

RENT REVIEW: LANGUAGE TRUTH AND LOGIC?

by Edward Cole

**This lecture was the 2002 Simmons & Simmons
Falcon Chambers Lecture**

1. Introduction

This article is the revised text of the Simmons and Simmons Falcon Chambers Spring Lecture delivered on 15th May 2002 under the title “Rent review: where are we now?”. In it I consider the ways in which the Courts have striven to allow justice and commercial common sense to triumph over the literal meaning of words when construing legal documents: often having to make sense of tortured language, half truth and gobbledeygook¹. This happens in the context of rent review clauses as much as anywhere. Two types of problem tend to occur. The first is ambiguous drafting. The second is a failure to comply with an agreed timetable set out in the rent review clause.

2. Where the drafting is less than ideal the question often is: “What do the words mean?” or (which usually amounts to the same thing): “What did the parties intend to achieve?”

3. It is axiomatic that in construing a legal document the subjective evidence of the parties as to what they intended to say or mean is inadmissible. To admit would mean departing from a principled approach

¹ I have borrowed my heading from the monograph with that title of the distinguished philosopher Professor AJ Ayer

and opening the door to uncertainty. It would frequently end in an impasse either because the subjective evidence of the parties as to their intention would be different, or because it would be inconclusive.² So a person cannot be heard to say that he meant x when he said y if, viewed objectively y is different from x. Nor can he say that he would have added z if he had thought about it at the time.

4. But the objective approach to construction, looking at no more than the mere words used, will often produce unsatisfactory results if you suspect that the parties did not mean exactly what they said. How can you avoid being too blinkered in the analysis without admitting inadmissible evidence?

5. As the cases show you don't always have to say what you mean or mean what you say. The difficulty is that it is not always easy to tell when it will prove fatal not to say what you mean and mean what you say; when the Court will come to your aid and when it will not.

6. In the context of commercial contracts generally (including rent review clauses) the Court will allow itself to consider the context in which the contract was made in order to discern the presumed intention of the parties, often described as the matrix of fact. The supremacy of the objective approach to construction can be acknowledged without admitting subjective evidence by the invention of the reasonable man. He is a Socrates in a suit: omniscient and scrupulously fair, and is there (but invisible) when the contract is drafted or the notice is received etc. An intra-cranial dialogue can be conducted between him and the Judge. In the course of it this paragon tells the Judge what the document means. Behind the veil of decency given

² E.g. *Prenn v Simmonds* [1971] 1 WLR 1381

by this fiction the Judge can say what he thinks the parties should have said and therefore meant by the language they used.

7. In the particular context of the hypothetical letting frequently provided in a rent review clause for the purpose of ascertaining the new rent, the “presumption of reality” has emerged as a guiding rule.

8. **The commercial purpose of a rent review clause**

One can start with the trite proposition that the purpose of a rent review clause is to give the landlord an opportunity to increase the rent periodically during the term and (in the less common case of an upwards and downwards rent review clause) to give the tenant an opportunity to reduce the rent periodically.

9. The idea, in theory at least, is that the tenant should continue to pay, and the landlord should continue to receive, market value for the asset represented by the residue of the lease, the rent being adjusted to reflect changes in the real value of property and to counter the eroding effect of inflation on the value of money³.

10. The achievement of this apparently straightforward objective is often frustrated. This is sometimes because the parties, having established a mechanism for determining a reviewed rent do not follow it to the letter. There can then be no review at all or no review to a true valuation unless the Court comes to the aid of one of the parties by allowing the process to continue by using judicial interpretation to loosen the linguistic bonds which

³ *British Gas Corporation v. Universities Superannuation Scheme Limited* [1986] 1 WLR 398, 401; *Equity & Law Life Assurance Society Plc v. Bodfield Limited* [1987] 1 EGLR 124, 125; *Basingstoke & Deane B.C. v. Host Group Limited* [1988] 1 WLR 348, 353.

tie its hands. Sometimes it is because in the drafting language has been inadvertently used which, pedantically construed, does not lead to the presumed objective of enabling a review to present market rent to occur. The language has to be massaged to produce a meaning that makes commercial sense even if that is not the most obvious meaning of the words used.

11. Time

In the context of time the Courts have had to consider to what extent it is permissible to allow a review to proceed where a structured timetable has been set out in the lease but has not been complied with. Is time of the essence or not? Viewed simplistically one might conclude that if a specific timetable has been spelt out requiring a step to be taken by a particular date, and it is not taken in time, the “defaulting” party cannot take the step after the date has passed. This is certainly so in the case of options. If the same rule applied in other cases it would at least have achieved the much-prized goal of commercial certainty and a great deal of litigation would have been avoided.

12. But, as is well known, that this is not generally true of stipulations as to time in rent review clauses. Long before the decision of the House of Lords in *United Scientific v. Burnley Borough Council* and *Cheapside Land Development Co. Limited v. Messels Service Co.*⁴ those masseurs of language, the Judges of the courts of Equity, had decreed that there was a presumption that commercial men did not, as a rule, intend that stipulations as to time should work inflexibly.

⁴ [1978] A.C. 904.

13. In his play *Richard II* Shakespeare has the Earl of Salisbury lamenting the fact that the king had arrived a day too late. In the interim he had lost to Bolingbroke the allegiance of 12,000 Welshmen. The loyal Earl says:

“...O call back Yesterday, bid Time return....”.

How differently the plot might have developed if *United Scientific* has been decided 400 years earlier.

14. In *United Scientific* the House of Lords appeared, at first sight, to have provided a straightforward test which would enable any future dispute about time provisions to be resolved quite easily. It was encapsulated in the now hallowed words of Lord Diplock (page 930F) where he said:

"So upon the question of principle which these two appeals were brought to settle, I would hold that in the absence of any contra-indications in the express words of the lease or in the inter-relation of the rent review clause itself and other clauses or in the surrounding circumstances the presumption is that the timetable specified in a rent review clause for completion of the various steps for determining rent payable in respect of the period following the review date is not of the essence of the contract."

It is rather surprising then that a quarter of a Century after the decision of the House of Lords in *United Scientific v Burnley BC* stipulations as to time in rent review clauses are still giving rise to litigation.

15. I remember being told wistfully by a senior practitioner soon after that decision that the then burgeoning industry of rent review litigation would “wither on the bough”. I remember the same prediction being made in the light of the House of Lords decision in 1985 in *Street v. Mountford* to the effect that it would never again be necessary to litigate the question whether

a particular document created a lease or a licence. Both predictions were wrong

16. In each of the cases that the House of Lords there considered the parties had, in the lease, set out a detailed timetable during which various steps needed to be taken in order to review the rent, and one party or another had failed to comply with their own timetable. As a matter of ordinary language, the timetable not having been complied with by the landlord it would have appeared on an straightforward reading of the words that the landlord had lost the opportunity to have the rent reviewed. Setting the absence of any serious detriment to the tenant if the determination of the new rent was postponed against the potential detriment to the landlord if strict adherence to the date specified in the rent review clause was to be treated as of the essence of the contract Lord Diplock was compelled to the view that:

"So far from finding any contra-indications to displace the presumption that strict adherence to the timetable specified in this rent review clause is not of the essence of the contract, the considerations that I have mentioned appear to me to reinforce the presumption."⁵

17. In reaching this conclusion their Lordships relied upon what they called the revolutionary change brought about by the Supreme Court of Judicature Act 1873 in bringing about a fusion of common law and equity⁶.

18. Deeming provisions in rent review clauses

Difficulties soon arose as the Courts attempted faithfully to apply this apparently straightforward test. Problems occurred most acutely in cases

⁵ Ibid. 932B.

⁶ See for example Lord Diplock, page 927B and Lord Simon of Glaisdale page 944G.

involving "deeming" provisions. Typically in such a case there is a mechanism which entitles the landlord to initiate a rent review clause by serving a trigger notice specifying a rent, followed by a provision requiring the tenant, if he wishes to challenge that figure, to serve a counter-notice within a specified time coupled with such words as:

"If on the expiration of one month from the date of service of the relevant review notice the tenant shall not have served on the landlords a counter-notice in writing in accordance with the preceding paragraph of this Schedule the amount stated in the relevant review notice shall be deemed to be the market rent."

19. As a matter of language this is fairly clear: if a counter-notice is not served within the requisite period the rent is reviewed to the figure set out in the landlord's trigger notice.

20. While English lawyers have always worshipped respectfully in the shrine of *United Scientific Holdings Limited* not everyone has treated it as hallowed ground. The Commonwealth jurisdictions soon broke ranks and distanced themselves from the increasingly unsatisfactory attempts of the English Courts to make deeming provisions fit the *United Scientific* mould. Meagher JA sitting in the Supreme Court of New South Wales⁷ said:

"The contractual provisions merely state that if a landlord wishes to alter the tenant's rent he may give a certain notice

⁷ *GR Mailman & Associates Pty Limited v. Wormald (Aust) Pty. Limited* (1991) 24 NSWLR 80 at page 99C. Did the Australian judges give a XXXX for the House of Lords? Reading the judgments you can hear the sizzle of the beach barbecue as Lords of Appeal in Ordinary roast over the charcoal.

which if unacceptable to the tenant will generate a right to give a counter-notice. [It was a case with a deeming provision in it] Then, each step in a stately saraband is spelt out. The question arises as to what is the effect of being out of time for giving one of the notices. This question first arose in [*United Scientific*]. That celebrated case deals with two issues. The first is the effect of the *Supreme Court of Judicature Act 1873* (UK). On this issue Lord Diplock (at 925) (perhaps with the concurrence of his brethren) expressed the remarkable view that the Act effected a "fusion" of law and equity so that equity as a distinct jurisprudence disappeared from English law. That view is so obviously erroneous as to be risible, and one may confidently anticipate that no Australian Court will ever follow it in this regard. The absurdities to which it gives rise may be observed in the English cases which have followed it"

21. In the same case Gleeson CJ was more restrained, he said⁸:

"The difficulty which the English Courts have had with this particular problem arises at least in part, I think, because the reasoning of the House of Lords in *United Scientific* represents something of a victory of commercial common sense over strict legal logic. This, in turn, makes it difficult to work out how far it is possible to go in taking that reason to its logical conclusion."

22. He was speaking of the line of authorities at first instance and in the Court of Appeal in which the English Courts had struggled to avoid perceived injustice and to give effect to the commercial purpose of a rent review clause without ignoring altogether the apparent meaning of the language which the parties have used in their contract.

⁸ Ibid. 90E.

23. The cases turned on fine distinctions of language and by last year there were two groups, in one of which it had been held that the failure to take the requisite step meant that the rent review was concluded at the figure proposed by the landlord⁹ and in the other of which the language was held not to exclude further steps being taken to have the rent formally determined.¹⁰

24. There were soon cases in particular, both in the Court of Appeal, band both decided within months of each other which were very difficult to reconcile with any degree of intellectual integrity. In *AWADA* the majority of the Court of Appeal held that a deeming provision was inconsistent with the survival of any right on the part of the tenant to serve a counter-notice after the expiration of the requisite period.

25. This was very shortly followed by the decision of the Court of Appeal in *Mecca Leisure*. In substance the relevant provisions were identical to those in *AWADA* although there were minor differences of drafting; in particular the lease in *Mecca Leisure* did not involve (as it had done in *AWADA*) a deeming provision which might work against both landlord and tenant. The majority of the Court of Appeal in *Mecca Leisure* distinguished *AWADA*, Eveleigh LJ regarding the former decision as being of no help at all, and May LJ seeming to misunderstand the judgment of Slade LJ in the earlier case.

⁹ *Lewis v. Barnett* [1982] 2 EGLR 127; *Mammoth Greeting Cards Limited v. Agra Limited* [1990] 2 EGLR 124 where the expression "shall be conclusively fixed at the amount stated in the lessor's notice" was held by Mummery J. to be "a form of expression which clearly evinces the concept of finality"; *Henry Smith's Charity Trustees v. AWADA Trading & Promotion Services Limited* [1984] 1 EGLR 117; *Visionhire Limited v. Britel Fund Trustees Limited* [1992] 1 EGLR 128 and *Banks v. Kokkinos* [1999] 3 EGLR 133.

¹⁰ *Mecca Leisure Limited v. Renown Investments (Holdings) Limited* [1984] 49 P&CR 12; *Bickenhall Engineering Co. Limited v. Grandmet Restaurants Limited* [1995] 1 EGLR 110.

26. In the minority Browne-Wilkinson LJ said that there were two possible views. One was that the existence of a provision for what he called a "default" rent was not, by itself, a contra-indication sufficient to displace the presumption that time was not of the essence. The second view (which he reluctantly favoured) was that an express provision for a default rent in the event of a failure to serve a notice within a specified time necessarily showed that time *was* of the essence. There was, after all, no reason why the parties could not, if they wished to, expressly provide for what was to happen if the appropriate step was not taken within the specified time limit. Alternatively, he argued, it could be said that the whole doctrine of time not being of the essence could not apply to a deeming provision. That doctrine, in his view, only operated so as to allow one party to perform obligations laid down in the contract at a later date, it never operated so as to alter the substantive terms of the contract entered into between the parties. To hold that time was not of the essence of the tenant's counter-notice would involve:

"not simply extending the time limits within which the parties' bargain could be formed, but an alteration of the parties' bargain itself."

That view was echoed in different language by Simon Brown LJ in *Bickenhall*¹¹. He said that if there was a deeming provision of this kind in a lease it would not be permissible to override it by an application of the presumption. This led him to conclude that a deeming provision of this kind was indeed a decisive or virtually decisive, contra-indication displacing the presumption that time was not of the essence.

¹¹ *Bickenhall Engineering Co Ltd v Grandmet Restaurants Ltd* [1995] 1 E.G.L.R. 110

27. On that state of the authorities the law was left in a very unsatisfactory position until the decision of the Court of Appeal in *Starmark Enterprises Limited v. CPL Distribution Limited*¹². The law was described at first instance in this case in the following terms:

"It is unfortunate that over 15 years after these cases were decided, the legal effect of a common provision in a rent review clause is still unknown. This is the common law at its least impressive."

28. The upshot was that in the Court of Appeal in *Starmark* the approach in *AWADA* and in the dissenting judgment of Browne-Wilkinson LJ in *Mecca Leisure* was upheld and the decision of the majority in *Mecca Leisure* was not followed on the basis that it had incorrectly distinguished the earlier Court of Appeal decision in *AWADA*.

29. So, in relation to deeming provisions at least the law is that you must say what you mean and do what you say. Yet the difference between the two positions is not huge. (1) If a contract states that a step has to be taken by a particular date, and it is not taken in time, the presumption is that time is not of the essence so the step can be taken late so as to enable the rent to be determined at the true figure. The rationale is that commercial men would not insist on performance to the letter of the contract. (2) But if a contract says that failure to take a step by a particular date means that the rent is fixed at a figure stipulated in a notice given by the landlord, it is not possible to forgive the default and allow that step to be taken late so as to enable rent to be determined at the true figure. The rationale is that

¹² [2002] L&TR 13.

commercial men would insist on the contract being performed to the letter. the true figure.

30. I mentioned above the Australian case in which Meagher JA had been caustic about Lord Diplock and the English cases pre-dating *Starmark* on deeming provisions. The same more robust view was taken in New Zealand too. A year before *Starmark* was decided the Privy Council had heard an appeal from the Court of Appeal in New Zealand¹³ in which a rent review clause contained a deeming provision. On receipt of a notice from the landlord proposing a new rent the tenant had 28 days to serve a counter-notice referring the question to arbitration. In the absence of a counter-notice the figure in the landlord's notice was deemed to be the rent. Both before and after the expiry of the time for service of the counter-notice the landlord had been in negotiation with the tenant about the amount of the new rent. The decision in the case was that by continuing to engage in such negotiations the landlord had waived its right to rely on strict compliance with the time provisions in the lease.

31. What is of interest for present purposes is that it does not appear to have occurred to anyone to argue that time might *not* be of the essence. No one referred to *United Scientific* or to *AWADA* or *Mecca* or to any in that line of cases. It was taken for granted that time was of the essence. Having recited the rent review timetable from the lease Lord Hobhouse said:

“The effect of these provisions is straightforward and contemplates a number of sequential steps.

.....

Two important features of this scheme must be stressed. First, the time provision governing the time within which the tenant may serve

¹³ *Fifield v Jack* [2001] L&TR 4, p39.

a counter-notice is of the essence. (*Mobil Oil New Zealand Ltd v Mandeno* [1995] 3 N.Z.L.R. 114). A late notice is non-contractual and ineffective”.

32. Was *United Scientific* wrongly decided? The question dare not speak its name. There was a bold attempt in *McDonald's Property Co.Limited v. HSBC Bank Plc*¹⁴ to say that time *was* of the essence of a rent review clause which was in practical terms identical to that considered by the House of Lords in the *Cheapside* case (heard together with *United Scientific*) on the basis that everything that the House of Lords had said about whether time was of the essence for the service of the trigger notice was *obiter*. This assault upon the inner sanctum of the Temple of Rent Review was thwarted.

33. This discussion may appear to be academic and of interest to antiquarians only, since it is now very unusual to see rent review clauses in modern leases with specific timetables for conducting the rent review. I suspect that none or virtually none are drafted in these terms today. Nonetheless many leases that were drafted in the Stone Age of rent review were granted for very long terms and will continue to haunt the landscape for some time to come. There has been a surprising rash of cases in which time of the essence points have been taken.

34. In *Iceland Foods Plc v. Dangoor*¹⁵ a lease provided for the service by the lessor of a trigger notice not more than 12 nor less than 3 months before the review date. If the rent had not been agreed by not less than 2 months before the review date or within 3 months after the service of the trigger notice the rent had to be determined by a surveyor agreed between the

¹⁴ [2001] 3 EGLR 19.

¹⁵ [2002] EWHC 107.

parties not less than one month before the review date or, in default of agreement, nominated by the PRICS. The lease expressly provided that if the rent had not been agreed at least 2 months before the review date and the lessor failed to apply for the appointment of a surveyor, any trigger notice already given was to be "*void and of no effect*". In fact the trigger notice was not served until nearly a month after the review date. It was held that time was not of the essence of the requirement to serve a trigger notice nor of the date for an application for the appointment of a surveyor. The lessor would only lose the right to review if it failed to apply for the appointment of a surveyor within a reasonable time after the service of a trigger notice.

35. Time was on the other hand held to be of the essence in *First Property Growth Partnership LP v. Royal & Sun Alliance Property Services Limited*¹⁶. This case is not without difficulty. The rent review, on a five yearly pattern, had to be triggered by notice from the landlord. Such notice could be given "at any time not more than 12 months before the expiration of each or any of the following years of the term, that is to say every fifth year of the term *but not at any other time*". The rent, if higher than the passing rent, became payable as from the "material date", meaning the end of the year of the term during which the notice was given. The landlord served a trigger notice nearly a year after the end of a relevant 5 year period of the term. The tenant contended that the words "*but not at any other time*" meant that a notice could not be given before or after the 12 month period preceding the material date, so that it had to be given during the fifth year of every five year period. The landlord's argument was that time was not of the essence because the clause merely identified a date *before which* notice could not be given, or the *earliest date by which* it could be given.

¹⁶ [2002] EWHC 305; [2002] 12 EG 134(CS).

36. The Judge accepted that the landlord's interpretation accurately reflected the literal meaning of the words used. *Literally* read, the words only identified the start date from which a notice might be given, and did not also identify an end date by which it *must* be given. But the literal construction was rejected on the basis derived from *Mannai* that “we no longer confuse the meaning of words with the question of what meaning the words were meant to convey”.

37. Approached in that light the words "but not at any other time" fixed a starting date before which notice could not be given by reference to the twelve month period ending immediately before the commencement of the next five year period during which the rent was to be paid. If the landlord was correct it would have been easier simply to say that the notice could be served at any time after a given date “and not at any other time” without referring to the fifth year of the relevant period at all. Moreover, if the landlord was correct the rent could be reviewed late but the new rent would only become payable from a date later than the commencement of the review period, which was not what the clause appeared to contemplate.

38. The Judge then said that the true meaning of the clause was that notice could be given “at any time *during*, *but* not more than twelve months before the expiration of, each or any of the following years of the said term that is to say every fifth year thereof but not at any other time”. The Judge accepted that this reformulation involved supplying two words and two commas and that the end result was the use of more words than were needed to convey the same message. It is comforting to know that the Court may be prepared to conclude that your contract means something different from

what it says and then go on to re-cast the language and punctuation to reflect what it should have said, but it is still better to say what you mean in the first place.

39. **Making time of the essence**

Another point was made in *United Scientific* that has received less attention until recently. Even if time is not of the essence of the clause as drafted, time can be made of the essence. Lord Diplock put it thus:

“Once the time has elapsed that was specified for the performance of an act in a stipulation as to time which was not of the essence of the contract, the party entitled to performance could give to the other party notice calling for performance within a specified period: and provided that the period was considered by the court to be reasonable, the notice had the effect of making it of the essence of the contract that performance should take place within that period.”¹⁷

40. The ability to do this has been considered recently in the Court of Appeal¹⁸. The lease in question contained a 7 yearly review pattern. The revised rent was not to be less than the initial rent and was to be agreed between the landlord and tenant by a date 3 months before the next 7 year period was to commence. In default of agreement the rent was to be assessed by a surveyor to be appointed on the application of the landlord only. There was no provision for an application to be made by the tenant. The parties were unable to agree what the rent should be for the period commencing in December 1996. The tenant argued for a nil increase. Nearly 4 years later, in September 2000, the tenant served a notice requiring the landlord to make an application to the President of the RICS within 28

¹⁷ [1978] A.C. 928G; also Lord Simon of Glaisdale 946G.

¹⁸ *Barclays Bank Plc v. Saville Estates Limited* [Court of Appeal 19th April 2002]; [2002] 18 EG 152 (CS).

days, and purporting to make time of the essence, and stating that if no such application were made the rent would remain at its existing level. The landlord made no such application.

41. It is easy to see how time can be made of the essence of a contract which contains bilateral obligations (such as a contract for the delivery of goods). It is less easy to see why this principle should be applied to a provision such as an upwards only rent review clause where there are not bilateral obligations but a unilateral right on the part of the landlord alone to seek an increase in the rent.

42. But the Court of Appeal held that in order to give the lease business efficacy it was necessary to imply a term into it imposing a time limit within which the landlord was to apply for a determination of the rent to be paid. If this were not done the tenant could be left in a period of uncertainty for years as to what the correct rent was to be. In taking the course of implying a term the Court distinguished an earlier decision of a strong Court of Appeal¹⁹ in which it had been held that where time was not of the essence of a contract mere delay however unreasonable would not debar the party guilty of delay from exercising the right in question.

43. They construed the rent review clause as being both "upwards and downwards", but said that even if it had not been, it was desirable for the tenant to be able to attain certainty. Without such certainty he might find it difficult to assign for example. The landlord should have made the application by the beginning of the relevant 7 year period. Having failed to do so it was open to the tenant to serve notice requiring an application for the

¹⁹ *Amherst v James Walker(Goldsmith & Silversmith) Ltd* [1983] 2 EGLR 108.

appointment of a surveyor to be made. Although the tenant's notice took eight days to arrive it still gave a reasonable period and was effective to make time of the essence.

44. This case may prove to be a valuable weapon in the tenant's arsenal because it is common to see rent review clauses with provisions that enable the landlord but not the tenant to make an application for the appointment of an arbitrator.

Where are we going?

45. The decision in *Starmark* exhibits an unwillingness to allow the meaning of perfectly clear language to be subverted by the inappropriate application of a presumption, since to do so would involve re-writing the contract, or, in the words of Browne-Wilkinson L.J. in *Mecca Leisure*, "an alteration of the parties, bargain itself". Yet in other cases the Courts, in the interest no doubt of reaching a just result in the case in question, have shown a willingness to depart from the literal meaning of the words used and even re-cast the wording to reflect the presumed intention of the parties.

46. In other aspects of rent review too the Courts, while paying lip service to the conventional approach to construction have strained very hard to give words an unnatural meaning in order to produce a result which is consistent with the Court's perception of commercial reality. For instance, in dealing with the hypothetical world in which the assumed transaction takes place, the "presumption of reality" is now deeply entrenched. It was justified by Hoffmann LJ²⁰:

²⁰ *Co-operative Wholesale Society Limited v. National Westminster Bank Plc* [1995] 1 EGLR 97, 99J.

"This approach has produced what is sometimes called a "presumption of reality" in the construction of rent review clauses. In the absence of clear contrary words or necessary implication, it is assumed that the hypothetical letting required by the clause is of the premises as they actually were, on the terms of the actual lease and in the circumstances as they actually existed. But there is no doubt that most clauses require some assumptions which are or may be contrary to reality. In most such cases, however, there is no conflict between such fictions and common sense."

47. A similar point was made by Aldous LJ²¹:

"... It is not the function of the Court, when construing a document, to search for an ambiguity. Nor should the rules which exist to resolve ambiguity to be invoked to create an ambiguity which, according to the ordinary words is not there. However, that does not mean that a clause in a lease should not be construed purposively to ascertain the intention of the parties. It should not be construed in vacuum. It should be construed with reality in mind and, unless the words are clearly to the contrary, to reflect that reality."

48. In another case²² Hoffmann LJ recognised the limitations of the presumption of reality in the face of very clear language. He said:

"... There will ... be cases in which the language used by the parties shows beyond doubt that they intended an assumption for which, to a third party who knows nothing of the negotiations, no commercial purpose can be discerned. In such circumstances the Court has no option but to assume that it was a quid pro quo for some other concession in the course of negotiations. The Court cannot reject it as absurd merely because it is counter-factual and has no outward commercial justification."

²¹ *St. Martin's Property Investments v. CIB Properties* [1995] 1 EGLR 97.

²² *MFI Properties v. BICC Group Pension Trust* [1986] 1 All ER 974.

49. In practice, however, the Courts do seem to approach questions of construction of the rent review hypothesis with a strong pre-conception about how it will interpret the language used.

50. I will consider two areas in which the Courts have shown the greatest ingenuity to give words a meaning which they naturally do not bear in order to come to the aid of the tenant.

The length of the hypothetical term

51. The first is dealing with the length of the hypothetical term. Most of the decided cases date from a time when it was automatically assumed that the longer the lease the greater the value it would have (an assumption which no longer necessarily holds good). In the absence of an express direction to the contrary in the rent review formula one would expect that the term of the hypothetical lease to be valued at each review date should be the same as the residue unexpired at the date of the actual lease. This would mean that the tenant is then not paying for a longer, and therefore potentially more valuable, lease than he actually has. This is subject to the qualification that if the hypothetical lease becomes too short it may give the tenant an opportunity to argue unfairly for an unrealistic discount at a later or at the last review on the basis that the hypothetical tenant would have to write down its hypothetical new investment in the business and in the property over a very short period; whereas the reality is that the actual tenant has had the whole of the term of the lease, or at least a much longer period than the residue to amortise its expenditure.

52. Nonetheless leases often contained an assumption that the hypothetical lease was assumed to be of the same duration as the original term of the actual lease. This ignores the wasting nature of the lease as an asset, and that artificiality could clearly operate unfairly to the tenant by making him pay for something he has not got.

53. The cases demonstrate the lengths to which the Courts have been prepared to go to strain the meaning of words in order to give effect to the presumption of reality. This is achieved either by declaring that the clause provided for a hypothetical term equivalent in length only to the unexpired residue; or by saying that the commencement of the hypothetical term was to be backdated to the commencement of the actual term. Some examples are as follows:

- (a) 22 year lease from 29.9.72. Assumption at each review that the premises were being let by a willing lessor to a willing lessee taking the lease "otherwise on the terms of this lease". Upon review at the end of the 12th year the question arose whether the hypothetical term was for 22 years or 10 years only²³.
- (b) 21 year lease from 1.7.77. "... having regard ... to the rental values then current for properties let on similar terms with vacant possession for a term equivalent to the term hereby granted ...". Treated as being for a hypothetical term at each review of 21 years from 1.7.77.²⁴
- (c) Lease granted for a term of 15 years. On review hypothetical letting "for a term of years equivalent to the said term".²⁵

²³ *Norwich Union Life Insurance Society v. TSB* [1986] 1 EGLR 136.

²⁴ *The Ritz Hotel (London) Limited v. Ritz Casino Limited* [1989] 2 EGLR 135.

²⁵ *Lynnthorpe Enterprises v. Sidney Smith (Chelsea) Limited* [1990] 2 EGLR 131.

- (d) Lease granted for a term of 24 years from July 1970. Hypothetical letting "for a term of years and on conditions and terms similar to the terms hereof".²⁶
- (e) 35 year lease. Hypothetical lease "in the same terms in all other respects (as this present lease other than the original rents hereby reserved ...)".²⁷
- (f) 99 year lease with 35 year rent reviews. Hypothetical lease for "a term of 99 years from the date hereof".²⁸
- (g) Lease granted in 1989 for 35 years from a date in 1986. Hypothetical lease "for a term equal in duration to the original term hereby granted".²⁹

54. One would have thought that the language in each case was quite clear and meant that the term of the hypothetical lease was of the same duration as the term that had been granted to the tenant at the outset when the lease in question was originally granted. Yet in all of these cases the natural meaning of the words used to describe the hypothetical term was ignored. In order to reach a result in accordance with the Court's perception of what is fair in accordance with the presumption of reality the words were distorted to produce a meaning which defied the literal meaning of the language used.

Headline rents

55. The other category of case in which the Courts have been willing to stretch the most natural meaning of the words used were the headline rent

²⁶ *Tea Trade Properties Limited v. CIN Properties Limited* [1990] 1 EGLR 155.

²⁷ *British Gas v. Dollar Land Holdings* [1992] 1 EGLR 135.

²⁸ *Worcester City Council v. A.S. Clarke (Worcester) Limited* (1995) 69 P&CR 562.

²⁹ *St. Martin's Property Limited v. Citicorp Investment Bank Properties Limited* [1998] EGCS 61.

cases. These so-called "headline rent clauses" were designed to protect the landlord from fluctuations in the market which could have a damaging effect on its reversionary value. Their purpose was to deny the tenant at rent review the benefit which might be obtainable in the market at that date of any rent free period or concession other than a rent free period for the purpose of fitting out and opening for business. Clearly to deny the tenant at rent review the benefits which he could have obtained if he was negotiating in the open market for the grant of a new lease is to seek to make the tenant pay more than the then current market value for the property. This approach means distorting the evidence by removing from comparables with such inducements a vital aspect of those comparables. The issue came to a head in the four cases heard together in the Court of Appeal in 1995 in the *Co-operative Wholesale Society Limited v. National Westminster Bank Plc* litigation³⁰. Each of the four cases concerned a lease said to contain a rent review clause which obliged the tenant to pay a "headline" rent on review. Only one survived the scrutiny of the Court.³¹

56. Perhaps *Starmark* is, in reality, no more than an example of the Court recognising that there are limits to which a "purposive" approach to the construction of documents can prevail in the face of wholly unambiguous language. Yet the willingness, one might even say the eagerness, to allow the meaning which a document might convey to the hypothetical reasonable reader of it to prevail over the precise meaning of the words used has also been exemplified in cases involving the construction of contractual and statutory notices too. Lord Hoffmann, in particular, has led the way in this

³⁰ [1995] 1 EGLR 97.

³¹ *Broadgate Square Plc v. Lehman Brothers Limited*.

area in the now celebrated decision in *Mannai Investment Co.Limited v. Eagle Star Life Assurance Co.Limited*³²:

It is a matter of constant experience that people can convey their meaning unambiguously although they have used the wrong words. We start with an assumption that people will use words and grammar in a conventional way but quite often it becomes obvious that, for one reason or another, they are not doing so and we adjust our interpretation of what they are saying accordingly. We do so in order to make sense of their utterance: so that the different parts of the sentence fit together in a coherent way and also to enable the sentence to fit the background of the facts which plays an indispensable part in a way we interpret what anyone is saying".

57. He returned again to the same theme in *Investors Compensation Scheme Limited v. West Bromwich Building Society*³³ in which he said:

"The meaning that a document (or 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 grammar; 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 meaning 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."

58. We have seen this being relied on by Rimer J in the *First Property Growth* case to which I referred above.

³² [1997] 1 EGLR 57.

³³ [1998] 1 WLR 896, 913.

59. In a later Privy Council case³⁴ Lord Hoffmann had summarised his approach in the following words:

"... the overriding objective in construction is to give effect to what a reasonable person rather than a pedantic lawyer would have understood the parties to mean. Therefore, if in spite of linguistic problems the meaning is clear, it is that meaning which must prevail."

Conclusion

60. Whatever the merits of this approach are in a particular case, the uncertainty which it gives rise to when giving advice is apparent from the litigation which the *Mannai* case itself has spawned, like *United Scientific* and in another context *Street v Mountford* before it. While a more flexible approach may be welcomed as enabling the Court to achieve what can be regarded in many cases as a just result, it makes life difficult for lawyers who have to give advice about ambiguous drafting whether in leases or other contractual documents, and it deprives the client of the greater certainty that the more traditional if sometimes harsher conventions of construction produced. Certainty may sometimes result in hard cases, but uncertainty causes litigation, as has been amply demonstrated by the recent theories of cases in the Court of Appeal dealing with the validity of notices served under section 20 of the Housing Act 1988 in connection with the creation of assured shorthold tenancies.³⁵

³⁴ *Jumbo King Limited v. Faithful Properties Limited* 2nd December 1999, Hong Kong Court of Final Appeal.

³⁵ *Kasseer v. Freeman* [2002] 03 EG 125 CS, *Ravenseft Properties Limited v. Hall* [2002] 03 EG 126 (CS), *White v. Chubb* [2002] 03 EG 127 (CS). *York v. Casey* (1999) 31 HLR 209, *Keepers & Governors of John Lyon Grammar School v. Secchi* [2000] L&TR 308 (concerning a notice served under the LR, H&UDA 1993).

61. It enables the Court to characterise the interpretation it wishes to adopt as that of the reasonable man and to condemn the alternative interpretation as pedantry, or even worse, legal pedantry.

62. It is also apparent even from *Mannai* itself how difficult or even subjective the new approach can be. How can you tell when the Court might say that in spite of linguistic difficulties the meaning is clear, and when it will say that that to depart from the literal construction is to alter the very bargain that the parties made? You might take comfort from the thought that on any given set of facts the right answer will be obvious. The cases to which I have referred do not justify that thought. In each of *United Scientific* and *Cheapside* the House of Lords reversed a unanimous Court of Appeal. It took 17 years for the English Courts to settle the law on deeming provisions. The decision in *Mannai* was a majority decision by 3 to 2 in the House of Lords reversing a unanimous Court of Appeal.

63. The *Mannai* approach can be justified if it is possible to say with a high degree of certainty that while saying one thing the parties obviously meant another. But despite Lord Hoffman's comforting words (see para 56 above) it is also our constant experience that people often convey their meaning *ambiguously* by using confusing or inapposite language. We are *not* always able to adjust our interpretation so as to discern with certainty what the words used mean. It is often *not* obvious what is meant when confusing language is used. We may think we have a good idea, but we cannot be sure. When this happens in conversation we can ask what was meant and whether we have understood it correctly, so as to avoid being at cross-purposes.

64. But the objective approach to the construction of documents does not permit such questions to be put to the parties to a disputed legal document. The risk therefore is that in taking the view of the reasonable man an error will be made.

65. Neither of the homely vignettes that Lord Hoffmann gave in *Mannai* is without difficulty. Mrs. Malaprop refers to an allegory on the banks of the Nile. The reasonable man hearing this understands what Mrs Malaprop means and substitutes alligator. But Mrs Malaprop made two mistakes and the reasonable man corrects only one of them. He should also have substituted another river where alligators occur, since crocodiles occur on the Nile but alligators do not. In this sense both are wrong, but only the legal pedant cares.

66. And what of the other example: the acquaintance who asks you: "and how is Mary?" The example proceeds on the assumption that it is obvious to you that this was intended to be a reference to your wife although your wife is in fact called Jane. You avoid embarrassment by saying "very well, thank you" without even drawing attention to the mistake. Lord Hoffmann says the message has been unambiguously received and understood. How can he be so sure of that? How does he know that you do not also know someone called Mary and do not realise there has been a mistake? You answer "very well, thank you" taking it to be a reference to Mary while thinking all the while "why is he asking me about Mary?"; indeed "how does he know about Mary anyway?"; and perhaps even: "I hope he doesn't tell Jane about Mary".