UPPER TRIBUNAL (LANDS CHAMBER)

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UTLC Case No: LRA/50/2017

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2011

LEASEHOLD ENFRANCHISEMENT –Flat – Premium – Whether ground rent validly reviewed – Whether notice validly served making time of essence of ground rent review

IN THE MATTER OF AN APPEAL AGAINST A DECISION OF THE FIRST-TIER TRIBUNAL PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

BETWEEN:

PROXIMA GR PROPERTIES LIMITED

Appellant

and

MICHAEL SPENCER

Respondent

Re: Flats 3, 7 and 17,
29 Leaside Road,
Hackney,
London E5 9LU

Before: His Honour Judge Hodge QC

Determination on written representations

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The following cases are referred to in this Decision:

Barclays Bank Plc v Savile Estates Ltd [2002] EWCA Civ 589, [2003] 2 P & CR 28
Holwell Securities Ltd v Hughes [1974] 1 WLR 155
Olympia & York Canary Wharf Ltd (No 2), Re [1993] BCC 159
Marks & Spencer Plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd [2015 UKSC 72, [2016] AC 742
Power Securities (Manchester) Ltd v Prudential Assurance Co Ltd [1987] 1 EGLR 121

The following additional case was referred to in the written representations:

United Scientific Holdings Ltd v Burnley Borough Council [1978] AC 904

DECISION

INTRODUCTION

1. This is a landlord's appeal from a decision of the First-Tier Tribunal Property Chamber (Residential Property) dated 22 February 2017 determining (pursuant to s 48 of the Leasehold Reform, Housing & Urban Development Act 1993) that the appropriate premium payable for the grant of new leases of three flats (numbered 3, 7 and 12) in the respondent's long leasehold ownership at 29 Leaside Road, Hackney, London E5 9LU was £6,800 for each flat. Each lease had been granted in September 1985 for a term of 125 years from 1 December 1984 at a yearly ground rent of £50 payable half yearly in advance "subject to review on each 21st anniversary of the grant hereof". Before the FTT the vast majority of matters relating to the assessment of the premium had been agreed, leaving only the passing ground rent, and consequently the premium payable on the grant of each new lease, to be determined by the FTT. As a result, the FTT determined the matter on the papers, and without carrying out a physical inspection of the property. The issue between the parties was whether the ground rent had been properly reviewed and determined with effect from the first review date on 1 December 2005. The parties' expert valuers had agreed two alternative valuations depending upon the resolution of this issue. If the ground rent had been properly reviewed and determined with effect from 1 December 2005 at a figure of £192.70 per annum, then it was agreed that the appropriate premium payable in respect of each lease extension was £7,900. If (as a result of letters said to have been sent by the respondent seeking to make time of the essence of the landlord's application for an expert to determine the rent review) the December 2005 rent review was time-barred, so that the ground remained at £50 per annum, then it was agreed that the appropriate premium payable in respect of each lease extension was £6,800. The FTT held that the ground rent had not been properly reviewed and determined so that the appropriate premium was the lesser figure. On 18 April 2017 the FTT determined that it would not review its decision and refused permission to appeal.

2. On 11 July 2017 the Deputy Chamber President (Martin Rodger QC) granted permission to appeal. The proposed appeal was said to be arguable for the reasons given in the draft grounds of appeal. More fundamentally, it was also said to be arguable that the FTT had been wrong to conclude that notice could be given making time of the essence of the right to appoint an expert to determine the rent review where the lease specifically stated that an expert might be appointed "at any time". An implied term that an expert would be appointed within a reasonable time would arguably appear to be inconsistent with an express term that an application might be made for such appointment at any time. The Deputy President directed that the appeal would be a review of the decision of the FTT and would be conducted under the Tribunal's written representation procedure. He also gave procedural directions for the conduct of the appeal, which have been duly complied with. As a result, the Tribunal has received written representations in support of the appeal dated 10 August 2017, a substantial written response from the respondent dated 6 September 2017 (incorporating earlier written representations to the Tribunal dated 28 June 2017 and a suite of other documents), and the appellant's response to the respondent's

representations dated 22 September 2017. The Tribunal has had due regard to these written representations and has taken them into account in arriving at its decision.

Background

3. Clause 2 (b) of each lease sets out the mechanism by which the rent is to be reviewed. It provides for the rent to be determined by a Chartered Surveyor, acting as an expert and not an arbitrator, who is to be appointed by the President of the RICS, or in default of the Law Society, "on the application by the Lessor made at any time after the expiration of the 20th, 41st, 62nd, 83rd or 104th year of the said term (as the case may be)". It should be noted that the leases contain no provision for the payment of interest on late reviewed rent. It was common ground that the first rent review should have been on 1 December 2005. However, no such review took place, although the rent payable at the sister block on the Bakers Hill side of the estate was reviewed, but not until 2009, a fact which the respondent invites the Tribunal to take into consideration.

4. Various demands were made upon the respondent for ground rent and service charges. The earliest rent demand notice before the FTT (for £25 half yearly rent in advance said to be due on 1 October 2010) appears to have been issued by Estates & Management Limited on 25 August 2010 and purports to have been given by Peverel Properties Ltd, with a registered office at Molteno House, 302 Regents Park Road, London N3 2JX, although the FTT noted that it would appear that the appellant had been the registered freehold proprietor since 2008. Also before the FTT was an earlier application to the respondent, dated 16 December 2009, for payment of a service charge year end adjustment for the period 1 October 2008 to 30 September 2009. This application for payment included the statement: "Notices to the landlord (including notices in relation to proceedings) may be served at:- Peverel Properties Limited, c/o Peverel OM Limited, Marlborough House, Wigmore Place, Luton LU2 9EX". On 13 January 2010 the respondent sent three separate letters, one for each flat, to this address, referring to the provisions for rent review in each lease and to Peverel Properties Ltd's complete awareness of the need to review the respondent's rent, and its failure to do so. The letters continued: "I am therefore giving you notice that time is now of the essence in respect of the rent review, and that I now require this to be completed and that I should be informed in writing accordingly by no later than 4 pm on 1 March 2010. This notice is without prejudice to all other rights I have to question any review in any manner available to me, and on any basis." There was no response, or any reaction, to these letters. In the appellant's written representations to the FTT on legal issues dated 7 February 29017 the appellant states (at paragraph 16) that then appellant "has no record of receipt of the 2010 letters" which the respondent claims he sent; but it is the appellant's position that, in any event, the letters were of no effect. At paragraph 29 of the same document the appellant reiterates that "there is no evidence that the 2010 letters were received" by the appellant at any time prior to 1 March 2010. It was noted that the 13 January 2010 letters had been sent, not to the appellant (which was said to have been the landlord of the flats since 2008), but to Peverel OM Limited, which had dealt with service charge collection, but not rent reviews, and had had no responsibility for dealing with rent reviews. Rent collections and rent reviews were said to have been, and still to be, dealt with on behalf of the

appellant by Estate & Management Limited. It was said that the onus was on the respondent to prove proper service of the 2010 letters. In its decision the FTT noted that the various rent demands had sought payment of the half yearly rent of £25 until October 2015, when demands were issued for £1,211.97 based on an annual rent of £222.50 which had been assessed by the appellant without following the procedures under the relevant lease. The FTT also noted (at paragraph 14 of its decision) that the appellant, through the RICS, had appointed Mr George Palos to review the rent as an expert, such appointment having been made on 3 March 2016, over 6 years after the respondent's January 2010 letters. It was not until 29 September 2016 that the new rent had been determined at £192.70 per annum.

The FTT's decision

5. It was against this background that the matter came before the FTT on the papers. In quoting from the FTT's decision the Tribunal has changed the descriptions of the parties so as to accord with their status in this appeal. At paragraph 15 of its decision the FTT noted that it was the respondent's case that the January 2010 letters had made time of the essence and that the appellant's failure to respond and deal with the review by the timescale in the letters had debarred the appellant from thereafter implementing the review and had invalidated both the appointment of Mr Palos and the rent he had determined. At paragraph 16 the FTT recorded that the appellant's assertions had been set out at paragraph 21 of its written representations dated 7 February 2017; and the FTT said that it had noted what had been said. The representations were said to go on to refer to the *Handbook of Rent Review*, an extract from which [paragraphs 3.12.1 to 3.12.4] had been annexed to Mr Balcombe's landlord's expert report [as HNG 3]. The representations were said to deal with the nature of the rent review provisions, an allegation that the 2010 letters had not been received by the appellant at any time prior to 1 March 2010, and the terms of the letters, which were said not to have stated what the consequences would be for failure to comply, and also to have referred to a number of authorities.

6. The FTT set out its finding at paragraphs 17 to 25 of its decision. It said that the extract from the *Handbook of Rent Review* had been helpful. The FTT said that it thought that it had been accepted that it was only the landlord which could trigger the rent review process and that its timing "is loose indicating that it could be made at any time after the 20th year and so forth as set out at clause 2 (b) of the lease. There is no cut-off date." Of the authorities the FTT said that it had found the decision of the Court of Appeal in *Barclays Bank Plc v Savile Estates Ltd* [2002] EWCA Civ 589, [2003] 2 P & CR 28 to be of the greatest assistance. It was said to post-date a number of the authorities referred to in the *Handbook*. The case was said to have involved a commercial lease but the FTT did not see why the principle should not apply in the instant case. Before going to the judgment of Aldous LJ, the FTT said that it was appropriate to review the issues raised by the appellant.

7. The FTT dealt with the argument that the January 2010 letter had failed to reach the appellant at paragraph 19. As to this, the FTT said: "It seems to us that this fault, if there be one, rests with the appellant. The demands for ground rent in 2010 and 2011 name Peverel Properties Limited as the party giving the notice for payment under the Commonhold and Leasehold Reform Act 2002. The Letter was sent to that company and it would be for Peverel or the appellant to show that the letter, of which there were three, did not reach the offices at Molteno House. They have not in our finding done so. The case of *Re Olympia & York Canary Wharf Ltd (No 2)* is referred to."

8. As to the argument that the 'time of the essence' letters contained no consequence for failure to comply, the FTT found (at paragraph 20) that "it is clear that given the terms of the Letter Mr Spencer is raising the lack of rent review and reserving his rights to question any review in any manner available to him and on any basis". The FTT then returned to the *Barclays Bank* case, summarising the Court of Appeal's finding and citing from paragraph 14 of the leading judgment of Aldous LJ. The FTT observed that in January 2010 the respondent had put the appellant, through Peverel, on notice that he required the rent review to take place. Indeed the appellant had sought to recover an increased ground rent, assessed without following the procedure set out in the lease. It was not until 2016 that Mr Palos had been instructed, and not until September 2016, some 9 months after the initial notice under s 42 had been served, that the reviewed rent had been determined. The FTT considered (at paragraph 24) that the letter had indeed constituted notice that time was of the essence: "It does not spell out the consequences but the appellant did nothing to review the rent until more than 6 years later. This was unreasonable. It leaves the respondent in a difficult position should he have wished to sell any of his flats as questions as to ground rent would have been raised. It has also meant that he may face a demand for back dated rent, which indeed has already been served on him." The FTT commented that at the time of the initial notice, and hence the valuation date, the rent passing was £50. In those circumstances the FTT concluded that the ground rent was set at £50 per annum and that the premium payable was £6,800 for each flat.

Criticisms of the FTT's decision

9. At paragraph 21 of its written representations to the FTT dated 7 February 2017 the appellant had rejected the respondent's assertions that the effect of the January 2010 letters had been to make time of the essence of each of the reviews under the leases and that the appellant's failure to deal with the reviews by 1 March 2010 debarred the appellant from thereafter implementing the reviews and invalidated the appointment and determination of Mr Palos for three separate reasons: First, the provisions of the rent review clauses were not of a nature that enabled time to be made of the essence. This objection was developed at paragraphs 22 to 28 by reference to paragraph 3.12.3 of the *Handbook of Rent Review* which was cited in support of the submission that there was simply no time limit in clause 2 (b) of each lease on which a time of the essence notice would have been able to bite. Secondly, there was no evidence that the January 2010 letters had ever actually been served on the appellant at any time prior to 1 March 2010. At paragraphs 29 to 31 it was said that the onus was upon the respondent to prove proper service of the 2010 letters.

Thirdly, the terms of the January 2010 letters were such that, insofar as they sought to make time of the essence of the reviews, they failed properly or validly to achieve this. The submission that the January 2010 letters were invalid for failing to state the consequences of a failure to comply with the notice purporting to make time of the essence was developed at paragraphs 32 to 35 by reference to the case of *Re Olympia & York Canary Wharf Ltd (No 2)* [1993] BCC 159 and paragraph 3.12.4 of the *Handbook of Rent Review*. The appellant contends that the FTT erred in rejecting each of these submissions. It is convenient to consider each of them in turn.

The nature of the rent review provisions

10. The appellant submits that clause 2 (b) of each lease does not provide a deadline for the landlord to initiate a rent review but expressly allows the landlord to apply for a Chartered Surveyor to be appointed as expert "at any time after the expiration of the 20th … year of the said term". Accordingly there is said to have been no delay by the landlord in triggering the review process and the respondent was not entitled to serve notice making time of the essence. At paragraph 18 of its decision the FTT said that it found the Court of Appeal's decision in the *Barclays Bank* case to be "of greatest assistance". It was said to post-date a number of the authorities referred to in the *Handbook*. Although that case involved a commercial lease, the FTT did not see why it should not apply in the instant case; and it stated the effect of the decision, and cited from the leading judgment of Aldous LJ at paragraphs 21 and 22. The appellant submits that the FTT was wrong to apply the decision in the *Barclays Bank* case as it did to the instant case. That case had held that business efficacy required a term to be implied into the rent review provisions of a lease that the landlord should make an application for the appointment of an independent expert within a reasonable time (which enabled the tenant to make time of the essence after a delay). It was inappropriate to imply a term in the subject leases that the landlord was to appoint an expert within a reasonable amount of time because those leases expressly allowed the landlord to appoint an expert "at any time after the expiration of the 20th … year of the said term". In its response to the respondent's representations, the appellant points out that although the review date is fixed, the formal review process is triggered by the landlord applying for the appointment of an independent expert to determine the reviewed rent, which may be made "at any time after the expiration of the 20th … year of the said term". That provision is said to be unambiguous. It is the respondent who is said to be seeking to import an implied term to change the natural meaning of the leases. The appellant points out that, unlike the subject leases, the lease in the *Barclays Bank* case did not state that an independent expert appointment could be made "at any time". It was well established that an implied term should not be imported into a contract that conflicted with a clear express term of that agreement, citing *Marks & Spencer Plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2015 UKSC 72, [2016] AC 742 at paragraph 28. Since the review clause was clear and a conflicting implied term should not be imported, considerations of business efficacy did not arise.

11. In his written representations the respondent had made reference to the Consumer Rights Act 2015, which had replaced the former Unfair Terms in Consumer Contract Regulations 1999, and had submitted that if he was to be entirely at the whim of the landlord as to when the rent review process was to be initiated (and thus determined) that would create a huge imbalance between the landlord and the tenant and was manifestly unfair. Fairness, and the requirement of good faith, were said to require that the tenant should be entitled to make time of the essence of the triggering of the rent review. The appellant's response was that since the leases pre-dated the coming into operation of the 2015 Act on 1 October 2015, it was the 1999 Regulations which were the governing provisions. There was said to be nothing in the OFT Guidance on Unfair Terms in Tenancy Agreements (which were said to be of continuing relevance to pre-October 2015 tenancy agreements) which would suggest that the subject rent review clause would be considered unfair, or require changing in the manner suggested by the respondent. The appellant pointed out that: (1) It was questionable whether a potential purchaser of the lease would be greatly concerned about a potential increase in the ground rent in the context of the capital value of the lease but, in any event, he could address any uncertainty by undertaking his own assessment of the likely new rent and factoring that in to his offer for the property or he could include a term that any backdated rent increase should be borne by the seller. (2) No reasonable landlord would delay reviewing the rent until the end of the lease because there was no provision for the recovery of interest on backdated rent increases. (3) The existence of an outstanding rent review(s) would not prevent a tenant from exercising their rights under the 1993 Act.

12. I accept the appellant's submissions on this point. Whilst the FTT rightly considered the *Barclays Bank* case to be of potential relevance and application to the rent review provisions in residential leases, it failed properly to analyse the difference between the provisions of the lease in that case and the subject leases. As appears from the quotation from the reddendum to the lease at paragraph 2 of the judgment of Aldous LJ, the lease in the *Barclays Bank* case merely provided for the reviewed rent to be assessed (in default of agreement) by a surveyor "to be appointed on the application of the landlord by the President" of the RICS. There was no express provision (as in the subject leases) for such application to be made "at any time" after a particular date. Twice in his leading judgment (at paragraphs 11 and 14) Aldous LJ expressly mentioned that "there was no stated time" within which the option to seek a rent review in default of agreement had to be exercised and "no stated time by which the landlord has to make up his mind and apply to the President of the RICS". In the Tribunal's judgment, the FTT should have had regard to, and applied, the following statement at paragraph 3.12.3 of the *Handbook of Rent Review* (reproduced as part of Appendix HNG 3 to Mr Balcombe's expert report and cited at paragraph 25 of the Appellant's representations dated 7 February 2017): "… it is axiomatic that, in order for a party to be able to serve notice making time of the essence, there must be a time limit (express or implied) for the step in question … If the rent review clause merely entitles the landlord to initiate a rent review at any stage (without stipulating when the initiation must take place), then a notice purporting to make time of the essence will simply be of no effect, there being no time limit to which such a notice could attach: see *Power Securities (Manchester) v Prudential Assurance* (1987) … It will be otherwise if the circumstances are such that it would be appropriate to imply a time limit – see *Barclays Bank v Savile Estates* (2002)." In *Power Securities (Manchester)*

Ltd v Prudential Assurance Co Ltd [1987] 1 EGLR 121 at 123 G-H Millett J expressly rejected the submission of counsel for the landlord that "where a party has an express right to do something at any time, the other can always make time of the essence by serving a notice stipulating a final date beyond which there should be no further opportunity given and making time of the essence of that date". Millett J expressly said: "Neither party is entitled to abridge the time given by the contract to the other. The most that he can do is to make time of the essence for the taking of a step for which a time limit has been prescribed in the contract and has been exceeded." It is this point that was raised by the Deputy President when formulating his reasons for giving permission to appeal. Although the observations of Millett J were strictly obiter, they are referred to without any disapproval in the commentary upon the case digest of the *Power Securities* case at para C-309 of Vol 2 of the *Handbook of Rent Review*, where it is said that Millett J "stated, obiter, that a notice making time of the essence cannot be served unless a time limit is prescribed in the contract. No such notice can, in his view, be served where a party has an express right to take a particular step at any time." In the Tribunal's judgment, that is an accurate statement of the law, which should have been applied by the FTT in the present case. The Tribunal would therefore allow the appeal on this point. Before the FTT no reliance was placed by the respondent on the 1999 Regulation and it is now too late to raise this point on appeal to the Tribunal; but, in any event, the Tribunal accepts the appellant's submission that there is nothing unfair in the rent review provisions of the subject leases which would require adjustment so as to entitle the respondent to serve notice making time of the essence of an application for the appointment of an expert to determine any outstanding rent review under the subject leases.

Service of the January 2010 letters

13. The appellant submits that there was, and is, no evidence of it having received any of the January 2010 letters prior to this dispute arising. At paragraph 19 of its decision the FTT stated that it would be for the appellant, or its former agent, Peverel, to show that the letters, of which there were three, had not reached the appellant's offices. That is said to be an incorrect statement of the law and that the burden should have been upon the respondent, as the sender of the letters, to establish their receipt by the appellant. Reference is made to the decision of the Court of Appeal in *Holwell Securities Ltd v Hughes* [1974] 1 WLR 155. The FTT should have placed the burden on the respondent. At the same paragraph of its decision, and also in connection with the issue of the receipt of the letters, the FTT had referred to the decision of Morritt J in *Re Olympia & York Canary Wharf Ltd (No 2)* [1993] BCC 159; but this is said to have been an irrelevant consideration as there is nothing in that decision on the question of service of letters and the burden of proof. It is submitted that despite having before it no evidence that the January 210 letters were actually received by the appellant or its agents, the FTT had incorrectly found (at paragraph 23 of its decision) that the respondent had, in January 2010, put the appellant on notice that he required the rent review to take place.

14. The Tribunal rejects these submissions. It considers that the FTT did not fall into error on the issue of the service of the January 2010 letters. The case of *Holwell Securities Ltd v Hughes* concerned the exercise of an option to purchase property; and as Lawton LJ observed (at p 159H): "It is a truism of the law relating to options that the grantee must comply strictly with the conditions stipulated for exercise". More pertinently, however, the decision in that case turned on the fact that it was not disputed that the relevant notice had somehow gone astray and had never reached its intended recipient: see p 157C-D per Russell LJ (with the agreement of Buckley LJ; see p 159G) and p 159H per Lawton LJ. In the instant case there was evidence from the respondent that he had sent the three letters to the agent identified in the most recent application for payment of the service charge year end adjustment (dated 16 December 2009) as the appropriate recipient for notices to the landlord (including notices in relation to proceedings). Having proved that the letters were sent, there is a presumption that they were served in the ordinary course of post which required to be displaced by evidence of non-receipt from the appellant. In other words, although the burden of proof of service originally fell upon the respondent, upon proof of posting of the letters an evidential burden passed to the appellant to establish that they were never received. The appellant did no more than say that it had no record of receipt of the letters. It did not condescend to any particulars of the inquiries it had addressed to Peverel OM Limited as the addressee of the letters, or of the procedures that had been in place in January 2010 for the forwarding of letters from its agent to the landlord. In those circumstances, the FTT was entitled to find that the appellant had not discharged the evidential burden of disproving the presumption that the letters were delivered in the normal course of post. The Tribunal asks rhetorically: what more could the respondent have produced by way of evidence that the letters had been duly received by the landlord's duly authorised agent? There was no more evidence the respondent could have adduced. The Tribunal would have dismissed the appeal on this point had it been necessary to do so.

Terms of the January 2010 letters

15. The appellant submits that there is a clear requirement at law that notice from a contacting party seeking to make time of the essence must state, among other things, the consequence of failure to comply with the notice. The appellant relies upon the decision of Morritt J in *Re Olympia & York Canary Wharf Ltd (No 2)* [1993] BCC 159 and the statement at paragraph 3.12.4 of the *Handbook of Rent Review* that a notice making time of the essence "must state clearly what the other party is required to do and the consequence if he fails". At page 170 of the report, Morritt J said: "I do not think it is necessary for a notice to make time of the essence that it should use those words. What is required is that the notice should state clearly what the other party is required to do and the consequence if he fails." The appellant submits that the January 2010 letters did not state the consequence of a failure to comply with their requirements. They simply state that: "I am therefore giving you notice that time is now of the essence in respect of the rent review, and that I now require this to be completed and that I should be informed in writing accordingly by no later than 4 pm on 1 March 2010. This notice is without prejudice to all other rights I have to question any review in any manner available to me, and on any basis." The FTT accepted (at paragraph 24) that the letters did not "spell out the consequences"; but the FTT nevertheless found (at paragraph 20) that it was clear that the respondent was "raising

the lack of rent review and reserving his rights to question any review in any manner available to him and on any basis". The FTT is said to have erred in determining (at paragraph 24) that the letters "did constitute notice that time was of the essence" despite that fact that they "did not spell out the consequences" The FTT is said to have applied the wrong test in dealing with the matter. It stated (at paragraph 24) that the appellant "did nothing to review the rent until more than 6 years later" and from this concluded that this was "unreasonable" as it left the respondent "in a difficult position should he have wished to sell any of his flats as questions as to ground rent would have been raised. It has also meant that he may face a demand for backdated rent." The appellant submits that if the FTT had considered the matter in the correct way, and applied the requirements set out in *Re Olympia & York Canary Wharf Ltd (No 2*), it would have been clear that if the letters had not only set down a reasonable timescale for applying for the appointment of an expert to determine the reviewed rent but had also spelled out the consequences of non-compliance with that timescale, the appellant would have been barred from implementing the rent review if he had failed to comply within that timescale. No issue of reasonableness on the part of the appellant is or would have been relevant as the respondent would have known exactly where he stood at the end of the deadline and would have been in a position to communicate this to potential purchasers.

16. Again, the Tribunal rejects these submissions. It considers that the FTT did not fall into error in finding that the wording of the January 2010 letters was sufficient to make time of the essence of the making of an application for the appointment of an expert to determine the reviewed rent. The point that Morritt J was making in *Re Olympia & York Canary Wharf Ltd (No 2*) was simply that a notice need not expressly state in terms that it is making time of the essence provided it states clearly what the other party is required to do and the consequence if he fails. But in the Tribunal's judgment, if a notice does expressly state that time is now of the essence and specifies a timescale for completion then that is sufficient to constitute a valid notice. Here the reasonable recipient of the letters, reading them with knowledge of the rent review provisions of the lease (which are expressly referred to therein), would have known precisely what the writer of the letters was seeking to achieve, namely to make time of the essence of the making of an application for the appointment of an expert to determine the by then long outstanding rent reviews. In the Tribunal's judgment, it was unnecessary for the letters to go on expressly to spell out the consequences of non-compliance, namely the loss of the right to initiate the outstanding rent review. That consequence followed from non-compliance with the timescale as a matter of law. The Tribunal would have dismissed the appeal on this point had it been necessary to do so.

Decision

17. For the reasons stated at paragraph 12 of this decision, the appeal is allowed.

18. The First-Tier Tribunal's determination that the appropriate premium payable for the new lease is £6,800 for each flat is set aside.

19. The Tribunal determines that the appropriate premium payable for the new lease is £7,900 for each flat.

David R. Hodge

His Honour Judge David Hodge QC

17 November 2017