The Remainder should be assessed at A12, which provides an NIA of 781.05 ITZA Units.
 - ii) The landlords have not proved that an exclusivity adjustment should be made to the rent.

²⁰⁴ A, 16, 196

- iii) The most relevant comparables are the other properties in the Parade, with the exception of the Co-operative.
 - iv) The starting point for assessing Zone A is £192.
 - v) Having regard to Covid-19 and the significantly deteriorating economic environment, a reduction of 25% should be made. 75% of £192 = £144.
315. I therefore conclude that the appropriate assessment under s.34(1) of the 1954 Act of the interim rent payable from 19 August 2020 and the rent payable under the new lease is as follows:
- £144 x 781 units = £112,464, which I round down to £112,000.