RENT REVIEW
IN THE RECESSION
– Yes, we can!

by

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RENT REVIEW IN THE RECESSION? YES, WE CAN!

Introduction:[1]

1. Despite the current downturn, it is our joint experience that disputed rent reviews are still occurring but that clients' thoughts are turning in different directions. The five short topics which we will be looking at during this session cover areas where clients have expressed a particular interest or raised particular questions.

Mothballing and Unmothballing the Review:[2]

2. The first topic bears this heading because it is a specific question posed by a particular landlord client as to whether he could "mothball" a review until better times in the future and whether he could "unmothball" (if there is such a verb) a review from better times in the past. (The client was, and is, an eternal optimist).

3. In many ways this topic ties in with another which I will deal with at the end of this session called "Floating Valuation Date" because the client's first question begs the further question as to why he would want to "mothball" the review. If the valuation date is fixed and in the past, then the landlord should know whether or not there is likely to be an increase in rental value which is worth trying to secure through the rent review clause. Also, if the valuation date is fixed and in the past, the landlord is more likely to want to get on with the review than to wait and see the market sink further and produce evidence which may harm his case. If, however, there is a floating valuation date then the landlord may have good reason to "mothball" the review.

[1] John Male QC.

[2] John Male QC.

Mothballs

4. So returning to the first question put to us, and assuming that the landlord has good reason to do so – can the landlord mothball his review? Taking the matter stage by stage, in the absence of an expression provision allowing the landlord to defer the review, the first issue will be whether time is of the essence for any steps which have to be taken by the landlord to initiate the review.

5. Although it might be thought that this particular question is now fully played out a search for the last three/four years shows that it still raises issues: see, for example, *Lancecrest Limited v. Asiwaju*;[3] *Riverside Housing Association Ltd v. White*;[4] *Warborough Investments Ltd v. Central Midlands Estates Ltd;*[5] *Wilderbrook Ltd v. Oluwu;*[6] and *Secretary of State for Communities & Local Government v. Standard Securities Ltd*.[7]

6. The last two cases just mentioned provide interesting examples of how variations on the same basic review clause can provide issues for consideration by the Court.

7. In *Wilderbrook Ltd v. Oluwu* the appellant was the landlord and the respondent was the tenant under a lease of commercial premises. The rent review provisions provided for service on the tenant of a rent notice specifying an amount of rent. The tenant could, within one month of receipt, serve a counternotice calling upon the landlord to negotiate the rent, failing which it would be deemed to have agreed to pay the sum specified in the rent notice. In the absence of agreement, a surveyor was to be appointed to determine the rent. A further clause provided that time was deemed to be of the essence of all periods of time referred to in the schedule, with a proviso that the landlord or tenant could, notwithstanding, always require the appointment of a surveyor to determine the question of new rent, and any delay by either party in that respect would not deprive them of their right to have a new rent determined by a surveyor.

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[3][2005] EWCA Civ 117.

[4][2007] EWHC UKHL 20.

[5][2006] PLSCS 139.

[6][2005] EWCA Civ 1361.

[7] [2007] All ER (D) 328 (Jun).

8. The appellant sent a rent notice to the respondent's premises by recorded delivery, proposing a rent that was more than twice the existing rent. Although the notice arrived the following day, the respondent did not serve a counternotice until more than a month later. The appellant brought proceedings for a declaration that the respondent was consequently deemed to have agreed the rent set out in the rent notice. Dismissing the claim, the judge held that time was not of the essence with respect to the counternotice, since a tenant could still require the appointment of a surveyor under the proviso.

9. On appeal, it was held that the general presumption that time was not of the essence with regard to rent review provisions was not rebutted. The deeming provision in the lease, when limited by the proviso, was an insufficiently clear and explicit contra-indication to have that effect. The proviso could not be applied selectively, and, consequently, it overrode the deeming provision in respect of the entire process of a stipulated rent review that could lead to the determination of the rent by a surveyor.

10. A different variation on time of the essence arose in *Secretary of State for Communities & Local Government v. Standard Securities Ltd*.[8]

11. The rent review clause in the lease provided that the new rent was to be agreed by the landlord and tenant at least two months prior to the rent review date, and, in the absence of agreement, would be determined by an independent surveyor following a written request made by the landlord. The clause went on to provide that if the landlord had not made such a request by the review date, then the rent would remain the same for the next seven years. The review dates were at seven-year intervals.

12. The parties had not agreed the new rent and the landlord did not serve a notice before the rent review date requiring determination by a surveyor. The High Court (Blackburne J) held that, while time is not usually of the essence of procedures in a rent review clause, this was subject to contra-indications in the lease. Here, the rent review clause clearly prescribed the consequences of a

[8][2007] All ER (D) 316 (Jun).

failure to comply with the timetable laid down. The Court did not accept the landlord's argument that the provision was merely designed to be a "fall-back" position as to the rent which was to be payable pending completion of the rent review.

13. Returning to the question of mothballing, assuming that there is no express provision providing for the landlord to defer the review and assuming that time is not of the essence, then that is still not the end of the matter because the tenant might be able either to initiate the review or to make time of the essence for the taking of a particular step. As to the former, my co-speaker will be touching on this aspect in his part of this talk.

14. Assuming that the tenant cannot initiate the review then the tenant may still be able to make time of the essence for particular steps within the review process. So, for example, if the rent review clause provides that landlord's trigger notice has to be served by a certain date and it is not then the tenant will be able to make time of the essence for doing so.

15. As Neuberger LJ said in *Lancecrest* of a landlord's trigger notice which had to be given "no more than 12 months before the review date…."

> "[26] ... the day after the review date, the tenant can make time of the essence for the service of a trigger notice. Accordingly, while it might seem a commercially unrealistic solution to many people, and not what the parties to the lease envisaged, the tenant's right to make time of the essence for the service of a trigger notice means that he need suffer very little delay beyond the time limit contemplated by clause 5.1(b), if time is not in fact initially of the essence for the service of a trigger notice. On any review, the tenant could have no complaint if the trigger notice was served the day before the review date (with the consequent possible delay in assessing the reviewed rent until some time after the review date). By very promptly making time of the essence, he could, in practice, ensure that the trigger notice is served, say, one month,

or even possibly two or three weeks, after the review date, failing which the landlord will have lost the right to review the rent."

16. There are some situations where notices making time of the essence cannot be served.

17. First, in order for a party to be able to serve notice making time of the essence, there must be a time limit (express or implied) for the step in question. If the rent review clause entitles the landlord only to initiate a rent review at any time (without stating when the initiation must take place), then a notice purporting to make time of the essence will simply be of no effect, there being no time limit to which such a notice could attach.

18. It must be borne in mind that in an appropriate case the Court may imply a time limit. So, in *Barclays Bank Plc v. Savile Estates Ltd.*, the Court of Appeal was concerned with a rent review clause which provided for the reviewed rent to be agreed between the parties and in default of agreement to be assessed by a surveyor appointed on the application of the landlord by the President of the RICS.[9] There was no express time limit for a landlord to apply to the President.

19. The Court of Appeal held that an implied term was necessary to give business efficacy because otherwise a review could take place anything up to six years after the appropriate date. The term was that the landlord should make the application for the appointment of the independent expert within a reasonable time of the relevant rent review date. Consequently, the tenant's letter making time of the essence for the landlord to apply to the President was effective and, as the landlord had not applied, the landlord had lost its right to a review. The Court below had held that there was no time limit in which to take the step. This was wrong and the appeal was allowed.

20. Secondly, even where there is a time limit, any steps required by the rent review clause must be taken before a notice making time of the essence can be served.

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[9][2002] EWCA Civ 589; [2002] 2 EGLR 16 (CA).

In *Northern and Midland Holdings Ltd v. Magnet Ltd*,[10] the judge rejected[11] a submission that a notice served by the tenant purporting to make time of the essence for the landlord to apply to the RICS for the appointment of a surveyor was effective, because the notice had been served prematurely.[12]

21. Thirdly, the purpose of giving a party a right to serve a notice making time of the essence is to provide him with a remedy against inaction by the other party. Accordingly, a party cannot serve a notice making time of the essence for taking a step in the procedure which it is open to the party himself to take: see *Factory Holdings Group Ltd v. Leboff International Ltd*.[13] In that case, the relevant step was the failure of the landlord to apply to the President for the appointment of an expert, but the tenant himself could apply to the President.

22. If one gets through all the above stages, then the landlord can "mothball" the rent review.

23. So, it can be seen that there will be cases where the landlord can mothball its review, but they are likely to be rare. They are likely to be cases where the landlord alone can initiate the review and it is expressly provided that he can do so at any time.[14]

Unmothballing

24. If there is such a word as "unmothballing", what the landlord client had in mind was whether it could re-visit a past rent review which it had not exercised.

25. Again, this question begs the further question as to why the landlord would want to "unmothball" such a past review. The express reason given was that with the

[10] [2004] EWHC 120 (Ch); [2004] PLSCS 98 (Mann J).

[11] This case also considers, albeit *obiter*, the question of how long a period of notice was required. On the facts of this case, eight or nine working days was sufficient.

[12] This was because prior to such an application the parties had to try to agree upon the identity of a surveyor and on the evidence this stage has not been reached.

[13] [1987] 1 EGLR 135.

[14] Even then one wonders whether the Court might imply that the review was to be exercised "at any time [within a reasonable time after the review date]."

benefit of hindsight the client thought that the market at the rent review date might have been higher than was thought at the time and therefore they wanted to revisit the review. One suspects that the real reason was that in the current difficult times the client was trying to work its assets as much as it could.

26. Whatever the reason, once again the first stage is to consider whether time is of the essence for any steps which the landlord had to take to initiate the review. This is familiar territory which I will not trouble you with any further today, particularly just after a good lunch.

27. Assuming that time is not of the essence and that the tenant has not sought to make time of the essence in the past, the next issue is whether (despite the landlord's question) the landlord has already exercised the review. A memorandum recording a nil increase would be bad news as would an exchange of correspondence between landlord and tenant or between agents recording agreement on a nil increase. A letter from the landlord or its agent saying that the landlord had decided not to exercise the review might lead to questions of waiver or estoppel. Oral discussions between surveyors could lead to the sort of issue considered in *Esso Petroleum Co Ltd v. Anthony Gibbs Financial Services Ltd*. as to whether or not the review had been exercised.[15]

28. If these hurdles are surmounted, then in principle the landlord can unmothball his review. However, one then faces potentially difficult evidential issues for the valuers who will have to re-create market conditions from some time ago. Valuers are well used to carrying out this sort of exercise but it can present difficulties. Also, the usual questions will arise about the extent to which post valuation date evidence may be admissible. My co-speaker will discuss the issues here in a little more detail later on.

Express contractual provisions

29. All that I have said so far about mothballing and unmothballing is based on general principles. Of course, the rent review clause itself may make express

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[15] [1983] 2 EGLR 112.

provision for the landlord to serve a “late notice” in the event that it fails to serve a first, timeous, notice: see, for example, *H. Turner & Son Ltd v. Confederation Life Insurance Co (UK) Ltd*.[16]

30. Two points arise regarding such provisions.

31. First, where the clause does so provide that will be a clear indication that time is of the essence for service of the first notice.

32. Secondly, difficult questions of construction may arise as to the effect of the late notice, i.e. (i) when the rent is payable and (ii) when is the valuation date.

33. As to (i), in *Turner* at first instance it was held by the Recorder that the rent increase was payable from the original rent review date. On appeal it was held by Park J that the increase took effect from the expiration of the late notice. The Court’s natural inclination is therefore likely to be to make the rent payable from a date later than the rent review date for otherwise the “late notice” provision is otiose.

34. As to (ii), if the valuation date is the date when the late notice is served, then service of that notice may be self-defeating where the market is falling. In *Turner* there was an overriding proviso that the value was to be that at the relevant review date.

Summary

35. In summary therefore, there may be rare cases where you can mothball or unmothball a rent review clause. The message as always is that the particular wording of the rent review clause is key. Small variations in wording can have a significant effect.

36. I will now hand over to my co-speaker. I will return at the end of this section to look at the topical question of a floating valuation date.

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[16] [2003] 2 EGLR 1.

"*Landlord Says No" - When Can the Landlord Refuse to Implement the Review:*[17]**

37. My eminent co-speaker has talked about the situation where one of the parties has sought to delay the review. I am going to start by going one step beyond that: when can a landlord legitimately maintain an over-market rent by *refusing* to implement the review?

38. Let us just put the question into context first. Although many rent review clauses are drafted on to operate "upwards only", so that the rent payable can never diminish, there are clauses to be found out there which either permit the rent on review to either go up or down freely, or go down, but not beyond a pre-set minimum sum, or "floor".[18] Where there is a floor, this is often the rent originally reserved by the lease.

39. Upwards-only rent-review clauses, for a short period, occupied the spotlight as A Bad Thing for the British economy; so much so that a voluntary Code of Practice for Commercial Leases in April 2002 sought to restrict their use. In May 2004, the Office of the Deputy Prime Minister published a consultation paper, *Commercial Property Leases: Options for Deterring or Outlawing the Use of Upward Only Rent Review Clauses*.[19] Since then, there has been no real action, not least of all because the numbers of Very Bad Things for the British economy have multiplied, and who needs to vilify rent review clauses, when one can vilify bankers?

40. Whether or not any given rent-review clause is "upwards-downwards" or "upwards-only" is, of course, a matter of construction of the clause. So, the first question is to ask whether the clause has an "upwards-only" effect. If the answer to that question is unclear, is there any presumption that the clause should be interpreted as being "upwards-downwards"?

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[17] Nicholas Taggart

[18] These do not seem to be terribly common in the UK, but seem more common in the Antipodes: see the Privy Council decision from New Zealand, *Norwich Union Life Insurance Society v. Attorney-General* [1995] NPC 86, [1995] EGCS 85 (PC).

[19] ODPM is now "Communities and Local Government", which makes you wonder why they're remotely interested is this subject, but there it is. The report has a publication code of 05 RLPD 03022 and is available on line.

A presumption in favour of implementing the review?

41. It might be thought that there ought to be such a presumption. The landlord should not be able to frustrate the assumed underlying purpose of a rent review clause by refusing to implement to the review: after all, it might be said, that the Courts have decided that rent review clauses share an essential purpose, which can be summarised as follows. The function of a rent review clause is well known as being:

    41.1 to keep the rent in line with current property values,

        41.1.1 having regard to the changes in the values of property and

        41.1.2 the current value of money; and

    41.2 ***not*** to provide either the landlord or the tenant with a windfall based upon an artificial basis of valuation.

42. This, of course, derives from the classic statement of the purpose of a rent review clause given by Sir Nicolas Browne-Wilkinson V-C in *British Gas Corporation v. Universities' Superannuation Scheme Ltd*, which is worth repeating because it does look like it ought to be setting a presumption:[20]

> "There is really no dispute that the general purpose of a provision for rent review is to enable the landlord to obtain from time to time the market rental which the premises would command if let on the same terms on the open market at the review dates. The purpose is to reflect the changes in the value of money and real increases in the value of property during a long term. Such being the purpose, in the absence of special circumstances it would in my judgment be wayward to impute to the parties an intention that the landlord should get a rent which was additionally inflated by a factor which had no reference either to changes in the value of money or in the value of property..."

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[20] [1986] 1 WLR 398, 401.

Construing a clause in a way which gives the landlord a "windfall" in respect of the rent payable under the lease, by generating a rent which is kept artificially high when there have been adverse changes in the property market might, therefore, be leaned against. Indeed, it might be said it would be "wayward" to construe the clause as keeping rents artificially high.

43. But, I consider that things have moved on since the *Universities' Superannuation Scheme* case: the times, they are a-changin'.[21] It is no longer necessary to show "special circumstances" before departing from the proposition that a rent review clause should be interpreted to give the landlord the right to retain an above-market rental. As Hoffmann J pointed out some years ago, when it comes to interpreting rent review clauses, "there are no special rules".[22] The ordinary principles of construction apply.

44. Accordingly, the courts are much more likely to give primacy to the natural meaning of the words used than to give effect to a presumed intention. As Sir Thomas Bingham MR said in the (non-rent review) case of *Arbuthnott v. Fagan*:[23]

> "To seek to construe any instrument in ignorance or disregard of the circumstances which gave rise to it or the situation in which it is expected to take effect is in my view pedantic, sterile and productive of error. ***But that is not to say that an initial judgment of what an instrument was or should reasonably have been intended to achieve should be permitted to override the clear language of the instrument, since what an author says is usually the surest guide to what he meant.*** To my mind construction is a composite exercise, neither uncompromisingly

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[21] *Per* Dylan, B in *The Times They Are A-Changin'* (1964): "Come writers and critics / Who prophesize with your pen / And keep your eyes wide / The chance won't come again / And don't speak too soon / For the wheel's still in spin / And there's no tellin' who / That it's namin'. / For the loser now / Will be later to win / For the times they are a-changin'."

[22] *Co-operative Wholesale Society Ltd v. National Westminster Bank plc* [1995] 1 EGLR 97, 99C *per* Hoffmann LJ (CA).

[23] [1995] CLC 1396 *per* Sir Thomas Bingham MR (CA).The relevant passages are cited in *International Fina Services AG v. Katrina Shipping Ltd, The MV "Fina Samco"* [1995] 2 Lloyd's Rep. 344, 350 *per* Neill LJ, Roch and Auld LJJ agreeing (CA).

> literal nor unswervingly purpositive: the instrument must speak for itself, but *in situ* and not be transported to the laboratory for microscopic analysis."

The emphasis is mine. To the same effect is the more recent observation by Lord Steyn in *Sirius International Insurance Co. (Publ) v. FAI General Insurance Ltd*:[24]

> "[18] The settlement contained in the Tomlin order must be construed as a commercial instrument. ***The aim of the inquiry is not to probe the real intentions of the parties but to ascertain the contextual meaning of the relevant contractual language. The inquiry is objective: the question is what a reasonable person, circumstanced as the actual parties were, would have understood the parties to have meant by the use of specific language.*** The answer to that question is to be gathered from the text under consideration and its relevant contextual scene."

The emphasis is, again, added.

Time to split hairs:

45. So, in the context of whether a rent review machinery can be manipulated so as to allow the landlord to refuse to trigger the review, one has to read the lease with extra care and ask an open question: on a fair reading, does the lease give the landlord a unilateral right to trigger the review? In *Melanesian Mission Trust Board v. Australian Mutual Provident Society,* the Privy Council found itself construing a lease which was alleged to have an upwards-only, or "ratchet" effect.[25] The clause in question, clause 3.1, said this:

> The Lessee shall pay to the Lessor during the term of this Lease rent (hereinafter called 'Base Rent') at the rate specified in Item 9

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[24] [2004] UKHL 54; [2004] 1 WLR 3251, 3258. Lord Bingham, Lord Nicholls of Birkenhead, Lord Walker and Lord Brown all agreed: see paragraphs [1], [2], [39] and [40] respectively.

[25] [1997] 2 EGLR 128. The Committee comprised Lord Goff, Lord Mustill, Lord Nicholls, Lord Hoffmann and Lord Hope.

> of the First Schedule or **where increased** in accordance with the express provisions of this Lease at the increased rent.

My emphasis. Item 9 of the First Schedule defined the "annual base rent" as a fixed sum, A$499,126.62 *per annum*. However, clause 3.5 of the lease then provided that:

> At any time not earlier than 4 months prior to each successive date stated in Item 12 of the First Schedule (each of such dates being called "the review date"), the Lessor **shall** notify the Lessee in writing of the Lessor's assessment of the current market rent to apply from that particular review date in respect of each part of the Premises.

The emphasised "shall" in clause 3.5 became the fulcrum of an argument that clause 3.5 required the landlord to specify whether it thought the market rent had gone up or down, thereby creating a conflict with the reference to "**increased** in accordance with the express provisions of this Lease" in clause 3.1. The New Zealand Court of Appeal held that the various words I have emphasised gave rise to an ambiguity in the lease as a whole as to whether the rent was upwards only or upwards-downwards. This, it held, allowed it to interpret the lease in a way which was not "commercially absurd", which meant reading the clause as having an "upwards-downwards" effect.

46. Delivering the advice of the Privy Council, Lord Hope was pretty scathing about that:[26]

> "The intention of the parties is to be discovered from the words used. Where ordinary words have been used they must be taken to have been used according to the ordinary meaning of these words. If their meaning is clear and unambiguous, effect must be given to them because that is what the parties are to be taken to have agreed to by their contract. Various rules may be invoked to assist interpretation in the event that there is an ambiguity. ***But it is not***

[26] At 128F.

> ***the function of the court, when construing a document, to search for an ambiguity*****.** Nor should rules which exist to resolve ambiguities be invoked in order to create an ambiguity which, according to the ordinary meaning of the words, is not there. So the starting point is to examine the words used in order to see whether they are clear and unambiguous. It is of course legitimate to look at the document as a whole and to examine the context in which these words have been used, as the context may affect the meaning of the words. ***But unless the context shows that the ordinary meaning cannot be given to them or that there is an ambiguity, the ordinary meaning of the words which have been used in the document must prevail***."

The emphasis is important. If the parties have made themselves reasonably clear, the fact that the consequences may be hard for one side or another, or that the result is contrary to some pre-conceived commercial purpose, is nothing to the point. In other words, there is *no* judicial presumption as to the commercial basis upon which a rent review clause should be interpreted. The Court should not presume to understand the underlying commercial bargain, as it may otherwise unwittingly end up re-making the bargain. As Hoffmann J explained in *MFI Properties Ltd. v. BICC Group Pension Trust Ltd.*:[27]

> "…. the court has no option but to assume that *[the provision in question]* was a *quid pro quo* for some other concession in the course of negotiations. The court cannot reject it as absurd merely because it is counterfactual and has no outward commercial justification."

47. Going back to *Melanesian Mission*, the Privy Council restricted the use of the word "shall", in "the Lessor **shall** notify the Lessee in writing of the Lessor's assessment of the current market rent to apply from that particular review date" to the status of mere machinery. If the Landlord wanted to operate the review, he had to operate the machinery by first telling the tenant what he considered the

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[27] [1986] 1 All ER 974, 976 (CA).

market rent should be from the review date. The fact that he had to operate the machinery to get an increased rent did not mean that he had either an obligation to operate the machinery come what may, even if it was obvious that the rent would go down on a review.

48. The same approach was taken by Patten J in *Hemingway Realty Ltd v. The Master, Wardens and Commonalty of Freemen of the Art or Mystery of Clothworkers*.[28] A careful scrutiny of the lease showed that, although the rent on review was not expressed to be assessed on an "upwards only" basis, the lease gave the landlord the sole right to implement the review:

> "The Lessor ***shall have the right to review*** the yearly rent as at *[the review dates]* in manner set out below (that date in each of such years being in this sub-clause (3) referred to as 'the date of review') at any time prior to the expiration of twelve months following the Twenty-fourth June in each of such years"

My emphasis. The Judge held that this formulation unequivocally conferred on the landlord, and the landlord alone, the right to implement the review. Moreover, the lease elsewhere provided that the right to appoint an arbitrator arose, "In the event of *[the parties]* failing to agree as to the open market rack rental value ... prior to the expiration of three months following the exercise by the Landlord of the right given to it by (i) of this sub-clause then". The words I have emphasised reinforced the view that the right to implement the review was the landlord's right alone.

49. That case can be contrasted with *Royal Bank of Scotland v. Jennings*, where the *reddendum* provided that the rent payable was to be the initial yearly rent until 24th December 1992 and thereafter, "during the remainder of the term the yearly rent subject to review as hereinafter mentioned such review to be calculated in accordance with the provisions of the Fourth Schedule".[29] The review machinery in the Fourth Schedule provided for the reviewed rent to be agreed or, in the

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[28] [2005] EWHC 299 (Ch); [2005] 2 EGLR 36.

[29] [1997] 1 EGLR 101 (CA).

absence of agreement, determined by a valuer to be agreed between the parties or nominated by the President of the RICS, "upon application of the Landlord". It was argued that since only the landlord had a right to apply to the RICS for the appointment of a valuer, the landlord was entitled to prevent a review by declining to make the appropriate application.

50. That argument failed. The Court of Appeal held that on the proper construction of the lease the parties had agreed that there would be a rent review on each review date. The landlord's failure to apply to the RICS would not be allowed to frustrate that intention. The leading judgment was given by Sir Richard Scott V-C, who construed the lease as requiring that there be a rent review on every review date. This requirement could not then be undermined by the "mere machinery", which vested the obligation to seek the appointment of an arbitrator in the landlord alone. This was the point of contrast with the *Hemingway* decision: the landlord had the right to choose to implement the review as a whole, not just the dispute resolution mechanism. Sir Richard said this:[30]

> "In my judgment, the issue depends upon whether construing the lease as a whole, the conclusion is justified that the landlord was intended to have that option. If the landlord was intended to have that option, the landlord was entitled to exercise it and to decide whether or not there should not be a rent review. But if the judge below was right in concluding that the provision in question was no more than mere machinery for the carrying out of rent reviews which were intended to happen in any event, then, on authority, there is no reason why the landlord's failure to make the application should be allowed to frustrate the contractual intention discerned from the lease as a whole. The court will in that event if necessary supply machinery to prevent that frustrating refusal from achieving its purpose."

[30] At 103. Saville and Potter LJJ agreed and did not add anything.

51. *Jennings* was followed by Jacob J in *Addin v. Secretary of State for the Environment*.[31] The landlord argued that, on its proper construction, the lease permitted it to implement the review alone, relying on the reference to "a notice by the lessors" in this provision:

> "…. the higher of the sum of £148,500 aforesaid or such sum as ***shall*** be assessed as the current open market rent of the demised premises for the appropriate period such assessment being made in the following manner, that is to say Either
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> (a) such assessment as shall be specified in writing and ***in a notice by the lessors*** to *[the tenant]* given not more than twelve and not less than six months before the review date …"

The emphasis is mine.

52. The Judge disagreed, holding that "the key commercial provision" was contained in the opening words.[32] In particular, the word "shall" indicated that there was to be a rent review. The subsequent sub-clauses were merely "administrative and accounting provisions". The Judge was clearly heavily influenced by his view that the notion of the parties having agreed an upwards or downwards clause which could only be implemented by the landlord (so that the landlord could maintain the rent at a level in excess of the true market rent) made little commercial sense.

53. In practice, the net effect of an upwards-downwards review mechanism which can only be implemented by the landlord is that the clause is converted into an upwards-only clause, unless the landlord misjudges the market and triggers the review at a time when rents have declined. For this reason, the courts are likely to scrutinise carefully the language used. It may be that the tenant is likely to be given the benefit of any genuine doubt. Nonetheless, it is clear from the

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[31][1997] 1 EGLR 99.

[32]At 100L.

judgment in *Hemingway* that, if the parties expressly agree, however subtlely, that the right to trigger the review is to be that of the landlord alone, as opposed to the machinery to give effect to the review, the court will give effect to that intention, irrespectively of whether the review is otherwise intended to be upwards or downwards.[33]

The last resort of the desperate?

54. Is another way of approaching the problem of a clause which seems to give the landlord the unilateral right to implement the review the implication of a term that, if the fails to trigger the review, the tenant can do so. My learned co-speaker has already referred to *Barclays Bank Plc v. Savile Estates Ltd*., where the Court of Appeal held that there should be an implied term that the landlord must make an application to the President of the RICS for the appointment of the independent expert, within a reasonable time of the relevant rent review date.[34] This is a slightly curious case, as the Court did not really address the possibility that the effect of the drafting was that the landlord could unilaterally decide not to implement the review, even though the rent review mechanism was, in the view of the Court, upwards-downwards.[35] The *reddendum* provided that the rent shall be:

> ... ***as shall be agreed between the Landlord and the Tenant*** on or before the 29th September 1975 and each quarter day thereafter immediately preceding the expiry of every seventh year of the term respectively but not less than £1,250 *per annum* and ***in default of agreement between the landlord and the tenant*** as to the amount of the said yearly rents for the second and each following period of seven years of the term respectively the yearly rent of not less than £1,250 ***to be assessed by a surveyor to be appointed***

[33] There is some interesting further learning on this in two New Zealand cases: *Australian Mutual Provident Society v. National Mutual Life Association of Australasia* [1995] 1 NZLR 581 and *Board of Trustees of the National Provident Fund v. Brierly Investments* [1995] 1 NZLR 1 (Privy Council).

[34] [2002] EWCA Civ 589; [2002] 2 EGLR 16 (CA).

[35] I would suggest that the court may have overlooked the words, “subject to a floor of £1,250 *per annum*” when it described the rent as upwards-downwards.

> ***on the application of the Landlord*** by the President of the Royal Institution of Chartered Surveyors…

My emphasis.

55. The best explanation of the decision of the Court, which is not as thoroughly reasoned as it might be, is that the term was implied as mere machinery because the overall intention of the clause was to allow both parties to implement the review, as is shown by the first two sets of emphasised words. The landlord had merely been allocated the task of writing to the President, rather than been given the right to choose to refuse to implement the review. In other words, the latter set of emphasised words were mere machinery.

56. Such an interpretation would also avoid having to read this case as contravening one of the fundamental building blocks of contract law about when you can imply a term, as expressed by Lord Parker in *Tamplin Steamship Co. v. Anglo-Mexican Petroleum Products Co.Ltd.*:[36]

> "It is, of course, impossible to imply in a contract any term or condition inconsistent with its express provisions, or with the intention of the parties as gathered from those provisions."

57. So, if the parties have found themselves with a lease which permits an upwards or downwards review of the rent, the next question might be this: how far down can the rent go?

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[36] [1916] 2 AC 397, 422 (HL).

"Unnatural Assumptions" - Assuming a Market When No Market Exists:[37]

58. It may be that, in the real world, and at the present stage of the economic cycle, there is effectively no market for a particular property or class of properties. It may also be the case that the actual market is so sluggish that there are no transactions out there with which one can form a realistic body of comparable transactions.[38]

The Presumption of a Market

59. Even though the market is dead, rent review clauses almost always require there to be an assumption that a hypothetical transaction takes place, on the valuation day, in order to identify the value of the subject premises. Any rent review clause which requires the determination of an open market value, actually *requires* the assumption of the existence of an "open market" and that the assumption of a "transaction" which crystallises the value of the property. To make both those assumptions, one has to make two further assumptions: the existence of a hypothetical *willing* tenant and an equally hypothetical *willing* landlord, who are to enter into the hypothetical transaction which forms the basis of the rent review.

60. As Fox LJ said in *Dennis & Robinson Ltd. v. Kiossos Establishment*:[39]:

> "The notion of a letting in the open market between an unwilling lessor and an unwilling lessee (or between a willing lessor and an unwilling lessee) for the purpose of determining a reasonable rent makes no sense."

Therefore, one cannot simply wring one's hands and say that there is no market. In rent review world, the hypothesis is king. And it is sometimes, it is the king of

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[37] Nicholas Taggart

[38] I shall look to the effect on comparable transactions after the valuation date below.

[39] [1987] 1 EGLR 133, 134 (CA).

a castle in the air, which has to be valued. So, what can we lawyers do to assist the valuers faced with valuing property for which there exists no real market?

The Willing Parties

61. The first thing we can do to help is emphasise that the willing tenant and willing landlord are necessary abstractions. It does not achieve the purpose of a rent review mechanism to identify all the actual potential occupiers for the Premises and assert that none of them would want it. The review hypothesis requires that someone, somewhere, will pay a rent for the premises, which the equally hypothetical willing landlord will find acceptable. Who are these hypothetical persons and what are they like:

    61.1 The hypothetical landlord is an abstract concept, not a real person and certainly not the actual landlord. He is not affected by financial or other constraints of the actual landlord, nor is he afflicted by personal ills, such as a cash-flow crisis or importunate mortgagees. But, at the same time, he is not someone to whom it was largely a matter of indifference whether he lets the property. He is not in a position to wait for the market to improve. He wants to let the premises, on the day, at a rent appropriate to all the factors which affected the marketability of the premises, including the market rent of other comparable premises.[40] He is actively, if not eagerly, seeking to let the Premises.

    61.2 Equally, the hypothetical tenant is a hypothetical person actively (but not eagerly) seeking a property to fulfil requirements which the subject premises could fulfil. He, too, will be unaffected by liquidity problems, or other pressures.[41] The hypothetical tenant cannot be necessarily invested with all of the characteristics of the actual tenant.[42]

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[40] *FR Evans (Leeds) Ltd. v. English Electric Co.Ltd.* [1978] 1 EGLR 93 (Donaldson J). The case was affirmed on appeal, but the appeal is unreported. See the note at [1978] 1 EGLR 93 at 96.

[41] *FR Evans (Leeds) Ltd. v. English Electric Co.Ltd*.

[42] *First Leisure Trading Ltd. v. Dorita Properties Ltd*. [1991] 1 EGLR 133.

61.3 Whilst the hypothetical tenant is a willing tenant, he is not an importunate one. The hypothetical tenant wishes to take a lease of the premises, but he is operating in a commercial field and in deciding what to offer by way of rent will take account, covertly or overtly, of the market as a whole. He can have regard to the possibility of taking a lease of two or more premises, rather than a lease of the subject premises alone. That is not to say that he would prefer that solution. That will depend on the level of rent which is under consideration.

61.4 It also does not matter whether the only potential tenant was the actual tenant. Even if there is only one tenant in the market, and he is hypothetical, because even the actual tenant does not want the premises any more, this single potential tenant is to be assumed to be a willing: not reluctant; not importunate; but willing.

61.5 That said, the hypothesis that there are parties to the assumed transaction does not shed any light on the state of the market. The hypothetical landlord will wish to secure as much rent as he can, while the hypothetical tenant will wish to pay as little rent as he can. Both are willing parties, but only at the right price.[43]

61.6 The corollary of the parties being content to do a deal, but only at the right price, means that neither party can exploit the other. The parties both know that the hypothetical tenant remains a willing tenant for so long as the willing landlord does not press his demand for rent beyond the point at which he is ceasing to act as a willing landlord. At that point, the willing tenant would cease to be a willing tenant. That is why:[44]

> "... the negotiations *[are]* to be assumed to be friendly and fair but otherwise conducted in the light of all the bargaining advantages and disadvantages existing on that date"

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[43] *Dennis & Robinson Ltd. v. Kiossos Establishment* [1987] 1 EGLR 133 (CA).

[44] *FR Evans (Leeds) Ltd. v. English Electric Co.Ltd.*, at 94.

Of course, the hypothetical parties never reach breaking point. They are, as Donaldson J put it in *FR Evans (Leeds) Ltd. v. English Electric Co.Ltd*, “happy hypothetical higglers”.[45]

The Available Premises

62. So, that is the nature of the hypothetical parties: what is the transaction which those parties are to undertake? The answer to that depends on what assumptions the lease directs us to make. In the absence of any direction allowing the parties to assume to the contrary, the parties cannot value on the basis that the hypothetical transaction is anything other than the letting of the whole of the premises. Even if, in the real world, the landlord would obtain the best rents by sub-dividing the premises into smaller units and letting them out separately, the landlord cannot do that ***if*** the lease contemplates a hypothetical letting of the premises as a whole.[46]

63. Lewison J has looked at this issue in *Marklands Ltd. v. Virgin Retail Ltd*.[47] The subject premises was a large retail unit (20,000ft²), spread over three floors. The landlord argued that the hypothetical landlord would only appreciate that the premises was more valuable as separate units, so would threaten that, if the tenant seeking to take a lease of the whole did not increase his bid, he would let to others who would take only parts. This is a neat idea: the lease directs that the premises must be let as a whole, but it did not say that the landlord could not argue for an increased rental value by *threatening* to let the premises in parts (even though he would not actually do so).

64. The landlord’s argument was a cunning plan, and as such, failed. Lewison J rejected it because it went to far.[48] He said that the landlord can properly point

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[45]“If the arbitrator is heard to murmur, ‘Oh happy hypothetical higglers’ that is only too understandable. He has my sympathy.” At 95.

[46]“The fact that the property could be subdivided and let in parts or sublet and the advantages and disadvantages of that approach are irrelevant. The clause contemplates a letting as a whole.” *Per* Donaldson J put it in *FR Evans (Leeds) Ltd. v. English Electric Co.Ltd.*, at 94.

[47][2003] EWHC 3428 (Ch); [2004] 2 EGLR 43.

[48]At paragraph [50].

to *other* (hypothetical) tenants willing to take a lease of the property on the terms proscribed by the lease. The tenant can point to other properties that it would be willing to take (including the possibility of taking two units). But the hypothetical landlord could not even argue that it could enter into a different kind of transaction, precisely because it is a willing landlord, on the terms of the hypothetical lease. That will mean (in the absence of an express provision to the contrary) the hypothetical lease is a lease of the whole, let to a single tenant. Lewison J stated that the landlord does not have to be persuaded into entering that transaction by being compensated for giving up other, more profitable, transactions. It is a willing landlord on the terms specified in the lease.

65. This is, of course, right. If one takes into account that the hypothetical landlord might have done better letting the premises on a wholly different basis, then one risks forcing the *actual* tenant to pay a rent which is artificially too high, because it is based on a different transaction from that encapsulated by the *actual* lease. The same argument prevents the landlord arguing for a letting for uses other than that permitted by the actual (or hypothetical) lease.[49]

66. On the other hand, the lease can require the making of an assumption that the hypothetical premises can be let in parts, if that is what the parties have agreed to. It is, still, a free country. If the lease does so direct, we have to abide by the parties' bargain and do as we are told. The lease in *Level Properties Ltd v. Balls Brothers Ltd* made a direction to value the hypothetical premises:[50]

> "... upon the assumption if not the fact that the demised premises are available to be let as one unit or separate ground floor and basement and part ground floor premises available to be traded from separately and independently (there being disregarded any restriction on alienation of part under the Lease) with each area having its own independent services and facilities without any loss of net lettable space within the demise."

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[49]See *Northern Electric plc v. Addison* [1997] 2 EGLR 111 (CA), a case on the rent for a renewal lease under the Landlord and Tenant Act 1954, section 34.

[50][2007] EWHC 744 (Ch); [2007] 2 EGLR 26 (Wyn Williams J).

The lease also contained the usual clause, "words importing the singular shall include the plural and vice-versa". Wyn Williams J held that a combination of the direction that the premises were available to be traded separately, together with that "singular and plural" boilerplate clause, would justify the "real world" landlord having the premises valued on the basis that his hypothetical equivalent would be able consider both a single or two separate lettings. The actual landlord would, therefore, get whichever rent was higher: that produced by a single letting or by separate lettings.

The Strength of the Market

67. The existence of the hypothetical willing landlord and the equally hypothetical and willing tenant still does not help define the *strength* of the market. The willing landlord has to be a pragmatist, because he is not entitled to wait for the market to improve. He is a landlord willing to let on the review date, even if the market is in a miserable state, because:[51]

> "It is assumed that there is a willing lessee. But the willing lessee is not going to pay more than the market requires him to pay. It is essentially a matter for the valuer to inquire into and determine the strength of the market. He is, for example, entitled, if such is his expert opinion on the facts, to say that, having regard to the state of the market and the condition of the property, a tenant, though a willing tenant, could not be expected to take the stipulated lease save at a low or nominal rent and that the full yearly market rent must be determined accordingly."

In other words, although it is assumed that there is a market, there is no assumption required as to how lively that market is. The strength of the market and the rental value of the premises in the market are matters for the valuer's discretion, based on his own knowledge and experience of the letting value of such premises.[52] The presumption of a letting at the best rent in the open

[51] *Dennis & Robinson Ltd. v. Kiossos Establishment* [1987] 1 EGLR 133, 134 *per* Fox LJ (CA).

market means just that: the hypothetical tenant pays the best rent in the market, but he does not pay over the odds. If that means that the hypothetical landlord ends up with little to show for the transaction, over and above transferring to the tenant the responsibility for repairs, insurance and rates, that may be all the market has on offer.[53]

68. A market is not just made up of transactions, however. The valuer must also have regard to sentiment, that is the view of the people who make up the market as to whether things are going to get better or worse. This is a factor which can sometimes be exploited to the landlord's advantage, even when the market is poor.

69. The hypothetical tenant will, of course, pay only what the market will bear for the hypothetical letting. But the hypothetical transaction is for a lease which may have a term of many years to run, although it may have a hypothetical rent review in, say, five years. The valuer should be asked to keep in mind when he undertakes the review that the hypothetical willing landlord will be able to argue with the willing tenant that, "things can only get better",[54] therefore the rent payable for the premises today will also reflect the fact that the tenant will be securing premises for full duration of the hypothetical term, and may find that demand for the premises will increase as the market recovers.

70. The tenant may also be encouraged to bid on the basis that he may wish to secure the right to pay the present, low, rent for the next five years. If the landlord can show that market sentiment is predicting a recovery before the next rent review under the hypothetical lease, he may be able to show that the tenant's bid will include something for the right to pay *below* the going rate for some of the next five years.

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[52] *Per* Dillon LJ at 135.

[53] A comment to that effect can be seen in the rating case of *Hoare v. National Tust* [1999] 1 EGLR 155, 162 *per* Peter Gibson LJ (CA).

[54] "You can walk my path, you can wear my shoes / Learn to talk like me and be an angel too / But maybe you ain't never gonna feel this way / You ain't never gonna know me, but I know you / I'm singing it now / Things can only get better / Can only get better, if we see it through" *D:Ream*, arr. A.C. Blair *et al*.

71. The same technique can be used in respect of the comparables. The landlord's valuer may be able to argue that the market was more pessimistic at an earlier stage, so the tenant in an earlier comparable transaction would not have included anything in his bid to reflect the hope that, he will be paying under the market rent in three or four years time, when the market recovers. The hypothetical tenant in this transaction might be able to perceive some of those elusive green shoots of recovery that signal a recovery, presently only visible to Government ministers...[55]

72. One has to be careful in applying valuation under the Landlord and Tenant Act 1927, section 18, to rent review, because one is valuing an unencumbered freehold under section 18, not the hypothetical lease. Nevertheless, an example of a valuation being influenced by sentiment can be seen in the section 18 case of *Craven (Builders) Limited v. Secretary of State for Health*.[56] A large textile mill was handed back in extreme disrepair, which was costed at £312,500.00. The freehold value was, however, only £245,000.00 in disrepair.

73. Neuberger J found that the *only* likely purchaser for the building in repair or out of repair would have been someone who was prepared to hold it until the market improved or changed, with a view to putting the building or its site to whatever use could be justified financially in the changed market circumstances and could be lawfully achieved in planning and listed building terms. In the meantime, he would put the building to such short–term use, if any, as he could. The logical can be applied to a rent review case, as long as one is careful to respect the hypothetical lease covenants.

74. Those comments on sentiment lead me to my next topic: the valuation date and evidence.

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[55]Or, at least to Baroness Vadera on 15th January 2009.

[56][2000] 1 EGLR 128 (Neuberger J).

The Valuation Date and Post Valuation Date Evidence:[57]

75. We all know now that a number of Very Bad Things have happened to the economy as a whole and that rents have gone deeper down than the *Titanic*. That is because we were all there when it happened (the recession that is, not the *Titanic,* unless you count the film version), and can look back on it with hindsight. But, of course, any given rent review clause will set a specific review date, on which day the hypothetical transaction which sets the rent takes place.

76. Imagine a review date of 25th March 2008. Things were going pretty badly just then; Northern Rock had rolled, but this was before the failure of Lehman Brothers really made for a meltdown.[58] Imagine that review going to arbitration now. The valuation date is long past, but to what extent would the parties on that date have appreciated how bad it was going to get? If the valuers use post valuation date evidence, given all that has happened since, do they make a mistake?

77. When one is trying to establish the value of any given property on any given date, one clearly has to be have regard to events which have actually occurred, or circumstances which actually existed, at any time up to the valuation date. These are "known knowns" on the valuation date.[59] They may include transactions on comparable properties, and other general events which may affect property values.[60]

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[57]Nicholas Taggart

[58]Northern Rock was taken into public ownership on 17th February 2008. Lehmans filed for "Chapter 11" on the 16th of September.

[59]"There are known knowns. These are things we know that we know. There are known unknowns. That is to say, there are things that we know we don't know. But there are also unknown unknowns. There are things we don't know we don't know." Former U.S. Defence Secretary Donald Rumsfeld, in February 2002. Good thing he was not in charge of the economy, eh?

[60]This is a statement of the obvious, but if an authority is needed, *Marklands Ltd v. Virgin Retail Ltd.* [2003] EWHC 3428 (Ch); [2004] 2 EGLR 43, at paragraph [9] (Lewison J) is a pretty good start point: "Valuation essentially proceeds by analogy. The valuer looks for an analogue that is as close as possible to that which he has to value, and which has been the subject matter of a real transaction. He then works on the premise that if the subject matter of his valuation were to be the subject of a similar transaction, it would command the same value as the analogue. Since the analogue will never be identical to the subject matter of the valuation, the valuer will have to make adjustments to the value revealed by the analogue in order to reflect the differences between the analogue and the subject matter of his own valuation. In the case of a property valuation, the analogues are usually called 'comparables'. In a property valuation, typical adjustments will reflect differences between the comparables in location, terms of letting and so on."

78. One can also have regard to such expectation of future events as might exist at the valuation date, provided that these would be matters which would be known in the hypothetical market at the valuation date. These are, at the valuation date "known unknowns".[61] Expectations of future events often affect property values at a given date: these can include events at a national level, such as changes in interest rates, or changes in property taxation. Anticipated local events, for instance the opening of a new road, can have an effect on property in the locality.

79. However, one must keep in mind that actual future events must be disregarded, save to the extent that they were foreseeable and actually foreseen as at the valuation date. The hypothetical willing lessor and willing lessee are good, but they are not psychic. They cannot *know* for certain as at the valuation date whether the market will go off a cliff a few months after they agree a rent.[62] They can only be credited with the degree of optimism or pessimism which existed in the market on the valuation date.[63]

80. Accordingly, care must be taken when deriving values from transactions concerning comparable properties which take place after the valuation date. Such transactions are actually admissible, and clearly can have a probative value in determining the rent which would be obtained for the premises being valued on the valuation date. If a transaction which is otherwise an excellent comparable occurs a few days after the valuation date, it would be quite wrong to say it had ***no*** probative value in relation to the likely rent of the premises to be valued on the valuation date.[64] It has evidential value, not because it would be known to the hypothetical lessor and lessee on the valuation date, but because it

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[61] *Cornwall Coast Country Club Ltd. v. Cardgrange Ltd* (the "Crockfords' Case") [1987] 1 EGLR 146 (Scott J).

[62] *Melwood Units Pty Ltd v. Comrs Main Roads* [1979] AC 426, 436 *per* Lord Russell (PC); *Segama NV v. Penny Le Roy Ltd* [1984] 1 EGLR 109 (Staughton J); *Electricity Supply Nominees Ltd v. London Clubs* [1988] 2 EGLR 152 (Hoffmann J).

[63] *Industrial Properties (Barton Hill) Ltd. v. Associated Electrical Industries Ltd* [1977] QB 580 (CA); *Duvan Estates Ltd. v. Rossette Sunshine Savouries Ltd.* [1982] 1 EGLR 20 (Robert Goff J); *Gaze v. Holden* [1983] 1 EGLR 147 (HH Judge Finlay QC, sitting as a judge of the Chancery Division).

[64] *Currys Group plc v. Martin* [1999] 3 EGLR 165 at 172 (Mr Michael Harvey QC, sitting as a deputy judge of the Queen's Bench Division).

is an indication of the rental value on the valuation date, irrespective of such knowledge.

81. When relying on a transaction which occurs after the valuation date, events which have occurred between the valuation date and the date of the comparable transaction need to be considered. Such events are not considered because they would be known to the hypothetical parties, but because the weight to be attached to the post-valuation date comparable may be affected by these events.

82. The professional negligence case of *Currys Group plc v. Martin* is a good example of this.[65] A lease of shop premises on the second floor of a shopping development provided for a rent review at 13th January 1993. The review was determined by an expert, who relied heavily on the letting of three other shops also on the second level of the development. Two of the lettings had been effected prior to the review date, and one after that date. By April 1994, when the expert made his determination, it was known that the tenants of all three units had experienced financial difficulties, and that the shops had closed. The expert decided to ignore these last facts.

83. It was held that, as a matter of law, he was correct to do so. The taking into account of the first two lettings was correct, because those were pre-valuation date events, giving rise to comparable transactions. The expert was right also to the take into account the third letting, because it was evidence of the value of the relevant shops in the market, even after the valuation date. Thirdly, the judge held he was right to disregard the closure of the shops after the valuation date, because that was not a foreseeable event on the valuation date. The fact that the shops would fail in the future was, as at the valuation date, an "unknown unknown". Nobody in the market knew it was going to happen, so it cannot have an influence on the hypothetical transaction.

84. It is sometimes considered that a post-valuation date comparable is of less evidential weight than a pre-valuation date comparable. This is said to be because the post-valuation date evidence is of matters which were not known,

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[65] [1999] 3 EGLR 165.

and so could not affect the minds or the negotiations of the hypothetical parties.[66] Perhaps the better way of expressing that thought is that the comparable needs to be adjusted to strip out the effect of events in the market, and the broader real world, which would not have been known as at the valuation date.[67]

85. So, the weight of the evidence available at the valuation date might bob up and down a bit, but does the valuation date itself ever float? For a consideration of that issue, I must hand the floor back to my co-speaker.

Floating Valuation Date:[68]

86. What I mean by a "floating valuation date" is a valuation date which is not linked to the review date or the start of the review period, but which is linked to the date of agreement between the parties or the date of determination by the expert or arbitrator. These dates will depend upon when the parties negotiate, when the third party surveyor is appointed and when he issues any decision and therefore the valuation date may "float". In a rapidly rising or falling market a floating valuation date may give either party the chance to try to manoeuvre for an advantage.

87. This point may also arise in options to acquire freehold land. This is a live point in at least one pending challenge in the Court brought by a housebuilder exercising its option to buy land and seeking to get the valuation date put back as the market continues to fall.

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[66]See, for example, *Preferred Mortgages Ltd. v. Countrywide Surveyors Ltd.* [2005] 31 EG 81 (CS) (Mr Edward Bartley-Jones QC, sitting as a deputy judge of the Chancery Division), a negligence claim against a valuer who had valued a residential property. The Court stated it obtained no assistance from the use of later transactions, which were 'devalued' back to the valuation date by reference to a house price index covering a wide area. The adjustments it was sought to make were too broad-brush to be of use to the Court.

[67]When assessing ***damages***, the Court is entitled to give full effect to hindsight: "why speculate when one actually knows". See *Bwllfa and Merthyr Dare Steam Collieries (1891) Ltd v. Pontypridd Waterworks Co* [1903] AC 426 (HL). But there are limits: when a court assesses damages, it may take into account all matters known to it at the date of assessment, but when a court or tribunal has to find the value of a piece of land at a specified valuation date, save as set out above, it is limited to the facts and events known or anticipated by the parties at that date.

[68]John Male QC

88. Normally, the valuation date will be the rent review date or the beginning of the period for which the reviewed rent is payable. Where there is ambiguity, the Court is likely to try to find that that is the valuation date. However, there are cases where a floating date has been found to exist.

89. An example of what was, apparently,[69] a floating valuation date is the formula used in *Touche Ross & Co. v. Secretary of State for the Environment*.[70] In that case, the Court was concerned with a review clause which required the assessment of the fair "market rack rental" which was defined as follows:

> "... the amount which would be the annual amount obtainable at the **date of agreement or determination as aforesaid** as between a willing landlord and a willing tenant in respect of the demised premises on a letting thereof as a whole with vacant possession for a term equivalent to the unexpired residue of the term hereby granted at such date…"

The emphasis has been added and it can be seen from the emphasised words that a floating date might be said to arise. Certainly the Court proceeded on the basis that the rent was to be determined at the date of determination.[71]

90. The Court proceeded on the same basis in *London & Manchester Assurance Co. Ltd v. G.A. Dunn & Co.*[72] In that case the "open market rental value" was defined as being "at the time of such determination the annual value of the demised premises in the open market or a lease for a term…" (Emphasis added). In deciding issues on whether time was of the essence, the Court proceeded on the basis that the rental value had to be decided as at the time of the determination by the arbitrator.

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[69] I say 'apparently', because there seems to have been no argument on the point and the parties and the Court simply proceeded on that basis.

[70] [1983] 1 EGLR 123.

[71] See p.125D.

[72] [1983] 1 EGLR 111.

91. A more robust approach was taken in *Glofield Properties Ltd v. Morley (Nº.2)* where the expression used was "a sum…determined in manner hereinafter provided and being at the time of such determination the annual rental value…" (emphasis added).[73]

92. The Court of Appeal accepted that at first sight the wording might seem to refer only to the time at which the determination is actually made.

93. However, the Court concluded that there was such ambiguity that they felt able to depart from what it had accepted was the natural meaning.

94. The first point relied upon by the Court of Appeal was that the expression "the open market rental value" was stated to mean a sum "in relation to the review period or the second review period as the case may be".[74] Nourse LJ relied upon the inclusion of these words to say that "the sum to be determined is to have some relation to the particular review period".

95. The next point relied upon by the Court of Appeal was linked to the one which I have just mentioned.[75] It was that in the reddendum the word "for" was used, i.e. the rent was to be the higher of the passing rent and "the open market rental value of the Demised Premises for the review period" (my emphasis).

96. The third point relied upon by the Court of Appeal was that the crucial words were "determined…as being at the time of such determination" (emphasis added). Counsel for the successful appellant (Mr. Reynolds QC) relied upon the contrast between the words "time" (which was used) and "date" (which was not used).

97. The Court of Appeal also relied upon the inclusion of the words,"in relation to the review period or the second review period as the case may be" and said of them:

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[73][1989] 2 EGLR 118.

[74]See p. 120 E.

[75]Aso at p. 120E.

> "I come, then, to the crucial words 'determined…as being at the time of such determination the annual rental value' etc. Mr. Reynolds, for the defendants, has pointed to the contrast between the word 'time' and the word 'date' where the latter appear in clause 5(3). He has argued that the words 'at the time of', when contrasted with 'at the date of', mean 'on the occasion of'. I would not put it quite in that way. The words used are 'at the time of such determination'. I would accept that those words are fully capable of meaning 'at the time at which such determination is made'. Indeed, I would go further and say that that is their natural meaning. But they are also capable of meaning 'at the time for such determination' or, if you prefer, 'at the time to which such determination relates'. The time for the determination of a reviewed rent is the start of the review period to which it relates. And I do not think that there is any offence in that construction if, as has been shown, some purpose and effect can thereby be given to the words 'in relation to the review period or the second review period as the case may be'. Moreover, the presence of those latter words, being wholly unnecessary if the plaintiff's construction is correct, leads me to conclude that the intention of the parties is not clearly and unequivocally expressed. I therefore do not hesitate to favour a construction which produces what the judge rightly thought was a far more sensible and realistic commercial result."

98. *Glofield (Nº. 2)* shows just how the Court will strive to avoid a floating valuation date. One would have thought that "at the time of such determination" meant exactly what it says. Having said that, the facts of *Glofield (Nº. 2)* were extreme in that taking the literal meaning would have the effect that a review due in 1982 and 1987 would be carried out on the basis of 1989 values.

99. Despite the above decision I would suggest that it may still be possible for a particular rent review clause to lead to a floating valuation date. As always, the particular wording and the context will be crucial. However, one can envisage a clause which refers to "the annual rent obtainable at the date of agreement

between the parties or at the date of the award by the arbitrator as between a willing landlord and a willing tenant…" which might lead to such a result. If there was such a clause, then it would give scope for the parties to try to tie the agreement or the award in with rises or falls in the market.

100. I would sound a word of warning in that as with all such cunning plans it may be that the plan would rebound as it would involve attempting to read the market. Alternatively, it might be said that such a provision was an onerous/beneficial term and if the hypothetical lease was long enough to have rent reviews then that onerous/beneficial term might have a self-cancelling effect.

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