Neutral Citation no. [2004] NIQB 42 | *Ref:* **HIGF5004**

Judgment: approved by the Court for handing down | *Delivered:* **29/6/04**

(subject to editorial corrections)

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

_____

BETWEEN:

BELFAST FASHIONS

Plaintiff;

-and-

WELLWORTH PROPERTIES LIMITED

Defendant.

_____

HIGGINS J

[1] By a specially endorsed writ of summons issued on 24 January 2003 the plaintiff's claim is for £344,814.20, due and owing by the defendant to the plaintiff in respect of rent due and owing by the defendant and due by a settled account in respect of Store 2014 at Ards Shopping Centre, Newtownards, County Down. The amount is made up of rent of £268,750.00 due on 1 October 2002 and 1 January 2003 together with arrears and VAT less two payments of £176,250.00 on account paid on 26 September 2002 and 3 January 2003 respectively. The Writ was sent to the wrong address and as a consequence no appearance was entered and judgment was marked against the defendant on 24 February 2003. That judgment was set aside by Order of the Master on 21 March 2003 and time for entry of an appearance extended. By their defence served on 8 April 2003 the defendant denied that a letter dated 21 May 2002 constituted or is deemed a valid notice under the Third Schedule of the lease or that the defendant consented or agreed to the proposed increase in rent or that the rent review clause under the Third Schedule had been properly exercised. By way of counterclaim the defendant seeks a declaration pursuant to the terms of the Third Schedule that the terms of any review of rent or assessment of open market rental value should be referred to the award of a single arbitrator and specific performance of the

terms of the lease dated 7 January 1976. By their defence to the counterclaim the plaintiffs deny that there is any sustainable dispute that entitles the defendant to a declaration that an arbitrator be appointed.

[2] The plaintiff is the intermediate landlord of retail premises at Ards Shopping Centre and holds the premises pursuant to a lease (the Head Lease) dated 15 October 1975 between Nomedar Limited and Ross Ferry Limited and the Plaintiff. The defendant (as assignee of F W Woolworth & Company Limited) occupies the premises as sub-tenant pursuant to a sub-lease dated 7 January 1976 (the 1976 lease) between F W Woolworth and Co Limited and the plaintiff. Clause 1(i) of the 1976 lease provides that the lease for the first six months shall be at a peppercorn rent. Clause 1(ii) provides that for the next thirteen and one half years the rent shall be at the yearly rent of £43,750. Clause 1(iii) makes provision for the period after the first fourteen years. It incorporates the terms of the Head Lease and is in these terms –

> "(iii) And thereafter during the remainder of the said term the yearly rent to be ascertained in accordance with the same stipulations and conditions as are expressed and contained in the Third Schedule to the Head Lease as if the same were herein set forth at length and with such modifications only as are necessary to make the same applicable to this present demise and the parties hereto PROVIDED ALWAYS that in addition to disregarding those matters referred to in sub-clauses (i) (ii) and (iii) of paragraph (a) of the Third Schedule to the Head Lease there shall also be disregarded in relation to the rent review to take place at the end of the fourteenth year of the said term any effect on rent of the works carried out by the Tenant at its own expense pursuance to an Agreement dated the Twenty Eighth day of August One Thousand nine hundred and seventy-two and made between the Head Lessors of the one part and the Landlord of the other part …"

The rent review provisions of the Head Lease provide –

> "THIRD SCHEDULE
>
> RENT REVIEW
>
> (a) The rent payable hereunder shall with a view to securing that it is in line with the level of open market rental value from time to time current during the term hereby created be subject to review at the

instance of the Lessors at the end of the first twenty eight years of the term hereby created and hereafter at the end of every fourteenth year (hereinafter called 'the review date') and such reviews shall be effected in accordance with the following provisions of this clause. The expression 'the open market rental value' shall mean a sum in relation to the review period as being at the review date the annual rental value of the demised premises in the open market on a lease by a willing lessor without the payment of any fine or premium for the term of years equivalent in length to the residue then remaining unexpired of the said term hereby created with vacant possession but upon the supposition (if not a fact) that the Lessee has complied with all the obligations as to repair and decoration herein imposed on the Lessee such lease being on the same terms and conditions (other than as to amount of rent and length of term) as are herein contained and there being disregarded (i) any effect on rent of the fact that the lessee or any sub-lessee has been in occupation of the demised premises (ii) any goodwill attached to the demised premises by reason of the carrying on thereat of the business of the Lessee and (iii) any effect on rent of any improvement carried out by the Lessee or any sub-Lessee otherwise than in pursuance of an obligation to his immediate Landlord.

(b) The Lessors shall give to the Lessee not less than three months notice in writing prior to the review date of the Lessor's intention to exercise the right to require a review of the rent then payable hereunder. Such notice shall specify the rent which the Lessors propose as the open market rental value of the demised premises for the review period. In the event of the Lessee not accepting the rent specified in the said notice as being the open market rental value as hereinbefore defined at that time, the Lessee shall so notify the Lessors in writing within twenty one days after the receipt of such notice from the Lessors and the determination of such open market rental value shall be referred to the award of a single arbitrator in case the parties can agree upon one and otherwise to two arbitrators one to be appointed by each party and in either case in accordance with the provisions of the Arbitration Act (Northern Ireland)

1937 and such award shall be final and binding on the parties hereto to the effect that in the event of the amount of the open market rental value therein specified being more than the minimum yearly rent hereby reserved such amount shall become the yearly rent payable hereunder from and after such review date for the remainder of the term of years hereby created or until the next review date as the case may be and all the other terms and conditions of these presents shall remain in full force and effect. In the event however of the amount of the open market rental value specified in such award being less than the yearly rent payable hereunder immediately before the review date then the yearly rent payable hereunder immediately before the review date shall continue to be the rent payable under these presents;

(c) In the event of the Lessors failing to give due notice in terms of sub-paragraph (b) of this clause of intention to exercise the right to require a review of the rent payable hereunder at the review date the Lessors shall be entitled to require such a review at any succeeding quarter day by giving to the Lessee at least three months Notice in writing prior to such quarter day and the foregoing provisions of this clause shall mutatis mutandis apply to such review provided (i) that the review of rent in terms of this provision shall have regard to the open market rental value as hereinbefore defined at the review date and not at such succeeding quarter day and (ii) any increase in rent resulting from such review shall have effect for the succeeding term only and not from the review date."

[3] The relevant review date was 12 September 2002. On 21 May 2002 the plaintiff served notice upon the defendant at 1 High Street, Enniskillen of their intention to exercise the right to require a review of the rent payable. It was in these terms –

"Dear Sirs

RE: BELFAST FASHIONS and WELLWORTH PROPERTIES LTD
UNIT D1 ARDS SHOPPING CENTRE

> We write to you as authorised agents fro Belfast Fashions and in accordance with Clause 1(iii) of the lease dated 7 January 1976 between Belfast Fashions and F W Woolworth & Co Ltd and the Rent Review provisions set out in the Third Schedule of the lease of 15 October 1975 between Nomedar Limited and Ross Ferry Limited and Belfast Fashions, WE HEREBY GIVE YOU NOTICE of our Clients intention to review the rent payable.
>
> In accordance with the provisions in the Third Schedule referred to above, we give you notice that with effect from 12 September 2002 we require the yearly rent payable under the lease to be increased to £1,075,000 (one million and seventy five thousand pounds sterling) per annum.
>
> We would be grateful if you would confirm your acceptance and we will have the necessary Rent Review Memoranda prepared and sent to you for execution."

[4] No immediate response was received to the agent's notice. A specially indorsed writ of summons was issued dated 24 January 2003. An appearance was entered on behalf of the defendants on 24 February 2003. On 27 February 2003 the defendant's agent served a notice disputing the amount of rent increase and requiring the issue to proceed to arbitration in accordance with the terms of the Third Schedule. This was well beyond the 21day period specified in paragraph (b) of the Third Schedule. It was contended on behalf of the plaintiff that by reason of the failure of the defendant to serve a notice within 21 days notifying the plaintiff that the rent specified in their notice was not accepted, the defendant is deemed to have accepted the rent specified in the plaintiff 's notice dated 21 May 2002. The defendant contended that the letter dated 21 May 2002 relied on by the plaintiff as a notice of rent review, was incomplete misleading and ambiguous and thereby not a proper notice to effect a change in rent. In addition it was submitted that time was not of the essence in this rent review and that the dispute between the parties as to future rent should proceed to arbitration in accordance with the terms of the Third Schedule. When the case came on for hearing it was agreed between the parties that the court should rule on two preliminary issues. Counsel reduced these to writing in the following terms –

1. Whether time is of the essence of the rent review provisions applying to the lease between the parties of 7 January 1976;

2. Whether the words "we require the yearly rent" and the last paragraph of the landlords notice of 21 May 2002, render the notice in invalid.

[5] It is probably more convenient to deal with the issues in reverse order. If the notice of 21 May 2002 is invalid then it might be immaterial whether time is of the essence of the agreement or not.

[6] It was contended on behalf of the defendant that the words "we require the yearly rent" were inadequate and that the agent should have referred to the "open market value" following the words used in the lease. Furthermore it was argued that the last paragraph of the letter dated 21 May 2002 that was alleged to constitute the required notice was misleading and highly ambiguous in its language and import. Counsel on behalf of the defendant submitted that a notice that purported to increase the yearly rent to £1,075,000 required to adhere strictly to the terms of the lease and to be couched in clear and unambiguous language. This notice was sent to the lessee and not his lawyer or agent. The terms of the notice were open to the interpretation that the increase in rent was subject only to acceptance by the lessee. It was submitted that the letter should have stated that if the lessee did not accept the proposed rent he must serve notice upon the landlord to that effect and that if he failed to do so the rent would be fixed for the next fourteen years at £1,075,000 per annum.

[7] Counsel for the plaintiff responded that the notice must be read in the context of the lease and objectively. Viewed in these terms it was not ambiguous. A reasonable lessee on receipt of the notice would have the terms of the lease at the forefront of his mind. The question is how such a recipient would have understood the notice.

[8] Shirlcar Properties Ltd v Heinitz and Another 1983 2 EGR 120 was an appeal by the landlord against the judgment of Michael Davies J whereby he dismissed the landlords claim for increased rent in relation to a lease the terms of which are somewhat similar to the terms of the lease in the instant case. The first stage in the rent review process was that the landlord required to serve a notice in writing, signed by or on behalf of the landlords and posted by recorded delivery. Upon service of the notice the lessee had three options – do nothing, enter into negotiations or by counter-notice served within the specified period ask for arbitration. The landlord's agent wrote to the lessee in the following terms –

> "We act on behalf of your Landlords, Shirlcar Properties Ltd, and have been instructed to deal with the rent review on the above premises due as at the 29 September 1981. The rent required as from the review

> date is £6,000 pa exclusive, and we look forward to receiving your agreement."

[9] It was held that this part of the letter complied strictly with all of the relevant provisions of the lease. However, under the author's signature in underlined capital letters were the words "subject to contract". It was held that the inclusion of these words introduced an element of doubt as to whether the landlord was putting forward the sum of £6,000 as a firm figure or as a provisional figure. Thus it could not be said that the notice was an effective trigger notice for the purpose of the lease, as a reasonable lessee might regard this as merely a provisional figure.

[10] Counsel on behalf of the plaintiff in the instant case submitted that in Shirlcar Properties the Court of Appeal and in particular Dillon LJ were satisfied that, apart from the words "subject to contract", the notice was a valid notice. Lawton LJ said that the notice, "subject to contract " apart, complied with everyone of the provisions of subclause (iii) of the lease. Dillon LJ said that he had no doubt that, apart from the words "subject to contract", the notice was a valid notice. Kerr LJ expressed no view on it. He did find the words of Templemen J (as he then was) in Keith Bailey Rogers & Co v Cubes Ltd 1975 31 P&CR 412 at page 415 as apposite. Templeman J said –

> "If it is clear … that each of the recipients could be in no doubt as to what the landlord was up to and what the notice and the letter meant as far as he was concerned, it does not seem to me that the court is entitled or bound to be perverse and invent imaginary difficulties which might have arisen in other cases."

[11] The question of the construction of such notices in the context of a lease was considered in Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd 1997 AC 749. In that case office premises and a car park were demised by two leases dated 11 March 1992 for a term of 10 years from and including 13 January 1992. Each lease contained a clause by which the lessee could determine the lease by serving not less than six months notice in writing on the landlord or its solicitors to expire "on the third anniversary of the term commencement date". By letters dated 24 June 1994 the lessee gave notices to the landlord to determine both leases on 12 January 1995. The judge held that on the true construction of the leases and the notices served by the tenant, the leases were determined on the last moment of 12 January being the first moment of 13 January 1995. The Court of Appeal allowed the landlord's appeal holding that a notice stated to take effect on 12 January could not operate to determine a lease on 13 January and accordingly the notices were ineffective. The tenant appealed to the House of Lords where a majority held that the notices were effective. Their Lordships held that the construction of

such notices had to be approached objectively. The question was how a reasonable recipient would have understood the notices, bearing in mind their context. The purpose of the notices was to inform the landlord of the tenant's decision to determine the leases in accordance with the break clauses; that a reasonable recipient with knowledge of the terms of the leases and of the third anniversary date would have been left in no doubt that the tenant wished to determine the leases on 13 January 1995, but had wrongly described it as 12 January 1995. Lords Steyn, Hoffman and Clyde were of the opinion that the notice required to be considered against the background of and in the context of the lease from which it derived. In so doing the minor error of giving the wrong date could be cured. Lord Steyn summarised his analysis of the problem and the reasons for hi s conclusion in this way at page 767D –

> " The reasons for my conclusion can be stated in the form of numbered propositions.
>
> (1) This is not a case of a contractual right to determine which prescribes as an indispensable condition for its effective exercise that the notice must contain specific information. After providing for the form of the notice ('in writing'), its duration ('not less than six months') and service ('on the landlord or its solicitors'), the only words in clause 7(13) relevant to the content of the notice are the words 'notice to expire on the third anniversary of the term commencement date determine this lease.' Those words do not have any customary meaning in a technical sense. No terms of art are involved. And neither side has suggested that anything should be implied into the language. That is not surprising since the tests governing the implication of terms could not conceivably be satisfied. The language of clause 7(13) must be given its ordinary meaning. A notice simply expressed to determine the lease on the third anniversary of the commencement date would therefore have been effective. The principle is that that is certain which the context renders certain: *Sunrose Ltd v Gould* [1962] 1 WLR 20.
>
> (2) The question is not how the landlord understood the notices. The construction of the notices must be approached objectively. The issue is how a reasonable recipient would have understood the notices. And in considering this question the notices must be construed taking into account the relevant objective contextual scene. The approach in

Reardon Smith Line Ltd v Yngvar Hansen-Tangen (trading as H E Hansen-Tangen) [1976] 1 WLR 989, which deals with the construction of commercial contracts, is by analogy of assistance in respect of unilateral notices such as those under consideration in the present case. Relying on the reasoning in Lord Wilberforce's speech in the *Reardon Smith* case, at pp. 996D-997D, three propositions can be formulated. First, in respect of contracts and contractual notices the contextual scene is always relevant. Secondly, what is *admissible* as a matter of the rules of evidence under this heading is what is arguably relevant. But admissibility is not the decisive matter. The real question is what evidence of surrounding circumstances may ultimately be allowed to influence the question of interpretation. That depends on what meanings the language read against the objective contextual scene will let in. Thirdly, the inquiry is objective: the question is what reasonable persons, circumstanced as the actual parties were, would have had in mind. It follows that one cannot ignore that a reasonable recipient of the notices would have had in the forefront of his mind the terms of the leases. Given that the reasonable recipient must be credited with knowledge of the critical date and the terms of clause 7(13) the question is simply how the reasonable recipient would have understood such a notice. This proposition may in other cases require qualification. Depending on the circumstances a party may be precluded by an estoppel by convention from raising a contention contrary to a common assumption of fact or law (which could include the validity of a notice) upon which they have acted: *Norwegian American Cruises A/S (formerly Norwegian American Lines A/S) v Paul Mundy Ltd* [1988] 2 Lloyd's Rep. 343. Such an issue may involve subjective questions. That is, however, a different issue and not one relevant to this appeal. I proceed therefore to examine the matter objectively.

(3) It is important not to lose sight of the purpose of a notice under the break clause. It serves one purpose only: to inform the landlord that the tenant has decided to determine the lease in accordance with the right reserved. That purpose must be relevant to the construction and validity of the notice. Prima facie

> one would expect that if a notice unambiguously conveys a decision to determine a court may nowadays ignore immaterial errors which would not have misled a reasonable recipient.
>
> (4) There is no justification for placing notices under a break clause in leases in a unique category. Making due allowance for contextual differences, such notices belong to the general class of unilateral notices served under contractual rights reserved, e.g. notices to quit, notices to determine licences and notices to complete: *Delta Vale Properties Ltd. v. Mills* [1990] 1 WLR 445, 454E-G. To those examples may be added notices under charter parties, contracts of affreightment, and so forth. Even if such notices under contractual rights reserved contain errors they may be valid if they are "sufficiently clear and unambiguous to leave a reasonable recipient in no reasonable doubt as to how and when they are intended to operate:" the *Delta* case, at p. 454E-G, *per* Slade LJ and adopted by Stocker and Bingham LJJ; see also *Carradine Properties Ltd v Aslam* [1976] 1 WLR 442, 444. That test postulates that the reasonable recipient is left in no doubt that the right reserved is being exercised. It acknowledges the importance of such notices. The application of that test is principled and cannot cause any injustice to a recipient of the notice. I would gratefully adopt it.
>
> (5) That brings me to the application of this test. The facts are simple. Crediting a reasonable recipient with knowledge of the terms of the lease and third anniversary date (13 January), I venture to suggest that it is obvious that a reasonable recipient would have appreciated that the tenant wished to determine the leases on the third anniversary date of the leases but wrongly described it as the 12th instead of the 13th. The reasonable recipient would not have been perplexed in any way by the minor error in the notices. The notices would have achieved their intended purpose."

[12] There is no reason to suppose, nor was one suggested, that the reasoning employed by Lord Steyn was not equally valid for a notice to review rent. Several matters emerge from that analysis. The purpose of the notice is relevant to its validity. So is the contextual scene and such

surrounding circumstances as are admissible. As Lord Steyn said – the inquiry is objective; what would a reasonable person in the same circumstances have in mind on receipt of such a notice. Even if the notice contained errors, if it is sufficiently clear and unambiguous, then it is still effective. In the instant case the question is whether a reasonable person, familiar with the terms of the lease and reading the notice dated 21 May 2002, could be left in any doubt that a) the rent referred to in the notice was the open market rental value as defined in the Third Schedule ; and b) that in the event of the lessee not accepting the rent specified as the open market rental value, the lessee required to so notify the lessor in writing, whereupon the determination of the open market rental value would be referred to arbitration.

[13] I do not think that any error was created by the failure to mention the "open market rental value". The notice clearly refers to the rent payable and the rent proposed. The reference in the lease to the "open market rental value" is the means by which the rent is assessed. In specifying the rent required the lessors were referring to the rent proposed, the amount of which would be determined by reference to the open market rental value. A reasonable recipient of that notice with the terms of the lease at the forefront of his mind could have come to no other conclusion but that the notice referred to the rent that was proposed by the lessors, which rent would be determined by reference to the open market rental value.

[14] The second issue relating to the notice was whether the notice should have informed the recipient that, if he did not accept the proposed rent he required to so notify the lessor in writing and that if he did not do so he would be fixed with the lessor's proposed rent for the next fourteen years. What did the lease require ?

Paragraph (a) of the Third Schedule entitled Rent Review provided that –

i. the rent was subject to review;
ii. after twenty-eight years and thereafter after every fourteen years;
iii. with a view to securing that the rent is inline with the current level of open market rental value.

Paragraph (b) of the Third Schedule provided that -

i. that three months prior to the review date the lessors give notice;
ii. in writing;
iii. of their intention to exercise the right to require a review of the rent payable; and
iv. to specify the rent proposed.

In the event of the lessee not accepting the rent specified in the lessor's notice paragraph (b) provided that -

i. the lessee shall notify the lessor that the proposed rent is not accepted;
ii. in writing;
iii. within twenty-one days after receipt of the lessor's notice.

[15] The lessee did not do so within twenty-one days. The lessor gave notice in writing within the three months period. The notice specified the rent proposed and that it was in accordance with the provisions in the Third Schedule of the lease. Furthermore the request to confirm their acceptance of the rent specified did not alter the lessee's obligation nor did it introduce any new requirement. It was in accordance, strictly, with the terms of the lease. Therefore my conclusion is that the notice dated 21 May 2002 was a valid and effective notice for the purposes of the lease.

[16] The second substantive issue was whether time was of the essence in the rent review provisions of the lease. It was submitted by the plaintiff that it was as it was the substantive means whereby the lessor could secure determination of the rent review. The rent is subject to review at the instance of the lessors at specified times. The lessor is required to give three months notice in writing specifying the rent proposed. Thereafter the requirement to act passes to the lessee if he does not accept the rent specified in the lessor's notice and is mandatory in its terms. He shall notify the lessor in writing that he does not accept the rent specified and his obligation is to do so within 21 days. If he does so determination of the rent is referred to arbitration. Only the lessee can trigger the arbitration process and he does so by his notice. There is no other method. Counsel on behalf of the plaintiff submitted that the circumstances of this lease were sufficient to imply into the agreement that time was of the essence for the purposes of the rent review. Receipt of the lessor's notice requires the lessee to make up his mind about the rent proposed by the lessor and react to it. Emphasis was placed on the language of paragraph (b) – "in the event of the lessee <u>not accepting</u> "the proposed rent then he " <u>shall</u> "notify the lessor in writing within 21 days. If he fails to act he is deemed to have accepted the landlord's proposed rent as there is no other means by which the rent can be determined. It was submitted that this was an important contra-indication that the presumption that time was not of the essence was rebutted. If time was not of the essence the lessee could receive the lessor's notice and take no action and the lessor would be powerless to review the rent after 28 or 42 years or thereafter. There is no means whereby the lessor could seek arbitration. The language of paragraph (b) sets out a clear time-table for an orderly review of the rent in the event of the lessee not accepting the lessor's proposed rent. If he fails to indicate that he does not accept the proposed rent then the consequence is that the proposed rent becomes the actual rent.

[17] On behalf of the defendant it was submitted that the normal rule was that time was not of the essence. This presumption could only be displaced if a strict adherence to time limits was either expressly provided for in the agreement or it was a necessary implication from the terms of the agreement and the surrounding circumstances. The consequences of the failure of the lessee to respond to a lessor's notice are relevant. If time is of the essence it means that a lessee could be fixed with a grossly inflated rent for the remainder of the lease. On the other hand if time is not of the essence and the lessee fails to respond to a notice to review the rent, the landlord can renew his notice on the following quarter day. The defendant recognised that, in theory, the lessor could not instigate the arbitration process. However it was argued that whilst this may be a lacuna it was not a surrounding circumstance that could justify the implication that time was of the essence of the rent review provisions of the lease. Where the lessee offered arbitration and the lessor was not prejudiced by the offer the provision should be interpreted contra proferentem. Furthermore it was submitted that the lessor's right was to require a rent review not to fix or increase the rent. He has a right to propose a rent only. It was submitted that if the terms of the lease read " In the event of the Lessee not accepting the rent specified in the said notice as being the open market rental value as hereinbefore define at that time, the Lessee shall notify the Lessors in writing within twenty one days after the receipt of such notice from the Lessors and the determination of such open market rental value shall be referred to the award of a single arbitrator etc ", - the inclusion of the comma after the word "time", could be construed as referring the issue to arbitration when the lessee failed or declined to serve a notice. On the other hand the draftsman could readily have framed the clause in such a way that the rent proposed by the lessor was binding in the absence of a notice referring the matter to arbitration.

[18] The Supreme Court of Judicature (Ireland) Act 1877 (the 1877 Act) provided for the union of several courts of jurisdiction in the High Court of Justice in Ireland and amended and declared the law in several respects. In particular it declared that the rules of equity should prevail in any conflict or variance with the rules of the common law. The Judicature (Northern Ireland) Act 1978, (the 1978 Act), repealed the Supreme Court of Judicature (Ireland) Act 1877 but re-enacted the effect of the 1877 Act in slightly different terms. Section 86 provides that the concurrent administration of law and equity (provided for by the 1877 Act) was to continue and that the rules of equity were to prevail.

Section 88 of the Judicature (Northern Ireland) Act 1978 states that –

> "Stipulations in contracts as to time or otherwise, which according to rules of equity are not to be deemed to be or to have become of the essence of the

> contract are also construed and have effect at law in accordance with the same rules."

This section is to be the same effect as, albeit with a slight variation in the wording, Section 41 of the Law of Property Act 1925.

[19] Prior to 1978 a dichotomy had emerged in the construction of rent review provisions. In some cases it was held that the wording of review provisions was such that in reality they amounted to an option to which stipulations as to time should be applied. In 1977 two appeals were conjoined and considered by the House of Lords. They were United Scientific Holdings Ltd v Burnley Borough Council, and Cheapside Land Development Co Ltd and Another v Messels Service Co, and they are reported together at 1978 AC 904 (United Scientific). In these appeals the House of Lords considered the question whether and if so, in what circumstances, time was of the essence in rent review provision in leases for terms of years. The Courts of Appeal in both cases decided albeit for different reasons that for anything that needed to be done by a landlord in relation to rent review, it was presumed that time was of the essence unless the presumption was displaced by strong indications in the wording of the lease In allowing both appeals it was held that there was nothing in either of the leases in question to displace the presumption that strict adherence to the time-tables specified in their respective rent review clauses was not of the essence of the contract and that therefore the new rents should be determined in accordance with the procedures specified in the respective leases. In both cases the issue was whether the failure of the landlord with a long term lease to act within a stipulated time, precluded the landlord from achieving a review of the rent that had been paid for a substantial number of years. The terms of the two leases in question were very different. The House of Lords held that the failure of the landlords to act within the stipulated time did not prohibit them from seeking a review of the rent. Such review provisions in long term leases were not to be regarded as options that created a new agreement in which time was of the essence nor did their commercial character require that they be interpreted differently. They were an integral part of the original contract designed to cater for inflation, otherwise properties would remain let at wholly uneconomic rents or non-market rental values. In an era of inflation no landlord would agree to a long term lease without the opportunity to review the rent after a specified term of years. Their Lordships approved the law relating to time in contracts as summarised in Halsbury's Laws of England 4th edit. Volume 9 at paragraph 481 where it states –

> "Time will not be considered to be of the essence unless: (1) the parties expressly stipulate that conditions as to time must be strictly complied with; or (2) the nature of the subject matter of the contract

> or the surrounding circumstances show that time should be considered to be of the essence; "

[20] The equitable principles governing the construction and effect of stipulation in contracts as to time as set out in Fry on Specific Performance 6 edit at paragraph 1075 were also approved. This states –

> "Time is originally of the essence of the contract, in the view of a Court of Equity, whenever it appears to have been part of the real intention of the parties that it should be so, and not to have been inserted as a merely formal part of the contract. As this intention may either be separately expressed, or may be implied from the nature or structure of the contact, it follows that time may be originally of the essence of a contact, as to any one or more of its terms, either by virtue of an express condition in the contract itself making it so or by reason of its being implied…"

[21] Their Lordships found no reason to interpret rent review provisions differently. In giving the leading opinion Lord Diplock stated at page 930 –

> "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 interrelation of the rent review clause itself and other clauses or in the surrounding circumstances the presumption is that the time-table specified in a rent review clause for the completion of the various steps for determining the rent payable in respect of the period following the review date is not of the essence of the contract."

[22] Those appeals concerned the landlords failure to act and whether the whole rent review process was postponed for a substantial number of years. In the instant case it is the tenant's failure to act which is said to fix the rent for the next fourteen years, without the necessity of a review process. However the principle settled in the United Scientific case and set out above still applies. Thus time is not of the essence in rent review provisions unless the parties have stipulated otherwise or there are contra-indications in the wording of the lease or in the interrelation between the clauses or in the surrounding circumstances. Lord Fraser said in United Scientific at page 962 that time is of the essence in rent review clauses " unless there is some special reason for excluding its application to a particular clause".

[23] Both parties referred to various cases heard since 1978. One of these was Trustees of Henry Smith's Charity v AWADA Trading & Promotions Services Ltd 1984 47 P&CR 607. In that appeal the landlord had failed to obtain the appointment of a surveyor to ascertain the market rent within one month of the tenant's counter-notice specifying the rent to apply. The tenant maintained that in these circumstances the landlord had lost the right to appoint a surveyor to ascertain the market rent and that the rent specified in the tenant's counter-notice was deemed to be the market rent. The judge ruled that time was not of the essence and that the landlord was not precluded from appointing a surveyor to asses the market rent. The tenant's appeal was allowed. The headnote states that the " general rule was displaced where the provisions of the lease expressly made time of the essence or where the language of the rent review clauses in the lease by necessary implication led to that result; that it was open to a tenant to make time of the essence by giving the landlord an appropriate notice;… and that on the true construction of the lease here, the parties had set out a time table and had also stated the consequences of the failure to follow the timetable. " In his judgment Griffiths LJ (as he then was) stated –

> "Suppose in the present case clauses 3 and 4 had been elided to provide that 'If the tenant objects to the new rent proposed by the landlord he must serve a notice of objection within one month.' Such a clause carries the implication that if the tenant does not serve the counter-notice he accepts the landlord's new rent and it would add nothing to the meaning of the clause to add at the end of it 'and if he does not do so he is deemed to accept the new rent.' If such a clause including the deeming provision stood alone, I would not, I think, be prepared to hold that it was sufficient to displace the general rule that time was not of the essence of the contract. In *Davstone (Holdings) Ltd v Al-Rifai* Golding J held that such a clause did not make time of the essence. The clause in that case provided, 'if the lessee shall raise no objection to the increased rental proposed by the lessor within 28 days of receiving such notice, the lessee shall be deemed to have accepted and agreed the same.' That case was cited by distinguished counsel for the appellants and the respondents in their arguments in *United Scientific Holdings Ltd v Burley Borough Council.* Neither of them submitted that it was wrongly decided and no doubt was cast upon it by any of their Lordships' speeches, but it is right to recount that none of their Lordships referred to it.

> I do not accept that the mere presence of a 'deeming' provision in a rent review clause will in all cases be sufficient to make time of the essence of the contract.
>
> But when I consider the rent review provisions of this lease as a whole I have been driven, albeit, reluctantly, to conclude that in this case they carry the necessary implication that the parties to this lease intended that time should be of the essence of the rent review provisions."

[24] In Bickenhall Engineering Co Ltd v Grandmet Restaurants Ltd 1995 a EGLR 110 clause 4(8) of a lease dated 14 January 1986, provided that the market rent specified in the landlord's notice was payable from the rent review date unless the tenant had served a counter- notice. Clause 4(4) provided that the tenant may serve a counter-notice specifying the market rent within 5 weeks of the landlord's notice. The rent review date was 25 March 1991. The landlord specified a rent of £25,000. The tenant failed to serve any counter-notice until 16 May 1991 when it specified a rent of £12,000. At first instance the Judge allowed the landlord's claim for arrears based on a rent of £25,000. The tenant appealed contending that time was not of the essence for the service of the counter-notice. The appeal was allowed. It was held following United Scientific, that the provision in clause 4(8) that the rent specified by the landlord's notice is deemed to be the rent from the rent review date, was not a sufficient contra-indication to rebut the presumption that time is not of the essence. Neil LJ said at page 115 that "contra-indications must be clear and explicit ". Simon Brown LJ agreed with Neil LJ. He said that the issue whether time was of the essence for the service of the lessee's counter-notice raised two central questions which at page 115 he posed as follows –

> "The sole issue raised in the case is whether time was of the essence for the service of the lessee's counternotice. That issue in turn raises two central questions:
>
> (1) Does clause 4(8) on its proper construction constitute 'an express provision for a default rent in the event of a failure to serve a notice within a specified time'? (Those are the words of Browne-Wilkinson LJ in *Mecca Leisure Ltd v Renown Investments (Holdings) Ltd* (1984) 49 P&CR 12; Slade LJ in *Henry Smith's Charity Trustees v AWADA Trading Promotion Services Ltd* (1983) 47 P&CR 607 called such a clause a 'deeming provision' and for the sake of convenience so shall I).

> (2) If so, which of two conflicting principles emerging from the trilogy of Court of Appeal decisions – the two I have mentioned and the earlier case of *Lewis v Barnett* (1981) 246 EG 1079 – do we – a court now free and indeed bound in accordance with the principles established in *Young v Bristol Aeroplane Co Ltd* [1944] KB 718 to choose between them – think it right to follow? The conflict of principle concerns whether or not deeming provisions are (again to quote the judgment of Browne-Wilkinson LJ in *Mecca*) 'a decisive, or virtually decisive, contraindication displacing the presumption that time was not of the essence'.
>
> If we were to decide (a) that clause 4(8) *is* a deeming provision and yet (b) that is not 'decisive or virtually decisive' in the landlord's favour, a third question would arise: looking at the express words of the review clause as a whole, are there nevertheless contra-indications displacing the presumption otherwise arising in the lessee's favour, ie the presumption that time was not of the essence?"

[25] Simon Brown LJ thought that clause 4(8) was capable of two meanings. He concluded that it was not a deeming provision and that there were no contra-indications capable of displacing the presumption. However at page 116 he went to express some views about question 2 –

> "Having regard to my conclusion upon question one, question two strictly does not arise. I would nevertheless wish to express my own brief views upon it.
>
> There are, as it seems to me, three ends to which it may be argued that the *United Scientific* presumption can be put:
>
> 1. In the absence of any express terms specifying what is to happen in default of the exercise of the rights given to the respective parties within the permitted periods of time (ie in the absence of a deeming provision), the presumption applies: time is not of the essence unless and until it is made so, and in the result a time stipulation cannot be strictly enforced against whoever fails to observe it. (I

decline to use the language of default; there is no obligation to observe such a time limit, merely a prospective loss of the benefits of compliance).

2. In the event of dispute whether or not there is such an express deeming provision, the presumption applies as a rule of construction to assist the resolution of that dispute.

3. Even if there *is* such an express deeming provision the presumption can nevertheless still apply to defeat both it and the strict enforcement of the separate time stipulation.

In my judgment, the presumption applies in situations 1 and 2, but not in 3. Situation 1 was that arising in *United Scientific* itself. Situation 2 I believe to be the present case and, as indicated, I would apply the presumption first to construe clause 4(8) as *not* amounting to a deeming provision, and then of course to clause 4(4) as in situation 1. If, however, contrary to my view on question 1, clause 4(8) *is* to be construed as a deeming provision, then I would not think it permissible to over-ride it (as well as the *prima facie* effect of clause 4(4) itself) by application of the presumption. That indeed would involve, as Browne-Wilkinson LJ pointed out in *Mecca*, 'not simply extending the time-limits within which the parties' bargain could be performed but an alteration of the parties' bargain itself'. And that – the effect of applying the presumption in situation 3 – seems to me to go beyond what *United Scientific* permits: so far from the court being entitled to rewrite the parties' contract, it is bound to find the presumption displaced by express words of the lease which are inconsistent with it and thus 'contra-indications' to it.

Accordingly, I, for my part, would hold that a deeming provision is indeed 'a decisive, or virtually decisive, contra-indication displacing the presumption that time was not of the essence.' I find myself, in short, with the majority (although not, I think, with Griffiths LJ) in *AWADA* and with the minority in *Mecca*."

[26] In Phipps-Faire Ltd v Malbern Construction Ltd 1987 1 EGLR 129 Clause 3 of the rent review provisions provided inter alia, that if the lessee served a notice containing a proposal as to the amount of the revised rent, the amount so proposed should be the revised rent unless the lessor applied to the President of the RICS for determination of the rent by a valuer within three months after service of the lessee's notice. The lessors did not apply to the President within the three months period and the lessee sought a declaration that the rent was the amount that they proposed. The lessors sought a declaration that their application to the President after the three months period was a valid one. The issue was whether time was of the essence for the purpose of the three month period. It was recognised in that case that the presence of such a default provision did not necessarily indicate that time is of the essence, though it may be so, following Mecca Leisure Ltd v Renown Investments (Holdings) Ltd 1984 49 P&CR 12 (CA). The Court held that " the presumption that time is not of the essence of a provision in a rent review clause is strong and that it will not be rebutted by any contra-indication in the express terms of the lease unless it is a compelling one " (see page 131). The Court did not find the contra-indications relied on as compelling and found in favour of the lessors. The Mecca Leisure decision was not followed in Starmark Enterprises Ltd v CPLO Distributions Ltd 2002 Ch D 306. In that case the rent review provisions included a clause providing that if the lessee should fail to serve a counter-notice within one month from receipt of a rent notice "they shall be deemed to have agreed to pay the increased rent specified in the rent notice". The landlord served a notice on 31 March 1999. The tenant did not serve its counter-notice until 16 June 1999. The notice specified a rent of £84,800 and the counter-notice specified a rent of £52,725. The judge ruled that the normal presumption that time was not of the essence was not displaced by the deeming provision. The landlord's appeal was allowed. It was held that where a deeming provision expressed a clear intention as to the consequence of a party's failure to comply with the stipulated timetable, the court would not conclude that time was not of the essence. To conclude that time was not of the essence would be to rewrite the contract by which the parties had agreed to be bound. The dicta of Simon Brown LJ in Bickenhall Engineering Co Ltd v Grandmet Restaurants Ltd referred to above was applied.

The dissenting judgment of Browne-Wilkinson LJ (as he then was) in Mecca Leisure Ltd v Renown Investments (Holdings) Ltd was preferred and the following passage from his judgment at page 23 quoted with approval –

> "In my judgment, there are two possible views as to the correct answers to this question. The first view is that the decision of the House of Lords in *United Scientific Holdings Ltd v Burnley Borough Council* [1978] AC 904 establishes that provisions for rent review are mere machinery for ensuring the payment of a market

> rent throughout a long term and that, in the absence of contraindications in the terms of the lease or the surrounding circumstances, failure to serve a notice before the date specified in the lease does not preclude the service of such notice within a reasonable time thereafter. Then, it can be said, a provision in the machinery that, in the event of a failure to serve a notice by the specified date, a rent not necessarily being the proper market rent ("the default rent") shall be payable is not of the essence of the parties' bargain but merely part of the machinery designed to fill the gap unless and until a notice (albeit strictly out of time) is served. Therefore, the existence of a provision for a default rent is not, by itself, a contraindication sufficient to displace the presumption that time is not of the essence.
>
> The second view is that an express provision for a default rent in the event of a failure to serve a notice within a specified time necessarily shows that time is of the essence of the service of the notice. This view could be reached by two different routes. First, it can be said that the provisions for a default rent is the clearest possible indication of the parties' intention that the service of the notice in time should be of the essence, because the parties have expressly fixed what is to happen if no proper notice is served within that time limit. Secondly (and to my mind more powerfully), it could be said that the whole doctrine of time not being of the essence cannot apply to such a case. Hitherto, the doctrine has only operated so as to allow one party to perform obligations laid down in the contract at a later date; it has never operated so as to alter the substantive terms of the contract entered into between the parties, other than the terms as to time ... 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."

And at page 24 –

> "It would, in my judgment, be most undesirable if in every case where a notice was served out of time the parties were in doubt as to the legal consequences. In

> commercial and property law it is, in my judgment, of the highest importance that the parties should know the legal consequences of their acts without having to go to court for them to be determined. Therefore, with regret, I cannot agree that the matter depends in each case on the exact detailed drafting of the rent review clause, the existence of a provision for a default rent being merely one of the factors to be taken into account in deciding whether time is of the essence."

[27] In Davstone Holdings Ltd v Al-Rifai 1976 32 P&CR 18 a 14 year lease provided for a review at the end of the first seven years. The landlords were required to give three months notice in writing of the proposed rent with a proviso for determination by a surveyor in default of agreement. The review clause also provided that if the tenant did not object to the rent proposed within 28 days of receiving the notice he should be "deemed to have accepted and agreed the same". The landlords gave notice that was judged to have been validly served, though it did not come to the tenant's attention with in the 28-day period. The tenant served his notice out of time. The landlords sought a declaration that the rent had been increased to the figure specified in the landlord's notice. It was held that time was not of the essence for service of the counter-notice so the tenant was not taken to have agreed the rent proposed by the landlord and accordingly the matter should be determined by an expert in accordance with the rent review clause. Although this case was decided before United Scientific it accords with the principles recited therein.

[28] In addition to the cases cited one other case is of relevance. In Taylor Woodrow Property Co Ltd v Lonrho Textiles Ltd 1986 52 P&CR 28 the landlords served a notice in accordance with the review clause specifying a rent for the next term of years of £47,500 per year. The review provisions provided that the tenant within one month of receipt of the rent notice may serve on the landlord a counter-notice calling upon the landlord to negotiate the amount of rent to be paid. The landlords notice was served on 5 July 1983 and no counter-notice was served until 19 December 1983, well outside the monthly period. The landlords contended that the counter-notice was out of time as time was of the essence of the period within which the notice had to be served. The landlord relied on five matters as constituting sufficient contra-indications to rebut the presumption that time was not of the essence. These included that the landlords were required to inform the tenants of their right to serve a counter-notice and to draw to their attention in their notice the consequence that would follow a failure to serve a counter-notice. It was held that the presence in the review provisions of a "deeming provision", was not sufficient, without more, to make time of the essence for the service of the tenant's counter-notice.

[29] The lease dated 7 January 1976 is for a term of ninety nine years at a yearly rent of £43,750 for the first thirteen and one half years. Thereafter the yearly rent was to be ascertained in accordance with provisions contained in the Third Schedule to the Head Lease. The provisions of the Third Schedule provided that the rent payable was subject to review at the instance of the lessors at the end of the first twenty eight years and thereafter at the end of every fourteenth year. These periods set the review date, namely, 12 September 2002. The purpose of the review is to secure that the rent is in line with the current level of open market rental value. The expression "open market rental value " is defined as the open market rental value of the premises in the open market at the review date. If the lessor intends to exercise his right to require a rent review he must give not less than three months notice in writing to the lessee prior to the rent review. The lessor is required to specify in the notice the rent that he proposes as the open market rental value of the premises. In the event of the lessee not accepting the rent specified in the lessor's notice as being the open market rental value he shall notify the lessor in writing within 21 days. In such event the determination of the open market rental value is referred to arbitration. If the arbitrator's award is more than the rent reserved for the first thirteen and one half years then that amount becomes the annual rent. Should the award be lower, then the rent paid before the review date remains the rent payable. If the lessor fails to give due notice of his intention to exercise the right to require a review of the rent prior to the review date, he is entitled to require such a review at any succeeding quarter day by three months notice to the lessee. In that event any increased rent is not payable from the review date.

[30] The landlord's notice was served on 23 May 2002. The tenant's notice was served on 27 February 2003. The lessor's notice seeks to increase the rent from £43,750 per annum to £1,075,000. That is an increase by a factor of 24 over 28 years. The lessor is entitled to seek to raise the rent to any figure. The purpose of the rent review provisions of the Third Schedule is to secure that the rent is in line with the level of open market rental value. Whether that sum reflects open market rental value at September 2002 is not for this court to decide on this occasion. What is apparent is that the notice does not suggest that this figure is in line with the open market rental value. Paragraph (b) of the Third Schedule provides that the lessor's notice shall specify the rent which the lessors propose as the open market rental value. If the lessee does not accept the rent specified as being the open market rental value then he shall notify the lessor in writing within 21 days.

[31] The plaintiff's submit that time is of the essence and that Clause (b) is a deeming provision. By reason of the failure of the defendant to serve his counter-notice within 21 days, he is deemed to accept the rent proposed. The terms of the lease do not state that time is of the essence, though it is correct to note that they rarely do, despite Lord Salmon's plea in United Scientific. I

do not consider this to be a deeming provision. While it does state that the lessee should notify the lessor if he does not accept the rent specified, it does not say what the consequences would be if he failed to do so namely that the rent specified becomes the open market rental value for the purposes of the lease for the period in question. The plaintiff submits that this is the only mechanism whereby the lessor can instigate a rent review. Once the lessor serves notice the lessee is the only party who can trigger arbitration. If the lessee does not serve a notice it was submitted that there is no other mechanism whereby arbitration can be effected. In my judgment it would be open to the lessor to make time of the essence by stating in his notice or in a further notice, that in the event of the lessee not serving a counter-notice within 21 days, the rent specified shall become the rent for the review period in question. Therefore clause (b) is not a deeming provision.

[32] The plaintiff does not make the case that the interrelation of the clauses of the Third Schedule and the lease or the existence of surrounding circumstances justify the rebuttal of the presumption as to time. Rather it is submitted that there are contra-indications arising from that wording of clause (b) that require the lessee to act to trigger arbitration. Another way of putting this is to say that it arises by necessary implication. I do not find it necessary to imply that time is of the essence. I do not consider that when the parties entered into this agreement that it was their intention that it should be so. If contrary to my view, clause (b) is a deeming provision I do not find its wording compelling or sufficiently clear or explicit to override or displace the presumption that time is not of the essence nor is clause (b) clear in its intention that it should be so.

[33] There are no express terms specifying what is to happen should the lessee fail to serve his counter-notice. In the absence of such express terms the presumption that time is not of the essence applies. The fact that the lessee triggers arbitration is not a compelling reason to displace the usual presumption and to make time of the essence.

[34] Therefore my conclusion is that the lessee is not deemed to have accepted the rent specified in the notice dated 21 May 2002 and that the lessee's counter notice dated 27 February 2003 is a valid counter-notice for the purpose of referring the question of the open market rental value to arbitration.