**UPPER TRIBUNAL (LANDS CHAMBER)**

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**TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007**

***LEASEHOLD ENFRANCHISEMENT –purchase price – provision in lease for rent reviews – proper construction of rent review provisions – whether LVT in error in rejecting lessor's argument that the reviewed rent should have been assessed in the same manner as a modern ground rent under section 15(2) Leasehold Reform Act 1967 – whether reviewed rent to be assessed on basis that the hypothetical lease was to be granted at no premium***

**IN THE MATTER OF AN APPEAL FROM A DECISION OF THE LEASEHOLD VALUATION TRIBUNAL FOR THE WEST MIDLAND RENT ASSESSMENT PANEL**

**BETWEEN:**

**NICHOLAS RICHARD PLOTNEK** **Appellant**

**AND**

**RAJENDRA KUMAR GOVAN** **Respondent**

**Re: 65 Lingfield Avenue,**
**Great Barr,**
**Birmingham**
**B44 9TX**

**Before: His Honour Judge Nicholas Huskinson**

**Sitting at: 43-45 Bedford Square, London WC1B 3AS**
**on**
**14 July 2014**

*Ellodie Gibbons* instructed by Bureau Property Consultants, on behalf of the appellant
*Nana Turkson BSc, MSc, PgDip, MRICS* on behalf of the respondent

The following cases are referred to in this decision:

*Jarrett v Burford Estates and Property Co Ltd* [1994] 1 EGLR 181
*Elmbirch Properties Plc v Schaefer-Tsorpatzidis* [2008] 1 P&CR 8
*Investors Compensation Scheme Ltd v West Bromwich Building Society* [1988] 1 WLR 896
*Arnold v Britton* [2013] EWCA Civ 902
*Basingstoke and Deane Borough Council v Host Group Limited* [1988] 1 WLR 348
*Arrowdell Limited v Coniston Court (North) Hove Ltd* [2007] RVR 39
*Hill v Booth* [1930] 1 KB 381
*Manson v Duke of Westminster* [1981] 1 QB 323

## DECISION

### Introduction

1. This is an appeal from the decision of the Leasehold Valuation Tribunal for the West Midlands Rent Assessment Panel (the LVT) dated 5 June 2013 whereby the LVT decided that the price to be paid by the respondent to the appellant for the freehold of 65 Lingfield Avenue ("the property") was £6,843.00. The respondent holds the property, which is a house, from the appellant upon the terms of a lease dated 28 February 2008 whereby the property was demised by the appellant to the respondent's predecessor in title for a term of 99 years from 1 May 2002 at a premium of £170,000. The respondent has exercised the right to enfranchise under the Leasehold Reform Act 1967 as amended and the matter came before the LVT because the parties were unable to agree upon the price payable.

2. Various matters were agreed between the parties before the LVT. The date of the relevant notice was 9 January 2012. The following further matters were agreed:

(1) Capitalisation rate 6.5% on the basis of a low or nominal ground rent

(2) Deferment rate 5.5%

(3) Unexpired term 89.3 years

(4) Entirety value £110,000

(5) Site percentage 32.5%

(6) Surveyor's and legal fees £900 plus vat.

3. The matter in dispute between the parties, which meant they were unable to agree the price payable such that it had to be determined by the LVT, was the effect of a rent review clause in the lease. The lease reserved a rent of £125 p.a. subject to the provisions of clause 6. Clause 6 provided that the expression "Rent Review Dates" meant 1 May 2012, 1 May 2037, 1 May 2062 and 1 May 2087. Clause 6.2 provided as follows:

> "6.2. The yearly Rent shall be: -
>
> (a) Until the first Rent Review Date the Rent specified in clause 1
>
> (b) The Rent specified under clause 1 being a nominal rent notwithstanding, during each successive Review Period such revised rent as may be ascertained as herein provided."

Clause 6.3 made provision for the machinery by which the revised rent for a review period was to be determined and went on then to provide what this reviewed rent should be, namely:

> "…. the revised rent agreed or determined by the valuer shall be a sum representing the open market letting value of the land hereby demised as if it were a vacant site without any buildings thereon (hereinafter called "the Site") to be assessed in accordance with current open market values of the Site at the Relevant Review Date on the following assumptions that at that date the Site:-
>
> (a) Is available to let on the open market for residential development for purposes authorised by The Planning Acts for a term of 99 years

(b) Is to be let as a whole subject to the terms of this lease (other than the Term and the amount of the Rent hereby reserved) but excluding the provisions for rent review at the prescribed intervals."

4. It was argued on behalf of the respondent that the reviewed rent as at 1 May 2012 should be £145 pa, which in effect was based upon the original nominal rent but with a marginal increase to reflect the change in the value of money since the grant of the lease. On this basis it was submitted the purchase price should be £2,517.03. On behalf of the appellant it was argued that the reviewed rent as at 1 May 2012 was a full ground rent assessed on the assumption that the property was being let at no premium for 99 years and otherwise on the terms of the lease but with no provision for rent review; that in effect what was required was the assessment of a modern ground rent in the same manner as the assessment which is carried out under section 15 of the Leasehold Reform Act 1967; that the reviewed rent therefore should be £1966; and that in consequence the purchase price should be £35,367.

5. It is clear that the LVT did not find this case an easy one. There was a hearing on 16 January 2013. After the hearing the LVT reconvened (without the parties) on 22 March 2013 and, having deliberated, caused a letter dated 26 March 2013 to be written to the parties asking for further submissions upon various points. These submissions were duly made. The LVT gave its decision on 5 June 2013, namely that the rent payable following the review as at 1 May 2012 should be assessed in the sum of £350 p.a. and that in consequence the purchase price was £6,843.00.

6. It is not necessary to set out in any detail the arguments of the parties before the LVT, but in summary they were to the following effect.

7. On behalf of the appellant the following submissions were advanced:

(1) The rent review clause provides for review to "open market letting value" of the site, which is wording clearly directed to what is usually called a "full" ground rent. This was to be assessed on the assumption that the site was to be let on a lease with no premium for 99 years with no rent review.

(2) This rent would therefore not be a nominal rent but would be a substantial rent.

(3) The wording of clause 6.2(b) made clear that the reviewed rent might well be something other than a nominal rent. This arises from the wording:

"The Rent specified under Clause 1 being a nominal rent notwithstanding…"

(4) The matrix of material surrounding the circumstances in which the lease was granted shows that the original tenant may have entered into what many might regard as a bad bargain. However the wording of the rent review clause was clear. There was no scope for the operation of any *contra proferentem* rule. A full ground rent was intended.

(5) Certain cases in the Lands Tribunal relied upon by the respondent were distinguishable, namely the cases of *Jarrett v Burford Estates and Property Co Ltd* [1994] 1 EGLR 181 and *Elmbirch Properties Plc v Schaefer-Tsorpatzidis* [2008] 1 P&CR 8. In those cases the Tribunal had reached a decision that the reviewed rent was to be assessed as the rent

which would be payable on the assumption that a premium was taken upon the grant of the lease (i.e. such that the reviewed rent would continue to be a nominal ground rent). It was submitted that the opposite result must be reached in the present case, namely that the reviewed rent must be assessed on the basis that the hypothetical letting for 99 years was at no premium.

(6) The wording of the rent review clause brought in the machinery for assessing a modern ground rent as laid down in section 15(2) of the Leasehold Reform Act 1967. The appellant's surveyor's calculation was therefore correct and should be accepted. By this calculation the agreed site value (namely 32.5% of £110,000 which is £35,750) should be taken and a rent calculated from this by applying an annual equivalent of 5.5%.

(7) Extensive reference was made on behalf of the appellant to the principles of construction of contracts as summarised by Lord Hoffman in *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1988] 1 WLR 896. It was submitted that the wording of the rent review clause was clear and that there was nothing in the principles governing the interpretation of contracts to permit anything other than this clear meaning being given effect to, notwithstanding that the result might mean that the original tenant had made a bad bargain.

8. On behalf of the respondent the following submissions were advanced:

(1) The lease was granted at a premium. The original rent was nominal. The appellant was not entitled fundamentally to alter the basis upon which rent was charged from a nominal rent to a full rent.

(2) The original premium paid was a full price for both the buildings and the land. A tenant under the lease would expect to pay a nominal rent on review because the converse would mean paying twice for the land, namely once initially in the premium and then again through a full ground rent on review.

(3) There was in fact no market for sites sold on full ground rents for residential development in Birmingham. The lease uses the expression "open market letting value" which suggests it was contemplated there would exist a market by reference to which to assess the reviewed rent. This pointed away from the reviewed rent being assessed on a basis, namely a full ground rent, for which there was no market.

(4) The calculation should take into account the premium reserved as an implied term of the hypothetical lease. The level of rent should be nominal taking into account the premium reserved.

(5) The market had not changed significantly between the date of the lease and 1 May 2012. Therefore the passing nominal rent should be maintained but it was reasonable to allow a marginal increase to reflect the change in the value of money.

**The LVT's Decision**

9. The LVT rejected the respondent's argument based upon the change in value of money, concluding that the words used did not make evident any such intention to have some form of inflation related increase.

10. The LVT concluded there was little doubt that the intention of the draftsman was that at review the ground rent should be the "open market letting value of the site" and not simply be a review of the nominal ground rent of £125 p.a. The word "notwithstanding" in clause 6.2(b) made clear that the reviewed rent need not be a nominal rent – but the word "notwithstanding" did not mean that, after considering the open market letting value, the valuer was prevented from finding that this letting value was in fact little more than the amount of the nominal rent. In short the open market letting value was to be considered afresh without reference to the existing rent.

11. The LVT concluded in paragraph 57 that reliance upon the literal meaning of the words used (as argued for by the appellant) produced a result which was:

> "… in fact so far away from "*normal commercial practice*" in the drafting of residential long leases as to justify the Tribunal applying Lord Hoffman's 5 principles from *Investors Compensation Scheme* and looking behind the words written to ascertain the intention of the parties."

12. The LVT pointed out that not only are the words used not usually found in residential leases, but that the reasonable man in possession of all the background knowledge simply would not have entered into a contract which involved not only paying a premium substantially above market value, but also covenanting to a disadvantageous rent review in only three years time. The LVT concluded that in the present case it could be said (as it was said in the *Elmbirch* case) that the original tenant would have been "astonished" to learn that the nature of the rent was going to change so as to be calculated by reference to section 15.

13. The LVT found in paragraph 60 that the rent review clause was ambiguous:

> "…in so far as it appears that the intention of the draftsman was to create a situation where the provisions of section 15 would hopefully "kick in" without actually spelling this out. The draftsman has taken the parties to the door leading to the statutory world of section 15 without actually stepping through it."

The LVT did not consider that a reasonable tenant being proffered the lease would expect the rent to rise by an amount in excess of 15 times the existing rent after a period of only 3 years. To construe this intention the words used would have had to spell the consequences out without any doubt or ambiguity.

14. The LVT expressed its final conclusions in paragraph 62-65 in the following terms:

> "62. Miss Gibbons makes the point that the doctrine of *contra proferentem* is to tell the court to select one of two possible interpretations of the contract and that no alternative meaning has been put forward to the contention that, as the wording in the lease mirrors section 15, the clause requires a calculation of a full ground rent. The Tribunal rejects this contention. The ambiguity is whether the draftsman intended the valuer to make his valuation applying the same methods as are

used in the statutory world or whether he was to assess a rent based upon the rent achievable in the open market without using those methods.

63. Accordingly, applying the *contra proferentem* rule the Tribunal finds as a matter of construction of the lease that the rent review clause does not direct the parties to the statutory world. Therefore, applying the words actually used, the task of the Tribunal is to assess the rent payable in the open market. Both valuers agree that there is in fact 'no market' in Birmingham for the letting of sites for development at a "full" rent. However, in order to comply with the provisions of Clause 6, the Tribunal must stand in the shoes of the valuer and consider what the likely response would be if the site were advertised for letting on the basis set out in Clause 6.

64. The Tribunal finds that on the basis that no premium would be payable for the vacant site, that the rent obtainable in the market would not, in fact, be much more than a 'nominal rent'. If the site were to be offered for lease by open tender, the Tribunal considers that the most likely bids would be from developers who would wish to erect a house on the site, and then sell that house on an underlease, or by assignment. The Tribunal finds that no prospective developer would pay a rent analogous to a section 15 rent for the following reasons:

(1) The completed property would be unlikely to be mortgageable and thus saleable at a price which would make the construction of a property on the site viable let alone profitable.

(2) The payment of the rent at this level during the development period would adversely affect the profitability of the project especially (as is likely) there would be a delay in finding a buyer on such terms which would mean the ongoing liability for the rent would remain with the developer.

(3) The property would eventually have to be placed into a limited market of 'cash buyers' who would be in a position to drive the premium down to reflect the high ground rent.

65. However, the Tribunal is mindful of the fact that sales of houses on long leases at a premium will, in the current market, often provide for an escalating ground rent during the period of the lease. Accordingly, the Tribunal considers that a developer might be prepared to pay more than the current 'nominal' rent of £125, on the basis of there being no future rent reviews and no premium. As a matter of judgment, the Tribunal finds that the maximum that such a developer would pay in this instance is £350 per annum, for the reasons set out in the preceding paragraph."

15. The appellant applied to the LVT for permission to appeal on the grounds:

(1) That the LVT had failed correctly to interpret and apply the relevant law – in effect the LVT had failed properly to interpret the meaning of the words used in the lease and that the LVT, if it had proceeded correctly, would have concluded that the rent was to be calculated in accordance with section 15.

(2) The LVT had allowed a substantial procedural defect to occur because the interpretation placed upon the clause in paragraph 62 and following of its decision was an interpretation that had not been raised by either of the parties nor had it been raised

by the LVT with the parties for their submissions and no evidence had been directed towards this basis of assessment.

(3) That the proper interpretation of this clause was potentially of wide implication because there were known to be other leases worded in effectively the same way.

16. The LVT granted permission to appeal only upon ground (3) above. However the Upper Tribunal notified the parties that, as the LVT had given permission to appeal on the basis that the question in issue was a question of potentially wide implication, that meant that all of the grounds advanced by the appellant could properly be the subject of the appeal to the Upper Tribunal. It was stated that the appeal would proceed by way of a review of the LVT's decision.

**The appellant's submissions**

17. On behalf of the appellant Ms Gibbons advanced the following arguments.

18. The present appeal was a review of the LVT's decision. The principal question for the Upper Tribunal was whether the LVT was correct in its interpretation of the rent review clause and in its consequent calculation of the reviewed rent. The Upper Tribunal is concerned with the proper construction of clause 6 of the lease.

19. The reviewed rent provided for by clause 6 is a rent which is analogous to a section 15 rent calculated in accordance with the Leasehold Reform Act 1967. Section 15(2) is in the following terms:

> "(2) The new tenancy shall provide that as from the original term date the rent payable for the house and premises shall be a rent ascertained or to be ascertained as follows:-
>
> (a) the rent 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 buildings on the site) for the uses to which the house and premises have been put since the commencement of the existing tenancy, other than uses which by the terms of the new tenancy are not permitted or are permitted only with the landlord's consent;"

Ms Gibbons accepted that the lease did not expressly state that the rent was to be assessed as per section 15, but she submitted that the wording of the clause was such as to make clear that the reviewed rent was to be calculated in the same manner as a section 15 rent.

20. Section 15(2) does not set out an express valuation approach as to how such a rent should be calculated. However valuers have worked out a method of calculating section 15(2) rent, for instance the standing house approach of taking the total value of the house and site and then attributing a percentage to the value of the site and then taking an appropriate percentage of this site value to get the reviewed rent. This is the calculation performed by the appellant's valuer in the present case before the LVT. Further, the respondent accepts (and Mr Turkson confirmed this to me) that, if a section 15(2) rent is indeed to be taken as the amount of the reviewed rent under clause 6 of the lease, then the method of calculating a section 15(2) rent as advanced on behalf of the appellant is not disputed, such that the section 15(2) rent would be £1,966 p.a. calculated as at page 3 of the bundle.

21. In summary Ms Gibbons submitted that clause 6 of the lease brings in the section 15(2) valuation method. It was quite clear that what was intended by clause 6.3 was a calculation the same as that which is done under section 15(2).

22. In the present case the LVT was correct to conclude that the reviewed rent must be assessed on the basis that the hypothetical lease was to be granted at no premium but was wrong to conclude that only a rent (effectively a nominal rent) of £350 p.a. was payable. There can be no logic to this conclusion because in effect it means the landowner is disposing for 99 years of a building site at no premium and also at effectively only a nominal ground rent. This involves the landowner almost giving away the land. Thus the LVT correctly found that what must be assessed is the open market letting value of the site on a 99 year lease with no premium, but the LVT wrongly adopted their own methodology of assessing this reviewed rent rather than applying the method established under section 15(2) of the 1967 Act.

23. In answer to a question from the Tribunal as to what was the commercial objective of the clause and whether the clause as interpreted by the appellant produced a fair result, Ms Gibbons responded as follows. The commercial objective could be understood by remembering that as at the date of the lease in February 2008 there had been unprecedented growth in the property market such that significant future growth would be anticipated. Therefore the commercial purpose of the clause was to reflect changes in the value of money and real increases in the value of property in the long term. As to whether the clause produced a fair result involving a full premium being paid in 2008 but then a full ground rent (assessed on the basis that no premium had been paid) being payable from the first review date in 2012, Ms Gibbons indicated that she did not seek to advance any argument on behalf of the appellant that this result was fair. She accepted that the rent review clause in the lease is not normal commercial practice in that it is an unusual clause. However she submitted that the clause was clear in its meaning, there was no ambiguity, and there was no legal justification for giving it any other meaning than that contended for by the appellant. If the result was "unfair" to the tenant then that was unfortunate but the tenant was stuck with this result. Ms Gibbons drew attention to *Arnold v Britton* [2013] EWCA Civ 902 especially at paragraph 56 where the Court of Appeal, having recognised that the result of the interpretation of a service charge clause was not at all attractive remarked:

> "But, as I have sought to show, it is the result of the bargain made: and the court cannot properly, under the guise of a process of interpretation, introduce new and other terms to amend a bad bargain: which is in reality, what the court is being asked to do. To do so would involve distortion of all correct legal principles. Whatever the hopes and aspirations of these lessees, understandable although they may be, the court cannot simply come up with some "fair" result irrespective of the terms of the contract and in the absence of any claim for rectification. Moreover Mr Daiches was entitled to point out that the "merits" may have looked very different had inflation continued in the interim at rates corresponding to those experienced in the late 1970s and do in fact look very different in the version of the lease containing the triennial increase."

24. Ms Gibbons submitted that everything comes back to the words actually used in this rent review clause. The relevant principles of construction are summarised by Lord Hoffman in *Investors Compensation Scheme v West Bromwich Building Society* and by Nicholls LJ in *Basingstoke and Deane Borough Council v Host Group Limited* [1988] 1 WLR 348 at 353. Consistently with those principles it is necessary to consider the meaning which the rent review clause would convey to a reasonable person having all the background knowledge which would have reasonably been available to the parties entering into the lease. What must be concentrated on is the meaning the document would convey to a reasonable

third party, not to a reasonable lessee concerned only with their own interests as lessee. It is necessary to start with the words of the lease and to construe those in the light of the background factual matrix. It is not appropriate to start from the background factual matrix and then decide what the words of the clause should say.

25. In regard to the background knowledge available to the reasonable reader of the clause, Ms Gibbons submitted that (consistently with Lord Hoffman's second principle) this background information includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man. She submitted that this would include a knowledge of the provisions of the 1967 Act, especially section 15, and a knowledge of the two decisions of the Lands Tribunal in *Jarrett* and in *Elmbirch.* That information all being part of the factual matrix she submitted that the reasonable man would conclude that the intention of the clause was to achieve a result different from that in *Jarrett* and in *Elmbirch* (where the reviewed rent was to be assessed by reference to the level of rent customarily reserved when a house is let at a premium on a long lease) and was instead to be assessed on the same basis as in section 15(2) of the 1967 Act.

26. Accordingly the LVT misconstrued the lease and as a result was wrong in law by concluding that the reviewed rent was to be a rent assessed otherwise than in accordance with section 15.

27. If the foregoing was wrong and if the LVT was entitled to conclude that the reviewed rent was to be assessed otherwise in accordance with section 15, then Ms Gibbons argued that the LVT was not entitled to reach the conclusions it did reach in paragraphs 62-64. This was because:

(1) The result was on the face of it absurd because no landowner would let the site (cleared of buildings) on a 99 year lease with no rent review and no premium for a rent as low as £350 p.a. This would involve almost giving the site away.

(2) No evidence had been advanced to the LVT regarding the assessment of rent on the basis finally adopted by the LVT in paragraphs 62-64, nor was the LVT's approach and provisional views made clear to the parties for their submissions prior to the LVT adopting these views. Ms Gibbons submitted that the correct approach to the LVT's use of its own knowledge and experience was set out in *Arrowdell Limited v Coniston Court (North) Hove Ltd* [2007] RVR 39 as follows:

> "It is entirely appropriate that, as an expert tribunal, an LVT should use its knowledge and experience to test, and if necessary to reject evidence that is before it. But there are three inescapable requirements. First, as a tribunal deciding issues between the parties, it must reach its decision on the basis of evidence that is before it. Secondly, it must not reach a conclusion on the basis of evidence that has not been exposed to the parties for comment. Thirdly, it must give reasons for its decision … to support a valid decision the reasons must enable the parties to understand why it was that the tribunal reached the conclusion that it did rather than some other conclusions, so as to show that the conclusion was one to which the tribunal was entitled to come on the basis of the evidence before it."

Ms Gibbons submitted that the conclusions of the LVT in paragraphs 62-64, namely as to what was the open market rent using a method other than the section 15(2) approach were conclusions which had been reached otherwise than on the basis of the evidence before the LVT and were reached on the basis of

evidence, apparently from the LVT's own knowledge and experience, which had not been exposed to the parties for comment.

28. So far as concerns the disposal of the present appeal, being an appeal to the Upper Tribunal by way of review, Ms Gibbons submitted:

(1) That if the Upper Tribunal concluded, in accordance with her submissions, that the LVT had erred in omitting to apply the section 15(2) valuation approach, then the Upper Tribunal should allow the appeal and should determine the price to be paid in the sum of £35,367 as shown in the calculation at page 3 of the bundle. (It can for convenience here be noted that Mr Turkson agreed that, if this was the finding of the Upper Tribunal, then the section 15(2) approach would indeed lead to a rent of £1,966 p.a. and a purchase price of £35,367, such that if the Upper Tribunal did accept Ms Gibbon's principal argument then the Upper Tribunal could properly allow the appeal and order that the purchase price was £35,367).

(2) If the Upper Tribunal concluded that the LVT was entitled to reject the section 15(2) method of valuation, but also concluded that the LVT was not entitled to reach the conclusions in paragraphs 62-64 on the basis of the evidence before it and without exposing this line of approach to the parties for their comment, then the matter would have to be remitted to the LVT for further consideration.

29. During the course of the hearing I raised with Ms Gibbons the question of what were the terms of the hypothetical lease of the land under clause 6.3 of the existing lease in relation to which the open market letting value had to be assessed. The lease in clause 6.3 provides that this rent is to be assessed in accordance with current open market values of the site at the relevant review date on certain assumptions. One of these assumptions is that at the review date the site is to be let:

> "… as a whole subject to the terms of this lease (other than the Term and the amount of the Rent hereby reserved) but excluding the provisions for rent review at the prescribed intervals."

I asked for submissions as to what was meant by these words and whether what had to be envisaged was the offering of a lease in the same terms as the existing lease save that the term is 99 years from the review date (rather than 99 years from 2008), that the rent is different (this of course is the unknown amount which has to be assessed) and that there are no provisions for rent review such that the rent will remain unaltered for 99 years. However if a draft lease based on the existing lease was prepared so as to be available to the hypothetical tenant with just these relevant alterations being made to the text, then part of the printed text of the draft lease would be the provision for the payment of a premium. I asked whether this provision for the payment of a premium was one of the terms of the lease which was to be included in the hypothetical lease of the site for which the rent has to be assessed. (Mr Turkson indicated that this was an argument that he was taking and had taken before the LVT, see paragraph 41 of the LVT's decision). On this point Ms Gibbons replied that there was authority to the effect that the inclusion of the premium in the existing lease was not one of "the terms of this lease". She referred to *Hill v Booth* [1930] 1 KB 381 and *Manson v Duke of Westminster* [1981] 1 QB 323.

**The respondent's submissions**

30. On behalf of the respondent Mr Turkson advanced the following submissions.

31. He accepted that the respondent had not sought to cross-appeal. He did not seek to argue that the reviewed rent should be less than £350 p.a. or that the price payable should be less than the amount determined by the LVT.

32. Mr Turkson agreed that the main issue before the Upper Tribunal was the proper interpretation of the rent review clause in the existing lease. As regards the appellant's submission that what was intended was an assessment of rent on the same basis as a modern ground rent under section 15 of the Leasehold Reform Act 1967, Mr Turkson invited the Tribunal to compare the wording of section 15(2) with the wording in clause 6.3 of the lease. He submitted that there were clear differences. If what was intended was a section 15(2) lease this could have been provided for expressly or the draftsman could have simply lifted the precise words from section 15(2), but this had not been done.

33. Mr Turkson drew attention to certain particular words in clause 6.3 namely that the reviewed rent should be a sum representing the "open market letting value" of the site and also referred to the "current open market values". This showed that the draftsman was directing attention to an actual open market in which values can be established, not to a valuer's convention as adopted under section 15(2) for assessing a modern ground rent. This valuer's convention is adopted because there exists no open market in which to assess the level of the rent, but the lease is contemplating that the reviewed rent can indeed be assessed by reference to actual open market letting values.

34. Mr Turkson confirmed that he did submit that the terms of the hypothetical lease included the payment of a premium. If this premium, which was to be included in the hypothetical lease of the site, was a premium in the same sum as in the existing lease namely £170,000 then he accepted that no one would bid anything for the lease, because the site together with the building was only worth £110,000 and therefore the site itself was worth much less (indeed it was agreed the site was worth £35,750). If the site was offered on a long lease at a premium of £170,000, it would be unsalable. However he submitted that the hypothetical lease should be assessed on the basis that a premium was being demanded. The original lease was at a premium and the hypothetical letting is to be on the same terms as the lease (subject to certain specific exceptions) and therefore must be assumed also to be at a premium rather than to be something completely different. If it had been intended that the hypothetical lease was to be at no premium then this could easily have been expressly provided for by the addition of a few words.

35. Accordingly Mr Turkson submitted that the LVT was in error in finding at paragraph 64 that the reviewed rent should be assessed on the basis that no premium would be payable. However he was not seeking to cross appeal on this point (so as to contend for a rent less than £350 p.a.) but merely seeking to uphold the LVT's decision on the basis of an argument not accepted by the LVT. He said that he had raised this point before the LVT, namely that the calculation should take into account the premium reserved as an implied term of the hypothetical lease (see paragraph 41 of the LVT's decision recording this argument) and he submitted the LVT was wrong to reject this argument.

36. As regards the LVT's analysis in paragraphs 62-64, which proceeded on the basis that there was to be no premium but that the assessment of a modern ground rent under section 15(2) did not apply, Mr Turkson submitted that it was within the jurisdiction of the LVT as an expert tribunal to reach the

conclusions it did for the reasons it gave and that the matter should rest as decided by the LVT rather than there being any remittal to the LVT for further consideration on this point. He agreed that it would make no sense for a landlord to dispose of a cleared site (but ready for residential development) for 99 years on terms which involved the payment of no premium and effectively no rent, but he did not accept that this was what had happened. The LVT had decided upon a rent of £350 p.a. as being what the site was worth under this hypothetical 99 year lease at no premium. He submitted that the LVT was entitled to conclude that a developer would have viewed the site as being one from which no (or little) profit could be made and that therefore the LVT was entitled to decide that a rent of no more than £350 p.a. would have been paid.

**Discussion**

37. I remind myself of the principles of construction relied upon by Ms Gibbons as summarised in paragraph 24 above. I must therefore concentrate upon the wording of the rent review clause contained in the lease and I must construe that by examining what this clause would convey to a reasonable person having all the background knowledge which would have been reasonably available to the parties entering into the lease.

38. I note that the original lease was a lease granted at a full premium. There is no suggestion that the original premium of £170,000 was in some way a premium which was less than it otherwise would have been in order to reflect an onerous ground rent. Instead the evidence suggests that the original tenant overpaid rather than underpaid for the lease. The fact that the original tenant may have overpaid for the grant of the lease is not relevant to my consideration. What is however part of the relevant background, in my view, is that fact that this is a lease which was granted at a full premium, having regard to property values at the date of the lease, rather than at a diminished premium to reflect an onerous ground rent. The appellant has not suggested otherwise.

39. Ms Gibbons' primary contention on behalf of the appellant is that the rent review clause has brought into operation the machinery which is applied for assessing a modern ground rent under section 15(2) of the Leasehold Reform Act 1967 and that the well known valuers' convention of how to assess such a modern ground rent should be applied. I am unable to accept this argument. If one has open before one the wording of section 15(2) and also the wording of clause 6.3 of the lease the difference in wording is obvious and substantial. In particular the lease requires the reviewed rent to be assessed by reference to the current open market values of the site upon certain specified assumptions including that in paragraph (b). If the draftsman had wished to ensure that the reviewed rent was assessed as though it were a modern ground rent under section 15(2) the draftsman could have made express provision to that effect or could, perhaps, have used precisely the same language as that contained in section 15(2). Neither of these approaches has been followed.

40. I reach the conclusion that clause 6.3 does not bring into operation the machinery of section 15(2) quite apart from the next mentioned point, which merely serves to confirm me in a conclusion I would reach apart from it. The point is this. Assuming in favour of Ms Gibbons' argument that the parties to the original lease must be deemed to be aware of the provisions of section 15(2) of the 1967 Act and with the Lands Tribunal decisions in *Jarrett* and in *Elmbirch*, the parties would have been aware of the following

matters. In *Jarrett* the relevant rent review clause was argued to bring into operation the machinery for assessing a modern ground rent under section 15(2) and that argument was rejected on the basis that:

> "A comparison of the definition of a modern ground rent with the rent review provisions in this appeal shows considerable differences ..."

Also in both of these cases it was held that the reviewed rent was to be a nominal ground rent, that is to say that it was to be ascertained by the reference of the level of rent customarily reserved when a house or flat is let at a premium on a long lease. If the parties had wished to achieve a result different from that achieved in those cases, such that the section 15(2) approach for assessing the reviewed rent was to be adopted, the parties could reasonably be expected to have made that clear having regard to the results in *Jarrett* and *Elmbirch*.

41. I return to the wording of clause 6.3. This expressly provides in paragraph (b) that the reviewed rent is to be assessed on the assumption that the site:

> "Is to be let as a whole subject to the terms of this lease (other than the Term and the amount of the Rent hereby reserved) but excluding the provisions for rent review at the prescribed intervals."

It may be noted that this provision expressly excludes certain terms of the lease, namely the Term (i.e. so that the 99 years runs from the date of the rent review clause rather than from 2008) and (obviously) the rent itself and also the provisions for rent review. The draftsman has therefore thought it appropriate to make these express exclusions. The draftsman has not excluded the provision in the lease for the payment of a premium. In the absence of authority requiring a different conclusion, I would conclude that when paragraph (b) of clause 6.3 requires the assumption that the site is to be let "as a whole subject to the terms of this lease..." this is a reference to all the terms including the requirement of a premium, except of course for the expressly excluded terms. Put another way, I construe the expression "terms of this lease" within clause 6.3(b) as a reference to terms which include the provision in the lease for the payment of a premium. That in my judgment is the natural use of the language. The lease is a document. The document contains many provisions which can properly be described as the terms of the lease. The requirement for the payment of a premium is one of these provisions. Merely as a matter of the normal use of the English language I consider the wording of clause 6.3(b) contains an indication that the reviewed rent is to be assessed by reference to a hypothetical lease of the site at a premium rather than a hypothetical lease of the site at no premium. Quite apart from this matching the natural use of the English language such a conclusion also makes commercial sense because it involves the rent in a lease which was granted at a full premium being reviewed by reference to rent levels payable in respect of the site if let at a premium (i.e. let on the same basis as the lease itself) rather than let at no premium (and therefore let on a different basis from the lease itself).

42. Ms Gibbons submits that the expression in clause 6.3(b) "subject to the terms of this lease..." is a reference to the terms of the lease not including the provision for payment of a premium. She submits that the provision for payment of a premium is not a term of the lease at all, but is instead a provision for payment in order to obtain the lease. She refers to *Hill v Booth* and to *Manson v Duke of Westminster*.

43. In *Hill v Booth* X, who was an owner of a theatre, executed a lease of the property to Y in consideration of the payment of a sum of £1,000 which was stated to be a premium and secondly in consideration of a rent and certain covenants. The property had been mortgaged by X and soon after the

lease was granted the mortgagee sold the property, as they were entitled to do, to Y (i.e. to the tenant). Y then argued that, having acquired the freehold, he thereby became freed from all the obligations of the lease relating to enjoyment of the property (because the lease had terminated on a merger) - free from the rent etc and also free from the obligation to pay the unpaid balance of the premium. The lease had provided for this premium of £1,000 to be paid in instalments and there existed certain unpaid instalments at the date of this merger. The court held that the £1,000 was a sum which was payable once and for all for the granting of the lease and the obligation to pay it was a personal obligation which survived the termination by merger of the lease. The premium was a consideration for which the lease was granted. Having regard to what *Hill v Booth* was concerned with, I do not see that it is any authority as to the proper construction of the expression "the terms of this lease" in clause 6.3(b) of the present lease.

44. More to the point is *Manson v Duke of Westminster* which concerned the proper construction of the proviso to section 4(1) of the Leasehold Reform Act 1967 which contained definitions as to the meaning of a tenancy at a low rent. The basic rule was that a tenancy was at a low rent at any time when rent was not payable under the tenancy in respect of the property in a yearly rent equal to or more than two thirds of the rateable value of the property on the appropriate day or, if later, the first day of the term. However the proviso stipulated that a tenancy granted between the end of August 1939 and the beginning of April 1963 (otherwise than by way of building lease) shall not be regarded as a tenancy at a low rent if at the commencement of the tenancy:

> "... the rent payable under the tenancy exceeded two thirds of the letting value of the property (on the same terms)."

A question arose as to what was meant by the expression "on the same terms". In the *Manson* case the house had been demised for a term of 40.5 years from September 29, 1945 at an annual rent of £100 (which was the highest rent properly chargeable because this was the standard rent) and also in return for a payment of a premium of £500. The taking of this premium was at that date lawful. The question arose therefore as to whether the rent of £100 exceeded two thirds of the letting value of the property "on the same terms", which in turn gave rise to the question of how the premium of £500 should be dealt with. Clearly if the letting value of the property on the same terms was only £100, then the rent of £100 was more than two thirds of this value. The court held that the expression "the letting value of the property (on the same terms)" meant the annual rent obtainable in the open market having regard to the limits imposed in the form of the standard rent or otherwise by the Rent Act but adding the decapitalised value of any lawfully obtainable premium - which, in fact, was the capital value of the difference between the actual rent and the best rent obtainable. Stephenson LJ recorded a concession by counsel that the payment of a premium was not one of the "terms" of the lease, but the consideration for the grant of the lease - and reference was made to *Hill v Booth*. However the following matters may be noted regarding *Manson v Duke of Westminster*:

> (1) That case concerned the construction of a statute, which was, of course, significantly differently worded from the rent review clause in the present lease. I am concerned with the construction of this rent review clause in respect of which the matters noted above (and in particular paragraph 41) are of significance.
>
> (2) Brandon LJ examined the question of whether the words in brackets "on the same terms" included or excluded the payment by the tenant of the premium. In respect of this he stated:
>
> > "In my view the words in brackets "on the same terms", though capable of including the payment of the premium, should, in the context which they are found, be construed as not

> doing so. The payment of the premium should rather be regarded as the consideration for which the lease was granted: see *Hill v Booth*.... I take that view because the contrary view would, as it seems to me, result in relatively few tenants satisfying the requirements of a tenancy at a low rent under the proviso to section 4(1)."

Accordingly Brandon LJ considered that the context in which the words "on the same terms" were used, which is of course a different context from the present context, led him to reach the view he did namely that these words did not include the payment of the premium. This analysis confirms that there can be no rule that the words "on the same terms" must always in relation to the terms of a lease exclude a term for the payment of a premium - it must all depend upon the context in which the words are used. The present context in my view points to these words including rather than excluding the provision for payment of a premium.

(3) Brandon LJ's analysis further goes to show that, even if (contrary to my view) the wording in clause 6.3(b) namely "subject to the terms of this lease..." can properly be taken as a reference to the terms other than those expressly excluded and also other than the provision for payment of a premium, the matter is ambiguous.

45. Accordingly my primary view is that the wording in clause 6.3(b) is a clear direction to assume a letting which is subject to the terms of the existing lease (save for the terms expressly excluded) including the term requiring a payment of a premium. If my primary view is incorrect then the situation is not that clause 6.3(b) is clearly providing for a hypothetical lease on terms which do not include a premium but is instead ambiguous in failing to make clear whether the premium is one of "the terms of this lease" which is to be included in the hypothetical lease or whether it is treated as not being one of "the terms of this lease" and is therefore not to be one of the terms of the hypothetical lease.

46. If the clause is ambiguous, then in my judgment the clause should be construed against the appellant (i.e. on the *contra proferentem* principle) and also should be construed in the manner which commercially makes more sense, namely for the reviewed rent under this lease (granted at a premium) to be assessed upon the like basis (i.e. by reference to a hypothetical letting at a premium) rather than an unlike basis (i.e. a hypothetical letting without a premium).

47. Accordingly I conclude that the reviewed rent is to be assessed by reference to a letting of the site in accordance with the assumptions laid down in clause 6.3 which include a letting for 99 years from the review date with no provision for rent review and upon payment of a premium.

48. I accept that it is obvious, and would have been obvious to the parties to the original lease, that if the hypothetical letting under clause 6.3 is assumed to be a letting not only at a premium but at a premium of £170,000, then a letting of the cleared site at such a premium would attract no bids in the market and the rent would necessarily be in effect nil (or negative). However in my view what must be assumed is a letting of the site for 99 years from the review date and with no rent reviews and upon the terms of the lease including the term for payment of a premium, but not a premium of £170,000. The question therefore becomes: What is the ground rent which would be paid for such a 99 year lease, having regard to current open market values, if the site were let for 99 years with no reviews at a premium. Clearly the higher the premium the lower the rent and the lower the premium the higher the rent. However it is for the valuer determining the rent to reach a conclusion in accordance with current open market values, as to

what premium and rent could reasonably be expected to be paid in the open market at the review date. In my judgment it satisfies the meaning conveyed by the rent review provisions in clause 6.3 to assume that the hypothetical letting is at a premium (albeit not at the original premium of £170,000). It does not satisfy this meaning if one assumes the hypothetical letting is at no premium at all.

49. The LVT did not consider what rent would be payable for the site if the hypothetical letting was at a premium. However bearing in mind that the LVT concluded that only £350 p.a. would be payable even if there was no premium payable, it would seem necessarily to follow that a letting at a premium would have commanded a rent of certainly no more than £350 p.a. I did not understand Ms Gibbons to argue that, if the hypothetical letting was at a premium, a rent of more than £350 p.a. could properly be payable.

50. Mr Turkson does not argue for a rent of less than £350 p.a.

**Conclusion**

51. For the reasons set out above I conclude that the appellant has failed to show that the LVT was in error in omitting to find that the reviewed rent would be more than £350 p.a. As can be seen I respectively disagree with the LVT that the hypothetical letting under clause 6.3 is a letting at no premium. However in the result I conclude that the appellant's appeal, whereby he argues for a reviewed rent of more than £350 p.a, must be dismissed.

52. If I were wrong in the conclusion which I have reached upon the proper construction of clause 6.3, such that the reviewed rent is to be assessed by reference to a hypothetical letting at no premium, then in these circumstances I would have accepted Ms Gibbons' arguments as summarised in paragraphs 27 and 28(2) above and I would have allowed the appellant's appeal to the extent of remitting the matter to the LVT for further consideration after a hearing at which the parties had the opportunity of producing further evidence and argument directed towards the approach adopted by the LVT in paragraphs 62 to 64 of its decision.

53. In the result however, the appellant's appeal is dismissed.

Dated: 8 September 2014

His Honour Judge Huskinson