IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
APPEALS (ChD)
**[2019] EWHC 3119 (Ch)**
On appeal from:
The County Court at Central London
HHJ Johns QC

No. CH-2019-000018

Rolls Building
Fetter Lane
London, EC4A 1NL

Friday, 25 October 2019

Before:

MR JUSTICE NUGEE

B E T W E E N :

JAFARI — Appellant

- and -

TAREEM LIMITED — Respondent

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MR E. FRANCIS (instructed by LCF Law) appeared on behalf of the Appellant.

MR G. BLAKER QC (instructed by SBP Solicitors) appeared on behalf of the Respondent.

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**J U D G M E N T**

MR JUSTICE NUGEE:

## INTRODUCTION

1 I have before me an appeal against an order of HHJ Johns QC, sitting in the County Court at Central London dated 28 December 2018 given after a five-day trial in an action between landlord and tenant. Permission to appeal was refused by the Judge but granted by me on 29 March 2019.

2 The tenant is Dr Jafari, a dentist. He is the appellant. In 2010, he bought a dentist's practice in Brighton for a substantial sum, about £800,000. As part of the acquisition, he took an assignment of the lease of the premises where the practice was carried on. This was a suite of rooms on what was called the first floor - although due to the sloping nature of the site was, in fact, more like a raised ground floor - of a building known as 'Mitre House' in Brighton. Mitre House occupies an island site between Western Road to the south and Hampton Street to the north, a little way north of the seafront. It consists of two blocks, the North Block and the South Block, and the present proceedings only concern the North Block. The premises acquired by Dr Jafari are on the north west corner of the site. They have their own entrance from a side street called Hampton Place. They are self-contained and do not communicate with rest of the North Block. They were demised by a lease dated 20 May 2002 for a term of 20 years from that date and so when assigned to Dr Jafari in March 2010, had some twelve years to run. The initial rent was £14,500 per annum, payable quarterly in advance on the usual quarter days. It was subject to five yearly upwards only rent reviews, the basis of review being "fair rack rent market value" and it was not disputed that the £14,500 represented a rack rent at the time of grant. There was, in fact, no review in 2007, so the rental was still £14,500 in 2010. The successive reviews at 2012 and 2017 have not been completed but are, I was told, outstanding.

3 The lease contained a number of covenants in the usual way among which was a covenant by the landlord for quiet enjoyment in fairly standard form. That was in clause 5.1 which reads as follows:

> "5. THE LANDLORD COVENANTS with the Tenant as follows:
>
> 5.1 The Tenant paying the rents reserved and performing the Tenant's covenants in this Lease may lawfully and peaceably enjoy the Premises throughout the Term without interruption by the Landlord or by any person lawfully claiming through under or in trust for the Landlord or by title paramount"

No reliance was placed before me on any of the other terms of the lease.

4 By the time Dr Jafari acquired the lease, the reversion was vested in the respondent Tareem Limited ("Tareem") which owned the whole of Mitre House. The remainder of the North Block had formerly been let as offices but Tareem decided to convert it to a 134-bedroom hotel. That was a substantial project including the stripping out of the existing building, the addition of a new fourth floor contained within a new mansard roof, and the creation of new bedrooms and the like for the hotel. It also included replacing all the windows and new rendering to the North and West facades. It did not involve any work to the interior of Dr Jafari's premises but it did involve work on the rest of the building adjacent to and above his premises; the erection of scaffolding encasing the exterior of his premises; a hoarding at ground floor level; and the erection of a new fire escape immediately adjacent to his premises.

5 Planning permission was granted on 7 February 2012. A contractor called Kilby & Gayford Limited ("K & G") was engaged, scaffolding erected, and work started but in mid-April 2012 K & G went into administration and work came to a halt. The scaffolding was, however, left in place. A new contractor, HOC (UK) Limited ("HOC") was engaged towards the end of January 2013. The work took most of 2013 to complete with the scaffolding struck in early August and practical completion on 5 November 2013.

6 In these proceedings, Dr Jafari complained about a number of aspects of the works that had been carried out and the impact that that had on his dental practice. I will have to look at some of the detail later but they included the way in which the scaffolding and hoarding obscured the entrance and made his premises look like a building site, the fact that rough sleepers used the entrance to his premises for sleeping and as a toilet, and the noise from the works going on around him. He blamed the cumulative effect of these and other matters for a significant downturn in the profitability of the practice. Tareem had waived the rent for the period of the works, that is for 7 successive quarters from March 2012 to December 2013, but rent became due again from the December 2013 quarter day. Dr Jafari, who by then was in dispute with Tareem, made some payments in January and July 2014 but otherwise stopped paying rent. That, in due course, led to Tareem issuing these proceedings for arrears of rent and service charge. The covenant to pay rent required payment without any set off. So although Dr Jafari had a counterclaim for damages, the Judge in due course gave judgment on the claim, the sum awarded being £79,279.14. There is no appeal against that part of his order and I need say no more about it.

7 The more significant dispute between the parties arose on Dr Jafari's counterclaim. This was a counterclaim for damages put on a number of bases but, most pertinently, for breach of the covenant for quiet enjoyment and for nuisance. There was a claim for the cost of certain remedial works and an unparticularised claim for general damages for discomfort, inconvenience, and loss of amenity, but the first head of damage, and by far the largest element of the claim, was for loss of profits, pleaded at over £450,000 for the years ending April 2013 to 2015 and continuing thereafter. Mr Gary Blaker QC, who appeared for Tareem, told me that there was some debate at the trial whether the quantum of the claim was about £0.5 million or more like £1 million but nothing now turns on it. It was, on any view, a substantial claim.

## THE JUDGMENT

8 The Judge handed down a written reserved judgment dated 27 November 2018. After setting out the background and referring to the evidence he had heard, he dealt first with the counterclaim, starting with the question of what he called "interference", that is whether there had been wrongful interference by Tareem with Dr Jafari's enjoyment of the premises. He recorded at [12] that:

> "Both sides proceeded on the basis that there was no difference in the principles to be applied whether the case was framed in nuisance, breach of covenant for quiet enjoyment, or derogation from grant."

He then referred to the principles as found in the decision of Mr Alan Steinfeld QC in *Timothy Taylor Ltd v Mayfair House Corporation & Anor* [2016] EWHC 1075 (Ch) ("*Timothy Taylor*"). In essence, he held that the question was whether the landlord had taken all reasonable steps to minimise disturbance and that in considering that question, the court could take account of any financial compensation offered by the landlord to the tenant.

9 He then turned to the facts and made a number of factual findings. He dealt first at [20]-[34] with the question of noise from the works. He found that there was "frequent intrusive noise from heavy drilling and demolition work near the premises" in the period February to mid-April 2012 when the first contractor K & G was carrying out the works (see [21]). However, in the period when the second contractor, HOC, was carrying out the works, that is January 2013 to October/November 2013, there was an arrangement to restrict the hours during which the noisiest works would be carried out (see [23]) and he found that noisy work was generally done only during the restricted hours although there were "occasions when such work was done outside those hours though most of those occasions came towards the end of the works in around August 2013" (see [25]), giving a number of reasons drawn from the witness and documentary evidence for that conclusion (see [26]-[30]). There were some days near the end of March 2013 when noisy works were carried on outside restricted hours but this was short-lived and by 28 March, Dr Jafari's solicitors had sent a letter to Tareem threatening an injunction and that threat was taken seriously (see [31]). He concluded his section on noise at [34] as follows:

> "I should spell out, before moving on, that in relation to my findings on noise, in referring to the carrying out of noisy works I am not to be taken as suggesting there was otherwise silence. Most construction work will involve some noise. Rather, I am referring to the heavier work which would be impossible for those in the Premises to ignore. The video recordings I viewed show examples of noisy works."

10 He then considered the question of the scaffolding. He found that no consideration was given to the design of the scaffolding so as to minimise the disruption to Dr Jafari (see [36]) and that the scaffolding design could have been adapted to improve the visibility of Dr Jafari's premises, in particular, by providing a much wider entrance through the scaffolding which would have made the premises more noticeable (see [37]). He found that when a door was introduced in the hoarding to keep out rough sleepers, it was not done effectively and rough sleepers were still able to gain access. That was accepted by a witness for Tareem to be unacceptable. He rejected a suggestion that the scaffolding should have come down after K & G went into administration but did say that the change of contractor "presented a natural opportunity to redesign the scaffolding" (see [39]) and that larger more prominent signage could have been installed by the contractors (see [40]).

11 Having dealt with the factual position as regards noise and scaffolding, the Judge then considered other factors which he regarded as relevant to the question whether all reasonable steps were taken to minimise disturbance to Dr Jafari in the carrying out of the works. He referred to a number of factors relied on by Mr Francis, who appeared then, as he did before me, for Dr Jafari, namely:

(1) The scale of the development (as to which he accepted that it was a very significant redevelopment with the potential to create significant disturbance);

(2) That the works were not repairs but for the benefit of Tareem (which he accepted, although he said that the works did benefit Dr Jafari to the extent that his windows were to be replaced with new as part of the works); and

(3) The fact that the premises were used as a dental surgery which is a sensitive user (which he said he had regard to) (see [43]).

On the other side, he said he had to have regard to the financial compensation offered to Dr Jafari which he described as significant. It was for the full amount of the rent and:

> "Dr Jafari therefore received back, by way of concession, the full value of these premises for a period equivalent to that for which the scaffolding was up and very much longer than that for which he experienced noise from the development works, those works being on hold from April 2012 until January 2013." (see [44])

He then gave his conclusions on reasonableness which I should read in full:

> "45. What then is the answer to the question of reasonableness given all those factors? Subject to one point, it my judgment that having regard to all the circumstances, including the financial compensation offered, Tareem did take all reasonable steps to minimise the disturbance to Dr Jafari. Overall, while it is true that there could have been some improvements to the way the works were done from Dr Jafari's standpoint, principally the design of the scaffolding and avoiding altogether noisy works outside of what I have referred to as restricted hours, this is not a case where no consideration was given to the tenant. For much of the period of the works a scheme was put in place for the noisy works to be carried out during very restricted hours and was largely adhered to. Further, generous financial compensation was given, being the annual value of the premises for a period of around 21 months, from the March 2012 quarter day to the December 2013 quarter day.
>
> 46. I have said my conclusion on this question of reasonableness is subject to one point. That point is that whereas I have had regard to the fact that the redevelopment works had some benefit for Dr Jafari in that his old windows were to be replaced with new, that part of the works was in fact never carried out. To that limited extent, Tareem has not taken all reasonable steps and so the failure to replace the windows should be reflected in damages if that failure does not otherwise sound in damages."

12 He then turned to what was conveniently labelled "physical damage" consisting of such matters as cracks to the ceiling, damage to ceiling tiles, damage caused by water leaks, and the like. As explained at [47], it was common ground that these matters did not require the court to assess reasonableness, Tareem being liable for any damage caused, and as a result of concessions made in the course of a trial, Tareem accepted it was liable for the costs of repairing various items (see [48]). The only remaining issue in contention on this part of the case was the question whether Tareem was liable for damage to the windows and for the cost of their replacement. The Judge found in favour of Dr Jafari on that point and awarded various sums for the cost of repairs (see [49]). The Judge then dealt with damages for loss of amenity. He awarded a total of £10,875 saying this at [52]:

> "Using a necessarily broad brush and such damages not, in any event, being a matter of precise mathematical calculation, I award a total of £10,875. That is a sum equivalent to the rate of 15% of the annual rent for a period of five years, being from the conclusion of the redevelopment works contract to date."

That award is the subject of challenge as being too low in Ground 7 of the appeal. Finally, on this aspect of the case the Judge awarded various modest sums for the costs of repairs actually carried out, totalling £1,906.62 (see [53]). No challenge is made to that figure.

13 The Judge then dealt with the loss of profits claim which he described as "the focus of the trial insofar as damages was concerned" (see [54]). He expressed his conclusion at the outset of his discussion of the issue at [55] as follows:

> "Having listened carefully to both the factual witnesses and the accounting experts, I have come to the clear conclusion that the works did not cause Dr Jafari a loss of profit. The way Dr Jafari described the effect of the works was that a good practice went downhill when the scaffolding went up. That is not, in my judgment, what the evidence shows."

He then gave reasons for that based on both the expert evidence and the other evidence before him (see [56]-[63]) and, again, expressed his conclusion at [64] as follows:

> "A number of suggestions were explored in cross-examination as to why turnover of the business subsequently reduced and that there is now, for the first time, a reduction in NHS fee income. One example was a lack of leadership. But I do not need to reach a conclusion about that. What is clear to me, for the reasons I have given, is that Tareem's works are not the cause."

At [66], he dealt with and rejected an application for aggravated damages and then at [67]-[74] dealt with a number of issues on the claim for arrears of rent and service charges which I need not refer to.

14 The result of his judgment was as follows. He gave judgment to Tareem on its claim, as already mentioned, in the total sum of £79,279.14. He gave judgment to Dr Jafari on his counterclaim in a total sum of £77,984.24. It can be seen that that figure was just less than the amount of the claim. It was made up of the £10,875 award for loss of amenity, the modest sums of under £2,000 for the cost of repairs actually carried out, and the balance, some £64-£65,000, for the costs of repairs not carried out. He also ordered Dr Jafari to pay 80% of the costs of the claim and counterclaim with a substantial payment on account. That was all encapsulated in the order dated 21 December 2018 which is under appeal.

## GROUNDS OF APPEAL

15 There are seven grounds of appeal in all. Grounds 1 and 2 concern the correct approach to the question of breach of the covenant for quiet enjoyment and, in particular, whether the Judge was right to consider that the financial compensation offered by Tareem was relevant to that question. They raise issues of law.

16 None of the other grounds of appeal, in my judgment, raise issues of law at all. Grounds 3 and 4 challenge the conclusion of the Judge that Tareem had acted reasonably in carrying out the works as one that gave undue weight to Tareem's waiver of rent or as a decision which no reasonable judge could reach. These are challenges, as Mr Francis accepts, to an evaluative decision reached by the Judge. Grounds 5 and 6 challenge two factual findings made by the Judge, namely (Ground 5) the finding at [25] of the judgment that "noisy work was generally done only during the restricted hours" and (Ground 6) the conclusion of the Judge that the works did not cause any loss of profits. Both of those are issues of primary fact. Ground 7 challenges the award of £10,875 for loss of amenity as too low. Since that is

a figure for general damages not a finding of specific pecuniary loss, that too is a challenge to an evaluative assessment by the Judge.

17 I propose to address the factual grounds, that is all except Grounds 1 and 2, first. I was referred to a number of authorities on the correct approach of an appellate court to factual appeals. Mr Francis himself referred me to the very recent decision of the Court of Appeal in *Prescott v Potamianos & Anor* [2019] EWCA Civ 932 on the approach to appellate challenges to an evaluative decision, in that case, the conclusion of the Judge on the question of whether or not Dr Potamianos's conduct justified his exclusion from the management of a company and so whether there had been unfair prejudice in the conduct of the company's affairs. The judgment of the court considers this at [72]-[78], a passage which is far too long to read at length but in which the principles are summarised at [76] as follows:

> "So, on a challenge to an evaluative decision of a first instance judge, the appeal court does not carry out a balancing task afresh but must ask whether the decision of the judge was wrong by reason of some identifiable flaw in the Judge's treatment of the question to be decided, 'such as a gap in logic, a lack of consistency, or a failure to take account of some material factor, which undermines the cogency of the conclusion'."

that being taken from a Supreme Court decision in *R (on the application of AR) v Chief Constable of Greater Manchester Police & anor.* [2018] UKSC 47. Mr Blaker, for his part, referred me to a number of further authorities, namely the decision of the Supreme Court in *McGraddie v McGraddie & Anor* [2013] UKSC 58 and those of the Court of Appeal in *Fage UK Ltd & Anor v Chobani UK Ltd & Anor* [2014] EWCA Civ 5, and *Staechelin & Ors v ACLBDD Holdings Ltd & Ors* [2019] EWCA Civ 817. In the latter case, Lewison LJ, at [29], cited from what he had said in *Fage* at [114] as follows:

> "Appellate courts have been repeatedly warned, by recent cases at the highest level, not to interfere with findings of fact by trial judges, unless compelled to do so. This applies not only to findings of primary fact, but also to the evaluation of those facts and to inferences to be drawn from them. ...The reasons for this approach are many. They include
>
> i. The expertise of a trial judge is in determining what facts are relevant to the legal issues to be decided, and what those facts are if they are disputed.
>
> ii. The trial is not a dress rehearsal. It is the first and last night of the show.
>
> iii. Duplication of the trial judge's role on appeal is a disproportionate use of the limited resources of an appellate court, and will seldom lead to a different outcome in an individual case.
>
> iv. In making his decisions the trial judge will have regard to the whole of the sea of evidence presented to him, whereas an appellate court will only be island hopping.
>
> v. The atmosphere of the courtroom cannot, in any event, be recreated by reference to documents (including transcripts of evidence).

vi. Thus even if it were possible to duplicate the role of the trial judge, it cannot in practice be done."

At [30]-[32], Lewison LJ cited various statements from another Supreme Court case, *Henderson v Foxworth Investments Ltd* [2014] UKSC 41, including statements that:

> "What matters is whether the decision under appeal is one that no reasonable judge could have reached."
>
> [and]
>
> "An appellate court is bound, unless there is compelling reason to the contrary, to assume that the trial judge has taken the whole of the evidence into his consideration."
>
> [and]
>
> "An appellate court could therefore set aside a judgment on the basis that the judge failed to give the evidence a balanced consideration only if the judge's conclusion was rationally insupportable."

and at [33], from yet another Supreme Court Case, *Perry v Raleys Solicitors* [2019] UKSC 5 at [52] as follows:

> "They may be summarised [that is the constraints on interfering with findings of fact] as requiring a conclusion either that there was no evidence to support a challenged finding of fact, or that the trial judge's finding was one that no reasonable judge could have reached."

Those are the principles that I should apply to the factual grounds. They self-evidently make it difficult to challenge a judge's factual findings, not just his findings of primary fact but his evaluative assessments based on those facts.

## GROUND 5

18 I will start with Ground 5, which raises a challenge to a pure question of primary fact, namely to what extent Tareem's contractors kept to the arrangement that noisy work should take place in restricted hours. In approaching this question, one must start with the Judge's actual findings. These are, as Mr Blaker submitted, quite nuanced. At [25], the Judge's finding is that noisy work was generally done only during restricted hours, (emphasis added), but "there were occasions when such work was done outside those hours". At [28], he referred to the evidence of Dr Jafari and of Ms Lynch (Dr Jafari's practice manager and also his partner) to the effect that the agreement was adhered to in the first part of 2013. At [29], he refers to Dr Jafari's video recordings which contain no entries in 2013 until mid-August. He adds:

> "The video recordings are not, I accept, a complete record of noisy works and I have no doubt that there were occasions before mid-August 2013 when noisy works were done outside the restricted hours. However, the spread of video recordings points to such incidents only occurring with frequency towards the end of the works. Had the noisy works been occurring with that frequency earlier in 2013, there would have been at least some recordings in that period."

At [30], he deals with a diary log and says:

> "While there are numerous entries in there from August 2013, there are only isolated entries for noise before then. While the log was probably not comprehensive, I would expect it to contain most incidents."

At [31], he deals with a particular problem near the end of March 2013 but concludes that the threat of an injunction was a new reason for Tareem to adhere to the restricted hours. At [34], he explains what he means by the finding of noisy works. So, overall, the Judge has not found that there was no noisy work outside the restricted hours but only that the restricted hours were generally adhered to. That is reflected in his conclusion at [45] where he said that one of the ways in which matters could have been improved on was the avoidance altogether of noisy works outside the restricted hours. This gives every appearance of being a careful balancing of the oral and documentary evidence. What then is the basis on which it is said that it can be disturbed?

19 Mr Francis relied on a number of matters. He referred to what he had called the "shifting nature" of Tareem's case. It had first pleaded in its Particulars of Claim that in response to alleged noise issues, its contractor, HOC, had agreed to work in the vicinity of the dental practice only between 8.00 a.m. to 9.00 a.m. on weekdays and 9.00 a.m. to 1.00 p.m. on Saturdays; it had then, in its Defence to Counterclaim, pleaded that it had agreed to seek to seek to limit "noisy" work and in Further Information, that it limited the time for "noisy work such as drillings" whereas in its evidence, given by Mr Dennis Spriggs, who then worked for HOC, the agreement was said to be one that limited "excessive noisy works". Points such as this, pointing to an evolution in the parties' case can sometimes be tellingly employed at trial but sometimes carry little or no weight. They are the sort of points that, in the course of a trial, may or may not affect a trial judge's assessment of the oral evidence leading him or her to prefer one witness's account over another but they are just the sort of point that it is impossible for an appellate court to assess as they cannot stand in isolation but can only be assessed in the context of the totality of the evidence. They are a very good illustration of the point made by Lewison LJ in *Fage*, as his point iv, that:

> "The trial judge will have regard to the whole of the sea of evidence presented to him, whereas an appellate court will only be island hopping."

It is the same point that was made using a different metaphor by Iacobucci and Major JJ giving the majority judgment in the Canadian Supreme Court in *Housen v Nikolaisen* [2002] 2 SCR 235 at [14] in a paragraph cited by Lord Reed in *McGraddie v McGraddie*, partly at [4] and partly at [33]. Having adopted observations that, "The trial judge has sat through the entire case and his ultimate judgment reflects this total familiarity with the evidence," they went on to say:

> "Appeals are telescopic in nature, focussing narrowly on particular issues as opposed to viewing the case as a whole."

I find it impossible to say that the Judge here erred in not ascribing weight to this particular point.

20 Similarly, Mr Francis said that the Judge found Mr Spriggs's evidence incorrect in a number of respects, that Mr Spriggs was shown in cross-examination to be an unreliable witness, and that the evidence of another of Tareem's witnesses, Mr David Crofts, was found to be unrealistic. These are points that can be urged on a trial judge. They cannot realistically be deployed on an appeal to overturn a finding of a trial judge who has seen the witnesses and

been immersed in a case in a way an appeal court never can be. This illustrates the wisdom of another of Lewison J's points in *Fage* at vi that the appellate court cannot, in practice, duplicate the role of a trial judge. In any event, the Judge did not simply accept Mr Spriggs's evidence in its entirety which was that the restricted hours had been adhered to but, as indicated above, made the more limited finding that they were generally adhered to. Mr Francis said that having accepted that the arrangement was both disregarded in late March 2013 and again from mid-August 2013, he should have been cautious about accepting it was adhered to at all after March 2013. However, the fact that a judge rejects one party's case as overstated does not logically compel him to accept the other party's case in its entirety. The truth very often lies somewhere in the middle. Mr Francis said that the Judge had demonstrably erred in saying that the diary log contained only isolated entries before mid-August 2013 as there were 15 separate incidents recorded between 19 April and 8 August 2013 and it was not suggested that they were falsely recorded. However, I do not read the judgment as indicating that the Judge rejected the evidence in the diary log. He described it as a log by Dr Jafari of what he regarded as incidents of nuisance including noise and, indeed, said that the log was probably not comprehensive. When, therefore, he described the entries for noise as "only isolated", I do not think he had somehow miscounted them as only one or two. It is far more likely that he thought that 15-plus occasions over more than four months, less than once a week, could properly be characterised as isolated by contrast to the "numerous" entries from August 2013 onwards. In general, an appellate court should assume a trial judge has had the evidence before him in mind: see the passage from *Henderson v Foxworth* cited by Lewison LJ in *Staechelin* at [31] to which I have already referred:

> "An appellate court is bound, unless there is compelling reason to the contrary, to assume that the trial judge has taken the whole of the evidence into his consideration."

What needs to be shown on an appeal against findings of primary fact is either that there was literally no evidence to support a conclusion (see *Thomas v Thomas* [1947] AC 484 at 492 per Lord Simonds, cited by Lord Reed in *McGraddie v McGraddie* at [27] and [31]), or that a decision under appeal is one that no reasonable judge could have reached because it was rationally insupportable (see *Staechelin* at [30], [32], and [33]). These are high hurdles and the evidential material relied on by Mr Francis in support of Ground 5, in my judgment, falls a long way short of them. It cannot be said that there was no evidence in support of his conclusion as it was Mr Spriggs's evidence that the restricted hours were adhered to. It cannot be said that no reasonable judge could have reached that conclusion as there is nothing irrational about it. In any event, to investigate the point would require a recreation of the entirety of those parts of a trial which concern this question and in practical terms that simply could not be done. For these reasons, in my judgment, Ground 5 is not made out.

## GROUND 6

21 I propose to consider next Ground 6 which is the only other ground which concerns a finding of primary fact. Ground 6 challenges the Judge's conclusion that the works did not cause the loss of profits. Here too one must start with the Judge's reasons for his conclusion. At [55], he says he was struck by two features of the financial evidence in particular. At [56], he says:

> "There was no decline in income from private work in the year ended April 2013."

I was told that although there had been numerous versions of the accounts of the practice, by the time of the trial agreement had been reached on the accounts to be used, namely those submitted to HMRC. These indeed showed that there was an overall increase in turnover, as the Judge said, from £665,632 for the year ended April 2012 to £672,493 for the year ended April 2013. At [57], the Judge referred to the other feature of the financial evidence that struck him which was that the accounts showed that the cost to Dr Jafari of associate dentists remained at a similar level during and either side of the works. Dr Jafari had agreed that this cost, representing his payments to associate dentists for work carried out by them, was a good indicator of performance. Again, those showed an increase from 2011/12 (£150,774) to 2012/13 (£157,897). The point made by the Judge was that the case Dr Jafari was advancing was that the business suffered during the works as patients failed to appreciate the business was still open and that there were many cancelled appointments. If that was so, it would be felt in the period the works were being carried out. The year to April 2013 was the only full year impacted by the works as the scaffolding was up throughout. The Judge did not only rely on what could be gleaned from the accounts. At [60], he referred to the fact that although Ms Lynch referred to gaps in the appointment book, no evidence of an appointment book showing cancellations or gaps was produced and that although there was a process for logging patient complaints, no complaints relating to the works was logged. At [61] he said that:

> "Clearly, Dr Jafari found these works difficult to live with. In my judgment, the disturbance from them has become exaggerated in his mind and in the minds of those around him, and there has been attributed to the works an impact on his business which does not match the reality."

22 Mr Francis made a number of points in his attack on the Judge's conclusion. So far as the accounts are concerned, he said that a more detailed analysis of the accounts showed that there was a drop off of private income in the year ended April 2013. A breakdown of the turnover shown in the accounts showed that from the year ended April 2012 to the year ended April 2013, there was in fact an increase in the NHS contract value from £242,559 to £266,884 (an increase of some £26,000) and a corresponding but smaller decrease in private fee income from £423,073 to £405,609 (a decrease of some £17,000). But it does not appear that was a point deployed before the Judge - Mr Francis said he only picked it up re-reading the report shortly before the hearing of the appeal - and, in any event, it is impossible to say what impact if any such a point would have had on the Judge's conclusions. It remains the case, whatever the breakdown of the turnover, that the total income of the practice for the year ended April 2013 was higher than the year before and I do not see that this undermines the Judge's conclusion that the impact of the works at any rate during the year to April 2013 was not such as to cause a drop in income. That was, as the Judge said, inconsistent with Dr Jafari's case at trial that the impact of the works was immediate and severe - his witness statement said that this decline can clearly be shown to have started in line with commencement of the works but, as the Judge said, the figures do not support this.

23 Mr Francis said that there was, by contrast, a marked decline in turnover for the year ended April 2014 where the turnover dropped to £501,878. That was not something overlooked by the Judge. He referred to it at [58] as follows:

> "I do not ignore that income did drop in the year to April 2014 but that is explained, at least in large part, by Dr Jafari then practising from Bexhill as well as from the premises; he having acquired a dental business in Bexhill in 2012. From the financial evidence I have referred to, I am satisfied that that

> different pattern of work was not caused by a drop in business at Brighton resulting from the works."

Mr Francis said Dr Jafari's evidence did not support that conclusion and, in any event, even if Dr Jafari did spend more time at Bexhill, one would expect the income from the combined practices to remain much the same whereas, in fact, they showed a significant drop.

24 I accept that the evidence did show a significant drop in turnover for the year ended April 2014 whether one looks at just the Brighton practice or the combined practices. However, that does not seem to me to enable me, sitting as an appellate court, to conclude that the Judge must have gone wrong. The point about the combined turnover is just the sort of spotlight point that it is impossible to assess in isolation. The Judge prefaced this section of his judgment by saying he had listened carefully to both the factual witnesses and the accounting experts and he would have been immersed in the whole of that sea of evidence. I do not have that advantage. I have, rightly, not been asked to read the transcripts of the accounting expert evidence in total, or their reports, but even if I had, it would not be possible to recreate the atmosphere of the trial. I therefore find it impossible to conclude that Mr Francis's point about the combined turnover undermined the Judge's conclusion. It might, for example, depend on whether the work carried out in the two practices was equally profitable or not, something on which I have no information but which, for all I know, may have been the subject of evidence before him and, in any event, none of this undermines the main point made by the Judge that taking the Brighton practice on its own, the accounting evidence did not support a drop in turnover in the year ended April 2013 at all although on Dr Jafari's case that would have been expected.

25 Mr Francis also said that the Judge was wrong to rely on the lack of an appointment book showing cancellations or the lack of complaints. He said that the accounts spoke for themselves and showed a drastic decline in the year ended April 2014. That called for an explanation and in the absence of any other explanation, entitled the court to infer that the decline was due to the impact of the works. He referred me to *Drake v Harbour* [2008] EWCA Civ 25 where the question was whether a fire that had broken out in a roof space was caused by the negligence of the defendant that was carrying out work there. Longmore LJ said that where negligence has been found and damage has occurred of a sort that one might expect to occur from the nature of the work which the defendants should carry out, a court should be prepared to take a reasonably robust approach to causation. In circumstances where there was no evidence of any other cause of the fire, the Judge was entitled to conclude that the likelihood was that the defendant's negligence caused it (see at [15] to [16]). Toulson LJ said something similar at [28] as follows:

> "In the absence of any positive evidence of breach of duty, merely to show that a claimant's loss was consistent with breach of duty by the defendant would not prove breach of duty if it would also be consistent with a credible non-negligent explanation. But where a claimant proves both that a defendant was negligent and that loss ensued which was of a kind likely to have resulted from such negligence, this will ordinarily be enough to enable a court to infer that it was probably so caused, even if the claimant is unable to prove positively the precise mechanism. That is not a principle of law nor does it involve an alteration in the burden of proof; rather, it is a matter of applying common sense."

However, these citations only show that a trial judge is entitled to take that view. I do not see how they can be elevated into a principle that the Judge here was not entitled to

conclude, on the totality of the evidence, that the decline in business was not shown to be caused by the works. It is certainly the case that there was a marked decline in 2014. It is certainly possible that one explanation for decline was the impact of the works in fact carried out in April to November 2013, together with some delayed knock-on effects of the works from the year to April 2013. The fact that such an impact might be delayed was, I was told, suggested by Dr Jafari's expert accounting witness although, as I understand it, the experts were in general not asked for their opinions of the causes of the decline but rather to indicate what the accounts did or did not show. However, as Mr Blaker told me, there were a number of possible causes of the decline that were nothing to do with the works which were canvassed at trial. The Judge did not have to decide what the cause was, as he said at [64], only that the works were not the cause. I have been wholly unpersuaded that that conclusion was one that was not open to him and nothing in *Drake v Harbour*, in my judgment, shows that it was.

26 Finally, on this aspect of the case, Mr Francis referred to [61] of the judgment where the Judge said:

> "An early example of exaggeration is to be found in the first letter from Dr Jafari's solicitors being dated 28 March 2013. It complained of incessant noise since October 2012 when, of course, works did not resume until January 2013."

He showed me the letter in question and it includes the following:

> "However, since October 2012 until now and ongoing, our client's business has practically been brought to its knees due to the incessant noise and general disruption caused by your contractors."

I do not find it surprising that the Judge read that letter as suggesting that there had been incessant noise since October - this seems a natural reading of it. But Mr Francis says that was never put to Dr Jafari and so the Judge did not know what explanation he might have. I accept that, in general, a judge should be slow to make adverse findings against a party or a witness which have not been put to them and it would perhaps have been preferable for him not to rely on this letter. However, his conclusions as to exaggeration do not, it seems to me, rest on this one letter alone and even if one puts it on one side, it is impossible to think that the Judge would have reached a different conclusion on the question of whether the decline in profits was caused by the works.

27 For these reasons, I find that Ground 6 of the appeal is not made out.

## GROUND 7

28 I propose next to consider Ground 7 which stands apart from the remaining Grounds 1 to 4 which are all concerned with the reasonableness of the works. Ground 7, by contrast, concerns the Judge's award of damages for loss of amenity. As already referred to, he awarded a sum of £10,875, equivalent to 15% of the rent of £14,500 for five years, that being from the conclusion of the works in November 2013 to the date of judgment in November 2018. Mr Francis advanced a number of discrete criticisms of this award, his overarching submission being that it was too low. First, he submitted that the rate of 15% adopted was too little. He acknowledged that in *Timothy Taylor* an award was made of 20% of the rent payable but said that in that case, which concerned a high class modern art gallery in Mayfair, the rent was very much higher than it was here and that where the rent was comparatively small, there should be an uplift to the percentage to take account of the

impact in the real world on the occupier and that it was wrong, mechanistically, to tie the damages to a percentage of the passing rent.

29 This was a point argued below and although it does not find its way into his judgment, the Judge's reaction to it, as recorded in the transcript, was that nuisance, which Mr Francis accepted was the cause of action in question, is an interference with property and hence damages for diminution in enjoyment of a property are naturally tied to the rental value of the property, that being a financial quantification of the value of enjoying a property. He said that the fact is that property happens to be more valuable in Mayfair than in Brighton and so it is not surprising that a percentage award produces a higher absolute figure for one than the other.

30 I agree with the Judge. I do not need to say, and do not, that an award of damages for loss of amenity must always be based on a percentage of the rental value of the property which would be far too prescriptive but I do say that there is nothing wrong with the Judge adopting this technique which, although it was not cited to him, is consistent with the Court of Appeal decision cited to me, *Larksworth Investments Limited v Temple House Limited* (unreported, 18 January 1999), where the Court of Appeal had to deal with solicitors offices where two rooms were largely unusable and the rest of the first floor, although usable, were "down at heel" causing inconvenience and discomfort. Robert Walker LJ, with whom Tuckey LJ agreed, allowed £10,000 for the two virtually unusable rooms, amounting to 100% of the rent or thereabouts, and a further £15,000 for the balance of the first floor, based on an allowance of £2.50 per square foot out of approximately £9.00 per square foot in rent. That equates to some 27% but, for present purposes, what is significant is that the methodology adopted was to award a percentage of the rent. In those circumstances, I do not think the Judge here can be said to have been wrong in principle to adopt a percentage of the rent as the basis for his calculation.

31 The next point taken by Mr Francis is that the percentage in fact adopted by the Judge of 15% was too low. He said that it should have been 40% which he said was the rate in *Larksworth*, which he suggested was a comparable case on its facts, or if not, 30%. I do not think *Larksworth*, in fact, supports a figure of 40%. It is true that the ultimate award was £5,000 a year compared to a rent of £12,720 for the first floor as a whole, which is about 40%, but as I have referred to, that is because part of the award was for two rooms which were almost wholly unusable. The percentage for the parts of the premises that were usable but less pleasant, convenient, and comfortable than they should have been was considerably lower at about 27%. However, in any event, there is and can be no set tariff for cases such as these. Such awards are, of course, as I have already referred to, awards of general damages for non-pecuniary loss and cannot, as the Judge said, be capable of precise mathematical calculation. On appeal, the question is not what the appellate court might think appropriate to award but whether the award made by the Judge is outside the range of permissible awards. In circumstances where the continuing loss of amenity consisted of such items as cracks to ceilings and walls, damage to ceiling tiles, water damage to floor coverings, and damage to windows, all of which would undoubtedly have made the premises less attractive but which it is not suggested came anywhere close to rendering them unusable, I find it impossible to say that an award based on 15 percent of the rent is outside the range of possible awards. It is notable that Tareem was contending for 5 to 10% and on the limited exposure that I have had of the detail, I would not have been surprised at an award anywhere between 10% and 25%. But that illustrates the difficulty for an appellate court that inevitably has much less feel for the practical reality and day to day inconvenience caused by the real but limited damage that the trial judge found, than the trial judge had. I am unpersuaded that an award based on 15% has been shown to be wrong.

32 Mr Francis said that a period of five years was too short: it started too late because there was a loss of amenity before the works were completed, and it finished too early because it did not allow any time for the repairs to be done which Mr Francis said should have been allowed for at four months. I do not think these points, however impeccable the logic, mean that the Judge's figure was wrong. I was not referred to anything in the transcript which suggests that the Judge was addressed on these particular points, so the Judge cannot be criticised for not expressly dealing with them in his judgment. So far as the starting point is concerned, the Judge may have started when the works were complete on the basis that that is really when the repairs should have been done, or he may have taken the view that no further damages should be payable for the period up to December 2013 because there was a 100% waiver of rent anyway, and any loss of amenity was already compensated for by being subsumed in that. So far as the end of the period is concerned, he may have thought that in performing an exercise that he himself described as "necessarily broad brush", a period of five years was a good enough approximation. However, in any event, at the rates used by the Judge, a further four months would add very little to the award - by my calculation, a total of £725, taking the award from £10,875 to £11,600. I find it impossible, however, to say that with an award of damages for nonpecuniary loss of this sort of magnitude, that the difference between £10,875 and £11,600 makes the difference between right and wrong. I think it would have been very difficult, if not impossible, to disturb the round sum of £10,000 and the fact that the Judge has, in fact, calculated it more nicely does not, in my judgment, entitle the appellate court to tinker with his figure.

33 Finally, Mr Francis took two other points which can be shortly disposed of. One was that there were outstanding rent reviews, so the £14,500 figure was too low. The short answer to this is that the Judge had no evidence at all as to the current rental value and hence no evidence that £14,500 was, indeed, lower than the market rental. He could only work with the material he had. The other point was that Dr Jafari was liable to pay VAT on the rent and, no doubt because dentistry is exempt from VAT, was unable to recover it. But, as I think Mr Francis in the course of argument recognised, the passing rent is just a proxy for the value of the premises and, in principle, the value of business premises cannot be affected by whether the particular tenant is one whose business consists of making exempt supplies or not as the demised property is the same in each case.

34 For these reasons, I do not find Ground 7 made out.

## GROUNDS 3 AND 4

35 The remaining grounds, 1 to 4, all concern the conclusion of the Judge at [45] - [46] of the judgment on the question of reasonableness; that is whether Tareem did take all reasonable steps to minimise the disturbance to Dr Jafari. Grounds 1 and 2 concern the legal questions (1) whether the Judge was right to conduct a balancing exercise at all, and (2) whether the Judge was right to take account of the waiver of rent in conducting that exercise. Grounds 3 and 4 seek to attack the Judge's conclusions on the basis (3) that if the Judge was entitled to have regard to the waiver of rent at all, he gave undue weight to it, and (4) he reached a decision that no reasonable judge could reach having regard to the evidence.

36 Although, logically, there is much to be said for deciding the points of law raised by Grounds 1 and 2 first, it is, in fact, more convenient to consider Grounds 3 and 4 first. They were argued together and I can consider them together. Mr Francis tended to address this question as if the Judge had concluded that there was no breach of the covenant for quiet enjoyment. Strictly speaking, I do not think that is entirely accurate. What the Judge said at [45] is that Tareem did take all reasonable steps, subject to one point, that being Tareem's

failure to replace the windows with new (see [46] which I cited earlier). That seems to me to mean that, strictly speaking, the Judge did find a breach of the covenant for quiet enjoyment but he did not award any separate damages, in fact, for this breach as he awarded damages in relation to the windows under the head of physical damage. For the purpose of analysis, it is therefore simpler to put the issue of the windows on one side and I accept that if one does that, the Judge effectively found that Tareem had otherwise overall acted reasonably.

37 Mr Francis, while acknowledging that that is an evaluative decision which, following *Prescott v Potamianos*, requires some identifiable flaw in the Judge's treatment, such as a gap in logic or lack of consistency, or failure to take account of some material factor, said that that was the case here. He relied, first, on the actual findings of the Judge in relation to the scaffolding and the instances of noisy work and said that the Judge failed to follow through on his own findings, thereby betraying a lack of consistency. I do not think that is a sustainable criticism. The Judge sets out his specific finding as to the noise and scaffolding at considerable length as I have earlier referred to. At [45], he acknowledges that things could have been done better from Dr Jafari's standpoint:

> "...principally, the design of the scaffolding and avoiding altogether noisy works outside of what I have referred to as restricted hours."

He cannot therefore be said not to have had his earlier findings in mind and the use of the word "principally" shows that he was conscious that these were not the only matters. As I read paragraph [45] of his judgment, what the Judge concluded overall was that the fact that noisy works were, for much of the period, confined to the restricted hours and the complete waiver of rent for seven quarters tipped the balance and outweighed the matters he had referred to. As the transcript shows, he had suggested in argument that if an offer of financial compensation could be taken account of at all, it could tip the balance in this way. See the transcript for Day 5 at page 46 where he said:

> "No, but given it is a factor ... it must be capable of changing the conclusion, must it not, so that it may make reasonable that which without the financial offer would have been unreasonable?"

To which Mr Francis in fact said, "Indeed." That, as I read the judgment, is what he found, namely, that the waiver of rent offered, which he described as "generous financial compensation", made reasonable that which would or at any right might without such offer have been unreasonable. That means that I do not think Mr Francis's first point that the Judge had failed to follow through his own findings is a valid criticism. He has taken account of his own findings as to Tareem's failings but has found them balanced by the waiver of rent.

38 Mr Francis also said that the Judge should have had regard not only to the failings of Tareem but also to the impact they had on Dr Jafari and his staff. He referred me to some of the evidence given by Dr Jafari and to emails from his associate dentists as well as matters recorded by Dr Jafari both on video and in his diary log. These matters were, he said, key to any assessment of reasonableness. But there are three difficulties with such a submission. First, the mere fact that a judge does not mention a piece of evidence does not justify a conclusion that he has overlooked it or thought it irrelevant (see the point in *Henderson v Foxworth* cited in *Staechelin* at [31] which I have already referred to). Second, although Mr Francis took me to particular passages in the oral and documentary evidence, this was necessarily an exercise in island hopping. It is impossible to recreate the totality of the

evidence and I could not possibly duplicate the role of a trial judge in assessing all the evidence. Thirdly, in any event, the submission really comes down to a failure by the Judge to give sufficient weight to these matters, but that does not justify interfering with the Judge's evaluative assessment. It cannot be equated to a logical flaw, or a lack of consistency, or a failure to take account of a material factor undermining the cogency of a conclusion but that is what is required before an appellate court can conclude that the assessment was wrong.

39 Standing back from the detail, the Judge evidently thought that for Tareem to have waived 100% of the rent for the duration of the works was sufficient offset for the inconveniences suffered by Dr Jafari. I do not think I can possibly conclude that that was a conclusion no judge could reasonably come to. The impact of the scaffolding was said to have put patients off and given the impression the practice was closed but the Judge no doubt had in mind the conclusion he expressed later that the accounting figures did not show any marked loss of business in the year to April 2013 despite the scaffolding being up throughout the year. There were, as the Judge pointed out, no noisy works at all from April 2012 to January 2013 and outside that period, the noisy works were not continuous but largely, although not totally, confined to certain limited hours. Dr Jafari was evidently able to carry on his practice if not on every day - there was evidence he closed on some days - but certainly on the majority of days, and the Judge might well have thought that in those circumstances, the compensation that might otherwise be due for the disturbance would be rather less than 100% of the rent and his reference to the rent waiver as both "substantial" and "generous" suggests that he indeed did think this. However at any rate his conclusion shows that he considered it to be at least adequate compensation for the disturbance. I have not been persuaded that I can disturb that assessment on appeal.

**GROUNDS 1 AND 2**

40 That leaves Grounds 1 and 2. Although these were put by Mr Francis at the forefront of his appeal and, indeed, were the main reason why I thought that permission to appeal should be granted, as the hearing continued I became more and more doubtful whether, even if either or both grounds were made out, it would make any practical difference. The essential point that Mr Francis made was that the Judge should not have taken account of the rent waiver in assessing reasonableness at all. The suggestion that a landlord's offer of compensation could be a factor in the reasonableness of his works was first made by Sedley LJ giving the judgment of the court in *Goldmile Properties Ltd. v Lechouritis* [2003] EWCA Civ 49 at [18]-[19] as follows:

> "18. We have deliberately made no reference so far to an aspect of the case to which the district judge paid express attention in the passage of his judgment cited above. He found that the work had been arranged to meet the claimant's requirements as far as possible, and that the lessor had been helpful with regard to the reduction and payment of the service charge. It is worth explaining what he was referring to, because it illustrates what may make the difference between the reasonable and unreasonable execution of repairs which are going to disturb a tenant's quiet enjoyment. In brief, before embarking on the works the lessors had sent the lessee a copy of the full estimate which they proposed to accept, prices included. The lessee wrote back, strongly querying the price but also pointing out that the proposed start date would interfere with the restaurant's busiest period over Christmas. The lessors, having considered these representations,

postponed the start of the works until March 1997 and agreed to spread the first instalment of the consequent service charge over a year. It can readily be seen why the district judge's view that the lessor had taken all reasonable steps to respect the lessee's contractual interests was not contested on appeal. It will always be necessary for reasonableness to be looked at on the facts and in the light of the legal considerations which we have set out above.

19. This lease, like many leases, makes limited provision to compensate the tenant for interruption of the enjoyment of the demise. It is perfectly possible, at least in principle, to make provision in a lease to cover the kind of disruption which has occurred here. In its absence, while there is no obligation or necessity to reflect the disturbance of quiet enjoyment by remitting rental service charges, an offer to do so may well help in establishing the overall reasonableness of the lessor's intervention."

That was picked up by Mr Alan Steinfeld QC in *Timothy Taylor* at [24] as follows:

"I deduce from these authorities [one of which was *Goldmile*] the following propositions, most of which were common ground between the parties:-

(a) In a case like the present, the landlord's reservation of a right to build in a way which, but for that reservation, would constitute either a breach of the covenant for quiet enjoyment or a breach of the implied covenant not to derogate from the grant should be construed as entitling the landlord to do the work contemplated by the reservation provided that in doing that work the landlord has taken all reasonable steps to minimise the disturbance to the tenant caused thereby;

(b) In considering what can reasonably be carried out, it is relevant what knowledge or notice the tenant had of the works intended to be carried out by the landlord at the commencement of the lease;

(c) An offer by the landlord of financial compensation to the tenant to compensate the tenant for disturbance caused by the works is a factor which the Court is entitled to take into account in considering the overall reasonableness of the steps which the landlord has taken."

Mr Francis says that that only applies in a case like *Goldmile* or *Timothy Taylor* where the lease contains not only a covenant for quiet enjoyment but also a right or obligation on the landlord to do the work. See also *Century Projects Ltd v Almacantar (Centre Point) & Ors* [2014] EWHC 394 (Ch), a decision of my own, at [45(5)] where I said this:

"Even without authority, therefore, I would have no difficulty in accepting that where a landlord has let premises for a particular purpose and the lease contains both a covenant for quiet enjoyment and an obligation or right on the landlord to do repairs, neither provision trumps the other. On the contrary, they have to be made to fit together. The landlord cannot say that as the tenant took the demise subject to his repairing obligation, the tenant has to put up with the landlord's works, however unreasonably they are carried out. But, equally, the tenant cannot say that having given the covenant for quiet enjoyment, the landlord cannot carry out any work unless

> it is shown to cause the least possible interference with the tenant's business. Both positions are too extreme. The way the two provisions fit together is that the landlord can carry out work provided he acts reasonably in the exercise of his right."

At [46] I commented that that is what I regarded *Goldmile* as establishing. This is Mr Francis's Ground 1 and he can point in support of it to a decision of Mr Recorder Morgan in the County Court at Central London in *Francia Properties Limited v Aristou & Ors* [2017] L & TR 5 at [50(iii)] where he said that the question of whether the clause had been breached had to be approached on the basis that:

> "This is not a case where there is a right to build that expressly qualifies the covenant for quiet enjoyment and, therefore, the court is required to strike a balance between those competing rights (see *Timothy Taylor*)."

Mr Francis's Ground 2 is that what the Court of Appeal said in *Goldmile* was obiter and that, logically, an offer of compensation could not be relevant to the question of breach although it could be taken into account in assessing quantum.

41 Both points were developed by Mr Francis at some length and with some cogency but the difficulty I have is that I do not see that they will assist Dr Jafari. Let it be supposed that Mr Francis is right and the Judge should have ignored the rent waiver when deciding whether Tareem had unreasonably interfered with Dr Jafari's enjoyment of the premises. That would mean that he should have concluded that Tareem was in breach of the covenant for quiet enjoyment. But it seems to me that had he done so, he would inevitably have come to the same overall conclusion. As I have already said, it is necessarily implicit in his conclusion that he considered the rent waiver to be, at the very least, adequate compensation for the disturbance he had found, if not indeed overcompensation. If, therefore, he had been asked to assess damages for the breach which, on this view, he should have found, I think he would have been bound to come to the view that no further damages were payable as the damage had already been adequately compensated for by the rent waiver.

42 In those circumstances, interesting though the legal arguments advanced by Mr Francis are, I have come to the conclusion that no useful purpose will be served by my expressing a view on them. It is noticeable that the Judge cannot be criticised for dealing with the case in the way he did as it was never suggested to him that he should not be guided by *Timothy Taylor* let alone that he should depart from the guidance given by the Court of Appeal in *Goldmile*. Mr Francis did suggest that one of the factors that should be taken account of in the balancing exercise of assessing reasonableness was for whose benefit are the works (see Day 5 at page 43), and he also made the point that here there was no question of a landlord carrying out works in fulfilment of his repairing obligations or in exercise of an express reservation of a right to build in the lease. However, he accepted that the overall question was one of reasonableness (see page 42) and he accepted that compensation or abatement of rent was an element to throw into the balance of reasonableness (see page 45). In those circumstances, the Judge proceeded on the basis that it was common ground that the principles were those to be found in *Timothy Taylor* notwithstanding that in the case before him, unlike in *Timothy Taylor*, there was no express reservation of a right to build (see [12] of his judgment). That explains why there is no consideration by the Judge of the points now urged by Mr Francis.

43 In those circumstances, as I have said, I do not think any useful purpose would be served by my considering these points as I have come to the conclusion that they would not lead to any

greater award of damages to Dr Jafari even if one or other of them was made out. Mr Francis said that if the Judge should have found a breach, it would be necessary to remit the case for a further hearing on the question of damages. I do not think that is right as there is, for the reasons I have given, sufficient material in the judgment to indicate what the Judge would have found had he been asked to approach the case in this way. Moreover, if, contrary to the view that I have come to, there had really been insufficient findings of fact and the case would have to be remitted, that would, as it seems to me, be a reason for not permitting new points of law to be taken on appeal that were not advanced before the Judge. In general, an appeal court should be slow to allow new points of law to be advanced on appeal unless it is confident that all the necessary factual findings have already been made.

44 I propose, therefore, to say no more about Grounds 1 and 2. They do raise interesting points of law but they do not, in my judgment, justify disturbing the Judge's overall conclusions.

45 I have now considered each of the grounds of appeal and for the reasons I have given will dismiss the appeal.

**L A T E R**

46 This is necessarily a broad-brush exercise. The purpose of an interim award is to make a stab at what might be reasonably likely to be obtained on a standard assessment. I propose to award the sum of £32,000.

**CERTIFICATE**

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

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**This transcript has been approved by the Judge**