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RESIDENTIAL PROPERTY TRIBUNAL

LEASEHOLD VALUATION TRIBUNAL

Reference: LVT/0013/04/13

In the matter of 115 Pantbach Road, Cardiff CF20 4DZ
In the matter of an Application under Sections 21(1)(a) of the Leasehold Reform Act 1967

TRIBUNAL David Evans LLB LLM
Andrew Morris LLB
D Rhys Davies FRICS

APPLICANT Clarise Properties Ltd

RESPONDENTS Rachel Emily Rees and John James Rees

DECISION

INTRODUCTION

1 The Respondents are the leasehold owners of number 115 Pantbach Road, Cardiff (the Property), a four bedroom, semi-detached, traditionally constructed house located in Rhiwbina, a residential area north of the city centre. The lease under which the Property is held (the Lease) was granted on the 7th June 1991 by Burford Estate & Property Company Ltd (Burford) to Nita Doreen Casey and Sylvia Airey (the Original Lessees) for a premium of £600 and with an initial annual ground rent of £45. The lease is expressed to be for a term of 99 years from the 24th June 1990. The Applicant is the current owner of the freehold reversion.

2 The Respondents purchased the leasehold interest in the Property on the 7th September 2001. On the 10th September 2011 they served on the Applicant a Notice of Claim to acquire the freehold of the Property and on the 26th October 2011, the Applicant admitted the Respondents' right to do so. No issue arises in respect of the Respondents' Notice of Claim or the Applicant's Notice in Reply. The parties have agreed that the price payable for the Applicant's freehold reversionary interest falls to be determined under section 9(1) of the Leasehold Reform Act 1967 (the Act).

THE ISSUE

3 The difficulty which has arisen relates to the interpretation of that part of clause 1 of the lease which deals with the payment of rent as follows:

(a) From the commencement of the term to the 23rd day of June 2015 the annual rent of FORTY FIVE POUNDS (£45.00)

(b) In each of the second and third periods of twenty five years of the said term and in the last remaining twenty four years of the said term such periods beginning on the 24th day of June 2015 the 24th day of June 2040 and the 24th day of June 2065 respectively (the Rent Review Dates") such annual rent (being not less than the rent payable immediately prior to each relevant Rent Review Date) being a sum representing the open market letting value of the land hereby leased as if it were a vacant site without any buildings thereon ("the Site") to be assessed in accordance with current open market values of the Site at each relevant Rent Review Date when the Site shall fall to be assessed as if it were at such Rent Review Date available for residential development for purposes authorised by the Town and country [sic] Planning Acts…

4 Clearly, there is no difficulty with regard to the initial rent of £45 pa. However, the surveyors for both parties have encountered a problem when it comes to assessing the rent which would have been payable from the first Rent Review Date, namely the 24th June 2015. The calculation of this revised rent is a critical step in the methodology generally employed by surveyors when negotiating and agreeing the "fair terms" (section 1(1) of the Act) and in particular "the price…which at the relevant time the house and premises, if sold in the open market by a willing seller…might be expected to realise" on the assumptions set out in section 9(1) of the Act. One of those assumptions is that the lease has been extended by 50 years under section 14 of the Act at a rent determined in accordance with section 15(2). The Applicant considered that the reviewed rent was akin to (but not the same as) the rent envisaged by section 15(2) of the Act - which was referred to at the hearing as a "modern ground rent" - whilst the Respondents believed that the reviewed rent was a "nominal ground rent" of the type generally seen in leases of properties bought and sold today.

5 As the parties were unable to agree the price, on the 26th April 2013, the Applicant made its application to this Tribunal for us to determine the amount payable by the Respondents for the freehold reversion. Standard Directions were issued on the 16th May 2013 following which we were invited to deal with the interpretation of clause 1(b) of the Lease (which we shall refer to as the Rent Review Clause) as a preliminary issue. Consequently, further Directions were issued on the 9th July 2013 and the matter was set down for hearing. Subsequent Directions were given on the 31st July.

HEARING

6 The preliminary issue was heard at the Tribunal Offices on the 3rd and 4th September, 2013. Both parties were represented by Counsel. Mr Mark Loveday represented the Applicant and Mr Barry Denyer-Green represented the Respondents. The surveyors for both parties attended and gave evidence, Mr John Geraint Evans FRICS for the Applicant and Mr Kenneth John Cooper FRICS for the Respondents. The Applicant also called Mr Philip Mizon, a property manager employed by the Marcus Cooper Group, a group of companies of which the Applicant is a part, and Mr Nicholas Richard Plotnek, the principal of a Birmingham valuation practice who had been a director of Burford at the time of the grant of the Lease.

7 The parties had agreed a brief statement of facts, dated the 29th August 2013, which in addition to the details of the lease referred to above and a description of the Property confirmed the following:

(a) The valuation date is the 10th September 2011.
(b) At the valuation date there remained 77.78 years of the Lease unexpired.
(c) The Applicant was registered as freehold proprietor on the 9th November 2010.
(d) The Original Lessees sold the property to David Raymond Airey and June Ann Airey on 8th March 1993 at a price of £67,000.
(e) The Respondents were registered as leasehold proprietors on the 16th October 2001 having paid (according to the Land Registry) the sum of £133,000.
(f) At the date of the Lease (ie 1991), the Property was in average condition for a house of the same type and age in Cardiff.
(g) The premium of £600 paid by Original Lessees in 1991 was significantly less than the open market capital value of a freehold house of the same type and age in Cardiff.
(h) The rent of £45 payable under the Lease was, in 1991 significantly less than the open market rent for a house of the same type and age in Cardiff.

Other matters were agreed by the parties during the course of the hearing and we shall refer to these where they arise.

8 We were provided with:

(a) a paginated Hearing Bundle - we shall refer to the page numbers of the documents;
(b) supplemental reports from Mr Evans and Mr Cooper which were given additional page numbers (59A-D and 95A-K respectively);
(c) the Applicant's and the Respondents' skeleton arguments;
(d) the Applicant's bundle of authorities - tabbed 1-10. We shall refer to an authority in this bundle as being at A-T followed by the tab number. In closing, Mr Loveday provided us with two further authorities;
(e) the Respondents' bundle of authorities - tabbed 1-11. We shall refer to an authority in this bundle as being at R-T followed by the tab number;
(f) the Applicant's and the Respondents' closing submissions.

9 We take the opportunity to thank both Counsel and both surveyors for the thoughtful and helpful way in which the hearing was conducted.

INTERPRETATION

10 Before considering the clause in detail, it is helpful to remind ourselves of the principles to be adopted when interpreting legal documents. The approach is that generally referred to in the speech delivered by Lord Hoffman in Investors Compensation Scheme Ltd -v- West Bromwich Building Society [1998] 1 WLR 896 at 912-913 (West Bromwich)(A-T1). We are to ascertain the meaning which the clause would convey to a reasonable person having all the background knowledge reasonably available to both Burford and the Original Lessees in 1991. As stated by Lord Bingham in Bank of Credit and Commercial International -v- Ali [2002] AC 251 at 259 (BCCI) (R-T2), "the object of the court is to give effect to what the contracting parties intended". To do so we must give the words used "their natural and ordinary meaning in the context of the agreement, the parties' relationship and all relevant facts surrounding the transaction so far as known to the parties". It is an objective judgment. We do not enquire into the parties subjective states of mind. Nor do we consider pre-contract negotiations (see West Bromwich and Chartbrook v- Persimmon Homes Ltd [2009] UKHL 38).

11 We must also take into consideration that a lease is essentially a practical document. It is drafted with the intention of regulating the conduct of parties for many years, long after the original signatories have ceased to have an interest in the property. We should therefore adopt a "commercially sensible construction" (per Lord Steyn in Mannai Investment Co Ltd -v- Eagle Star Life Assurance Co Ltd [1997] AC 749 at 771(R-T8)). We should not apply "technical interpretations" or place "undue emphasis on niceties of the language". As Lord Diplock commented in The Antaios [1985] AC 191, "if detailed and syntactical analysis of words in a commercial contract is going to lead to a conclusion which flouts business common sense, it must be made to yield to business common sense".

12 It is also reasonable that we take account of the purpose of the clause. What that purpose is, is a question of fact and we shall refer to this later. We appreciate, as Mr Loveday pointed out, that there are differences between commercial leases at a rack rent and long residential leases at a ground rent, so that not all commercial cases will have relevance to issues concerning residential leases. However, the principles will generally be the same and it is their application which may differ according to the circumstances of each case. After all, for the Applicant this was a business transaction.

13 We may also consider whether the outcome of either of the conflicting interpretations leads to "a very unreasonable result" (per Lord Reid in L Schuler AG -v-Wickman Machine Tools Sales Ltd [1974] AC 235 at 251)(Schuler)(R-T7). However, if the words are clear and there is no alternative interpretation, then the parties must accept that result, however unreasonable it may be (see Arnold -v- Britton & others [2013]EWCA Civ 902 and Earl Cadogan and Cadogan Estates Ltd -v- Escada and others [2006] EWHC 78 (Ch)).

BACKGROUND

14 Mr A Greenman, the father of the Original Lessees, died in 1991. At his death he was the leasehold owner of the Property. Unfortunately, the lease under which he held the Property has been lost and we have had no documentary evidence as to the terms of that lease. Under the legislation at the time, any enfranchisement rights which Mr Greenman may have had died with him. It is the Respondents' case that the Original Lessees, who were the deceased's Personal Representatives (PRs), wished to sell the Property. By 1991, there was only a limited residue left of the lease term. The actual residue is again not known, but Mr Evans on behalf of the Applicant suggests that the original term would have been 99 years from between 1925 and 1935 (p55). Mr Cooper suggests, on the basis of his discussions with the Original Lessees, that the length of the term was 99 years from 1927 (p62). For the purposes of this Decision the difference between the parties is not significant. The usual sources of lending would not have been available for a purchaser and so there would have been a limited market for the Property without either acquiring the freehold or extending the lease. The property market at that time was stagnant and the result would have been to depress the value of the leasehold interest in the Property to a price that only a cash buyer, or a buyer who could borrow against other security, was willing to pay.

15 On the 7th June 1991, the Original Lessees, as PRs of Mr Greenman, in all probability, surrendered their interest in the old lease, and were granted a new lease for 99 years from 24th June 1990 at a premium of £600 and an initial ground rent of £45 pa (see the evidence of Mr N R Plotnek at p34).

16 The ground rent was stated in the lease to be subject to review in 2015 to "a sum representing the open market letting value of the land". It is the nature of that review which is the subject of this preliminary issue.

THE VALUATION EVIDENCE

17 There was a considerable amount of agreement between Mr Evans and Mr Cooper. Both agreed that the probability was that the original lease was for 99 years at a ground rent of £5 (Mr Evans) or £8 (Mr Cooper). The commencement of the term would have been from 1925 to 1935 (Mr Evans) or 1927 (Mr Cooper). The enfranchisement value under the Act in 1991 would have been between £1,600 and £3,070 (Mr Evans)(p 56) or £1,985 (Mr Cooper)(p 67). The factors resulting in these figures differed, but both parties agreed that the difference was not significant in the context of the issue being determined. Both valuers were confident that they could have reached agreement should it have been required.

18 Both valuers also agreed that in 1991 there was no evidence of plot "sales" at a "modern ground rent" only and that was still the situation today. The Original Lessees were not entitled to enfranchise under the Act. Two developers in particular sold houses by granting leases at a premium and at nominal ground rents (as per Mr Cooper at p 67). The two developers had stopped this practice although Mr Evans stated that one of the developers had re-started. Both valuers were aware of transactions involving houses with nominal ground rents. Mr Evans was aware of transactions involving houses subject to "modern ground rents" granted under the Act and, in the last 18 months, lettings subject to modern ground rents outside the Act.

19 Both accepted that the ground rent in the new lease was "nominal" as was the premium. Both agreed that the original lease was more valuable than the Lease - although in Mr Evans' case because the review to a modern ground rent brought forward the value of the reversionary interest. Both also agreed that where a premium was charged it would affect the level of the ground rent - the higher the premium, the lower the ground rent. The valuers agreed that the level of a "modern ground rent" would be in the region of £4,000 to £5,000 pa. They did not, however, agree on one critical point: whether a house or plot subject to a "modern ground rent" was saleable or mortgageable. Mr Cooper was clear in his opinion that it was not (p 68). Mr Evans was somewhat reluctant when asked about this. He did not think that the Property would become unmortgageable if the ground rent was reviewed to a "modern ground rent", although he did concede that it might be difficult to mortgage. It was put to him that a building society would not be happy at the prospect of having to pay a ground rent of £4,000 - £5,000 pa for a defaulting mortgagor simply to protect its security. He considered that the society might not lend such a high percentage as normal. However, Mr Evans conceded that he did not carry out valuation work for mortgagees. As to the saleability of the Property with a "modern ground rent", in his view everything had a price; he could not say that there was no market. In his supplemental report (p 59B), Mr Evans pointed out that the Property had in fact been mortgaged. However, in evidence he conceded that this could be because no-one at the time realised that the ground rent might be reviewed to a "modern ground rent". He suggested that a builder might take a lease at a "modern ground rent" in order to build to let. Mr Cooper did not agree. He told us that the costs of construction, finance, repairs, insurance and management were such that he could not imagine any builder willing to take the risk.

20 On the issue of mortgageability and saleability, we prefer the evidence of Mr Cooper. His responses were clear and demonstrated a practical and common sense approach to the issue. Mr Evans on the other hand was more guarded and gave nothing in support of his contentions. In our view, a builder will not be interested in letting the finished house. He/she needs the capital replenished in order to recoup the cost, start the next job and realise a profit. He/she will always keep in mind that whatever is built has to be sold. The same is true for a self-build property. The buyer always has one eye on the eventual re-sale, maybe four or five years ahead. Further, any lender, whether to a builder or a purchaser, is going to consider the possibility that it might have to fund any ground rent in the event of default. Further, if a building society were prepared to lend a reduced percentage because of the "modern ground rent", a substantial number of buyers would be ruled out. Others would be deterred as this could well indicate future difficulties with mortgageability and saleability of the Property.

21 There is in any event a natural reluctance for purchasers to acquire leasehold properties when there is an abundance of freeholds for sale. After all, a lease is a diminishing asset. The two house builders who in 1991 were selling leasehold houses ceased doing so. One has apparently restarted. However, the ground rents were and are nominal. We accept Mr Evans' evidence that there are properties with "modern ground rents" in the market more recently, but we were not provided with any evidence as to the extent of the depressing effect on values. We are satisfied on the basis of Mr Evans' evidence that any market in "modern ground rents" is limited.

OTHER BACKGROUND ISSUES

22 The parties raised a number of issues which they considered would assist in determining the meaning of the Rent Review Clause. Not all of these were agreed, and some of these are not really relevant to our Decision. However, as they were raised, we shall deal with them.

Cummings -v- Severn Trent Water Authority (West Midlands Rent Assessment Panel - 19th June 1985/30th December 1985)(Cummings)

23 This was a decision of the West Midlands Rent Assessment Panel which was included in the Applicant's bundle of authorities at A-T7. In that case, the lease had been granted subject to a condition that "the yearly rent reserved thereby shall be altered in upward direction only to a figure to be assessed in accordance with current market values of the land at the time when the said land shall fall to be reassessed as if the land were at such review periods available for residential development for purposes authorised by the Town and Country Planning Acts…" In valuing the freehold reversion, the tenant's surveyor had adopted a "nominal ground rent" as the reviewed rent whereas the landlord's surveyor had adopted a "modern ground rent". The Panel decided in favour of the "modern ground rent". No reasons are given in the report of the case supplied to us for this. Neither is there any suggestion in the report that there was any legal argument concerning the interpretation of the clause.

24 In evidence (at p 33), Mr Plotnek told us that he was employed by Burford in 1987 and was appointed a Director of Burford in 1989. He stated that he became aware of the decision in Cummings in that year. Following this, when Burford received an enquiry to purchase a freehold reversion, it would offer a freehold price and an alternative of a new 99 year lease at a nominal rent and premium but with a rent review to a modern ground rent after 25 years. In Mr Plotnek's view, that is probably what happened in the case of the Property.

25 Mr Plotnek explained that the report appeared in a loose leaf text book on residential leasehold property, possibly the Handbook for Leasehold Reform, the name and author of which he could not fully recall. It was the practitioner's "bible" and he still had a copy although he had ceased subscribing to the "updates" in the late 80's or early 90's. He had obtained a copy of the full decision from the Panel, but he no longer had it. The drafting of the leases was the responsibility of the Solicitors. He left Burford in 1993 (p 37) and, although he is not a chartered surveyor, he has since been practising on his own account specialising in valuation work for landlords and tenants under the Act and under the Leasehold Reform, Housing and Urban Development Act 1993 (the 1993 Act).

26 We were not convinced by Mr Plotneks evidence. He was vague about the source of his information. He did not retain a copy of a decision which constituted a significant policy change for his employers (Burford) and which would, no doubt, have been of great assistance in his capacity of a valuer dealing with enfranchisement and lease extensions. We also have doubts that a substantial company would have effected such a policy change upon the strength of a decision of a Rent Assessment Panel.

27 Mr Loveday argued that as the decision was contained in a practitioner's handbook it was available to both parties. Therefore, in 1991 valuers were aware or ought to have been aware that reviews to "modern ground rents" were possible options.

28 We are not persuaded. The appearance of a summary of a case decided by a Rent Assessment Panel on a page and a half of a loose leaf text book, with no heading and with no reasoning and where the calculations comprise 2/3^{rds} of the report is unlikely to attract the attention of many practitioners in general practice. The lack of written reasons for the decision and its non-binding effect will not have helped. The fact that the case appeared in 1985 when Mr Plotnek was responsible for the management of various ground rent portfolios and he only came across it four years later in 1989 suggests to us that Cummings was not a decision which was circulated widely.

29 We do not accept that, by virtue of Cummings, the valuers (if any) or the Solicitors for the Original Lessees would or should have been aware that a review to a "modern ground rent" was a possibility.

The Terms of the Surrender

30 Mr Cooper argued that the value of the leasehold interest surrendered in 1991 was £60,000 (p 67). His reasoning was that the price of £67,000 which Mr and Mrs Airey paid for the new leasehold interest in 1992 was a true market price based upon the assumption that the ground rent would remain nominal throughout the term. Assuming a ground rent of £8 pa under the original lease, capitalisation and deferment rates of 7% and a site value proportion of 30%, he estimated the value of the freehold reversion in 1991 would have been £1,985. Carrying out the same exercise based on the original lease but at a 1994 value of £80,000, when a purchaser would have been entitled to enfranchise under the Act, he calculated that the value of the freehold reversion would have been £2,854. The cost of waiting three years was not great and so he assessed the value of the leasehold interest given up in 1991 was only £7,000 less than the 1992 purchase price. Since Burford was entitled to have the ground rent reviewed 10 or possibly 20 years earlier than under the original lease, what the Original Lessees were surrendering was more valuable than the Lease. According to Mr Denyer- Green, this points in favour of the revised ground rent being reviewed on the same nominal basis as the existing ground rent.

31 Mr Evans had valued the 1991 reversionary interest under the original lease at £3,070 assuming a reversion of 35 years and a ground rent of £5 and at £1,600 assuming a reversion of 45 years. The main difference is in the value of the entirety of the plot and building which he put at £90,000 with a site percentage of 33%. He had not been asked to value the surrendered leasehold interest.

32 Mr Loveday submitted that there was insufficient evidence to support Mr Cooper's conclusions. We do not know the length of the term, the amount of the ground rent which may have been low or high, with or without reviews. We do not know what the terms were or whether there was a premium. He pointed out that there is no reference in the Lease to the surrender of the original lease as part of the consideration (p 39) and the certificate of value in clause 8 of the Lease (p 50) limits the value of the transaction to £30,000. In his view, the transactions were not linked. He rightly pointed out that in evidence Mr Cooper appeared unable to justify the figure of £60,000 - other than on the basis of his professional experience. He also suggested that Mr Cooper's calculations did not take into account that the Original Lessees were receiving a mortgageable leasehold interest in place of an un-mortgageable one. Further, Burford gave up the right to possess the Property in 35 years' time.

33 We accept Mr Loveday's comments that we have no evidence as to the terms of the original lease and that much of what both valuers have done is based upon assumptions drawn from their very wide experience of leasehold properties in Cardiff. There is not in fact a great deal of difference between their valuations. Mr Evans, the Applicant's valuer, had the advantage of being brought up in a similar property in nearby Llanishen. We do not accept, however, Mr Loveday's

comments concerning the consideration stated in the Lease or the conclusions to be drawn from the certificate of value. We do not know whether there was a formal surrender of the old lease, or whether Burford simply granted the Lease and the old lease and counterpart - if they existed - were exchanged or destroyed. We do not attach any significance to these clauses in the Lease. A surrender by operation of law may not have been regarded as chargeable consideration for Stamp Duty purposes in 1991. The only operable deed may have been the Lease. We simply do not know.

34 We are also not convinced by Mr Cooper's assessment of the surrender value of the existing lease. Even if his assumptions are correct as to the length of the original lease and the ground rent, we do not consider his valuation of a long leasehold interest in the Property at a nominal ground rent in March 1993 to be consistent with his evidence (p 66) of values of 3 bedroom inter-war semi-detached properties in 1991. The range given is between £65,000 and £85,000 with a slight drop in 1993 to £60,000- £80,000. Mr Cooper acknowledges that the Property has four bedrooms but regards the site as restrictive from the point of view of access to a garage. This is, however, one of the better residential areas of Cardiff and with two double bedrooms and two "three quarter" bedrooms (p80), it would seem to us to be at the higher end of that range, even allowing for the fact that it was leasehold. In our view, Mr Evans' valuation of the entirety value (p 56) is closer to the mark subject to some allowance for the Property being leasehold at a nominal ground rent, which is the basis of Mr Cooper's valuation.

35 As Mr Loveday says, the Original Lessees were giving up a lease which was un-mortgageable. The pool of interested purchasers for the old lease would inevitably have been limited to cash buyers and those able to raise the purchase price on other property. That necessarily impacted upon the price achievable in the open market. The sale to Mr and Mrs Airey was not at arm's length and may not fairly reflect the market value of the Lease (subject to a nominal ground rent) in 1993. We have noted that even that assignment did not proceed until more than a year after the Lease was completed (p71). No explanation was given for the delay.

36 In our view there are dangers in attempting to separate the deal into small self-contained parts. We need to be looking at the totality of the agreement. We also need to look at the reality of the situation. The Original Lessees had a problem. The old lease was of an age where traditional lenders would not lend on the security of the Property. They did not have a right to enfranchise and so a purchaser would need to be able to finance the purchase without recourse to a mortgage on that Property. Such a purchaser would demand a substantial discount. We can well understand the pressures on the Original Lessees acting as PRs with, we are told, five beneficiaries having a share in the proceeds (p 62). To sell the Property at a reasonable price, the Original Lessees needed to have something mortgageable to sell. Burford knew the situation. It was under no obligation to sell its freehold reversion. It could name its price. If it were too greedy, the Original Lessees would have no option but to wait. However, the softer option of a lease at a nominal ground rent, at least for the immediate future, might be the answer. It freed up the Property for sale. The fact that it was sold to a relative, possibly at an under-value is not relevant. The Property was now mortgageable and could be put on the open market.

37 Legally, the transaction may comprise a surrender and re-grant. In reality, the two would have taken place simultaneously. We do not know whether the Original Lessees took valuation advice at the time. We do not know if their Solicitors were sufficiently versed in matters relating to enfranchisement. It is not relevant. The fact is that the deal was done. The original lease was consigned to history and the new mortgageable and therefore saleable Lease came into existence.

38 There is of course no such thing as a free lease. In the short term, there was a capital payment or premium of £600 and a nominal ground rent of £45 pa. According to Mr Cooper, ground rents of new build four bedroom properties in the 1990s in Talbot Green and Llantwit Fardre were £90 pa (p 67). In Pontyclun in 1992 initial rents for new build houses were £72 pa rising to £288 (p 68). He suggested that the £600 premium, decapitalised in perpetuity, would result in an additional rental figure of £42 pa which added to the reserved ground rent of £45 makes a total of

£87 pa - close to the general level of ground rents charged on new build properties at the time. However, as Mr Loveday pointed out, there had to be a consideration, something in the deal which made it worthwhile for Burford. Mr Cooper argued that the higher ground rent and an earlier increase to an updated nominal ground rent would be sufficient to recompense Burford for the low premium and the low initial ground rent. We do not agree. The capitalisation of a higher nominal ground rent of £45 pa (even with reviews to nominal ground rents) for over 90 years with the deferral of the plot value for the same length of time would in no way compensate Burford for the loss of the plot value deferred for 35 years, let alone provide a profit on the deal. We shall return to this aspect again.

The 1999 proposed sale

39 In March 1999, Mr and Mrs Airey placed the Property on the market with Lloyd Williams, Estate Agents (p 82). The asking price for the leasehold interest was £99,500 and within a short time an offer was received for the full asking price (p 83). The buyers wished to purchase the freehold reversion. A quotation was received in the sum of £8,555 for the freehold reversion.
Mr William Ricketts was instructed to discuss the quotation with the freeholder and the proposed purchase price for the freehold reversion was reduced to £7,500. Neither the sale nor the purchase of the freehold reversion proceeded.

40 According to Mr Evans this meant that Mr Ricketts accepted the principle of a review to a "modern ground rent". At page 59B, he has set out a calculation which shows that Mr Ricketts must have accepted that the reviewed rent was £1472 pa ie a "modern ground rent" and not a nominal one. The Respondents counter this in a number of ways. Firstly, there is nothing to suggest that Mr Ricketts agreed the figure of £7,500. Secondly, the prospective purchasers did not agree that figure. Thirdly, even if the figure had been agreed, it was affected by the desire to conclude the prospective sale/purchase - the so-called Delaforce effect (see Delaforce -v- Evans (1970) 22 P & CR 770).

41 During the course of the proceedings we invited both Counsel to consider whether a negotiation held some years after the Lease had been concluded could assist in the interpretation of that document. Both Counsel agreed that it had no relevance and we therefore take no account of it.

GROUND RENTS

42 Part of the problem when interpreting leases involving ground rents is that there is no actual definition of the term "ground rent". It is generally used when referring to a number of different arrangements. The most common of these are what we have referred to in this decision as a "nominal ground rent". These are "nothing more than ad hoc financial arrangements whereby some developers obtain a return on their investment partly by capital payments and partly by income" (see Gajewski -v- Anderton and another [1971] RVR 199 per Mr J H Emlyn Jones). They have little effect upon the sale price of the house, provide a small amount of regular income for the developer and in a few years some additional capital whenever the lessee decides to enfranchise. The sort of nominal ground rents in the 1990s are those typified in Mr Cooper's statement (pp 67 and 68).
There are other kinds of nominal ground rents. Leases granted in the late 19th Century and early 20th Century were often for 99 years or even 999 years at ground rents ranging from 5 shillings (25 pence) pa to £15 pa or £20 pa. These appear to be nominal ground rents now, but 100 years ago they could well have represented an investment return on the land leased to a builder providing much needed accommodation at the time.

43 At the other end of the scale is the "section 15 ground rent". Section 15(2) states that the rent payable under a lease extension "shall be a ground rent in the sense that it shall represent the letting value of the site (without including anything for the value of the buildings on the site)…" This is generally interpreted as a rent representing the "rate of income return the freeholder might expect if he were to grant a 50 year lease on the terms set out" in the Act (see Hague on Leasehold Enfranchisement, 5th Edition (Hague) at paragraph 8-06 (A-T10)).

44 Section 15(2) ground rents are sometimes referred to as "full ground rents" (see Jarrett -v- Burford Estates & Property Co Ltd [1999]1 EGLR 181 (Jarrett)(A-T4)) as they represent the full investment return on the land. They are also sometimes referred to as "modern ground rents". However, this expression can be misleading (see Hague , paragraph 8-05 (A-T10))as it can encompass both the Section 15 ground rent and updated nominal ground rents.

45 The issue for us to decide is which sort of ground rent did the parties intend in 1991 should be payable when it came to be reviewed in 2015. The starting point has to be the clause itself.

THE RENT REVIEW CLAUSE

46 We have broken the clause down into its component parts. The reviewed rent is to be:

(a) such annual rent (being not less than the rent payable immediately prior to each relevant Rent Review Date)
(b) being a sum representing the open market letting value of the land hereby leased
(c) as if it were a vacant site without any buildings thereon ("the Site")
(d) to be assessed in accordance with open market values of the Site at each relevant Rent Review Date…
(e) as if it were at such Rent Review Date available for residential development for purposes authorised by the Town & country Planning Acts…

47 The first thing to notice is the resemblance of (b) and (c) above to section 15(2) of the Act which refers to "the letting value of the site (without including anything for the value of the buildings on the site)". Also, (d) and (e) above appear to follow Cummings: "to be assessed in accordance with current market values of the land at the time when the said land shall fall to be reassessed as if the land were at such review periods available for residential development for purposes authorised by the Town and Country Planning Acts…"

48 There is, however, one significant difference, as both parties acknowledge. The Rent Review Clause refers to "open market letting value" and not simply "the letting value" as stated in the Act. In Cummings, there is no reference to letting values - open market or otherwise. The reviewed rent was to be "assessed in accordance with current market values" of the land.

THE APPLICANT'S INTERPRETATION

49 Mr Loveday conceded that as the definition in the lease was not on all fours with the wording of section 15(2) of the Act, the reviewed rent was not therefore a section 15 ground rent. In his view, the review is to a "modern ground rent", which is more of an investment return on the current value of the site as opposed to a nominal ground rent. His arguments are as follows:

(a) Although the Rent Review Clause refers twice to the "open market", these words do not in themselves point to a revision to a nominal ground rent. The words are different from those used in Elmbirch Properties plc -v- Schaefer-Tsorpatzidis [2008]1 P & CR 8 (Elmbirch) (A-T5) and Jarrett which refer to "market ground" rents. In Elmbirch, there was a revision to the "increased market ground rental value". The Lands Tribunal (at p 144) was persuaded that the word "revision" - and he might have added, the word "increased" - indicated that it was the amount and not the basis of the payment which was being "revised". As the original ground rent was "nominal", the Tribunal concluded that the "revision" was to an updated "nominal" ground rent.

(b) The Rent Review Clause requires a valuation of the "open market letting value of the land". This does not suggest that the reviewed rent was to be ascertained by reference to levels of nominal ground rents. It is referring to the site and other comparable sites. Jarrett referred to "open market ground rent levels" which suggested to the Lands Tribunal that the reviewed rent was "to be ascertained by reference to the level of rent customarily reserved when a house is let at a premium on a long lease" (p 188). That is not the case here.

(c) The inclusion in the Rent Review Clause of specific hypotheses - a vacant site, availability for residential development and for purposes authorised by the Town and Country Planning legislation - only has relevance when assessing a modern ground rent. Nominal ground rents are ad hoc arrangements and such factors have no consideration when deciding these.

(d) The commercial purpose of a rent review clause is not to update the original rent but "to enable the landlord to obtain from time to time the market rental which the premises would command on the open market" (per Sir Nicholas Browne-Wilkinson V-C in British Gas Corporation -v- Universities Superannuation Scheme Ltd [1986] 1 WLR 398 at p 401(British Gas) (A-T3)).

(e) The possibility that the outcome may be unfair to one or other of the parties is not a consideration (see Arnold -v- Britton [2013] EWCA Civ 902). The wording "may not be very sensible from a business point of view" or even not "commercially realistic", but if "the clause is neither ambiguous nor incapable of implementation", we have to give effect to it.

(f) The fact that there is no evidence of transactions involving the letting of sites at "modern ground rents" should not deter the Tribunal from finding that the review is to a "modern ground rent". Valuers are adept at negotiating values in hypothetical markets, eg in the non-Act world of lease extensions for flats.

THE RESPONDENT'S INTERPRETATION

50 The Respondents contended that the wording of the rent review Clause can only be referring to a nominal ground rent. Mr Denyer-Green made the following points:

(a) The expression "open market letting value" necessarily implies a hypothetical letting by a willing landlord to a willing tenant (see Dennis & Robinson Ltd -v- Kiossos Establishment [1987] 1 EGLR 133 (Kiossos)(R-T9)). The hypothetical letting is of the land alone.

(b) As the letting value has to be "assessed in accordance with current open market values", the hypothetical transaction has to be of a type that takes place in the open market and assumes that there will be such transactions to act as comparables (see Jarrett). The only evidence of open market transactions in 1991 relate to long leases of buildings at nominal ground rents.

(c) The "presumption of reality" points to the terms of the hypothetical letting being on the same terms as the Lease, save as to rent and premium (Co-operative Wholesale Society Ltd -v- National Westminster Bank plc [1995] 1 EGLR 97(R -T6)) and not something fundamentally different from the from the original transaction. It must therefore be assumed that the tenant will be taking a 99 year lease of a site which it will develop and sell on at a premium. Leases at ground rents in excess of nominal ground rents would be un-mortgageable and un-saleable, something which both parties would have been aware of in 1991.

(d) A review to a "modern ground rent" would be disproportionate in relation to the increase in rental or property values and contrary to the purpose of rent review provisions. The purpose of the review is "to reflect the changes in the value of money and real increases in the value of property during a long term" (British Gas).
(e) It must have been contemplated that the Lease would be sold during the term and therefore the Property would have to be mortgageable and saleable. With a "modern ground rent", the Property is neither. The parties cannot have intended this. This would be a very unreasonable result and "the more unreasonable result, the more unlikely it is that the parties can have intended it, and if they do intend it, the more necessary it is that they make that intention abundantly clear" (per Lord Reid in L Schuler AG -v- Wickman Machine Tool Sales Ltd [1974] AC 235 at p 251(R-T7)).
(f) Section 15(2) is a statute and not a contract. The wording of the statute differs from that in the Lease - there is no reference in s 15(2) to "open market". If the draftsman had intended the reviewed rent to be a section 15 rent, he/she could have used identical language. Both Jarrett and Elmbirch distinguish s 15(2) from "current open market ground rent levels" and "market ground rental value" even though both clauses use the word "ground" to describe the nature of the rent as in the Section 15.
(g) The expression "open market value" can mean "open market rental value".

FACTUAL MATRIX

51 We find the following facts which are considered relevant to the interpretation of the Rent Review Clause. Most of these are in fact agreed:

(a) At his death in 1991, Mr Greenham was the leasehold owner of the Property. His interest was a long leasehold, probably 99 years, at a nominal ground rent. The length of the unexpired term is not known but has no significance for the purposes of this Decision.
(b) The Original Lessees were Mr Greenman's PRs. They were not entitled to purchase the freehold of the Property under the Act, nor could they serve a notice and assign the benefit of that notice.
(c) The Original Lessees were willing to sell the Property to Mr and Mrs D Airey. Mr Airey was the grandson of Mr Greenman and the son of one of the PRs. He required a mortgage in order to purchase the Property.
(d) The unexpired term of the original lease meant that building societies were unwilling to lend on the security of the Property which would depress its value. Consequently, the Original Lessees approached Burford with a view to buying the freehold or otherwise acquiring a mortgageable interest.
(e) Burford offered to sell the freehold reversion and in case this was too expensive, it offered to take a surrender of the original lease and grant a new lease on terms. Burford was under no obligation to sell the freehold reversion. The Original Lessees needed to have a saleable and mortgageable interest in the Property in order to sell it at a reasonable market value. The weight of bargaining power was with Burford.
(f) The Lease was granted subject to the payment of a premium of £600, a nominal sum which did not represent the value of the building on the site, and subject to a nominal ground rent of £45 pa. There were to be upwards only reviews of the ground rent in 2015, 2040 and 2065. With the benefit of the Lease, the Property was saleable and mortgageable.

52 "To ascertain the parties' intentions", we must make "an objective judgment based on the materials identified" (per Lord Bingham in BCCI at p259)(R-T2). On the basis of those facts we have concluded that both parties accepted that the underlying purpose of the transaction was to provide the Original Lessees with an immediately saleable and mortgageable leasehold interest at an initial

modest cost, in terms of both premium and ground rent, and that Burford would be recompensed subsequently either by the increased revenue stream when the ground rent was reviewed or on enfranchisement.

53 The Rent Review Clause is the mechanism whereby those common intentions were intended to be put into effect as - and we have noted this earlier - the nature of the review affects not only the income stream, but also the price payable on enfranchisement.

THE WORDS USED

54 It is important when seeking the intentions of the parties from an expression, phrase or clause, that each of its elements is considered as the inclusion of each such element is in all probability for a particular purpose. It may be to enhance or qualify or even to reinforce the meanings of other parts of that expression, phrase or clause. Of course, there is the possibility that the draftsman may have made what Lord Hoffman refers to as "linguistic mistakes" (West Bromwich at p 913), but in a formal document such as this, that would be rare. Neither party argued that to be the case here.

55 If the draftsman had intended the reviewed ground rent to be a Section 15 ground rent, it would have been easy enough to incorporate the wording of the statute into the clause or, simpler still, to have defined the reviewed rent by reference to section 15(2). Neither party has argued for this and we conclude therefore that such was not the draftsman's intention.

56 Turning to our breakdown of the Rent Review Clause in paragraph 46 above, it seems to us that there can be no issue in respect of sub-paragraphs (a), (c) and (e). The reviewed rent must be an annual rent, not less than that payable before the review date. The valuation(s) have to be on the assumption that what is being valued is a building plot with planning permission for residential development.

57 The dispute between the parties is really focussed on sub-paragraphs (b) and (d) and in particular on the use by the draftsman of the expressions "open market letting value" and "current open market values" in the context of this clause.

58 Mr Denyer-Green argued that the only market in 1991 was in respect of houses subject to ground rents. Such ground rents were "nominal" and so, he concluded, the draftsman could only have intended that sort of "market". However, if the draftsman had intended the reviewed ground rent to have been "nominal", he/she could have used an entirely different formula. He/she could have created a stepped increase, either by stating particular increased values or by doubling the ground rent every 33 years (see Mr Cooper's evidence at p 68). Further, as Mr Loveday pointed out, the inclusion of the wording set out in sub-paragraphs 46(c) and (e) above would have been unnecessary if a nominal ground rent had been the objective. We appreciate that such an interpretation is placing reliance upon a hypothetical market instead of an actual one, but again, as Mr Loveday stated, valuers are required from time to time to value interests in hypothetical circumstances making assumptions which may not accord with reality (the Lease does, however, pre- date the 1993 Act).

59 We have considered whether the effect of the Applicant's interpretation would have been so unreasonable that the parties would not have contemplated it. Mr Denyer-Green submits that it would be and so the revised ground rent must have been intended to be "nominal". However, the Applicant was in a strong bargaining position. It could name its price. It did not have to sell. If there was a delay, the shorter the unexpired term meant a higher price for the reversion. Burford required a "pay-back" at some point - no doubt when the lessee came to enfranchise a few years down the line. If one considers the formula used by Mr Evans at page 59B to calculate the amount of the ground rent used the 1999 negotiations and substitutes an updated nominal ground rent for "z", one can see that the resulting value of the freehold reversion is not one which the parties could have intended.

60 We appreciate that, as pointed out by Mr Denyer-Green, the purpose of a review is to enable a reserved rent to be adjusted to take account of increases in values, but, as Browne-Wilkinson says in British Gas (p 981), after stipulating the basic purpose of a rent review clause: "the lease may be expressed in words so clear that there is no room for giving effect to such underlying purpose. Again, there may be special surrounding circumstances which indicate that the parties did intend to reach such an unusual bargain". Further, in Basingstoke and Deane Borough Council -v- Host Group Ltd [1988] 1 WLR 448 (R-T5) (Basingstoke), Nicholls LJ (at p354), having put forward the same general principle, comments that "rent review clauses may, and often do, require a valuer to make his valuation on a basis which departs in one or more respects from the subsisting terms of the actual lease." We find that to be the case here. The use of the words "open market values of the Site" and the inclusion of parameters as to how the site is to be valued, whether such valuation is a capital valuation or a rental valuation, indicate to us that the draftsman was intending more than a nominal ground rent. The circumstances of the bargain also lead us to the same conclusion.

61 At the start of the hearing, Mr Loveday invited us to approach the case on the basis that there were two possible explanations: a "nominal ground rent" or a "modern ground rent". He appeared to be suggesting that if we were to find that the reviewed rent was not a "nominal ground rent", then it must be a "modern ground rent". Certainly, one of Mr Denyer-Green's arguments was the opposite, namely that the revised ground rent cannot be a "modern ground rent" and so it must be a "nominal ground rent". We raised with both parties the possibility that there may be other interpretations. As this was a preliminary hearing, we did not have valuation evidence as the valuers were not entirely clear what it was they were to value. We were at one stage asked to consider adjourning the hearing to enable the valuers to prepare figures, but having heard both Counsel, Mr Denyer-Green in favour of an adjournment and Mr Loveday against, we decided that from a practical point of view, little would be gained and in any event at that stage in the proceedings, we had heard Mr Evans and it would be unfair to the Applicant for us to hear Mr Cooper at the adjourned hearing.

62 In closing, Mr Loveday accepted that for the valuers to carry out meaningful negotiations and produce their reports, it would be necessary to do more than simply declare that the reviewed rent was "nominal" or "modern". Both valuers agreed.

63 We have indicated in paragraph 60 above that the expression used in sub-paragraph 46(d) makes it clear that the review is not to a "nominal ground rent". We must now consider the meaning of the expression "the open market letting value of the land hereby leased". We appreciate that there is no market as such. There is no evidence of any transactions of this nature. However, the lease envisages a hypothetical market and that is the basis of the valuation process which must be adopted. We have concluded the following:

(a) The expression assumes that the Applicant is willing to lease the land and the Respondents are willing to accept such a lease (see Kiossos).

(b) It also assumes that whilst it may be necessary to depart "in one or more respects from the subsisting terms of the actual existing lease", in general "the parties are to be taken as having intended that the notional letting postulated by their rent review clause is to be a letting on the same terms (other than as to quantum of rent) as those subsisting between the parties in the actual existing lease" (per Nicholls LJ in Basingstoke at p 354). The hypothetical lease for the purposes of calculating the rent is to be taken as being on the same terms as the Lease except in respect of the rent. It will take into account, therefore, that the letting is at a premium of £600 and that there are to be rent reviews after 25, 50 and 75 years. The issue of the premium was referred to during evidence. Mr Cooper regarded the premium as equating to a difference in the ground rent of £42 pa when taken over the full term of the lease. Mr Evans took the view that the amount was so small as to be insignificant in valuation terms. Mr Cooper had decapitalised the premium over the whole term. If he had carried out the same exercise over the first 24 or 25 years of the lease, the resulting figure would only have been

marginally higher. In our view, the premium, although relatively small, could well have some slight bearing on the rental payable. After all, as both valuers agreed, the level of a premium will affect the level of the rent.

(c) It will be necessary to consider the current open market value of the land. The draftsman has in fact used the word "values" in the plural. This suggests to us that the valuation exercise needs to be by reference to the sale values of plots of land rather than by the use of such formulae as the standing house method. Each comparable will suggest a value for the site. Two or more comparables may indicate a spread of values and it is these which need to be taken into account.

(d) Account will also need to be taken of the location of the site as well as its physical constraints: the width of the plot, the proximity of the adjoining properties, the location of windows in the adjoining properties and so on. Planning restrictions will also need to be considered, not only as to what can be built, but there may be restrictions as to times, noise, nuisance to adjoining owners and other conditions which are generally included by local planning authorities to preserve the amenity for neighbouring properties. It will also be necessary to have regard to the fact that construction on a confined plot will be more expensive than on a green field site and the fact that a local builder is unlikely to be able to command the economies of scale or the bargaining power of a national builder. These points are not meant to be comprehensive, merely indicative.

(e) The "open market letting value" means precisely that. The reviewed rent has to be a marketable rent. Upon this issue, we prefer the evidence of Mr Cooper. If the site were placed on the open market for letting only, the only purchasers would be a builder who would wish to build and sell the completed building either by way of underlease or assignment or a self-build purchaser. In either case the ability to fund the purchase is critical. We are satisfied on the evidence that there would be no market for a letting at a section 15 ground rent or at a ground rent akin to that. Potential buyers would be unable to access a mortgage on normal terms. The only buyers who would be in a position to buy therefore would be cash buyers, or those with other sources of funding, willing to take on a diminishing asset with a built-in regular and not insignificant financial commitment. A "modern ground rent" would be a continuous burden both during construction and whilst the builder waited for a buyer to complete. Any purchase of a house at such a ground rent would come at a price, and the amount of discount which a potential buyer would demand would in effect render the whole project unviable or at least so risky that we cannot see any builder willing to enter into such a transaction. Nor would a builder be prepared take on the Lease and build to let for the reasons already stated.

(f) The question is: what is "the open market letting value of the land"? The answer is: it is a marketable ground rent; the highest ground rent at which a purchaser (builder or otherwise) in the hypothetical open market would be willing to acquire a lease of the plot of land. We would assess it to be more than a "nominal" sum, but there will come a point, even in the hypothetical open market, when the cash buyer or one with other sources of borrowing will cease to be willing to take on the commitment, particularly as the leasehold interest depreciates over time and there is a prospect of an increase in the ground rent in 25 years.

64 As discussed at the hearing, it is now for the valuers to prepare their reports in the light of this Decision.

DIRECTIONS

65 We therefore direct:

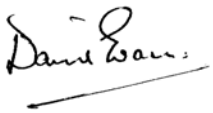
(a) The surveyors for both parties shall within 28 days of the date of this decision prepare and exchange written valuations in the light of this Decision;

(b) The parties shall within 21 days of such exchange attempt to agree the price payable by the Respondents for the freehold reversion;

(c) In default of agreement, either party may apply for the matter to be re-listed for final determination;

(d) Both parties shall have liberty to apply for further directions.

DATED this 19th day of September 2013



CHAIRMAN