LRA/22/2006

LANDS TRIBUNAL ACT 1949

LEASEHOLD ENFRANCHISEMENT – flats – value of existing leases affected by interpretation of rent review clauses – meaning of the phrase "increased market ground rental value" – whether* Jarrett v Burford Estates *[1999] 1 EGLR 181 rightly decided - ground rents chargeable on review – effects on value of existing leases and premiums payable – relevance of opinions of counsel not appearing before Tribunal - appeal dismissed – alternative valuations- Leasehold Reform, Housing and Urban Development Act 1993

IN THE MATTER of an APPEAL from a DECISION of the LEASEHOLD VALUATION TRIBUNAL of the EASTERN RENT ASSESSMENT PANEL

BETWEEN ELMBIRCH PROPERTIES PLC Appellant

and

(1) CHRISTINE TERESA SCHAEFER-TSOROPATZADIS
(2) CAROLYN ANN LINDA ABBOTT Respondents

Re: Flats 3 and 14 Sycamore Court, Springfield Road, Windsor, Berks SL4 3QQ

Before: His Honour Judge Gilbart QC and P R Francis FRICS

Sitting at: Procession House, 110 New Bridge Street, London EC4V 6JL on 1 and 2 February 2007

Edward Peters, instructed by Shoosmiths, solicitors of Fareham, Hants for the appellant landlord
Anthony Radevsky, instructed by Hadgkiss Hughes and Beale, solicitors of Moseley, Birmingham for the respondent tenants

The following cases are referred to in this decision:

Investors Compensation Scheme v. West Bromwich Building Society [1997] UKHL 28; [1998] 1 WLR 896
Basingstoke and Deane BC v Host Group Limited [1988] 1 WLR 348
Schuler AG v Wickman Machine Tool Sales Ltd [1974] AC 235
James Miller & Partners v Whitworth Street Estates (Manchester) Ltd [1970] AC 583
Ali v Lane [2007] EWCA Civ 1532 [2007] 02 EG 126
Jarrett v Burford Estates & Property Co Ltd [1999] 1 EGLR 181
Guildford Borough Council v Cobb [1994] 1 EGLR 156
F.R. Evans (Leeds) Ltd v English Electric Co Ltd (1978) 36 P&CR 185

The following cases were referred to in argument:

Land Securities PLC v Westminster City Council [1993]1WLR 286
BCCI v Ali [2001] 1 AC 251
Starrmark Enterprises v CPL Distributions [2002] Ch 306
Watcham v A-G for East Africa [1919] AC 533
Earl Cadogan and Cadogan Estates Limited v Sportelli [2006] RVR 382
Arbib v Earl Cadogan[2005] 3 EGLR 139

Reference in argument was also made to the following textbook:
The Interpretation of Contracts, by Kim Lewison QC, Sweet and Maxwell 2004

DECISION

Introduction

1. This was an appeal by Elmbirch Properties PLC ("the appellant landlord") from a decision of the Leasehold Valuation Tribunal for the Eastern Rent Assessment Panel ("the LVT"), relating to applications under section 48 of the Leasehold Reform, Housing and Urban Development Act 1993 ("the 1993 Act"), by the tenants of residential flats at 3 and 14 Sycamore Court, Windsor, to extend the terms of their leases. The LVT published its decision on 18th November 2005. Permission to appeal was refused by the LVT on 4th January 2006, but on 13th March 2006 the President of the Lands Tribunal granted permission to appeal, limited to the issue of the proper construction of the rent review clause, and the valuation consequences on the capitalised value of the ground rent, the yield and deferment rates, and the value of the existing leases. The appeal was resisted by the tenants, Mrs C T Schaefer-Tsorpatzidis of flat 3, and Miss C A L Abbott of No 14.

2. The central issue in the appeals related to the interpretation of the existing rent review provisions. If the landlord's contention was correct, the rent payable represented the full market rental available for the letting of a cleared site which was available for development. If that was the case the ground rent would rise, at the next review in 2013, by some 40 times, or 3,900%, from its current level of £125 pa to £4900 pa at No 3. At No 14 it would rise from £112.50 pa to £4,500 pa. By contrast the tenants contended (and the LVT agreed) that the appropriate level at 2013 (in current prices) would be £220 pa at Flat 3, and £200 pa at Flat 14. That would amount to an increase of just over 75%. It was their case that the landlord had misinterpreted the terms of the lease, and that the rent payable was what the parties called a "nominal" figure which was not related to the value of the site, but was the figure chargeable as part of a bargain whereby the tenants acquired the lease for a premium.

3. If the landlord's arguments are correct, the values of the tenants' current interests will be detrimentally affected by the prospects of the large increase in ground rent at 2013, and will therefore be less than those argued for by the tenants, and determined by the LVT. Given the fact that there was agreement about the values of the freehold interest and of the tenants' extended leasehold interests, the effect of the landlord's arguments would be to increase the premium payable on the grant of those extensions. If the appeal succeeds, there are disputes on three elements of the valuations.

4. If the landlord's appeal fails, there is no appeal against the valuations made by the LVT, which are attached as Appendices I and II. However, Rule 50(4) of the Lands Tribunal Rules 1996 applies and it reads:

> "(4) Where an amount awarded or value determined by the Tribunal is dependent upon the decision of the Tribunal on a question of law which is in dispute in the proceedings, the Tribunal shall ascertain, and shall state in its decision, any alternative amount or

value which it would have awarded or determined if it had come to a different decision on the point of law."

After setting out the background facts, will consider first the meaning of the rent review clause, and then consider valuation issues.

Background facts

5. Both flats lie within Sycamore Court, Springfield Road, Windsor, Berkshire, a development of 21 units consisting of 4 blocks, each of three floors. Three of the blocks have 2 flats per floor, and one block has 1 flat per floor. Both numbers 3 and 14 are 2 bedroom flats, No 3 also having a garage.

6. The leases are in identical terms save for the date of the agreement, the amount of premium and the amount of the rent. The relevant terms read as follows **[**Flat 14's terms appear in square brackets where they differ]:

> " THIS LEASE is made the 8th [28th] day of June (1973) between ……(….. "the lessors") of the one part and ……..(….. "the Tenant") of the other part
>
> WHEREAS:-
>
> (1) The Lessors are registered…….with absolute title of the freehold land……..and are in course of erecting a block of flats as shown on the plan annexed hereto and to be known as Numbers 1 to 21 Sycamore Court TOGETHER with garages paths gardens and other appurtenances thereto (all of which premises are hereinafter referred to as " the estate")
>
> (2) The Lessors have previously granted……. or intend hereafter to grant leases of flats on the estate other than the premises hereby demised….." [the clause continues with provisions relating to restrictive covenants]
>
> (3) The Lessors have agreed with the Tenant for the grant to the Tenant of a lease of the premises hereinafter described for the consideration of the rents and on the terms and conditions hereinafter appearing
>
> NOW THIS DEED WITNESSETH as follows:-
>
> 1. IN pursuance of the said agreement and in consideration of the sum of (£ 13,900) [(£11,900)] paid to the Lessors by the Tenant on or before the execution hereof……..the lessors HEREBY DEMISE unto the Tenant ALL THAT FLAT …..(.. "the flat") …..on the second floor of the said block of flats (……" the Building") but excluding from the demise all parts of the foundations and roof of the building and of the soil under the Building together with the garage……[~~together with the garage……~~]……..TO HOLD the said premises demised ……..unto the Tenant from the (25th March 1973) for the term of (99) years PAYING THEREFOR yearly during the first twenty years of the said term the sum of (£30) [(£27)] and thereafter that same rent or a rent calculated as hereinafter mentioned……..AND ALSO PAYING by way of further or additional rent from time to time a sum……..equal to one twenty first of the amount which the Lessors may expend in effecting or maintaining the insurance of such

parts of the estate as are not included in the insurance of individual flats or garages against loss or damage by fire and…….other risks…..

9. THE Lessors may by …….notice…….to expire (on 25th March 1993, and/or 25th March 2013, and/or 25th March 2033, and/or 25th March 2053) ……require such a revision to be made in the amount of the yearly rent hereby first reserved as shall equal the increased market ground rental value at the time of the relevant review date……..(which if not agreed shall be referred to a Surveyor appointed by the President of the Royal Institution of Chartered Surveyors)"

7. The leases incorporate some features which are by no means uncommon, albeit not necessarily always present, in a lease of one of a number of flats:

They related to a block of flats which was under construction

The bargain made between landlord and tenant was that the landlord granted a long lease of 99 years in return for a substantial premium and a very low rent.

The rent amounted to a modest annual payment, equivalent to just 0.2% of the premium for the lease.

That rent did not relate to any of the land on which the block was built nor to its foundations or roof

The rent reviews were to occur at substantial intervals, in this case once every 20 years.

In 1993, at the first review, the rents were varied to £125 p.a. (Flat 3) and £112.50 (Flat 14). The next review is in 2013.

8. The tenants applied under section 42 of the 1993 Act to extend their leases by 90 years. The extended lease would not contain provision for the payment of any rent. There was little between the parties before the LVT on the value of the extended leases, the tenant of flat 3 contending for £227,800 against the landlord's figure) of £235,000, and the tenant of flat 14 seeking £207,500 against the landlord's figure of £210,000. The LVT determined the values at £230,000 (Flat 3) and £210,000 (Flat 14). Although there were disagreements on other matters, the central dispute between the parties related to the existing value of the tenants' interests, where the tenants' valuations were significantly greater than those of the landlord. The tenants had contended that at the next review the rent would remain low at £200 (Flat 3) and £220 (Flat 3), whereas the landlord argued that the rents would rise to almost £5,000 per annum, which would lead to lower values for the existing leases, and therefore to greater premiums being paid for the extended leases. The LVT determined that the premium payable in respect of Flat 3 was £12,374, and that payable for Flat 14 was £11,534. In doing so, it accepted the tenants' approach to the rent review clause. The landlord had argued for premiums payable of £68,000 (Flat 3) and £58,000 (Flat 14).

9. Before us, the central issue remained that of the proper interpretation of the rent review clause. It was agreed that if we concurred with the LVT, there was no challenge to the other elements of the LVT valuation or decision. If we preferred the landlord's approach, it was agreed that the anticipated rent at the review date would be £4,900 pa for Flat 3, and £4,500 pa for Flat 14.

The meaning of the rent review clause: evidence

10. The appellant landlord called Mr Prosper Marr-Johnson MRICS, a partner in Marr-Johnson and Stevens LLP. He said that the tenants were seeking what he defined as a "nominal" ground rent; that is a rent, similar to other ground rents payable at other comparable flats nearby, that were let on long leases at a premium. However, whilst accepting that the initial rents reserved were relatively nominal for long leasehold flats of this size, the landlord was seeking a "full" ground rent, being the market value of the land or site on which the flats were built assuming no premium was payable. He said that any comments on the reasons that lay behind the drafting of the lease would be speculative, and accepted that there was no direct evidence relating to the making of it, other than the lease itself, and the finding by the LVT that the premiums paid were at full market price at the time was mere supposition. As all the flats had the same rent review clause, one could not be sure whether a full market value was paid. Tenants, he said, would have had little regard for the prospects of review at the time of purchase, as inflation of the degree actually experienced would not have been anticipated, and they would have been anxious to get on the housing ladder.

11. Mr Marr-Johnson acknowledged that the rent review clause in question was uncommon and would have been unusual in 1973, as most leases outside central London provided for fixed stepped increases every 33 years or so. Nevertheless, from the 1980s, some developers had introduced leases with low nominal ground rents at the outset which were then reviewable to high figures, an example being Morgan's Wharf, Battersea. There was also a development in Bournemouth, called The Saltings, where the lease tied rent increases to construction costs and those examples showed that unusual terms could exist.

12. He considered that the initial rents charged here were " relatively nominal" levels for a long leasehold property of this size, and that the reason why the original developer, Varney Investments Ltd (Varney), retained the ground rents rather than, as most developers do, selling them on as soon as the project was sold, was because he recognised the rent review clauses were attractive, and made the investment worthwhile in the long term. However, the freeholds of Maple Court (a similar development) and Sycamore Court were eventually sold to Elmbirch in 1993 for £50,000, a sum he described as "a not insubstantial amount of money" which must have reflected the potential. £25,585 of that sum related to Sycamore Court and £14,000 was for 7 garages (one of which was that let with Number 3). He said that the terms of a deed of variation relating to another flat in December 1977 did not support the view that the rents when reviewed would be nominal.

13. Mr Marr-Johnson said that the 417% increase in rent in 1993 was at a time when the property market was in deep recession and there would have been much land available in the market for residential development, as many developers had gone into liquidation. He understood that Varney was looking for a quick sale to Elmbirch and in his view the review rent would have been pitched at a level that avoided the need for independent determination, whilst still reflecting the geared nature of the review clause. An independent expert made subsequent rent reviews on other flats.

14. The word " market", he explained, presupposed the existence of a market with buyers and sellers, whereas nominal ground rents are arbitrary amounts that do not correlate to the value of the property. The correct interpretation of the review clause was that the value of the rent after review should reflect the land being used to construct a building to be let for a term of 99 years, and the rent could be assessed by one of three methods:

i. The value of comparable cleared sites ready for development in Windsor. This would be difficult due to the lack of sites available in the open market at the present time. Local agents were all, however, of the view that site values lay between 40% and 50% of gross development value;

ii. Carrying out a residual valuation of the whole of Sycamore Court and then apportioning the relevant land value to the individual flats. This subjective method, reliant as it is on a large number of variables, minor changes to which could produce significant variances, was considered to be too uncertain to be used;

iii. Assessing the current value of the property and applying a percentage to obtain the site value.

In his view, the percentage method (iii) was the most appropriate. It would take the long leasehold value of each flat, apportion it as between land and buildings, and then estimate the equivalent rental value by de-capitalising the premium. Although he acknowledged that the method was artificial, it was similar to that normally used to determine ground rental values under s15 of the Leasehold Reform Act 1967. Having considered building costs and Lands Tribunal decisions in respect of site values in central London, a Mr Marr-Johnson thought a 40% proportion was appropriate. He then applied a yield rate of 5.5% (that being the same as the decapitalisation rate) which produced annual rents for the two flats of £4,900 and £4,500 respectively.

15. In cross-examination and in answer to the Tribunal's questions, Mr Marr-Johnson accepted that he had no personal knowledge of the housing market in 1973, and that he had produced no evidence as to whether the 1973 ground rents were set at a full market price or whether they were what he called "concessionary." He agreed that there would be a trade off between the level of premium and the level of rent. He also agreed that the level of rents in the agreement bore no relation to the actual ground, and that if his preferred method of arriving at the rental level were applied in 1973, it would have resulted in a rental at No 3 of £305.80 pa and not £30 p.a. He thus accepted that the original rent reserved of £30 was not a market ground rent as he defined it, and that had it been calculated on his preferred method, the then tenants would not have purchased the leases at the prices which they paid. Furthermore, he acknowledged that his approach gave no credit, after the first review, for the fact that the initial tenant had paid a premium that would have reflected a low (rather than a full) rent for the whole of the 99 years of the term.

16. He acknowledged that the original landlord, as a family company, may have wanted to keep the freehold ownership and retain the ground rents, and he accepted that the price paid by Elmbirch represented 20 years ground rents at the rates fixed in 1993, and that the figures paid for the garages was a capital sum not fixed by reference to rent.

17. Mr Nigel Rohan Thompson FRICS, for the tenants, said that whilst the interpretation of the rent review clause was a matter for legal submissions, it was important to consider the likely original intentions of the parties to the leases. Firstly, there had been a deed of variation entered into on 30 December 1977 with the tenant of Flat 6, Sycamore Court allowing for fixed, stepped rents to be paid (£30, £60, £90 and £120 respectively for the first three 20 year periods and the last period of 39 years). In those circumstances it was clear that the original landlord was not intending for the rents on review to be at anything other than nominal levels, particularly as the new rent regime in the deed of variation was capped, in any event, at no more than two-thirds of the "gross rateable value". Secondly, almost 20 years after the leases were first granted, the original landlord proposed ground rents at the first review in 1993 of £125 pa and £112.50 for Nos 3 and 14 respectively (with the other flats in the block being treated similarly), and despite these increases being over 400%, they were clearly still nominal in nature.

18. Mr Thompson said that if one applied the landlord's approach, 40% of the original price of £13,900 at Number 3 and of £11,300 at Number 14 would produce site values of £5,560 and £4,520 respectively. Using 1973 yields of 10% when applied to those values would have produced predicted annual rents of £556 and £452 after the first 20 years, which were significant, and amounted to half the annual salary of a newly qualified chartered surveyor at the time. It would be stretching credulity, Mr Thompson said, to conceive of a situation where, when the flats were originally marketed, buyers would have been prepared to pay prices (premiums), comparable with similar flats that had conventional stepped reviews if they had to anticipate that, on review, ground rents might rise to as much as 40% of the open market value, the level suggested by Mr Marr-Johnson. It was also difficult to believe that any flats could have been sold at the development when other flats were available in Windsor with fixed ground rent increases to nominal levels.

19. Mr Thompson said that, in his experience, he had never come across a development being sold on a "full rental" basis. It was a market which only existed in the contrived world of litigation concerning poorly drafted leases. He said that Mr Marr-Johnson's examples were not comparable. The Battersea development, which had initial ground rents of £60 pa that were clearly nominal, had review provisions ascertained by reference to 8% of the rack rent, but in addition were subject to a capping provision whereby the rent under any circumstances could not exceed "£1 less than two-thirds of the rateable value..." (similar to the situation that prevailed in respect of the deed of variation on 6 Sycamore Court). The Bournemouth example related to a lease with particular provisions related to building costs and apportionment, and was the subject of an LVT decision in connection with a collective enfranchisement. It had also been clearly let originally at a nominal ground rent. Overall, Mr Thompson said, no conclusive evidence had been produced to support a market for leasehold flats at anything other than nominal ground rents.

20. In cross-examination, and in response to our questions he agreed that ground rent levels would not have been the subject of discussion, negotiation or technical valuation, but stated that it was up to a developer to choose a level which the market would stand and which would not affect saleability. Being a nominal amount, it would be at a level that would be of no particular financial consequence to the tenant and would not bring into question the amount of premium that was being sought. It was put to Mr Thompson that in 1973 the standard forms

of reservation were stepped rents, and that this transaction was unusual. He said that in Birmingham (which was his principal area of practice) stepped increases were introduced in the late 1960s, but he had come across leases elsewhere similar to these. One such case was where he had been acting as an independent expert dealing with a lease on a house, but he had not come across a modern lease with this type of rent review provision. In his experience, he said, the wording in the subject leases was just one of a number of different kinds that occurred in the late 1960s. He estimated that the spread might be: fixed 15%, stepped 65%, this type between 8 and 12% %, and other types 10%. He said that because problems had started to crop up on rent reviews, they were thought to be too much trouble, and fixed increases became the preferred option.

The meaning of the rent review clause: submissions

21. Mr Peters, for the appellant, drew attention to the principles of interpretation in *Investors Compensation Scheme v. West Bromwich Building Society* [1997] UKHL 28; [1998] 1 WLR 896 per Lord Hoffman. He said that the phrase is to be given its ordinary, well-established, meaning; namely the rent that someone would have been prepared to pay in the "market", at the relevant review date, for a lease of the "ground" (i.e. the land occupied by the flat), with the right to construct the flat in question. It was "the value in rental terms for the period of the lease … of the potentiality of using the land, the subject of the lease, for the development that has actually been carried out under the agreement and which has in fact been erected on the land" per HH Judge Rich QC, sitting as a deputy High Court Judge in the Chancery Division in *Guildford Borough Council v Cobb* [1994] 1 EGLR 156.

22. The phrase " market ground rental value" implied a figure that had been arrived at after a full valuation exercise and was informed by prices proven by a market where buyers negotiated by sellers. Mr Peters said that the appellant's interpretation was supported by opinions by two distinguished Leading Counsel. He said that *Jarrett v Burford Estates & Property Co Ltd* [1999] 1 EGLR 181 was wrongly decided and was *per incuriam* because it did not consider *Guildford Borough Council v Cobb.* He said the level contended for by the tenants was a " nominal" figure which reflected neither the value of a lease of the ground, nor one which was a market rent as described.

23. Mr Radevsky, for the respondents, also referred to *Investors Compensation Scheme* and said that the lease should be interpreted in the light of the principles set out in *Basingstoke and Deane BC v Host Group Limited* [1988] 1 WLR 348 at 353D-F. He said that both the initial ground rents and the first reviewed rents were nominal ground rents, not full ground rents in the way described by the appellants. Furthermore, at the time the leases were granted, and today, whilst there was a market for residential properties let at nominal ground rents, there was no market for residential proprieties let on full ground rents. He said that since the purpose of a rent review clause was to preserve the benefit for the landlord of its original bargain against the effects of inflation, the initial ground rent should be reviewed to a nominal ground rent at the valuation date.

24. It was submitted that a full ground rent was not what the parties to the leases in this case intended because if they had, they would have included the necessary "assumptions" and "disregards" such as it being a cleared site, with or without services, and the length of the

notional term. The leases make no reference to the notional building of a block of flats, or to the value of the land on which such a block would be constructed. It would be impossible for a valuer to assess a full ground rent for an individual flat as such a property could not be developed in mid-air, in isolation form the block containing it. There would also be a difficulty in apportioning the rent of the whole site to individual flats. It was to be noted that the reddendum clause referred to the possibility that the rent might remain the same on the review. Since the property was initially let at a nominal ground rent, it would be impossible for the rent to remain the same after review of the rent were to a full ground rent. Therefore, it was contended, the parties must have intended to refer to a nominal ground rent. In any event, the universal understanding of sellers and purchasers of long leasehold residential property was that the payment of a premium on the grant of the lease secured the benefit for the tenant of a nominal ground rent throughout the term of the lease, not merely for the period up to the first rent review.

25. Mr Radevsky said that *Guildford Borough Council v Cobb* related to a lease which enabled the construction of commercial premises by the tenant on the demise and therefore did not deal with the kind of lease or clause in issue in this matter. Whilst counsel in that case did not refer to *Jarrett*, nothing in that decision undermined any of the reasoning in *Jarrett.* That was a decision of the Lands Tribunal which was very much on all fours with the facts here, and with this type of lease and rent review clause. *Jarrett*, he said, was good law and should be followed.

The meaning of the rent review clause: conclusions

26. Both Counsel drew our attention to certain authorities and referred to the principles set out by Lord Hoffman in his speech in *Investors Compensation Scheme* where he said (at 912H-913F):

> " My Lords, I will say at once that I prefer the approach of the learned judge. But I think I should preface my explanation of my reasons with some general remarks about the principles by which contractual documents are nowadays construed. I do not think that the fundamental change which has overtaken this branch of the law, particularly as a result of the speeches of Lord Wilberforce in *Prenn v Simmonds* [1971] 1 W.L.R. 1381, 1384-1386 and *Reardon Smith Line Ltd v Yngvar Hansen-Tangen* [1976] 1 W.L.R. 989, is always sufficiently appreciated. The result has been, subject to one important exception, to assimilate the way in which such documents are interpreted by judges to the common sense principles by which any serious utterance would be interpreted in ordinary life. Almost all the old intellectual baggage of "legal" interpretation has been discarded. The principles may be summarised as follows:
>
> (1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.
>
> (2) The background was famously referred to by Lord Wilberforce as the "matrix of fact," but this phrase is, if anything, an understated description of what the background

may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it 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) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them.

(4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax. (see *Mannai Investments Co. Ltd. v Eagle Star Life Assurance Co. Ltd.* [1997] 2 WLR 945.

(5) The "rule" that words should be given their "natural and ordinary meaning" reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had. Lord Diplock made this point more vigorously when he said in *The Antaios Compania Neviera S.A. v. Salen Rederierna A.B.* [1985] 1 A.C. 191, 201:

> ". . . if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must be made to yield to business commonsense." ”

27. We were also referred to the judgment of Nicholls LJ (as he then was) in *Basingstoke and Deane BC v Host Group* [1988] 1 WLR 348 where he said, at 353 D-F:

> “The question raised on this appeal is one of construction of a rent review clause in a lease. In answering that question it is axiomatic that what the court is seeking to identify and declare is the intention of the parties to the lease expressed in that clause. 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 document and the matrix of the 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.”

28. We consider it helpful to note how that judgment continued (from 353F to 356D), after the statement of the above principle, because in our judgment it is important to concentrate on addressing the level of ground rent payable in the context of the original agreement, and on the same basis. At the end of that passage Nicholls LJ concluded in these terms at 356D :

> " We approach the construction of paragraph (vii), therefore, on the footing that, unless the paragraph otherwise requires, expressly or by necessary implication, or there is some context indicating otherwise, the parties are to be taken to have intended that the notional letting assumed for the purposes of the rent review assessment was to be on the same terms (other than as to quantum of rent) as those still subsisting under the actual, existing lease."

29. With one exception, there was agreement between the parties to this case that the subsequent conduct of the parties to the leases, or other subsequent events are not admissible or relevant to the process of interpreting a written contract: *Schuler AG v Wickman Machine Tool Sales Ltd* [1974] AC 235; *James Miller & Partners v Whitworth Street Estates (Manchester) Ltd* [1970] AC 583. The exception, as noted in submissions by the respondents, is that in the case of a conveyance which is unclear or ambiguous, it is permissible to have regard to the subsequent conduct of the parties to the original conveyance: *Ali v Lane* [2007] EWCA Civ 1532 [2007] 02 EG 126, per Carnwath L.J. at paragraphs 36-38. However that exception appears to relate only to ambiguities in determining the extent of land conveyed, and does not cut down on the general principle: see Carnwath LJ at paragraph 36.

30. It follows from the above that the rent review clause must be interpreted in context or "matrix", and in a way that is consistent with the other terms of the lease. One should not look at other later leases with different terms, subsequent negotiations, intentions and the like as in any way relevant to the task before us. It is of course historically correct that the rent was reviewed in 1993, but we accept that that does not assist us on the interpretation of the lease. It does however show that the market produced a rent review at " nominal" figures in that year.

31. We shall refer below to the authorities relied upon by the parties as to the meaning of "ground rental" and, having identified the principles, turn now to the particular language used and the matrix of the material surrounding circumstances, as per the judgement of Nicholls LJ in the *Basingstoke* case.

32. The original lease undoubtedly contained provision for the payment of what the parties described as a " nominal" rent. Both parties agree that what that means is a rent which is low and does not reflect the value of the land upon which the flat was built, nor the proportionate part of the whole site's value as a development site upon which the development would be constructed. Such an arrangement was known in the market, albeit but one of a number of types of arrangement made between developers and those buying long leaseholds of the flats being built by developers.

33. There was of course no direct evidence, apart from the terms of the lease, of what the parties intended in 1973, although Mr Thompson gave evidence (which we accept) of the types of transaction current at that time, of which this was one. But the lease is itself an important

piece of evidence, from which some inferences may safely be drawn as to intentions. In our judgment we can and do safely infer that the parties intended that this contract should be for the acquisition of the leasehold for a substantial premium, and the payment of a nominal ground rent, and was not a contract whereby the tenant was expected both to pay a significant premium, and to pay a "full" rental of the site value of the flat in question, or its proportion of the whole development's site value, at and after the first review. However we also find that it was not a "concessionary" rent, in the sense that it was intended to be less than the going rate for a ground rent of this kind.

34. It is also clear from the lease that future rents fixed on review were not to be different in any respect from the initial rent, save in amount. We remind ourselves that the rent review clause reads: "such….. revision to be made in the amount of the yearly rent hereby first reserved as shall equal the increased market ground rental value at the time of the relevant review date." Thus, what is to occur is a " revision…in the amount" and that is to equal the "increased market ground rental value". That necessarily implies, in our judgment, that the rent charged in 1973 was 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.

35. There is other evidence of the circumstances obtaining in 1973 in the property market. Mr Marr-Johnson candidly accepted that he had no knowledge or experience of the property market at that time. Mr Thompson had some direct experience of the property market then (albeit not in Windsor as such) and his evidence, which we accept, was that in 1973 leases of this kind represented about 8-12% of transactions. The nature of the bargain was that the tenant would pay a premium for the lease, together with a very modest annual rent. Had the rent been much higher, then that would have affected the level of premium substantially. We show the degree of change below. In effect the tenant was buying the lease for a capital sum.

36. The evidence of both valuers was that whereas the figures adopted for inclusion in the lease were not calculated by any process of valuation, and could fall within a range of figures, they would not be more than the market could take. That is itself part of the function of the market. In this context, we found the landlord's arguments that the market played no part in the fixing of a "nominal" rent to be quite unrealistic. The operation of the market may produce a number of arrangements, including (but not limited to):

(i) The letting of a flat in return for a full rent and no premium;

(ii) The letting of flat for a premium that represents a capitalisation of the rent which would otherwise be payable together with a very low or "nominal" annual payment called "ground rent";

(iii) In other types of development, a landowner may let land to a tenant for the purpose of the tenant erecting a development on the land. In such a case the landlord extracts a rent for the site, but no capital amount for the accommodation that is built.

As between those categories, there may be different ways of fixing the rent or ground rent. It may be defined with more or less particularity, and may be referable to the value of the site or not, depending upon the terms of the agreement. The definition of site value would also depend on the terms of the agreement.

37. One would expect that if the rent were a full rent, one would get a more thorough approach to valuation, because it becomes more important to both tenant and landlord to establish the correct level of rent. However while the modest absolute amount of a low "nominal" rent much reduces, or perhaps even obviates the need for negotiation on its level, that does not mean that there is no concept of market value at all. Both sides agreed that there comes a point where the amount of a "nominal" ground rent passes the point where it would be regarded as such. In the phrase used by Mr Thompson, a ground rent of this type must not exceed what the market can stand.

38. The landlord has persuaded itself that there is some inherent conflict between the concept of a "nominal" rent of the kind fixed here in 1973, and the concept of a level of rent which has market value. The conflict is illusory, and overlooks the fact that this bargain must be looked at as a whole, and not in discrete pieces. It also suffers from the logical fallacy of assuming that because the market operates in one way in situation A, and with particular mechanisms, therefore it must do so in a variant of situation A, or in situation B.

39. The demise of the flat did not contain any letting of any part of the site (and is thus quite different from the situation in *Guildford Borough Council*). Each is a lease of the flat in question and expressly excludes the soil and ground beneath.

40. The landlord's arguments require one to accept that the only "market" for the purposes of the rent review clause was a market where there was no trade off between the charging of a premium and the charging of rent, and where a rent is calculated which makes no allowance for the payment of a premium at the inception of the lease. Mr Peters also stoutly resisted any concept that a judgment on an appropriate level could constitute a market value, unless it was informed by a formal process of valuation.

41. Mr Marr-Johnson conceded that the transaction agreed in 1973 was a type of agreement known in the market. However the interpretation put on it by the landlord requires one to accept that, even though the original agreement did not approach the setting of rent thus, in 2013 the landlord would be entitled to charge a rent that made no discount for the payment of the premium, and would change from being a "nominal " rent (as the landlord described the 1973 rent and its 1993 varied amount), to being a full rent calculated as before described. In our judgment, that would be to change the nature of the 1973 bargain in a fundamental way. It would offend the principles drawn from the authorities set out by Nicholls LJ in *Basingstoke and Deane BC* at 353F – 356D. The scale of the change would be substantial indeed.

42. Mr Marr–Johnson's valuation would ascribe a value to the "ground" element of the value of some 40% of the value of the leaseholders' interest. We accept Mr Thompson's evidence that the effect of that as at 1973 would have been to change the rent payable then to about £500

p.a. That amounts to just under £10 per week, instead of about £0.55 - £0.60 per week, or an increase of 20 fold. £500 p.a, or £10 per week, was a not insignificant sum in 1973, and especially for those at this level of the housing market, which would include some first time buyers. On a mortgage of (say) £10,000 at 10% in 1973, that extra £500 or so would amount to more than an additional 50% in the annual payments made by a tenant, if he/she were buying the flat on mortgage. That provides a stark demonstration of how the landlord's approach makes so substantial a change in the basis of the payment of rent as to put it into a different kind of market, i.e. away from the "premium plus nominal ground rent" market sector. We accept Mr Thompson's evidence that that could have made a very real difference to the marketability of the premises.

43. At today's prices, the value of the leaseholds in question would, at the same ratio as used in 1973 be:

Flat 3 £4,900 x £13,900/30 = £2,270,333

Flat 14 £4,500 x £11,300/27 = £1,883,333

Even if one were to make allowance for the fact that at the valuation date, the lease had currently 67.33 years to run, and not 99 years (as in 1973) the figures tell their own story (the difference in PV between a payment deferred for 67 years and one deferred for 99 years is of course very small and would not affect the calculation very much at all). In fact, the agreed values of the extended lease (and therefore for a longer period of 157 years) are only £230,000 (Flat 3) and £210,000 (Flat 14). Thus, the equivalent figure for a 67year lease is 9-10 times greater than the actual agreed value for a 157year lease.

44. The landlord also argued that because the rent review clause refers to the rent being increased, therefore it was to be expected that (a) it would rise, and (b) it would rise to levels which could be calculated on the basis now sought. We disagree. Whilst some increase could be anticipated, we consider that the tenants in 1973 would have been astonished had they been informed that, despite the fact that they were each paying a premium for a lease of 99 years and not anything more than a "nominal" rent, yet the rent which they were expected to pay after 40 years would be calculated on a different basis. The effect of the landlord's approach would be to alter the nature of the bargain, and of the ground rental from "nominal" to "full", whereas in fact the effect of the rent review clause is that its nature is to remain the same**.** If change was to occur under the lease, such change should be in the *amount*, not the *nature* of the payment. The effect of the change is dramatic, which no doubt explains the vigour deployed in argument by the landlord. The levels of rent now sought are between 163 and 167 times the level of rent agreed in 1973, and approximately 40 times the level fixed in pursuance of the rent review clause in 1993.

45. These various matters again demonstrate the absurdity of the landlord's position. Its claim seeks the fundamental rewriting of the basis upon which the 1973 bargains were made, and in which a premium was paid for the whole term while a nominal ground rent was sought and paid. In effect, Elmbirch is seeking to rewrite the contract.

46. Mr Peters sought to place reliance on *Guildford Borough Council v Cobb.* He also sought to argue that *Jarrett* was wrongly decided. In *Guildford Borough Council v Cobb,* the defendant tenant erected at his expense industrial premises on land belonging to the plaintiff landlords. By a lease dated January 21 1980 the landlords granted the defendant a lease for a term of the land with the buildings (which were to be erected by the tenant) at an initial ground rent of £6,000 pa subject to review thereafter. The rent review clause provided that the arbitrator was to determine the ground rental value of the demised premises assuming a value in the open market for use of the demised premises as a developed site for general industrial purposes. The landlords contended that the expression ground rental value in the lease meant the rack-rental value. This passage appears in the judgement of HH Judge Rich QC, sitting as a deputy High Court judge of the Chancery Division:

> "The question of the basis upon which such surveyor is to determine the rent is, in my judgment, to be determined by reference to the particular words used by the parties in the provisions for variation of rent which I am called upon to construe.
>
> They are required by those provisions to agree a sum as being "the then current ground rental value of the demised premises hereinafter called the ground rental value". I have already drawn attention to the provision in the demise which defines the demised premises as being the land together with the alterations that have been effected upon the land during the currency of the building agreement. But what is to be found is the then current ground rental value of those premises. Ordinarily the word "ground rental value" imports, in my judgment, a valuation of the land as distinct from the land together with the buildings erected thereon. Mr Joseph Harper QC, who has appeared for the plaintiffs, has drawn my attention to the definitions in Stroud's dictionary of ground rent in these terms and, as I understand it, is willing to adopt it as the ordinary meaning of those words. The definition is:
>
> By the expression of ground rent, if unexplained, is to be understood a rent less than the rack rent of the premises. Its proper meaning is the rent at which land is let for the purpose of improvement by building.
>
> That, Mr Harper concedes, is a definition which can be used to identify a ground rent even for land upon which a building has already been erected, because it is apt to identify a particular part of the rack rent which the ground rent is less than, in accordance with the definition, namely that part which is attributable to the land as opposed to the building.
>
> There is, however, this difference between the ground rent of an empty and undeveloped site and the ground rent of a site upon which a building has already been erected, namely that in the latter case one has a ready answer to the question: what is one to assume is to be the pattern of development permitted for the land? If there were no provision in a rent review of a ground rent as to the assumed pattern of development, those charged with determining such ground rent would have to look exclusively to the guidance of the market for the particular piece of land. In the case of a review of ground rent, it would, however, commonly accord more closely with the reality of the commercial transaction that there should be considered not all potentiality of the particular site but only the value of the particular potentiality to erect the particular buildings which had in that particular transaction been erected by agreement of the parties…… …… The plaintiffs' contention was that, in the

particular schedule which I have to construe, there is contained a peculiar - unusual, I mean by that - definition of ground rent which equates the ground rent so called, in this case, with what is actually a rack rent for the buildings demised by this lease.

It is essential to that argument, as Mr Harper conceded in the course of his submissions, to accept that the definition is concerned with the actual buildings actually found on the site and that the issue as it had been presented in an affidavit on behalf of the defendant, namely whether the potentiality of the site is to be assumed for the actual buildings or for some hypothetical buildings, if it arose at all, was to be resolved in the way in which the tenant contends, namely by reference to the actual buildings. It is necessary therefore for me, in order to construe the clause and resolve the differences between the parties, only to address the question whether or not the particular clause in the second schedule upon which Mr Harper relies does in-deed contain a special definition of ground rent, to give to it in the context of the clause a meaning in effect equivalent to rack rent.

Mr Harper draws attention to the fact that the surveyors are required by the clause "to assume a value in the open market for use of the demised premises as a developed site for general industrial purposes" and he says that that is in fact a definition for the purposes of this clause of the ground rental value. In my judgment, it is nothing of the kind. The clause, after saying that what is to be assessed is the current ground rental value of the demised premises, goes on then to make a proviso as to how that ground rental value is to be assessed and it does so by identifying certain matters differing from the reality of the transaction between the parties which are, for the purposes of that assessment, to be assumed. Those additional provisions are, in my judgment, additional to the basic assumption imported by the use of the word "current ground rental value", namely that what is to be assessed by the valuers is the value of the land as distinct from the buildings placed thereon at the expense of the defendant.

The additional assumptions are set out as follows:

Provided always that in assessing the ground rental value the surveyor shall assume a value in the open market for use of the demised premises as a developed site for general industrial purposes and otherwise upon the terms of this lease."

47. We consider that that authority provides the landlord with no assistance. It is dealing with a different situation, where the tenant did take a demise of the land, and where the rent was never nominal, albeit that it was less than the rack rent. Of much greater relevance is *Jarrett*, which specifically addressed whether a nominal ground rent could be an "open market ground rent." We reject the argument that it is a decision *per incuriam* because *Guildford Borough Council* was not referred to. That case considered a different kind of lease of a different kind of demise.

48. In *Jarrett*, by a lease dated 25 August 1977 the appellant tenant held a 99-year term of a dwelling house at an initial rent of £35 pa. The lease provided for rent reviews in 2008 and 2041 to an annual rent "as shall be ascertained by reference to current open market ground rent levels". Following the service of a notice to acquire the freehold under the Leasehold Reform Act 1967, the Leasehold Valuation Tribunal determined the price under section 9(1) of the Act to be £5,800. The tenant appealed, contending that the meaning of the rent review clause

required the review rent to be ascertained by reference to the level of rent customarily reserved when a house is let on a long lease at a premium. On this basis, the valuation under section 9(1) should be £758. The respondent landlord submitted that the review rent was to be ascertained by reference to the annual return available on the open market to an owner of land who lets it for building purposes, excluding any return from improvement of the land or building; the purchase price would then be £5,800.

49. The Lands Tribunal allowed the appeal. It decided that on the true construction of the rent review provision in the lease, the review rents were nominal ground rents; that is to say they were to be ascertained by reference to the level of rent customarily reserved when a house is let at a premium at a long lease. The purchase price was £758. The relevant passages (at 185H- 187D) in the decision of Mr Peter H Clarke FRICS include the following:

> "…The long lease held by Mr Jarrett contains rent reviews at 33-year intervals and the principal issue in this appeal centres on the amount of the review rent. This, in turn, is governed by the true meaning of the rent review provision. The appellant says that the review is to a nominal ground rent of £85 pa and that the purchase price should be £758. The respondent says that the review is to a full ground rent, which is equal to a modern ground rent under section 15 of the 1967 Act of £1,058 pa, and the price should be £5,800. The leasehold valuation tribunal found for the respondent and it is against that decision that Mr Jarrett appeals to this tribunal.
>
> I was told that there are about 1,500 long leases in Redditch with the same rent reviews and that this appeal is in the nature of a test case. I will therefore set out the reasons for my decision in some detail.
>
> I start with part of the judgement of Nicholls LJ in *Basingstoke* where he explains the principles of construction of rent review clauses. [The Tribunal then referred to the passages at p353D ff and 353H cited above, and continued]:
>
> Against this background of principle, I turn to the lease of the appeal property. The rent review provision is contained in the reddendum, which provides for two rents. First, an initial rent of £35 pa from 25 December 1975 to 25 December 2008. Second, during the periods from this last date to 25 December 2041 and from that date to the expiry of the lease in 2074 "such annual rents (being not less than the rent firstly hereinbefore reserved) as shall be ascertained by reference to current open market ground rent levels".
>
> I must construe this rent review provision in the context of the matrix of the material surrounding circumstances (the matrix of facts) at the time when the lease was granted. This requires some findings of fact. On the evidence I find that the following facts constitute the matrix of material surrounding circumstances at the grant of the lease:
>
> 1. The initial rent of £35 pa was a nominal ground rent. This is common ground between the valuers and I accept Mr Rutledge's evidence that a full ground rent at the start of the lease would have been in the region of £218 to £235 pa.
>
> 2. It was common practice for new town development corporations to sell houses on a leasehold basis for reasons of good estate management and not to maximise the rental income. This is seen in Ministry of Housing and Local Government papers 1 and 2. The latter states at pp3 and 4:

> "Rent reviews have normally only been included in industrial or commercial leases where the consideration consists wholly of an annual payment by way of rent and the values can be expected to rise considerably during the lease. Rent reviews had not been incorporated in residential ground leases because the major part of the consideration has been a premium and the annual payment is relatively small. Although this payment will become progressively out of step with values as the lease proceeds, the disposal is primarily a capital transaction using the leasehold machinery to ensure the maintenance of environmental amenities through the covenants of the lease."

3. There was, and still is, a market in nominal ground rents of residential properties in Redditch. It was the practice of the development corporation to grant long leases for a capital premium and a nominal ground rent, and these properties were bought and sold in the market with mortgages from building societies. This is not in dispute between the valuers.

4. Conversely, there was, and is, no market in full ground rents of residential property in Redditch, either for letting or for sale. Again, this is not in dispute between the valuers. I put this point to both Mr Rutledge and Mr Davis and both said that there was no market in full ground rents, that is to say there were no lettings of residential land at a full ground rent and residential properties were not bought and sold in the market on a full ground rent basis. Mr Davis went further and said that lack of market evidence of full ground rents has forced him to calculate his review rent by adopting a modern ground rent approach under section 15 of the 1967 Act. This was, of course, at the valuation date, some 17 years after the lease of the appeal property was granted, but he also accepted that a market in full ground rents did not exist at the grant of the lease.

The words that I must construe against this background of fact are "current open market ground rent levels". No dispute emerged during the hearing regarding the meaning of "current". In my view, it means that the re-view rent is to be determined by reference to the level of ground rents current at the date of review. I now look at the remaining words, first by considering the term "ground rent", then "open market" and finally "levels".

The term "ground rent" has no precise meaning. It must be interpreted in its context against the background of the matrix or material surrounding circumstances. Mr Readings referred to two 19th-century authorities: *Stewart v Alliston (1815) 1 Mer 26* and *Bartlett v Salmon (1855) 6 De GM&G 33*. I do not find them helpful as to the meaning of "ground rent" but they illustrate the need to look at this term in its context. Much closer in time is the decision of this tribunal in *Gajewski v Anderton* in 1971. Here, the member (JH Emlyn-Jones) referred to the difference between nominal and full ground rents. He said at p891:

> "(the tenant's valuer) quotes ground rents of £60 and £100 pa paid on new leasehold houses selling for £18,000 and £20,000 within about half a mile of the subject property. It is significant, however, that in section 15(2)(a) the expression ground rent is not used simpliciter but is defined "in the sense that it shall represent the letting value of the site (without including anything for the value of buildings on the site)." In my view this definition casts doubts on the value as comparisons of many so-called ground rents which represent nothing more than ad hoc financial arrangements whereby some developers obtain a return on their investments; partly

by capital payments and partly by income. The ground rents quoted by (the tenant's valuer) therefore beg the question - do they represent the letting value of the site concerned? I have not been supplied with the answer."

The term "ground rent" in the rent review provision could therefore refer to a nominal ground rent or a full ground rent. To find the true meaning, these words must be construed in the context of the remainder of the rent review provision and in the matrix of material surrounding circumstances.

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 draftsman of the lease was referring to a nominal ground rent. It is common ground, and I have found it as 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 Bartlett 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, and 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 draftsman 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 he therefore used these qualifying words to indicate the form of ground rent on review. It is unlikely that he would have referred to a full ground rent by reference to the open market when a market for those rents did not exist.

This construction of the rent review provision is reinforced by the word "levels" placed after "ground rent". 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. The direction in the review is therefore to look at general levels of (nominal) ground rents. Mr Rutledge's evidence was that these levels of rent can be found in the market and he gave some examples. It is unlikely that the word "levels" would have been applied to full ground rent comparables had they existed in the open market.

My conclusion is, therefore, that the words "current open market ground levels", construed in their context in the lease and in the matrix of material surrounding circumstances, refer to a nominal ground rent.

I am reinforced in this view by the application of the second principle of construction of rent reviews referred to by Nicholls LJ in *Basingstoke*. The purpose of the first review is

> to consider the initial rent of £35 pa in the light of "current open market ground rent levels" and, if these indicate a higher figure, to increase the rent to that figure for the next 33 years. Expressed simply, the initial rent is, in a rising market, to be increased to the equivalent of that rent in December 2008, having regard to increases in property values and the effects of inflation. Important factors in this review are the nature of the initial rent (whether it is a nominal or a full ground rent) and the current level of equivalent ground rents (nominal or full) at the review date. I have found that the initial rent of £35 pa was a nominal ground rent at the grant of the lease. It follows, therefore, that the revised rent at review should also be a nominal ground rent, namely the initial rent increased for changes in values and inflation since the commencement of the lease. The parties and independent expert are directed to assess that rent by reference to nominal ground rent levels at that time. The respondent argues that the lease provides for a low initial rent rising to the full ground rent at the first review. I do not agree. The terms of the lease should normally remain unaltered at the review dates. I could only agree with the respondent's argument if it is expressly stated in the lease, or it 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. This conclusion is reinforced by five matters arising out of the evidence……..”

50. We can find no legal flaw in the reasoning in *Jarrett*, which was not, as far as we aware, the subject of any appeal to the Court of Appeal by the disappointed freeholder, let alone a successful one. It applies the tests in *Basingstoke* to the rent review clause in question, having regard to admissible evidence on the intention of the parties. The reason why Elmbirch’s case sought to attack its reasoning is that it undermines its contention that a rent review clause which refers to “current open market ground rent levels” or in the instant case “market ground rental value” could not refer to what it describes as a nominal rent. We respectfully endorse the approach of the Tribunal member on that occasion in the passages where he considers the meaning of the term “ground rent” and its relationship to “open market” in the lease at issue in that case.

51. Mr Peters’ fallback argument was to seek to distinguish between the use of the words “value” (in the instant lease) and “levels” (in the *Jarrett* lease). There is no distinction of any relevance to the issue before us.

52. Adopting the same analytical method as Mr Peter H Clarke FRICS in *Jarrett*, we have concluded that:

> (a) the respondents’ Sycamore Court flats were demised by way of long leases with nominal ground rents and substantial premiums;
>
> (b) there was a market for such transactions, and therefore for such rents;
>
> (c) there is no conflict between the concept of a nominal ground rent and a market value ground rent.

53. We therefore determine that the rent review clause was directed to identifying a nominal ground rent, assessed as the ground rent payable in the market as part of a bargain whereby a long leasehold is sold at a premium; it does not reflect any value to be ascribed to the value of any part of the site as the value of the potentiality of using the land, the subject of the lease, for the development that has actually been carried out under the agreement and which has in fact been erected on the land, and, the agreed figures that reflect the interpretation at (a) above are £220 pa for flat 3 and £200 pa for flat 14.

54. Mr Radevsky pointed out that the lease in this case did not include any part of the underlying site. He contended therefore that the description of "ground rent" in *Guildford* could not be applied, and that it must be wrong to treat the premises as having any " ground" which could be developed for anything. Mr Peters argued that we could assume that all the leases of the flats would fall in at the same time, and that one should therefore look at the proportionate part of the aggregate whole. He argued also, following *F.R. Evans (Leeds) Ltd v English Electric Co Ltd* (1978) 36 P&CR 185 that one could assume that a hypothetical transaction occurred. In that case Donaldson J (as he then was) held that on the rent review of a large factory of which the only potential occupier was the tenant in question, one should assume a hypothetical landlord and hypothetical willing tenant so that the rental levels were not affected by one or both parties being in a monopoly position. Valuers were still able to assess what rent would be sought from, and paid by, a willing tenant. Donaldson J found that valuers could say what the level of rent would be beyond which a landlord and tenant would be willing landlord and tenant (see p 190). But that is not the case here. What is hypothetical is not the degree of market desire for the premises, but the legal interest which the landlord invites the Tribunal to assume. We also note the criticisms in *Jarrett* of the artificiality of the standing house or site value approaches, whereas there is in fact a real world in the market of rent reviews of ground rents of this kind. We make it plain that we would have found against the landlord's interpretation whatever our conclusion on this latter point.

55. Lastly, we should say something about the use of the opinions of counsel who did not appear before the Tribunal. We consider that they should carry no weight. Mr Peters argued that they were the equivalent of a textbook. Even allowing for the modern practice of a court considering the views of authors who are still alive as well as those that have died (never an easy distinction to justify), there is a fundamental difference between a textbook and an opinion. Textbooks are written without any client or class of client in mind, are then published and are susceptible to comment, whether adverse or complimentary, in legal journals or other textbooks. They are available to all and do not belong to any particular party. Opinions are not published thus. They are directed to one particular point, and belong to the party who sought them, and are not available for comment in practitioners' journals or other textbooks, unless published in some publicly accessible form. Now while a properly considered opinion should express its author's views fearlessly, it is still written to answer specific questions asked by particular clients, and is not published in the way in which a textbook is made available.

56. There is also a sound practical reason for discouraging this practice. The Tribunal, like the courts, observes a clear demarcation between evidence and legal submission. Evidence comes from witnesses, and submissions come from the advocates appearing before the Tribunal or Court. Such an opinion is not evidence but a legal submission. If a client wishes to have the arguments of Mr or Miss X put before the Tribunal then it can instruct Mr or Miss

X. Mr or Miss X can then defend his or her submission in argument. Otherwise one will get a battle of the Opinions from various Leading Counsel being cited by the advocates who are actually instructed. Thus, Mr Radevsky told us that he too had other Opinions from other Leading Counsel which could be produced if we gave any weight to those flourished by Mr Peters. We note also that although the two Leading Counsel involved have been involved in the writing of a well known textbook, the arguments relied upon do not appear within it. Nothing we have said above is intended to alter the system whereby parties exchange opinions they have obtained.

57. It follows from the above that the appeal must be dismissed. Pursuant to Rule 50(4) we now turn to the valuation if the appeal on this point had succeeded.

Valuation : evidence

58. The differences between the valuers on the landlord's approach were helpfully set out in a table produced by Mr Radevsky, which we have amended to reflect what was agreed at the hearing:

Flat 3

	Landlord	*Tenant*
Capitalisation rate	5.5%	8%/9%
Rent on review	£4,900	£4,900
Value of long lease	£230,000	£230,000
Uplift for freehold	1%	Nil
Value of existing lease	£163,750	£187,457
Premium	**£62,050**	**£36,049**

Flat 14

	Landlord	*Tenant*
Capitalisation rate	5.5%	8%/9%
Rent on review	£4,500	£4,500
Value of long lease	£210,000	£210,000
Uplift for freehold	1%	Nil
Value of existing lease	£145,750	£170,337
Premium	**£58,150**	**£33,390**

59. Mr Marr-Johnson said that he had adopted both capitalisation and deferment rates of 6.0% before the LVT, but that those figures had been arrived at upon independent analysis of each aspect, acknowledging that there was a move towards separating those two elements in the valuation exercise. He said that he had reconsidered the capitalisation rate question in preparing his report for this Tribunal, and had firstly analysed ground rent auction results. They were not reliable, in his view, producing, as they did, rates varying between 0.5% and 12%. He had also consulted the quarterly review of returns on residential investments (4th quarter 2004) produced by the Association of Residential Letting Agents (ARLA) from a survey of data from 486 letting offices and 309 investor landlords. That report said that only 5.5% of the investors do so for rental income, the remainder looking for a combined yield between income and capital appreciation. The gross annual yield from predominantly buy-to-let properties for the Windsor area showed an average weighted return from flats of 5.3%. In view of the highly geared nature and frequency of rent reviews in these cases, he felt that 5.5% would be appropriate. In cross-examination he accepted that the ARLA data related to properties let on assured shorthold tenancies at rack rents and that as such the information was of no direct assistance. He also acknowledged that there would be some risk for investor landlords if ground rents were to be reviewed to the levels he was suggesting in respect of tenants' ability to pay, possibility of disputes and risks of bad publicity, but said that, overall, the higher rent levels would be much more attractive to an investor than purely nominal rents.

60. He said that if a full ground rent were to be applicable, (that was anything over £750 pa for flat 3 and £500 pa for flat 14), the existing leasehold value would be affected. Using the 5.5% capitalisation rate he had adopted, this produced £163,750 and £145,750 respectively.

61. Mr Marr-Johnson also proposed an uplift of 1% to reflect the increased value of a freehold to an extended lease of 157 years (rather than the 0.5% he had proposed before the LVT) although in cross-examination he agreed that the uplift made a difference of only £5 after allowing for the deferment. However, he said that as a matter of principle, a freehold must be worth more than leasehold (and he did not accept the argument that in the case of flats that was not necessarily the case), but accepted that there was no material difference where the leasehold term was so long. Revised valuations reflecting his latest thinking, and further measures of agreement between him and Mr Thompson were produced during the hearing. (We also note from these that the deferment rate, which was not a point in issue, has been moved from the 6% argued for by the landlord to the LVT, to the 7.0% determined by them). These showed the appropriate premiums to be as set out in paragraph 58 above, but he said that in the light of the Tribunal's decision in *Earl Cadogan and Cadogan Estates Limited v Sportelli* [2006] RVR 382, if the generic deferment rate were to be applied at 5.0% the premiums became £65,250 (Flat3) and £61,050 (Flat 14).

62. Mr Thompson said that whilst he agreed with Mr Marr-Johnson that the "psychological barrier" above which the level of ground rent would be likely to have an effect on the value of the current leasehold interest in respect of flat 3 was £750, he said that level would be £650 on flat 14. He also produced revised valuations on "the appellant landlord's" basis using a capitalisation rate of 8% to the first review in 8.33 years, and 9% thereafter. He said that he arrived at these figures following an analysis of previous LVT and Lands Tribunal decisions, and adjusted upwards to reflect the additional risks inherent in a situation where the ground rent on review became such a significant sum. Investments in "nominal" ground rents, he

said, were seen as secure and trouble free, and the capitalisation rates applicable to them (in this case, 7.5% adopted by the LVT) reflected that. If the landlord's interpretation of the rent review clause in this case was found to be correct, this would become far from a trouble free and safe investment, and the rate should reflect that. In cross-examination, Mr Thompson accepted that the amount of weight that should be given to previous decisions was limited, but he said he was also calling upon his considerable experience in deriving what he considered to be an appropriate upwards adjustment to reflect the additional investment risks involved.

63. As to the current leasehold value of the individual flats, Mr Thompson said that the reduced value he had applied was purely a mathematical calculation derived from the adopted capitalisation rate. He said that, clearly, the imposition of a significant increase in the ground rent would have an impact on the valuation of the flat at anything above the psychological barrier he had referred to. In the case of flat 3, a rise to £4,900 (£4,150 above the "psychological barrier", capitalised at 9% in perpetuity and deferred for 8.33 years, resulted in a deduction from the his estimated current leasehold value at a nominal ground rent (£210,000) of £22,543 (£4,150 x 5.432 [YP]) leaving £187,457. In respect of flat 14, using his revised psychological barrier of £650, the result (being a deduction from his adjusted current lease value of £191,250), was £170,337.

64. Finally, in respect of Mr Marr-Johnson's proposed uplift, Mr Thompson made no adjustment as he considered the difference between a freehold and a lease of 157 years was de-minimis – as had been demonstrated in Mr Marr-Johnson's valuation.

Valuation: conclusions

65. In all respects, on the areas disputed between the parties, we prefer Mr Thompson's evidence. Although Mr Peters was correct to point out that reliance upon valuation decisions of this Tribunal decisions is not condoned, it seems to us that in using his considerable experience and plain common sense, Mr Thompson was right to apply a one to one and a half point uplift to the capitalisation rate to reflect the additional risk factor which would undoubtedly be there if a tenant suddenly had to find such significant annual sums at the next review. Mr Marr-Johnson, in applying such a low rate (1.5% lower than the LVT had applied on the basis of a nominal ground rent) admitted that he had misinterpreted the purpose of the ARLA data. We can find no support in his conclusions, which seem to us to defy logic, as to appropriate capitalisation rates in the light of the risks involved were his arguments to be accepted. As to his opinions of the values of the current leasehold interests, Mr Thompson undertook research into sales of comparable properties within the vicinity, and we are satisfied that his conclusions were correct.

66. As was agreed, the adjusted value of the existing leasehold interest is a product of the capitalisation rate. This just leaves the question of whether there should be an uplift of 1% as argued for by Mr Marr-Johnson. We think there should not, and he produced no evidence in support of his conclusions.

67. In the light of the above, our valuation on the alternative basis required, is attached as Appendix III. It will be seen that, as the parties have agreed upon a 7% deferment rate, we have not applied the generic deferment rate determined in *Sportelli.*

Dated 2nd March 2007

His Honour Judge Gilbart QC

Paul Francis FRICS

Appendix I

Residential Property Tribunal Service
Leasehold Valuation Tribunal for the Eastern Rent Assessment Panel
Valuation schedule for flats at 3 and 14 Sycamore Court, Springfield Road
Windsor, Berkshire SL4 3QQ

3 Sycamore Court

Term

Ground Rent		£125		
YP 8.33 years 7.5%		6.03116		
			£754	
Ground Rent		£220		
YP 59 years @ 7.5%	13.1463			
PV £1 in 8.33 years @ 7.5%	0.54556			
		7.1721		
			£1,578	
Reversion to extended lease value		£230,000		
PV £1 in 67.33 years @ 7%		0.0105		
			£2,415	
Value of freeholder's existing interest				£4,747
Marriage Value				
Extended Lease Value			£230,000	
Less				
Leaseholder's current interest	£210,000			
Freeholder's current interest	£ 4,747		£214,747	
Marriage Value			£15,253	
50% Share				£ 7,627
			Premium payable	**£12,374**

Appendix II

14 Sycamore Court

Term

Ground Rent		£112.50		
YP 8.33 years 7.5%		6.03116		
			£678	
Ground Rent		£200		
YP 59 years @ 7.5%	13.1463			
PV £1 in 8.33 years @ 7.5%	0.54556			
		7.1721		
			£1,434	
Reversion to extended lease value		£210,000		
PV £1 in 67.33 years @ 7%		0.0105		
			£2,205	
Value of freeholder's existing interest				£4,317
Marriage Value				
Extended Lease Value			£210,000	
Less				
Leaseholder's current interest	£191,250			
Freeholder's current interest	£ 4,317		£195,567	
Marriage Value			£14,433	
50% Share				£ 7,217
			Premium payable	**£11,534**

Lands Tribunal Alternative Valuations
(Rule 50(4) Lands Tribunal Rules 1996)

Flat 3 Sycamore Court, Windsor

Term and reversion

Ground rent			£ 125		
YP 8.33 years @ 8%			5.913		
				£ 739	
Ground rent			£ 4,900		
YP 59 years @ 9%	11.042				
P V £1 8.33 years @ 9%	0.488				
			5.388		
				£26,401	
Reversion to extended leasehold value			£230,000		
PV £1 in 67.33 years @ 7%			0.0105		
				£ 2,415	
					£29,555

Marriage Value

Extended leasehold value			£230,000		
Less					
(a) Tenant's current interest		£187,457			
(b) Landlord's current interest		£ 29,555			
			£217,012		
Marriage value			£ 12,988		
50%					£ 6,494
					£36,049

Flat 14, Sycamore Court, Windsor

Term and reversion

Ground rent			£ 112.50		
YP 8.33 years @ 8%			5.913		
				£ 665	
Ground rent			£ 4,500		
YP 59 years @ 9%	11.042				
PV £1 in 8.33 years @ 9%	0.488				
			5.388		
				£24,246	
Reversion to extended leasehold value		£210,000			
PV £1 in 67.33 years @ 7%		0.0105			
				£ 2,205	
Value of freeholder's current interest				£27,716	

Marriage Value

Extended leasehold value			£210,000		
Less					
(a) Tenant's current interest		£170,337			
(b) Landlord's current interest		£ 27,116			
			£197,453		
Marriage Value			£ 12,547		
50%					£ 6,274
					£ 33,390