

# RENT REVIEW: THE REALITY PRINCIPLE REVISITED

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*by*

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## INTRODUCTORY

*"I'm not crazy about reality, but it's still the only place to get a decent meal"*

*(Groucho Marx)*

1. For present purposes, the so-called principle of reality (or presumption of reality or reality principle) may be defined as a presumption of interpretation – the force of which varies according to the circumstances - to the effect that, save to the extent that the lease otherwise requires, the reviewed rent is to be assessed on the basis of the factual and legal state of affairs that exists on the valuation date in reality, not on some other, artificial, basis.
2. The reality principle came to prominence in the rent review field in the late 1980s. But it is not something that is peculiar to the field of rent review, and it had already been making frequent visits – albeit incognito - for many years in other valuation fields (notably, capital taxation and rating). As Lewison LJ pointed out in Harbinger Capital Partners v Caldwell,<sup>1</sup> the principle applies wherever a contract or statute provides for the fixing of an amount by reference to a hypothetical transaction:

*“There are many areas of the law in which an amount is to be ascertained by postulating a hypothetical transaction of one kind or another. Rating is perhaps the oldest example, for which purpose rateable value was measured by postulating the hypothetical grant of a tenancy from year to year. But hypothetical transactions abound in other areas of the law: for example compulsory acquisition, taxation and rent review clauses. Sometimes the hypothesis is statutory and sometimes it is contractual. The courts have developed a well-established set of principles that apply to both kinds of case. The most important of these is that things are to be taken as they are in reality on the valuation date, except to the extent that the instrument postulating the hypothetical transaction requires a departure from reality. In the old cases this is summarised in the Latin phrase *rebus sic stantibus*. In the more modern cases it has been described as the principle of reality.”*

3. The principle is now an established feature of the jurisprudence of rent review. It is almost invariably deployed by one side or the other in any dispute where the proper interpretation of the clause is in issue. So, where does it come from, what are the sort of areas in which it applies, and how far does it go?

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<sup>1</sup> [2013] EWCA Civ 492. Note that Lewison LJ dissented in the result, but the remaining judges did not disagree on his explanation of the reality principle.

## THE REALITY PRINCIPLE

*“Reality is that which, when you stop believing in it, doesn't go away”  
(Philip K Dick)*

4. A lease is a contract to which the ordinary rules of construction apply, and there are no special rules of construction for the interpretation of rent review clauses<sup>2</sup>. At root, the question is the same as that in any interpretation dispute, namely, what would a reasonable person having all the background knowledge which would have been available to the parties have understood them to be using the language in the contract to mean?<sup>3</sup> The answer must be arrived at in the light of, among other things, the overall purpose of the relevant provision and the contract of which it forms part, and business common sense.<sup>4</sup> As Lord Hodge explained in Wood v. Capita Insurance Services,<sup>5</sup> construction is a “unitary exercise”, which involves an iterative process by which each suggested interpretation is checked against the provisions of the contract (“textualism”) and its factual background and commercial consequences (“contextualism”).
  
5. The presumption of reality is an example of contextualism in action. It is derived from the proposition that the commercial purpose of a rent review clause is to update the original rent to take account of changes in market conditions and the value of money during the course of the term. That proposition was established in a series of first instance decisions in the mid-1980s, in most of which the question was whether the hypothetical lease contained the same rent review provisions as the actual lease.<sup>6</sup> Perhaps the most-often cited is British Gas Corporation v. Universities Superannuation Scheme,<sup>7</sup> in which Sir Nicolas Browne-Wilkinson said:

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<sup>2</sup> Per Hoffmann LJ in Co-Operative Wholesale Society v. National Westminster Bank [1995] 1 E.G.L.R. 97.

<sup>3</sup> Arnold v Britton [2015] UKSC 36 at [15] per Lord Neuberger (quoting Lord Hoffmann in Chartbrook Ltd v Persimmon Homes Ltd [2009] 1 AC 1101 at [14]).

<sup>4</sup> Arnold v Britton, above, at [15].

<sup>5</sup> [2017] A.C. 1173.

<sup>6</sup> Pearl Assurance plc v Shaw [1985] 1 E.G.L.R. 61; Norwich Union Life Insurance Society v. Trustee Savings Banks Central Board [1986] 1 E.G.L.R. 136; Datastream International v Oakeep [1986] 1 E.G.L.R. 98; MFI Properties Ltd v BICC Group Pension Trust [1986] 1 All E.R. 974; British Gas Corporation v. Universities Superannuation Scheme [1986] 1 W.L.R. 398.

<sup>7</sup> [1986] 1 W.L.R. 398.

*“There is really no dispute that the general purpose of a provision for rent review is to enable the landlord to obtain from time to time the market rental which the premises would command if let on the same terms on the open market at the review dates. The purpose is to reflect the changes in the value of money and real increases in the value of the property during a long term. Such being the purpose, in the absence of special circumstances it would in my judgment be wayward to impute to the parties an intention that the landlord should get a rent which was additionally inflated by a factor which had no reference either to changes in the value of money or in the value of the property ... Of course, the lease may be expressed in words so clear that there is no room for giving effect to such underlying purpose. Again, there may be special surrounding circumstances which indicate that the parties did intend to reach such an unusual bargain. But in the absence of such clear words or surrounding circumstances, in my judgment the lease should be construed so as to give effect to the basic purpose of the rent review clause and not so as to confer on the landlord a windfall benefit which he could never obtain on the market if he were actually letting the premises at the review date ...”*

6. This is the genesis of the principle of reality. If the underlying commercial purpose of a rent review clause is to update the rent to reflect changes in the value of money and the value of property during the term, it follows that (save where the review clause otherwise provides) the rent is not to be inflated – or, for that matter, deflated - by reference to artificial factors which have no reference to changes in the value of money or in the value of the property. Hence, the presumption that the reviewed rent is to be calculated on the same basis as that which exists in reality.
  
7. This appears clearly from the decision of the Court of Appeal in Basingstoke & Deane BC v The Host Group,<sup>8</sup> where the issue concerned the terms of the hypothetical lease. Nicholls LJ said:

*“The means by which rent review clauses afford landlords relief in respect of increases in property values or falls in the value of money is by providing, normally, for a valuer, in default of agreement, to assess the up-to-date rent for the demised premises at successive review dates. In making that assessment the valuer will be achieving the intended purpose of keeping the rent in line with current property values having regard to the current value of money if, but only if, he assesses the up-to-date rent on the same terms (other than as to quantum of rent) as the terms still subsisting between the parties under the actual, existing lease. If he departs from those terms, and assesses the up-to-date rent on the footing of terms materially less onerous to the tenant than those in the actual, existing lease, the rental at which he arrives will reflect, in addition to the rental increases attributable to a rise in property values or a fall in the value of money,*

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<sup>8</sup> [1988] 1 W.L.R. 348.

*an additional element, viz., the increased rental attributable to the fact that he is calculating the rent of a lease on terms more favourable to the tenant than the terms in the actual, existing lease. Conversely, if he assesses the up-to-date rent on the basis of terms materially more onerous to the tenant than those in the actual existing lease, the rental figure at which the valuer arrives will not fully reflect the rise in property values or the fall in the value of money since the lease was granted or the rent was last fixed.*

*Of course rent review clauses may, and often do, require a valuer to make his valuation on a basis which departs in one or more respects from the subsisting terms of the actual existing lease. But if and in so far as a rent review clause does not so require, either expressly or by necessary implication, it seems to us that in general, and subject to a special context indicating otherwise in a particular case, the parties are to be taken as having intended that the notional letting postulated by their rent review clause is to be a letting on the same terms (other than as to quantum of rent) as those still subsisting between the parties in the actual existing lease. The parties are to be taken as having so intended, because that would accord with, and give effect to, the general intention underlying the incorporation by them of a rent review clause into their lease.”*

8. Thus did the reality principle come of age in the rent review field. Perhaps its clearest and most trenchant formulation is that of Hoffmann LJ in Co-operative Wholesale Society v. National Westminster Bank<sup>9</sup> as follows:

*“In the absence of clear contrary words or necessary implication, it is assumed that the hypothetical letting required by the clause is of the premises as they actually were, on the terms of the actual lease and in the circumstances as they actually existed”*

## **BUT WHAT REALITY?**

*“Reality is merely an illusion, albeit a very persistent one”*

*(attributed to Albert Einstein)*

9. The reviewed rent must, absent clear contrary words or necessary implication, be fixed by reference to reality. But what reality, and viewed from what perspective?
10. As Staughton LJ observed in Lynnthorpe Enterprises v Sidney Smith (Chelsea),<sup>10</sup> reality points in two different directions. One is the terms of the original bargain. If this is the relevant reality, the reviewed rent must be assessed by reference to a

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<sup>9</sup> [1995] 1 E.G.L.R. 97 at 99J-K.

<sup>10</sup> [1990] 2 E.G.L.R. 131.

hypothesis which replicates the position as it was when the lease was granted. The other is the state of affairs that exists on the review date, on which basis the valuation must reflect changes which have occurred since the initial grant.

11. The distinction can be illustrated by reference to the facts of Lynnthorpe itself. One of the issues was whether the hypothetical term to be assumed to be granted on the review date was a term equal to the original 15-year term, or a term equal to the unexpired residue of that term, which was 6 years. Staughton LJ said that if possible he would have given greater weight to the first than the second, but felt unable to do so, first because it has been uniformly rejected by a number of Chancery judges at first instance, and second, because it was impossible to reconcile with the period for future reviews which would have to be included in the hypothetical lease.
12. As he himself recognised, Staughton LJ's view had not found favour with the first instance judges who had already considered the hypothetical term issue, nor has it found favour since. It is clear from the cases that for the purposes of the presumption, the relevant reality is the factual and legal state of affairs which exists at the review date.
13. One consequence of this concerns the correct approach to provisions in rent review clauses which provide, as many do, that the hypothetical letting is on the "same terms and conditions" as the actual lease, or something to that effect. In most cases, there will be no difficulty. The assumption will ordinarily be construed as meaning that the notional lease contains those terms as they applied in reality at the review date, not as they applied when the lease was granted. Thus, if for example, the original user clause has, by the review date, been varied by a deed of variation, the hypothetical lease will ordinarily be assumed to contain the varied clause, not the original one. Equally, where a particular obligation is "spent", it will not usually be imported into the hypothetical lease.<sup>11</sup>
14. But arguments may arise where the actual lease contains a break clause. A good example comes from the facts of R & A Millett (Shops) v Legal & General Assurance Society.<sup>12</sup> A lease contained a landlord's break clause exercisable at any time after

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<sup>11</sup> Buffalo Enterprises v Golden Wonder, above.

<sup>12</sup> [1985] 1 E.G.L.R. 103.

the expiration of the first 12 years of the term. The review clause provided that the hypothetical letting was to be “*upon the terms and conditions of this lease*”. It was argued that the break clause was to be imported verbatim into the hypothetical lease, so that the right to break arose at the end of the first 12 years of the hypothetical term. The effect of this, if correct, was to create a notional right to break which did not exist in reality.

15. The Court rejected the argument, holding that the correct interpretation was that for the purposes of the review clause, the right to break was to be treated as arising at the end of the first 12 years of the actual term, not the first 12 years of the hypothetical term: the break date was therefore the same in the hypothetical lease as it was in the actual lease. In the ordinary case, this is likely to be the correct answer to this sort of problem. As it is put in *Woodfall*, “*The effect to be given to the terms of the lease are their effect in reality; not the effect which they would have if repeated verbatim in the hypothetical lease*”. So if, for example, the actual lease contains a tenant’s right to break at the end of the 10<sup>th</sup> year of the term, which is, say, 25<sup>th</sup> March 2025, the hypothetical lease for the purposes of a rent review on, say, 25<sup>th</sup> March 2020 will, absent contrary indications, contain a break clause operable on the same date, i.e. 25<sup>th</sup> March 2025, not 25<sup>th</sup> March 2030.

## **APPLICATION IN PRACTICE**

*“I am searching for abstract ways of expressing reality,  
abstract forms that will enlighten my own mystery”  
(Eric Cantona)*

16. In a well-drafted rent review clause, the reality principle will have little or no part to play, because the valuation hypothesis will spell out exactly what assumptions are required. But where the principle is engaged, the commonest assumptions to which (subject to clear contrary words or special circumstances) it will give rise are:

- (1) The premises are in the physical form in which they existed on the review date, including all alterations and improvements.<sup>13</sup> Note, however, that this is usually modified by an express disregard of tenant’s improvements, and also

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<sup>13</sup> *Laura Investment Co. v Havering LBC* [1992] 1 E.G.L.R. 155.

that licenses to alter often provide expressly that the works are to be disregarded on review.

- (2) The premises are being notionally let for a term equal to the unexpired residue of the actual term at the review date. This applies not only where the review clause is silent as to the assumed term,<sup>14</sup> but also where an express direction can reasonably be read as referring to the unexpired residue. So, the following formulations have all been held to require a hypothetical term equal to the unexpired residue at the review date: “*a term of years equivalent to the said term*” (Lynnthorpe<sup>15</sup>); “*for a term equivalent to the term hereby granted*” (Ritz Hotel (London) v Ritz Casino<sup>16</sup>); “*for a term equal in duration to the original term hereby granted*” (St Martins Property Investments v CIB Properties<sup>17</sup>); and “*for a term equal to the term originally granted under this lease*” (Chancebutton UK v Compass Services UK & Ireland [2004] 2 E.G.L.R. 47).<sup>18</sup> It may be added that although the Courts in these cases regarded themselves as doing no more than applying the ordinary and natural meaning of the words, it is far from clear that this was, in fact, either the natural meaning of the language, or the meaning which the words would have conveyed to someone active in the market at the time when the leases was granted, when longer terms were regarded as more valuable.
- (3) The premises are being notionally let on the same terms and conditions as the actual lease, in so far as those terms continue to apply on the review date and are not, for example, “spent”.<sup>19</sup>
- (4) The hypothetical lease contains provisions for review in the same terms, and on the same dates, as the actual lease.<sup>20</sup>

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<sup>14</sup> Norwich Union Life Insurance Society v. Trustee Savings Banks Central Board [1986] 1 E.G.L.R. 136; British Gas v. Dollar Land Holdings [1992] 1 E.G.L.R. 135.

<sup>15</sup> Above.

<sup>16</sup> [1989] 2 E.G.L.R. 135.

<sup>17</sup> [1999] 1 L. & T. R. 1.

<sup>18</sup> These cases should be contrasted with Canary Wharf (Three) v Telegraph Group, discussed below.

<sup>19</sup> Buffalo Enterprises v Golden Wonder [1991] 1 E.G.L.R. 141.

<sup>20</sup> See the cases referred to in fn. 6 above, and also St Martins Property Investments v CIB Properties, above.

(5) The relevant surrounding factual and legal circumstances - for example, the permitted planning use, the presence of a restrictive covenant binding the land, or the carrying out of disruptive building works in the locality - are the same as they were on the review date.

(6) The hypothetical market contains anyone who might be in it if the premises were being offered for letting in reality,<sup>21</sup> including the occupier of adjoining premises, even if he happens to be the actual tenant,<sup>22</sup> and any special purchaser.<sup>23</sup>

17. The general principle explained, it is now necessary to look at some of its limitations.

### **LIMITATIONS ON THE REALITY PRINCIPLE**

*“... human kind  
cannot bear very much reality  
(T.S. Eliot ‘Burnt Norton’)*

18. One important – indeed, by far the most important - limitation on the principle of reality has already been noted, namely, that it is simply a presumption of interpretation, which yields to clear contrary words or special circumstances. It is not a free-standing principle of law, and it must not be elevated into a mechanistic rule.<sup>24</sup> In all cases, the root question remains: how would a reasonable person, knowing the background, understand the words? And, as the cases show, a reasonable person would not be wedded to reality where the language and circumstances of the lease show that the parties intended something different.

19. Other points are as follows.

20. First, there is no conceptual limit to the potential application of the principle. It is not confined to the terms of the hypothetical lease. Thus, for example, it applies where

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<sup>21</sup> IRC v Gray [1994] 2 E.G.L.R. 185.

<sup>22</sup> First Leisure Trading v Dorita Properties [1999] 1 E.G.L.R. 133; British Airways v Heathrow Airport [1992] 1 E.G.L.R. 141.

<sup>23</sup> IRC v Clay [1914] 3 K.B. 4667; *Hill & Redman’s Guide to Rent Review* (M. Barnes QC), at para. 3.16. Cf. Cadogan v Pitts [2008] UKHL 71.

<sup>24</sup> Canary Wharf Investments (Three) v. Telegraph Group [2004] 2 P. & C. R. 24.

the issue concerns the applicable valuation methodology: in such a case, the Court “will require the language of the lease to make it clear that the parties intended to alter the valuation principles and assumptions normally applicable, before requiring the valuer to attach greater significance to the evidence of comparable lettings than they would otherwise command”.<sup>25</sup>

21. Second, the presumption applies with varying degrees of force, depending on the issue. The more unfair or one-sided the departure from reality contended for, the stronger the presumption may be. In other words, although the presumption can only be rebutted by “clear” words, the requisite degree of clarity may vary.

22. Thus, in Canary Wharf Investments (Three) v Telegraph Group<sup>26</sup> Neuberger J said that the presumption operates with more force where the issue is whether the hypothetical lease contains the same provisions for rent review as the actual lease, than it does where the issue concerns the length of the hypothetical term: in the former case, the presumption applies “with particular force”, because a valuation based upon a hypothetical lease with no reviews is manifestly unfair, it is capable of operating in favour of only one party (the landlord), and it can present very serious valuation difficulties; but those factors do not apply, or apply with less force, in the latter case. Applying this approach, the judge went on to hold (distinguishing the hypothetical term cases referred to above) that a direction in a 25-year lease to assume a letting “for the grant thereof, for a term of 25 years” was sufficiently clear to require the valuer to assume a fresh 25-year term from the review date, and not a term equal to the unexpired residue at the review date.

23. A further example comes from the headline rent cases. A provision requiring the reviewed rent to be a headline rent - that is to say, the rent that a tenant in the market would pay if he were being given, as part of the deal, a rent-free period for the sole purpose of inducing him to enter into the lease – is oppressive, unfair and artificial, because in reality the tenant is not getting any such rent free period. Moreover, such a provision is only capable of operating in favour of the landlord. For these reasons, a high degree of clarity is required before a clause will be interpreted as providing for a headline rent. As is well-known, in Co-operative Wholesale

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<sup>25</sup> Beegas Nominees v Decco [2003] 3 E.G.L.R. 25.

<sup>26</sup> Canary Wharf Investments (Three) v Telegraph Group, above.

Society v National Westminster Bank,<sup>27</sup> in only one of the four appeals was the relevant clause held by the Court of Appeal to produce a headline rent. Hoffmann LJ thought that *“in the absence of unambiguous language, a court should not be ready to construe a rent review clause as”* requiring a headline rent. Simon Brown LJ said that *“only the most unambiguous of such clauses could properly be found to bear the landlord’s construction”*. The degree of creativity of the reasoning in the cases where the clause was held not to require a headline rent shows quite how strong the presumption is in headline rent cases.

24. Third, the presumption will ordinarily be stronger where the hypothetical lease is of the same kind as, and its subject matter is the same as, the subject matter of the original lease, than it will be where the hypothetical lease is a fundamentally different thing.<sup>28</sup> Thus, in Brown v Gloucester CC<sup>29</sup> and Westside Nominees v Bolton MBC<sup>30</sup>, the actual lease in each case was for a very long term at a geared rent (which reflected the fact that one party had contributed the land and the other the building works), but the reviewed rent was to be assessed by reference to a letting of the premises as a whole or in parts at a rack rent or rents. The tenant’s argument that the hypothetical term or terms were the unexpired residue of the actual term was rejected, in favour of the hypothetical term being such term as the landlord might reasonably be expected to grant and the tenant to take on the valuation date.

25. The same may be true where the rent review operates by reference to something other than the usual hypothesis of an open market letting. Thus, in Elmfield Road v Trillium (Prime) Property GP,<sup>31</sup> which concerned the proper interpretation of an indexation rent review clause, the Court of Appeal regarded the presumption of reality as of *“only limited assistance”*, because:

*“In the first place, the parties have excluded any increase in rent attributable to changes in the value of the property over the long term. Instead they have chosen index-linking alone. Second, [British Gas] was concerned with a conventional review to market rent; and it was in that context that the purpose of a rent review clause was described. Third, what was at issue in that case was*

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<sup>27</sup> Above.

<sup>28</sup> See Brown v Gloucester CC [1998] 1 E.G.L.R. 95.

<sup>29</sup> Above.

<sup>30</sup> (2001) 81 P. & C. R. 11.

<sup>31</sup> [2018] EWCA Civ 1156.

*the details of the assumptions to be made in connection with the hypothetical lease to be assumed for the purposes of the rent review.”*

26. Fourth, the fact that the review clause explicitly departs from reality in one relevant respect does not, of itself, mean that the presumption has no part to play.

27. Thus, in Dukeminster (Ebbgate House One) v. Somerfield Properties Co.,<sup>32</sup> a lease of a retail distribution warehouse of approximately 250,000 sq. ft. on the Overross Industrial Estate at Ross on Wye provided for the reviewed rent to be the greater of the passing rent, the rental value of the actual premises and 82.5% of the rental value of the “*Notional Premises*” applied as a rental value per square foot to the actual premises. The latter expression meant (so far as relevant) “*a warehouse unit within a thirty five mile radius of Ross on Wye and having the following characteristics:- (a) a total gross internal area of 50,000 sq. ft. ...*”. The issue was whereabouts within the thirty-five mile radius the notional unit was situated. The Court of Appeal held that it was situated either where the actual premises were situated or in a comparable location within the specified radius. Nourse LJ said:

*“We must ... find a commercial solution to the problem posed. And in doing so we must bear in mind that all rent review provisions, even those which operate by reference to a valuation of notional premises, operate in a real world and not in one of fantasy. Thus, in the absence of clear words, notional premises cannot be taken to be such as to produce a valuation, whether it be too high or too low, which cannot reasonably have been intended to apply to the actual premises.”*

28. It can be argued that where the review provisions expressly depart from reality in a respect which (unlike, say, the conventional disregard of tenant’s improvements) cannot be explained by reference to fairness or commercial commonsense, that is all the more reason for saying that a high degree of clarity is necessary before it would be right to construe the clause as requiring any further departures from reality. The contrary argument is, of course, that once reality has been departed from in such a manner, the presumption must inevitably be weaker. The availability and strength of these arguments will, of course, vary from case to case.

29. Fifth, it is, of course, very common for rent review clauses expressly to manipulate reality by introducing express counter-factual assumptions or disregards. These are

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<sup>32</sup> [1997] 2 E.G.L.R. 125.

usually explicable by reference to commercial good sense and fairness. For example, the conventional assumption that the tenant has complied with his covenants prevents him from arguing for a reduced rent by reason of his own breaches; and the usual form of disregard of tenants' improvements means that the tenant does not have to pay rent for his own improvements. But even where an express counter-factual assumption cannot be justified by reference to commercial common sense, clear words will be given effect to, however unfair the result, because "... *the court has no option but to assume that it was a quid pro quo for some other concession in the course of negotiations. The court cannot reject it as absurd merely because it is counter-factual and has no outward commercial justification*".<sup>33</sup>

30. Sixth, even where the rent review clause does not expressly provide for the rent to be fixed on a counter-factual basis, the requirement to determine an open market rent as between willing parties may necessarily imply a departure from reality. Thus, for example, the actual lease must be assumed to have ended and the tenant to have vacated; the premises must be assumed to have been properly exposed to the market;<sup>34</sup> and where the user clause in the actual lease restricts use to that of the actual tenant by name, the clause must necessarily be adjusted.<sup>35</sup>

## **PILING HYPOTHESIS UPON HYPOTHESIS**

*"Reality leaves a lot to the imagination"*

*(John Lennon)*

31. An issue which sometimes comes up in practice is just how far a counter-factual assumption can properly be taken, or to put it another way, to what extent it is permissible to follow the assumption through to what might be argued to be its logical conclusion, or otherwise to investigate its consequences.

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<sup>33</sup> MFI Properties v BICC Group Pension Trust, above.

<sup>34</sup> Van Dal Footwear v Ryman [2010] 1 W.L.R. 2015.

<sup>35</sup> The Law Land Company v Consumers' Association (1980) 255 E.G. 617. The position may be different where the importation of the same user clause would not stultify the rent review provisions: James v British Crafts Centre [1987] 1 E.G.L.R. 139.

32. The short answer is that the assumption must not be taken any further than its terms make strictly necessary, and in all other respects, reality must be adhered to so far as possible. It is not permissible to pile hypothesis upon hypothesis.<sup>36</sup> As Lewison LJ put it in Harbinger Capital Partners v Caldwell,<sup>37</sup> “... *there is a clear distinction between hypotheses expressly directed to be made and assumptions allegedly consequential on the express hypotheses. Where the alleged consequence is not inevitable, but merely possible (or even probable), then the consequence cannot be assumed to have happened*”.

33. Thus, to take a common example, the express assumption of vacant possession requires one to assume that the actual tenant is no longer in occupation of the demised premises. But it will not ordinarily be right to go on and inquire into why he has left, what has happened to him, or where he has gone.<sup>38</sup> A further example concerns the hypothetical marketing period referred to above. This is no more than an assumption required to enable the valuation to take place: it does not entitle the valuer to reconstruct what would or might have happened during such period, and thereby to create notional rights or obligations which did not in fact exist in reality on the valuation date.<sup>39</sup>

## **DEPLOYING THE PRESUMPTION IN DISPUTES**

*“Either you deal with what is the reality,  
or you can be sure that the reality is going to deal with you”*

*(Alex Haley)*

34. Finally, three short points on the forensic deployment of the presumption of reality in rent review disputes.

35. First, it will generally be good advocacy not to rely on the principle to the exclusion of all else. The starting point will, as always, be the words used, interpreted in the context of the lease as a whole. If the result contended for can be derived from the express materials available, coupled with the admissible background, but without

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<sup>36</sup> Cornwall Coast Country Club v Cardgrange [1987] 1 E.G.L.R. 146.

<sup>37</sup> Above.

<sup>38</sup> Cornwall Coast Country Club v Cardgrange, above.

<sup>39</sup> Van Dal Footwear v Ryman, above.

primary recourse to the presumption, so much the better. That is not, of course, to say that the presumption cannot or should not be deployed – even forcibly deployed – in support. But the dispute resolver – be they judge, arbitrator or legal assessor – will usually be reluctant to decide the issue on the presumption alone, unless there really is no other material. There usually will be.

36. Second, when arguing for the application of the presumption in any particular case, the primary task will be to demonstrate that the words in question are reasonably capable of more than one meaning. But it will also be helpful to point to the fact, if true, that in all respects other than the matter in dispute, the rent review clause is drafted along conventional lines; it contains no express departures from reality which cannot be explained by reference to fairness and commercial commonsense; and there is nothing in the admissible factual background (excluding negotiations) which might point to or otherwise explain an intention to fix the rent on an artificial basis.

37. Third, when arguing for the rebuttal of the presumption, the principal focus will obviously be on the extent to which the words can be said to be clear and free from ambiguity. But other useful areas to look at will be (i) whether there is anything in the admissible factual background (excluding negotiations) which might help to explain why the parties might have wanted to depart from reality; in this regard, it is often helpful to look at any preceding agreement for lease or collateral agreement, which may contain relevant material; and (ii) whether it can properly be argued that the nature of the issue is such that the departure from reality contended for is not unfair in the sense that it is capable of benefitting either party, depending on the state of the market on the review date.

(c) Nicholas Dowding QC (March 2019)