Case No: CH-2016-000266

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

The Rolls Building
7 Rolls Buildings
Fetter Lane
London EC4A 1NL

Tuesday, 8 November 2016

BEFORE:

MR JUSTICE NUGEE

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BETWEEN:

MONDIAL ASSISSTANCE (UK) LIMITED
Claimant/Respondent

\- v -

BRIDGEWATER PROPERTIES LIMITED
Defendant/Appellant

\- - - - -

MR WARWICK QC (instructed by ASB Law) appeared on behalf of the Claimant

MR T DUTTON QC (instructed by Walker Morris) appeared on behalf of the Defendant

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(Official Shorthand Writers to the Court)

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JUDGMENT

1. MR JUSTICE NUGEE: I have before me an appeal from a decision of Mr Recorder Williamson, dated 14 October 2016, sitting in the County Court at Central London in proceedings in which the claimant, Mondial Assistance (UK) Limited, seeks a new lease under Part 2 of the Landlord and Tenant Act 1954. The decision related to the admissibility of the evidence for a trial which is due to start next Monday, that is 14 November, and was heard on an expedited basis. I was told, although I have not, I think, seen any order to this effect, that Rose J directed that the appeal be listed for a rolled-up hearing, that is for permission to appeal with the appeal itself to follow if permission was granted. I heard the application yesterday afternoon, 7 November, and at the end of the hearing granted permission as the matter is, plainly, one of some substance that is arguable. This is my decision on the appeal itself.

2. The claimant is the occupier of an office block in Croydon and has been in occupation since November 1999. The block itself dates back to some time in the late 1970s. Its most recent lease was dated 27 October 2010. This expired contractually on 28 September 2015 but the claimant continues in occupation under the 1954 Act. On 30 September 2014, it served a section 26 request for a new tenancy commencing on 29 September 2015. On 8 December 2014, it issued proceedings for a new tenancy. The defendant landlord, Bridgewater Properties Limited, does not oppose the renewal of the lease, as such, but there is a dispute as to the terms of a new lease. The terms which are in dispute appear to be the term and rent commencement dates, inclusion of a tenant's break option and a landlord's break option and the timing of any such options, the inclusion of rent review provisions and the extent of a tenant's repairing obligation.

3. On 27 October 2015, an order was made by DDJ Mohabir allocating the claim to the multitrack and giving directions for trial, including directions for expert evidence under which each party had permission to rely on and call separate evidence at the hearing, as follows: Expert evidence from a valuer relating to the rent which will be payable, including the effect, if any, upon the rent that the inclusion in the lease of the landlord's break clause will have, reports to be exchanged by 4.00 pm on 29 April 2016, and then various other common form directions.

4. By a consent order made by HHJ Mitchell on 28 April 2016, the time for exchange of reports was extended to 4.00 pm on 27 May 2016. On 27 May 2016, I was told, the claimant was ready to exchange but the defendant was not. There were then some procedural moves which I am not sure I have fully understood but, as I understand it, on 2 June the defendant applied for an extension of time to serve its expert's report. That appears to have been dismissed on 14 June but an appeal was allowed by HHJ Dight on 26 August and that order permitted the defendant to rely on expert valuation evidence from a Mr Andrew Smith.

5. In the meantime, the defendant had seen the claimant's report. I do not think I was told precisely when that was but on 11 August 2016 the defendant issued an application seeking an order under CPR 32.1 requiring that various documents appended to the report of the claimant's expert, Mr Jonathan Dickman, be removed and that all reference to those documents in the body of the report be deleted on the grounds (1) that Mr Dickman was not able to verify the contents of those documents; and (2) the claimant did not seek to adduce, and had not sought permission to adduce, the expert evidence that would be necessary to verify those contents.

6. That came before the recorder as part of the pre-trial review, as I have said, on 14 October. At this point, I should refer to Mr Dickman's report. It is a substantial report, dated 27 May 2016. He says at paragraph 3.01 that he had been instructed by the claimant to provide an expert's report setting out his opinion of rental value. In the course of his report, he said this about the condition of the premises, under paragraph 7:

> "7.01. For the purpose of my report, I am required to assume that the premises are in repair in accordance with the terms of the lease."

(I interpose to say, that in fact, that was not a requirement of the lease. That requirement stems from the fact that in an application for new a tenancy under Part II of the Landlord and Tenant Act 1954, the rent is to be assessed on the basis that the tenant has complied with his obligations in the existing lease because otherwise it would enable a tenant who had failed to comply with a covenant to repair to take advantage of his own wrong.)

> "The age of the premises and the fact that some of the plant is original will mean elements of the premises will be subjected to increasing expenditure in order to keep in repair and functioning. In anticipation of taking a further lease, the claimant has commissioned reports on the windows, lifts and plant. These are summarised below."

7. Then he summarises in paragraphs 7.02, 7.03 and 7.04 reports in relation to curtain walling, M & E and lifts. Then at paragraph 12.05, he says:

> "12.05. The circumstances that I am required to consider for this lease renewal exercise, i.e., a letting of the premises in their current unrefurbished condition but in repair would, in my view, be difficult to envisage for an office of this size on the basis of a new ten year lease, even with a tenant's break option at the end of the fifth year, without some form of refurbishing. A prudent and well advised tenant would undertake an element of due diligence which

> would identify future issues with the lifts and windows and they would expect either the landlord to rectify these or an allowance made to the rent to reflect future cost.
>
> 12.06. As a valuation exercise, however, and in the absence of any comparable unrefurbished buildings, I believe that such a scenario could be approached on the basis of what rent the premises might reasonably, attract after the work has been completed from which a deduction should then be made to reflect the amortised cost to the tenant of carrying out those works, given an allowance for time and risk."

Then at paragraph 13.04, having said at paragraph 13.03 that he thought it unrealistic to assume a tenant would take the space for a ten-year term certain:

> "… even with the benefit of a tenancy break in the fifth year without some upgrading to the plant and machinery and if forced to take a full repairing lease, even with the benefit of a schedule of condition, any well-advised tenant would factor in the cost at the start of the lease of potentially replacing the windows over the ten-year term."

At 13.04, he says this:

> "Using advice from the external consultants, I have taken advice from our buildings surveyors at SHW to provide an approximate cost. The hypothetical cost is attached at appendix F."

8. When one goes to the appendices, appendix D contains the three reports. The first report is from consultants called J B Lift Consultants and is a report on lift services. It is dated March 2016 and it is based on what is described as a recent visual survey of the equipment and adjacent building fabric. At paragraph 3.3, they deal with the cost of major modernisation works and then at 3.4 deal with what are described as five year minimum works, on which they say:

> "We do not consider that the existing lift equipment could be retained to operate reliably over the next ten years and, as such, we submit what we consider to be the minimum works necessary for the next five years, as follows:"

And then they provide estimated budget costs for that.

9. The second report is from consultants called Cladtech Associates and that is described as a condition report on external curtain walling. It is dated 26 August 2014 and it is based on an inspection on 19 August 2014. It is described in the introduction as follows:

> "The aim of this report is to describe the condition of the existing curtain walling to assist Alliance…"

which is a reference to the claimant tenant:

> "… in their decision-making process regarding the possible renewal of their existing lease which is due to expire."

Their summary and recommendations include statements that the curtain wall is in reasonable condition for its age, that various matters will require replacement and at paragraph 3.6:

> "There are no current insulated glass unit failures but these units are already around 25 years old and despite being the drained glazing system, they will not last indefinitely."

Then various other matters are dealt with, ending up with:

> "It is very probable that within a further ten years, an extensive remedial program will be necessary on this curtain walling which is likely to involve the replacement of all the glass."

10. A third report is from consultants called Conserve Limited. That is dated 16 March 2016 and it is based on a site visit made on 10 March 2016. It says in its introduction that the report had been compiled to enable the reader to gain information about the extent of services currently installed at the site, the condition of services,

identification of the main defects and recommendations and that details the condition of the mechanical and electrical services, including two tables containing the anticipated lifespan of various elements, both of the mechanical services and the electrical services. Appendix F to the report is a one page list of outline refurbishment works and costs and my attention was drawn by Mr Warwick QC, who appeared for the claimant, to a figure of £1.65 million which appears in section 2 of that summary.

11. It is not in dispute that the content of those reports contains opinion evidence; that seems to me to be clear. The defendant's position, in summary, is that such opinion evidence fell within the purview of CRP Part 35 and that the claimants should have proceeded under CPR 35 to obtain permission to adduce it and complied with the requirements of Part 35. The claimant's position is that the evidence is admissible under the Civil Evidence Act 1995 as hearsay and should have been allowed in by the recorder.

12. A transcript of the recorder's judgment is not available but there is a note which has been agreed by counsel which is a brief note of his judgment. This was, as I was reminded, not a self-standing application but one only of several matters that were dealt with at a pre-trial review and he dealt with it quite briefly. The agreed note reads, so far as is relevant, as follows:

> "It is clear and it is accepted by the claimant that the content of those appendices is hearsay evidence. It is submitted by the claimant that because of the Civil Evidence Act 1995, the evidence is admissible in principle, but subject to questions of weight to be evaluated in accordance with section 4. However, matters do not stop there. CPR 32.1(2) provides that even where evidence is admissible, the court may exclude it under the court's case management powers. The notes in CPR 32.1(4) do not restrict the

> circumstances in which those case management powers can be exercised. The difficulty seems to be this, the matters are opinion evidence from other experts. That opinion evidence may be right and the experts may be reliable but in order for those matters to be tested, the expert evidence must be brought before the court under CPR Part 35 so that the court can decide whether, when and how their evidence is to be given. It is said by the claimant that authorities provide the answer to this point. I was taken to a decision of Norris J in **First Subsea Ltd v Balltec** [2013] EWHC 1033 (Pat) where Norris J refers to the decision of David Richards J (as he then was) in the **Daltel** case, where he said that in the light of the Civil Evidence Act 1995: 'It would rarely be a proper use of the power under Part 32.1(2) to exclude hearsay evidence which was relevant to the issues for a decision on the ground that it was hearsay.' With respect to Norris J and David Richards J, that is plainly right. The court will allow civil hearsay evidence in almost all cases. However, this does not deal with the difficulty that the evidence is being sought by the back door through reports for which permission has not been given. As a matter of case management, that is unattractive. If this were appropriate, then the claimant could have made an application. If it is allowed, then it would be expert evidence by a back door and the court at trial cannot hear cross-examination of these witnesses. For those reasons, the defendant's application of 11 August 2016 is rightly made."

13. There was before the recorder also an application by the claimant dated 7 September 2016 which sought permission under CPR 35.4 to rely upon the evidence of individuals at J B Lift Consultants, Cladtech Associates and Conserve Limited, being the three consultants whose reports appeared in appendix D, and another individual at Stiles Harold Williams LLP, the firm to which Mr Dickman belongs, on the indicative refurbishment costings and in the alternative to that, there were other ways of getting the matter before the court.

14. The note of judgment reads:

> "The recorder then heard submissions upon the claimant's application and refused it."

But I was not told anything as to the reasoning by which that application was refused.

15. Unfortunately, neither party referred the recorder to what is now accepted to be the leading case on the admissibility of hearsay opinion evidence, which is a decision of the Court of Appeal in **Rogers v Hoyle** [2014] EWCA Civ 257. That was a claim by the executors of a passenger in a light aircraft who had been killed and whose executors brought a claim in negligence against the pilot, and the claimants wished to rely on a report produced by the Department of Transport's Air Accident Investigation Branch ("AAIB"). The Court of Appeal, upholding Leggatt J, agreed that the report was admissible and that it would be a matter for the trial judge to make such use of the report as he thought fit.

16. The only reasoned judgment is given by Christopher Clarke LJ, with whom Treacy LJ and Arden LJ agreed. The entire passage of his judgment from paragraphs [41] to [67] is material, including, in particular, that part from paragraphs [58] to [67] but it is too long for me to read out. What emerges clearly from the decision is as follows. Firstly, (see paragraph [58]), section 3 of the Civil Evidence Act 1972 makes admissible the opinion on any relevant matter of a person called as a witness provided he is qualified to give expert evidence. Secondly, at paragraph [59], Christopher Clarke LJ says:

> "In the light of the Civil Evidence At 1995, it is no longer requisite that the expert be called to give evidence orally."

The 1995 Act makes hearsay evidence admissible in civil proceedings generally. That is the effect of section 1.(1):

> "In civil proceedings, evidence shall not be excluded on the ground it is hearsay."

And it is apparent that although section 2 requires notice to be given, section 2.(4) provides that a failure to comply with sub-section (1) or with rules under sub-section (2)(b) does not affect the admissibility of the evidence but may be taken into account by the Court. Section 4 deals with considerations relevant to the weight to be given to hearsay evidence and sets out various matters to which regard may be had, including under s.4(2)(f) in particular, whether the circumstances in which the evidence is adduced as hearsay are such as to suggest an attempt to prevent proper evaluation of its weight. Section 13 defines “statement” as meaning any representation of fact or opinion, however made. It is not, therefore, surprising that Christopher Clarke LJ said that it was no longer requisite that an expert be called to give evidence orally and it seems to me, from the note of his judgment, that the recorder accepted that the evidence was admissible, in principle, under the Civil Evidence Act 1995 because he went on to exercise powers under CPR 32.1(2) to exclude it. If he had decided that it was not admissible at all, he would not have needed to have done that.

17. Thirdly, Christopher Clarke LJ makes it clear at paragraphs [61] and [62] that CPR Part 35 is not a comprehensive code regulating the use of expert evidence. That was the submission being put forward at paragraph [61] and at paragraph [62] he said this:

> "This submission is not well founded. Section 3 of the 1972 Act does not purport to be all embracing or to restrict or alter the position at common law. The expert with whom CPR Part 35 is concerned is a person 'who has been instructed to give or prepare expert evidence for the purpose of proceedings.'"

I interpose to say that that is a quotation from CPR 35.2(1):

> "The expert evidence referred to in CPR Rule 35.1 and 35.5 and the expert's report referred to in CPR Rules 35.4 and 35.10 are the evidence and report of such a person. The purpose of CPR Part 35 is to regulate the evidence of experts instructed by the parties to ensure that they act as experts and to regulate the use and content of their

> reports. The expert evidence in the report does not fall within the CPR Part 35. The AAIB was not instructed by and is wholly independent of any of the parties.
>
> 63. CPR Part 35 is not a comprehensive and exclusive code regulating the admission of expert evidence. It regulates the use of a particular category of expert evidence."

18. The effect of that decision can be summarised, as I see it, as follows. Firstly, if opinion evidence is tendered and the evidence is of an expert qualified to give expert evidence within section 1(1) of the Civil Evidence Act 1972, then it is prima facie admissible, even if tendered in hearsay form, by a combination of section 1(1) of the 1972 Act and section 1(1) of the 1995 Act. That admissibility is not affected by the provisions of CPR Part 35 unless the report is the report of an expert within the meaning of CPR 35.2(1). If the report is outside the purview of 35.2(1), then CPR Part 35 has no bearing on the question of its admissibility.

19. An example of opinion evidence which falls outside 35.2(1) is the report of the AAIB in **Rogers v Hoyle** itself. In that case, the AAIB was not instructed by the parties and the report was not commissioned for the purposes of the proceedings. I should say that 35.2(1) reads as follows:

> "A reference to an "expert" in this Part is a reference to a person who has been instructed to give or prepare expert evidence for the purpose of proceedings."

It includes, also, academic literature and surveys conducted for purposes other than the proceedings. That is exemplified by Arnold J's decision in **Interflora Inc v Marks and Spencer plc** [2013] EWHC 936 Ch in which he expressed the view that Part 35 was not applicable to reports and articles of a scientific nature which had not been

prepared for the proceedings. On appeal (see [2014] EWCA Civ 1403) an appeal against that was not pursued in the light of the decision in **Rogers v Hoyle** (see the judgment of Kitchin LJ at paragraph [161]). In **Interflora**, the academic literature and the surveys were not commissioned by the parties and were not related to the proceedings in any way.

20. It also includes reports which were commissioned by the parties if they were commissioned for some other purpose and then sought to be adduced in the proceedings. That appears from the way in which Christopher Clarke LJ treated the judgment of Sales J in **Humber Oil Terminals Trustee Limited v Associated British Ports** [2012] EWHC 1336 Ch. In that case, a witness called to give evidence as to the cost of replacing a jetty relied on a report which had been commissioned by the claimant tenant, but for some other purpose, not for the purpose of the proceedings. Sales J was persuaded to accept the submission that that was subject to the requirement in CPR 35.4 to obtain permission because it was being adduced as expert evidence and fell within CPR 35, but it appears from Christopher Clarke LJ's judgment in **Rogers v Hoyle** that that was an error. At [66], he said this:

> "I would not regard the material in that case as wholly inadmissible. If it was, it is difficult to see how Mr Bartlett could deploy it. It was, however, plainly not the evidence of an expert as defined in CPR Part 35 and was, therefore, subject to very limited weight -- for the reasons set out in paragraph 145 of Sales J's judgment where he identified the weakness in Mr Bartlett's evidence by reference to the weakness of the Nuttalls' costs indication and Foster Wheeler reports, including but not limited to the absence of anyone from those companies being called to give evidence and subject to cross-examination.

21. That, it seems to me, makes it clear that the reports there referred to, the Foster Wheeler and Nuttall reports, not having been the reports of experts within the meaning

of 35.2(1), were not subject to any requirement to obtain permission under Part 35 and were, therefore, admissible but were, in the circumstances, entitled to very little weight.

22. The consequence of the judgment is that there is, as it seems to me, a sharp divide between opinion hearsay evidence which is adduced in circumstances where Part 35 does not apply because the evidence is not the evidence of an expert within the meaning of 35.2(1) and opinion expert evidence which is sought to be adduced where the person giving the evidence is an expert within 35.2(1). In relation to the former, because Part 35 does not apply, there is no requirement to obtain the permission of the court. The evidence is prima facie admissible under a combination of the 1972 Act and the 1995 Act, as I have explained. Being prima facie admissible, although the Court has a discretion, as it does with all evidence, to exclude it under 32.1(2) ("the court may use its power under this rule to exclude evidence that would otherwise be admissible") the general position is that the Court should be slow to exclude evidence that is admissible, leaving objections to the evidence to be given effect to by affecting the weight to be given by the evidence (see the decisions of David Richards J in **Daltel Europe Limited v Makki** [2005] EWHC 749 Ch and of Norris J in **First Subsea Limited v Balltec Limited** [2013] EWHC 1033 (Pat). At paragraph [56] of **Daltel** [2005] EWHC 749, David Richards J said:

> "Part 32.1(2) is primarily a case management power. It enables the court to exclude evidence so as, for example, to confine it to particular issues or to control the proliferation of evidence on an issue where significant evidence has already been adduced and the addition of further evidence would involve a disproportionate use of the parties and the court's resources In **Post Office Counters Limited v Mahida** [2003] EWCA Civ 1583 at para [24], Hale LJ said:
>
> > "The power of the Civil Procedure Rules to exclude evidence even if it is admissible is principally a case management power designed to allow the court to stop

> cases getting out of hand and the hearing becoming interminable because more and more admissible evidence, especially hearsay evidence, is sought to be adduced."

David Richards J continues:

> "No doubt the power to exclude evidence may be used for other purposes which are not connected with case management, for example, to ensure compliance with the European Convention on Human Rights. However, in the light of the approach adopted by the Civil Evidence Act 1995, it seems to me it would rarely be a proper use of the power under Part 32.1(2) to exclude hearsay evidence which was relevant to the issues for decision on the ground that it was hearsay."

That, as appears from the note of the recorder's judgment, was a principle that the recorder accepted as plainly right. If, therefore, evidence falls outside the purview of CPR Part 35, the prima facie position is that provided that it is evidence of someone qualified to give expert evidence, it is prima facie admissible and it would rarely be appropriate for it to be excluded.

23. There is, as I say, a sharp divide between that and evidence which falls within the purview of CPR 35. There, the default position is that the evidence cannot be adduced without the permission of the court. That is the effect of CPR 35.4(1) ("no party may call an expert or put in evidence an expert's report without the court's permission") and there are, as is well known, a number of requirements which apply under CPR 35 and the Court is astute to see that expert evidence is not adduced without complying with Part 35.

24. In those circumstances, it seems to me the relevant question which the recorder should have been asked to decide was whether the material in the appendices that were objected to were or were not reports of experts within the meaning of 35.2(1).

Unfortunately, because neither party focused on the decision in **Rogers v Hoyle** or on those questions, it does not appear from the brief note of his judgment that he was asked to consider that question as a separate question nor, indeed, does he appear to answer it as a separate question. But it is fairly clear from the note of his judgment that he assumed that if the claimant wished to put the reports in, he should have complied with Part 35 because he describes it as evidence being sought by the back door through reports for which permission has not been given, and that as being unattractive. I proceed, therefore, on the basis that he assumed the reports were not admissible, otherwise than with the permission of the court, under Part 35.

25. I agree with Mr Dutton QC, who appears for the defendant that logically, the first question on this appeal is whether appendices D and F did contain reports of experts within the meaning of CPR 35.2(1). I will consider, first, the curtain wall report. It seems to me that it is very plain, on the face of it, that it was not a report that falls within CPR 35.2(1). As I have said, it was dated 26 August 2014 and based on a site inspection on 19 August 2014. That is not only before proceedings were commenced but before the section 26 request was served. As I have referred to, it describes itself as being to describe the condition of the existing curtain walling to assist the tenant in its decision making process regarding the possible renewal of its lease and I see no reason to doubt that was the case. That, in my judgment, means the consultants were not being instructed to provide a report for the purpose of giving evidence for proceedings.

26. It is pointed out in the notes in the White Book at 35.2.1 that the effect of the CPR rules is to create a distinction between (1) an expert who advises a party on a specialist or technical matter within his/her expertise at any stage of a problem, dispute or claim,

and (2), an expert witness who is instructed by a party during proceedings usually to prepare a written report for the court. That seems to me to be a real and practical distinction and, on the face of it, this report is of the former type and not of the latter.

27. Mr Dutton QC submitted it was enough to come within 35.2(1), if the person instructed was instructed to prepare a report, which was then subsequently used for proceedings. That, I think, is not a natural reading of the language. The language, which refers to "a person… instructed to give or prepare expert evidence for the purpose of proceedings," most naturally would mean, I think, that at the point of instruction, the reason for instructing the expert is to obtain evidence for the purpose of proceedings.

28. Mr Dutton QC also submitted it is enough if one of the reasons why the report was obtained was for use in proceedings and suggested that, given the timing, that may very well have been one of the reasons for commissioning the report. I accept it is possible, as a matter of fact, that one of the considerations the tenant had in mind, when asking for the report, was that it might be that it would wish to serve a section 26 request seeking a new lease and, no doubt, if that was done, it was at least possible, if not probable, that it might be necessary to take proceedings to settle the terms of any new lease, even if the principle was not itself disputed. None of that, in my judgment, means that the consultants, Cladtech Associates, can be described as instructed to give or prepare expert evidence for the purpose of proceedings. On the face of it, they were instructed to report to the tenant in order to assist the tenant in its decision making process and I have said already, I see no reason not to accept that at face value.

29. The position with the other two reports in appendix D is rather different. Both were dated March 2016 and based on inspections in March 2016 at a time when expert evidence had been directed - it had been directed, as I have said, in October 2015 by DDJ Mohabir - and when the expert evidence was due in the reasonably near future. Both look, as I have referred to, at the likely future costs involved, in respect of the lifts and M&E matters, respectively. It was suggested by Mr Warwick QC that one of the reasons for permission might have been to consider the potential dilapidations liability if the application for a new lease was abandoned but they do not give me the impression, on reading them, that they are intended to identify the cost of repairs that are currently needed. On the contrary, they give the impression of being commissioned in order to look forward to the next five or ten years.

30. It does seem probable that the consultants were instructed to prepare those reports for the very purpose of informing the valuer's valuation of the rent which was due, at that stage, at the end of April, although subsequently extended to the end of May, and, hence, of being relied on as part of his report and, hence, as being adduced in evidence as part of that report. If that is the case, it does seem to me that the individuals who gave the reports were experts within the meaning of 35.2(1) because they were persons instructed to give or prepare expert evidence for the purpose of proceedings.

31. As to appendix F, there, I think the position is even clearer because paragraph 13.04 of Mr Dickman's report says in terms that he had taken advice from his building surveyors at his own firm to provide an approximate cost. That is being done in order to inform the evidence which he gives as to the appropriate discount to the rent per square foot, if amortised over a particular term. That does seem, clearly, to have been commissioned

for the very purpose of being adduced in evidence for these proceedings as part of Mr Dickman's report and, again, it seems to me that the person who was asked to do that was a person who had been instructed to give or prepare expert evidence for the purpose of these proceedings.

32. The question, then, is what is to be done. It does seem to me that the recorder's decision is, in part, flawed because in relation to the curtain wall consultant, no doubt not through any fault of his own, the recorder does seem, from the note of the judgment, to have proceeded on the basis that permission should have been sought for adducing the curtain wall report and that, as I have already said, must be on the basis that it fell within the scope of Part 35 which, as matters appear to me, was not the case. In those circumstances, the recorder's decision has to be set aside, at any rate, in respect of that report. There is then a question as to whether I should make a decision, myself, or whether, as Mr Warwick QC, I think, suggested at some stage, it would be more appropriate for the whole question of what should be done to be remitted, to be determined by the trial judge on the first day of the hearing.

33. Matters are complicated by the fact that, on the face of it, it seems very probable to me that the other two reports, those of the lift consultant and the M&E consultant, were within the scope of Part 35 but I am conscious that the evidence that was adduced on this application and, indeed, on the appeal, did not really address the question directly and that that is an inference I have drawn largely from the timing of the reports and was not one the recorder was either asked to or did consider. That, I think, leaves the Court in a rather unsatisfactory position where there is a danger of proceeding on the basis of an inference which it is possible might be unsound.

34. In those circumstances, although, in general, an appellate Court will, if it has set aside a decision of the Court below, remake the decision and although I can see it could be said that the foundation behind the recorder's exercise of his discretion in relation to the other two reports is not undermined in the same way as it is, in my judgment, in relation to the curtain wall report, I have come to the conclusion that it is the most sensible course, in the circumstances, to remit the whole question to the trial judge to decide on the opening day of the trial next Monday. That will enable the parties, if so advised, to adduce further evidence to displace what I have said are the prima facie indications from the form of Mr Dickman's report as to whether the lift consultants and M&E consultants were instructed, in effect, to give or prepare expert evidence for the purpose of proceedings.

35. I have expressed some fairly strong views on that but I do not think it right to shut out the claimant, in particular, from adducing evidence to show that the views which I have expressed based on inferences from the form of Mr Dickman's report, in fact, turn out to be wrong. More significantly, it will enable the trial judge, who will have a much better idea of the practical consequences for the shape of the trial before him or her than I can, to decide what should be done in the circumstances where, on the face of it, my conclusions would lead to the consequence that there is no good reason shown why the curtain wall consultant's report should be excluded or, at any rate, to be more precise, the reasons given by the recorder cannot be sustained, but that on the basis of the recorder's reasoning, the reasoning would continue to apply to the other two reports and, indeed, to the costings in appendix F. That, I regard as giving rise to quite difficult considerations as to how is the best way to deal with these matters.

36. There are, as so often, things to be said on both sides. On the one hand, litigation should be conducted at proportionate cost and it is very common in my experience for valuers to wish to have, and hence to obtain, advice from other experts before opining on rental values and anything which led to a practice whereby all those who had an input into a valuation report had to be called separately, subject to the restrictions of Part 35, would be likely, in very many cases, to lead to disproportionate cost being spent on what, in the end, is a valuation question. If every sub discipline had to be, separately, the subject of expert evidence, that could well get out of hand. On the other hand, there may well be substance in objections of the type put forward by Mr Dutton QC, who complained that, for example, the makers of the reports have not carefully distinguished between what was repair and hence must be assumed to be done for the purposes of the rental exercise, and what were matters of replacement, and the like; and that the valuer, himself, Mr Dickman, was not an expert in these matters and that the authors of the reports could not be questioned.

37. In those circumstances, it does seem to me that rather than my attempting to weigh up these various matters now, in circumstances where I have necessarily had to give this decision as a matter of some urgency and in circumstances where I have not felt confident that I have fully understood the likely dynamics of the trial, let alone the impact it will have on the practicalities of running the trial, I have decided to accede to Mr Warwick QC's suggestion that the whole question be remitted to the trial judge to decide on the first day of the trial.

38. I have decided, for the reasons I have given, that the recorder was not asked to and, hence, did not, answer the right question. I have expressed my view on the curtain wall consultant's report, which I regard as a clear case. I have expressed some quite strong views on the other reports but I have not expressed any view as to what, in the circumstances, the trial judge should do and I leave that entirely to his or her discretion to balance the various considerations which I have mentioned and any other considerations which occur to him or her as he or she embarks on the trial.