Neutral Citation Number: [2025] EWHC 1247 (Ch)

Case No: PT-2020-000828

IN THE HIGH COURT OF JUSTICE

CHANCERY DIVISION

BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES

COMPANIES COURT

Rolls Building

Fetter Lane, London,

EC4A 1NL

Date: 23/05/2025

Before:

MR JUSTICE RICHARDS

- -

Between:

LONDON TROCADERO (2015) LLP **Claimant**

- **AND -**

(1) PICTUREHOUSE CINEMAS LIMITED

(2) GALLERY CINEMAS LIMITED **Defendants**

(3) CINEWORLD CINEMAS LIMITED

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Nicholas Trompeter KC (instructed by **Ronald Fletcher Baker LLP**) for the **Claimant**

Jonathan Seitler KC and **Benjamin Faulkner** (instructed by **CMS Cameron McKenna Nabarro Olswang LLP**) for the **Defendants**

Hearing dates: 4 –11 March 2025

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Approved Judgment

This judgment was handed down remotely at 10.30am on 23 May 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Mr Justice Richards:

PART A – INTRODUCTION

1. This is a landlord and tenant dispute relating to premises which form part of the Trocadero Centre (the **Centre**) in London. The Claimant has been the freehold proprietor of the Centre since 2015. Subject to forfeiture proceedings that are ongoing in the County Court at Central London, the First Defendant occupies part of the Centre under the terms of two leases (the **Leases**) dated 20 June 1994 (the **1994 Lease**) and 18 September 2014 (the **2014 Lease**). The First Defendant uses the parts of the Centre demised pursuant to the Leases to run a cinema (the **Cinema**).

2. Although the Claimant's position is that the Leases have been forfeited, in the interests of readability, I will refer to the Claimant and First Defendant as the **Landlord** and the **Tenant** respectively without in any way prejudging that issue. In addition, since the parties are agreed that the 1994 Lease contains almost all the contractual provisions that are relevant to this dispute, I will refer to the 2014 Lease only where necessary.

3. The Second Defendant was the original tenant of the Cinema pursuant to the 1994 Lease. The Third Defendant became tenant of the Cinema subsequently, assigned its interest to the Tenant in 2014 and is now a guarantor of obligations owed under both Leases. Although not a party to these proceedings, Criterion Capital Limited (**CCL**) plays a prominent role in them. CCL is a member of the same group of companies as the Landlord (the **Criterion Group**) and acts as a managing agent for companies in the Criterion Group by arranging insurance for them.

4. Very broadly, pursuant to the Leases, the Landlord is obliged to obtain insurance for the whole Centre and is entitled to recover the cost of doing from the various tenants of the Centre (including the Tenant itself). The dispute before me concerns the Tenant's liability or otherwise to pay insurance rent to the Landlord.

5. This dispute forms part of what was previously a wider dispute concerning a claim by the Landlord for recovery of arrears of rent, including insurance rent, and other sums which had accrued during the COVID-19 pandemic. The Tenant originally raised its arguments concerning insurance rent as a counterclaim in those proceedings brought by the Landlord. The Landlord obtained summary judgment on its claim in a judgment reported at [2022] P&CR 19 and the Court of Appeal dismissed an appeal brought by the Tenant in a judgment reported at [2023] 2 P&CR 19. All that now remains of that dispute is the Tenant's counterclaim.

6. Insurance rent under the Leases is payable by reference to an "**insurance year**" that starts in June each year. The Tenant's position is that it has been overcharged insurance rent for all insurance years starting with 2015/16 and ending in 2024/25. However, in consequence of case management orders I made at the pre-trial review, only insurance rent payable in the years from, and including, 2015/16 to, and including, 2022/2023 are dealt with in this judgment.

7. It is common ground that the Tenant has paid all the insurance rent demanded for 2015/16 to 2022/2023. Accordingly the Tenant's counterclaim is for repayment in whole or in part and raises three central issues:

    i) The **Premium Issue** - By Clause 3.6.1(a) of the 1994 Lease, insurance rent is calculated by reference to the amount of "premium payable by [the Landlord] for keeping the Centre insured". Similar phrasing applies to other constituents of insurance rent. The Tenant objects to the fact that part of the premiums on which the Landlord relies to establish its entitlement to insurance rent was paid back to the Landlord by way of commission. The Tenant argues that any such commission paid back to the Landlord does not form part of a "premium payable [by the Landlord] for keeping the Centre insured". It also argues that terms should be implied into the 1994 Lease that preclude the Landlord from charging insurance rent corresponding to this commission. Relatedly, the Tenant argues that it was not obliged to pay a 35% fee that the Landlord levied in addition to the insurance premium in 2022/23.

    ii) The **Sprinkler Issue** - The Tenant argues that the Landlord was in breach of its obligations under the Leases by failing to maintain a sprinkler system at the Centre that would be effective should a fire break out. It argues that the Landlord's failings caused the premium payable to insure the Centre to be increased and asserts that it should not be liable for insurance rent to the extent of those increased premiums. (The Tenant's skeleton argument included allegations that the Landlord has also failed to maintain the fire alarm system at the Centre, but this allegation was not pursued in closing.)

    iii) **The Excess Issue** – The Tenant says that by Clause 3.6.1(a) of the 1994 Lease, it is only obliged to pay insurance rent for insurance that covers "the full costs of rebuilding or reinstating the Centre against loss or damage by the Insured Risks". For a number of insurance years, the Landlord's insurers required a significant excess and/or a co-insurance clause under the relevant policies because, says the Tenant, of poor fire safety controls at the Centre. The Tenant argues that it should

not have to pay any insurance rent for those years because the Landlord was not obtaining cover for the "full costs of rebuilding or reinstating".

8. The Tenant's counterclaim also raises some more specific issues:

   i) The **Settlement Issue** - Whether the Tenant's counterclaim was settled by a Settlement Deed executed on 18 September 2014 (the **Settlement Deed**).

   ii) The **2015/16 Issue** – Whether the Tenant has any remedy against the Landlord (as distinct from London Trocadero Limited (**LTL**), the Landlord's predecessor in title) for the 2015/16 insurance year in relation to the Premium Issue.

   iii) The **Electricity Issue** - whether the Landlord was entitled to £9,536.99 by way of a charge for electricity.

One Pleading Issue

9. The Landlord argues that the Tenant's pleaded claim is apt to deal only with the insurance rent that the Tenant paid attributable to insurance cover dealt with under Clause 3.6.1(a) of the 1994 Lease for risks of loss or damage to the Centre (**Property Owners' Insurance**). The Landlord argues that other categories of insurance cover, such as insurance against terrorist acts, loss of rent, and insurance against liability to third parties (**POL Insurance**) are not within the scope of the Tenant's claim.

10. While, with hindsight, the Tenant's pleading could have been clearer, I do not accept that its claim is limited to insurance rent in relation to Property Owners' Insurance. The Tenant certainly focuses in its pleadings on Property Owners' Insurance as all of the Premium Issue, the Excess Issue and the Sprinkler Issue relate to that category of insurance. However, the Premium Issue is of potential application to all categories of insurance rent dealt with by Clause 3.6.1(b) to (e) as well. Paragraph 32 of the Tenant's Re-Re-Re-Re-Amended Defence and Counterclaim (the **D&CC**) pleads a case that all or part of various "Payments in Issue" set out in a table in paragraph 31A of the D&CC "were not owing under the terms of the 1994 Lease, and in particular under clauses 3.6.1(a) and 4.2.6 of the 1994 Lease because they were in respect of insurance premiums which were … inclusive of commission at a rate of 48% or at any rate…".

11. Moreover paragraphs 32.4 and 32.6 of the D&CC plead a claim that the Tenant is entitled to repayment of any part of the "Payments in Issue" that comprised payments of insurance rent by reference to the law of restitution. This claim was not limited to insurance rent claimed under clause 3.6.1(a).

12. If the Tenant's arguments relating to Property Owners' Insurance had been inapplicable to other categories of insurance rent, or if significant adaptations to those arguments had been needed to make those arguments applicable, the Landlord could have been prejudiced by being unaware of the Tenant's full case until trial. However, I do not consider that to be the case. As will be seen the architecture and wording of Clause 3.6.1(a) is similar to that of Clauses 3.6.1(b), (c) and (e) with the differences attributable only to the fact that the clauses deal with different kinds of insurance. In addition, in practice, in all insurance years other than 2015/16, risks dealt with in Clauses 3.6.1(a), (b), (c) and (e) of the 1994 Lease were identified in a single certificate of insurance relating to the Cinema (see paragraph 31 below). The Tenant is claiming reimbursement of sums paid without distinguishing between the "part" of that policy providing Property Owners' Insurance and the parts dealing with POL Insurance, loss of rent or loss of service charge. Viewed as a whole, I consider, that the Tenant has pleaded a case that can be applied to all categories of insurance in Clauses 3.6.1(a) to (e) and the Landlord has had adequate notice of that case.

13. The Tenant's case is, however, limited to the "Payments in Issue" specified in the D&CC. If payments in respect of particular categories of insurance dealt with by Clauses 3.6.1(b) to (e) are not reflected in those Payments in Issue, the Tenant has no pleaded case in relation to those payments and I am not giving the Tenant permission to expand its pleaded case.

PART B – WITNESSES AND PROCEDURAL MATTERS

The witness evidence before me

14. The Landlord served witness statements from (i) Andrew Sell (CCL's Head of Asset Management from 2018 to 2021 and a consultant to CCL since then), (ii) James Burfitt (CCL's Head of Construction since January 2017), (iii) Peter Chapman (a director at Orbit Property Management Limited (**Orbit**) who provided property accounting services to CCL), (iv) David Taylor (an associate director in Orbit's accountancy team), (v) Brian Watkins (a client executive at Marsh JLT Specialty (**Marsh**) CCL's insurance brokers for the 2020/21 insurance year) and (vi) Chris Wright (an account director at Towergate Insurance Brokers (**Towergate**) who were CCL's insurance brokers for the 2021/22 insurance year).

15. The Landlord's witnesses were cross-examined except that:

    i) Mr Burfitt is very unwell, has recently had major surgery and was unable to attend court to be cross-examined. I have admitted his witness statement as hearsay

evidence, but I will have due regard to the absence of cross-examination when assessing the weight of that evidence.

ii) Mr Sell did not attend for cross-examination as he was on holiday at the time of the trial. That holiday was booked after the trial date was fixed. I regarded the explanation for Mr Sell's non-attendance as unimpressive. However, neither side applied for a witness summons requiring him to give evidence. Ultimately the Tenant did not oppose the Landlord's application for permission to serve a late hearsay notice in respect of Mr Sell's witness statement. I have, therefore, admitted that witness statement as hearsay evidence. I was not referred to much of Mr Sell's evidence by either party but, where I was and his evidence was contentious, I have borne in mind the poor quality of his reasons for not attending the trial when assessing its weight.

16. In addition, the Landlord relies on expert evidence on insurance matters given by James Purvis, who attended the trial and was cross-examined.

17. The Tenant served witness statements from (i) Kevin Frost (the Property Director for the Cineworld Group since September 2014), (ii) Kenneth Gold (the Tenant's Associate Manager and then Deputy Manager of the Cinema from October 2015 to September 2019 and its Deputy General Manager from May 2022 to February 2024) and (iii) Nigel Kravitz (a solicitor and General Counsel for the Cineworld Group from 2017 until September 2024).

18. All of the Tenant's factual witnesses were cross-examined except Mr Frost who sadly died in 2024. I have admitted his evidence as hearsay evidence.

19. The Tenant also relied on expert evidence on insurance matters from Sean Finnegan, who was cross-examined.

Impressions of witnesses who were cross-examined

20. I do not see any utility in this particular case in giving an assessment of each witness's credibility simply because I have concluded that all witnesses of fact were seeking to assist the court and gave their evidence honestly.

21. The dispute involves some questions of detail as to insurance that was placed up to 10 years ago. In those circumstances, the recollections of witnesses have been of relatively little significance and the contemporaneous documentary record, as elucidated by witnesses has been of greater assistance. Therefore, while on occasions the recollections of individual witnesses on particular points have been shown to be wrong by reference to the documents, and some witnesses were more argumentative than

others, I do not characterise any of the witnesses of fact as "unreliable". That said, I do note that Mr Gold's witness statement gave the impression that he knew quite a lot more about fire safety issues at the Centre than he actually did and my impression of his evidence was affected as a result.

22. I considered that both experts were dispassionate and scholarly and sought to assist the court with their expert opinions. On occasions, I have preferred the opinions of one expert to those of the other but in doing so I make no criticism of the other expert: I have simply chosen between two competing, but helpful, points of view. I derived more assistance from Mr Finnegan's attempt at least to estimate the effect of the Sprinkler Issue on premiums for insurance at the Centre than from Mr Purvis's conclusion that it was simply not possible to do so.

Whether to draw inferences from witnesses' absence

23. The Tenant invites me to draw adverse inferences from the absence of other potential witnesses from the Criterion Group who, it was submitted, could have shed a light on relevant matters. Particular reference was made to Mr Aziz, the founder and CEO of Criterion Capital, who the documentary record showed to be closely involved in the process for obtaining insurance for the Centre.

24. I will not draw any adverse inferences save in one limited respect since, while the documentary record was occasionally patchy, I considered in general that I had sufficient documents to enable me to determine matters in dispute. There were two exceptions to this:

    i) I would have benefited from witness evidence on the nature of the dispute in 2014 that led to the Settlement Deed which would have helped with the task of construing the Settlement Deed. However, both the Landlord and the Tenant (or affiliated companies) were involved in that dispute, and I did not consider that either was more at fault than the other in not putting forward witness evidence on this matter. I have therefore made the best of the limited evidence that I was given on this issue without resorting to inferences against either party.

    ii) I would have benefited from evidence as to the commercial bargain between LTL and the Landlord when the Landlord acquired the freehold of the Centre in 2015 as that would have assisted with the 2015/16 Issue. Mr Aziz could have given evidence on that matter, or could have identified a member of his staff to do so. The terms of that transfer were entirely within the knowledge of the Criterion Group, and entirely outside the knowledge of the Tenant, and so I have drawn the limited inference described in paragraph 317.vi) below from the Landlord's failure

to adduce witness evidence on this issue. More generally, given that failure, I have approached the 2015/16 Issue by considering what inferences can be drawn from the patchy contemporaneous documentation noting that the Landlord could have produced evidence to gainsay the inferences that I have drawn if it had wished to.

PART C – FACTUAL FINDINGS

The Centre and the Cinema

25. The Centre is a large mixed-use property with a floor area of some 588,000 square feet. It is located on an island site and is bounded on four sides by public highways. The Centre is not a single building but is rather a combination of about seven individual buildings. Some parts of the Centre date to the 1800s and some parts of it have listed status. In the words of Mr Sell, the Centre "attracts a greater risk profile than other commercial buildings". This is partly because of its esoteric construction, its age, its proximity to historic London landmark buildings and the sheer number of people who visit it each day.

26. The Cinema is located over various floors of the Centre. The Cinema is large, with a gross internal floor area of some 62,000 square feet. Thus, the Cinema occupies a significant proportion of the Centre but by no means all of it, or even most of it. Other parts of the Centre are occupied by third party tenants, some units at any given time might be vacant as the Landlord seeks to find a new tenant and some parts are occupied by the Landlord (or affiliated companies). Naturally, some of the Centre comprises common parts that are not occupied exclusively by anyone.

27. As will be discussed in more detail later in this judgment, in 2014 LTL commenced a significant refurbishment and redevelopment of the Centre (the **Landlord's Works**) with a view to converting the upper parts of the Centre into a hotel that the Landlord itself (or affiliated companies) would operate.

Insurance for the Centre – general findings

Process that the Landlord followed to place insurance

28. The Criterion Group includes a number of property-owning companies which own a portfolio of property worth over £4 billion (the **Portfolio**). Those property-owning companies delegated to CCL the task of arranging property insurance. Rather than obtaining separate policies for each property in the portfolio, CCL arranged a single "block policy" (a **Block Policy**) that, in return for the payment of an aggregate premium, covered all properties in the Portfolio.

29. That Block Policy would, among other types of cover, provide Property Owners' Insurance for the full cost of rebuilding each property in the Portfolio. A central element in calculating the amount of cover was each building's "**declared value**" being the cost of reinstating the building, should it be destroyed, to a condition substantially the same as its condition when new, including necessary professional fees and the costs of removing debris. Typically, that declared value would be increased by a factor of 25% to produce the maximum amount payable under the policy.

30. That process, and the nature of the Criterion Group's business, meant that two separate apportionment issues arose in connection with the Criterion Group's insurance renewal for each insurance year:

    i) The aggregate premium that the Criterion Group paid under the Block Policy had to be apportioned between the various properties in the Portfolio that were covered by that policy.

    ii) Once a part of that premium had been apportioned to a particular property, it was then necessary to perform a further apportionment allocating that premium among the various units in the property concerned. This second apportionment was necessary because a number of those units would be tenanted (referred to as "**recoverable units**") and the relevant Criterion Group company would typically have the right pursuant to the relevant lease to charge the tenant the cost of insurance premium attributable to that unit. However, some other units (referred to as "**non-recoverable units**") might not be tenanted, or might be occupied by a member of the Criterion Group. The part of the aggregate premium apportioned to non-recoverable units was a cost that the Criterion Group had to bear.

31. As a result of both apportionments, it is meaningful, if something of a shorthand, to speak of an "insurance policy" in respect of the Centre and the Cinema even though the underlying insurance policy was the Block Policy. I will adopt that shorthand in this judgment where absolute precision is not necessary. In particular, in each insurance year, the Tenant would receive a certificate of insurance in respect of the Cinema that showed the Landlord as the insured, but recorded the fact that the Tenant occupied the Cinema as a tenant. Those certificates of insurances referenced the risks described in Clauses 3.6.1(a), (b), (c) and (e) of the 1994 Lease.

32. In each of the insurance years in dispute, CCL engaged the services of an insurance broker to help with the process of negotiating and securing insurance for the Portfolio. Because of the size of the Portfolio and its associated risk, no single insurer would take on the entire risk. Therefore, in each relevant insurance year, CCL arranged a Block Policy with a syndicate of insurers each of whom accepted a percentage of the overall risk. The

"**lead insurer**" that was taking the greatest proportion of risk on the Block Policy had the right to determine the contractual terms on which cover would be provided. The "**follow insurers**", who were taking lower percentages of the risk, provided cover on the terms that the lead insurer determined, although there were occasionally bespoke arrangements under which follow insurers would provide cover only for specified risks, or specified buildings within the Portfolio. Appendix 1 to this judgment sets out who the broker, lead insurers and follow insurers were for each of the relevant insurance years.

33. An important task for CCL's broker was to negotiate a price for insurance cover for the Portfolio. As might be expected, a number of elements drove the outcome of that negotiation. CCL's expectations as to commission will be dealt with later in this judgment. However, for the time being I simply note that perceptions as to whether the market for that insurance year was "hard" or "soft" had an impact in that negotiation. In a "harder" market, demand for property owners' insurance was higher, insurers tended to be more selective about the risks that they would cover and required higher premiums for doing so. In a "softer" market, insurers would perceive that they had excess capacity to take on risk and they might accordingly be prepared to take on less attractive risks and charge lower premiums.

34. In highly simplified terms, the process of placing insurance for the Portfolio operated as follows:

    i) A few months before the beginning of an insurance year, the renewal process would commence. The appointed broker would have a meeting with CCL that would cover a number of topics, including perceptions as to whether the insurance market was hard or soft, claims experience over the year and CCL's "demands and needs" as to the terms on which cover for the Portfolio was provided.

    ii) With that understanding of the landscape and CCL's position, the broker would approach a few insurers in the first instance by making a "market submission" to a few insurers. Sometimes the broker would get the sense that a satisfactory deal would emerge from discussions with those insurers only. However, if the broker considered that there might be a better deal available from other insurers, the risk might be "re-marketed".

    iii) Once negotiations with insurers were complete, the broker would typically give CCL a written "**Renewal Report**" outlining the terms on which cover for the Portfolio was available. If CCL was content with those terms, the broker would be instructed to arrange the Block Policy and, once the insurance was placed, the broker would arrange for a certificate of insurance to be issued.

35. The process outlined in paragraph 34 would culminate in CCL obtaining a Block Policy covering the Portfolio. However, obtaining the Block Policy would not be the end of the broker's involvement. In particular, the broker would assist with both apportionment exercises that I have summarised in paragraph 30 and the preparation of certificates of insurance for all tenants, including those described in paragraph 31. I have concluded from Mr Purvis's evidence that there would often be multiple ways of performing the apportionment and both CCL and insurers would have some interest in the precise apportionment adopted. There was, therefore, a range of acceptable apportionments and the precise apportionment within that range that was selected would involve some degree of dialogue that addressed both CCL's and the insurers' interests. For example:

    i) CCL would tend to prefer a higher apportionment to recoverable units than to nonrecoverable units since the Criterion Group could recover premium apportioned to recoverable units from third-party tenants.

    ii) CCL might prefer a lower apportionment to perceived "good tenants".

    iii) However, insurers would not want any apportionment to a particular property in the Portfolio to be unduly low considering that property as a stand-alone risk. That is because there was always a risk that the Criterion Group might sell that property and the purchaser might regard the premium apportioned to that property as a benchmark for a stand-alone premium in the future. Insurers had similar issues in connection with an apportionment to individual units within a property.

36. The broker would help to facilitate that dialogue by performing calculations and suggesting apportionments. However, the ultimate decision on apportionment would not be that of the broker, but rather would represent a synthesis of CCL's and the insurers' requirements with the relevant discussion facilitated by the broker.

What is "commission"?

37. Insurance brokers need to be rewarded for performing the kind of services that I have described in the preceding section. In addition to any fee payable by the insured to the broker, brokers might be entitled to obtain commission from insurers. I conclude from the expert evidence that in the relevant insurance years, three different types of commission might in principle be paid by an insurer to a broker:

    i) a "policy commission" at a percentage of the premium charged by the insurer designed to compensate the broker for their costs in sourcing the client, collating and presenting to the insurer information about the underlying risk, dealing with

the negotiations, checking policy documentation and (where relevant) handling claims;

ii) a "work transfer payment" in return for certain work that the insurer would otherwise have to do for example, issuing policy documentation and providing data and management information to the insured; and

iii) an "overrider commission" which an insurer might pay to a broker introducing certain agreed volumes of business in a particular year. Overrider commissions are not relevant to the present dispute and therefore I say no more about them.

38. However, a broker would not necessarily retain all, or even most of, any policy commission received from insurers. Brokers were free to share their commission with others if they chose. In addition, the amount of policy commission that any particular insurer would pay was not fixed. It was susceptible to negotiation because, as noted in more detail later in this judgment an insurer retained the option of increasing the premium chargeable by reference to the amount of commission that it had to pay.

39. The two features that I have summarised in paragraph 38 had an effect on the insurance arrangements that CCL entered into in all insurance years from, and including, 2015/16 to, and including, 2021/22 that was reflective of a dynamic that was present in the market for landlords' insurance generally. In broad summary:

i) A good proportion of any premium that CCL paid for insurance could be passed on to the holders of recoverable units.

ii) CCL and its brokers had a significant influence over the amount of policy commission that an insurer would be prepared to pay. For example, even if CCL requested that a 50% broker's commission be payable under a particular year's Block Policy, that request would cost the insurer nothing if the insurer could simply add that commission to the premium it charged under the policy.

iii) Significant broker's commission would not necessarily benefit the broker. To the extent the broker agreed to rebate all or part of the commission to CCL, then it would be CCL, rather than the broker who benefited from it. It was common practice in all the insurance years in dispute for a broker to agree to share its commission with a landlord client.

iv) Therefore, high levels of broker's commission would, to the extent that commission was rebated to CCL, offer CCL the prospect of a significant benefit without any additional cost to the insurer. To the extent that the Criterion Group

was able to recover the premium (as increased by broker's commission) from occupiers of recoverable units the cost of CCL's benefit would fall on those occupiers.

v) To the extent that the premium (as increased by broker's commission) was attributable to non-recoverable units, a rebate of broker's commission would offer no incremental benefit to the Criterion Group as a whole. In theory, the relevant member of the Criterion Group occupying the non-recoverable unit would pay a higher premium (because of the effect of the broker's commission) and CCL would obtain a benefit in the form of a rebate or part of that broker's commission. However, since that would involve the Criterion Group effectively paying money to itself, as Mr Sell explained, in practice the occupier of the non-recoverable unit would simply not be charged the amount of premium representing rebated commission.

40. In paragraph 9 above, I have distinguished Property Owners' Insurance (of the kind dealt with in Clause 3.6.1(a) of the 1994 Lease) from other categories of insurance dealt with by other clauses such as POL Insurance. However, that distinction is relevant only to distinguish the requirements of one provision of the 1994 Lease from another. The dynamic that I have described in paragraph 39 applied to all the risks against which the Landlord was entitled to seek recovery pursuant to Clauses 3.6.1(a) to (e) of the 1994 Lease.

41. In its closing submissions, the Tenant used the term "**Landlord's Commission**". The Landlord objected that this phraseology was tendentious because no separate commission was payable by insurers to CCL (still less the Landlord) in any insurance year. Rather, brokers received policy commission and chose to share some of that with CCL. I see no harm in using the term "Landlord's Commission" to describe the part of the broker's commission for the relevant insurance years that was, in practice, rebated to CCL and I will use the term in that limited sense. In doing so, I should not be taken as suggesting that the Landlord or CCL had any contractual right as against insurers to be paid commission for any of the insurance years in question.

42. Whether or not a broker shared commission with a landlord, and whether or not the Landlord's Commission could be regarded as a commercial incentive, I conclude in light of Mr Finnegan's cross-examination that all commission paid to the broker would be regarded by participants in the insurance industry in all relevant insurance years as "commission".

Process that insurers followed to fix a premium

43. In all of the relevant insurance years, the premium that insurers would charge for insurance at the Centre represented the sum of the following items:

    i) an amount required to fund anticipated claims. Calculating this sum involves an assessment of the likelihood of claims, their frequency and likely cost together with an appropriate amount in respect of the insurer's profit;

    ii) an amount the insurer needs to pay expenses (other than claims) associated with running its insurance business; and iii) an amount to cover commissions that the insurer must pay.

44. During the trial, the parties referred to the sum of the elements set out in paragraphs 43.i) and 43.ii) as the "**net premium**". When the amount attributable to commissions is added, the total is the "**gross premium**". That would be the amount that CCL would have to pay. In addition, the gross premium would attract insurance premium tax (**IPT**) which would be payable by CCL.

45. Insurers would determine the net premium for a risk as large and as complicated as that underwritten by the Block Policy by using proprietary and sophisticated underwriting software (an **underwriting engine**) that applied actuarial methods to model risk by reference to a large quantity of inputs. The software would generate a "technical rate" which when applied to the declared value of the property or properties would produce a theoretical net premium commensurate with the risk being assumed.

46. That underwriting model might, or might not, contain some allowance for "embedded commission" being commissions that the model simply assumed would be payable. For example, an underwriting model might assume that a particular level of work transfer payment would necessarily be paid to a broker without enquiring whether any such payment would actually be made. If an underwriting model assumed that such a work transfer payment would be made when it was not, the result could be an element of windfall to the insurer.

47. The "technical rate" would not always be the final rate used to determine the "premium rate" that was actually applied to declared values to calculate the net premium. Underwriters at the insurers would have a margin of discretion within which they could depart from the technical rate, although I had no evidence as to the precise margin that any of the insurers in this case afforded their underwriters. Moreover, market forces operated. In a hard insurance market, insurers would tend to apply the technical rate or

something close to it. In a softer market they might be persuaded to depart more from that rate in order to attract business.

48. There was no evidence before me as to the precise underwriting models that the insurers used in the insurance years in dispute, or the inputs to which those models were applied.

49. Moreover, neither Mr Purvis nor Mr Finnegan had access to the underwriters' models. I have concluded from Mr Finnegan's cross-examination that if he knew only that an insurer using an underwriting engine had charged a premium of £1000 in Year 1 for underwriting a risk and had charged a premium of £1500 in Year 2 for underwriting the same risk, he would not be able to express a high degree of confidence as to why the premium had increased without seeing (i) the inputs to the underwriting engine, (ii) the outputs and (iii) how the technical rate produced by the underwriting engine had been adjusted to produce a premium rate.

50. Insurers had other tools that they could employ to control their risk even after a gross premium had been charged to CCL. For example, if insurers wished to apply pressure on CCL to take particular steps that would reduce their risk, they could specify certain "risk improvements" that should be adopted at particular properties in the Portfolio and a sanction if those risk improvements were not undertaken by a particular deadline. That sanction could range from an increase in premium to a denial of cover altogether. In addition, insurers could impose a policy excess requiring CCL to bear a specific part of any loss covered, or a "co-insurance" provision requiring CCL to pay a specified percentage of any such loss.

Understanding of the term "Premium" among landlords and tenants in 1994

51. Later in this judgment, I will need to determine, as a matter of construction, what the words "payable … by way of premium for keeping the Centre insured" mean in Clause 3.6.1(a) of the 1994 Lease. In this section, I deal with a more narrow point of factual dispute, namely whether, viewed objectively, parties executing the 1994 Lease in 1994 would have had a common understanding as to the concept of "premium" and, specifically, whether it did or did not, include Landlord's Commission.

52. Neither side adduced factual evidence as to the understanding between landlords and tenants of the term "premium" in covenants relating to the payment of an insurance rent in 1994. However, both parties evidently considered that the evidence of their experts could shed some light on this issue. Mr Finnegan and Mr Purvis were agreed, at a high level, that in 1994 a typical landlord and a typical tenant would expect an insurance "premium" to include commission that the insurer had to pay.

53. I have concluded from the expert evidence that, in 1994, someone working in the insurance industry would appreciate that a premium charged by an insurer would comprise the various elements that I have summarised in paragraph 43 above. Such an insurance industry insider would realise that commission rates on insurance policies taken out by landlords were typically high and that a broker would probably share a good part of that commission with the landlord. Accordingly, an insurance industry insider would realise in 1994 that, as Mr Purvis put it in paragraph B.3 of his expert report "… it was not unusual for landlords to retain the majority of insurance premium commissions. Many saw insurance as a means of increasing profits in an environment where transparency of landlord income was not considered necessary, or indeed desirable".

54. I conclude that larger commercial landlords in 1994 would consider that they might be able to increase their profits by benefiting from a share of commission payable on insurance policies that they took out for tenanted properties. After all, landlords were significant beneficiaries of the practice Mr Purvis outlined as summarised in paragraph 53. However, I do not consider that landlords would consider that opportunity to arise from any general understanding of the word "premium". That would be too legalistic a way of looking at matters which is being advanced with the benefit of hindsight and knowledge of the particular issues arising in this case. Rather, a larger commercial landlord in 1994 would simply regard the opportunity as arising from the fact that property owners' insurance attracted, or could be made to attract, high commission rates giving the landlord the option to benefit from that circumstance if it chose.

55. Mr Purvis was not able to provide much evidence on what tenants would have understood to be an "insurance premium" in 1994 because he did not practise in the real estate sector in 1994. I accept Mr Finnegan's evidence that even commercial tenants in 1994 would generally not know that their landlord might be retaining a share of commission paid on property owners' insurance that they arranged. However, while I am certainly prepared to accept that tenants in 1994 would not want their landlord to benefit from commission that was funded out of their payment of insurance rent, Mr Finnegan's evidence says little about tenants' understanding in 1994 of what was, or was not, embraced within the concept of an "insurance premium" beyond the general understanding referred to in paragraph 52.

56. I have concluded that as a general matter, a typical landlord and a typical tenant would expect the term "premium" to include parts of that premium that were used to fund commissions paid to brokers. They would not expect that meaning to change simply because a broker chose to share its commission with another. However, notwithstanding the understanding of insurance industry insiders that I have described in paragraph 53 above, there was no general understanding shared between larger commercial

landlords and their tenants in 1994 that landlords would be able to receive and retain Landlord's Commission or that the premium paid to brokers would include an amount of Landlord's Commission. The common understanding of a typical landlord and tenant as to the meaning of "premium" was a general one that did not deal with the specifics of Landlord's Commission. Accordingly, it did not amount to an understanding that it was in order for a landlord to benefit from Landlord's Commission at a tenant's expense.

The Landlord's Works and issues with the sprinklers at the Centre

The sprinkler system as it stood on 18 September 2014

57. By a deed of variation dated 18 September 2014 (the **Deed of Variation**), the Landlord became subject to a contractual obligation to provide various services in connection with "firefighting prevention detection equipment". It is common ground that on that date there was a sprinkler system in the Centre and that this sprinkler system fell within the scope of that definition.

58. In broad summary, the sprinkler system had the following components:

    i) The main plant for the sprinkler system was located in the basement of the Centre and was not part of the demise of any tenant in the Centre. That included a tank in which water was held, lined with an impermeable tank liner.

    ii) Water was pumped from that tank, by a pump or pumps located in the basement, through distribution pipework to a valve chamber.

    iii) There was then further distribution pipework from the valve chamber to individual tenants' demises.

    iv) That distribution pipework then connected to piping that fed sprinklers in the tenants' demises.

59. I refer to the pipework described in paragraphs 58.i) to 58.iii) as "**Landlord's Pipework**" and to the piping described in paragraph 58.iv) as "**Tenants' Pipework**".

60. Although the plant and pipework that I have described was in place on 18 September 2014, I had no evidence as to the extent to which sprinklers in any part of the Centre were operational on that date.

The effect of the Landlord's Works on the sprinkler system

61. The Landlord's Works involved converting the upper parts of the Centre, that had previously been let to tenants, into a hotel (the **Hotel**). In March or April 2015, the Tenants' Pipework located in those former tenants' demises was stripped out. That meant that, even if water could still flow through the Landlord's Pipework, that water could not make its way to the part of the Centre that would form the Hotel.

62. An email of 28 April 2015 states that work being undertaken at that time "has involved stripping out much of the existing sprinkler pipework, with the exception of those systems where tenants remain trading". I have therefore concluded that Landlord's Pipework was not removed in March or April 2015: the removal was limited to Tenants' Pipework in the former demises that were to become the Hotel.

63. However, the fact that Landlord's Pipework was still in place did not mean that there was a functioning sprinkler system at the Centre. On 21 October 2015, Oasis Building Services Limited (**Oasis**) provided a quote for the replacement of the pumps referred to in paragraph 58.ii), having performed an inspection of the existing pump or pumps on 11 September 2015.

64. I am unable to conclude whether the pumps were functioning at the time of Oasis's inspection but they were clearly in need of replacement as otherwise Oasis would not have been invited to tender. An impairment notice issued by Emcor UK (**Emcor**) dated 15 December 2016 recorded that Emcor had been unable "to complete works compliant with LPC BS EN12845, for periodic test and inspection over a 12 month period" because the sprinkler pump at the Centre had been disconnected, pump power supplies had been isolated and one electric pump had been removed. Emcor's certificate recorded that the Centre and units within it "have **NO** Sprinkler Protection". At the time Emcor issued its certificate, therefore, there was no sprinkler protection at all in the Centre. I had no evidence as to precisely when sprinkler protection ceased. I will infer that this took place half way between the date of Oasis's visit and Emcor's abortive inspection – i.e. towards the end of April 2016.

65. The Landlord ordered a new pump that was delivered in January 2017. However, that had not been installed by 24 May 2017 because on that date, Nigel Long of Condensed Underwriting prepared a report for insurers in connection with the 2017/18 insurance renewal (the **Condensed Underwriting Report**). That was a hard-hitting report. Mr Long concluded that "there appears to be a disregard for normal professional standards & an intention to minimise expenditure as far as possible irrespective of the potential consequences". He noted in the report that all parts of the Centre were without sprinkler

protection (apart from a particular unit whose tenant had its own pumps and tank system).

66. Following visits to the Centre in April and May 2017 QBE, the lead insurer for the 2017/18 insurance year, provided a list of risk improvements, one of which mandated that the new pump that had been located in the Centre's basement since January 2017 should be installed as soon as possible together with another pump.

67. Some measure of progress was achieved by the end of August 2017 when a new diesel pump was installed and the "system [had] been tested and filled out to valve room on ground floor" in the words of Sandeep Kumar of KGD Construction in an email of 29 August 2017. However, the electric pump was still not operational and there was a problem with the liner for the water storage tank in the basement.

68. Problems with the electric pump continued until a new pump was installed on 19 April 2018. There was a further setback because some time in May 2018, someone unknown entered the plant room in the basement of the Centre and interfered with the diesel pump. That was no fault of the Landlord.

69. On 15 June 2018, the London Fire Commissioner sent CCL a formal notice requiring it, among a number of other matters, to repair and reinstate the "wet pipe sprinkler system".

70. By 21 June 2018, the electric pump in the basement was operational, but work was still needed to the diesel pump. Water could be pumped through the Landlord's Pipework and it was possible to begin to work to make sure that the Tenants' Pipework was connecting properly with the Landlord's Pipework. However, there was still no operative sprinkler system in the Hotel.

71. A further problem was identified in August 2018. The Landlord had by then largely completed a like-for-like replacement of the sprinkler system (other than the parts located within tenants' demises) to "OH3" standard below the level of the Hotel. However, the Landlord's Works had added to the height of the Centre and regulatory requirements relating to buildings that contained cinemas had moved on. Some body (described as "LBC" in an email from John Isari of 13 August 2018, but probably the "Loss Prevention Council" representing insurers of the Centre) would not issue a certificate of compliance for the sprinkler system unless it complied with an "OH4" standard which would require a larger tank and a larger pump. A possible workaround involved retaining the existing system but installing an additional pump to service the higher levels of the Centre.

72. From there the contemporaneous record of the status of the sprinkler system in the Landlord's parts of the Centre becomes sparse. In October 2019 the Landlord had apparently decided that it would deal with the "OH3" versus "OH4" issue by installing extra pumps and tanks to service the sprinkler system in the upper parts of the building. It obtained a quote for that work in October 2019, although I had no direct evidence of these works being completed.

73. Works on the Hotel finished in February 2020 and, although some glitches with the sprinkler system remained, the system, including that in the Hotel, was substantially operational by then. The Tenant does not rely on any breach of the Lease in relation to sprinkler issues after June 2020.

The Tenant's maintenance of the sprinkler system in the Cinema

74. On 17 May 2017, Tony Sokhi of Orbit informed two employees of the Tenant (Holly Smallman and Kenneth Gold) that the sprinkler system at the Centre was "offline". That apparently came as news to the Tenant and, submitted the Landlord, demonstrated that the Tenant cannot have been trying very hard to maintain its own sprinkler system as otherwise it would have discovered this much earlier in the course of its routine maintenance programme. More generally, the Landlord argues, by reference to excerpts of Kenneth Gold's cross-examination, that there was a "culture" at the Tenant of prioritising high-profile screenings over fire safety and of "not doing anything until there is a problem".

75. I do not accept that argument. Kenneth Gold was simply not a senior enough individual at the Tenant to be able to speak to its general "culture". He accepted that there were occasions on which the Tenant preferred not to cancel screenings of films at the London Film Festival in order to accommodate works for the connection of its sprinkler system to that of the Landlord, but it is an overstatement to treat those instances as indicative of a "culture".

76. Attempts to connect the Tenant's sprinkler system back to that of the Landlord started in early June 2018. Initial problems were attributed to a faulty butterfly valve and on 29 August 2018, the Tenant obtained a quote of £5,900 plus VAT to repair it. However, even after the butterfly valve was replaced there were still problems which were attributable to small but persistent leaks from Tenants' Pipework in the Cinema which were identified in November 2018.

77. The Tenant certainly could have dealt with the leaks and other issues more quickly than it did. The Landlord is correct to assert that some of the delays were caused because the Tenant did not wish to cancel high-profile screenings to enable works to take place.

However, the problems with the Tenant's sprinkler system were small in comparison with the issues with the Landlord's system.

78. By April 2019, most remaining problems with the Tenant's sprinkler system had been resolved and it was successfully connected to the Landlord's system.

Findings as to premium and commission relevant to all insurance years

Salient terms relating to the insurance policy for the Cinema

79. The figures in the table set out in Appendix 2 (the **Summary Table**) are drawn from Mr Finnegan's expert report. They set out figures attributable to the Cinema specifically. Accordingly, they have been produced by reference to figures that have been apportioned to the Cinema following both apportionment exercises that I have described in paragraph 30.

80. I did not understand Mr Finnegan's summary of (i) declared values and amounts covered, (ii) excess/co-insurance terms that applied in the various insurance years or (iii) the actual premium apportioned to the Cinema to be controversial. Mr Finnegan drew that summary from contemporaneous documents, including certificates of insurance that were provided to the Tenant in respect of the Cinema, and I accept those figures to be accurate. Moreover, subject to the Excess Issue, the parties agreed that the amount of cover that the CCL obtained was sufficient to cover the full cost of rebuilding or reinstating the Centre should one of the insured risks require such a rebuilding or reinstatement.

81. The parties agreed that the Summary Table correctly sets out the amounts of Landlord's Commission that the Landlord received and retained in the relevant insurance years. However, although there was no dispute as to Mr Finnegan's arithmetic in deriving the percentage figures that he set out in Column 5 (he divided the agreed amount of commission received by the gross premium the Tenant paid in respect of the Cinema excluding IPT), the Landlord concluded that the percentage figures risked giving a misleading impression of the amount of the Tenant's permissible claim for the following reasons:

    i) The (agreed) total Landlord's Commission was received in connection with coverage against a variety of risks including Property Owners' Insurance, POL Insurance and loss of rent. The Landlord's position is that the Tenant's pleaded case alleges only an overpayment of insurance rent in respect of Property Owners' Insurance and that it is accordingly wrong in principle to calculate percentage figures by reference to insurance payments that are not in issue.

ii) The percentages calculated overlook the potential incidence of embedded commission.

iii) The percentage figures are potentially misleading because it is not clear whether they do, or do not, reflect commission paid to, and retained by brokers.

82. As noted in paragraph 12 above, I do not accept the Landlord's arguments based on the extent of the Tenant's pleaded case. I will deal with the question of "embedded commission" in more detail below. Although Mr Finnegan acknowledged some uncertainty on the point in paragraph 81.iii) in his cross-examination, I regard it as clear that his calculation of percentage figures did not include commission that brokers retained. That follows as a matter of arithmetic. The amount of commission referred to in column 5 of the Summary Table is Landlord's Commission that the Landlord received and retained. Mr Finnegan derived those figures from contemporaneous documents showing how much commission was due to the Landlord. Commission that brokers were receiving and retaining are not included in the figures in column 5 and so are not reflected in the percentage figures. I consider that the percentage figures are useful when it comes to assessing the extent to which the Landlord's Commission received in this case was in excess of any norm.

83. Mr Finnegan's percentage figures involve him dividing total Landlord's Commission received in connection with the insurance for the Cinema by total premium paid for coverage at the Cinema. That is a single blended rate: Mr Finnegan has not, for example, calculated separate rates for Property Owners' Insurance, POL Insurance or insurance against terrorism. That said, the experts were agreed that Property Owners' Insurance tended to attract the highest levels of commission. I have concluded, therefore, that in order to produce the blended rate set out in the Summary Table, the level of Landlord's Commission applicable to Property Owners' Insurance specifically would have been higher than that blended rate.

The Landlord's control over the amount of commission paid

84. In all the insurance years from, and including, 2015/16 to, and including, 2021/22, CCL viewed the opportunity to obtain Landlord's Commission as a driver of the Criterion Group's earnings and profits. It actively sought to obtain levels of Landlord's Commission that were towards the top of what could realistically be achieved without adverse financial consequence for the Criterion Group. I will not go as far as to say that the Landlord sought to "maximise" Landlord's Commission. There were occasions (for example the 2017/18 and 2020/21 insurance years considered below) in which CCL judged that the Criterion Group would obtain a better financial result overall if it received less Landlord's Commission but obtained other benefits elsewhere.

85. In all of the insurance years from 2015/16 to 2021/22, if CCL had asked for no Landlord's Commission it would still have been able to obtain the same level of insurance cover for the Portfolio. Landlord's Commission was optional, was obtained at CCL's initiative and request and was not something that insurers or brokers imposed on CCL. CCL obtained that Landlord's Commission by first indicating to insurers in negotiations the level of Landlord's Commission that it wanted. Insurers reflected that Landlord's Commission in the amount of total commission that they paid to brokers and increased the premium chargeable accordingly. CCL had agreed with brokers that, although ostensibly paid to brokers, the Landlord alone would benefit from Landlord's Commission.

86. There was no shortage of evidence for the two propositions set out in paragraphs 84 and 85 and I will refer to just a small selection of it.

87. In its Renewal Report for the 2015/16 insurance year, CCV, CCL's then broker, recorded that their strategy for that insurance year had been "to negotiate with the existing insurers on all the Property covers to maximise the commission rebate". CCV recorded CCL's instructions to the following effect:

> You have advised us that your most significant concerns when purchasing insurance are to have suitable cover, and maximising commission rebates at competitive premiums from those insurers available to us…

88. When pitching to take over as CCL's brokers for the 2016/17 insurance year, AJ Gallagher stated that the "AJG Difference" was "to future proof your insurance programme ensuring that you have an optimal programme that maximises commission retention from the insurance market". AJ Gallagher's pitch was successful and they retained CCL's business for four of the insurance years in dispute, much longer than other brokers CCL had over the period.

89. AJ Gallagher drove a hard bargain on commission on CCL's behalf. On 21 June 2018 (just before the renewal for the 2018/19 insurance year would take effect), Craig Elkins of AJ Gallagher emailed Mr Aziz reporting on the final outcome of negotiations:

> Subsequent to our meeting yesterday we reverted to insurers with a view to improve your earnings within the current proposal. As anticipated they are unable to seed [perhaps Mr Elkins meant "cede"] any upfront additional commission with levels being at their maximum. However, we have been able to negotiate a commercially viable proposal, being a profit share arrangement. A 2.5% MDBI (material damage and business interruption) premium rebate will be paid to

> Criterion at the end of the policy period subject to MDBI claims not exceeding a 30% net loss ratio…

90. In March 2020, COVID struck. The insurance market hardened dramatically. The number of recoverable units in the Portfolio fell and the Criterion Group would have to pay the insurance premium allocated to non-recoverable units itself. CCL asked its broker to focus on getting premium rates down because the Criterion Group itself would have to fund a good proportion of the premium. Landlord's Commission was still welcome but was not the focus of negotiation that it had been in prior years because there were other levers of profitability associated with the insurance renewal that CCL wished to pull. Moreover, Landlord's Commission now came at an additional IPT cost. If a premium allocated to a recoverable unit was 1200, inclusive of Landlord's Commission of 200, the tenant of that recoverable unit would have to pay the IPT on the full 1200 premium and the Criterion Group would retain the full 200 of Landlord's Commission. However, if the same premium was allocated to a non-recoverable unit, the Criterion Group would have to pay the IPT which would erode the benefit of the Landlord's Commission allocated to that unit.

91. CCL's response to the 2020/21 insurance renewal emphasised that it saw Landlord's Commission as a driver of earnings and profit. When circumstances changed, and Landlord's Commission stopped being the component of profit that it had been, CCL adjusted the extent to which it sought Landlord's Commission in order to obtain a better commercial result overall.

92. CCL had a good degree of influence over the level of Landlord's Commission that it received. Economically, Landlord's Commission did not cost insurers anything. Continuing with the example in paragraph 90, an insurer was in the same economic position if it charged a premium of 1000 with no Landlord's Commission, or if it charged a premium of 1200 and paid 200 of Landlord's Commission to a broker. Moreover, insurers realised that a good proportion of any commission payable under Property Owners' Insurance would be rebated to a landlord. If any particular insurer was unduly parsimonious in the levels of commission that it would allow on such insurance, the concern was that business might migrate to insurers who were more accommodating.

93. However, that did not mean that insurers would be prepared to write a policy with any level of commission that CCL would specify. When cross-examined as to the reasons why insurers in practice insisted on some limit on commissions, despite the fact that in pure economic terms those commissions cost them nothing, Mr Purvis alluded to "reputational risk". He chose his words carefully and made it clear that insurers at the time would not consider themselves to be "moral guardians" or "guardians of best practice from a landlord's point of view". I have concluded from this evidence that

insurers thought that they themselves might be criticised if it were perceived that they were prepared to allow landlords an unlimited ability to enrich themselves with Landlord's Commission at the expense of their tenants.

94. That concern is consistent with the fact that from 2016/17 onwards, the amount of Landlord's Commission that CCL was able to obtain fell year on year. It is also consistent with the Renewal Report that AJ Gallagher prepared in advance of the 2018/19 insurance year. In that report, AJ Gallagher commented that there was "downward pressure on commission levels within the Real Estate Market". It presented a diagram in the form of a triangle that showed the commission levels that various insurers were prepared to accept (stating that no insurer would accept a commission level in excess of 50%). It advised that, because of CCL's "demands of maintaining monetary commission, we are limited to 7 available markets".

95. Finally, I conclude that every pound of Landlord's Commission that the Criterion Group obtained for all insurance years in question increased the overall insurance premium (excluding IPT) by a pound. The Landlord argues against that conclusion because of the matter of "embedded commission" referred to in paragraph 46. In summary, the Landlord suggests that insurers' underwriting engines might make an immutable assumption that embedded commission of up to 10-15% of the gross premium is payable when fixing the underwriting rate. If such levels of embedded commission were present, then the "pound for pound" effect that I have outlined would not be present as the effect of the embedded commission could not be stripped out of the underwriting rate.

96. Mr Purvis's expert report provided some support for the Landlord's position:

> D5.7 Insurers will account for a certain level of commission in their underwriting models, however at levels above that amount (usually 10% to 15%), premiums are adjusted to reflect the increased commission levels being requested.
>
> D.5.8 There is therefore an impact on premium rates if commission levels exceed certain set percentages ...

97. However, that was evidence as to the position of "insurers" generally. The experts were agreed that they did not know whether the underwriting engines of the insurers who provided cover in this case contained immutable assumptions as to embedded commissions at the level Mr Purvis suggests. Moreover, Mr Purvis accepted in crossexamination that insurance engines in "more recent times" (by which he meant the last

"7 to 10 years") could take out "most embedded commission but not necessarily all of it". Mr Purvis also accepted that his personal experience of underwriting engines came from his time at Royal and Sun Alliance (which he left in 2006).

98. Paragraph 7.9.2 of Mr Finnegan's expert report expressed the opinion that Landlord's Commission at the levels that CCL was seeking had a pound for pound effect on premium to the extent that exceeded commission payable to brokers in consideration for their services.

99. I prefer Mr Finnegan's opinion. First, that opinion strikes me as consistent with the dealings between CCL (and its brokers) and insurers. CCL and its brokers were seeking to obtain a high level of cover for the Portfolio. That would have been a significant piece of business for the insurers concerned. Moreover, the risks posed by the Centre itself were complicated and bespoke. The combination of a large item of business and the bespoke and complicated risk suggests to me that insurers were not being invited simply to provide an "off the peg" solution and would have had every incentive to depart from a standard if they could.

100. Indeed, there is tangible evidence from the time that suggests that, if CCL reduced its commission demands to nil, the result would be a pound for pound reduction in premiums. In 2016, the Criterion Group was considering the IPT inefficiency that Landlord's Commission produced in relation to non-recoverable units (see paragraph 90 above). Robert Hoadley of the Criterion Group and Stuart Whitcher of CCV, the Criterion Group's then brokers, discussed an idea for addressing this in an email exchange on 15/16 June 2016. Broadly, the idea was that the non-recoverable units be let under a separate policy under which the Criterion Group would receive no rebate of Landlord's Commission. The hope was that, instead of paying £530,000 (inclusive of IPT) on nonrecoverable units and receiving Landlord's Commission of £270,000 (a net cost of £260,000), the Criterion Group could insure recoverable units for a premium of £245,000 (inclusive of IPT). The working assumption of Robert Hoadley and Stuart Whitcher was that, by removing Landlord's Commission from the policy, the premium would fall pound for pound (and indeed more). There was no suggestion that embedded commission would provide any obstacle to achieving this result and it appears that the proposal was not pursued, not because it was felt that it did not work, but because Robert Hoadley felt that "if the remaining tenants work out that even certain shop units have been excluded, this would lay the landlord open to serious interrogation which would jeopardise the entire estate in my view and is not worth the risk".

Whether commission exceeded market norms

101. In paragraph B.2 of his expert report, Mr Purvis said:

> Back in 1994 when the Lease was granted, it was not unusual to see insurance commission levels of 50%-60% and indeed I am aware that commissions levels of up to 100% were agreed in some cases (although this was unusual).

102. That was a statement as to levels of total commission on policies issued to landlords of tenanted buildings and not levels of Landlord's Commission being the part of total commission that was rebated to a landlord. Therefore, Mr Purvis's calculation approaches matters differently from the calculation set out in the Summary Table (see paragraph 82 above). Moreover, when read together with the Experts' Joint Statement, I take Mr Purvis to be expressing an opinion on typical levels of insurance commission payable on Property Owners' Insurance specifically. That also represents a difference from the position set out in the Summary Table which sets out a blended rate across various categories of insurance.

103. In cross-examination, it was explored with Mr Purvis whether his percentages were expressed as a percentage of net premium or gross premium (using the expressions in paragraph 44 above). In answer to pre-trial questions from the Tenant on his expert report, Mr Purvis said that the percentages were expressed by reference to the gross premium. However, he accepted in cross-examination that this answer was mistaken as commercially it was impossible for commission to be 100% of the gross premium since that would leave no net premium to compensate the insurer for the risk it was taking on. He accepted that the percentages in paragraph B.2 of his report referred to percentages of net premium.

104. That was significant. If an insurer needs a net premium of 100 and allows for commission of 60% of that premium (the upper bound of a premium level that Mr Purvis thought was "not unusual"), then the gross premium would be 160. The 60 of commission would represent 37.5% of the gross premium. A similar calculation leads to a conclusion that 100% of net premium equates to 50% of gross premium.

105. The evidence of the Landlord's own expert, therefore, is that the rates of Landlord's Commission specified in the Summary Table for 2015/16, 2016/17 and 2017/18 were "unusual" even by reference to norms prevailing in 1994. That is true, even though the Summary Table sets out a "blended rate" whereas Mr Purvis's evidence was concerned with commission on Property Owners' Insurance generally given my conclusion set out in paragraph 83.

106. As I have noted, the levels of commission that insurers would accept were falling after 2016/17. Moreover, the figures in the Summary Table underestimate the total commission that was chargeable on the policies for those years as those figures are

calculated by reference only to Landlord's Commission. Some of the total commission payable on the policies would have been paid to, and retained by, brokers and so would not form part of Landlord's Commission.

107. Even ignoring those points, the levels of commission in 2018/19, 2019/20 were significantly in excess of the 37.5% figure that Mr Purvis gave as the upper bound for commissions that were "not unusual" in 1994.

108. Mr Finnegan's conclusion was that a "typical policy commission rate for property owners policy might be 30% but I am aware that amounts of 50% or sometimes up to 60%, were on occasions being paid between the years 2015 to 2019". Mr Finnegan considered that from the latter part of 2019, commission rates began to reduce to around 30%, or even less.

109. There is obviously some difference between the figures that Mr Finnegan quotes and those of Mr Purvis. Matters have been complicated by the fact that they have expressed their percentages on different bases with Mr Purvis expressing his figures as a percentage of net premium and Mr Finnegan as a percentage of gross premium. However, in my judgment, both experts' evidence supports the proposition that Landlord's Commission on policies from, and including, 2015/2016 to, and including 2019/20 were above the norm. In Mr Finnegan's view, a commission of "50% or sometimes up to 60% were on occasions being paid". The flavour of that evidence is that rates such as this were atypical. Mr Purvis's opinion, once his figures are expressed as a percentage of gross premium, was that commission of up to 37.5% of gross premium was "not unusual", suggesting that a commission above that rate was "unusual".

110. I am reinforced in this conclusion by contemporaneous evidence from the 2018/19 underwriting year. At a pre-renewal meeting on 13 March 2018, AJ Gallagher advised that CCL's requirements as to Landlord's Commission were abnormal: 6.5% more than its closest peer and 27.5% more than its second closest. CCL ultimately obtained Landlord's Commission at a rate of 45.7% in that year and AJ Gallagher's opinion at the time was that this was abnormal by a good margin.

111. I conclude that the commission levels for all years from, and including, 2015/2016 to, and including 2019/20, were outside the norm.

112. I will not conclude that commission rates for 2020/21 and 2021/22 were outside the norm. While rates of commission that insurers found "acceptable" in those years had clearly fallen, I have insufficient evidence to determine what a norm was for those years. Moreover, as will be seen, 2020/21 was a very difficult insurance year, affected as it was by the COVID pandemic, and I am not satisfied that Criterion would have had the

bargaining power to achieve a result better than any "norm" in that year. In 2021/22, the commission rate falls within both experts' perceptions of a range of normality.

113. 2022/23 was an altogether different year since it was the first year in which the Landlord imposed the 35% Fee described in paragraph 164 below. It is not meaningful, therefore to consider whether commission rates were outside the norm for that insurance year.

What were "normal" commission rates for the various years?

114. Thus far I have reached the view that commission rates on policies for the Cinema from 2015/16 to 2019/20 were outside the norm without expressing what a "normal" total commission, or a "normal" Landlord's Commission would be. My later conclusions mean that I do not need precision on that question. However, in case I am wrong in those conclusions, I will make some brief additional factual findings for the years 2015/16 to 2019/20.

115. I start with the level of commission that brokers could expect to retain. In 2016/17, 2017/18 and 2018/19, AJ Gallagher noted in correspondence with CCL that it was obtaining broker's commission of 5% of the gross premium for buildings insurance. I note that CCV obtained a lower level of commission for 2015/16 and that I have no figures for 2019/20.

116. The experts were not agreed on how much commission a broker could expect to receive and retain for policies such as these. Mr Finnegan stated in the Experts' Joint Statement that a broker would typically take a share of somewhere between 30% and 50% of total commission on the policy. However, he said in the main body of the report that sometimes the application of a flat percentage such as this to total commission would be difficult to justify (if the commission on the policy was high). Mr Purvis made a similar point in expressing his conclusion that there was no "typical split" of commission as between broker and landlord with much depending on the absolute level of commission received and the nature of work undertaken by the broker.

117. Doing the best I can with the figures, I will conclude that, for policies such as these, between 2015/16 and 2019/20, a broker could expect to retain 5% of gross premium (excluding IPT) by way of broker's commission, the amount that AJ Gallagher actually received in those years.

118. Neither expert broke down their conclusions on "normal" levels of commission between the various insurance years. Doing the best I can with the evidence, I will conclude that "normal" total commission for policies such as these was 33.75%, halfway between Mr

Finnegan's figure of 30% and Mr Purvis's figure (once expressed as a percentage of gross premium) of 37.5%. Making allowance for a broker retaining 5% of gross premium, I conclude that "normal" Landlord's Commission for 2015/16 to 2019/20 was 28.75%.

119. The Tenant suggests a lower figure of around 18% for "normal" Landlord's Commission. It justifies that by reference to (i) an FCA Report of April 2023 entitled "Multi-occupancy buildings insurance – broker remuneration" which, the Tenant submits, supports a "normal" total commission of around 23% and/or (ii) Mr Finnegan's opinion that a broker would take a share of around 50% of "normal" total commission of 30% of gross premium. However, I do not accept that methodology. First, the opening paragraph of the FCA report indicates that it was a response to the Grenfell tragedy and is concerned with the cost of buildings insurance to residential leaseholders. Second, I have explained why I have not accepted Mr Finnegan's conclusions as to the level of commission that a broker could expect to retain.

120. I will not express an itemised conclusion as to "normal" rates of commission for the different types of insurance dealt with in Clauses 3.6.1(a) to (e) of the 1994 Lease since neither expert expressed their conclusions in that kind of granularity. The conclusions I express above are as to "normal" rates of commission for Property Owners' Insurance specifically since that was the type of insurance on which I took Mr Finnegan and Mr Purvis to be expressing their opinions.

Whether the arrangements are arm's length

121. It was common ground that the pricing of the premium allocated to the Cinema for all relevant insurance years was arm's length in the sense that it was a market premium taking into account the amount of commission that was payable.

122. I have underlined the words in the section above to bring out a contrast. While the pricing was arm's length, the way that CCL and insurers approached the pricing of the Block Policy was different from that that would be adopted in a "straightforward" situation in which two commercial enterprises are negotiating a contract with only their commercial interests in mind. In such a case, any benefit to one party will often involve a corresponding disbenefit to the other. However, the Block Policy was different. When CCL and insurers agreed to the high level of commission on the Block Policy, both sides knew that (i) the Criterion Group would obtain a benefit to the extent that premium could be allocated to recoverable units and that (ii) Criterion Group's benefit in that case would come from tenants of those recoverable units having to pay more insurance rent that included their pro rata share of Landlord's Commission and (iii) if there were no Landlord's Commission the insurance rent payable would be lower.

123. That dynamic meant that it was within the insurers' gift in their negotiations with CCL to confer on the Criterion Group a benefit at the expense of tenants of recoverable units. At CCL's request, insurers agreed, subject to imposing an overall cap on the amount of commission that they would entertain (to control their "reputational risk" described in paragraph 93), to conferring that benefit. Both CCL and insurers would have been well aware that the benefit was coming at the expense of tenants.

"Secrecy"

124. The Tenant invites me to make findings as to the extent to which the Landlord kept the amount of Landlord's Commission it was receiving "secret" from the Tenant. However, it requests these findings to support an argument to the effect that the Landlord's alleged "secrecy" demonstrated that the 1994 Lease could not have contemplated the Landlord being entitled to charge insurance rent corresponding to Landlord's Premium. That was impermissibly relying on conduct following the execution of an entirely written contract as an aid to the construction of that contract. I do not, therefore, see any need to make findings as to any "secrecy" on the part of the Landlord.

What if any work did CCL do in return for the Landlord's Commission?

125. CCL had to perform a good deal of work to secure a Block Policy for each relevant insurance year. For example, it had to provide exposure information to enable insurers to assess risk, liaise with tenants, appoint a broker, oversee performance of that broker and agree an appropriate strategy for placing the insurance.

126. However, neither CCL nor any member of the Criterion Group did any work for the insurers in return for Landlord's Commission. They did not, for example, take over administrative duties that insurers would otherwise have to perform so that the Landlord's Commission represented the kind of work transfer payment that I have described in paragraph 37.ii). I reach that conclusion for the simple reason that (i) I was shown no contract between any member of the Criterion Group and insurers setting out work that Criterion Group would do for insurers and (ii) none of the tasks that the Criterion Group had to undertake struck me as being for the benefit of insurers (as distinct from being tasks that the Criterion Group would have to do anyway as part of looking after its valuable Portfolio).

127. It was suggested that Landlord's Commission economically represented a fair reward for the tasks that CCL had to perform in arranging the renewal of insurance each year. I had some evidence as to the remuneration that brokers earned for their work on the insurance renewal each year. For a number of years, they obtained commission equal to

5% of the gross premium. In the 2021/22 and 2022/23 insurance years, Towergate received a flat fee of £70,000 and £75,000 respectively. Mr Wright said in his oral evidence in response to a question from me that this was in addition to a commission paid by insurers equal to 5.4% of "actual property owner's premium". I was shown no documentation to that effect. However, even if Mr Wright is correct, it would mean that in 2021/22:

i) CCL obtained Landlord's Commission totalling £47,232 attributable to the Cinema alone.

ii) The total premium for insurance for the Cinema was £266,829 in that year excluding IPT as compared to the total premium for the whole Portfolio of £2,797,858. Therefore, the Cinema can be assumed to represent 9.5% of the Portfolio at least in terms of premium.

iii) Towergate's reward for arranging insurance on the Cinema can therefore be estimated at 5.4% of £266,829 (assuming Mr Wright's evidence is correct) plus 9.5% of Towergate's £70,000 flat fee, a total of £21,059.

iv) Therefore, even in 2021/22 when Landlord's Commission was at its lowest, CCL would be obtaining Landlord's Commission in an amount that was over twice as much as Towergate's remuneration.

128. Based on the evidence I have as to CCL's tasks as compared with Towergate's, I do not consider that to be an appropriate economic reward for CCL even in 2021/22. The position in earlier years is even starker. In 2016/17, CCL's then brokers, AJ Gallagher, received commission equal to 5% of the buildings premium (with no suggestion of a flat fee as well). Its reward, therefore, for arranging buildings insurance for the Cinema was £8,053 being 5% of £161,060 (the premium allocated to the Cinema for that year). In 2016/17, CCL obtained well over 10 times that figure (£92,054) in Landlord's Commission allocable to the Cinema.

129. I do not consider that in any of the insurance years in issue, the Landlord's Commission represented an appropriate reward for CCL's work in arranging insurance.

Administrative matters

130. The combination of the fact that (i) CCL was arranging a Block Policy covering the entire Portfolio and (ii) that demands for insurance rent needed to be sent to occupiers of recoverable units necessitated a good degree of administration. So far as relevant to the present dispute, I reach the following conclusions on administrative matters:

i) CCL was acting as agent for the Landlord (and other members of the Criterion Group) when negotiating, and entering into, the Block Policy.

ii) In all relevant insurance years, it was Orbit who issued demands for insurance rent payable by the Tenant and other occupiers of recoverable units. It did so in its capacity as the Landlord's agent. I was shown, for example, an "application for payment" issued by Orbit on 26 July 2017 in respect of the 2017/18 insurance year that was expressed to be issued by Orbit acting as agents for the Landlord. In a similar vein, I was shown an application for payment issued by Orbit on 22 July 2021 in respect of the 2021/22 insurance year that was expressed to be "issued on behalf of your Landlord". The latter application for payment included Orbit's bank details.

iii) Since Orbit issued the demands for payment as agent for the Landlord, I conclude that the Tenant made payments to Orbit and that Orbit similarly received those payments as agent for the Landlord.

iv) Some arrangements were then needed, organised by brokers, to ensure that the Landlord and other members of the Criterion Group would pay the necessary sums over to insurers to defray CCL's obligation to fund the premium on the Block Policy. I was shown an invoice from AJ Gallagher for the 2018/19 insurance year requesting the Landlord to pay its share of the insurance premium due to an AJ Gallagher bank account and I conclude that the Landlord either instructed Orbit to pay the sums demanded as its agent or that Orbit first paid sums received as described in paragraph iii) into the Landlord's bank account with the Landlord then making payment itself to defray its share of CCL's liability.

v) Mr Sell, throughout his witness evidence, stressed the fairness with which both apportionment exercises described in paragraph 30 were performed. It would not be fair if the Landlord simply ceded to CCL its pro rata share of Landlord's Commission. Moreover, manuscript additions to invoices from AJ Gallagher for the 2018/19 and 2019/20 insurance years suggest in that year, the Landlord retained "at source" its share of Landlord's Commission by paying over to a broker only the premium less Landlord's Commission. There is no reason why the Landlord should keep its share of Landlord's Commission in 2018/19 and 2019/20 but give it up in other years. I infer that the arrangements put in place to channel receipts from the Tenant (and other tenants of the Centre) to insurers resulted in the Landlord retaining its share of Landlord's Commission rather than giving that up voluntarily to CCL or any other member of the Criterion Group. That was achieved either by the Landlord retaining its share of Landlord's Commission at source (as in 2018/19

and 2019/20) or receiving back from CCL or the relevant broker its pro rata share of total Landlord's Commission on the Block Policy.

Findings as to premium and commission for specific insurance years

2015/16

131. The insurance market in this year was reasonably soft. CCL and its then brokers (CCV) were able to secure insurance for the Centre for a premium of £1.142m (including IPT). The Landlord suggests that this was a reduction on the previous year's premium. I will not make that finding as I am not sure whether the premium for the previous year that I was shown (£1.19m) included IPT. However, there was no significant increase and CCL's requirements as to Landlord's Commission gave rise to no problems as far as insurance was concerned.

132. Allianz, the lead insurer for this year, provided a list of risk improvements before inception of the policy that included matters relating to the sprinklers. However, Allianz did not indicate significant concern on this issue as demonstrated by the fact that it required only that the matters be dealt with within 90 calendar days.

133. I conclude that neither CCL's requirements as to commission nor issues associated with the sprinklers, had any effect on insurance terms offered in the 2015/16 insurance year.

2016/17

134. The position was similar to that for the 2015/16 insurance year. While the sprinkler system at the Centre was out of action for much of this insurance year, I see little evidence that insurers expressed much concern on the issue and I conclude that it had no effect on premiums for this year. Similarly, I conclude that CCL's requirements as to Landlord's Commission caused no difficulties as far as insurers were concerned.

2017/18

135. Issues with the sprinklers at the Centre emerged as a serious concern for insurers before the beginning of, and during, the 2017/18 insurance year. Those concerns were summarised in the hard-hitting Condensed Underwriting Report described in paragraph 65 above. On 23 June 2017, just before insurance cover was due to commence, CCL's then brokers, AJ Gallagher, wrote that insurers were prepared only to provide cover for the Centre for 30 days in order to allow the sprinklers to be reinstated as soon as possible. An extension to that period was agreed. When it became clear on 13 September 2017 that the sprinklers had not been reinstated and that a number of risk improvements related to the sprinklers remained outstanding, the insurers backed away

from their threat of withdrawing cover. However, they were prepared to continue cover only on terms that (i) there would be a 10% co-insurance clause and (ii) an excess of £1 million for each and every loss applicable to claims relating to the Centre. The insurers also specified a number of risk improvements that had to be undertaken in relation to the sprinkler system at the Centre.

136. I conclude that the excess and co-insurance clauses were imposed partly because of insurers' concerns about risks posed by the absence of a sprinkler system at the Centre. A contemporaneous email from Craig Elkins of AJ Gallagher made clear that these terms were being imposed "[d]ue to insurers view of a halt in progress and the serious risk presented by not having operational sprinklers". Both Mr Purvis and Mr Finnegan endorsed that view, saying in their Joint Experts' Statement that they agreed that the "excess and co-insurance clause were introduced because of insurers' concerns over the management of risk within the Centre, including the continued lack of operational sprinklers". They also agreed that the levels of excess and, where relevant, co-insurance clauses imposed on the Landlord in 2017/18 and later years were very uncommon.

137. The experts were also agreed that:

> … the continued disconnection of the sprinkler system and a failure to operate a fire alarm system for an extended period of time did increase the premiums charged to the Defendant.

138. The Landlord emphasises that whether issues with the sprinklers increased premiums or not is a question for me to determine and that I am not bound by the experts' opinions. That is correct: the experts are providing an opinion rather than a binding determination. However, I agree with the experts' opinion. Issues with the sprinklers at the Centre caused premiums to increase for 2017/18 as compared with what those premiums would have been <u>had there been no sprinkler issues</u>.

139. I have added the underlining in paragraph 138 to emphasise that my finding as to an "increase" in premium is by reference to the premium that would have been charged absent sprinkler issues. That conclusion follows both as a matter of common sense and from the way the underwriting engine worked (see paragraphs 45 to 47 above). Some of the inputs into that underwriting engine that I have described must have brought out the fact that there was no operational sprinkler system covering much of the Centre. If, by contrast, the relevant inputs had indicated that there was an adequate sprinkler system at the Centre (but all other inputs had been left unchanged), the engine would have produced a lower technical rate. The underwriting rate would also have been lower, since the underwriting rate proceeded by way of adjustment to the technical rate.

140. Negotiations with insurers for the 2017/18 year also demonstrate that CCL was not setting out to "maximise" Landlord's Commission. In this year, for reasons that I do not fully understand, CCL wanted to limit the average premium increase to tenants of the Criterion Group's commercial estate to 9%. CCL was, therefore, prepared to reduce its requirements as to Landlord's Commission in order to ensure that this could be achieved. That said, CCL had other tools that it could apply to generate commercial advantage from the annual insurance renewal. For example, it could within margins of acceptability determined by insurers, "flex" the amount of premium allocated to recoverable units (see paragraph 35 above). Therefore, every pound in Landlord's Commission forgone would not necessarily cost the Criterion Group a whole pound to the extent that other tools could be deployed to its advantage.

2018/19

141. As I have noted in paragraph 110 above, at the pre-renewal meeting for 2018/19, AJ Gallagher expressed the view that CCL's demands as to Landlord's Commission were outside the norm and, in AJ Gallagher's opinion "limits the number [of] insurers who can underwrite the portfolio, therefore reducing the competition and placement options".

142. Mr Finnegan accepted in cross-examination that this is the first occasion in the contemporaneous documentation in which any reference is made to CCL's commission requirements having any restrictive effect on the pool of available insurers. Mr Finnegan also accepted in cross-examination that if any competent broker thought that CCL's commission requirements were limiting factors they would have mentioned that fact to CCL, although that discussion "might not be documented".

143. Mr Finnegan's expert opinion is that, even before 2018/19, CCL's demands as to Landlord's Commission meant that it could only approach a restricted pool of insurers. Among other matters, that meant that CCL lost out on the downward pressure on premiums which he described as the "remarketing effect" that could be achieved by approaching a wider syndicate of insurers. Mr Finnegan's opinion is that the Tenant's share of premiums for all of 2015/16 to 2019/20 was affected by this factor and he concludes the reduced competitive tension among CCL's insurers cost the Tenant some £49,182 in additional insurance rent over those years. Mr Purvis's opinion was that it was simply not possible to quantify what, if any, effect any reduced pool of insurers had on premiums in any relevant insurance year.

144. I find that CCL's requirements as to Landlord's Commission meant that the pool of insurers that it could approach in 2018/19 and subsequent years was limited because

that is what AJ Gallagher said at the time (see paragraph 110 above). I will not, however, find that there was any such effect in earlier years.

145. In urging me to a different conclusion, the Tenant points to what it characterises as a paucity of disclosure provided by the Landlord on the insurance renewals process. The Tenant observes that minutes of only two pre-renewals meetings have been provided and that there are cases where contemporaneous emails (such as one sent on 21 June 2018 by Craig Elkins of AJ Gallagher) refer to meetings but no minutes of those meetings have been disclosed. The Tenant also complains that it has had no disclosure of discussions between brokers and insurers for relevant years and that the Landlord has not tendered evidence from individuals (such as Mr Aziz or Mr Hoadley of Criterion Group or Mr Elkins of AJ Gallagher) who could have been cross-examined on the issue.

146. However, in my judgment it is now too late to complain of disclosure failings. If the Tenant felt it needed additional disclosure to make good its case on the absence of "competitive tension", it should have sought that prior to trial. It evidently chose not to do so (perhaps because this represents a relatively small part of its claim). Without disclosed documents, I do not consider that much would have been obtained from additional witnesses in cross-examination. I conclude that I must make the best of the evidence that I have which does not suggest any absence of competitive tension prior to 2018/19.

147. That then leads to the question whether an absence of competitive tension increased the premium for 2018/19. Mr Finnegan's evidence is that it did and that but for CCL's requirements as to Landlord's Commission competitive tension would otherwise have produced a premium 10% lower.

148. I quite understand the appeal to common sense that is implicit in Mr Finnegan's approach. At a highly general level, increased competition can reduce prices. However, this is a difficult point to demonstrate in a particular case and to quantify. In the Competition Appeals Tribunal, lengthy expert evidence is deployed at trials lasting several weeks to explain what, if any, effect a cartel has on a price for a particular commodity. In saying that Mr Finnegan's evidence does not deal with the complexities of the question, I am not criticising him: it would have been difficult, perhaps impossible, to do so proportionately given the relatively small amount at stake in connection with this issue.

149. What I consider to be most missing is an analysis of the insurers who did provide cover for 2018/19, those who could have provided cover, and an analysis of why, having regard to their own particular characteristics, a wider pool could be expected to provide better pricing. Mr Finnegan's analysis assumes that better pricing would have been available

without explaining why. Conceptually it is quite possible to surmise that the pool of insurers who were prepared to accommodate CCL's commission demands had selfselected to be keen to attract business and so might naturally offer keener pricing. Mr Finnegan's analysis does not deal with issues such as this.

150. I will not, therefore, find that the reduced pool of available insurers in 2018/19 had any effect on the premium charged for that year. No better evidence was available for subsequent insurance years and I therefore conclude that there was no effect for later insurance years either.

151. Sprinkler issues continued to be important in 2018/19. In March 2018, Mr Elkins of AJ Gallagher sent an email to, among others, Mr Aziz of Criterion Group, saying that he was "99% sure your insurers will not continue cover for the Trocadero at renewal should the property's sprinklers remain inoperative". That assessment proved too pessimistic, but QBE did pull out as lead insurer (to be replaced by Allianz) because, I conclude, of concerns about risk management at the Centre. Moreover, the £1 million excess and 10% co-insurance continued to apply to claims at the Centre in part because of the absence of functioning sprinklers.

152. Mr Elkins can only have provided his gloomy assessment because of feedback received from insurers who must have mentioned sprinklers at the Centre as a significant cause of concern. Moreover, the experts' agreed position summarised in paragraph 137 above is that the disconnection of the sprinkler system had some effect on premiums. The sprinkler system remained disconnected in 2018/19. I conclude that concerns about sprinklers also led to an increase in premium for this year, just as they had for 2017/18 (see paragraphs 138 to 140 above).

153. It was in the 2018/19 insurance year that the problems with the Tenant's sprinkler system emerged (see paragraphs 76 to 78 above). However, I conclude that these issues had no effect on the premium charged for insurance at the Centre whether in 2018/19 or subsequent insurance years for the following reasons:

    i) Although the Tenant took longer than it should have done to address the issue with the butterfly valve and to fix the leaks, these were not systemic issues affecting the whole Centre but rather were self-contained maintenance failures. As Mr Purvis put it in cross-examination, "… there were enough issues that they [insurers] identified for the building as a whole that they weren't going to be spending too much time at a tenant-by-tenant level".

    ii) The issues arose after the insurance for the 2018/19 year was incepted and were remedied before the renewals process for 2019/20 was substantially under way.

iii) Although the Condensed Underwriting Report demonstrated that the Cinema formed a large proportion of the Centre's floor area and also represented a good degree of the insurance risk posed at the Centre because of the nature of the business conducted there, I do not consider that insurers paid any particular attention to the state of the sprinklers in the Cinema itself.

2019/20

154. There was limited documentary evidence available as to the insurance renewal for the 2019/20 insurance year. The sprinkler system remained disconnected throughout much of 2019/20 in the sense that, while connection to the Cinema had been restored before the beginning of this insurance year, there was no operative sprinkler system at the Hotel until February 2020 at the earliest. Given the experts' agreed position summarised in paragraph 137, that suggests that problems with the sprinkler system at the Centre had some effect on premium in 2019/20 as well.

155. The Landlord submits, however, that there was no such effect. I was referred to a table headed "Trocadero Risk Improvements 30-Jan-25". That referenced a number of risk improvements that insurers had notified to the Landlord following a "Survey Date" of 13 May 2019. The Landlord points out that none of those risk improvements referenced the sprinkler system and invites me to infer that sprinklers cannot, therefore, have featured any more in insurers' thinking in 2019/20.

156. I do not accept that interpretation. The point of that document was to capture previous risk improvements that had not been dealt with at 30 January 2025. That is demonstrated by the fact that a risk improvement relating to "1901 Kitchen Fire Suppression Siirgista" is shown as having a "Deadline Date" of 28 July 2019 and the column "Number of days left" shows as "-2014" (in red). The point is that 2014 days passed between 28 July 2019 and 30 January 2025 without the issue being remedied. A document like this would not catch risk improvements relating to sprinklers which were remedied before 30 January 2025.

157. In comments on the judgment I circulated in draft, the Landlord explained that the document discussed in paragraph 156 did not record a position as at 30 January 2025, but had been attached to an email dated 18 October 2019. It was explained that the "30 January 2025", and the "-2014" number in red had been added when the document was converted into PDF format for the trial bundle. I was not aware of that matter during the trial and it obviously puts a different complexion on the document. However, given the experts' agreed position and the fact sprinklers were disconnected through much of

2019/20 I conclude that issues with the sprinklers continued to have some effect on premium in 2019/20. I also note the uncontroversial fact that the excess and coinsurance clause remained in place in this year.

2020/21

158. This was a particularly hard insurance market driven in large part by the COVID-19 pandemic. The problems with the sprinkler system in the Centre had been resolved before the beginning of this insurance year. Insurers continued to insist on an excess of £1 million for each and every claim involving the Centre. The co-insurance clause was, however, removed.

159. Since problems with the Landlord's sprinkler systems had been remedied shortly before the start of this insurance year, the common ground between the experts that I have summarised in paragraph 137 no longer applied. Mr Finnegan considered that there was a potential "hangover" effect on the basis that the long delay in dealing with the sprinkler problem was suggestive of a poor attitude to risk management. He therefore considered at paragraph 7.20.6 of his expert report that, even once sprinkler issues were addressed "an insurer may be more cautious and just relax any premium load or other special terms applied at the next renewal, but not remove them completely. At subsequent renewals, should there be no further issues, the premium would revert to standard".

160. Mr Purvis was less convinced of the existence of a hangover effect and considered that, once the sprinkler issues were remedied, an insurer would be open to persuasion from the broker that any premium load should be removed completely. While he did say that "underwriters tend to have quite long memories of bad experiences", he expressed that opinion in the context of Allianz's refusal to rejoin the syndicate of insurers in 2021/22 having left the syndicate on conclusion of the 2019/20 insurance year. I consider it would be a bigger step for an insurer to rejoin a syndicate it had previously left than it would be to reduce premiums to take into account risks that have been remedied.

161. Ultimately, I have a difference of professional opinion between Mr Finnegan and Mr Purvis with little to guide me as to whose views to prefer. On balance I prefer the opinion of Mr Finnegan to the effect that sprinkler issues continued to have some lingering effect on premiums in 2020/21. That is largely because the 2020/21 market was exceptionally hard with CCL's main priority being to obtain cover at all. Moreover, even if the Landlord had remedied sprinkler problems before the start of the 2020/21 insurance year, it would only have done so shortly before the year commenced. Given the hard insurance market, I conclude that insurers would be unlikely to be persuaded by brokers'

assurances that sprinkler problems were completely addressed and would continue to load the premium at least to some extent.

2021/22

162. In this year, an excess of £2 million applied to each and every claim involving the Centre. I see no explanation for this requirement other than a perception of risk management issues at the Centre.

163. However, by this insurance year, even if concerns about risk management continued, the problems with the Landlord's sprinklers had been fixed. Mr Finnegan's view that I have summarised in paragraph 159 suggested that the hangover effect was limited and would come to an end after a complete year with no sprinkler problems had passed. I conclude that problems with the Landlord's sprinklers did not increase premiums for the 2021/22 year.

2022/23

164. In 2022/23, CCL decided not to seek any Landlord's Commission in connection with insurance policies covering certain parts of the Portfolio. Rather, it decided that relevant tenants at the Centre, including the Tenant, would be charged a "placement, administration and work transfer fee" (the **35% Fee**) at the rate of 35% of the applicable insurance premium.

165. Significant features of the 35% Fee were as follows:

    i) The Landlord charged the 35% Fee to tenants of the Centre by adding it to their share of the insurance premium. Therefore, the 35% Fee was added "at source" and before insurers received their premium for insuring the Centre. It follows that the 35% Fee did not cost insurers anything.

    ii) The 35% Fee was applied only in connection with insurance for recoverable units.

    iii) Both Mr Purvis and Mr Finnegan agree that someone working in the insurance industry in 2022/23 would not regard the 35% Fee as part of a "premium" for obtaining insurance for the Centre.

166. The 35% Fee was Towergate's idea. I have concluded that there were two broad reasons for it. First, in each year since 2016/17, the amount of Landlord's Commission that insurers would allow had fallen. The 35% Fee freed the Criterion Group from limits that insurers imposed on what the Criterion Group considered to be a valuable source of income. Second, following the COVID-19 pandemic, the proportion of non-recoverable

units had increased. As explained in paragraph 90 there was an IPT inefficiency associated with Landlord's Commission that was allocated to non-recoverable units.

Since the 35% Fee was considered not to attract IPT at all, Towergate's proposal dealt with that inefficiency.

167. I saw no evidence that the 35% figure was calculated by reference to an arm's length price for the Criterion Group's work done in connection with insurance. In the absence of any such evidence, I conclude that the 35% figure was the amount that the Criterion Group wanted to, and thought that it could, obtain from tenants and bore no relation to the cost of its work associated with the annual insurance renewal.

168. In 2022/23, the Landlord obtained £83,035 from the Tenant by application of the 35% Fee. In 2021/22, the Landlord had obtained £47,232 by way of the Landlord's Commission on the insurance premium for the Cinema. Since I have concluded that the Landlord's Commission represented more than an arm's length price for the Landlord's work in connection with the insurance renewal (see paragraph 128 above) it follows that the 35% Fee was also in excess of such an arm's length price.

Payments of insurance rent for the various years

2015/16 and 2016/17

169. The insurance rent that the Landlord demanded for 2015/16 was £211,622.36, inclusive of VAT. The Tenant paid this sum on 27 July 2015. The insurance rent that the Landlord demanded for 2016/17 was £211,633.68 inclusive of VAT. The Tenant paid this sum on 3 August 2016.

170. I do not consider that the Tenant had any concerns at the time it paid insurance rent for these years that the amounts demanded were excessive. I conclude that it paid the sums demanded because (i) it had received an invoice from the Landlord or its agents and (ii) it thought the sums demanded were lawfully due.

171. The Landlord argued that the evidence was insufficient to establish the existence of the subjective belief referenced at (ii) of paragraph 170. It noted that senior management at the Tenant had not given witness statements as to their subjective thinking when paying the insurance rent for 2015/16. Mr Frost accepted in paragraph 7.4 of his witness statement that he had little recollection about the payment of the 2015/16 insurance rent. Mr Kravitz accepted a similar lack of recollection in cross-examination. However, I do not accept the Landlord's argument. The subjective belief can be inferred from the fact that the Tenant paid the amount demanded without question or challenge.

2017/18

172. The insurance rent demanded for this year was £236,977.97 inclusive of VAT. It was in this insurance year that the Tenant started to believe that it was being overcharged insurance rent. The Tenant had made enquiries of its own insurance brokers and had formed the view that it could, if permitted, arrange its own insurance more cheaply. It raised some queries about the insurance policy and premium with Orbit that were not answered. The Tenant did not, therefore, pay the insurance rent when demanded.

173. Orbit was assertive in its demands for payment. On 8 September 2017, Sarah Hill of Orbit sent an email to Greig Allan and Shannon Jennings of the Tenant stating that Orbit expected "payment of the insurance in full as your lease requires – any queries can be investigated in due course". In support of that position, Sarah Hill referred to a "Tenant Information Document" which included the following paragraph:

> In the event that the insurance premium is in dispute we request that the sum being requested be settled on a non-prejudicial basis from the outset to ensure that subrogation waiver continues to apply.

174. Eventually, the Tenant decided that it would pay the insurance rent, albeit late "under protest". It made payment on 29 September 2017 and at the time it made that payment, I conclude that the Tenant did not believe that all of the sum paid was contractually due, although it realised that part was. In his letter of 28 September 2017 to the Landlord, confirming that the Tenant would pay the insurance rent demanded, Mr Kravitz wrote:

> Picturehouse Cinemas will pay the full amount of the Insurance Invoice immediately, but it does so under protest and on the understanding that: (a) Picturehouse Cinemas will promptly get access to all relevant insurance calculations and information that have been requested; and (b) you will promptly refund Picturehouse Cinemas if it transpires that the amount of the Insurance Invoice is in excess of the amount that Picturehouse Cinemas should be paying for insurance…

175. In cross-examination, Mr Chapman accepted that this "protest wording" reflected what Orbit had been asking for namely an arrangement under which the Tenant would "pay now, dispute later". I consider that a reasonable observer would conclude from the discussions between the Landlord and Tenant and surrounding circumstances that there was a common understanding between them that (i) the payment of insurance rent was being made on the assumption that it was all contractually due and (ii) to the extent any part of the sum paid was not contractually due, the Landlord would refund it.

176. That said, I conclude that the Tenant had no subjective belief as to the legal effect of the "protest wording". Any subjective belief would have to come from Mr Kravitz, as the Tenant's general counsel. However, Mr Kravitz produced the wording because he wanted, in a general sense, to reserve the Tenant's position. When in private practice, he had specialised in mergers and acquisitions. He did not have much knowledge of the law of restitution and was not in a position to form a subjective belief that the "protest wording" necessarily conferred a legal right for the Tenant to recover any overpayment.

2018/19 and 2019/20

177. The Tenant continued to believe that not all the insurance rent demanded was contractually due. It did not pay the entire insurance rent demanded for 2018/19 on the due date. When it did not do so, Mr Sell of CCL requested that it pay on an "on-account without prejudice basis £236,997.97, being the sum you paid last year". I conclude that this was a request for a similar "pay now, dispute later" arrangement as that reached in 2017/18.

178. The Tenant made a part payment of £150,861.53 inclusive of VAT on 6 November 2018. Before making that payment, the Tenant sent a letter to the Landlord that included the following paragraph:

> We shall make a payment of £125,717.94 [i.e. the VAT-exclusive figure] (which covers insurance costs and broker costs) in respect of insurance for the coming year in order to meet our requirements for insurance payments under the lease. But please note that this payment is made without prejudice to any claims we may have for overpayment of insurance amounts in previous years and we reserve all of our rights under the lease to make claims in respect of any such overpayments.

179. The last sentence refers specifically to claims "for overpayment of insurance amounts in previous years". However, that simply reflected a degree of imprecision in the language used. The Tenant can scarcely have intended only to reserve rights in relation to previous years' payments, particularly given that Mr Sell had specifically asked it to make an "onaccount without prejudice" payment for the 2018/19 insurance year. I conclude that viewed objectively, the payment of 6 November 2018 was made on the same understanding between Landlord and Tenant that I have summarised in paragraph 175.

180. By 6 November 2018, therefore, the Tenant had made two significant payments, following a good degree of argument, correspondence and query, on a "pay now, dispute later" basis. When on 12 April 2019 it paid the balance of the insurance rent demanded for 2018/19 (£104,037.15 including VAT), there were some other relevant

circumstances. The Landlord had served a statutory demand for the insurance rent, but the Tenant was legally advised and would not have considered that there was any real risk of a winding-up petition succeeding given that the insurance rent was clearly being disputed. In addition, the Tenant wanted to use a kiosk in front of the Cinema and thought it needed some permission from another member of the Criterion Group to do so. However, notwithstanding these additional circumstances, given the previous discussions on insurance rent, I consider that, viewed objectively, the Landlord and Tenant were proceeding on the same common understanding as is set out in paragraph 175. Nothing had obviously changed to allay the Tenant's concerns that it was being overcharged. It would be quite contrary to the parties' dealings with each other for the Tenant suddenly to make payment on the footing that it reserved no right to request a repayment should the amount paid be more than was due given that the statutory demand was largely sabre-rattling and the Tenant did not ever secure the permission it sought to use the kiosk.

181. The same analysis applies to the payment in respect of the 2019/20 insurance year. The Tenant paid the full amount demanded (£257,177.40 including VAT) on 24 July 2019. It did not accompany that payment with any separate "protest wording". However, by then it was clear, viewed objectively, that Landlord and Tenant were in a dispute about insurance rent and they were both proceeding on the basis that the arrangement summarised in paragraph 175 would continue until that dispute was resolved.

182. The Tenant's subjective belief as to the efficacy of the protest wording used in connection with the payments for 2018/19 and 2019/20 was the same as summarised in paragraph 176.

2020/21, 2021/22 and 2022/23

183. The Landlord issued proceedings to recover rent and service charge from the Tenant in October 2020.

184. The insurance rent demanded for 2022/23 was £331,079.35 (including VAT). As noted, that insurance rent included the 35% Fee. The Tenant was not aware that this fee had been added to the insurance premium charged at the time it made payment. Given the ongoing dispute, the Tenant did not believe all of that sum to be due but paid the insurance rent demanded for 2022/23 on 12 May 2023. It preceded that payment with an email in the following terms:

> We refer to the demand for insurance rent of £331,079.35 in respect of the period 24 June 2022 to 23 June 2023. We are paying this sum today under protest, strictly without prejudice to our defence and

> counterclaim in the ongoing proceedings (under Claim Number PT2020-00828) and to our rights of recovery against your client based on the outcome of such proceedings.

185. The Tenant paid the insurance rent demanded in respect of 2020/21 (£356,178.52) and that in respect of 2021/22 (£359,043.58) on 29 June 2023. It continued to believe that those sums were not all contractually due. The payment on 29 June 2023 was preceded by a letter from the Tenant's solicitors that included the following:

> The Insurance Rent is paid under protest, strictly without prejudice to our clients' defence and counterclaim in the Proceedings (under Claim Number PT-2020-00828) and to our clients' rights of recovery against your client based on the outcome of the Proceedings… Payment of all sums today are of course without prejudice to the Counterclaim in the Proceedings.

186. The Landlord submits that the objective meaning of both sets of protest wording used in May and June 2023 was somewhat different from earlier formulations of the wording in that it referred to specific legal proceedings. I do not accept that. Both sets of protest wording indicate that rights of recovery "based on the outcome of [proceedings]" were reserved. In the proceedings in question, the Tenant was arguing, among other matters, that the Landlord was not entitled to insurance rent to the extent that it corresponded to Landlord's Commission. Its point in including this protest wording was that, if its arguments in the proceedings were shown to be correct, it expected a refund of the part of the insurance rent that was shown not to be due as a consequence.

187. The protest wording that I have set out above was "unilateral" in that it was not preceded by any express request from the Landlord to pay insurance rent on a "pay now/dispute later" basis. However, I do not consider that would strike a reasonable observer as significant. By 2023, it was clear that the dispute about insurance rent was ongoing and had proceeded to litigation. Despite the clear differences between the Landlord and Tenant, the Landlord was obtaining the use of the Tenant's money and could scarcely reasonably conclude that the money would be the Landlord's to keep whatever the outcome of the proceedings. A reasonable observer would conclude that both Landlord and Tenant were proceeding on the same basis as is set out in paragraph 175. Having proceeded on that common basis in relation to previous payments, it would make no sense for a different basis to apply to the payments in 2023.

188. By 29 June 2023, the Tenant had obviously taken legal advice on the "protest wording" since that wording was set out in a letter from the Tenant's solicitors. However, the Tenant has permissibly not waived privilege in relation to legal advice on that issue. I

conclude on the evidence that I have that the Tenant's subjective belief in the legal effect of both sets of protest wording used remained as summarised in paragraph 176.

PART D – CONSTRUCTION OF THE LEASE – EXPRESS TERMS

Relevant terms of the Lease

The "Landlord" and the "Superior Landlord"

189. What I have referred to as the 1994 Lease was in fact a reversionary underlease, for a term of 35 years commencing on 30 September 2006, originally granted in 1994 by Power Trocadero (Cinema) Ltd (defined as the "Landlord" in the 1994 Lease) to Gallery Cinemas Limited (defined in the 1994 Lease as the "Tenant"). At that time, the "Landlord" was itself the tenant under a lease whose landlord (defined in the 1994 Lease as "Superior Landlord") held the freehold reversion.

190. Accordingly, the covenants in the 1994 Lease contain a number of references to the "Superior Landlord" which will become relevant when construing the 1994 Lease. In that connection, Clause 1.2.2.1 and Clause 1.2.2.2 of the 1994 Lease contained the following definitions:

> 1.2.2.1 "the Landlord" means the person named as the Landlord in the Particulars and includes any other person for the time being entitled to the reversion immediately expectant upon the determination of the Term
>
> 1.2.2.2 "the Superior Landlord" means the person named as Superior Landlord in the Particulars and includes successors in title and assignees or person in whom the freehold reversionary interest in the whole of the Centre (as herein defined) may from time to time be vested provided always that for the avoidance of doubt if the Landlord hereunder shall at any time hold such freehold reversionary interest any reference to "the Superior Landlord" shall be deemed to be a reference to the Landlord hereunder

191. Although the parties are not agreed on the effect of Clause 1.2.2.2 they do agree on the following matters:

    i) In July or August 2015, London Trocadero (2015) LLP acquired the reversion immediately expectant upon the term of years granted by the 1994 Lease with the result that obligations expressed to be binding on the "Landlord" in the 1994 Lease are binding on London Trocadero (2015) LLP. I can, therefore, use the term

"Landlord" to refer both to the "Landlord" as defined for the purposes of the 1994 Lease and to London Trocadero (2015) LLP and will do so.

ii) The predecessor in title to London Trocadero (2015) LLP was LTL. At the point LTL assigned its rights to London Trocadero (2015) LLP, LTL owned the freehold reversion to the Centre. Accordingly, the situation specified in Clause 1.2.2.2 was present since, at all times material to this dispute, the "Landlord" held the freehold reversionary interest. Therefore, the parties agree that every time the defined term "Superior Landlord" is used in the 1994 Lease it should be read as a reference to the "Landlord". However, the parties do not agree on the implications of that, particularly for the purposes of construing Clause 3.6.1(a) considered below.

Terms dealing with insurance

192. Clause 3.6.6 of the 1994 Lease is one of the Tenant's covenants by which it covenanted not to maintain its own insurance in the following terms:

> 3.6.6 Not to effect or maintain or contribute towards the maintenance of any insurance on or in respect of the demised premises (or the Centre) in duplication of any insurance effected and maintained by the Superior Landlord…

193. By contrast, Clause 4.3 of the 1994 Lease was a Landlord's covenant by which the Landlord agreed:

> At all times during the Term to procure that the Superior Landlord keeps the Centre…insured (or procures that the same are kept insured) in the full cost of reinstatement against loss or damage by the Insured Risks…

194. Since the term "Superior Landlord" in the above clause must be read as a reference to the "Landlord", Clause 4.3 is one of a number of provisions of the Lease that ostensibly requires the Landlord to procure itself to do something.

195. The obligation to "procure that the Superior Landlord keeps the Centre… insured" is qualified by Clause 5.6 of the 1994 Lease which provides as follows:

> The Landlord shall be deemed to be complying with its obligations as to insurance under this Lease notwithstanding that the insurance for the time being maintained by the Superior Landlord is subject to conditions or limitations which the Superior Landlord has considered it reasonable to accept and without prejudice to the foregoing nothing in this Lease shall require the Landlord or the Superior Landlord at any time to insure

> against loss or damage or destruction from any causes for which United Kingdom insurance offices of repute are not for the time being prepared to grant insurance

196. Under clause 3.6.1, the Tenant covenanted:

> To pay to the Landlord on demand by way of additional rent in respect of each year during the Term:
>
> (a) A proportionate part of the total sum (such proportion being conclusively determined (save in the case of manifest error) by the Superior Landlord or the Superior Landlord's surveyor from time to time) equivalent to the amount from time to time assessed by the Superior Landlord or the Superior Landlord's insurers as being payable by the Superior Landlord by way of premium for keeping the Centre insured for an amount (estimated from time to time by the Superior Landlord or the Superior Landlord's surveyor) necessary to cover the full costs of rebuilding or reinstating the Centre against loss or damage by the Insured Risks…together with the amount of any fees and expenses incurred in obtaining valuation and advice as to the appropriate level of insurance cover for (inter alia) the demised premises or as to loss of Rent or otherwise relating to the insurances referred to in this Lease
>
> (b) a sum (or in the event that the loss of the Rent hereinafter mentioned is not separately insured a proportionate part of the total sum insured such proportion being conclusively determined (save in the case of manifest error) by the Landlord or the Landlord's Surveyor from time to time) equivalent to the amount from time to time assessed by the Landlord's insurers as being payable by the Landlord by way of premium for insuring the loss of the Rent for the Loss of Rent Period including the Landlord's or the Landlord's estimate thereof where a part of the period in respect of which loss of rent insurance is or is to be effected by the Landlord is subsequent to a date or dates when the Rent falls to be reviewed pursuant to the provisions of the Third Schedule hereto and …
>
> (e) a sum equivalent to the amount from time to time assessed by the Landlords insurers as being payable by the Landlord by way of premium for providing insurance cover in respect of any liability of the Landlord to the public or third parties arising by reference to the demised premises or its use

197. Clauses 3.6.1(c) and (d) were to similar effect with Clause 3.6.1(c) dealing with insurance covering loss of service charge and Clause 3.6.1(d) dealing with insurance against the risk of insurance premiums for adjoining or neighbouring premises being increased as a consequence of various acts of the Tenant in relation to the demised premises.

The 2014 Lease

198. On 18 September 2014, the 2014 Lease by which LTL leased additional premises to the Tenant was executed. The rent payable pursuant to the 2014 Lease was a peppercorn. Clause 2.4 of the 2014 Lease provided that:

> This grant is made and the terms of this lease which includes the Incorporated Terms as if they were set out in full in this lease.

199. The definition of "Incorporated Terms" was as follows:

> all of the terms, requirements, covenants and conditions contained in the Existing Lease [i.e. the 1994 Lease] (except to the extent that they are inconsistent with the clauses written in this lease) and with such modifications as are necessary to make them applicable to the Property, this lease and the parties to this lease and as specifically varied by clause 3:
>
> (a) including:
>
> (i) the definitions and rules of interpretation in the Existing Lease…

200. Clause 3.1 of the 2014 Lease provided as follows:

> for the purposes of this lease only, the terms of the Existing Lease [i.e. the 1994 Lease] shall be varied as set out in the Schedule and this lease shall be read and construed accordingly.

201. In their closing submissions, I took the Landlord and the Tenant to be agreed that the contractual terms that are in dispute should have the same construction in the 2014 Lease as they have in the 1994 Lease. Similarly, I took the parties to agree that if a particular contractual term is, or is not, implied into the 1994 Lease, that outcome would be determinative of the question as to whether that term should be implied in the 2014 Lease.

202. That is a point of some general significance, but it is particularly relevant when it comes to considering the Premium Issue. Conceptually, the ordinary meaning of the term

"premium" could have changed between 1994 and 2014. Similarly, at least in theory, the question whether a term is necessary or has business efficacy could have a different answer if asked in 2014, rather than in 1994. The parties' common position outlined in paragraph 201 means that, when construing the relevant contractual provisions, and when considering whether a particular term should be implied, I will answer that question as at the date of the 1994 Lease.

203. In my judgment, the provisions of the 2014 Lease that I have quoted provide the justification for the parties' position. The clear intention is that the grant made by the 2014 Lease should be on the terms of the 1994 Lease except to the extent that provisions of the 1994 Lease were specifically varied. That intention would not be achieved if the 2014 Lease had to be construed afresh by reference to facts and circumstances in existence in 2014 since it would result in a difference between the approach to construction of the 2014 Lease as compared with the 1994 Lease.

Terms dealing with the obligation to maintain sprinklers

204. The Landlord's obligations in relation to the sprinkler system arose as a consequence of the Deed of Variation. The Deed of Variation introduced, as a new Landlord's covenant, a clause 4.2.7 of the 1994 Lease that required the Landlords to provide the "Services". The definition of "Services" included, so far as material:

> (d) the maintenance operation inspection repair overhaul replacement and renewal (including the acquisition of a stock of spare parts and other items in anticipation of future requirements and the expense of any replacement guarantee contract) of…any fire and smoke alarms firefighting prevention detection equipment and smoke detection extraction or ventilation equipment including fire and/or smoke shutters and pressure relief units which may from time to time be installed in the Centre

205. Clause 5.4.1 of the 1994 Lease included a limitation on the Landlord's liability in the following terms:

> 5.4. 1 The Landlord shall be under no obligation to provide or supply (or procure the supply of) any services or other things save those services or things which the Landlord hereinbefore expressly covenants to procure are provided or supplied and notwithstanding anything in any provision contained in this Lease neither the Landlord nor the Superior Landlord shall be liable to the Tenant nor shall the Tenant have any claim against the Landlord or the Superior Landlord in respect of any

> interruption in any of the services or things which the Landlord or the Superior Landlord does provide or supply from time to time by reason of any necessary inspection overhaul repair or maintenance of any plant equipment installations or apparatus or damage thereto or destruction thereof by any cause whatsoever or by reason of electrical mechanical or other defect or breakdown or frost or other inclement conditions or shortage of fuel materials water or labour or whole or partial failure or stoppage of any mains supply or by reason of other circumstances of whatsoever nature beyond the control of the Landlord or the Superior Landlord

Principles applicable to the construction of the express terms of the Leases

206. In its written and oral closing submissions, the Tenant referred briefly to the principles applicable to the construction of the express terms of the Lease. The Landlord did not dispute the Tenant's analysis and I therefore proceed on the basis of the Tenant's highlevel summary of the applicable principles which was as follows:

i) The construction of the express clauses of the Leases depends upon the objective meaning which those clauses would convey "to a reasonable person having all the background knowledge which would reasonably be available to the audience to whom the instrument is addressed" in the words of Lord Hoffmann in *Attorney General of Belize v Belize Telecom Limited* [2009] 1 WLR 1988. This is not necessarily the same as the (subjective) "intention of the parties".

ii) In the words of Lord Neuberger at [15] of his judgment in *Arnold v Britton* [2015] UKSC 36, [2015] AC 1619:

> That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions.

iii) The court's task is to decide on meaning, not on reasonableness. Therefore, the court has, in the words of Lord Hoffmann in *Belize Telecom*, "no power to improve upon the instrument which it is called upon to construe" and cannot, therefore, "introduce terms to make it fairer or more reasonable". However, the consideration of reasonableness can be a guide to meaning since, as Lord Reid said in *Schuler v Wickman Machine Tool Sales Ltd* [1974] AC 235 at 251 E-F:

> The fact that a particular construction leads to a very unreasonable result must be a relevant consideration. The more unreasonable the result the more unlikely it is that the parties can have intended it, and if they do intend it the more necessary it is that they shall make that intention abundantly clear.

Whether Clause 3.6.1(a) of the 1994 Lease requires the Tenant to pay sums represented by Landlord's Commission or the 35% Fee

The main body of Clause 3.6.1(a)

207. In order to work out how much insurance rent the Tenant is obliged to pay pursuant to Clause 3.6.1(a), the following steps must be taken, so far as material to the present dispute:

    i) The Superior Landlord or the Superior Landlord's surveyor must "estimate" the amount necessary to cover the full costs of rebuilding or reinstating the Centre against loss or damage from Insured Risks.

    ii) The Superior Landlord or the Superior Landlord's insurers must "assess" the amount payable by the Superior Landlord by way of premium for keeping the Centre insured for that amount against the Insured Risks.

    iii) The Superior Landlord or the Superior Landlord's surveyor must "determine" the proportionate part of that total sum that the Tenant must pay.

208. The amount "estimated" as described in paragraph 207.i) does not need to be considered in connection with the Premium Issue. However, it is appropriate to set out my conclusion that the word "necessary" in Clause 3.6.1(a), in my judgment, relates to the sum to be insured ("the amount necessary to cover the full costs of rebuilding or reinstating the Centre…"). In places in its submissions, the Tenant suggested that, to constitute a "premium" recoverable under Clause 3.6.1(a), expenditure of that premium needed to be "necessary" in some sense. I do not accept that.

209. The Tenant is not arguing that the "determination" referred to in paragraph 207.iii) was wrongly performed.

210. Therefore, the focus of this element of the dispute is on the process summarised in paragraph 207.ii) and even that dispute is of a confined nature. Both sides seemed disposed to accept that the process of "assessment" referred to in that paragraph is apt to describe the process by which a premium for the Centre specifically is distilled from the whole premium paid to cover the Portfolio pursuant to the Block Policy. The Tenant

does not suggest that this process has been performed wrongly so that, for example, too much has been allocated to the Centre as distinct from other parts of the Portfolio. Rather, the Tenant's argument is that sums that the Criterion Group received back by way of Landlord's Commission were incapable of forming part of the amount "payable … by way of premium for keeping the Centre insured" and were therefore incapable of founding a payment obligation pursuant to Clause 3.6.1(a).

211. The Landlord's first objection to the Tenant's analysis focuses on the language used. The Landlord argues that Landlord's Commission is certainly part of the "premium" payable for insurance of the Centre. The Landlord relies on the opinions of both experts summarised in paragraphs 42 and 52 above to the effect that (i) commission is part of an insurance premium and (ii) that is the case whether or not that commission operates as a commercial incentive or otherwise and whether or not the recipient of that commission chooses to share it. I was shown an insurance "placement slip" for the insurance at the Centre that described the entire amount of £3,209,833.32 (which would have included Landlord's Commission) as the "premium" paid for insurance at the Centre.

212. However, that involves a focus on the single word "premium" which risks overlooking other indications of meaning to be found in Clause 3.6.1(a) and the 1994 Lease generally.

213. To found a payment obligation under Clause 3.6.1(a), it is not enough that a particular sum answer to the definition of "premium". Rather, the sum in question must be an amount "payable … by way of premium for keeping the Centre insured". Read as a whole, the phrase requires also that the sum in question (i) must be "payable" (and so constitute a real cost to the Superior Landlord) and (ii) must be "for keeping the Centre insured [against the Insured Risks]". Therefore, while I acknowledge the Landlord's submission, by reference to *Myers v Sarl* 121 ER 457 that where words and expressions are used in a contract that have acquired a "peculiar meaning" the parties must be taken to use those words "in their restricted and peculiar signification", that does not provide a complete answer to the question of construction. Clause 3.6.1(a) of the 1994 Lease itself contains a suggestion that it is not concerned with everything that answers to the definition of "premium", in a specialist insurance sense. Rather, to be the kind of "premium" with which Clause 3.6.1(a) is concerned, the sum in question must both be "payable" and "for" the requisite purpose.

214. My factual conclusions suggest that Landlord's Commission does not satisfy either of these requirements:

    i) Even if Landlord's Commission does form part of a "premium", it is rebated as part of arrangements that the Landlord itself, through its agent CCL, engineered. The

proposition that the part of premium corresponding to Landlord's Commission is not "payable" in any realistic sense involves no strain on the contractual language used. If someone "pays" 100 but has engineered an arrangement under which 30 is inevitably going to be repaid, it is perfectly sensible to say that only 70 is truly "payable".

ii) If, continuing with the example, the 30 represented consideration for services that the Landlord was providing to insurers, the force of the point would be diminished. In that case, it would be realistic to speak of 100 being "payable" with the Landlord receiving a separate payment of 30 for services rendered. However, I have concluded in paragraph 129 that Landlord's Commission was not consideration for services provided to insurers.

iii) As I have concluded in paragraph 85, Landlord's Commission was optional. In that regard, Landlord's Commission can be contrasted with the element of brokers' commission that brokers were expected to receive and retain. CCL did not have the power to dictate to its insurers how much commission brokers received and retained. However, CCL did have an unfettered ability to reduce to nil, if it chose, the amount of Landlord's Commission that flowed back to the Criterion Group. That suggests that, even if that Landlord's Commission was ostensibly "payable" by virtue of its status as a component of premium, it was not "for … keeping the Centre insured [against Insured Risks]". Rather, it was "for" providing the Landlord with an opportunity to profit at the Tenant's expense.

215. The indications that I have set out in paragraph 213 are not unanswerable. For example, the Landlord submits that Clause 3.6.1(a) refers to the concept of a sum being payable by way of premium "for … keeping the Centre insured [against] Insured Risks" only as a means of distinguishing between the various categories of insurance rent discussed in Clauses 3.6.1(a) to (e). For example, Clause 3.6.1(a) is concerned with Property Owners' Insurance, and Clause 3.6.1(e) is concerned with POL Insurance. It is, therefore, appropriate to test the indications of meaning in paragraph 213 against other indications of meaning, including the reasonableness of the outcomes for which both sides argue.

216. On executing the 1994 Lease, the Tenant was committing itself to a lease with a 35-year term. During that term it was, by Clause 3.6.6, precluded from arranging its own Property Owners' Insurance and was, in effect, a forced buyer of whatever insurance policy the Superior Landlord chose to maintain. On the Landlord's interpretation, the insurance rent payable by the Tenant could be inflated by as much Landlord's Commission as the Superior Landlord thought that it could get away with, with the only operative constraint being the willingness of insurers to accommodate the Superior Landlord's demands. As events transpired, insurers did show themselves, over time, to be less willing to

accommodate demands for high Landlord's Commission, but this could not have been anticipated in 1994 when the 1994 Lease falls to be construed.

217. That said, viewed objectively, the parties would have contemplated that the Landlord would have to do a good amount of work each year to secure insurance for the Centre. The approach set out in paragraph 213 could leave the Landlord uncompensated for that work. However, I do not consider that to be an unreasonable result. The 1994 Lease is the Landlord's document and contains numerous provisions designed to enable the Landlord to recover costs, such as provisions relating to service charge. If those provisions do not enable the Landlord to recover the costs of its efforts in securing insurance, that is an indication that the costs in question are in the nature of overheads or costs of the Landlord's letting business which is to be paid out of the receipt of rent.

218. Overall, I consider the Landlord's proposed interpretation to produce an unreasonable outcome. That is certainly not determinative of the question of construction as the extract from the judgment of Lord Reed in *Schuler v Wickman* in paragraph 206.iii) makes clear. However, it does raise the question whether the words of the 1994 Lease would indicate clearly to its audience that this unreasonable result was the true effect of the 1994 Lease.

219. Both sides referred to evidence as to understandings as to Landlord's Commission in 1994 in support of their positions. The Landlord submitted that the expert evidence established that the parties could be taken to have understood in 1994 that Landlord's Commission was "part of the commercial landscape". For its part, the Tenant argued that the 1994 Lease was addressed to the Tenant (as it set out a payment obligation of the Tenant) and that in 1994, no reasonable Tenant could be taken to understand that the Landlord would be able to obtain Landlord's Commission and also charge that to the Tenant as a component of insurance rent.

220. I do not consider that either party's submissions on this issue advanced the debate greatly. I do not accept that the "audience" for Clause 3.6.1(a) was the Tenant only, or that that clause was "addressed to" the Tenant only. Both the Landlord and the Tenant were the audience since the Tenant needed to know what it had to pay and the Landlord (and Superior Landlord) needed to know how much they were entitled to charge.

221. However, as I have explained in paragraph 56, I do not accept either the Landlord's submission that the parties would have understood Landlord's Commission to be a feature of the landscape in 1994.

222. The Landlord submits that a construction of Clause 3.6.1(a) that carved out Landlord's Commission cannot have been objectively intended because it would be unworkable. It

argues that, on the Tenant's proposed construction, it would be necessary to interrogate insurers' underwriting models in order to discern the technical rate on which the premium was based. That, the Landlord submits, would be completely impracticable given that insurers' underwriting engines and models would be inaccessible and complicated. Even if it were possible to obtain this information, it would then be necessary to address further difficult questions such as how much, if any, "permissible" brokers' commission was added when deriving the final underwriting rate, as distinct from "impermissible" commission.

223. I do not accept that submission. The indications of meaning that I have summarised in paragraph 213 simply require that only sums that represent an actual cost to the Superior Landlord (as distinct from sums that the Superior Landlord has volunteered to pay on the basis that it expects to have them rebated) which has been incurred to keep the Centre insured can be recovered under Clause 3.6.1(a). The Superior Landlord knows what it is paying and how much of that is to be rebated. It will know the detail of its negotiations with its insurers. No engagement with insurers' underwriting models, or its commercial relationships with brokers is necessary to give effect to an interpretation that would preclude the Landlord from charging an insurance premium that corresponds to Landlord's Commission.

224. Thus far in my analysis, I have referred extensively to the Superior Landlord even though it is common ground that, when construing the 1994 Lease, any reference to the "Superior Landlord" needs to be read as a reference to the "Landlord" (see paragraph 191 above). I do so in order to address an overarching argument by the Landlord to the effect that, in 1994, the "Superior Landlord" and the "Landlord" were different persons. Therefore, as matters stood in 1994 it was the Superior Landlord (rather than the Landlord) who had control over insurance at the Centre, as demonstrated by the fact that Clause 4.3 of the 1994 Lease required the Landlord to procure that the Superior Landlord arranged insurance, rather than obliging the Landlord to arrange insurance itself.

225. The Landlord relied on that state of affairs primarily in support of its arguments against the two implied terms for which the Tenant argued (see paragraphs 267 to 268 below). However, for completeness I do not consider that this factual state of affairs in 1994

sheds much light on the construction of Clause 3.6.1(a). As I have noted, by Clause 1.2.2.2 of the 1994 Lease, the parties expressly dealt with what should happen if the Landlord acquired the freehold reversion. The trigger event specified in Clause 1.2.2.2 took place and the result was that all references to "Superior Landlord" should be treated as references to Landlord. The analysis of Clause 3.6.1(a) that I have set out above remains valid once references to "Superior Landlord" are read in that way.

226. The Tenant has referred to a number of other judgments dealing with provisions requiring tenants to defray costs incurred by landlords. I was also referred to *Swain v Law Society* [1983] 1 AC 598 whose facts were not dissimilar to the facts of this case, since it concerned the question whether the Law Society was entitled to retain commission it earned on placing a "master insurance policy" the premiums for which were recharged to individual solicitors. However, ultimately I have derived little assistance from these authorities which were concerned with the wording of different contracts entered into in different factual matrices. *Swain v Law Society* was decided not as a question of contractual interpretation but by reference to the Law Society's public duties and functions. Perhaps revealingly, neither side devoted much attention to the various authorities in their oral submissions.

227. I conclude that the part of an insurance premium that corresponded to Landlord's Commission in the years from, and including, 2015/16 to, and including 2021/22 was not an amount "payable … by way of premium for keeping the Centre insured" for the purposes of Clause 3.6.1(a).

228. The Landlord does not argue that the 35% Fee was an amount "payable … by way of premium for keeping the Centre insured" since it accepts, in the light of the expert evidence, that the 35% Fee was not a "premium".

Clauses 3.6.1(b) to (e)

229. Clauses 3.6.1(b), (c) and (e) all use similar formulations permitting the Superior Landlord to assess amount as being "payable … by way of premium for [insuring against specified risks]". Those provisions should be construed in the same way as Clause 3.6.1(a) with the result that amounts corresponding to Landlord's Commission do not fall within their scope either.

230. Clause 3.6.1(d) is phrased somewhat differently in that it does not contain the concept of a sum being paid by way of premium "for" insuring against a particular risk. The Tenant addressed no argument on this aspect of Clause 3.6.1(d) and I conclude that it has not established that any particular sums paid fall outside the scope of Clause 3.6.1(d). It is unclear to me whether this conclusion matters since none of the certificates of insurance relating to the Cinema that I was shown referenced the risk specified in Clause 3.6.1(d).

Effect of this interpretation of the main body of Clause 3.6.1(a)

231. The obligation in Clause 3.6.1(a) requires the Tenant to pay the amount the Landlord "assessed" to be the relevant amount. Clause 3.6.1(a) does not state expressly that the Landlord's assessment is to be conclusive, by contrast with the first part of the clause

that provides for the Landlord's determination of the "proportion" to be conclusive "save in the case of manifest error". The Landlord does not argue in this case that the Landlord's "assessment" of the amount payable by way of premium for keeping the Centre insured is determinative: the Landlord accepts that the Tenant can challenge its assessment with its point in the present proceedings being that the Tenant is bringing its challenge in the wrong way.

232. A fine question of interpretation could arise, similar to that arising in *Sara & Hossein Holdings Ltd v Blacks Outdoor Retail* Ltd [2023], as to whether the Tenant was obliged to make a payment of the amount the Landlord assessed even if it retained the right to dispute the contractual liability for that payment. I do not consider that question needs to be determined since, by contrast with the position in *Sara & Hossein Holdings Ltd*, I am not concerned with whether the Landlord could obtain summary judgment for a demand that the Tenant pay the amount it "assessed". Indeed, in answer to one of my questions, Mr Trompeter KC seemed disposed to accept that if there was a genuine dispute as to whether a particular sum was properly comprised in the Landlord's "assessment" under Clause 3.6.1(a), the Tenant could not be compelled to pay that sum and that even if a statutory demand were made for that sum, it could not form the basis of a successful winding-up petition. I will not, therefore, conclude that the Tenant had an unfettered obligation to pay the amount comprised in a demand within Clause 3.6.1(a). Even if it did, it would be open to the Tenant to argue that any sum paid pursuant to Clause 3.6.1(a) was not contractually due to the extent it corresponded to Landlord's Commission.

233. There is no express term dealing with the situation where an amount comprised in an "assessment" under Clause 3.6.1(a) is later shown not to be contractually due. As will be seen, the Landlord argues that a restitutionary remedy should not be available because payment was made under a contract that was, at the time, valid and subsisting. The Landlord therefore suggested that the Tenant should have brought its claim for repayment of the Landlord's Commission element as a claim for breach of an implied term of the Lease, but the Landlord does not positively assert the existence of any implied term. For its part, the Tenant also does not positively assert that there is any implied term dealing with the situation. I can only determine this case on the basis of the parties' pleadings. Since neither party asserts that there is a relevant implied term that requires the Landlord to repay sums received under Clause 3.6.1 that are in excess of its contractual entitlement, I conclude that there is no such implied term.

The tailpiece to Clause 3.6.1(a)

234. The 1994 Lease as a whole is drafted in a somewhat inaccessible style, perhaps reflecting the fact that it is now over 30 years old. Clause 3.6.1(a) is a long paragraph, unbroken by

punctuation. By the "tailpiece" to Clause 3.6.1(a), I mean the phrase beginning with "together with the amount of fees and expenses…".

235. The Landlord glosses this phrase as providing that the Landlord is entitled to receive the amount calculated as summarised in paragraph 207 "together with the amount of any fees and expenses … otherwise relating to the insurances referred to in this Lease".

236. I do not, however, accept this interpretation. The words omitted in the summary quoted in paragraph 235 matter. Once all the words in the tailpiece are read together, I conclude that the tailpiece is concerned with fees and expenses "incurred in obtaining valuation and advice". That "valuation" (probably intended to read as "valuations") and advice can relate to either (i) the appropriate level of insurance cover for the demised premises or loss of rent or (ii) the insurances referred to in the 1994 Lease. However, to be covered by the tailpiece, the fee or expense in question must be incurred in obtaining "valuation and advice".

237. I acknowledge that, given the absence of punctuation, it is possible to read the tailpiece as covering (i) fees and expenses incurred in obtaining valuation and advice in relation to the appropriate level of insurance cover and (ii) fees and expenses otherwise relating to the insurances referred to in the Lease. However, I consider this reading not to be the better one. The main body of Clause 3.6.1(a) sets out prescriptive provisions for determining how much the Tenant has to pay in connection with insurance for the Centre. A reasonable reader of the 1994 Lease would not consider that those restrictive provisions could be side-stepped simply by the Landlord establishing that a particular sum was expended (and so was an "expense") relating to the insurances referred to in the Lease. That interpretation would mean that the tailpiece of Clause 3.6.1(a) would, for example, cover the insurance premium itself and so overlap with the main body of Clause 3.6.1(a).

238. The better interpretation is that the tailpiece is dealing with matters additional to those dealt with in the main body of the clause (i.e. fees and expenses for obtaining valuations and other advice) that would not naturally be covered by the concept of "premium".

    Even if the alternative interpretation set out in paragraph 237 is the correct one, I would conclude that the "fees and expenses" in question must be different in nature from the sums dealt with by the prescriptive provisions in the main body of Clause 3.6.1(a). The amount of insurance premium that corresponded to Landlord's Commission is not, therefore, covered by the tailpiece to Clause 3.6.1(a).

239. The 35% Fee is not covered by the tailpiece to Clause 3.6.1(a) either since it is not charged for "valuation and advice". Even on the alternative interpretation set out in

paragraph 237, I do not consider the 35% Fee to be a "fee or expense" relating to the insurances referred to in the 1994 Lease since it was an entirely arbitrary sum that was determined to provide the Landlord with a desired amount of cash rather than following any determination of costs or expenses that the Landlord incurred in connection with insurance. Given the Landlord's acceptance summarised in paragraph 228, it follows that I have been shown no contractual basis on which the Landlord is entitled to recover the 35% Fee and I conclude that there is none. **Points of construction on the Sprinkler Issue**

240. On my findings:

i) Between around April 2015 and some point between February and June 2020, there was no functioning sprinkler system at the part of the Centre that was to become the Hotel.

ii) Between around April 2016 and June 2018 there was no way of pumping water through the Landlord's Pipework since there was no pump in the basement that worked. Accordingly, between those dates none of the tenanted units or common parts had any sprinkler protection either.

iii) Between June 2018 and October 2019, the sprinkler protection that the Landlord supplied through the Landlord's Pipework to tenanted units failed to comply with the applicable "OH4" standard.

iv) It is possible that compliance with the OH4 standard was achieved in October 2019, but I am unable to make a finding to that effect since there is no evidence that the works described in paragraph 72 were ever performed to achieve compliance with that standard.

v) These problems with sprinklers had some effect on the premium paid for Property Owners' Insurance at the Centre in the insurance years 2017/18, 2018/19, 2019/20 and 2020/21, but had no effect in 2015/16 or 2016/17.

241. The Landlord acknowledges the possibility that it was in breach of its obligation under Clause 4.2.7 of the 1994 Lease to provide the Services in the 2015/16 and 2016/17 insurance years. However, it submits that by the time any problems with the sprinklers could have affected premiums, in 2017/2018, "reinstatement had taken over" and that, in the insurance years 2017/18, 2018/19 and 2019/20, it was complying with its obligations under the 1994 Lease by renewing pipework and pumps at the Centre. This argument raises some questions as to the proper construction of Clause 4.2.7 as well as the related question of whether the Landlord was in breach of that clause once properly construed.

242. By Clause 4.2.7 of the 1994 Lease, the Landlord's obligations included "maintenance operation inspection repair overall replacement and renewal" of the sprinkler system.

243. The Landlord certainly performed some activities of this nature between 2017/18 and 2020/21. For example, it obtained a new diesel pump in January 2017 (an act of "renewal"). After some delays that have not been satisfactorily explained, that pump was installed in August 2017. Further acts of "renewal" and "maintenance" were performed leading to the electric pump becoming operational by June 2018 so that (after over two years) water could finally be pumped as far as the tenants' units. Similarly, over time, as the construction of the Hotel progressed, pipework would have been reinstalled so that, some time between February and June 2020, the Hotel had a functioning sprinkler system.

244. However, as a matter of construction, the Landlord was obliged also to operate firefighting equipment. The focus on the acts of reinstatement that were ongoing overlooks the fact that throughout 2017/18, 2018/19 and 2019/20 there simply was no operative sprinkler system in the part of the Centre that was to constitute the Hotel. In oral submissions on behalf of the Landlord, Mr Trompeter KC argued that the absence of sprinkler coverage was "part and parcel of the overhaul [or] the renewing."

245. I do not accept that. There was no sprinkler system at the Hotel for nearly five years because the Landlord stripped out necessary pipework in the course of works to build the Hotel. For those years, the Landlord "operated" no sprinkler system at the Hotel because the construction works were ongoing. It was not repairs, or overhaul of the sprinkler system that rendered it inoperative; it was the construction of the Hotel.

246. Clause 5.4.1 of the 1994 Lease has a bearing on this issue. It is also written in a long paragraph with no punctuation, but towards the middle of the paragraph it is made clear that any "interruption" of services "by reason of any necessary inspection overhaul repair or maintenance" does not lead to liability on the part of the Landlord or Superior Landlord. The purpose of this clause is straightforward. It is in the nature of things that machinery needs to be inspected, overhauled, repaired and maintained. While this is happening, the machinery might not work as usual and the Landlord should not be liable for resulting "interruptions".

247. I acknowledge that, once the Hotel was built, the pipes stripped out in April 2015 would be replaced. However, in my judgment it would be a misuse of language to describe the works of construction of the Hotel as constituting an overhaul, repair or maintenance of the sprinkler system. The construction of the Hotel had a rationale that stood entirely separate from the sprinkler system and pipework and involved much more work than just work on sprinkler pipes.

248. In a highly literal sense, the non-availability of sprinklers in the Hotel while the Landlord's Works were ongoing can be described as an "interruption" since after five years, the sprinkler system was restored. However, Clause 5.4.1 is concerned with a specific kind of "interruption" namely an interruption that is consequent on "inspection, overhaul, repair and maintenance" and the Landlord's Works do not answer to that definition. Clause 5.4.1 is not, therefore, engaged.

249. I conclude that there was, therefore, a breach of Clause 4.2.7 in all insurance years from, and including, 2014/15 to, and including, 2019/20 because the sprinkler system at the Centre was not operative in those years. That breach had no effect on premiums in 2015/16 and 2016/17. There was no further breach in 2020/21. However, as I have concluded, the breaches in earlier years affected the insurance premium payable for 2020/21.

Points of construction relevant to the Excess Issue

250. Clause 4.3 of the 1994 Lease required the Landlord to "procure that the Superior Landlord keeps the Centre … insured … in the full cost of reinstatement against loss or damage by the Insured Risks". Clause 3.6.1(a) used a similar formulation: the Tenant's obligation to pay the component of insurance rent relating to Property Owners' Insurance feeds off an assessment of the amount payable by way of premium "for keeping the Centre insured for an amount … necessary to cover the full costs of rebuilding or reinstating the Centre against loss or damage by the Insured Risks". The Tenant's complaint leading to the Excess Issue is that, because of the excess and coinsurance clauses, the Landlord did not obtain cover for that "full cost". In those circumstances, the Tenant argues that Clause 3.6.1(a) does not oblige it to contribute to the cost of Property Owners' Insurance at the Centre at all.

251. In my judgment, it is necessary to deal separately with Clause 4.3 and Clause 3.6.1(a). Clause 4.3 sets out the Landlord's obligation. Clause 3.6.1(a) explains how much the Landlord is entitled to charge the Tenant.

252. Both sides' positions on Clause 4.3 have difficulties. The Landlord submits that whether it obtained cover for the "full cost of reinstatement" can be answered simply by looking at the certificate of insurance and verifying that the amount insured is sufficient. That approach risks focusing on form rather than substance as the figure shown on the certificate of insurance may not show the whole story. For example, even if the certificate of insurance showed cover for up to £100m and that was an adequate figure, the Landlord will effectively have no insurance if the insurers imposed a 100% coinsurance clause or a £100m excess.

253. The Tenant's position has similar difficulties. On the Tenant's approach, a £5,000 excess imposed in connection with an insurance policy providing cover up to £100m would fail to satisfy Clause 4.3. In oral submissions on behalf of the Tenant, Mr Seitler KC argued that, in practice no-one would be likely to sue if the policy just provided for a small excess (and indeed the Tenant itself takes no issue with the policy for 2015/16 and 2016/17 which provided for excesses of £100 for some perils and £1000 for others). However, I do not consider that answers the point. Even with small excesses, a tenant might have every incentive to sue, on a technicality, if it thought it would be able to recover significant insurance rent paid.

254. On balance, I prefer the Landlord's submissions on Clause 4.3. Construing the term as the Landlord suggests does give rise to the issues identified in paragraph 252. However, large excesses and co-insurance clauses of the kind described in that paragraph are rare. Indeed, both experts were agreed that even the 10% co-insurance clause and £1 million excess imposed in connection with claims at the Centre were rare. Therefore, on balance I consider that a reasonable reader of the 1994 Lease in 1994 would conclude that, in practice, a test that focused on the amount of cover as stated on a certificate of insurance would be adequate since it would deal with most cases and the risk of excesses, or co-insurance clauses, sufficiently high to create a problem could be discounted as unlikely. Since it is not suggested that the amount of insurance purchased against Insured Risks was insufficient and the complaint is limited to the effect of the coinsurance clause and excess, I conclude that the Landlord was not in breach of Clause 4.3.

255. In my judgment, Clause 5.6 provides a further reason that supports that conclusion. The excess and co-insurance clauses for the relevant years can fairly be described as "conditions or limitations". The Tenant objects that there is no evidence to demonstrate

that the Landlord "considered it reasonable to accept" them. However, I disagree. The excesses and co-insurance clauses demanded were highly abnormal, as both experts agree. The Landlord was a sophisticated buyer of insurance and was advised throughout by skilled and reputable insurance brokers. If it was "unreasonable" for the Landlord to accept those clauses, it would not have done so: it would simply have gone elsewhere for its insurance cover. The fact that the Landlord accepted these onerous clauses demonstrates that the Landlord considered it had little choice. Since it clearly needed cover for both the Portfolio and the Centre, I am prepared to infer that it was reasonable for the Landlord to accept those terms.

256. The Landlord was not, therefore, in breach of Clause 4.3. The clear purpose of Clause 3.6.1(a) is to enable the Landlord to pass on to the Tenant the cost of obtaining the insurance required by Clause 4.3. In my judgment, the analysis above applies mutatis

mutandis for the purposes of Clause 3.6.1(a) and the Landlord was not precluded from charging the Tenant insurance rent in relation to the insurance policy for the Centre that it had procured.

257. The Tenant argues that this analysis breaches the principle set out in the speech of Lord Jauncey in *Alghussein Establishment v Eton College* [1988] 1 WLR 588, at 594C-D, to the effect that:

> the clear theme running through (the authorities) was that no man can take advantage of his own wrong. … A party who seeks to obtain a benefit under a continuing contract on account of his breach is just as much taking advantage of his own wrong as is a party who relies on his breach to avoid a contract and thereby escape his obligations.

258. The "own wrong" from which the Tenant considers the Landlord is profiting is the Landlord's breach of Clause 4.2.7 of the 1994 Lease. However, I consider that analysis to suffer from two flaws.

259. The "clear theme" referred to in the quoted extract from *Eton College* is a principle of contractual interpretation which could also be expressed as an articulation of an implied term. Whichever formulation of the principle is applied, I do not consider it to be engaged. Whether or not the Landlord breaches the provision of Clause 4.2.7 of the 1994 Lease, its contractual entitlement under Clause 3.6.1(a) is the same: namely to charge insurance rent by reference to the premium payable for keeping the Centre insured for an amount "necessary to cover the full cost of rebuilding or reinstating the Centre…". I have explained why I consider that concept is engaged even where the Landlord obtains a policy that requires a significant excess. That analysis applies whether or not the Landlord is in breach of Clause 4.2.7.

260. In any event, I do not consider that the Landlord is "taking advantage of [its] own wrong" in charging the Tenant an insurance rent under Clause 3.6.1(a) even if it is in breach of Clause 4.2.7. As a consequence of the Landlord's breach of Clause 4.2.7, combined with other failures of risk management that involved no breach of contract, insurers required a significant excess under the Block Policy for losses at the Centre. Far from providing the Landlord with an "advantage", that operated to the Landlord's disadvantage since it would be required to fund repairs at the Centre itself without being able to look to insurance proceeds, or tenants of the Centre for a contribution. It would be the Tenant who obtained a disproportionate advantage if it were relieved of any obligation to contribute to the cost of insurance for the Centre since it would obtain some insurance protection for truly significant losses above the excess but would not be obliged to pay anything for it.

261. I reject the construction of the 1994 Lease on which the Tenant's case on the Excess Issue relies.

PART E – IMPLICATION OF TERMS

262. In support of its case on the Premium Issue, the Tenant argues that two terms should be implied into the 1994 Lease:

    i) The "**Havenridge Implied Term**", so-called because of its similarity to an implied term contended for in the case of *Havenridge Ltd v Boston Dyers Ltd* [1994] 2 EGLR 73 (***Havenridge***) to the effect that:

> The Landlord was only entitled to demand sums by way of insurance to the extent that such sums were representative of the market rate and as reflects insurance contracts negotiated at arm's length and in the ordinary course of business.

    ii) A "**Braganza Implied Term**" (so-called because it is inspired by the judgment in *Braganza v BP Shipping Ltd* [2015] 1 WLR 1661) that imposes limits, engaging concepts of reasonableness, rationality and good faith in relation to what is described as the Landlord's "discretion in selecting which insurance policy to purchase from which insurance company".

263. The Tenant's primary case in relation to the Premium Issue was put as a claim for restitution (see Part G below). That case was based on the construction of express terms in the 1994 Lease and did not depend on the existence of either implied term alleged. Accordingly, I do not need to consider the existence or otherwise of the implied terms in order to dispose of this case. I will, however, express some conclusions on the implied terms but will seek to do so briefly. Moreover, I will approach my analysis of the implied terms on the footing (the **Contrary Interpretation**) that I am wrong in my conclusions about the construction of the express terms of the 1994 Lease since it is only in that case that the existence or otherwise of the implied terms would matter. Under that Contrary Interpretation, the express terms of the 1994 Lease would ostensibly entitle the Landlord to pass on the cost of an insurance premium by establishing only that it had been, or would be, payable as contractual consideration for an insurance policy covering the Centre.

Applicable principles of law

264. In his written closing submissions on behalf of the Landlord, Mr Trompeter KC provided a summary of what the Landlord considers to be the relevant principles governing the

implication of terms into a contract. The Tenant did not dispute that summary and accordingly, without purporting to give an exhaustive analysis of all the relevant authorities, I will simply apply the Landlord's suggested principles which I summarise as follows:

i) The applicable principles are set out at [51] of the judgment of Carr LJ (as she then was) in *Yoo Design Services Ltd v Iliv Realty Pte Ltd* [2021] EWCA Civ 560.

ii) I will have regard to what Lord Neuberger described as the "cardinal rule" in *Marks and Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2016] AC 742, namely that no term can be implied into a contract if that would contradict an express term.

iii) Particular care is required when considering implying terms into a sophisticated and professionally drawn agreement between well-resourced parties such as the 1994 Lease. That is because such agreements give rise to the strong inference that the express terms contain all the terms by which they have agreed to be bound (see, for example *UTB LLC v Sheffield United Ltd* [2019] EWHC 2322 (Ch)).

iv) Terms that are uncertain or unworkable will not be implied, not least since such terms will not give business efficacy to a contract and, being uncertain and unworkable, would be far from obvious.

The Havenridge Implied Term

265. I do not accept the Landlord's submission that the Havenridge Implied Term is "uncertain in scope and operation". While it might be difficult to tell, in a particular case, what a market rate is, or whether parties have transacted at arm's length, the concepts are not "uncertain". Tax law, for example, frequently requires parties to compute profits

or losses on an assumption that connected parties are transacting on arm's length terms or that a market value should be substituted for an actual contract price. In a different sphere, freezing orders routinely invite consideration of whether a particular sum was expended in the "ordinary course of business".

266. Indeed Evans LJ's judgment in *Havenridge* explains how these concepts could be applied in practice, having due regard to the fact that: (i) there can be a range of market rate insurance premiums, and so the fact that a lower premium could have been obtained does not necessarily mean that a higher premium exceeds a market rate; (ii) it follows that it is quite possible to obtain a "market rate" premium, even without shopping around for the lowest premium possible; (iii) it is possible for parties to be transacting at "arm's length", even if they do not land on a "market rate" premium. A particular

example of proposition (iii) is where people sell assets at lower than market prices to ensure a quick sale or people buy assets at higher than market prices if they are thought to have some particular value not available to others in the market.

267. The Landlord argues that the Havenridge Implied Term would contradict express provisions of the 1994 Lease. It reasons that the 1994 Lease required the Landlord only to "procure" that the Superior Landlord keeps the Centre insured against various risks. Therefore, the decision as to which insurance policy to select was, by the terms of the 1994 Lease, vested in the Superior Landlord and it would be inconsistent with the terms of the 1994 Lease for the Landlord to be subject to contractual restrictions affecting the terms of an insurance policy that it was for the Superior Landlord to select and over which the Landlord had no control.

268. That argument would have had more force had the trigger event for operation of Clause 1.2.2.2 of the 1994 Lease not occurred (see paragraph 190 above). However, as I note in paragraph 225, by that clause, the parties expressly agreed what was to happen on occurrence of that trigger event with the result that the Landlord is subject to an obligation to "procure itself" to obtain insurance. I agree with the Tenant that such an obligation is indistinguishable from an obligation on the Landlord to obtain insurance. There is no inconsistency with any express term since the effect of the Lease was that in all relevant insurance years, the Landlord was itself subject to a contractual obligation to provide insurance and the Havenridge Implied Term is perfectly capable of regulating the manner in which the Landlord complies with that obligation.

269. Ultimately, therefore, the matter has to be considered by reference to the considerations of "necessity" and "obviousness" referred to at [51] of Carr LJ's judgment in *Yoo Design*. I have concluded that on the Contrary Interpretation, there must be some limit of the kind set out in the Havenridge Implied Term to the amount of insurance rent

that the Landlord can charge. Without any such limit, the Landlord could, if it found a willing insurer, induce that insurer to inflate the premium charged with "Landlord's Commission" of £1m, £10m or whatever figure the Landlord thought it could get away with, and require the Tenant to pay absurd amounts by way of insurance rent. The officious bystander would regard it as obvious that the Landlord does not have the power to do this.

270. The Havenridge Implied Term seeks to address that by imposing three requirements: that the insurance (i) be negotiated on arm's length terms, (ii) be negotiated in the ordinary course of business and (iii) be at a market rate. It is not in my judgment necessary for all three of these requirements to imposed in order to give business efficacy to the 1994 Lease. That is because the reasonable observer would note that the

third aspect relating to "market rate" will tend to add little to the first two requirements since parties transacting at arm's length in the ordinary course of business in a functioning insurance market will tend to agree on a price within a range that can be described as a "market rate". There are some theoretical exceptions. Just as people sell property at a reduced price if they need money quickly, a landlord who needs to obtain insurance at short notice for reasons of its own may, even transacting at arm's length in the ordinary course of business, have to pay more than a "market rate" for that insurance. It is not "necessary" to limit the Landlord's ability to recover insurance rent from the Tenant if it finds itself in a circumstance such as this.

271. In addition, the second requirement relating to "ordinary course of business" adds little to the first requirement requiring "arm's length terms". In my judgment it is obvious only that the 1994 Lease required the Landlord to charge insurance rent reflective of a price agreed following an arm's length negotiation. In its usual sense, an "arm's length" negotiation involves two parties seeking a deal that is in their own commercial interests, unaffected by any subjective wish to confer a benefit on the other. In this case, however, it also includes something a little broader, and connotes an absence of any intention to confer a benefit on the Landlord at the Tenant's expense. I consider that adaptation to the familiar concept of an "arm's length" negotiation would be obvious to a reasonable observer who would note that without that adaptation, on the basis of the Contrary Interpretation, the Landlord would be free to combine with an insurer with a view to obtaining an arbitrarily large benefit entirely at the Tenant's expense by the simple expedient of inflating the premium with Landlord's Commission. A reasonable observer would not expect the Landlord to have that freedom simply because, if Landlord's Commission is added to the premium, the Landlord obtains no benefit at the insurer's expense.

272. As I have noted, an "arm's length" negotiation will often, though not invariably, produce a "market rate". The more limited formulation of the Havenridge Implied Term that I have described does not require the Landlord to "shop around" for the lowest possible price: only to deal at arm's length in the sense I have identified with the insurers it selects. I consider the limited version of the Havenridge Implied Term that I have described to be perfectly workable. The Landlord suggested otherwise, submitting that it would preclude the Landlord from obtaining insurance from a "captive" insurer within its own group. I do not accept that. As I have noted, companies in the same group frequently trade on arm's length terms with each other. Tax law and regulatory obligations often require this. Under the Havenridge Implied Term, the Landlord would be free to purchase insurance from an affiliated company that is its "captive insurer" provided that it transacted on arm's length terms.

273. The Landlord notes correctly, that there is no determinative ratio in *Havenridge* to the effect that a term should be implied into the contract at issue in that case. The Court of Appeal consisted of two Lord Justices who gave different reasons for their conclusions. Evans LJ considered that the answer to the case came either from the express terms of the lease in issue or from an implied term. Peter Gibson LJ determined the case by reference to the express terms only. However, I consider it goes too far to argue that Peter Gibson LJ rejected any possibility of a term being implied in that case. Certainly, at page 77 of the report, he said that the term which the tenant sought to imply in that case "cannot possibly satisfy the officious bystander test nor, in my opinion, is there any necessity to imply such a term". However, read in context, I consider that Peter Gibson LJ was rejecting an implied term to the effect that an insurance premium be "reasonable". In this case, the Tenant does not argue that the underlying insurance premiums be "reasonable" in amount. I do not, therefore, consider my conclusion in paragraph 271 to be inconsistent with the outcome of *Havenridge* and I conclude that the more limited version of the Havenridge Implied Term set out in that paragraph formed part of both Leases.

The Braganza Implied Term

274. The Braganza Implied Term pleaded is expressed to operate as constraining the Landlord's "discretion in selecting which insurance policy to purchase from which insurance company and/or its entitlement to demand sums by way of insurance". The Tenant expresses the relevant constraints as including (i) that the Landlord would not exercise its discretion in a way that was irrational, arbitrary or capricious (ii) that the Landlord would take into account only relevant considerations in exercising its discretion, (iii) that the Landlord would exercise its discretion in good faith, consistently

    with its contractual purpose, being to ensure that the Centre was properly insured and (iv) that the Landlord would exercise its discretion reasonably.

275. That formulation of the proposed implied term was clearly inspired by the following extract of Baroness Hale's judgment in *Braganza*:

> Contractual terms in which one party to the contract is given the power to exercise a discretion, or to form an opinion as to relevant facts, are extremely common. It is not for the courts to re-write the parties' bargain for them, still less to substitute themselves for the contractually agreed decision-maker. Nevertheless, the party who is charged with making decisions which affect the rights of both parties to the contract has a clear conflict of interest. That conflict is heightened where there is a significant imbalance of power between the contracting parties as

> there often will be in an employment contract. The courts have therefore sought to ensure that such contractual powers are not abused. They have done so by implying a term as to the manner in which such powers may be exercised, a term which may vary according to the terms of the contract and the context in which the decisionmaking power is given.

276. I agree with the Landlord's submission that the Tenant has not satisfactorily explained, or for that matter pleaded, the precise "contractual power" whose exercise the Braganza Implied Term seeks to constrain. The Tenant's position as explained in closing is that the Braganza Implied Term fastens on "anterior discretions" that had to be exercised before the Landlord could provide any "assessment", "determination" or "estimate" pursuant to Clause 3.6.1 of the Lease. As Mr Seitler KC put it in closing " … just as a matter of common sense, you don't get to having insurance in place unless you have exercised a series of choices that involve discretions to get there…". In opening, the Tenant pointed, for example, to the "discretion" as to which insurers to approach and how much Landlord's Commission to ask for.

277. The Tenant argues that it did not need to plead which "anterior discretions" it relied upon. I do not accept that. As Baroness Hale points out in the extract from *Braganza* that I have quoted, the Braganza Implied Term has to constrain the exercise of a specific contractual power. The Landlord is entitled to know in advance of the trial which specific contractual power is referred to since not infrequently there is scope for debate as to whether a provision is a "contractual discretion" of the kind that is susceptible to a *Braganza*-style implied term or an "absolute contractual right" which is not.

278. In any event, pleaded or not, I do not accept the Tenant's argument that the "anterior discretions" on which it relies are susceptible to a *Braganza*-style qualification. The 1994 Lease does not confer on the Landlord any contractual power to decide which insurers to approach, or how much Landlord's Commission to ask for. Those matters are unregulated by the 1994 Lease and are aspects of the Landlord's own business dealings. Since no term of the 1994 Lease has been pleaded that is said to regulate the way in which the Landlord should approach, and negotiate with, its own insurers, I see no good case for the Braganza Implied Term.

279. Of course, the 1994 Lease does regulate the provision of insurance for the Centre since Clause 4.3 requires the Landlord to procure that the Superior Landlord keeps the Centre insured against Insured Risks. However, that clause prescribes an outcome, the provision of insurance, as distinct from giving the Landlord power to exercise a discretion. It is no doubt because of this point that I do not understand the Tenant to argue that Clause 4.3

is itself subject to a *Braganza*-style implied term but rather "anterior discretions" that result in insurance being obtained.

280. More generally, the Braganza Implied Term could not be "necessary" or "obvious" if the Havenridge Implied Term is present since the Havenridge Implied Term would impose adequate constraints on the amount of insurance rent that could be charged. Therefore, the critical case is if the Leases contain no Havenridge Implied Term. In that case, by hypothesis, it would not be "necessary" or "obvious" that the Landlord should be constrained to obtain an insurance policy following an arm's length dealing. If that is the position, I consider it would not be "necessary" or "obvious" that the 1994 Lease should contain the kind of public law-inspired constraints on the exercise of "anterior discretions" that comprise the Braganza Implied Term.

PART F – QUESTIONS OF BREACH AND CAUSATION

281. The main way in which the Tenant frames its claim on the Premium Issue is in the law of restitution which is addressed below. Considerations of breach of contract in relation to the Premium Issue therefore arise only on the Tenant's alternative cases based on the Havenridge Implied Term and the Braganza Implied Term.

The Havenridge Implied Term

282. Although not necessary to my decision given my conclusion on the restitutionary claim, I record my conclusion that the Landlord would have been in breach of the Havenridge Implied Term. I conclude from my findings in paragraphs 121 to 123 above that dealings between the Landlord's agent, CCL, and insurers were not arm's length in the requisite sense.

283. The Landlord argued that any breach of the Havenridge Implied Term has caused the Tenant no loss because, for the 2017/18 insurance year onwards, it paid insurance rent demanded even though it considered the full amount was not due. I do not accept that. I accept the Tenant's pleaded case set out in paragraph 32.3 of the D&CC that the breach of the Havenridge Implied Term caused the Landlord to demand more insurance rent than was due. Had the Landlord complied with the Havenridge Implied Term, the Landlord would have demanded a lower sum and the Tenant would therefore have paid a lower sum.

284. I will not burden an already lengthy judgment with a detailed analysis of quantum of damages for a breach of contract that I do not need to perform given my conclusion on the claim in restitution. However, I have sought to make factual findings to enable this issue to be addressed if necessary. In particular:

i) I consider that, in a counterfactual world in which the Landlord complied with the Havenridge Implied Term, it would not have engineered the receipt of any Landlord's Commission that operated to increase the total premium payable for insurance at the Centre. Engineering a premium-increasing Landlord's Commission such as this involved the Landlord and insurers bargaining to obtain an advantage at the Tenant's expense in breach of the Havenridge Implied Term. The Landlord complains that this leaves it uncompensated for work that it did in arranging insurance for the Centre which benefited the Tenant. I do not accept that for the reasons set out in paragraph 217. The Landlord was operating in an environment in which it did not consider it was entitled to charge for that work pursuant to any other provision of the 1994 Lease. By recouping its costs (and considerably more) through Landlord's Commission the Landlord was obtaining an advantage at the Tenant's expense since it could not otherwise recover those costs.

ii) I conclude in paragraph 95 that every pound of Landlord's Commission charged in excess of commission payable to brokers in consideration for their services increased the overall insurance premium, before IPT, by a pound, rejecting the Landlord's argument based on the significance of "embedded commission".

iii) I do not consider that quantum for breach of the Havenridge Implied Term involves a contrast between the level of Landlord's Commission that the Landlord actually received and "normal" levels of such commission. However, in case I am wrong about that, I have made factual findings as to "normal" levels of Landlord's Commission in the relevant insurance years.

The Braganza Implied Term

285. I have rejected the Tenant's case for implication of the Braganza Implied Term, but have sought to make factual findings that will enable any question of breach and quantum to be determined in case I am wrong on that.

Sprinkler Issue

286. I have concluded that the Landlord was in breach of Clause 4.2.7 of the 1994 Lease in relation to the Sprinkler Issue.

287. As I have explained in paragraph 137 above, the experts were agreed that poor fire safety at the Centre as reflected in the Sprinkler Issue increased insurance premiums charged. I agree with that opinion and find that the Landlord's breach of contract increased the insurance rent for which the Tenant was liable under Clause 3.6.1(a) of the 1994 Lease in insurance years from, and including 2017/18 to, and including,

2020/21. The "increase" to which I refer in this paragraph is, accordingly, the difference between (i) the amount of insurance rent that the Tenant actually had to pay and (ii) the amount of insurance rent it would hypothetically have paid if the Landlord had complied with its obligations under the Lease.

288. Some confusion has been caused by the fact that, in seeking to estimate the amount of "increase" (of the kind referred to in paragraph 287 above), Mr Finnegan had regard to a different "increase" in premium, namely the extent to which premiums for Property Owners' Insurance at the Centre actually increased from one insurance year to the next. So, for example, at paragraph 8.12 of his expert report, Mr Finnegan concluded that (i) in 2017/18, the Property Owners' Insurance premium for the Centre increased in real terms by 18.5%, (ii) any "hardening" of the insurance market could not explain that increase, (iii) rather the increase could be attributed to two factors namely a poor claims history and fire safety issues, and (iv) half of the "increase" of 18.5% was attributable to each factor.

289. That approach prompted the Landlord to submit that, without knowing the various inputs that were entered into insurers' underwriting engines, Mr Finnegan could express no credible view as to either (i) why the premium for Property Owners' Insurance at the Centre increased from one year to the next or (ii) how much of any such increase was attributable to the Sprinkler Issue and how much to other factors that involved no breach of contract by the Landlord. Accordingly, argues the Landlord, the situation is analogous to that considered in *Government of Ceylon v Chandris* [1965] 3 All ER 48 in that any loss that the Tenant has suffered is attributable to multiple causes, one of which may consist of a Landlord's breach of contract, but others of which do not. Since the Tenant cannot explain how much of its asserted loss is attributable to the Landlord's breach of contract, it submits that the Tenant is entitled only to nominal damages.

290. I do not accept the Landlord's analysis. Mr Finnegan's approach to the quantification of loss has caused the Landlord to embark on a flawed chain of reasoning. In my judgment, the Tenant has established that it has suffered some loss that is attributable solely to the Landlord's breach of contract. That loss consists of having to pay more by way of insurance rent than would have been due if the Landlord had complied with Clause 4.2.7. Although Mr Finnegan chose to estimate that loss by considering the extent to which insurance premiums increased from one year to the next, the Tenant's loss does not consist of that kind of "increase" in premiums. The Tenant would still have suffered the loss it claims if insurance premiums fell from one year to the next since, if the Landlord had performed its contract, the premiums would have fallen by even more.

291. The Tenant is not, therefore, in the situation of the claimant in *Government of Ceylon*. Rather it is in the position summarised by Toulson LJ (as he then was) at [22] of *Parabola Investments Ltd v Browallia Cal Ltd* [2011] QB 477:

> Some claims for consequential loss are capable of being established with precision (for example, expenses incurred prior to the date of trial). Other forms of consequential loss are not capable of similarly precise calculation because they involve the attempted measurement of things which would or might have happened (or might not have happened) but for the defendant's wrongful conduct, as distinct from things which have happened. In such a situation the law does not require a claimant to perform the impossible, nor does it apply the balance of probability test to the measurement of the loss.

292. I therefore conclude that the Tenant does not need to show, on a balance of probabilities, that its determination of the amount of loss caused is correct. Rather, I consider this to be a case where I should assess damages by applying "the exercise of a sound imagination and the practice of the broad axe" in the famous words of Lord Shaw in *Watson, Laidlaw* Case 1914 SC (HL), 18.

293. Perhaps less evocatively, it is appropriate for me to follow the approach set out in the then current edition of *Chitty on Contracts* which Lord Reed approved at [38] of his judgment in *One Step (Support) Ltd v Morris Garner* [2019] AC 649:

> Where it is clear that the claimant has suffered substantial loss, but the evidence does not enable it to be precisely quantified, the court will assess damages as best it can on the available evidence.

294. I agree with the Tenant that seeking to estimate the "increase" referred to in paragraph 287 from the altogether different "increase" in insurance premiums from one year to the next is a potentially unreliable exercise. Moreover the greater the relevant differences between circumstances in one insurance year and circumstances in the later year the more unreliable the method will become since it will be correspondingly more difficult to isolate the effect of the Sprinkler Issue.

295. However, Mr Finnegan's methodology has something useful to say especially in the 2017/18 insurance year. Mr Finnegan's professional opinion is that the market conditions in 2017/18 were broadly similar to those in 2016/17. The only factors he could point to as driving the 18.5% increase in real terms net premium were: "poor claims history" and "fire safety issues". Although the Landlord criticises this approach as speculation, I consider Mr Finnegan's professional judgment in this regard to be of

assistance, particularly given that Mr Purvis has not been able to provide any assistance as to the effect of the Sprinkler Issue on premiums. In principle, I consider that an application of the "broad axe" could involve a somewhat rough and ready apportionment between the factors that Mr Finnegan identifies.

296. However, there is a problem with Mr Finnegan's methodology. The Landlord rightly observes that, even though the Landlord was in breach of its obligations in relation to sprinklers, not all "fire safety issues" involved a breach of contract. The experts agree that "continued disconnection of the sprinkler system and a failure to operate a fire alarm system for an extended period increased the premiums charged." However, the Tenant has not pursued in closing any claim that failure to operate a fire alarm system involved a breach of contract, focusing its case on the Sprinkler Issue. I therefore consider it appropriate to refine Mr Finnegan's methodology by assuming that there were three operative causes of the premium increase namely (i) "poor claims history", (ii) the Sprinkler Issue and (iii) "fire safety issues other than the Sprinkler Issues". I would then attribute the 18.5% increase in premium equally to all of those factors (so that each resulted in an increase in premium of 6.163%).

297. Since I concluded that there were no fire safety concerns in 2016/17, and since I accept Mr Finnegan's opinion that market conditions in 2016/17 were broadly the same as in 2017/18, the above approach suggests a determination of the 2017/18 premium for the Centre that is attributable to the Sprinkler Issue. That element can then be expressed as a percentage of the total premium to establish the percentage of total premium that was payable in 2017/18 because of the Sprinkler Issue (the **Sprinkler Issue Percentage**).

298. I would then simply assume that the Sprinkler Issue Percentage in 2018/19, 2019/20 and 2020/21 is the same as that for 2017/18. In my judgment, that is a more reliable approach than that applied by Mr Finnegan since it is grounded in just two insurance years (2016/17 and 2017/18) in which Mr Finnegan was of the view that insurance conditions were similar. It therefore avoids the need to make largely impressionistic comparisons between the circumstances applicable in multiple different insurance years whose circumstances were different. In addition, although Mr Finnegan's task was difficult, I agree with the Landlord that Mr Finnegan has not shown a secure basis for his conclusions that the two 27% "increases in premium" in 2018/19 and 2019/20 were driven by "fire safety" issues.

299. I also regard the use of a single Sprinkler Issue Percentage across all relevant insurance years as consistent with the evidence I saw. The logic of Mr Finnegan's approach was that insurers perceived the risk posed by sprinkler issues as ever increasing. I do not accept that. Rather, I conclude that, concerned as they were by fire safety issues,

insurers perceived the proportion of total risk driven by Sprinkler Issues to be more or less the same from one insurance year to another.

300. I therefore, consider the approach I have outlined involving the Sprinkler Issue Percentage to build on the most secure aspect of Mr Finnegan's estimate while not adopting those elements that were insecure. When calculating damages, no deduction is appropriate for alleged contributory negligence consisting of the Tenant's failure to maintain its own sprinkler system given my factual conclusions in paragraph 153. Some care will need to be taken to avoid a double count with Landlord's Commission featuring both in the restitutionary claim considered in Part G below and as damages for breach of contract in relation to the Sprinkler Issue.

PART G – THE CLAIMS IN RESTITUTION

Preliminaries

301. Given my conclusion on the proper construction of Clauses 3.6.1(a), (b), (c) and (e), it has established that the insurance rent paid that corresponds to Landlord's Commission on those categories of insurance was simply not contractually due. It has also established that the Landlord was not contractually entitled to receive the 35% Fee. The Tenant invokes the law of restitution as its primary route to recover what it characterises as an "overpayment".

302. The Tenant makes a similar argument in relation to the Excess Issue. However, that argument fails since I have rejected the construction of the 1994 Lease on which the Tenant relies. Accordingly, this Part is concerned only with the claim in restitution in relation to the Premium Issue and the 35% Fee.

A threshold question

303. The Landlord raises a threshold objection to the effect that, because the Tenant made its payments pursuant to a valid and subsisting contract, it could have no restitutionary remedy. The Landlord relies on the judgment of the Supreme Court in *Barton v Morris* [2023] AC 684 reasoning that (i) the Tenant's payment obligations were dealt with in a contract that was valid and subsisting at the time even if the 1994 Lease was later forfeited, (ii) the Tenant was not asserting that the 1994 Lease made any provision as to what was to happen if it paid insurance rent in excess of its contractual liability, (iii) therefore the 1994 Lease should be taken as affording no contractual remedy in that situation and accordingly (iv) to give the Tenant a restitutionary remedy would be to "expand the law of restitution to redistribute risks for which provision has been made under an applicable contract" in the words of Lord Goff in *Pan Ocean Shipping Co Ltd v Creditcorp Ltd (The Trident Beauty)* [1994] 1 WLR 161 at p166D.

304. In *Barton v Morris*, Lord Leggatt dissented in the result, but agreed with the majority on the issue of restitution. At [191] to [193] of his judgment, Lord Leggatt explained that the existence of a contract can preclude a claim based on unjust enrichment. The obstacle to a restitutionary remedy does not arise simply because the parties to the dispute have entered into a contract. Rather, a closer analysis is required with Lord Leggatt explaining the rationale of that analysis as follows:

> Nevertheless, there is also another broader reason why the existence of a contract precludes a claim based on the law of unjust enrichment. This is that there already exists a system of law for determining what rights and remedies contracting parties have in relation to the subject matter of their contract. It is called the law of contract. In relation to the subject matter of the contract, the law of contract determines, and governs the consequences of, not only the existence but also the absence of an obligation on one contracting party to confer a benefit on the other. To redistribute the allocation of benefits and losses provided for by the law of contract by applying another set of legal principles would undercut this regime.

305. In *The Trident Beauty*, a shipowner and charterer agreed terms on which all or part of an instalment of charter hire would become repayable, or set off against future payments of charter hire, because the vessel in question had been off hire. The term in question might be either express or implied but it dealt with the issue. Since the contract dealt with the issue, there was no room for a restitutionary claim by a charterer for repayment of charter hire on the grounds that the vessel was off hire for a period, even

    if that claim was brought against an assignee of the shipowner's debt rather than against the original contracting party.

306. *The Trident Beauty* was a case where the contract dealt with the situation in terms. By contrast, in *Barton v Morris* the contract in question provided for an estate agent to receive £1.2m in commission if a property was sold for at least £6.5m. The contract said nothing about what was to happen if the property sold for less than that. However, by its very silence, the contract dealt with that situation. As Lady Rose held at [96], the very fact that the parties had made no provision for that scenario demonstrated an intention that the agent should obtain nothing if the property sold for less than £6.5m. Accordingly, to give the estate agent a restitutionary remedy when the property sold for £6m would be to cut across the risk allocation in the contract.

307. The Landlord seeks to extrapolate from that a principle that, since the 1994 Lease makes no provision for the return of amounts wrongly demanded pursuant to Clause 3.6.1(a),

to provide a restitutionary remedy would similarly "cut across" the risk allocation. I do not accept that. An important function of Clause 3.6.1(a) was to delineate between amounts that are contractually due and those that are not, yet on the Landlord's approach, having drawn that line, there is no difference between sums that are contractually due and sums that are not, with the Landlord being entitled to retain both categories of sum. The Landlord is in effect arguing that the 1994 Lease manifested an intention for it to be entitled to retain sums that are not contractually due to it. I do not accept that is the effect or intention of the 1994 Lease. I reject the proposition that to provide a restitutionary remedy would be to undercut the risk allocation in the 1994 Lease. On the contrary, it supports that risk allocation by providing a means for the Landlord to retain only amounts to which it is entitled under the 1994 Lease.

The Premium Issue – Restitution

308. The parties agree that, per Lord Clarke at [18] of *Bank of Cyprus UK Ltd v Menelaou* [2016] AC 176 the Tenant will be entitled to restitution if it can show that:

i) the Landlord was enriched; ii) that enrichment was at the Tenant's expense; and iii) the circumstances are such that the law regards the enrichment as unjust.

Enrichment at the Tenant's expense: years other than 2015/16

309. The 2015/16 insurance year gives rise to particular issues and the question of "enrichment at the Tenant's expense" is considered separately in relation to that year below.

310. The Landlord argues that, in other insurance years, given the cashflows described in paragraph 130 above, any overpayment of insurance rent was used to defray CCL's liability to pay the premium under the Block Policy. Accordingly, it argues that any enrichment was of CCL rather than the Landlord.

311. I do not accept that analysis. The Tenant's contractual obligation was to pay insurance rent to the Landlord. The Tenant discharged that obligation, and also paid additional sums that were not contractually due, by making payments to Orbit in its capacity as the Landlord's agent. Receipt of those payments by Orbit therefore counted as a receipt by the Landlord itself for the purposes of the Tenant's claim in restitution (see [48] of the judgment of Lord Reed in *Investment Trust Companies v Revenue and Customs Commissioners* [2018] AC 275). Those receipts were clearly at the expense of the Tenant.

Once the Landlord's agent had received the money, it was up to the Landlord how to direct its agent to deal with that money. The Landlord may well have directed Orbit to pay money to CCL, or to brokers, in order to discharge the Landlord's obligation to CCL to pay its pro rata share of the insurance premium for the Block Policy. However, that would still represent a dealing by the Landlord with its own money, to discharge its own obligation. Moreover, as I conclude in paragraph 130, ultimately the Landlord benefited from its pro rata share of Landlord's Commission.

312. The Landlord characterises the extent of the enrichment as being "the Landlord's Commission actually paid to Criterion including IPT". I have heard no argument on the IPT element of this formulation, but I do not fully understand it. There is no IPT on "Landlord's Commission": rather IPT is payable on the gross premium that CCL paid to obtain cover under the Block Policy. It seems to me likely that the Landlord was "enriched" simply by (i) the total Landlord's Commission that it received and (ii) the 35% Fee. If that proposition is controversial, I will hear further submissions on it before finalising the order giving effect to this judgment.

Enrichment at the Tenant's expense: 2015/16

313. The following context in which the issue for the 2015/16 insurance year arises is common ground:

i) Because of the age of the 1994 Lease, the provisions of sections 141 and 142 of the Law of Property Act 1925 (**LPA 1925**) applied at the time of the transactions described below.

ii) On 16 July 2015, LTL transferred the freehold of the Centre to the Landlord. LTL and the Landlord were, and remain, members of the same group of companies.

iii) The Landlord was not registered as proprietor until 20 August 2015. Therefore, until then the transfer took effect in equity only.

iv) The Tenant was invoiced for the insurance rent for the 2015/16 insurance year on 30 June 2015. At that point, LTL was the Tenant's landlord. To the extent that invoicing for an "excessive" amount of insurance rent involved any breach of the 1994 Lease, only LTL, and not the Landlord, is liable for the resulting breach of contract by virtue of s142 of LPA 1925.

v) The Tenant paid the invoice for the 2015/16 insurance year on 27 July 2015 during the "registration gap" between LTL transferring the freehold and the Landlord becoming registered proprietor.

vi) The Tenant made the payment to Orbit.

vii) By 27 July 2015, when the Tenant paid the insurance rent, LTL had not given any formal notice to the Tenant that the freehold interest had been assigned.

314. The Tenant argues that it can be inferred that Orbit received the insurance rent on 27 July 2015 as agent for the Landlord so that the Landlord has been unjustly enriched by that receipt.

315. The Landlord argues that that inference is not available. It reasons that:

i) By s141(2) of LPA 1925, the insurance rent is to be treated as received by "the person from time to time entitled, subject to the term, to the income … of the land leased".

ii) The judgment of Carnwath LJ (as he then was) in *Scribes West Ltd v Relsa Anstalt and others* (No 3) [2005] 1 WLR 1847 demonstrates that the Landlord only became so entitled once notice was given to the Tenant requiring it to pay rent to the Landlord rather than LTL.

316. Orbit obviously received the money on 27 July 2015 as agent for either LTL or the Landlord, since on no view did the insurance rent paid belong beneficially to Orbit. I

agree with the Tenant that it is important to determine whether Orbit held that payment as agent for LTL or the Landlord.

317. There is an evidential vacuum in relation to this issue because the Criterion Group has not disclosed contemporaneous documents in relation to the transfer in 2015, no doubt because it could not locate them. However, there is a strong inference that Orbit held the money as agent for the Landlord for the following reasons:

i) An insurance certificate relating to the Centre for the 2015/16 insurance year records the "Insured" as LTL and the cover as expiring on 6 July 2016. I infer, therefore, that the insurance commenced on 7 July 2015 (since all insurance at issue in this case has been for a calendar year) and that, accordingly on 7 July 2015 LTL had either paid, or was subject to a liability to pay the insurance premium for the Centre.

ii) As between LTL and the Landlord, the person with the economic liability to pay the insurance premium for the Centre must have been entitled to the insurance rent received from tenants of the Centre. It would make no sense, for example, for

LTL to have funded the insurance premium, but the Landlord to be entitled to the insurance rent (or vice versa).

iii) That leaves two possibilities. Either LTL retained the economic liability to pay the insurance premium and retained entitlement to insurance rent received from tenants, or the Landlord took over the liability to pay the insurance premium and agreed with LTL that the Landlord should benefit from the insurance rent.

iv) It would make little sense for the Landlord to own the freehold of the Centre, but LTL to be the insured. I therefore infer that by some mechanism or other, whether it be an assignment of the insurance policy or a trust arrangement, LTL and the Landlord arranged that the Landlord should have the benefit of that policy.

v) It would not make sense for the Landlord to have the benefit of the insurance policy unless it reimbursed LTL for any premium paid or took over liability to pay the premium to the extent it remained unpaid. I therefore infer that the Landlord, rather than LTL took over the economic cost of the premium.

vi) Accordingly, I infer that, the Landlord and LTL agreed, as between themselves that the Landlord should be entitled to the benefit of insurance rent paid by tenants. I acknowledge the possibility that the Landlord and LTL could have agreed between themselves that LTL should retain the benefit of Landlord's Commission. However, if the Criterion Group wished to rely on that possibility, since it relates to a matter entirely within their own knowledge, and outside the knowledge of the Tenant, the Criterion Group could and should have produced a witness (such as Mr Aziz) to speak to the detail of the arrangement between LTL and the Landlord. That is particularly the case given the lack of contemporaneous documentation on the transfer. From the Criterion Group's failure to produce a witness to speak to this matter, I infer that no such agreement was reached.

vii) I therefore conclude that Orbit received the 2015/16 insurance rent as agent for the Landlord.

318. That chain of reasoning disposes of the issue. Whether or not the Landlord and LTL had given notice to the Tenant that it was to pay rent to the Landlord going forward, the Landlord and LTL had agreed between themselves that the insurance rent received belonged, in its entirely, to the Landlord and so Orbit received that sum as agent for the Landlord. The position is, accordingly, indistinguishable from that analysed in paragraphs 309 to 312: the Landlord was unjustly enriched, by the receipt of sums by its agent, Orbit, and that enrichment was at the Tenant's expense.

Failure of basis - general

319. The parties agree in principle that, if a payment is made on a particular basis, shared between the payer and the payee, and that basis fails then the resulting "failure of basis" can be regarded as an unjust factor that supports the claim in restitution. The rationale for that approach is explained in paragraphs [79] and [80] of *Dargamo Holdings Limited and another v Avonwick Holdings Limited and others* [2021] EWCA Civ 1149 (***Dargamo***): in such circumstances the benefit has been conferred on a joint understanding that the recipient's right to retain it is conditional so that it would be unjust for the recipient to retain the benefit if the condition is not fulfilled.

320. The parties also agree on the following propositions of law applicable in cases of "failure of basis":

    i) The relevant basis must be shared between the parties and is to be assessed objectively. Accordingly, it does not matter what the particular parties actually thought or what they actually read. Rather, it is necessary to determine what a reasonable person would consider the basis to be in the light of the information and documents reasonably available to the parties.

    ii) The basis can be expressly stated, but need not be (see, for example, *Rowland v Divall* [1923] 2 KB 500). Where appropriate, the basis can be inferred from surrounding circumstances. So, for example in *Barnes v Eastenders Cash & Carry*

    Plc [2015] AC 1, the basis could be inferred from the common-sense, but unexpressed, proposition that the receiver should not be expected to provide services for no consideration.

    iii) For a failure of basis to found a claim in restitution, the failure of basis must be total. However, in appropriate cases, particularly those involving the payment of monetary consideration, apportionments can be made when formulating the appropriate basis. So, for example in the Australian case of *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 208 CLR 516, part of the consideration paid by a purchaser of products was apportioned as being to defray the costs of a "licence fee" imposed by the New South Wales government on the vendor of the products. When that "licence fee" was found to have been imposed unlawfully, the purchaser was able to recover the part of the contract price so apportioned, even though, looked at more widely, the purchaser had received products in return for the total contract price that it paid. The basis on which one element of consideration was paid had failed totally even though the basis for other payments under the contract had not.

321. It is clear from the case law that a payment can be made on multiple bases. A failure of just one of those bases can found a claim for restitution. *Rowland v Divall* is a case in point. In that case, a purchaser paid for a car and used it for four months before realising that the purported vendor of the car did not have good title to it. The purchaser was able to recover the purchase price even though he had the use of the car for four months. The rationale for this was that there were at least two operative bases. The purchaser paid the contract price to obtain the use of a car that he could drive. That basis did not fail totally as he was able to use the car for four months. However, there was another basis too: the purchaser paid the price to acquire good title to it and since this basis failed totally, a restitutionary remedy was available.

The relevant basis in this case

322. The parties advanced different formulations of the relevant basis that is operative in this case. The Landlord characterised the relevant basis as being either:

    i) That the basis was expressly spelled out on the face of the 1994 Lease. The Tenant paid the rent, including the payments demanded by Clause 3.6.1 in consideration of being granted a demise of the Cinema. This basis did not fail at all since (putting to one side debates about whether the Leases have been validly forfeited) those Leases are still in existence.

    ii) That the Tenant paid sums due under Clause 3.6.1 in return for the Centre being covered by insurance. That basis did not fail, and certainly did not fail totally, since an insurance policy has been in place in all relevant insurance years.

323. The Tenant's case is that it is necessary to focus on the overpayments, since it is only those payments that it seeks to recover. It argues that the overpayments in all relevant insurance years were made on the basis that they were discharging contractual obligations that were actually due. That basis failed totally.

324. Both parties argued that their formulation of the basis was the "correct" one and that of the other party was "incorrect". Given my observation in paragraph 321, I am not sure that there is necessarily only ever one "correct" formulation of basis in a particular case. However, the Landlord argues that, at least in the circumstances of this case, [133] of the judgment of Carr LJ (as she then was) in *Dargamo* demonstrates that the Tenant's formulation of the applicable basis is incorrect. In that paragraph, Carr LJ said:

> However, where the basis of the consideration is expressly and unconditionally spelt out on the face of a valid and subsisting contract, as here, there is no proper scope for inquiring into an alternative basis that is plainly contrary to the express basis freely agreed between the

> parties. It is not an inquiry that was carried out in *Roxborough* or *Barnes* where the basis that failed was one not at odds with (and indeed in the case of *Roxborough* expressly reflected in) the relevant contractual provisions.

325. In the Landlord's submission, Clause 2 of the 1994 Lease "expressly and unconditionally" spells out the true basis: rent is paid in return for the demise of the Premises, and this excludes the possibility of the Tenant's formulation of basis being correct.

326. I do not accept that. In the passage quoted, particularly when read in the context of the paragraphs that precede it, Carr LJ was concerned with an asserted basis that was entirely inconsistent with a basis expressed on the face of the contract. There is no such inconsistency in this case. The proposition that the parties understood rent to be paid in return for the demise of property, or as part of arrangements for the provision of insurance, is entirely consistent with the parties having an understanding that the Landlord could not retain rent in excess of that contractually due.

327. I have concluded that in all relevant insurance years, a reasonable observer would conclude that the Landlord and Tenant shared a common understanding that the Landlord's right to retain sums demanded under Clause 3.6.1 was conditional on those sums being contractually due. I reach that conclusion for the following reasons:

    i) It is consistent with the architecture of Clause 3.6.1 which envisages the Landlord "assessing" the Tenant as being liable to pay a sum that answers to a contractual description. If the Landlord assesses a sum as being due when it is not, it is consistent with that architecture for the Landlord to have no right to retain the part of the sum that is not due.

    ii) It is consistent with common sense that the Landlord could not retain sums that were not due, just as it was consistent with common sense in *Barnes* that someone could not be expected to work without payment.

    iii) The Landlord's position, that the basis of the payment was simply to discharge an invoice received is at odds with commercial reality and common-sense. People do not pay invoices simply because those documents answer to the description of "invoice". They pay invoices because they consider them to request payments of sums that are lawfully due.

328. In 2017/18 and 2018/19, as noted in paragraphs 173 and 177, both the Landlord and the Tenant expressly agreed that the payment for insurance rent in those years was being made on a "pay now argue later basis". I consider this only makes the position for

those years clearer. I do not consider that the absence of any such agreement in 2015/16 or 2016/17 detracts from the conclusions set out above. Nor do I consider it to matter that, in 2015/16 and 2016/17, the Tenant did not have any subjective belief that it was, or might be, overcharged by the Landlord's demands for insurance rent. The applicable basis must be determined objectively and the analysis that I have set out in paragraph 327 is just as applicable even in years in which the Tenant was not aware of the possibility of an overcharge.

329. In a similar vein, I do not consider it matters that the Tenant paid insurance rent for 2020/21, 2021/22 and 2022/23 under what I have termed "unilateral protest wording". As explained in paragraph 187, an objective observer would consider the relevant basis to be present in those years as well.

330. In my judgment, both juristically and commercially, the insurance rent that the Tenant paid in all relevant insurance years can be apportioned into a part that was contractually due in accordance with the terms of the 1994 Lease and a part that was not contractually due. The basis for the juristic distinction between these two parts is obvious. The basis for the commercial distinction is similarly obvious: people in a business relationship governed by a contract such as the Landlord and Tenant expect to pay and receive only sums that the contract requires. Once that distinction is appreciated, the flaw in the Landlord's formulation of the applicable basis, set out in paragraph 322.ii), is revealed. The Tenant certainly paid the part of insurance rent for which it had a contractual liability in return for insurance, but the same is not true of the amount corresponding to Landlord's Commission, for which it had no contractual liability. Accordingly, there was a total failure of basis, in relation to the payment of the amount corresponding to Landlord's Commission, even though the Tenant benefited from insurance cover during the years in dispute.

Failure of basis – 2015/16 to 2022/23

331. The Tenant's claim for a restitutionary remedy succeeds. The Landlord must repay the Tenant the following sums:

    i) amounts of insurance rent that the Tenant paid in insurance years from 2015/16 to 2021/22 (inclusive) pursuant to Clauses 3.6.1(a), (b), (c) and (e) that corresponded to Landlord's Commission; and ii) the 35% Fee that was added to insurance rent in 2022/23.

332. The Tenant advanced an alternative case on the "unjust" element of the Landlord's enrichment based on the proposition that it paid sums to the Landlord under two operative mistakes of fact or law:

    i) It paid insurance rent for 2015/16 and 2016/17 in a mistaken belief that the sums were contractually due.

    ii) It paid insurance rent thereafter in the mistaken belief that the Landlord was obliged to refund any excess payment that was not lawfully due.

333. The Landlord argues that various aspects of this case were not pleaded and that the facts necessary to establish them have not been made out. I will not deal with the Tenant's alternative case in this judgment since I do not need to do so. However, I have made factual findings on both (i) objective conclusions that a reasonable person would draw from the circumstances in which payment was made and (ii) the Tenant's subjective beliefs when it made payment that will enable this aspect of the Tenant's case to be considered if I am wrong in my conclusion on failure of basis.

Counter-restitution

334. I took the Landlord and Tenant to agree that no question of counter-restitution arises in relation to the Premium Issue.

PART H – OTHER ISSUES

The Settlement Deed

Terms of, and background to, the Settlement Deed

335. The Settlement Deed was executed on 18 September 2014. The parties to it included LTL, the Landlord's predecessor in title, and the Tenant. The Landlord was not itself party to the Settlement Deed, but it is not suggested that is significant.

336. As is obvious from its title, the Settlement Deed was intended to compromise some dispute between LTL and the Tenant. The "Background" to the Settlement recited that:

> A dispute has arisen between the first three named parties relating to: i) the payment of service charges reserved by the Lease; ii) the payment of insurance contribution reserved by the Lease; iii) the carrying out of the Landlord's Works (***Dispute***)

337. Neither side based their case on the meaning of the Settlement Deed to any significant extent on witness evidence of "factual matrix" consisting of the nature of the dispute that was compromised (as distinct from factual matrix that could be inferred from contemporaneous documents). That said, it was not suggested that Mr Frost was wrong to say in his Second Witness Statement that:

> The Settlement Deed settled a long and outstanding dispute with the landlord of Picturehouse Central over insurance. I recall that Lyn [Goleby – the Tenant's then CEO] informed me that both the Cineworld and Picturehouse parts of the business were unhappy that too big a share of the total insurance premium for the Centre was being allocated to Cineworld, but that the dispute had to come to an end in order to secure the landlord's consent to the assignment from Cineworld to the First Defendant.

338. Sadly, Mr Frost could not be cross-examined on this statement. However, it is consistent with the wording of the Settlement Deed. That contains a definition of "Current Insurance Calculation" whose effect, when combined with Clause 4.2 of the Settlement Deed, was to ensure that the proportion of insurance premiums at the Centre for which the Tenant was to be liable was to be calculated by reference to the proportion of the floor area of the Centre that the Tenant occupied (with the total floor area so occupied being treated as 62,334 square feet).

339. By Clause 3 of the Settlement Deed, the parties agreed to settle the "Dispute" on terms set out in Heads of Terms that were annexed as Annex 3. Clause 3 provided that the purpose of the Settlement Deed was to give effect to those Heads of Terms.

340. Clause 4 of the Settlement Deed provided as follows:

> This deed is in full and final settlement of, and each party hereby releases and forever discharges, all and/or any actions, claims, rights, demands and set-offs, whether in this jurisdiction or any other, whether or not presently known to the parties or to the law, and whether in law or equity, that it, its Related Parties or any of them ever had, may have or hereafter can, shall or may have against the other party or any of its Related Parties arising out of or connected with: (i) the Dispute; (ii) the underlying facts relating to the Dispute, (Collectively the ***Released Claims***).

341. That provision was reinforced by Clause 5 by which each party agreed on behalf of itself and its "Related Parties" (which included parent companies, subsidiaries and assignees) not to sue in respect of "Released Claims".

Applicable principles

342. The Landlord's written closing submissions contained passages setting out the proper approach to construction of the releases effected by the Settlement Deed. The Tenant did not take issue with these principles and I will apply them. The principles on which the Landlord relies are quite limited: the Settlement Deed is a contract and should be construed like any other contract. However, given the nature of the contract, close attention should be paid to the precise type of claims at which the release is directed (see *Bank of Credit and Commerce International SA v Ali* [2002] 1 AC 251 at [26] per Lord Nicholls).

Analysis

343. Clause 4 of the Settlement Deed is capable of extending to claims not known about at the time of the Settlement Deed, and claims brought against the Landlord (which, being a transferee of LTL, is a "Related Party" for the purposes of Clause 4). Accordingly, the mere fact that the Tenant's Counterclaim was brought after the date of the Settlement Deed, and against the Landlord rather than LTL, is not an automatic impediment to that counterclaim being released.

344. The central question is whether any part of the counterclaim "arises out of" or is "connected with" the "Dispute" or the "underlying facts related to the Dispute".

345. The Landlord notes that the parties to the Settlement Deed expressly contemplated that the Landlord would undertake the Landlord's Works since a definition of those works appears in the Settlement Deed. I am, therefore, prepared to accept that in 2014, the Tenant realised that there would be extensive works going on at the Centre which might be disruptive both to the Tenant and to the Centre itself. The definition of "Landlord's Works" in the Settlement Deed referred to the terms of a planning permission. Neither party took me to the terms of that planning permission. The Landlord said that it was freely available to view online. However, I have concluded that it is both impracticable and procedurally unfair for me to seek to access the planning permission online and form my own conclusions on it unguided by submissions from the parties. I therefore make no finding as to whether the definition of "Landlord's Works" in the Settlement Deed did, or did not, envisage the removal of sprinkler pipework.

346. Even though the parties contemplated some disruption from Landlord's Works it does not follow that they intended that the Tenant should lose the right to sue at all for breaches of covenant arising out of those works. Clause 3.2.6 of the Settlement Deed provided an indication that this was not the intended result since that clause expressly provided that, by acknowledging the Landlord's Works, the Tenant was not waiving any rights that it might have to take action for breach of the covenants contained in the Leases. That impression is fortified by the Heads of Terms which give the impression that the Tenant's interest in the Landlord's Works was that they should not be excessively noisy, or at least not so noisy during film screenings as to affect the enjoyment of the Tenant's customers. It would make no sense, given that articulation of the Tenant's concerns, for the Settlement Deed to release any future claim whatsoever arising from those works.

347. That then leaves the insurance element of the Dispute. The defined term "Dispute" is intended to describe the dispute that was current between the parties in 2014. It did so by reference to the broad parameters of that dispute (which included a reference to the "payment of insurance contributions reserved by the Lease"). It does not follow from the way that the parties chose to describe their dispute (in 2014) that they intended any subsequent dispute relating to the "payment of insurance contributions" to be compromised. Such a consequence would be commercially irrational. For example, the Tenant can scarcely have expected following the Settlement Deed that it could decline altogether to pay insurance rent on the basis that any future claim against it was released by Clause 4.1.

348. To be released by Clause 4.1, therefore, a dispute had to "arise out of" or be "connected with", the dispute that was current between the parties in 2014 or its underlying facts. The Settlement Deed and Term Sheet provide a clear indication of the general nature of

that dispute. It concerned the allocation of the total insurance premium at the Centre to the Cinema. There is an indication, supported by the Heads of Terms, that the Tenant felt that Landlord was overestimating the floor area of Cinema (with that claim compromised by including a specific area in the definition of "Current Insurance Calculation"). Alternatively, the parties might have been at odds as to whether insurance should be apportioned by reference to floor area at all.

349. However, I conclude that in 2014, there was no dispute between any member of the Criterion Group and any member of the Tenant's group of companies that even related tangentially to that comprised within the Premium Issue or the Excess Issue. There could not have been any such dispute because (i) even by 2015/16, the Tenant had no suspicion that the presence of Landlord's Commission caused it to be overcharged

insurance rent and (ii) significant excesses on policies covering the Centre did not start until 2017/18.

350. That conclusion is not altered by the Landlord's submission that, in 2014, it was well understood that a "premium" payable for an insurance policy included "commission". I have made factual findings in paragraphs 51 to 56 as to what hypothetical landlords and tenants would have thought about Landlord's Commission in 2014. I do not consider those findings to support the proposition that the parties intended to compromise the present dispute by the Settlement Deed in 2014.

351. The Landlord argues that the release of claims effected by the Settlement Deed must have been "wide" because the Heads of Terms stated that a purpose of the 2014 documents was to turn the Tenant's "non-profitable operation into a profitable one". I do not accept that submission. Considerations of whether the Settlement Deed was "wide" or "narrow" does not advance the debate greatly. I conclude that no part of the present dispute was compromised by the Settlement Deed.

Electricity Issue

352. Paragraph 2 of the Fifth Schedule to the 1994 Lease requires the Tenant to pay, on demand, amounts in respect of electricity costs. On 29 June 2023, the Tenant made a payment in respect of the rent due for the June 2023 quarter together with service charge. Since the Landlord wished to forfeit the 1994 Lease, it returned most of that payment but retained £9,536.99 (including VAT) in respect of "electricity owed". The Tenant says that it is not liable for that sum because the Landlord has not shown that any "demand" was ever made. It notes that it has made requests for further information in the course of this litigation for the underlying demands. The Landlord replied to those requests purporting to provide references in the disclosure to the demands, but the Tenant says that they were unable to reconcile these with disclosed documents.

353. It was common ground that the electricity demands were not in the trial bundle. They were not produced during the trial or subsequently. However, Mr Taylor has given sworn evidence that the requisite demands were issued. He was not challenged on that evidence in cross-examination. In those circumstances, I will accept Mr Taylor's sworn evidence that a demand was made and I determine the Electricity Issue in favour of the Landlord.

DISPOSITION

354. The Tenant's counterclaim succeeds in relation to the Premium Issue and the Sprinkler Issue. It fails in relation to the Excess Issue and the Electricity Issue. I have throughout

this judgment provided guidance as to how the quantum of the Tenant's successful claims should be determined and I leave the parties to agree the figures.

355. The Tenant indicated that it seeks a declaration as to the recoverability of the 35% Fee in later insurance years. The Landlord indicated that it will seek to set off sums that it is held to owe following this judgment against other sums that it considers to be due from the Tenant. These disputes seemed minor, but if they need to be addressed, that is best done as part of the process of finalising the order giving effect to this judgment. There will need to be a further hearing on consequential matters which will need to take place within 28 days of hand down of this judgment.

APPENDIX 1 - brokers, lead insurers and follow insurers

Insurance Year	Broker	Lead Insurer	Follow Insurers
2015/2016	CCV Southampton	Allianz	Axa
2016/2017	AJ Gallagher	QBE	Zurich
2017/2018	AJ Gallagher	QBE	Zurich
2018/2019	AJ Gallagher	Allianz	Tokio Marine Kiln Axa RSA
2019/2020	AJ Gallagher	Allianz	Tokio Marine Kiln Axa RSA
2020/2021	Marsh	Axa	Ecclesiastical RSA
Insurance Year	**Broker**	**Lead Insurer**	**Follow Insurers**
			Aspen Aviva Starr

2021/2022	Towergate	Axa	Ecclesiastical AIG Chubb Aspen Starr
2022/2023	Towergate	Axa	Ecclesiastical AIG Chubb Zurich

APPENDIX 2 – INSURANCE POLICY FOR THE CINEMA

Year	Cinema Declared Value / sum insured	Excess Level(s)	Cinema Gross premium including IPT/excluding IPT	Landlord's Commission for Cinema in amount and as a percentage of gross premium excluding IPT
2015/16	£27,704,812 / £36,016,255	For certain insured perils £100, but £1,000 for subsidence.	£176,352/ £166,370	£87,178 / 52.4%
2016/17	£26,149,861 / £39,224,792	For certain insured perils £250, but £1,000 for subsidence.	£176,361/ £161,060	£92,054 /57.2%
2017/18	£28,477,813 / £31,895,151 /	£1m each and every loss and 10% co-insurance of any one loss applied from 13.9.17	£197,498/ £176,338	£88,447 / 50.2%
2018/19	£28,477,813 / £31,895,151	Excess / co-insurance still applies	£212,416/ £189,657	£86,698 / 45.7%
2019/20	£28,477,813 / £31,895,151	10% co-insurance of any one loss, or £1m each and every loss, whichever is the greater.	£214,314/ £191,352	£85,494 / 44.7%
2020/21	£28,477,813 / £35,597,266	£1m each and every loss at the Trocadero	£296,409/ £264,651	£73,012 / 27.6%

2021/22	£30,278,190 / £37,847,737	£2m each and every loss.	£298,849/ £266,289	£47,232 / 17.7%
2022/23	£30,278,190 / £37,847,737	£2m each and every loss	£275,432/ £254,473 (IPT not chargeable on whole sum)	£83,035 / 32.6%