Claim Number: HC-2015-004437

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL
Date: 20/02/2017

Before:

MR MICHAEL BRINDLE QC
(Sitting as a Deputy Judge of the Chancery Division)

Between:

(1) FIRST TOWER TRUSTEES LIMITED
(2) INTERTRUST TRUSTEES LIMITED — **Claimants**

- and –

CDS (SUPERSTORES INTERNATIONAL) LIMITED — **Defendant**

Michael Gadd and Matthew Watson (instructed by **Olswang LLP**) for the **Claimants**

Edwin Johnson QC (instructed by **Ashfords LLP**) for the **Defendant**

Hearing dates: 30 January - 1 February 2017

JUDGMENT

1. This action concerns warehouse premises at Dearne Mills, Darton, Barnsley. Four bays are relevant namely Bays 1-3, which were the subject of a Lease, and Bay 4, which was the subject of an Agreement for a Lease, which was never completed. The Claimants were landlords, and the Defendant was tenant.

2. On 30th April 2015 the Claimants granted a Lease to the Defendant over Bays 1-3. Those Bays were, or appeared to be, ready for immediate occupation. Bay 4 was somewhat behind, being the subject of other occupation. On 30th April 2015, the parties entered into an Agreement for a Lease in respect of Bay 4. Under the terms of the Lease of Bays 1-3, the Defendant was obliged to carry our certain works, and for this purpose entered into possession on 6th May 2015.

3. Almost immediately, asbestos was discovered. This started on 14th May 2015. On 25th May 2015, further asbestos was discovered, and the Defendant ceased the works. On 12th June 2015 the previous tenancy over Bay 4 came to an end, but on 16th June 2105 asbestos was discovered there as well. Although the Claimants gave notice that the Vacant Possession Condition had been satisfied, the Defendant did not accept it. However, there was a condition subsequent in clause 4.3 of the Agreement whereby if the costs required to put Bay 4 into a condition making it fit for occupation by the Defendant were not agreed by a certain date after vacant possession was obtained, either party was at liberty to terminate the Agreement. This right of termination was exercised by the Defendant on 5th August, when the Defendant wrote stating that agreement had not been reached within Clause 4.3, and that the Agreement was terminated. There is no present dispute about the validity of that termination.

4. Remedial work on Bays 1-3 commenced in November 2015, and in respect of Bay 3 were completed on 11th December 2015. The premises were ready for occupation on 18th December 2015. It is claimed that Bays 1 and 2 were ready for occupation on 15th January 2016, and damages are claimed from 1st May 2015 to 15th January 2016.

5. Initially, it was the Claimants who took the initiative, claiming for rent unpaid and for specific performance of the Agreement relating to Bay 4. However, this has fallen away. All rent due has been paid, and the Claimants do not now persist in the claim for specific performance, recognising that the Agreement for a Lease relating to Bay 4 has been validly terminated. All that remains, therefore, is the Counterclaim for damages by the Defendant, relating to the losses alleged to have been suffered as a result of the unavailability of the premises due to asbestos damage.

6. When the matter was called on for hearing, the first matter for consideration was the Claimants' application for permission to amend its pleadings to allege that any liability of the Claimants was limited to the extent of the funds available within the Trusts, and did not extend to full personal liability on behalf of each of the trustees ("the trustee limitation issue"). I have separately issued my judgment allowing this application to amend, and I do not repeat my reasoning here. I consider the merits of this argument below.

7. The simple fact is that it is only the Counterclaim which remains to be decided, firstly as to whether it is well founded as a matter of liability, secondly as to the measure of damages and thirdly as to the trustee limitation issue. I consider first the question of liability.

Liability

8. The Claimants elected to call no evidence at all. The Defendant called two witnesses, Mr Simpkin and Mr Adlard, who were both cross-examined. There were two other witnesses, Mr Pickard and Mr Chatterton, an expert witness, whom the Claimants did not wish to cross-examine. However, the Defendant wished to adduce this evidence (unchallenged) and I have accepted it. Both Mr Simpkin and Mr Adlard gave truthful evidence, which evidence I accept. I set out below the essential effect of that evidence.

9. Mr Simpkin explained that the Defendant entered into the Lease and the Agreement for a Lease on the basis of a number of representations, namely: -

(i) The S2 Report Misrepresentation. The Defendant was provided, before contract, with a report which was said to them to relate to the demised premises prepared by S2. This indicated to the Defendant that there were no problems with asbestos. Curiously, the Claimants have denied that the S2 Report related to Bays 1-4 at all. The Defendant is unable to contest this, although I have my doubts as a result of the evidence of Mr Adlard. Be that as it may, the report was certainly held out to the Defendant as relating to Bays 1-3 (at least) and led them to believe, as I accept, that there were no significant asbestos problems. A further report was produced by William Martin Firefly ("Firefly"), which did not actually reach the Defendant until 1st May 2015, after the Lease had been entered into. However, this report was treated by Mr Simpkin as essentially "clear". There were some presence of asbestos, but none was significant, save for one area relating to the insulation of a metal tank, but I accept Mr Simpkin's evidence that this was not regarded by him as of any importance, since it was well away from any of the works which the Defendant needed to undertake, and was regarded, when the report was read by Mr Simpkin, as of no real consequence. The Claimants did not contest this point in cross-examination.

(ii) More importantly, there were two significant representations arising out of the Replies to Enquiries dated 16th February 2015. In particular, answers 15.5 and 15.7 are relied upon. 15.2, in respect of "notices" etc., relating to environmental problems, was answered to the effect that the Claimants were not aware of any such notices, "but the Buyer must satisfy itself". As for 15.7, the question was as to details of any actual, alleged or potential breaches of environmental law… or other environmental problems relating to the Property. The answer was "The Seller has not been notified of any such breaches or environmental problems relating to the Property but the Buyer must satisfy itself." Paragraph 6 of the interpretation section of the Replies provided that prior to contract or completion the Claimants would notify the Defendant on becoming aware of anything which might cause any reply that had been given to be incorrect.

10. The answers set out at (ii) above were not updated prior to 30th April 2015, despite the facts that (i) the Firefly Report, which did reveal the presence of asbestos, came into the Claimants' hands on 16th April 2015 and (ii) an e-mail was sent by VPS, a specialist firm used by the Claimants, on 20th April 2015, which had reported a health and safety risk caused by the presence of asbestos near the loading bay, which contained the following sentence": -

> *"Please be advised that we have added a notice onto our system and we are unable to enter this property until we receive the relevant confirmation from yourselves that the site is safe. This would have to be in the form of a Clean Air Certificate or Asbestos Report."*

11. The remarks of VPS related specifically to Bays 1 to 3, which were untenanted at the time, but they also raised the possibility that Bay 4, at that time let to Kingspan Limited, might be unsafe to enter for the same reason.

12. I have no doubt that each of the representations set out on paragraph 9 above was false. The S2 Report was represented to relate to Bays 1 to 4, but according to the Claimants' own pleaded case it did not. It said nothing relevant about the asbestos problem which existed and prevented the premises from being occupied until remedial work was carried out. This is made patently clear by the VPS e-mail, of which the Defendant had no knowledge until after the Lease and Agreement had been entered into. It has been stressed on behalf of the Claimants that the Defendant had significant remedial work to do in any event, on a not insubstantial scale, but this does not in my judgment derogate from the clear fact that the premises required substantial further work to remedy the asbestos problem, which was wholly contrary to what the Defendant had been told before the Lease (and the Agreement for a Lease) were entered into. I should note that I reject the submission that this report was somehow out-of-date.

13. The Replies under 15.7 did not remain true as at 30th April 2015, in the light of the VPS e-mail which the Claimants had received two weeks earlier but had not passed on to the Defendant. The Claimants get no help from the words "*...the Buyer must satisfy himself*", since those words are preceded by "*The Seller has not been notified of any such breaches or environmental problems relating to the property*". That was untrue. Although the tenant is invited to satisfy himself, this means to satisfy himself about environmental problems in the context that the Claimants do not know of any. In fact, by 30th April 2015 the Claimants knew full well that there was a problem. I am less sure that 15.5 is engaged, since what VPS had sent was not an official notice of the sort with which 15.5 seems to me to be concerned. This does not matter, since the case is clear under 15.7.

14. I do not think that any misrepresentation case can succeed in relation to the Firefly Report, since that Report, when the Defendant did read it, caused no concern, and would, I find, have caused no concern if revealed earlier. I do not think it is open to the Defendant to treat the Firefly Report as notification to the Claimants of environmental problems of any significance.

15. Two of the alleged misrepresentations are therefore established, namely the S2 misrepresentation and the misrepresentation that the Claimants had (because of the VPS Report) not been notified of any breach of environmental law or other environmental problem. The misrepresentations were material and, from the evidence of Mr Simpkin and Mr Adlard, clearly relied upon, and satisfy section 2(1) of the Misrepresentation Act 1967, the Claimants having not attempted to prove the absence of negligence. This conclusion is, however, subject of course to the legal defences which the Claimants have advanced, which I consider below.

16. The Defendant also alleges that each of the misrepresentations constitutes a breach of a duty of care. However, this adds nothing, and imposes on the Defendant the unnecessary burden of proving negligence. Beyond that, it is alleged that paragraph 6 of the Enquiries before Contract gives rise to either (i) a free-standing duty of care or (ii) a collateral contract. I do not think that paragraph 6 creates an independent duty of care. Collateral contract requires more attention.

17. The Defendant likens the present case to *Evans v. Merzario* [1976] 1 WLR 1078 and invokes the wide words of Lord Denning MR at 1080C to G. But the other two members of the Court put the legal position more narrowly, and conclude that that was a clear case on the evidence of a collateral undertaking having been intended to be entered into. The modern law, collecting together previous authority, seems to me to be most clearly stated by Lightman J in *Inntrepreneur Pub Company Limited v East Crown Limited [*2000]2 Ll L R 611 at 615. The first point there made is that the parties must have the intention to make a contract. That requirement seems clearly to be lacking here. Paragraph 6 seems to me to be doing little more than to reinforce the general legal principle that a representation may continue after it is made for so long as the representee is likely to rely on it. There is also the problem of the "entire agreement clause in the Agreement for a Lease, which clearly prevents any collateral contract from arising in connection with Bay 4. I also do not see how the contractual offer is supposed to have been accepted. The Defendant argues that the offer was accepted when the Lease and Agreement were entered into, but I do not see that entry into those documents was in any sense the acceptance of an offer made by paragraph 6. The whole landscape of the Enquiries before Contract is clearly non-contractual, and I reject the claim based on collateral contract.

18. I now turn to consider the claim for breach of covenant. The Defendant relies upon clause 4.1 of the Lease, which is the usual landlord's covenant for quiet enjoyment. It is also alleged, correctly in my view, that the Lease is subject to the usual implied covenant of the landlord not to derogate from grant. The Defendant argues that these covenants are breached, because the Claimants demised premises which could not, by virtue of the asbestos, either be entered or used.

19. The Claimants submit that the two covenants are not engaged where the acts alleged to constitute breach occurred before the date of the covenant. They are not apt to deal with defective premises, but rather with actions of the landlord post-covenant which take away from the tenant what was demised, or interfere with his quiet enjoyment of what has been demised. Although the Defendant relies upon Woodfall's Landlord and Tenant vol 1 at 11.083, this seems to me to support the Claimants' argument. Crucial to this dispute is the decision of the House of Lords in *Southwark Borough Council v. Mills* [2001] 1 AC 1, especially the speeches of Lord Hoffmann at 10E to 11G and of Lord Millett at 22G to 24 E.

20. It seems to me that this is not a case where the landlord has done anything or omitted to do anything after the Lease which derogates from its grant or interferes with quiet enjoyment. The interference is the inability of the tenant to go into occupation until works were carried out by or on its behalf, as a result of the pre-Lease condition of the premises. I therefore accept the Claimants' argument and dismiss the claim for breach of the covenants of quiet enjoyment and non-derogation from grant.

21. The position with Bay 4 and the Agreement for a Lease is different. Here the Defendant relies upon clause 2.1 of the Agreement for a Lease, which is a promise to use reasonable endeavours of obtain vacant possession of Bay 4. It is said that the Claimants failed to use any endeavours to secure the removal of asbestos before completion and that this amounted to a failure to give vacant possession. Reliance is placed in the decision of the Court of Appeal in *Cumberland Consolidated Holdings Limited v. Ireland* [1946] KB 264. The Claimants counter with reliance on the decision of Scott J in *Hynes v Vaughan* [1985] P&CR 444.

22. In *Cumberland* Lord Greene MR said that it would be a rare case where a physical impediment to the right to possession constituted a failure to give vacant possession. Nonetheless, on the particular facts of that case, which were "very exceptional" the presence of sacks of hardened cement rendered a network of cellars forming a significant part of the demised premises totally unusable. In *Hynes* Scott J took a different view in relation to piles of debris in a rural setting. It seems to me that the asbestos here is not an impediment to vacant possession in the relevant sense. It is a pre-existing condition of the fabric rendering it dangerous, but does not prevent

vacant possession in the sense of the *Cumberland* case. I therefore dismiss this claim of the Defendant.

23. At this stage in the judgment I find, having reviewed all of the Defendant's claims, that they fail, with the vital exception of the misrepresentation claim based on the invalidation of answer 15.7 to the Enquiries by virtue of the VPS e-mail. This seems to me, however, to represent the heart of the Defendant's case. In general, a landlord does not warrant the state or condition of property he is letting. The prospective tenant must make his own inquiries, by survey or otherwise. But if the landlord represents, as here, that he knows nothing of any environmental problems when he is in possession of information clearly pointing to a serious problem that is when the law will come to the aid of the tenant.

Contractual terms limiting or excluding liability

24. By amendments made at the beginning of the trial, the Claimants introduced new arguments of law seeking to prevent liability from arising. I allowed the amendments since, although they were very late, they raised points of law, which the Defendant was well able to deal with without prejudice. That proved to be correct, given the skill with which Mr Johnson QC was able to marshal his arguments. There was one point where it was said that evidence of fact might be required, namely the "reasonableness" test under the Unfair Contract Terms Act 1977, but this seemed to me unrealistic, and in any event I required small changes to be made to the draft amendment to make it clear that evidence was neither required nor necessary.

25. The points were as follows: -

(i) That the collateral contract claim must fail because the Replies to Enquiries were "subject to contract and also because of the presence of an "entire agreement clause at clause 12.2;

(ii) That clause 5.8 of the lease and clauses 12.1 and 12.3 of the Agreement for a Lease are "non reliance" clauses, which estop the Defendant from establishing its misrepresentation case.

26. The first points are simple enough. I would in any event have found that the collateral contract claim failed. The presence of the entire agreement clause is certainly fatal to it. The fact that the Replies were "subject to contract" further highlights how unrealistic the collateral contract claim is.

27. The second points are more important. I set out the relevant clauses: -

(i) (5.8 of the Lease) "*The Tenant acknowledges that this lease has not been entered into in reliance wholly or partly on any statement or representation* made *by or on behalf of the Landlord.*"

(ii) (12.1 and 2 of the Agreement) "*The Tenant acknowledge {sic} and agree that it has not entered into this Agreement in reliance on any statement or representation made by or on behalf of the Landlord other than those made in writing by the Landlord's solicitors in response to the Tenant's solicitors' written enquiries... Nothing in this Agreement shall be read or construed as excluding any liability or remedy resulting from fraudulent misrepresentation*".

28. As Mr Johnson has submitted, there are three issues in respect of clause 5.8. They are:

    (i) Construction
    (ii) Basis clause or exclusion clause and
    (iii) Reasonableness.

29. The point of construction is whether the words of 5.8 can be construed so as to include the words which are found in clause 12.1 of the Agreement but not in the Lease itself. It is very tempting to adopt this construction. It is hard to see how any sensible draftsman would intend there to be a difference, although Mr Gadd for the Claimants suggested that where a lease is entered without prior contract the pre-contract enquiries might be of lesser importance. I doubt that, and cannot see any reason why the parties would want to make a distinction. But I think the temptation must be resisted, especially after the decision of the Supreme Court in *Arnold v Britton* [2015] UKSC 36. It cannot be assumed that the two clauses had the same intention, when their wording is so different. So the words must be given their clear meaning, without any imported restriction.

30. The point about basis clauses versus exclusion clauses arises from the decision of the Court of Appeal in *Springwell v J P Morgan* [2010] EWCA Civ 1221 [2010] 2 CLR 705. If a clause is part of the basis upon which the parties have contracted, it is not treated as an exclusion or exemption clause and is not subject to statutory control. This case has been followed in a number of later first instance decisions. Mr Gadd for the Claimants relies on paragraphs 141 to 171 of the judgment of Aikens LJ, but I do not think these assist him in this connection. Nor does the decision of Hamblen J in *Cassa di Risparmio v Barclays Bank* [2011] EWHC 484 (Comm); {2011]1 CLC 701.

31. The critical passage in *Springwell* is at paragraphs 181 and 182. Paragraph 182 is particularly clear, since there the Court construed a very similar clause to the present as an exclusion clause rather than a basis clause. (the relevant clauses in *Springwell is* set out at pages 780 and 786 of the CLR report). I think that the non-reliance clause

here, just as much as a clause saying that no representation has been made, is "an attempt retrospectively to alter the character and effect of what has gone on before and so is in substance an attempt to exclude or restrict liability". This approach recognised the judgment of Christopher Clarke J in *Raiffeisen v RBS* [2010] EWHC 1392.

32. I appreciate that my view differs from that of HH Judge Moulder in *Thornbridge Limited v Barclays Bank* [2015] EWHC 3430 (QB) and of HH Judge Hodge in *Sears v Minco* [2016] EWHC 433 (Ch). With respect to Judge Moulder, who refers to paragraphs 181 and 182 of the judgment of Aikens LJ in Springwell at paragraph 109, it seems to me that the words in *Springwell* which were found to be subject to UCTA were "non-reliance" or "no- representation" clauses similar to those before her. It may be that she was influenced by the fact that the Court in *Springwell* did find that some parts of the clauses relied upon were basis clauses, for instance where it was agreed that there was no advisory relationship and where the client accepted that he was a sophisticated investor who took full responsibility for the investments he was making. But paragraphs 181 and 182 make it entirely clear that where a representation has been made pre-contract and relied upon, a subsequent provision in the contract which states that there has been no representation or no reliance is, although contractually valid, an attempt to exclude or restrict liability and therefore subject to the reasonableness regime.

33. Section 3 of the Misrepresentation Act 1967 is therefore engaged. Clause 5.8 "shall have no effect except in so far as it satisfies the requirement of reasonableness as stated in section 11(1) of the Unfair Contract Terms Act; and it is for those claiming that the term satisfies that requirement to show that it does."

34. The burden is therefore on the Claimants. They have set out four points on which they rely:

(1) The parties are both commercial entities whose bargaining power is to be taken to be materially equal;
(2) The Defendant was not dealing on the Claimants' standard terms and had the opportunity to negotiate the terms of the Lease;
(3) The parties each retained solicitors who could act and advise in relation to the Lease and the Agreement for a Lease and the meaning and consequence of its terms;
(4) The Defendant can therefore be taken to have known of the existence and nature of the relevant clause before the Lease and Agreement were entered into.

35. I am prepared to accept all of these, but do not think they are conclusive as to reasonableness. The Defendant was anxious, when the late amendment was made, that

there was not time to mount any resistance to these facts, but I doubt very much whether they could be denied. There is no sign, on the evidence I have heard, of any bargaining inequalities. Both sides had solicitors in the negotiations, and the dealings were certainly not on standard terms. Point (4) is really a conclusion from (1) to (3), and I cannot see any prospect that the Defendant could have contended that it did not know of the non-reliance clause when the contract was entered into.

36. The leading authority on the reasonableness test, as applicable to a contract for the disposition of land, is the decision of Lewison J in *Foodco v Henry Boot* [2010] EWHC 358 (Ch), approved by the Court of Appeal in *Lloyd v Browning* [2013] EWCA Civ 1637. I have found this guidance more helpful to the facts of the present case than that given in some of the banking cases, although many of the principles overlap. In *Foodco* the non-reliance clause expressly permitted reliance on any reply given by the landlord's solicitors to the tenant's solicitors. If, therefore, something of importance had been stated in the course of negotiations upon which the tenant wished to rely, the tenant's solicitor only had to ask the landlord's solicitors the relevant question. That would have revealed whether the landlord was prepared to formalise the statement so that the tenant could rely on it or whether the tenant would have to undertake their own due diligence. The presence of this permitted reliance on the landlord's replies made the clause reasonable. The same approach was adopted by Amanda,Tipples QC, sitting as a Deputy Judge of the Chancery Division, in *Hardy v Griffiths* [2014] EWHC 3947 (Ch).

37. These authorities provide a clear answer to the non-reliance clause 12 in the Agreement for a Lease in the present case. There was again an exception in relation to Replies to Enquiries, so the clause was reasonable. This does not help the Claimants, however, since I have found that the misrepresentation was contained in the Replies at 15.7. There is therefore no impediment to liability for misrepresentation in relation to Bay 4, in so far as the case is based in the Replies to Enquiries. The misrepresentation claim relates to the S2 Report is, however, excluded. This is just the sort of liability which the Claimant was reasonably entitled to exclude.

38. But what of clause 5.8 of the Lease? It does not follow from the reasonableness of a clause which does allow reliance on Replies to Enquiries that a clause which denies such reliance is necessarily unreasonable. But it does seem to me to cast serious doubt on the reasonableness of clause 5.8. The very point which was crucial in upholding the reasonableness of the provision in the *Foodco* case is absent. So the landlord can say what he likes in Replies to Enquiries (fraud apart), withholding his own knowledge of a serious problem and requiring the tenant to carry out his own due diligence, and then meet the tenant with a contractual estoppel. That seems to me highly unreasonable, particularly in the conveyancing world, where pre-contractual enquiries have a particular and well-recognised importance. With clause 5.8 they

become a worthless, and indeed positively misleading exercise. I do not think this is reasonable.

39. There remains Mr Gadd's point that the parties have chosen, presumably deliberately, to draft the provision in the Lease in different terms from the provision in the Agreement for a Lease. Since the parties are of equal bargaining power, are well-armed with solicitors and must be assumed to know what they are letting themselves in for, is it not reasonable for the Defendant to be stuck with clause 5.8? I recognise the force of this argument, but we do not know why the two clauses are expressed differently, whether it was deliberate or whether two different standard precedents were used. I do not think that the Claimants can complain about this lack of evidence, since it was the Claimants who were permitted the very late amendment, which was not supported by any suggestion that evidence should or could be adduced. It was the Defendant who was concerned about the lack of opportunity to call evidence.

40. I am reminded that the burden lies on the Claimants. I do not think I can draw any inference one way or the other as to why the clauses differ in the two documents. I certainly cannot draw an inference which favours the Claimants. The fact is that clause 5.8 got into the Lease without the saving words in the Agreement for a Lease. That was not a reasonable clause to put into the Lease, because its effect would render the whole exercise of making enquiries and relying on answers thereto all but nugatory. I suspect that conveyancing practitioners would be appalled if such clauses gained wide currency and were upheld by the courts. This, I suspect, is why the form of words found in the Agreement for a Lease, and in the *Foodco* and *Hardy* cases, has found favour with conveyancers. I have also noted in this connection the decision of Dillon J in *Walker v Boyle* [1982] 1 WLR 495.

41. I therefore find that clause 5.8 fails the reasonableness test. Therefore, in relation to both the Lease and the Agreement for a Lease, there is no impediment to liability attaching in respect of the misrepresentation which I find to have been made and relied upon relating to the Replies to Enquiries. Again, the S2 representation is different, being just the sort of liability which the Claimants were reasonably entitled to exclude.

Damages

42. The damages claimed fall under three heads: -

(i) The costs of the asbestos remedial work: £ 428,344.82;

(ii) The costs of alternative warehouse accommodation whilst Bays 1-3 were incapable of use;

(iii) The costs of alternative warehouse arrangements as a result of the loss of Bay 4.

43. It has not been suggested by the Claimants that these are inappropriate as heads of damage, or that the measure of damage should be computed on any other basis. However, particular issues are raised on the quantification of loss, which I deal with below.

44. There is no issue as to the first head. The figure claimed represents the actual cost of clearing away the asbestos which ought not to have been there. I therefore award under this head the sum of £428,344.32, subject to the fact that VAT needs, as the Defendant accepts, to be deducted from some elements of this claim, since the Defendant is registered for VAT and able to reclaim these amounts. The correct sum, after VAT is removed, is £356,953.60

45. The second head is not controversial in principle. Plainly, the Defendant needed alternative warehouse space while the remedial works were being carried out. The amount claimed in paragraph 74 of the witness statement of Mr Simpkin is £ 1,249,549. His table at paragraph 65 confuses Bay 3 with Bays 1 and 2, but this does not affect the overall figures. The figure claimed is less than that set out in the Amended Defence and Counterclaim. I note that the period for which damages are claimed is 01/5/2015 to 12/2/2016 in respect of Bays 1 to 2, and 01/5/2015 to 18/12/2015 in respect of Bay 3. However, Mr Johnson fairly pointed out that the asbestos problem was solved in relation to Bay 3 by 11th December 2015 and in relation to Bays 1 and 2 by 15th January 2016, the remaining time being spent in carrying out work which the Defendant was in any event bound to carry out before it could go into occupation. That would seem to require a reduction in the figures, but I am not sure that I have heard full submissions on this point or been given figures to reflect this reduction. Again, I invite the parties to agree this, or to make further submissions when the draft of this judgment is handed down.

46. The Claimants' principal argument under this head is that the period for which damages are claimed is too long. It is said that the Defendant obtained four quotations for remedial work, between 1st June and 10th July 2015, but that for some unexplained reason the work did not start until 16th November. Why should the Claimants have to pay for the premises being out of use for so long? This is not put primarily as a failure

to mitigate, but as an argument of causation. The lengthy period for which the Defendant claims was caused in part by their own delay in progressing the works. I think that this argument is well-founded. Mr Simpkin, who was a fair witness, seemed slightly embarrassed by this delay. The difficulty is to say how much of the period from May to November 2015 should be disallowed. The Defendant complains that this uncertainty is a problem for the Claimants, but I do not agree. As so often with the quantification of damages, the Court has to make an educated assessment of how much time could have been saved if there had been no unreasonable delay. My assessment is that the work could and should have begun two months earlier, i.e. by 16th September 2015. I understood from Mr Johnson that it would be a simple matter to recalculate the damages to remove two months of the claim, and I invite him to do this before this judgment is finalised.

47. I now turn to the third head of damage, which relates to Bay 4. The position here is different, since the Agreement for a Lease was terminated, and the Defendant never went into possession. Nonetheless, the Defendant claims the costs of the alternative warehouse arrangements which it has been and remains obliged to make as a result of not being able to occupy Bay 4. On the face of it, this seems correct.

48. The Claimants advance a fundamental objection to this claim. They point out that the Agreement for a Lease was not terminated for breach, but because of the inability of the parties to agree costs. Therefore, argue the Claimants, the Defendant is not entitled to damages at all. I think that this is wrong. The fact that the Agreement was not terminated expressly for breach does not mean that there was no misrepresentation inducing the contract. Absent the misrepresentation, the Defendant would not have proceeded with the Agreement for a Lease at all. By entering into it, they have suffered losses so far as they have been unable, for some period at least, to make alternative warehousing arrangements. I therefore reject this argument.

49. Where the Claimants do have an argument is in relation to the period of time for which damages are claimed. The Defendant claims from 1st May 2015 (now amended to 19th June 2015, when vacant possession was purportedly given by the Claimants) until 17th May 2017, when the Defendant's new distribution centre in Bristol is expected to be available. This cannot be right. This would mean damages for a greater period for Bay 4, when the Agreement was terminated (and not terminated for breach), than for Bays 1-3. The Defendant's damages cannot extend beyond the time when, by virtue of the Claimants' misrepresentation being discovered and acted upon, the Defendant should have been able to find alternative warehouse space, to fill the interim period before the new distribution centre in Bristol became available. I see no basis upon which that should have been later than when the asbestos removal works on Bays 1 and 2 were completed in January 2016. There is no evidence as to how long it would have taken the Defendant to find an alternative, and it may be that in fact it did not do so and will not do so until the new distribution centre comes on stream.

That would argue for no loss at all, but that was not been argued and there is evidence from Mr Simpkin that the Defendant has had to use alternative space at Avonmouth. I think it right to compensate the Defendant for the period from 19th June 2015 until 15th January 2016.

50. Again, that will require further calculation once the draft of this judgment has been handed down. Other adjustments will be necessary. Mr Simpkin admits to an overstatement of the claim in paragraphs 9 to 12 of his second witness statement, reducing the claim from £1,588,193 to £ 1,204, 494. At paragraph s 13 and 14 of his second witness statement, he gives credit for sums which would have incurred if Bay 4 had been occupied. This credit is correct in principle, but will be reduced once the end date of the calculation is curtailed from 19th May 2017 to 15th January 2016. Again, I await the detailed results of the necessary re-calculation.

Trustee exposure

51. At the beginning of the trial I heard an application by the Claimants to introduce wholly new issues relating to the extent of the trustees' liability. In so far as concerned English law contractual issues I allowed the amendments, since although very late they were pure points of law, which the Defendant was able to deal with. The Claimants also sought to introduce an argument based upon the law of Jersey, which contains provisions quite different from English law in relation to the limitation on trustee liability. I refused that further amendment, since the extreme lateness of the application clearly prejudiced the Defendant, who was unable to research Jersey law in the time available. I should note that there was no evidence put before the Court as to Jersey law, save for the terms of the relevant statute, the Trusts (Jersey) Law 1984 and three decisions of the Court of Appeal of Guernsey. The interpretation of the Jersey statute give rise to obvious issues, which the Defendant was entitled to explore if the Claimants' point was to be admitted.

52. The English law argument is simple. English law is the governing law of both the Lease and the Agreement for a Lease, and the Claimants contend that the parties have provided for the liability of the trustees to be limited to the extent of the assets of the trust or trusts. The Lease provides at clause LR3 that the two Claimant companies contract "*in their capacity as trustees of the Barnsley Unit Trust and not otherwise.*" The Agreement for a Lease states in the opening definition of the parties that the Claimant companies contract "*in their capacity as trustees of the Barnsley Unit Trust and not otherwise.*"

53. The Claimants contend that these words mean that their liability in respect of the Counterclaim is limited to the trust property of the Barnsley Unit Trust. They cite in support of that proposition the decisions of the House of Lords in the Scottish appeals

of *Gordon v Campbell* (1842)1 Bell.App. 428 and *Muir v City of Glasgow Bank* [1879] 4 App Cas. 355, together with *Re Robinson's Settlement* [1912] 1 Ch 717, especially per Buckley LJ at 728-9.

54. Those authorities fully support the Claimants' argument. There is no reason not to give the contractual words their clear meaning. The Defendant put before me no authority calling this into doubt. I also think that the clauses at issue are basis clauses, setting out at the very outset the basis upon which and the capacity in which the trustees are contracting. If they are to be regarded as exclusion clauses, then they plainly satisfy the requirement of reasonableness. The limitation was a reasonable limitation and plain for the Defendant to see, and it was open to the Defendant to negotiate, if they did not like it, or decline to proceed with the transactions.

55. The important remaining question is the application of the clauses. It seems to me clear that they must cover any contractual liability. Hence, any claim on the covenants in the Lease and the Agreement for a Lease is affected by the limitation. I have, however, dismissed those claims. Any claim on a collateral contract would probably also be covered, but I have dismissed that claim also. What matters is whether or not the limitation covers the misrepresentation case, where I have found in the Defendant's favour in one vital respect.

56. The clauses in issue do not purport to limit liability for pre-contract misrepresentation. They are not "no-reliance" clauses or the like. They simply say that, when the trustees enter into the Lease or the Agreement for a Lease, they contract as trustees and not otherwise. I do not understand the legal mechanism by which it is alleged that this covers pre-contract representations. The Claimants argue that no cause of action in misrepresentation is complete until the relevant contract is entered into between representee and representor. This may be true, but it does not help as to the extent of the stipulated limitation. If the misrepresentation was made by or on behalf of the trustees, then it has to be possible, if the Claimants are to succeed, to construe the later contractual limitation clause as extending to that pre-contractual misrepresentation. I do not think that this is the true construction of the relevant clauses.

57. I have considered whether a parallel might be drawn with arbitration clauses, where provisions referring disputes to arbitration have been construed to include disputes in relation to tortious liabilities connected with the relevant contract. But those decisions are based on the proposition that the parties must have intended such connected disputes to be referred. I find no parallel here, and indeed no such parallel was invoked by the Claimants. It would have been very easy for the clauses to be drafted so as to include "connected" claims, but there is no hint of this. The clauses simply

define the capacity in which the trustees contract. They say nothing about connected non-contractual claims. They could easily have done so.

58. I therefore conclude that the trustee limitation provisions, whilst effective to limit the contractual liability of the Claimants to the extent of the assets in the trust(s), do not so limit the claim in misrepresentation. It is true that a claim under the Misrepresentation Act 1967 must result in a contract between representee and representor, but it does not follow from that that a limitation of contractual liability extends, without words to this effect, to pre-contractual liability.

59. Accordingly, the misrepresentation claim relating to paragraph 15.7 of the Replies to Enquiries is not limited, as against the Claimants, to the extent of the trust funds. That claim is therefore allowed in full.

Conclusion

60. I hope to receive from the parties, prior to this judgement being finalised, the details of the further calculation needed to complete the calculations referred to earlier in this draft judgment. Whatever sum is produced thereby is the sum for which I give judgment.