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HM Courts & Tribunals Service

Leasehold Valuation Tribunal

On an application under section 21(1)(a) of the Leasehold Reform Act 1967 ('The Act') to determine the price payable under section 9(1), in respect of the tenant's acquisition of the freehold, under section 21(1)(ba) of the Act.

Reference: BIR/00CN/OAF/2012/0029

Property: 65 Lingfield Avenue, Great Barr, Birmingham B44 9TX

Applicant: Mr N R Plotnek LLB (Freeholder)

Respondent: Mr R K Govan (Leaseholder)

Date of application: 16th April 2012

Date of tenant's notice: 9th January 2012

Appearances

For the Applicant: Miss Ellodie Gibbons of counsel who called Mr Geraint Evans BSc (Hons) MSc (Cantab), Dip. Surv., MCIM, FRSA, FRICS of Bureau Property Consultants

For the Respondent: Mr Nana Turkson BSc., MSc., Pg. Dip, MRICS of Pink Estates

Considered at the Residential Property Tribunal Service in Birmingham on 16th January 2012

Members of the Tribunal: Mr R T Brown FRICS
Mr W J Martin

Determination

1. The Tribunal determines that, taking account of the evidence adduced, its evaluation of that evidence, and using its general knowledge and experience, but not any special knowledge, the price payable by the lessee for the acquisition of the freehold interest in the property in accordance with section 9(1) of the Leasehold Reform Act 1967 as amended is **£6,843.00**

Reasons for Decision

Introduction

2. The parties do not dispute the right of the Respondent to acquire the Freehold interest in the subject property or that the valuation should be pursuant to section 9(1) of the Leasehold Reform Act 1967.

3. Directions were issued by the Procedural Chairman on 17th April 2012 detailing the timetable for exchange of documents and indicating the consequences of non-compliance.

Inspection and Lease

4. Following a number of postponements requested by the parties the members of the Tribunal inspected the subject property on 16th January 2013 in the presence of the Respondent.

5. The property is located some 5.5 miles north of Birmingham city centre in an urban residential district.

6. The property comprises a small semi-detached house constructed in the 1930s of traditional brick and tile. The double glazed and centrally heated accommodation comprises on the ground floor: hall, 2 living rooms and a lightly built lean-to addition containing a fitted kitchen. On the first floor: 3 Bedrooms and Bathroom (full suite). There is parking at the front and gardens to the rear.

7. The Lease is dated 29th February 2008 and was made between the Applicant (1) and Taresh Kumar (2). The term is for a period of 99 years from 1st may 2002.

8. The initial ground rent reserved was £125.00 per annum. The rent is subject to review on 1st May 2012 and thereafter on the 1st May 2037, 1st May 2062 and 1st May 2087. The review pending on 1st May 2012 has not been agreed following service of the Notice of Claim.

9. The clauses of the lease which are central to this dispute are quoted below:

Clause 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
Such revised rent for any Review Period may be agreed in writing at any time between the Landlord and the Tenant or (in the absence of agreement) determined not earlier than the Relevant Review Date by an independent valuer acting (at the option of the Landlord in his absolute discretion) as an expert or as an arbitrator such valuer being a chartered surveyor having not less than ten years practice in England to be nominated in the absence of agreement by or on behalf of the President for the time being of the Royal Institution of Chartered Surveyors on the application of either the Landlord or the Tenant made not earlier than three months before the Relevant Review Date and so

that in a case of such agreement or valuation the revised Rent agreed or determined by the valuer shall be a sum representing the open market 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 value of the Site at the Relevant Review Date on the following assumptions:-

(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

Matters agreed between the parties

10. The parties had helpfully agreed a number of matters:
    (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 £110,000.00
    (5) Site Percentage 32.5%
    (6) Surveyors and Legal fees of £900.00 plus VAT

11. The parties appeared to be in agreement as to the valuation methodology to be adopted. The Notice is not disputed and dated 9th January 2012.

Matters in dispute between the parties

12. The Respondent contends that the rent on review should be a 'nominal' rent of £145.00 per annum. The Applicant contends that it should be a 'full' ground rent of £1,966.00 per annum.

13. Arising from the above, the price to be paid for the freehold of the property.

Hearing

14. The hearing took place on the 16th January 2013 at the Tribunal's Hearing Rooms in Priory Court, Bull Street, Birmingham.

15. The Hearing was attended by :
    For the Applicant: Miss Gibbons and Mr Evans.

    For the Respondent Mr Turkson, Mr R Khan and Mr K Antwi-Boasiako (not participating)

Applicant's Case

16. Miss Gibbons spoke to her skeleton argument and explained (in summary) that the lease provides for the rent to be reviewed to a full ground rent and accordingly Mr Evans valuation (reverting to a section 15 rent for the remainder of the term and then in perpetuity) is to be preferred.

17. The principles by which legal documents are construed were summarised by Lord Hoffman in *Investors Pension Scheme Ltd v West Bromwich Building Society (No1)*

[1988] 1 WLR 896 and as set out in *Elmbirch Properties PLC v Schaefer-Tsorpatzides [2008] 1P.& C.R.8*

18. Those principles are (abbreviated here by the Tribunal for the benefit of the Parties) *(1) Ascertaining the meaning a document would convey to a reasonable person having all the background knowledge*
(2) Taking into consideration the 'matrix of facts' which includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man
(3) Excluding from the admissible background the previous negotiations
(4) The meaning of the document is what the parties using those words against the relevant background would reasonably have been understood it to mean.
(5) The words should be given their 'natural and ordinary' meaning reflecting the common sense proposition that that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. The law does not require judges to attribute to parties an intention which they plainly could not have had.

19. In *Basingstoke and Deane Borough Council v Host Group Ltd [1998] 1 W.L.R 348.* Nicholls LJ said: '.....*Thus like all points of construction, the meaning of this rent review clause depends on the particular language used interpreted having regard to the context provided by the whole documents and the matrix of material surrounding circumstances. We recognise, therefore, that the particular language used will always be of paramount importance. Nonetheless it is proper and only sensible, when construing a rent review clause, to have in mind what normally is the commercial purpose of such a clause'*

and *'Of course 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 existing lease. But if and in so far as a rent review clause does not so require, either expressly or by necessary implication.....'*

20. This means that in general each part or parts of the document, or clause, is taken to have been deliberately inserted, having regard to all the other parts of the document. In *Lewis v Barnett (1982) 264 EG 1079* Stephenson LJ said: *'I have not the smallest hesitation in saying that no principle of construction and no authority of any court compels or even justifies a judge in finding one paragraph in a written document (in this case a sealed lease) to have no effect. Effect must be given to the paragraph if it possible can'*

21. Miss Gibbons said that the Respondent relied on *Jarrett v Burford Estates and Property Co Ltd [1994] 1 EGLR 181* in which Peter Clarke FRICS in the Lands Tribunal said: *'I am required to construe the rent review position by reference to: (a) the words used considered in their context; (b) the matrix of material surrounding facts; and (c) the normal commercial purpose of a rent review'*

22. The Respondent seeks to rely on the matrix of material surrounding circumstances and the normal commercial purpose of a rent review to the exclusion of the words used. This is clearly wrong: the Lease and the provisions of the rent review clause cannot be ignored.

23. The rent review clause provides for review to 'open market letting value' of the demised premises 'as if it were a vacant site'. This phrase taken in isolation is clearly directed to what is usually called a 'full' ground rent. This is the sum paid by the builder of such houses for the use of the land to build. That construction is reinforced by the reference in sub clause (a) to the availability to let for residential development.

24. The Respondent relies on *Elmbirch* which applied *Jarrett*. Those cases did not decide *'that rent review clauses should be interpreted in a way that was consistent with the original terms of the lease and a landlord was not entitled to fundamentally alter the basis upon which the rent was charged from a nominal rent to a full rent'* (as per the Respondent's submission). What *Jarrett and Elmbirch* decided was the rent review clauses in those cases were to be interpreted in this way. The rent review clause in the present case is in different terms and, to a more limited extent, the surrounding circumstances differ.

25. In *Elmbirch* and *Jarrett* the issue boiled down to the meaning of 'ground rent/rental'.That phrase does not appear in the rent review clause under consideration. The words used are *'open market letting value of the land hereby demised'* which, Miss Gibbons submitted, lack any ambiguity.

26. A number of factors in *Elmbirch* led to the conclusion that 'ground rental value' meant a nominal ground rent only:

    (1)The review clause made no reference to any 'assumptions' and 'disregards' which would have been included had the parties intended a full ground rent.
    (2)The case concerned 2 flats, the demise of which did not contain any letting of part of the site and which expressly excluded the soil and ground beneath.
    (3)The reddendum clause refers to the possibility that the rent might remain the same.
    (4)The Tribunal in that case concluded that the lease made it clear that future rents fixed on review were not to be different in any respect from the initial rent, save in amount, saying at paragraph 34:

    'Thus, what is to occur is a "revision.....in the amount" and that is equal to the "increased market ground rental value". That necessarily implies, in our judgement, that the rent charged in 1973 was in itself the "market ground rental value". We say that because the past participle 'increased' connotes a change in amount and not a change in nature. That is because one cannot achieve a change to a revised basis of valuation by a process of increase, but only by a process of amendment or substitution. Furthermore, the lease is explicit that it is the 'amount' which is 'revised' and not the basis of payment'

27. In *Jarrett* the Tribunal rejected the argument that the lease provided for a low initial ground rent at first review: *'I could only agree with the respondents' argument if it is expressly stated in the lease, or arises by necessary implication, that the basis of review is to change at the first review from a nominal ground rent to a full ground rent. There are no such express or implied provisions in the lease and therefore the review rent must be assessed on the same basis as the initial rent, namely as a nominal ground rent.'*

28. In *Jarrett* the Tribunal took into account the following:

(1) That there was and had not been a market in full ground rents of residential property in Redditch

(2) That its construction of the rent review provision was re-enforced by the word 'levels' at page 18 line 41 *'The draftsman realised that nominal ground rent comparables would be levels of rent prevailing at the rent review date and not individual rents representing the letting value of the site, which could be analysed and applied to the appeal property.'*

29. In the present case the necessary assumptions and disregards are included:
(1) The lease is of the site (including the soil and ground) therefore development is possible and there are no issues of apportionment of rent.
(2) The reddendum does not refer to the possibility that the rent might remain the same on review and clause 6.2 makes it clear that it will not.
(3) There is no reference to the rent being simply increased i.e. changed in amount rather than nature.
(4) The lease is clear that future rents fixed on review are to be different from the initial rent by the words: *'The Rent specified under Clause 1 being a nominal rent notwithstanding'.*
(5) Clause 6 does not require the rent to be assessed by reference to full ground rents of other residential property and it is therefore irrelevant whether or not there is a market in such rents. Clause 6 requires an assessment of the open market letting value of the site.
(6) Clause 6 makes no reference to *'levels'* but explicitly refers to *'Letting value...of the site'*

30. The Respondent provides no explanation as to how the words of Clause 6 can be read to mean 'the current ground rent increased to reflect the change in the value of money and the real increase in the value of property by the application of the Retail Prices Index or the Consumer Prices Index'.

31. In the clear words of Clause 6, the matrix of material surrounding circumstances shows that the original tenant entered into what many might regard as a bad bargain. Whilst the purpose of this particular rent review clause may not accord with the normal commercial purpose of a rent review, the express terms of the clause clearly provide for such a departure.

32. Consequently Mr Evan's valuation of £35,367.00 should be adopted.

Respondent's Case

33. Mr Turkson as advocate, submitted, that using the principles set out in *Jarrett (above)* which concerned a review to *'current open market ground rent levels'* held that *'the rent review clause had to be interpreted within the context of all the surrounding circumstances at the time the lease was executed'. Elmbirch* applying *Jarrett* said that rent review clause should be interpreted in a way that was consistent with the original terms of the lease and a landlord was not entitled to fundamentally alter the basis upon which the rent was charged from a nominal rent to a full rent.

34. The facts were that the Freehold was purchased by th Applicant for £113,000.00 and on the same date he sold it Leasehold for £170,000.00. This is the highest sale recorded on the road.

35. £170,000.00 represents part land and part buildings. The tenant expects to pay a nominal rent on review because the converse would mean paying twice for the land initially in the purchase then again in the full ground rent for the future.

36. If the rent is not nominal the transaction is a best payment of £170,000.00 for a 4 year lease at £125.00 per annum with the option to renew on payment of full market rent for the land. There is no evidence that the tenant agreed to such a disadvantageous transaction.

37. There is no market for full ground rents of residential property in Birmingham either for letting or sale. There is a market for properties sold on long leases at a premium and with a nominal ground rent. It is therefore unlikely that a full ground rent was intended by reference to an 'open market' which does not exist.

38. It is established practice that the ordinary understanding of vendors and purchasers of leasehold houses is that the payment of a lump sum price secures the payment of a nominal rent throughout the lease. A house sold contrary to this principle at a premium with rack rents will not be saleable to anyone requiring a mortgage (*Jarrett*).

39. If the rent is not nominal, acquiring the Freehold will become increasingly prohibitive and will become a cloak for circumventing the mischief the Act seeks to remedy.

40. The revised rent cannot be assessed by any reference to section 15 of the Act, as besides being artificial, it is neither mentioned not implied in the lease (*Jarrett*).

41. The calculation should take into account the premium reserved as an implied term of the hypothetical lease as well as the normal purpose of a rent review clause to obtain open market rent.

42. In *British Gas Corporation v Universities Superannuation Scheme Ltd [1986]* it was said that the purpose of rent review *'is to reflect the changes in the value of money and real increases in the value of property during a long term'*

43. It is the Respondent's submission that this can best be done (albeit crudely) by applying the Retail or Consumer Prices Index.

44. Adopting the rent at review of £145.00 and all other matters mutually agreed the price should be £2,517.03.

45. In addition acting as expert Mr Turkson says that the level of rent should be nominal taking into account the premium reserved. Since the market has not changed significantly within the relevant period the passing nominal rent should be maintained, however it is reasonable to allow for a marginal increase as the value of money could have increased in the intervening period.

46. The Tribunal sought further submissions from the parties in a letter dated 26th March 2013 as follows:

The Tribunal reconvened on the 22nd March and the Chairman has asked me to write to you as follows:

1. The parties are in agreement that there is no market for sites subject to 'current open market value of the site' etc as described in the rent review clause.

2. The Tribunal accepts that the rent review clause is clearly drawn but for the rent review to be to the 'current open market rental value of the site for residential development'. This part of the clause, prima facie, seeks to rely upon comparison to a market the parties are agreed does not exist.

3. Miss Gibbons says that the lease is clear and unambiguous and that this should lead the Tribunal to a determination that the statutory basis set out in section 15 of the Act should be used to ascertain the rent.

4. Mr Turkson disagrees and says that the absence of a market should not mean that section 15 is automatically adopted. This is neither mentioned nor implied in the lease.

5. Miss Gibbons accepts that the *'contra proferentem'* rule in *Gilje v Charlgrove Securities Ltd [2001] EWCA Civ 1777* could apply, namely that where there is ambiguity in the drafting of a lease it should be construed in favour of the tenant.

6. The Tribunal refers the parties to *Jarrett v Burford Estates Ltd LRA/12/1994*:

   Paragraphs 185 H to 187 D page 18 lines 10 to 30:

   'The words before and after "ground rent' are "open market" and "levels" respectively and placed in this context, and in the matrix of facts, it is in my view, clear that the draftsmen of the lease was referring to a nominal ground rent. It is common ground, and I have found it is a fact, that when the lease was granted, there was no market in full ground rents. It is also common ground, and I have found it as a fact, that there was a market in nominal ground rents. Then, and now, residential land was not let in the market at full ground rents but leasehold houses were, and are, let and sold in the market on long leases at nominal ground rents. Whatever may have been the position in the residential market in the last century when Stewart and Bartlet were decided, the letting of residential property at full ground rents, in the sense of a rent reflecting the value of the land for building purposes, had, at least in Redditch and the West Midlands ceased. These rents, were and are, only to be found in the statutory world of the 1967 Act where they are referred to as modern ground rents and where due to a lack of open market evidence they are calculated by artificial methods, such as the standing house or the site value approach. Furthermore, it is important to remember that my task in this appeal is to fix a review rent, which is the key ingredient in the enfranchisement price, which exists in the real world of open market rent reviews and not in the artificial world of the modern ground rent, which only exists in the different statutory world of the 1967 Act.

   In my view the draftsmen of the lease intended to refer to a nominal ground rent and indicated this intention by qualifying the term "ground rent" with the words "open market". He was aware that a market existed for nominal ground rents, but not for "full ground rents", and therefore used these qualifying words to indicate the form of ground rent on review. It was unlikely that he would have referred a full ground rent by reference to the open market when a market for those rents did not exist' (Emphasis added)

   And paragraphs 22 to 24 on page 21 where PH Clarke says:

'I think it unlikely that the person who drafted these Particulars read the rent review provision and decided that it referred to a rent equivalent to a modern ground rent under section 15 of the 1967 Act'

7. Echoing PH Clarke's judgement in *Jarrett* above, the task of the Tribunal is to determine the review rent which exists in the real world of open market rent reviews and not in the artificial world of the modern ground rent which only exists in the different statutory world of the 1967 Act. The draftsman has used words that mirror those in section 15 of the Act, but has not directed the surveyor to enter that statutory world and use the methods commonly employed within it to ascertain a rent analogous to the statutory 'modern ground rent'. The Tribunal's initial view is that it is not prepared to infer such a direction. Its absence, at the very least, creates an ambiguity which, applying *Gilje*, must be resolved in favour of the leaseholder.

8. In view of the Tribunal's initial findings as above, the parties are invited to make written submissions on the following points:

   (1) Given the comments of P H Clarke in *Jarrett*, any basis on which it is possible to interpret the rent review clause to mean that section 15 should be automatically adopted as the method by which the current open market rental value of the site for residential development is to be ascertained.

   (2) In the event that the Tribunal does not adopt the section 15 approach why it should not adopt Mr Turkson's, albeit hypothetical and by his own admission crude, method of calculation applying the change in the value of money.

   (3) Given that the review clause as written provides for a review to a rent in a market which both parties acknowledge does not exist, how that rent should be calculated (as an alternative to (2) above), mindful of the valuation principle that *'where there is no market there is no value'*

47. For the Applicants Miss Gibbons responded:

Jarrett

(1) The issue boiled down to the meaning of '*ground rent*' the other words being unambiguous. The phrases 'open market' and 'levels' were to be considered as an aid to the construction of the phrase 'ground rent'.
(2) In the current case there is nothing unambiguous in the words *'current open market value of the site'*. "Open market" means an unrestricted market with free competition both of buyers and sellers, 'open market value' means the price which would be paid in such a market and 'Site' is defined at clause 6.3 of the lease.
(3) The fact that the market for the site might be hypothetical is not an issue. Valuers are regularly required to ascertain values in hypothetical markets for example paragraph 3(2) of Schedule 13 to the Leasehold Reform and Urban Development Act 1993.
(4) In *Cadogan v. Sportelli [2007] 1 E.G.L.R. 153 paragraph 52: 'It is implicit in this valuation process that there would be a market for such assets if they existed, and we are satisfied that there would indeed be such a market'.* It is submitted that the same can be said about the market for the 'Site'
(5) In *Jarrett* the ascertained rent had to be referable to open market values. This is not the case here; pursuant to Clause 6.2 the revised rent is to be *'as may be ascertained as herein provided'*

(6) The function of the valuer and the Tribunal is to apply the formula set out in Clause 6.3. A reviewed rent determined under a real world lease on the basis of a formula which involves the assumption of a hypothetical market in vacant sites is no less a rent which exists in the real world than a rent determined under a formula based on the Retail Prices Index for example.

Section 15

(7) As the Tribunal acknowledges, it is clear the draughtsman has used words that mirror those in section 15 of The Act. Consequently, the draughtsman has directed the surveyor to enter the statutory world and use methods commonly employed within it. That being the case, there was no need for the draughtsman to make explicit reference to section 15 and there are good reasons as to why he may have chosen not to do so, most probably because there is a risk that section 15 could be repealed and/or amended during the remaining term of the lease.

Contra Proferentem

(8) The nature and application of the contra proferentem principle is set out by Sir Kim Lewison in 'The Interpretation of Contracts' (5th ed.). Those principles are
   1) The principle only applies where there is doubt or ambiguity, not merely difficulty about a point of construction.
   2) The principle cannot be used to override the rule of construction that effect should be given to every word, if it is reasonable and proper to do so.
   3) The principle is one of last resort.
   4) The effect of the doctrine is to tell the court to select one of the possible interpretations, not one result of the action.
   5) The principle does not enable the court to adopt a strained meaning of the contract.

(9) Applying those principles:
   1) There is no doubt or ambiguity in clause 6 and consequently no need to resort to the principle of contra proferentem
   2) Even if the principle were to be applied, it only permits the Tribunal to favour one of two meanings. Implicit in this is the requirement for the clause to permit more than one meaning, which clause 6 does not. No alternate meaning for the words used in Clause 6 has been advanced and the Tribunal have not identified an alternative meaning. The Respondent contends that clause 6 should be read so as to mean that the current ground rent is increased to reflect the change in the value of money and the real increase in the value of property. Clause 6 does not say this and to favour such a construction would not only give a strained meaning of the contract but would result in no effect being given to nearly all the words in the clause, which is simply not permissible.

(10) It is the Applicant's submission that Clause 6 directs the surveyor to adopt the methodology used under section 15 which assumes a hypothetical market and that is how the rent should be calculated. For an example of the LVT applying this approach see the decision in *Fry v Walter Stanley trust LVT 13/398 (unreported).*

48. For the Respondents Mr Turkson responded

1) The Respondent submits that given the comments of P. H. Clarke in *Jarrett* there can be no basis on which it is possible to interpret the rent review clause to mean that section 15 should automatically be adopted to assess the current open market rental value of the Site. Accordingly no such basis is submitted.
2) If the Tribunal does not adopt the section 15 approach there is no reason why it should not adopt the use of the change in the value of money. It is the Respondent's submission that rent should be calculated on the basis of what was acceptable at the point of granting the lease. This is the nominal sum of £125.00 per annum.
3) Where a market does not exist, there will be some value if it is critically necessary that a transaction must go ahead. Such a transaction would however swing the balance of negotiating strengths greatly in favour of the buyer/tenant.

The Tribunal's Deliberations

49. The Tribunal considered all the oral and written evidence submitted by the Parties.

50. The Tribunal notes the reference to *Fry* (above) but is not bound by its own decisions and in any event that decision was made some 15 years ago before the decision in *Gilje* (above).

51. The Tribunal rejects the Respondents 'change in the value of money.....' argument on the basis set out in *British Gas* (above) because to do so would import an interpretation into the rent review clause which is not evident from the words used.

52. The issue before the Tribunal is to arrive at the correct interpretation of the lease taking into account the surrounding matrix of material evidence, applying Lord Hoffman's five principles set out in *Investors Pension Scheme* (see paragraph 18) and the guidance from the other cases referred to in this Decision.

53. The consequences of such interpretation are not issues upon which the Tribunal can make a determination.

54. The Tribunal, after considering both *Elmbirch* and *Basingstoke*, conclude that the literal interpretation of the terms of the rent review clause as presented by Ms Gibbons was correct up to the point where the valuer is asked to value to the open market rent in a hypothetical market.

55. The Tribunal finds there is little doubt, as submitted by Miss Gibbons, that the intention of the draftsman of the subject lease was that at review the ground rent should revert to the *'open market letting value of the site'*, and should not simply be a review of the 'nominal' ground rent of £125 per annum reserved by Clause 1 of the lease to compensate the Lessor for changes in the value of money, or of property values. This proposition is supported by the use of the words in Clause 6 (2) *(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'*

56. Put another way, Clause 6 (2) is saying that, despite the fact that the initial rent is a nominal rent, the review is to an open market rent for a site with planning permission for

development. However, the Tribunal does not find that the word 'notwithstanding' removes any possibility that, having considered the open market, the valuer might find that the market rent was in fact little more than the amount of the nominal rent after applying one of the conventional formulae for its review. The open market is to be considered afresh, without reference to the existing rent.

57. The Tribunal, in applying the tests in *Elmbirch* as proposed by Ms Gibbons finds that she did not look behind the words themselves but at their literal meaning.This produces a result, as Ms Gibbons suggests was intended by the draftsman, that is 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.

58. The difficulty the Tribunal faces is that the nature of the transaction is such that not only are the words used not usually found in such 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 3 years time.

59. In *Elmbirch* it was said that the original tenant would have been 'astonished' to learn that the nature of the rent was going to change. Given the '*surrounding matrix of fact*' in this case the Tribunal must reach the same conclusion with regard to the Applicant's contention that the reviewed rent is to be calculated by reference to section 15, namely that, in those circumstances, the bargain the original lessee was entering into was one which is not '*in the nature of normal commercial business' (Jarrett)* and nor is *'the meaning of the document [..] what the parties using those words against the relevant background would reasonably have been understood to mean.' (Investors Corporation Scheme).*

60. The Tribunal finds that in fact the clause is 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 Tribunal rejects Miss Gibbons' explanation for this as 'most probably because there is a risk that section 15 could be repealed and/or amended during the term of the lease.' It is quite within a competent draftsman's capability to provide for this eventuality. The Tribunal does not consider that a reasonable tenant being proffered this lease would expect the rent 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.

61. In support of this conclusion the Tribunal looked to *Gilje* (above) (a case about the payment of rent for a caretaker's apartment under a service charge clause in a residential lease). At paragraph 28 Lord Justice Laws *'At the end of the day, I do not consider that a reasonable tenant or prospective tenant, reading the underlease which was proffered to him, would perceive that paragraph 4 (2) (1) obliged him to contribute to the notional cost to the landlord of providing the caretaker's flat. Such a construction has to emerge clearly and plainly from the words that are used. It does not do so. On that short ground I would uphold the judge below and dismiss the appeal'.*

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 that 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 judgement, 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.

The Tribunal's valuation

66. The Tribunal's valuation under section 9 (1) of the Act, based on this figure is set out in the Appendix to this Determination.

Matters Agreed

67. The Tribunal adopts those elements of the valuation agreed between the parties.

Standing House Value

68. The Respondents submitted a Standing House Value of £85,000.00. This figure was not challenged by the Applicants and is accordingly adopted by the Tribunal

Reviewed Ground Rent

69. The determination of the Tribunal is that the rent payable following the review in clause 6 of the lease is £350.00 per annum.

Robert T Brown FRICS
Chairman
Dated ..... 5 JUN 2013 .....

Appendix

Term			
Current Ground Rent		£125.00	
YP 0.3 years @ 6.5%		0.2879	35.99
1st Review			
Revised Rent	£350.00		
YP 89 years @ 5.5%	18.0269		
	£6,309.42		
PV £1 in 0.3 years @ 5.5%	0.9883		6,235.59
Reversion			
Standing House Value	£85,000.00		
Less 20% Sch 10 Rights	£68,000.00		
PV £1 in 89.3 years at 5.5%	0.0084		571.20
			6,842.78
		say	**£6,843.00**