Neutral Citation Number: [2017] EWCA Civ 1135

Case No: C3/2014/4164

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL (LANDS CHAMBER)
Mr Martin Rodger QC, Deputy President
[2014] UKUT 0394 (LC)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28/07/2017

Before:

LADY JUSTICE BLACK
LORD JUSTICE SALES
and
LORD JUSTICE HENDERSON

- -

Between:

	CLARISE PROPERTIES LIMITED	**Appellant**
	- and -	
	(1) RACHEL EMILY REES **(2) JAMES JOHN REES**	**Respondents**

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- -

Mr Mark Loveday (instructed by **SE Law Limited**) for the **Appellant**
Mr Barry Denyer-Green (instructed by **Hugh James**) for the **Respondents**

Hearing date: 16 May 2017

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Judgment Approved

Lord Justice Henderson:

Introduction

1. This is an appeal from the decision of the Lands Chamber of the Upper Tribunal (Martin Rodger QC, Deputy President) released on 14 October 2014 ("the UT Decision"), dismissing the appeal of Clarise Properties Limited ("the Appellant" or "the Landlord") from a decision of the Leasehold Valuation Tribunal for Wales ("the LVT") given on 19 September 2013 ("the LVT Decision"). The LVT determined a preliminary issue arising out of a claim by Rachel Emily Rees and James John Rees ("the Respondents" or "the Tenants") under the Leasehold Reform Act 1967 ("LRA 1967" or "the 1967 Act") to acquire the freehold of a semi-detached house at 115 Pantbach Road, Cardiff ("the Property").

2. The sole issue on this appeal concerns the true construction of the rent review provision in clause 1(b) of the existing lease ("the Lease") of the Property. Depending on the answer to that question, the parties were able to agree figures in advance of the Upper Tribunal

hearing for the amount of the revised rent and the sum payable to the Landlord for the acquisition of the freehold under the 1967 Act. Accordingly, the question of construction remains the only live issue between these parties.

3. The amounts at stake in the present case are relatively modest. It is agreed that the price payable to the Landlord to enfranchise the Property is £10,530 if the UT Decision is upheld, and £79,352 if the Landlord's appeal succeeds. The answer to the question of construction, however, is of potentially wider significance to the Landlord, because it owns the freehold reversions to approximately 43 leases in South Wales and the Midlands which contain similar rent-review provisions as part of its portfolio of ground rents. The Landlord itself forms part of the Marcus Cooper group of companies.

4. The appeal to this court is brought with permission granted by Arden LJ and Sir Bernard Rix on 29 July 2015. As Arden LJ explained in her judgment when granting permission, the normal criteria for second appeals do not apply to cases (such as this) which originated in the LVT for Wales, so the relevant test was that for first appeals, namely whether the grounds of appeal had a real prospect of success: see [2015] EWCA Civ 1118 at [5] to [34].

5. The parties were represented before us by the same counsel as they were before the LVT and the Upper Tribunal, Mr Mark Loveday for the Landlord and Mr Barry Denyer-Green for the Tenants. I am grateful to both of them for their clear and helpful submissions.

The Lease

6. The Lease was granted on 7 June 1991 by Burford Estate & Property Company Limited to Nita Casey and Sylvia Airey ("the original tenants") for a term of 99 years from 24 June 1990, in consideration of a premium of £600 and at an initial rent of £45 per annum for the first 25 years of the term.

7. The Lease replaced an earlier lease which had been granted in the 1920s to the original tenants' father, and it was granted following the death of a long lessee. The residue of the earlier lease was by then too short to be mortgageable, so it could not easily be sold by the personal representatives of the deceased lessee; nor were the personal representatives themselves able to acquire the freehold under the 1967 Act, as they did not satisfy the qualifying conditions then in force. As the UT Decision records at [3], "[a] negotiation therefore took place which led to the grant of a new lease for a long term at a very modest premium and ground rent, but with a rent review clause".

8. Clause 1(b) of the Lease provided for the initial rent of £45 a year to be reviewed in 2015 on the 25th anniversary of the commencement of the term, and again on the 50th and 75th anniversaries. The new rent was to be:

> "… such annual rent (being not less than the rent payable immediately prior to each relevant Rent Review Date) being a sum representing the open market letting value of the land hereby

> leased as if it were a vacant site without any buildings thereon ("the Site") to be assessed in accordance with current open market values of the Site at each relevant Rent Review Date when the said Site shall fall to be re-assessed as if it were at such Rent Review Date available for residential development for purposes authorised by the Town & country [*sic*] Planning Acts …"

In the event of disagreement, the reviewed rent was to be determined by a Chartered Surveyor acting as either an expert or an arbitrator.

9. There are no other provisions of the Lease to which it is necessary to draw attention. It contained covenants of a usual nature, including a covenant by the tenant not to use the Property "for any purpose whatsoever other than a private dwelling in the occupation of one family only".

10. The following initial points may be noted about the reviewed rent payable from each Rent Review Date:

(a) the review was upwards only;

(b) the reviewed rent had to represent "the open market letting value" of the land comprised in the Lease, as if it were a vacant site without any buildings on it; and

(c) for this purpose, the open market site value of the land was to be assessed at each Rent Review Date as if it had the benefit of planning permission for residential development.

Thus, although the letting value of the land was to be expressed as an annual rent, it had to be derived from (or at least to be in accordance with) the notional capital value of the vacant site, without any buildings upon it but with the benefit of planning permission for residential development. It can also be seen that the formula for ascertaining the reviewed rent involved the making of two hypotheses: first, that the Property was a vacant site; and secondly, that the site was available for residential development. Further, both the annual letting value of the notionally vacant site, and the capital value of the site, were to be (or, in the case of the letting value, had to represent) values on the "open market".

11. Valuable guidance on what is meant by the concept of the "open market" in the context of a hypothetical sale was given by Hoffmann LJ, with whom Waite and Neill LJJ agreed, in Inland Revenue Commissioners v Gray [1994] STC 360, in relation to the statutory hypothetical sale of the property comprised in the deceased taxpayer's estate immediately before her death for the purposes of the charge to capital transfer tax under section 19(1) of the Finance Act 1975. Having pointed out that "[c]ertain things are necessarily entailed by the statutory hypothesis", including that the property must be assumed to have been capable of sale in the open market, and that the hypothesis must

be applied to the property as it actually existed, Hoffmann LJ continued, at 372a:

> "In all other respects, the theme that runs through the authorities is that one assumes that the hypothetical vendor and purchaser did whatever reasonable people buying and selling such property would be likely to have done in real life. The hypothetical vendor is an anonymous but reasonable vendor, who goes about the sale as a prudent man of business, negotiating seriously without giving the impression of being either over-anxious or unduly reluctant. The hypothetical buyer is slightly less anonymous. He too is assumed to have behaved reasonably, making proper enquiries about the property and not appearing too eager to buy. But he also reflects reality in that he embodies whatever was actually the demand for that property at the relevant time. It cannot be too strongly emphasised that although the sale is hypothetical, there is nothing hypothetical about the open market in which it is supposed to have taken place. The concept of the open market involves assuming that the whole world was free to bid, and then forming a view about what in those circumstances would in real life have been the best price reasonably obtainable … The valuation is thus a retrospective exercise in probabilities, wholly derived from the real world but rarely committed to the proposition that a sale to a particular purchaser would definitely have happened."

For similar comments made in relation to a hypothetical rent for rating purposes, see the judgment of Peter Gibson LJ in Hoare v National Trust (1998) 77 P. & C. R. 366 at 386-387, emphasising "the necessity to adhere to reality subject only to giving full effect to the statutory hypothesis". Peter Gibson LJ called this "the principle of reality".

12. In Dennis & Robinson v Kiossos Establishment (1987) 54 P. & C. R. 282, this court applied similar principles to the construction of a rent review provision in a lease which required a valuer to determine the "full yearly market rent" of industrial premises, and defined that as "the yearly rent … at which the property might reasonably be expected to be let in the open market" at a specified date. In relation to this language, Fox LJ said at 286:

> "The following assumptions in relation to that provision appear to me to be correct:
>
> (1) There will be a letting of the property. The judge, as I read his judgment, was not prepared to accept that in general terms. But in my opinion it must be so. The language of clause 5(2) expressly contemplates a letting on the open market.
>
> (2) There is a market in which that letting is agreed.
>
> (3) The landlord is willing to let the premises. Equally, the supposed tenant is willing to take the premises. The notion of a letting in the open market between an unwilling lessor and an unwilling lessee (or between a willing lessor and an unwilling

lessee) for the purpose of determining a reasonable rent makes no sense.

These assumptions seem to me to follow from the language which the parties chose to use."

Fox LJ added, at 287:

"The important fact is that clause 5(2) requires assumptions to be made. The fact that those assumptions are artificial is irrelevant. That is the bargain which the parties have made."

13. To similar effect, Dillon LJ said at 288:

"These phrases assume that there is a market in which agreement will be reached for a hypothetical letting of the premises to a hypothetical tenant. That necessarily imports a hypothetical landlord who is willing to let the premises and a hypothetical tenant who is willing to take the premises on the terms prescribed by the rent review clause, i.e. a willing lessor and a willing lessee. But though it is assumed that there is a market, there is no assumption required as to how lively that market is. The strength of the market and the rental value of the premises in the market are matters for the valuer's discretion based on his own knowledge and experience of the letting value of such premises."

14. The third member of the court, Russell LJ, agreed with both judgments.

Relevant provisions of the 1967 Act

15. The relevant provisions of the 1967 Act were explained with exemplary clarity by the Deputy President in paragraphs [6] to [11] of the UT Decision, which I gratefully adopt:

"6. Section 1(1) of the 1967 Act confers on the tenant of a leasehold house a right to acquire on fair terms either the freehold or an extended lease of the house in prescribed circumstances. Although this appeal concerns a claim to acquire the freehold of the Property, the arguments cannot be understood without referring briefly to the terms of the 1967 Act concerning the acquisition of an extended lease.

7. Where a tenant elects to acquire an extended lease, the landlord is obliged by section 14(1) to grant to the tenant in substitution for his existing tenancy a new tenancy for a term expiring 50 years after the term date of the existing tenancy. The terms of that tenancy are prescribed by section 15(1) and are broadly to be the terms of the existing tenancy. Any ground rent payable under the original tenancy remains payable at the same rate for the remainder of the original term, but after the term date of the

original tenancy section 15(2) provides for a different rent to become payable.

8. Section 15(2) provides as follows:

> "The new tenancy shall provide that as from the original term date the rent payable for the house and premises shall be a rent ascertained or to be ascertained as follows:
>
> (a) the rent shall be a ground rent in the sense that it shall represent the letting value of the site (without including anything for the value of buildings on the site) for the uses to which the house and premises have been put since the commencement of the existing tenancy, other than uses which by the terms of the new tenancy are not permitted or are permitted only by the landlord's consent;
>
> (b) the letting value for this purpose shall be in the first instance the letting value at the date from which the rent based on it is to commence, but as from the expiration of 25 years from the original term date the letting value at the expiration of those 25 years shall be substituted, if the landlord so requires, and a revised rent becomes payable accordingly;
>
> (c) the letting value at either of the times mentioned shall be determined not earlier than 12 months before that time …"

9. A rent determined in accordance with section 15 is often referred to as a "modern ground rent", although the alternative "section 15 rent" is sometimes preferred.

10. The significance of section 15(2) for the purpose of a case such as this, in which the tenants do not claim an extended lease but instead wish to acquire the freehold of the Property, is that the price payable for the freehold in accordance with section 9(1) of the 1967 Act is the amount which the house and premises might be expected to realise if sold in the open market on the assumption, if the tenancy has not in fact been extended under the Act, that it was to be so extended. The freehold to be valued is therefore taken to be subject to a lease under which the original ground rent will be payable for the duration of the existing tenancy, after which a ground rent determined in accordance with section 15(2) is assumed to be payable for a further 50 years. The extended lease is purely notional, as no such lease is granted in reality, but the assumed extension is nonetheless an important feature of the valuation hypothesis by which the price for the freehold is to be determined.

11. In order to determine the price payable for the freehold a valuer must therefore form a view of the level of rent which would notionally be expected to become payable in accordance with section 15(2) if the lease had been extended."

16. The Deputy President went on to explain, at [12] to [15], that section 15(2) does not prescribe how the "letting value of the site" is to be ascertained. Since no modern landlord would ever let a development site for a term of 50 years with a single rent review after 25 years, there is no evidence of comparable open market lettings upon which a valuer may draw in order to determine the section 15 rent. Accordingly, a valuation convention has evolved, which equates the section 15 rent with the rate of return which a freeholder could achieve on the capital value of the site if it was let on a 50 year lease. The valuer first ascertains the capital value of the site on the assumption that it is free of buildings and available for development, and then decapitalises the site value at an appropriate rate "intended to reflect the rate of income return which a freeholder might expect to achieve on the grant of a 50 year lease of the site with a single rent review after 25 years for the uses described in section 15(2)". In order to establish the value of the site, three different approaches have been established which were identified and discussed in the decision of the Lands Tribunal in Farr v Millersons Investments Ltd (1971) 22 P. & C. R. 1055, namely the "standing-house approach", the "cleared-site" basis, and the "new-for-old approach". As the Deputy President commented at [14], "[n]one of these approaches is without difficulty both in practice and in principle". For present purposes, however, it is unnecessary to explore the differences between the approaches, except to note that the third approach is now little used.

The proceedings before the LVT

17. The Tenants gave notice of their claim to acquire the freehold of the Property under Part I of the 1967 Act on 10 September 2011. It was agreed with the Landlord that the price payable for the freehold should be determined under section 9(1), and that the rent which was due to become payable after the first rent review in 2015 was relevant to the assessment of the price, because the higher that rent was likely to be, the more valuable would be the Landlord's interest, and the higher the price to be paid for it. The parties were unable, however, to agree on the approach required by the rent review clause in the Lease, so they agreed to invite the LVT to interpret the clause as a preliminary issue. The hearing took place on 3 and 4 September 2013, largely on the basis of an agreed statement of facts. Evidence was given by the surveyors for both parties, Mr John Geraint Evans FRICS for the Landlord and Mr Kenneth John Cooper FRICS for the Tenants.

18. The arguments advanced by the parties before the LVT were, in outline, as follows. The Landlord submitted that the reviewed rent should be determined, in the absence of agreement, by adopting the same valuation approach as is conventionally adopted in determining a section 15 rent, while the Tenants submitted that the reviewed rent should be a nominal ground rent akin to the annual rent of £45 payable for the first 25 years of the term. The LVT rejected the latter contention, holding (clearly correctly, in my view) that the references to open market value in the rent review clause showed that something more than a nominal ground rent was intended by the draftsman. However, the LVT was also unattracted by the Landlord's submission, and raised with both parties the possibility that there might be other interpretations: see paragraph [61] of the LVT Decision. They then said, at [63]:

> "We must now consider the meaning of the expression "the open market letting value of the land hereby leased". We appreciate

> that there is no market as such. There is no evidence of any transactions of this nature. However, the lease envisages a hypothetical market and that is the basis of the valuation process which must be adopted."

19. The LVT then proceeded to discuss a number of factors which they considered to be relevant in the remainder of [63], from which I quote the following extract:

> "(e) The "open market letting value" means precisely that. The reviewed rent has to be a marketable rent. Upon this issue, we prefer the evidence of Mr Cooper. If the site were placed on the open market for letting only, the only purchasers would be a builder who would wish to build and sell the completed building either by way of underlease or assignment or a self-build purchaser. In either case the ability to fund the purchase is critical. We are satisfied on the evidence that there would be no market for a letting at a section 15 ground rent or at a ground rent akin to that. Potential buyers would be unable to access a mortgage on normal terms. The only buyers who would be in a position to buy therefore would be cash buyers, or those with other sources of funding, willing to take on a diminishing asset with a built-in regular and not insignificant financial commitment. A "modern ground rent" would be a continuous burden both during construction and whilst the builder waited for a buyer to complete …
>
> (f) The question is: what is "the open market letting value of the land"? The answer is: it is a marketable ground rent; the highest ground rent at which a purchaser (builder or otherwise) in the hypothetical open market would be willing to acquire a lease of the plot of land. We would assess it to be more than a "nominal" sum, but there will come a point, even in the hypothetical open market, when the cash buyer or one with other sources of borrowing will cease to be willing to take on the commitment, particularly as the leasehold interest depreciates over time and there is a prospect of an increase in the ground rent in 25 years."

20. In the light of this guidance, the LVT gave directions for the parties' surveyors to prepare and exchange written valuations, and for the parties then to attempt to agree the price payable for the freehold, with liberty to restore the matter for final determination if agreement could not be reached.

21. Although the LVT entirely rejected the Tenants' case, it was the Landlord which sought permission to appeal: see the UT Decision at [24]. Having considered the proposed grounds of appeal, the Deputy President was rightly concerned that a decision of the Upper Tribunal on the preliminary issue might not bring the proceedings to an end. He therefore directed that, before permission to appeal would be considered, the parties should either agree, or invite the LVT to determine, alternative valuations on the basis of their respective cases. In the event, the parties were then able to agree the price payable

both on the basis of their original contentions, and on the basis adopted by the LVT, as follows:

(a) on the basis of a review to a "nominal" ground rent, £5,025;

(b) on the basis of a review to a conventional section 15 ground rent, £79,352; and

(c) on the basis of a review in accordance with the LVT's approach (described as a "market" ground rent), £10,530.

22. Since these figures were agreed, it is unnecessary to say much about the way in which they were calculated. The price based on a nominal ground rent reflected an agreement that such a rent would be approximately £180 at the first review date, while the price based on a conventional section 15 approach reflected an agreement that the appropriate rent would be in the range of £4,500 to £5,000 a year.

23. In relation to the intermediate "market" ground rent, based on the approach of the LVT, the Deputy President explained at [25] of the UT Decision that:

> "This figure represented the opinion of Mr Evans, the Appellant's valuer. As he explained in a report dated 14 April 2014, Mr Evans' view of the appropriate ground rent was based on a single piece of evidence: a flat in Cardiff offered for sale at a price of £194,950.00 with a ground rent of £450 p.a. Mr Evans took this ground rent to be "substantially higher than the nominal ground rent proposed by the Respondents" and as reflective of the "market" ground rent which the LVT had had in mind. He then used it to calculate the arithmetical relationship between that ground rent and the asking price of the flat before applying the same ratio to his own standing-house valuation of the Property. This calculation suggested to him that a ground rent of £650 p.a. represented the rent which would become payable following the first rent review in 2015. Applying that ground rent as a component in determining the price of the freehold reversion produced a premium of £10,530.00. The Respondents were prepared to agree that figure."

The UT Decision

24. The Landlord obtained permission to appeal to the Upper Tribunal on five grounds, which are summarised in the UT Decision at [28]. For present purposes, the relevant grounds were the second and third, which sought to challenge the approach and conclusions of the LVT based on a "marketable ground rent". After reciting the arguments of Mr Loveday in support of those grounds, which were similar to those which he addressed to us, the Deputy President said at [47] that he found none of them to be of any weight. He pointed out at [48] that the LVT had only been asked to provide assistance to the parties in providing a valuation, that the LVT was very experienced, and

that it "would have been very well aware of the levels of ground rents calculated employing the conventional section 15 approach, because it would regularly have seen such rents as components of the calculation of the price payable for the freehold of premises under section 9(1) of the 1967 Act". The LVT was satisfied that such rents were higher than those which would be agreed in the open market, for the reasons it gave in paragraph 63(e) of the LVT Decision.

25. The Deputy President then said:

> "49. In my judgment the LVT was quite right to emphasise that the rental value which was to be ascertained on each review date was to be a rent which would be agreed in the open market. Its use of the expression "a marketable rent" as a way of explaining "open market letting value" (a well understood term) may not have been particularly helpful, but it is clear enough what it meant and that it intended the two expressions to be synonymous. Clause 1(b) refers specifically to the new rent being a sum representing the open market letting value of the land, to be assessed in accordance with current open market values of the Site. Any valuation technique employed to ascertain that value must be directed towards identifying the rent which would be agreed in the open market on a letting which must be assumed to take place. Any technique yielding a result which, viewed objectively, simply would not be agreed in the open market is either a flawed technique, or is being wrongly employed.
>
> 50. All of the considerations mentioned by the LVT in paragraph 63(e) and (f) are matters which would be likely to influence the level of rent which would be agreed for a development site which was offered for letting in the open market without a premium. Apart from the fact that it makes the valuation exercise theoretical and therefore very difficult, it does not matter that such a transaction would never be encountered in the open market – the parties have agreed that the assessment of the rent is to be undertaken on that basis and it is therefore necessary to assume a letting would be achieved. The LVT was well aware of that and at the start of paragraph 63 it prefaced its whole discussion of the rent review hypothesis by reminding itself that such a market did not exist and that there was no evidence of transactions on the terms which had to be assumed. Nonetheless, as the Court of Appeal had explained in *Dennis & Robinson Ltd v Kiossos Establishment* [1987] 1 EGLR 133, it must be assumed that there will be a letting of the property between a willing landlord and a willing tenant."

26. I will say at once that I respectfully agree with the approach of the Deputy President in those two paragraphs, which seems to me to be firmly based on the Court of Appeal authorities to which I have already referred, and to give appropriate recognition to the fact that the letting value which has to be ascertained is a letting value in the open market. Conversely, there is no reference to the open market in section 15(2) of the 1967

Act.

27. Despite the absence of any reference to the open market in section 15(2), the Deputy President went on to observe at [56] of the UT Decision:

> "It is hard to see why a rental valuation taking into account all of the factors identified by the LVT and a valuation for the purpose of section 15 of the 1967 Act should not arrive at the same rent, assuming the same lease length in each case and no complications over the permissible use of the site. In both cases the property to be valued is a cleared site to be let for development with rent reviews at 25 year intervals. That the results yielded by the two approaches in this case were so different (£650 a year for the first, and £4,500 to £5,000 a year for the second) was a consequence of the parties' agreement based on the evidence available to them and the conclusions they drew from it. It may be that a greater degree of convergence might be expected in other cases."

28. The Deputy President added, at [57], that Mr Loveday had made it very clear that the Landlord was not to be taken to accept that the method of valuation adopted by its own expert, Mr Evans, in this case was necessarily appropriate for use in other cases where there is a rent review clause in similar terms. As the Deputy President commented:

> "Since the evidence on which Mr Evans based his conclusion was a proposed sale of a long lease of a completed flat at a premium of almost £200,000 whereas the rent review clause assumes a letting without a premium, albeit of a clear site, it is perhaps understandable that the Appellant may wish to present its case less conservatively on another occasion."

The appeal to this court

29. The three grounds of appeal to this court for which permission was granted may be summarised as follows:

(a) Ground 1: the Upper Tribunal was wrong to say (at [49] of the UT Decision) that the reviewed rent under clause 1(b) of the Lease was to be "a rent which would be agreed in the open market", because there was no such express limitation on the words "annual rent" in clause 1(b);

(b) Ground 2: the findings of the Upper Tribunal in [49] and [50] of the UT Decision are inconsistent, because a valuation exercise which was "theoretical and therefore very difficult" could not yield a rent "which would be agreed in the open market"; and

(c) Ground 3: in so far as the Upper Tribunal relied on the Kiossos case, that

authority is distinguishable on the facts and/or was wrongly decided.

30. In his written and oral submissions to us, Mr Loveday wisely abandoned the contention that Kiossos had been wrongly decided. In support of his other contentions, he repeated and developed the arguments which he had advanced to the Upper Tribunal. He began by reminding us that the interpretation of clause 1(b) of the Lease has a very significant effect on the price payable for the freehold, given the length of the unexpired term and the statutory bar on the inclusion of any "marriage value" as a component of the price. He then submitted that application of the market ground rent approach adopted by the LVT, and endorsed by the Upper Tribunal, presented both practical and legal difficulties to the parties in the present case. The practical problem was that there is no market for the sale of long leases of vacant plots of land subject to a ground rent. The only significant market, he submits, is for the sale of leases of flats and houses which are built upon such plots, and which are subject to purely nominal ground rents. But the figure of £650 per annum adopted by Mr Evans, and agreed by Mr Cooper, as the market ground rent was itself based on a nominal ground rent payable in the market. This reflected the legal difficulty in applying the market ground rent approach, namely that it forced the parties to reintroduce by the back door something which the LVT had already rejected as inconsistent with the terms of clause 1(b). On analysis, therefore, the reviewed market ground rent approach simply resulted in the adoption of a nominal ground rent, albeit the highest nominal ground rent which could be found in the market.

31. In relation to the construction of clause 1(b), Mr Loveday submitted that the use of the word "representing" in the phrase "a sum representing the open market letting value of the land hereby leased" meant that the annual rent was not itself the open market letting value, but rather a proxy for an open market rent, in circumstances where no open market rents are available. The Upper Tribunal was therefore wrong to say that the rental value envisaged was one which "would be agreed in the open market". On the other hand, the second part of the formula in clause 1(b) which requires the capital value of the vacant site to be ascertained does require the input of a true open market value, in relation to a market which clearly exists in the real world (i.e. for vacant development sites with planning permission). Section 15 of the 1967 Act then provides a familiar methodology, which should have been well known to the original parties to the Lease and their professional advisers in 1991, for assessing an annual rent on the basis of the capital value of such a site. This must therefore be the approach which the parties objectively intended to adopt, and it gives full content to the second reference to open market value in clause 1(b).

32. Mr Loveday sought to derive further support for this argument from the fact that the Lease had originally been granted on favourable terms, for a low premium and at a low initial ground rent. Consistently with this, he submits, the parties must have intended that the Landlord should be able to review the rent after 25 years to a level above that achievable in the open market.

33. Finally, in relation to Kiossos, Mr Loveday submitted that it is not authority for the proposition that one must ignore the fact that no open market existed for letting values of the site at the date of the Lease in 1991. On analysis, however, this seems to me to be just another aspect of Mr Loveday's submission that, on its true construction, clause 1(b)

does not require the open market letting value of the site to be ascertained, but only a sum which represents, or is a proxy for, such value.

34. These submissions were attractively presented by Mr Loveday, but I have to say I find them no more convincing than the Upper Tribunal did.

35. In the first place, I am unable to accept the significance which Mr Loveday would attach to the word "representing" in clause 1(b). To my mind, it signifies no more than that the open market letting value of the vacant site is necessarily a hypothetical open market value, because the land subject to the Lease in fact has the Property standing upon it. I am therefore unable to agree that the annual rent is in any sense intended to be a proxy for the open market letting value of the land. On the contrary, the open market letting value is to be ascertained making the specified assumptions, and the sum thus ascertained then represents, or in other words is to be taken as being, the annual rent.

36. Secondly, I am satisfied that the absence of comparable transactions in the real world is irrelevant. The parties to the Lease agreed on the hypothesis which has to be made, and as Hoffmann LJ explained in Gray, there is nothing hypothetical about the open market as such. The case is therefore on all fours with Kiossos, because it requires the assumption of a market in which the hypothetical letting value will be agreed. This kind of hypothetical exercise is one which expert surveyors are well accustomed to undertake, and the fact that Mr Evans and Mr Cooper were able to reach agreement on the basis of the LVT Decision shows that the exercise is not inherently impossible, whatever doubts one may harbour about the methodology actually employed by Mr Evans.

37. Thirdly, it seems to me paradoxical to argue that the parties to the Lease must be taken to have had in mind the methodology set out in section 15(2) of the 1967 Act, when if that was what they intended, it would have been the simplest thing in the world to say so. It needs to be remembered that the purpose of the rent review clause in the Lease was to ascertain the rent payable for the 74 years of the term running from 24 June 2015 until its expiry in June 2089. I can see no good reason to suppose that the parties would have had in mind for this purpose provisions of the 1967 Act which could apply only to the further notional term of 50 years which one has to imagine thereafter for certain purposes of the 1967 Act. Moreover, as I have already pointed out, there is no reference to the open market anywhere in section 15(2), whereas the draftsman of clause 1(b) of the Lease placed the open market at the centre of the rent review provision, using it both in relation to the annual letting value of the land and in relation to the capital value of the vacant site.

38. Fourthly, for the reasons which I have already given, I see no inconsistency between paragraphs [49] and [50] of the UT Decision. On the contrary, as I have already said, I respectfully agree with and endorse the reasoning of the Deputy President in those paragraphs.

39. Finally, the fact that the Lease may initially have been granted on favourable terms in 1991 seems to me entirely irrelevant to the true construction of the rent review provisions. Furthermore, any suggestion that the parties might reasonably have

contemplated review of the rent to a level in excess of market value seems to me quite impossible to reconcile with the repeated references to open market value in clause 1(b) itself. The notional open market value may be difficult to ascertain, but on no view of the matter can it be greater than market value. That would be to contradict the hypothesis which has to be applied.

40. For all these reasons, therefore, I consider that the Upper Tribunal came to the correct conclusion, and I would dismiss the appeal.

Lord Justice Sales:

41. I agree.

Lady Justice Black:

42. I also agree.