OUTER HOUSE, COURT OF SESSION

[2019] CSOH 7

CA40/18

OPINION OF LADY WOLFFE

In the cause

ASHTEAD PLANT HIRE COMPANY LIMITED

Pursuer

against

GRANTON CENTRAL DEVELOPMENTS LIMITED

Defender

Pursuer: MacColl QC; Anderson Strathern LLP
Defender: Garrity; Turcan Connell

25 January 2019

Introduction

[1] This case concerns the proper interpretation of a rent review provision in a commercial lease.

The Parties and the Premises

[2] The pursuer and defender are, respectively, the tenant and landlord (and proprietor) of commercial subjects known as and forming 50 West Harbour Road, Granton, Edinburgh

("the Premises"). The pursuer's business involves the storage, hire and sale of heavy plant and machinery in the construction industry.

[3] While not formally agreed between the parties, during submissions it was stated that a significant part of the Premises is unbuilt, in the sense that it is used for the storage of the pursuer's plant and machinery. The offices and other buildings on the Premises occupy only about 20% of the gross area of the Premises.

The issue

[4] In this commercial action the pursuer seeks declarator that the "Open Market Rent" for the premises is to be calculated on the basis of a hypothetical lease of the Premises which disregards the presence of any buildings or other constructions or tenants' improvements. (The defender's jurisdictional challenge to the pursuer's action was the subject of an earlier debate before Lord Doherty, who decided that issue in the pursuer's favour.) The matter debated before me concerned the proper interpretation of the rent review provision in Clause Third(c)(ii) of the lease (as amended) to ascertain the open market rent ("the Open Market Rent") as at the last rent review date. The debate focused on disregard (4) added at the end of Clause Third(c)(ii) by subsequent variation of the original lease.

[5] Parties lodged notes of argument and a joint list of authorities. Mr MacColl QC appeared for the pursuer and Mr Garrity, Advocate, appeared for the defender. I am grateful for their concise oral and written submissions.

Outline of parties' positions

[6] The pursuer argues that, in light of the disregards in clause Third(c)(ii) of the Lease, the rent should be reviewed on the basis that the "Open Market Rent" to be applied in terms

of the rent review provisions is to be calculated on the basis of a hypothetical lease of the Premises which disregards the presence of any buildings, other constructions or tenant's improvements located within the boundaries of the Premises. The defender argues that disregard (4) does not preclude the presence of the buildings within the Premises being taken into account in fixing the open market rent.

The Lease

The documents comprising the Lease

[7] The lease was entered into on 2 and 25 February 1988 between predecessors in title of the parties ("the original Lease"). The term initially granted was from Candlemas (2 February) 1988 until Whitsunday (15 May) 2012. The original lease was varied in certain respects by Minutes of Agreement in 1988 ("the 1988 Variation") and 1989 ("the 1989 Variation") and further varied by Minute of Variation of Lease dated 7 and 14 March 1997 ("the 1997 Variation"). The original lease and the foregoing variations thereof are collectively referred to as "the Lease".

The variations of the original lease

[8] It is necessary to note the effect of certain variations of the original lease, as follows:

1. The 1989 Variation added sub-clause 4 (referred to by the parties as "disregard (4)") at the end of clause Third(c)(ii) of the original lease;
2. The 1997 Variation included the extension of the period of the original lease to 28 May 2096; it provided for rent reviews every 5 years as from 28 May 2002, with the common proviso that the annual rent was to be the greater of:

   (i) the rent payable immediately before the rent review date and

(ii) a sum representing the open market rent (as defined in the Lease);

and it provided that the tenant should occupy and use the leased subjects for the purpose of the storage, hire and sale of equipment mainly for use by the construction industry.

[9] The parties had no information about what prompted the 1989 or 1997 Variations. It was explained that the buildings on the Premises are the same as those which stood at the time of the original lease. It was also uncontroversial that no new buildings had been constructed since the inception of the original lease.

The terms of the rent review provision in clause Third (as amended)

[10] So far as material to the issue debated, clause Third(c)(ii) provides:

> "'Open Market Rent' shall mean the best yearly rent for which the leased subjects if vacant might be expected to be let, without fine or premium, as one entity by a willing landlord to a willing tenant on the open market at and from the review date in question for a period, running from the review date in question, equal in length to the original duration of this Lease on terms similar in all respects to those contained or referred to in this Lease (save as to the amount of rent but including provision for a rent review cycle or pattern being a continuation of that herein contained) and on the assumption (if not a fact) that the Tenants have complied in all respects with all the obligations imposed on them under this Lease and, in the event of the leased subjects or any part thereof having been destroyed or damaged and not having been fully restored at the review date in question, on the further assumption that the destruction or damage had not occurred, there being disregarded however (1) any goodwill attached to the leased subjects by reason of the carrying on thereat of the business of the Tenants, (2) any work carried out in or to the leased subjects which has diminished the rental value of the same and (3) the effect on rent of all improvements carried out, with the prior approval of the [landlords], by the Tenants at their own cost after the date of entry hereunder provided such improvements are not in pursuance of an obligation to the [landlords] on the part of the Tenants **(4) the effect on any rent of the value of any buildings or other constructions erected on and any improvements carried out to the subjects of lease** [*by the tenants with the landlords' approval*]."

Disregard (4), which was inserted by the 1989 Variation, is highlighted in bold font for ease of reference. The words in square brackets are those which Mr Garrity suggested might be

added, on one of his proposed readings of this clause. For the avoidance of doubt, the words in italics do not appear in the Lease.

[11] The only observation to make in relation to the rent review provision in its amended form is that, because disregard (4) was added by the 1989 Variation, and which was presumed to be a considered amendment, parties did not advance any argument that any tension between that disregard and other features of clause Third of the Lease could be attributed to a drafting slip (cf *Ipswich Town Football Club Co Ltd* v *Ipswich Borough Council* [1988] 2 EGLR 146 ("*Ipswich*")).

Other provisions of the Lease

[12] In the course of their submissions, parties made reference to certain provisions of the Lease, as follows:

1. <u>The extent of the Premises</u>: The Premises (as comprised in the Lease) extend to "ALL and WHOLE that land extending to one acre and thirty four decimal or one hundredth parts of an acre or thereby with buildings and structures thereon at West Harbour Road, Granton, Edinburgh (hereinafter called 'the leased subjects'*)* all as delineated and outlined in red on the plan annexed" to the original lease. Mr MacColl QC noted that the plan annexed to the original lease indicates only the site boundaries; no buildings or other structures are shown on it. Mr Garrity noted that the definition of "the leased subjects" includes the land and "buildings and structures thereon".

2. <u>Use of the Premises:</u> In terms of Clause 4 of the 1997 Variation, the Premises are to be occupied and used for:

> "…the storage, hire and sale of equipment mainly for use by the construction and civil engineering industry with ancillary offices and all other items ancillary thereto or connected therewith including the hire, distribution and repair of mechanical and non-mechanical plant associated primarily with the construction industry and for no other purpose whatsoever without the prior written consent of the Landlords, all in terms of the Lease."

3. Repairing obligations: The Lease contained an extensive repairing/renewal obligation on the tenant in clause FIFTH in respect of the leased subjects, including the buildings included within that definition, *viz* "…and that regardless of the age or state of dilapidation of the buildings or others for the time being comprised in the leased subjects and irrespective of any latent or inherent defects therein." (clause FIFTH (a)). This clause included the following particular obligations:

   (i) the tenant was obliged to leave the leased subjects at lease expiry together with all additions and improvements, etc "…and that in such state and condition as shall in all respects be consistent with a full and due performance by the Tenants of the obligations herein contained." (clause FIFTH (f); and

   (ii) an obligation on the tenant to decorate the interior and exterior of the leased subjects and to keep windows cleaned, etc. (clause FIFTH (b), (c) and (d)).

4. Prohibition on alteration or erection of new buildings: The tenant is not entitled to carry out alterations or erect new buildings without the consent of the landlord. Any works carried out (with consent) are to be maintained and repaired in accordance with the tenant's repairing obligation. Any works

effected are to become and remain the property of the landlord (clause TWELFTH); and

5. Insuring obligations: The tenant is obliged to insure the leased subjects for full reinstatement value in the joint names of the landlord and tenant. The tenant is obliged to apply insurance monies to rebuilding, repairing or reinstating insured risk damage (clause SIXTEENTH).

[13] Notwithstanding passing reference to a "ground lease" in his Note of Argument, Mr MacColl QC did not insist (in my view correctly) on the argument that the Lease of the Premises was a ground lease. At debate it was common ground that the Lease was a lease of commercial premises, albeit a large area of the land was unbuilt.

Parties' submissions

Submissions on behalf of the pursuer

[14] Mr MacColl QC began by adopting his note of argument.

[15] Insofar as he referred to provisions of the Lease, he emphasised the reference to the plan which simply showed an outline of the area of land- "no more and no less"-but did not show any buildings. Under reference to the user clause, Mr MacColl QC explained that most of the Premises comprised a yard. While he accepted that the phrase "leased subjects" included buildings, in his submission disregard (4) was effective to exclude them for the purposes of ascertaining the Open Market Rent. On the application of the usual principles of construction, he submitted that the definition of "Open Market Rent" in the Lease plainly fell to be calculated on the basis that the presence of any buildings, other constructions and or improvements was to be disregarded as a part of the rental calculation process.

[16] He submitted that such a reading accorded with the application of the ordinary meaning of the words used in disregard (4), read in the context of clause THIRD(c)(ii) as whole, and the definition of the let subjects in the Lease. This construction also aligned with the general background - the letting of an area of ground for commercial purposes over a significant period, with the normal anticipation that changes will be made to it over the years by the tenants and at their expense, and in circumstances where, as the plan annexed to the Lease indicates, no particular concern was given to any pre-existing structures within the boundaries of the Subjects. He also submitted that, for the same reasons, this construction also accords with commercial common sense.

[17] Mr MacColl QC turned briefly to consider some of the cases cited by the defender. Under reference to the case of *Gong Eng Wah* v *Yap Phooi Yin* [1988] 2 EGLR 148, he accepted that the normal rule was for valuation of the Open Market Rent to include any buildings as well as the land. However, that general rule could always be displaced by particular terms. In his submission, disregard (4) was just such a term. Here, the court should uphold the bargain parties have made. The defender's defences were irrelevant. The pursuer's submissions were to be preferred and declarator should be granted.

Submissions on behalf of the defender

[18] Mr Garrity also adopted his note of argument at the outset of his submissions.

[19] He explained that the buildings comprised only 20% of the overall area of the Premises. He observed that there was no averment that any works had been done to the Premises either by the landlord or the tenant since the original lease commenced. The factual position, therefore, was the buildings were those which had been present at the commencement of the original lease.

[20] He referred to a number of provisions of the Lease in which the phrase "the leased subjects" appeared and which presumed the presence of buildings or imposed obligations in respect of those buildings (e.g. the repairing and insuring obligations). He invited me to reject any contention on the part of the pursuer that the Lease was "a simple ground lease" or that it was "unconcerned" with buildings forming part of the Premises.

[21] He referred to four English cases in the joint bundle concerning the construction of rent review provisions. The cases produced were *Ponsford and others* v *H.M.S. Aerosols Ltd* [1979] AC 63 at 72G-H; 75F-G; 77D-F; 78H-79C; 82H-83D; 86E-G; *Ipswich, cit supra*, at 147F-148K; *Goh Eng Wah,* ci*t supra*, at 149G-K; and *Ravenseft Properties Ltd* v *Park* [1988] 2 EGLR 164 at 166A-M. From these cases (particularly *Goh Eng Wah*) he relied on the existence of a general rule that buildings fell to be included in the valuation of let subjects for the purposes of rent reviews. This was so, even if the buildings in question had been constructed entirely at the expense of the tenant, as was illustrated by the case of *Ponsford*. There was, he submitted, no express provision in the Lease to displace this rule.

[22] Turning to the Lease and clause THIRD(c)(ii), Mr Garrity submitted that the rent review clause ought properly to be construed with the Lease whole and in accordance with now well-understood principles of contractual interpretation. The defender's primary position was that the buildings fell to be considered as part of the leased subjects.

[23] Disregards (2), (3) and (4) all required to be considered together. There was an element of overlap between them, but the general intent and effect of the disregards was, he submitted, to prevent rentalisation (at rent review) of improvements carried out by the tenant after commencement of the lease. This would avoid the scenario whereby the tenant both paid for the improvements and then became liable to pay rent for those improvements, with the protection for the landlord that any works that diminished rental value are also to

be disregarded (disregard (2)). Disregards (2) and (4) worked together to provide that if the tenant carried out significant works after lease commencement (such as complete replacement of an original building) then (a) the specific value or construction costs of the new building would not be taken into account at rent review, but (b) the demolition works/removal of the original building would also be disregarded (using disregard (2)), thus preserving the landlord's entitlement to a reviewed rent based on the existence of a building within the leased subjects – ie the open market rent would not be "diminished" to a mere ground rent.

[24] He submitted that this interpretation was entirely consistent with the provisions of the Lease read as a whole, and was commercially sensible in that it afforded both landlord and tenant appropriate protection of their commercial interests in the context of the rent review.

[25] In the course of submissions, he offered a second possible interpretation of disregard (4) and clause THIRD(c)(ii). He noted that disregard (4) did not use the defined phrase of "the leased subjects" but used the phrase "subjects of let". He candidly acknowledged that he was not sure if this was intentional, but hazarded that this might have been to cover any new buildings by the tenants on the land. He read the phrase "erected on and any improvements carried out" in disregard (4) as possibly referring to improvements which post-dated the inception of the Lease. In that way, one could reconcile this with disregard (3), at least if one added the phrase "by the tenants with the landlords' approval" at the end of disregard (4). (See para [10], above.)

[26] Mr Garrity submitted that the pursuer was not entitled to the declarator concluded for. (In passing he noted that its terms did not entirely reflect the Lease.) He invited the Court to sustain the defender's second and/or fourth plea in laws, and to dismiss the action.

Discussion

Preliminary observations

[27] There was broad agreement between the parties that there was little, if any, relevant background against which the Lease and the rent review provision fell to be construed. The Premises contained some buildings. These had been extant at the time of the commencement of the original lease. There was no suggestion that any tenant (including the defender) had replaced these or built new structures. Apart from noting the addition of disregard (4) at the end of clause THIRD(c)(ii) as effected by the 1989 Variation and that the majority of the site was unbuilt, no other circumstances were invoked by the parties. Neither party referred to or relied on the length of the term of the original lease, or as varied by the 1989 Variation (to 2012), although Mr MacColl QC did note the effect of the 1997 Variation (extending the Lease to 2096).

General principles of interpretation

[28] There was no dispute about the court's approach to the question of contractual interpretation. The general principles derived from cases such as *Rainy Sky SA* v *Kookmin Bank Co Ltd* [2011] 1 WLR 2900 at [14], *Arnold* v *Britton* [2015] AC 1619 at [15] and *Wood* v *Capita Insurance Services Ltd* [2017] AC 1173 at [10]-[14], included in the joint bundle, are well known. In short, the correct approach is to consider what the parties to the Lease meant by the language that they have used, read in the context of the Lease as a whole and against the background knowledge available to the parties at the time that the Lease was entered into. Applying those principles, the meaning of the clause is to be ascertained having regard to: (a) the natural and ordinary meaning of the clause; (b) any other relevant provisions of the

Lease; (c) the overall purpose of the clause and the Lease; (d) the facts and circumstances known or assumed by the parties to the Lease at the time it was executed; and (e) commercial common sense (in the context of the agreement of the provisions of the Lease). As noted above, there was very limited reference to circumstances known to the contracting parties for the purpose of factor (d). There was no dispute about factor (c). For the purpose of factor (b), parties emphasized different parts of the Lease. Little was said about factor (e), other than each party asserted that its approach accorded with commercial common sense. Accordingly, in this case the rent review provision in Clause THIRD(c)(ii) was essentially to be construed according to natural and ordinary meaning of the words used in the clause in the context of the other provisions of the Lease and so as to give a "commercially sensible construction" (*per* Lord Steyn in *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749 at 771A; and quoted with approval by Lord President Rodger (as he then was) in *Bank of Scotland v Dunedin Property Investment Co Ltd* 1998 SC 657 at 661E to F)

English cases on rent review provisions

[29] Parties included in the joint bundle four cases from the English courts construing rent review provisions. In his note of argument Mr Garrity referred to *Ponsford and others, Ipswich, Goh Eng Wah* and *Ravenseft Properties Ltd*. In addition, the case of *Coors Holdings Limited v Dow Properties Ltd* [2007] EWCA Civ 255; [2007] 2 P&CR 22 was produced towards the end of the debate. Short extracts from two academic works were also included in the joint bundle, although only the English textbook was referred to in oral submissions. The two academic works were '*Woodfall's Law of Landlord and Tenant*' (Looseleaf, 2018), paras 8.030 and 8.031 and McAllister, '*Scottish Law of Leases*' (4th ed., 2013), paras 12.54, 12.55, 12.70, 12.71 and 12.72.

[30] None of the provisions in the English cases was similar to Clause THIRD(c)(ii), but those cases vouched two propositions:

1. The first was that on the English authorities there was said to be a presumption (*per* HH Judge Barker QC in *Ravenseft* at 166H-J) or rule (*per* Lord Templeman in *Goh Eng Wah* at 149H-J) that an open market rent is fixed taking into account buildings as well as the land that was let, although I note that Sir Nicolas Browne-Wilkson V-C, as he then was, doubted whether the Privy Council in *Gow Eng Wah* was laying down a firm rule of construction applicable to all cases (see *Ipswich* at p 148K).
2. The second proposition was that that rule or presumption could be displaced, if there were "clear words" to do so (*per* the gloss on the cases in *Woodfall's Law of Landlord and Tenant* at para 8.031) or if the lease gave a clear indication of a contrary intention (*per* LJ Lloyd in *Coors* at para 10, citing Sir Christopher Slade in *Braid* v *Walsall MBC* (1999) 78 P&CR 94 at para 102).

[31] In substance, taken together, those propositions may simply reflect the court's task as identified in the general principles, above, which is to construe the provisions of the rent review, in the context of the Lease, in light of the relevant circumstances known to the parties (if any) and consistently with the purposes of commercial agreements of this character. I therefore turn to consider the terms of the Lease and clause THIRD(c)(ii).

Clause THIRD(c)(ii) in the context of the Lease

[32] In my view, the Lease is a commercial, not a ground, lease. I reject any contention to the contrary, though I did not understand Mr MacColl QC to insist on this argument. For completeness I reject Mr MacColl QC's submission, made under reference to the plan, that

"no particular concern" was given to any pre-existing structures within the boundaries of the subjects of let. That submission is, in my view, inconsistent with the definition of the phrase "leased subjects" and the use of that in other parts of the Lease. The phrase "leased subjects" is a defined term in the Lease and includes the buildings on the land which is let to the pursuer. As noted above, at paragraph [12(3)], there are extensive repairing obligations which suppose (and in some instances could only apply to) buildings. However, the fact that the Lease is a commercial lease of premises which include buildings is not, itself, conclusive of the issue debated. This is demonstrated by the cases of *Coors* (in which the phrase "site comprised in the demised premises" was construed as excluding the buildings on the land) and *Ipswich* (in which the court respected the clear division that had been drawn throughout the lease between the ground and the buildings, notwithstanding the reference (dismissed as a "drafting slip") in the schedule to a surveyor coming to a conclusion on the current market value "of the demised premises" (ie as including the buildings). I turn to consider the terms of clause THIRD(c)(ii).

Clause THIRD(c)(ii)

[33] Clause THIRD(c)(ii) follows the common form of identifying the subjects to be valued, the assumptions on which any valuation is made and the matters to be disregarded in reaching the open market value. The assumptions and disregards in clause THIRD(c)(ii) are, in the main, typical of rent review clauses. They seek to achieve a degree of neutrality, in the sense that a party is not to be disadvantaged by the other's breach (hence the assumption that all of the tenant's obligations under the Lease are assumed to have been performed) or disadvantaged by its own positive contribution or voluntary expenditure (hence the disregard of good will (in disregard (1)) and of disregard (3)). Mr Garrity's

submissions about disregards (1), (2) and (3) are broadly correct. I did not understand Mr MacColl QC to contradict them. However, there is no radical disjunction between those disregards and the later-added disregard (4). I should note that in respect of Mr Garrity's observations about the words "subjects of lease" at the end of disregard (4), in my view those words only qualify or relate to the second half of that disregard, concerning "improvements". They do not qualify the first half of that disregard, concerning the value of the buildings and to which parties submissions were directed. Disregards (1) and (2) both refer to "the leased subjects" and are not confined to "the buildings and structures thereon". Given that the majority of the Premises is unbuilt, disregards (1) and (2) could readily apply to the majority of the Premises, after disregarding the "buildings and structures thereon". In other words, disregard (4) narrows the scope of disregards (1) and (2); it does not negate their terms. While neither party specifically addressed the relationship between disregards (3) and (4), there is a degree of overlap between them. Disregard (3) excludes voluntary improvements (ie not undertaken in fulfilment of an obligation in the Lease) paid for by the tenants and carried out with the consent of the landlords. The latter part of disregard (4), "improvements carried out to the subjects of lease", is wider. On its ordinary and natural meaning, the latter part of disregard (4) excludes *all* improvements regardless of by whom made or whether or not in compliance with an obligation under the Lease. In effect, it supersedes disregard (3) by subsuming it with its scope. Accordingly, while disregard (4) has had an impact on the other disergards, it is not irreconcilably inconsistent with them. Therefore, the drafters of the 1997 Variation did not need to adjust the terms of those disregards in order to enable disregard (4) to operate in the way intended.

Is disregard (4) habile to exclude the buildings for the purpose of calculating the open market rent?

[34] Turning to disregard (4), both parties approached this on the basis that the words "the value of" were not significant. Mr Garrity expressly eschewed any argument that there was a meaningful distinction between "the value of the buildings" (which the surveyor was to disregard) and the buildings themselves (which the surveyor would normally be expected to take into account and for which Mr Garrity contended). Rather, he relied on his two alternative readings, noted above, proffered to counter Mr MacColl QC's straightforward reading.

[35] I have little hesitation in preferring the submissions on behalf of the pursuer.

[36] In my view, the ordinary and natural meaning of the words of disregard (4) are to direct the surveyor to disregard the buildings or other constructions erected on and improvements carried out to the subjects of lease.

[37] There is a degree of tension between disregard (4), which, read in isolation, would undoubtedly exclude the buildings, and the reference at the beginning of this clause defining the Open Market Rent as the "best yearly rent for which the **leased subjects**" might be let (emphasis added). Mr Garrity was critical of the pursuer's proposed reading, given the appearance of the phrase "the leased subjects" at the beginning of clause THIRD, and which he contrasted with the opening exclusionary phraseology in *Coors*. However, there is no legal rule which would preclude a disregard situated at the end of a rent review clause from excluding some part of the subjects of the lease themselves (as opposed to, say, the state or condition of the subjects) from the proposed valuation exercise. Had it been the intention of the parties to the original lease to exclude the buildings, then a more elegant means to do so might have been to define what was to be valued (ie the Premises excluding any buildings) at the outset, as was done in *Coors*. However, in terms of the original lease the buildings

were not to be excluded from the valuation exercise (a matter Mr MacColl QC readily conceded). Furthermore, the location of disregard (4) at the end of this clause is readily explicable as the product of a later amendment (by the 1997 Variation) to the original lease and that fact goes a considerable way in explaining the structure of clause THIRD(c)(ii). It was not a drafting slip. The drafters of the 1997 Variation might well have undertaken a fuller revision of this clause (eg by revisiting the reference to the phrase "the leased subjects" appearing at the outset) to better reflect the amendment, but, in my view, the addition of disregard (4) in the terms in which it appears sufficed to make the parties' intentions clear that the buildings or other constructions were henceforth to be excluded by the surveyor for the purposes of ascertaining the Open Market Rent. In terms of the overall purpose of a commercial lease, this is consistent, too, with the substantial extension of the term of the Lease to 2096. This may also be an example of the kind of circumstance envisaged by the Inner House in *Hoe International Ltd* v *Andersen* 2017 SC 313 at para 23.

[38] While parties did not make any particular submission about the phrase "any buildings or other constructions erected on… the subjects of lease" in disregard (4), that formulation is in my view a very wide one. It catches "<u>any</u> building" (emphasis added) and extends to "other constructions". The additional words Mr Garrity proposed would be materially inconsistent with the words used. Further, I am not persuaded there was any legitimate basis established to read in the proposed words. For these reasons, I reject as untenable Mr Garrity's proposed insertion of additional words.

[39] In short, the pursuer's interpretation of disregard (4) does not deprive the other parts of Clause THIRD(c)(ii) of meaning or content. By contrast, the defender's interpretation is inconsistent with the natural and ordinary meaning of disregard (4).

[40] For completeness, I should indicate that I have reached this view on the application of the general legal principles noted above (at para [28]) but without regard to the four English cases specifically on rent review provisions. The result I have reached, however, is entirely consistent with those cases.

Decision

[41] Parties were agreed at the outset of the debate that determination of the issue in dispute would determine this action, as neither party sought proof of any averments. There was some adverse comment on the terms of the declarator sought. Accordingly, I shall put the case out by order for discussion of the precise terms of the declarator to be granted. I reserve all question of expenses meantime.