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Supreme Court

**Arnold v Britton and others**

[2015] UKSC 36

B 2015 Jan 26;  
June 10Lord Neuberger of Abbotsbury PSC, Lord Sumption,  
Lord Carnwath, Lord Hughes, Lord Hodge JJSC

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*Landlord and tenant — Covenant — Service charge — Long leases for holiday chalets — Clause in leases purporting to provide for payment of charge at fixed sum to be increased at compound rate of 10% per year — Clause inserted at time of high inflation — Inflation subsequently at consistently lower annual rates — Landlord levying service charge in accordance with specified sum — Tenants claiming commercial sense requiring clause to be construed as variable service charge based on actual expenditure with fixed sum as cap only — Whether clause providing for fixed sum payment — Whether open to court to depart from natural meaning of clause to prevent commercially absurd result*

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From 1974 the then owners of an area of land granted a number of 99-year leases of plots on which holiday chalets were to be built, the preamble to each lease stating that it would be granted “upon terms similar in all respects” to the other leases, the introductory words of clause 3 providing that each lessee’s covenants as to use and repair of chalets were, inter alia, for the benefit of other lessees, and clause 4(8) containing a covenant by the lessors that the covenants imposed on other lessees were to like effect. Clause 3 of the first group of leases included, in clause 3(2), a lessee’s covenant “to pay . . . a proportionate part of the expenses and outgoings incurred by the lessors in the repair, maintenance, renewal and the provision of services [as set out in the lease] in the yearly sum of £90”, increasing thereafter at a three-yearly compound rate of 10%. Subsequently, leases in respect of further chalets were granted in which clause 3(2) provided for an annual 10% compound increase. In 2011 the tenants of those chalets, whose annual service charge had risen to over £2,700 as opposed to £282 for the chalets subject to the earlier leases, and who claimed that an interpretation of the clause which required a fixed sum payment resulted in such an absurdly high annual service charge that it could not be right, claimed that clause 3(2) should be read as requiring them to pay a variable sum, being a fair proportion of the cost of providing the services, with the specified sum being no more than a cap on the maximum sum payable. The landlord commenced CPR Part 8 proceedings in the county court seeking a declaration that clause 3(2) required the payment of the fixed sum and not any lesser variable amount. The judge construed the clause in accordance with the construction contended for by the tenants and so dismissed the claim. Allowing an appeal by the landlord the High Court judge held that, on a natural reading of the clause, the object of the verb “to pay” was the fixed sum of £90 as escalated, whereas the construction contended for by the tenants would involve rewriting the bargain which the parties had made, which, given the high levels of inflation in the United Kingdom when those leases had been granted, could not be said at that time to have lacked commercial purpose. Dismissing the tenants’ appeal, the Court of Appeal affirmed the High Court judge’s reasoning and held, additionally, that the words “a proportionate part” were not inconsistent with a fixed service charge in circumstances where other lessees were contributing to the overall service charge, which in consequence was to be apportioned between them.

On the tenants’ further appeal—

*Held*, dismissing the appeal (Lord Carnwath JSC dissenting), (1) that the interpretation of a contractual provision, including one as to service charges, involved identifying what the parties had meant through the eyes of a reasonable

reader, and, save in a very unusual case, that meaning was most obviously to be gleaned from the language of the provision; that, although the less clear the relevant words were, the more the court could properly depart from their natural meaning, it was not to embark on an exercise of searching for drafting infelicities in order to facilitate a departure from the natural meaning; that commercial common sense was only relevant to the extent of how matters would or could have been perceived by the parties, or by reasonable people in the position of the parties, as at the date on which the contract was made; and that, moreover, since the purpose of contractual interpretation was to identify what the parties had agreed, not what the court thought that they should have agreed, it was not the function of a court to relieve a party from the consequences of imprudence or poor advice (post, paras 15–20, 23, 66, 76–77).

Dicta of Lord Hoffmann in *Chartbrook Ltd v Persimmon Homes Ltd* [2009] AC 1101, para 14, HL(E) and of Lord Clarke of Stone-cum-Ebony JSC in *Rainy Sky SA v Kookmin Bank* [2011] 1 WLR 2900, para 21, SC(E) applied.

(2) That, applying those principles, the natural meaning of the words used in clause 3(2) were clear, namely that the first half of the clause stipulated that the lessee was to pay an annual service charge and the second half identified how that charge was to be calculated, namely by way of a fixed increase in the annual sum, which was explicable on the basis that the parties had assumed that the cost of providing the services would increase in line with the level of inflation then current and so accorded with commercial common sense at the date of the agreement; that the fact that it was now apparent that the sum payable could substantially exceed the parties' expectations at the time of the grant of the lease was not a reason for giving the clause a different meaning; that it followed that clause 3(2) of each lease fell to be applied as charging a fixed amount increasing annually at the compound rate stipulated therein; that such conclusion was unaffected by any building or letting scheme to be implied from the preamble to each lease read together with the introductory words to clause 3 and with clause 4(8), in that, even on an assumption that such a scheme of reciprocity and mutual enforceability of covenants could extend to a positive covenant to pay a service charge, it could not extend to the implication of a term preventing the lessor from recovering more by way of service charge than could be recovered under each of the earlier leases; and that, accordingly, the landlord had been entitled to the declaration sought (post, paras 24–26, 35, 48–49, 51, 55–58, 60, 62, 66, 75, 77).

Decision of the Court of Appeal [2013] EWCA Civ 902; [2013] L & TR 371 affirmed.

The following cases are referred to in the judgments:

*Aberdeen City Council v Stewart Milne Group Ltd* [2011] UKSC 56; 2012 SCLR 114, SC(Sc)

*Antaios Cia Naviera SA v Salen Rederierna AB (The Antaios)* [1985] AC 191; [1984] 3 WLR 592; [1984] 3 All ER 229, HL(E)

*Attorney General of Belize v Belize Telecom Ltd* [2009] UKPC 10; [2009] 1 WLR 1988; [2009] Bus LR 1316; [2009] 2 All ER 1127; [2009] 2 All ER (Comm) 1, PC  
*Bank of Credit and Commerce International SA v Ali* [2001] UKHL 8; [2002] 1 AC 251; [2001] 2 WLR 735; [2001] ICR 337; [2001] 1 All ER 961, HL(E)

*Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38; [2009] AC 1101; [2009] 3 WLR 267; [2009] Bus LR 1200; [2009] 4 All ER 677; [2010] 1 All ER (Comm) 365, HL(E)

*Co-operative Wholesale Society Ltd v National Westminster Bank plc* [1995] 1 EGLR 97, CA

*Dolphin's Conveyance, In re* [1970] Ch 654; [1970] 3 WLR 31; [1970] 2 All ER 664  
*Homburg Houtimport BV v Agrosin Private Ltd (The Starsin)* [2003] UKHL 12; [2004] 1 AC 715; [2003] 2 WLR 711; [2003] 2 All ER 785; [2003] 1 All ER (Comm) 625; [2003] 1 Lloyd's Rep 571, HL(E)

*Hyams v Titan Properties Ltd* (1972) 24 P & CR 359, CA

- A *Johnson v Unisys Ltd* [2001] UKHL 13; [2003] 1 AC 518; [2001] 2 WLR 1076; [2001] ICR 480; [2001] 2 All ER 801, HL(E)  
*KPMG LLP v Network Rail Infrastructure Ltd* [2007] EWCA Civ 363; [2007] Bus LR 1336, CA  
*MRS Distribution Ltd v DS Smith (UK) Ltd* 2004 SLT 631  
*McHale v Earl Cadogan* [2010] EWCA Civ 14; [2010] HLR 412; [2010] 1 EGLR 51, CA
- B *Norwich Union Life Insurance Society v Low Profile Fashions Ltd* [1992] 1 EGLR 86; 64 P & CR 187, CA  
*Pennant Hills Restaurants Pty Ltd v Barrell Insurances Pty Ltd* (1981) 145 CLR 625  
*Pink Floyd Music Ltd v EMI Records Ltd (Practice Note)* [2010] EWCA Civ 1429; [2011] 1 WLR 770, CA  
*Prenn v Simmonds* [1971] 1 WLR 1381; [1971] 3 All ER 237, HL(E)  
*Rainy Sky SA v Kookmin Bank* [2011] UKSC 50; [2011] 1 WLR 2900; [2012] Bus LR 313; [2012] 1 All ER 1137; [2012] 1 All ER (Comm) 1; [2012] 1 Lloyd's Rep 34, SC(E)
- C *Reardon Smith Line Ltd v Yngvar Hansen-Tangen (trading as HE Hansen-Tangen)* [1976] 1 WLR 989; [1976] 3 All ER 570; [1976] 2 Lloyd's Rep 621, HL(E)  
*Sigma Finance Corp'n, In re* [2009] UKSC 2; [2010] 1 All ER 571, SC(E)  
*Simon v Helmot* [2012] UKPC 5; [2012] Med LR 394, PC  
*Walker v Giles* (1848) 6 CB 662
- D *Wickman Machine Tool Sales Ltd v L Schuler AG* [1974] AC 235; [1973] 2 WLR 683; [1973] 2 All ER 39; [1973] 2 Lloyd's Rep 53, HL(E)

The following additional cases were cited in argument:

- Debenhams Retail plc v Sun Alliance and London Assurance Co Ltd* [2005] EWCA Civ 868; [2005] STC 1443; [2006] 1 P & CR 123, CA  
*Napier Park European Credit Opportunities Fund Ltd v Harbourmaster Pro-Rata CLO 2 BV* [2014] EWCA Civ 984, CA
- E *Waites (H) Ltd v Hambledon Court Ltd* [2014] EWHC 651 (Ch); [2014] 1 EGLR 119

#### APPEAL from the Court of Appeal

- By a claim form issued in the Swansea County Court dated 7 December 2011 the claimant landlord, Paddy Arnold, freehold owner of the Oxwich Leisure Park, Oxwich, Gower, Swansea, sought against the defendant tenants, Rodney Britton and 42 others, each being a lessee of a chalet on the land under a 99-year lease from 12 December 1974, a declaration that
- F (i) clause 3(2) of the lease obliged the lessee to pay a fixed sum of £90 in the first year of the term and thereafter a fixed sum which rose by the rate of 10% per annum, and (ii) accordingly, the sum payable pursuant to clause 3(2) was not a "service charge" within section 18 of the Landlord and Tenant Act 1985.
- G On 1 June 2012 Judge Jarman QC, sitting in the Cardiff County Court, refused to grant the declaration sought and instead declared that (i) clause 3(2) required the lessee to pay a proportionate part of the expenses and outgoings incurred by the lessor in the repair, maintenance, renewal and provision of services set out in the respective lease, the charge being limited to a yearly sum of £90 for the first year of the term granted by each lease and to a yearly sum increasing by 10% per annum for every subsequent year of
- H the respective lease, and (ii) such charge was a service charge within section 18 of the 1985 Act.

The claimant appealed. On 3 December 2012 Morgan J, sitting in the Cardiff District Registry [2012] EWHC 3451 (Ch); [2013] L & TR 174 allowed the appeal and granted a declaration in the terms sought by her.

38 of the defendants appealed. On 22 July 2013 the Court of Appeal (Richards, Davis, Lloyd Jones LJJ) [2013] EWCA Civ 902; [2013] L & TR 371 dismissed the appeal. A

On 11 February 2014 the Supreme Court (Lord Neuberger of Abbotsbury PSC, Lord Carnwath, Lord Toulson JJSC) granted those tenants permission to appeal, pursuant to which they appealed. The issue for the court, as stated in the parties' agreed statement of facts and issues, was whether as a matter of interpretation (including the possible implication of a term) the service charge clause in each of the leases provided for a fixed service charge with annual compounded increases at the rate of 10%, or for a variable service charge subject to a cap. B

The facts are stated in the judgments of Lord Neuberger of Abbotsbury PSC and Lord Carnwath JSC. C

*Timothy Morshead QC* and *Rawdon Crozier* (instructed by *Fursdon Knapper, Plymouth*) for the tenants.

*Michael Daiches* (instructed by *Morgan LaRoche Solicitors, Swansea*) for the landlord.

The court took time for consideration. D

10 June 2015. The following judgments were handed down.

**LORD NEUBERGER OF ABBOTSBURY PSC** (with whom **LORD SUMPTION** and **LORD HUGHES JJSC** agreed)

1 This appeal concerns the interpretation of service charge contribution provisions in the leases of a number of chalets in a caravan park in south Wales. E

#### *The facts*

2 The facts may be summarised as follows (although they are more fully set out by Lord Carnwath JSC at paras 81–103). F

3 Oxwich Leisure Park is on the Gower peninsular, and contains 91 chalets, each of which is let on very similar terms. The five leases which we have seen were granted between 1978 and 1991, either for a premium (of less than £20,000) or in return for the lessee constructing the chalet. Each of the 91 chalets was let on a lease which was for a term of 99 years from 25 December 1974 and reserved a rent of £10 per annum increasing by £5 for each subsequent period of 21 years. Paragraph (2) of the recital of each lease contains the statement that the chalets on the leisure ark were intended to be subject to leases “upon terms similar in all respects to the present demise”. G

4 Clause 3 of each lease contains various covenants by the lessee, and it is introduced by the words: H

“The lessee hereby covenants with the lessor and with and for the benefit of the owners and lessees from time to time during the currency of the term hereby granted of the other plots on the estate so far as the obligations hereafter mentioned are capable of benefitting them . . .”

- A The covenants that follow concern use, repair, alienation and the like. Crucially for present purposes, clause 3(2) is a covenant to pay an annual service charge. Each lease also contains covenants by the lessor. One such covenant is to provide services to the park, such as maintaining roads, paths, fences, a recreation ground and drains, mowing lawns, and removing refuse. The lessor also covenants in clause 4(8) that leases of other chalets “shall contain covenants on the part of the lessees thereof to observe the like obligations as are contained herein or obligations as similar thereto as the circumstances permit”.
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- 5 25 of the chalets are said by the respondent, the current owner of the leisure park and the landlord under the leases, to be subject to leases containing a service charge provision in clause 3(2), which requires the lessee to pay for the first year of the term a fixed sum of £90 per annum, and for each ensuing year a fixed sum representing a 10% increase on the previous year—i.e. an initial annual service charge of £90, which increases at a compound rate of 10% in each succeeding year. The issue on this appeal is whether the respondent’s interpretation of clause 3(2) in those 25 leases is correct.
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- 6 Of the 25 leases in question, 21 were granted between 1977 and 1991. Prior to the grant of most of those 21 leases, the other 70 chalets had been the subject of leases granted from the early 1970s. In each of those 70 leases, clause 3(2) was a covenant by the lessee:
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- “To pay to the lessors without any deduction in addition to the said rent a proportionate part of the expenses and outgoings incurred by the lessors in the repair maintenance renewal and the provision of services hereafter set out the yearly sum of £90 and VAT (if any) for the first three years of the term hereby granted increasing thereafter by ten pounds per hundred for every subsequent three year period or part thereof.”
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The effect of this clause, at least on the face of it, is that the initial service charge of £90 per annum was to be increased on a compound basis by 10% every three years, which is roughly equivalent to a compound rate of 3% per annum.

- 7 The 21 leases referred to in para 6 have two slightly different versions of clause 3(2), but the clause can be set out in the following form (with the words shown in italics included in 14 of the 21 leases, but not in the other seven):
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- “To pay to the lessors without any deductions in addition to the said rent *as* a proportionate part of the expenses and outgoings incurred by the lessors in the repair maintenance renewal *and renewal of the facilities of the estate* and the provision of services hereafter set out the yearly sum of £90 and VAT (if any) for the first year of the term hereby granted increasing thereafter by ten pounds per hundred for every subsequent year *or part* thereof.”
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- 8 To complicate matters a little further, the service charge clause in four of these 21 leases (being four of the seven which did not include the words in italics in the preceding quotation), had the word “for” before “the yearly sum of £90”. These four leases also included a proviso to the effect that, so long as “the term hereby created is vested in the [original lessees] or the survivor of them”, clause 3(2) would be treated as being in the form set out
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in para 6 above. This proviso has ceased to have effect as these four leases are no longer vested in the original lessees.

9 Finally, the service charge clause in four of the 70 leases referred to in para 6 above were varied pursuant to deeds of variation executed between October 1998 and August 2002 so as to be identical to that set out in para 7 above, including the words in *italics*.

*The issues between the parties*

10 As already explained, the respondent, the current landlord, contends that the service charge provisions in clause 3(2) of the 25 leases referred to in paras 6–9 above have the effect of providing for a fixed annual charge of £90 for the first year of the term, increasing each subsequent year by 10% on a compound basis. The appellants, the current tenants under 24 of the 25 leases, primarily contend that the respondent's construction results in such an increasingly absurdly high annual service charge in the later years of each of the 25 leases that it cannot be right. They argue that, properly read, each service charge clause in the 25 leases requires the lessee to pay a fair proportion of the lessor's costs of providing the services, subject to a maximum, which is £90 in the first year of the term, and increases every year by 10% on a compound basis. In other words, the appellants argue that, in effect, the words "up to" should be read into the clause set out in para 7 above, between the words "the provision of services hereafter set out" and "the yearly sum of £90". The appellants also have an alternative contention, based on the provisions of recital (2), the opening words of clause 3 and the provisions of clause 4(8) of their leases, namely that the lessor cannot recover more by way of service charge than could be recovered under each of the first 70 leases.

*The evidence*

11 Apart from the documents themselves and the published Retail Price Index ("RPI") for each of the years 1970–2010, there is no evidence as to the surrounding circumstances in which the 21 leases were executed, other than the fact that the four leases referred to in para 8 above were granted to individuals connected with the lessor. Following a request from the court, we were also told that three of the four deeds of variation referred to in para 9 above were entered into with the lessor's daughter as lessee.

12 I do not find it surprising that we have not been provided with any further evidence. So far as the wording of clause 3(2) is concerned, there may have been letters or notes of discussions in connection with the original drafting and granting (and, in the four cases referred to in para 9 above, the amending) of the leases. But, even if such notes or letters had survived, I very much doubt that they would have thrown any light on what was intended to be the effect of the drafting of the various forms of clause 3(2). Even if they had done, they would probably have been inadmissible as I strongly suspect that they would merely have shown what one party thought, or was advised, that the clause meant. If such documents had shown what both parties to the lease in question intended, they would probably only have been admissible if there had been a claim for rectification.

13 As to the possibility of other material, I am unconvinced that, even if it existed, evidence of the original level of services, the original cost of the

- A services or any investigations made on behalf of a potential lessee in relation to the original services and their cost would have assisted on the issue of what clause 3(2) of any of the 25 leases meant. The provisions for increase at the end of clause 3(2) of each lease were plainly included to allow for inflation, and the only evidence which appears to me to be potentially relevant would be contemporary assessments of the actual and anticipated annual rate of inflation, and, as already mentioned, we have the RPI for each
- B of the years in question.

*Interpretation of contractual provisions*

- 14 Over the past 45 years, the House of Lords and Supreme Court have discussed the correct approach to be adopted to the interpretation, or construction, of contracts in a number of cases starting with *Prenn v Simmonds* [1971] 1 WLR 1381 and culminating in *Rainy Sky SA v Kookmin Bank* [2011] 1 WLR 2900.

- 15 When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to “what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean”, to quote Lord Hoffmann in *Chartbrook Ltd v Persimmon Homes Ltd* [2009] AC 1101, para 14. And it does so by focussing on the meaning of the relevant words, in this case clause 3(2) of each of the 25 leases, in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances
- D known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party’s intentions. In this connection, see *Prenn* [1971] 1 WLR 1381, 1384–1386; *Reardon Smith Line Ltd v Yngvar Hansen-Tangen (trading as HE Hansen-Tangen)* [1976] 1 WLR 989, 995–997 per Lord Wilberforce; *Bank of Credit and Commerce International SA v Ali* [2002] 1 AC 251, para 8, per Lord Bingham of Cornhill; and the survey of more recent authorities in *Rainy Sky* [2011] 1 WLR 2900, paras 21–30, per Lord Clarke of Stone-cum-Ebony JSC.

16 For present purposes, I think it is important to emphasise seven factors.

- 17 First, the reliance placed in some cases on commercial common sense and surrounding circumstances (eg in *Chartbrook* [2009] AC 1101, paras 16–26) should not be invoked to undervalue the importance of the language of the provision which is to be construed. The exercise of interpreting a provision involves identifying what the parties meant through the eyes of a reasonable reader, and, save perhaps in a very unusual case, that meaning is most obviously to be gleaned from the language of the provision. Unlike commercial common sense and the surrounding circumstances, the parties have control over the language they use in a contract. And, again
- G save perhaps in a very unusual case, the parties must have been specifically focussing on the issue covered by the provision when agreeing the wording of that provision.

18 Secondly, when it comes to considering the centrally relevant words to be interpreted, I accept that the less clear they are, or, to put it another

way, the worse their drafting, the more ready the court can properly be to depart from their natural meaning. That is simply the obverse of the sensible proposition that the clearer the natural meaning the more difficult it is to justify departing from it. However, that does not justify the court embarking on an exercise of searching for, let alone constructing, drafting infelicities in order to facilitate a departure from the natural meaning. If there is a specific error in the drafting, it may often have no relevance to the issue of interpretation which the court has to resolve.

19 The third point I should mention is that commercial common sense is not to be invoked retrospectively. The mere fact that a contractual arrangement, if interpreted according to its natural language, has worked out badly, or even disastrously, for one of the parties is not a reason for departing from the natural language. Commercial common sense is only relevant to the extent of how matters would or could have been perceived by the parties, or by reasonable people in the position of the parties, as at the date that the contract was made. Judicial observations such as those of Lord Reid in *Wickman Machine Tools Sales Ltd v L Schuler AG* [1974] AC 235, 251 and Lord Diplock in *Antaios Cia Naviera SA v Salen Rederierna AB (The Antaios)* [1985] AC 191, 201, quoted by Lord Carnwath JSC at para 110, have to be read and applied bearing that important point in mind.

20 Fourthly, while commercial common sense is a very important factor to take into account when interpreting a contract, a court should be very slow to reject the natural meaning of a provision as correct simply because it appears to be a very imprudent term for one of the parties to have agreed, even ignoring the benefit of wisdom of hindsight. The purpose of interpretation is to identify what the parties have agreed, not what the court thinks that they should have agreed. Experience shows that it is by no means unknown for people to enter into arrangements which are ill-advised, even ignoring the benefit of wisdom of hindsight, and it is not the function of a court when interpreting an agreement to relieve a party from the consequences of his imprudence or poor advice. Accordingly, when interpreting a contract a judge should avoid re-writing it in an attempt to assist an unwise party or to penalise an astute party.

21 The fifth point concerns the facts known to the parties. When interpreting a contractual provision, one can only take into account facts or circumstances which existed at the time that the contract was made, and which were known or reasonably available to both parties. Given that a contract is a bilateral, or synallagmatic, arrangement involving both parties, it cannot be right, when interpreting a contractual provision, to take into account a fact or circumstance known only to one of the parties.

22 Sixthly, in some cases, an event subsequently occurs which was plainly not intended or contemplated by the parties, judging from the language of their contract. In such a case, if it is clear what the parties would have intended, the court will give effect to that intention. An example of such a case is *Aberdeen City Council v Stewart Milne Group Ltd* 2012 SCLR 114, where the court concluded that “any . . . approach” other than that which was adopted “would defeat the parties’ clear objectives”, but the conclusion was based on what the parties “had in mind when they entered into” the contract: see paras 21 and 22.

23 Seventhly, reference was made in argument to service charge clauses being construed “restrictively”. I am unconvinced by the notion that service

- A charge clauses are to be subject to any special rule of interpretation. Even if (which it is unnecessary to decide) a landlord may have simpler remedies than a tenant to enforce service charge provisions, that is not relevant to the issue of how one interprets the contractual machinery for assessing the tenant's contribution. The origin of the adverb was in a judgment of Rix LJ in *McHale v Earl Cadogan* [2010] HLR 412, para 17. What he was saying, quite correctly, was that the court should not "bring within the general words of a service charge clause anything which does not clearly belong there". However, that does not help resolve the sort of issue of interpretation raised in this case.
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*Discussion: interpretation of clause 3(2)*

- 24 When one turns to clause 3(2) of each of the 91 leases of the chalets in Oxwich Park, the natural meaning of the words used, at least until one considers the commercial consequences, seems clear. The first half of the clause (up to and including the words "hereafter set out") stipulates that the lessee is to pay an annual charge to reimburse the lessor for the costs of providing the services which he covenants to provide, and the second half of the clause identifies how that service charge is to be calculated.
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- 25 The fact that the second half of the clause results in the service charge being a fixed sum, rather than a sum dependent on the costs to the lessor of providing the contractual services is readily explicable. As stated in *Wonnacott's The History of the Law of Landlord and Tenant in England and Wales* (2012), p 106, clauses which provide for charges which vary with the costs of providing services have resulted, at least since around 1960, in "more trouble between landlord and tenant than anything else". Further,
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- legislation which started to come into force in 1972 has rendered it progressively more difficult for an "amateur landlord" (to use Wonnacott's expression) to recover a disputed service charge calculated on such a basis. The fact that the second half of the clause goes on to provide for a fixed increase in the annual sum is also readily explicable: the parties assumed that the cost of providing the services in sterling terms would increase, or, to put the same point another way, they assumed that the value of money would fall.
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26 Davis LJ concisely explained the thinking behind the clause in the course of his judgment in the Court of Appeal [2013] L & TR 371, para 52:

- "Lack of correspondence between outlay and receipt is the almost inevitable consequence of such a clause if the parties have elected for a fixed charge formula. It has a similarity with a liquidated damages clause: it represents the parties' estimate at the outset for the future with neither guarantee nor even expectation of entire coincidence with the eventual outcome. But the advantage is certainty. The parties know from the outset where they stand. Moreover, it is a surrounding circumstance legitimately to be taken into account here that the leases were made at a time of inflation—in some years, very significant inflation—which the parties, objectively and commercially speaking, could be expected to want to confront. They chose to do so by this particular formula of increase."
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27 In those seven leases where the word "as" is not included, I suppose that it might be said that this is not clear unless words such as "quantified in

the sum of” were included in order to link the two halves of the clause, but that is, to my mind, a really pedantic argument. Although perfectionist drafting might suggest the inclusion of such words, it seems to me that the absence of such words cannot fairly be invoked to suggest ambiguity or a lack of clarity. The reasonable reader of the clause would see the first half of the clause as descriptive of the purpose of clause 3(2), namely to provide for an annual service charge, and the second half as a quantification of that service charge.

28 It is true that the first part of the clause refers to a lessee paying a “proportionate part” of the cost of the services, and that, unless inflation increases significantly in the next 50 years, it looks likely that the service charge payable under each of the 25 leases may exceed the cost of providing services to the whole of the leisure park. However, if, as I believe is clear, the purpose of the second part of the clause is to quantify the sum payable by way of service charge, then the fact that, in the future, its quantum may substantially exceed the parties’ expectations at the time of the grant of the lease is not a reason for giving the clause a different meaning. As already explained, the mere fact that a court may be pretty confident that the subsequent effect or consequences of a particular interpretation was not intended by the parties does not justify rejecting that interpretation.

29 However, given the way things have turned out, it is tempting to latch onto the absence of words such as “quantified in the sum of”, and to see the two halves of clause 3(2) as mutually inconsistent in their effect. This would be on the ground that the first half of the clause requires the lessee to pay a “proportionate part” of the cost to the lessor of providing services, whereas the latter half requires the lessee to pay a sum which could exceed the whole of that cost. On that basis, it might be said that the court can reject or modify one half to give effect to the real intention of the parties: see e.g. *Walker v Giles* (1848) 6 CB 662. However, as explained in para 24 and 25 above, this argument would, in my view, involve the court inventing a lack of clarity in the clause as an excuse for departing from its natural meaning, in the light of subsequent developments.

30 Were it not for the percentage increases of 10% per annum specified in the 25 service charge clauses which are being considered on this appeal, coupled with the subsequent history of inflation in the United Kingdom, that would be the end of it. Thus, it seems to me that the original 70 leases (referred to in para 6 above), with a clause 3(2) which provided for increases of about 3% per annum (at a time when inflation was running at a significantly higher rate), should plainly be interpreted in the way in which the respondent contends. However, the consequences of the annual sum of £90 being increased annually by 10% on a compound basis are plainly unattractive, indeed alarming, to a lessee holding a chalet under one of the 25 leases. If one assumes a lease granted in 1980, the service charge would be over £2,500 this year, 2015, and over £550,000 by 2072. This appears to be an alarming outcome for the lessees, at least judging by how things look in 2015, because annual inflation in the last 15 years has hardly ever been above 4%, indeed has been under 3% for ten of those years, and has notoriously been falling recently almost to the point of turning negative, whereas the service charge over that period has increased, and will continue to increase, by 10% per annum.

A 31 The appellants argue that these figures illustrate the extreme unlikelihood of the parties to the 21 leases (or to the four subsequent deeds of variation), and in particular the lessees, having intended to agree that the original £90 service charge would be automatically increased by 10% annually on a compound basis. Accordingly, they contend, the latter half of clause 3(2) should be interpreted as imposing a maximum on the annual service charge recoverable by the lessor. In other words, the effect of the clause is said to be that the lessor is entitled to an appropriate percentage of the annual cost of providing the contracted services, subject to a maximum—which was initially £90, but which increases by 10% compound annually.

C 32 Despite the unattractive consequences, particularly for a lessee holding a chalet under one of the 25 leases, I am unconvinced by this argument. It involves departing from the natural meaning of clause 3(2) in each of those leases, and it involves inserting words which are not there.

D 33 Further, the appellants' argument involves attributing to the parties to the 25 leases an intention that there should be a varying service charge and that the lessor (or some other unspecified person) should assess the total costs of the services and determine the appropriate proportion of the cost of the contractual services to allocate to each chalet. Although I accept that it has an element of circularity, it appears to me that the average reader of clause 3(2) would have thought that those are exercises which the clause seems to have been designed to avoid.

E 34 Although there are one or two very small errors in the drafting, I do not consider that anything has gone significantly wrong with the wording of clause 3(2) of any of the 25 leases. As already explained, I would reject the notion that, on a natural reading, the two parts of the clause do not relate to each other, or appear to say different things, even in the seven cases where the word "as" is not included: as the Court of Appeal said, the first half imposes a liability for an annual service charge and the second half explains how it is to be assessed. I do not think that the reference to part of a year in the closing words of the clause (para 7 above refers), or the inclusion of an unnecessary "for" (para 8 above refers), in some of the 25 leases can possibly justify departing from the natural meaning of clause 3(2). At best the reference to part of a year is meaningless. However, given that the 99-year term of each lease ran from Christmas 1974, all of them would have ended part way through a year, as they would also have been very likely to do if surrendered or forfeited. Furthermore, the fact that some clauses refer not merely to "repair maintenance and renewal", but also to "renewal of facilities on the estate" seems to me to be irrelevant to the issue on this appeal.

H 35 Quite apart from the fact that the effect of clause 3(2) appears clear in each lease as a matter of language, I am far from convinced by the commercially-based argument that it is inconceivable that a lessee would have agreed a service charge provision which had the effect for which the respondent contends, at least in the 1970s and much of the 1980s. Although I would have expected most solicitors to have advised against it, and imprudent though it undoubtedly has turned out to be (at least so far), a lessee could have taken the view that a fixed rate of increase of 10% per annum on a fixed initial service charge, at a time when annual inflation had been running at a higher rate for a number of years (well over 10% per

annum between 1974 and 1981, indeed over 15% per annum for six of those eight years; although it was less than 10% per annum after 1981), was attractive or at least acceptable. A

36 If inflation is running at, say, 10% per annum, it is, of course, very risky for both the payer and the payee, under a contract which is to last around 90 years, to agree that a fixed annual sum would increase automatically by 10% a year. They are taking a gamble on inflation, but at least it is a bilateral gamble: if inflation is higher than 10% per annum, the lessee benefits; if it is lower, the lessor benefits. On the interpretation offered by the appellants, it is a one way gamble: the lessee cannot lose because, at worst, he will pay the cost of the services, but, if inflation runs at more than 10% per annum, the lessor loses out. B

37 The fact that a court may regard it “unreasonable to suppose that any economist will be able to predict with accuracy the nature and extent of changes in the purchasing power of money” over many decades (to quote Gibbs J in *Pennant Hills Restaurants Pty Ltd v Barrell Insurances Pty Ltd* (1981) 145 CLR 625, 639) is nothing to the point. People enter into all sorts of contracts on the basis of hopes, expectations and assessments which no professional expert would consider prudent, let alone feel able to “predict with accuracy”. I have little doubt that many fortunes have been both made and lost (and sometimes both) by someone entering into such a contract. C D

38 In terms of commercial justification, the analysis in paras 34 and 35 above becomes more difficult to invoke the further one moves on from 1981, the last year when inflation was above 10% per annum, although in 1990 it almost hit that figure. Accordingly, while I think the analysis comfortably applies to the 21 leases referred to in paras 6–8 above, which were granted between 1977 and 1990, it is unconvincing in relation to the four leases whose service charge provisions were amended around 2000, as mentioned in para 9 above. E

39 It seems rather extraordinary that a lessee under a lease which provided for an increase in a fixed service charge at the rate of 10% over three years should have agreed to vary the lease so that the increase was to be at the rate of 10% per annum, at a time when inflation was running at around 3% per annum. However, I do not accept that this justifies reaching a different result in relation to any of the four leases which were varied in 2000. Three of them are relatively easily explicable, as the lessee who agreed the variation was closely connected with the lessor. The fact that they were subsequently assigned is, I accept, remarkable, but that later fact cannot affect the interpretation of the deeds. As to the fourth deed, it was, on any view, an improvident variation to have agreed, but, as already explained, that is not enough to justify the court rewriting the contract under the guise of interpreting it. Further, given that, at least in my view, there could be no ground for suggesting that the original clause 3(2) in the three leases (providing as it did for an annual increase of around 3%) had any effect other than that for which the respondent contends, it is particularly difficult to suggest that the substituted clause, which changed the annual increase to 10%, but was otherwise identically worded (save that it included the word “as” and was therefore even clearer), should have a different effect. F G H

40 I note in this connection that, at a time when inflation was running at well over 10% per annum from 1974 to 1980 (possibly excepting 1984), the lessor was granting leases which provided, in effect, for increases in the £90

A at the rate of about 3% per annum (para 6 above refers). Of course, that cannot be taken into account when interpreting any of the 25 leases, but it shows the lessor was prepared to take what appears to have been an unwise decision which was not entirely dissimilar from the unwise decision which, in my view, the lessees under the 25 leases took.

B 41 I do not think that this is a case where the approach adopted by this court in *Aberdeen City Council* 2012 SCLR 114 can assist the appellants. Unlike that case, this is not a case where one of the parties has done something which was not contemplated by the contract. It is clear that the 10% per annum increase in clause 3(2) was included to allow for a factor which was out of the control of either party, namely inflation. In my judgment, there is no principle of interpretation which entitles a court to re-write a contractual provision simply because the factor which the parties catered for does not seem to be developing in the way in which the parties may well have expected.

D 42 It also appears to me that there is a degree of inconsistency in the appellants' case. That case is, of course, ultimately based on the unlikelihood of a lessor and lessee of a single chalet agreeing that an initial annual service charge of £90 should be increased at a rate which could well lead to the annual charge being an absurdly high figure—possibly more than the cost of providing the services for the whole leisure park. But it is also rather unlikely (albeit less unlikely, I accept) that they will have agreed a ceiling on the annual service charge which would become so absurdly high that it would be meaningless. In other words, it can be said with some force that the appellants' solution to the problem which they identify does not actually address the problem: it merely changes its commercial consequences.

F 43 I should add that, subject to the point dealt with in the next section of this judgment, I am unconvinced that any assistance can be gained from the differences between the various forms of clause 3(2). It seems to me positively unlikely that the lessees under the later 21 leases would have been aware of the terms of clause 3(2) of the earlier 70 leases. But, even if they had been so aware, it seems to me that it would assist the respondent's case, not that of the appellants. That is because, given that it appears clear that the second half of clause 3(2) in the earlier 70 leases operated to quantify the service charge, then it seems to me (as explained in the last sentence of para 39 above) that it is very unlikely that the parties can have intended the almost identically worded second half of clause 3(2) in the later 21 leases to have a very different effect from that in the earlier 70 leases.

G 44 In his judgment at para 116, Lord Carnwath JSC rightly points out that, even after he assigns the lease, the original lessee is bound for the duration (at least if it was granted before 1996). However, I do not see what that adds in this case: on any view, these leases involve long term commitments on both sides. I agree with his view in para 117 that a prospective lessee of a flat in a block or the like (as here) will normally be likely to have less negotiating freedom as to the terms than in relation to a "free standing" property. But so will the lessor, and either is free to walk away if he regards the terms as unsatisfactory.

H 45 I am also unconvinced that the remedies available (whether in common law or under statute) to the parties in the event of a breach in connection with services or service charge, as discussed in Lord

Carnwath JSC's paras 121–123, assists on the issue we have to decide. We are concerned with what a service charge clause means, not how it is being operated.

46 Finally on this first point, Lord Carnwath JSC makes some remarks about service charge provisions in his para 119. There will, I suspect, be many cases where his observations are very much in point: indeed, they may well be normally in point. However, the lessor has no duty to be “fair” when negotiating the terms of a lease (any more than the lessee does), although it may well be in his interest to be (or at least to appear to be) fair. But, whosever interpretation is correct, clause 3(2) was self-evidently not a “normal” service charge clause: on the respondent's case, the landlord might get more or less than the costs of providing the services; on the appellants' case, the landlord might get less than the costs of providing the services.

*Discussion: the effect of clause 4(8) and the terms of the other leases*

47 The appellants, at the invitation of the court, argued that clause 4(8), which as explained in para 4 above required leases of chalets to be granted subject to identical or similar obligations, substantially mitigated the effect of clause 3(2) of their leases. They contended that clause 4(8), when read together with the opening words of clause 3 and paragraph (2) of the recital to each lease, referred to in paras 3 and 4 above, enable them to limit the service charge which the landlord could otherwise recover under clause 3(2).

48 The appellants' argument in this connection proceeds in two steps. First, as a result of clause 4(8), the opening words of clause 3, and paragraph (2) of the recital in each of their leases, a term was implied into their leases to the effect that clause 3(2) was in the same terms as clause 3(2) of the leases of chalets which had already been granted—i.e the 70 leases referred to in para 6 above. Secondly, in those circumstances the lessor is now precluded from recovering more by way of service charge than would be recoverable under the terms of the service charge provisions in the 70 leases—i.e £90 plus 10% compounded every three years. While this argument has obvious attraction, I would reject it.

49 The purpose of clause 4(8), the opening words of clause 3, and recital (2) was, I would accept, to create what is sometimes referred to as a “building scheme”, but, at least in the present context is more accurately described as a letting scheme. Such a scheme, which is recognised and given effect to by equity, has to be apparent from the terms of the relevant leases (or, very unusually, from a side agreement entered into by each lessee with the lessor). A letting scheme involves properties within a given area being let on identical or similar terms, normally by the same lessor, with the intention that the terms are to be enforceable not only by the lessor against any lessee, but as between the various lessees—even by an earlier lessee of one property against a later lessee of another property. There is plainly a strong case for saying the combination of paragraph (2) of the recital, the opening words of clause 3 and the provisions of clause 4(8) establishes that there is such a scheme in relation to the chalets in the leisure park. Accordingly, I am prepared to assume that there was envisaged that there would be a degree of reciprocity and mutual enforceability between the lessees of chalets when it came to the covenants they entered into.

A 50 However, in my view, the appellants' reliance on the scheme in order to limit the service charges recoverable under clause 3(2) of their leases faces a number of problems.

B 51 First, it seems to me to be unclear whether a provision such as clause 3(2) could be or was subject to the scheme. There is room for argument whether a letting scheme can only extend, like freehold schemes, to restrictive covenants, or whether it can also extend to positive covenants (on the basis that positive covenants between lessor and lessee are enforceable as between their respective successors, whereas only restrictive covenants are enforceable as against successors of covenantors in relation to freeholds). Even if a leasehold scheme can extend to positive covenants, it is also questionable whether a lessee's covenant to pay a service charge, or any other sum of money to the lessor, can be within the ambit of a scheme.

C 52 Secondly, in so far as they are dealing with the provisions of leases of other chalets, clause 4(8), and (arguably) the opening words of clause 3 and recital (2) appear to refer to future lettings, not to past lettings. It is quite a bold step to imply a term as to what has happened in the past from an express provision which is limited to the future. Having said that, there is considerable practical force in the contention that the scheme contemplated by the three provisions could only work if leases of all the chalets, past, D present and future, were on the same terms.

E 53 Thirdly, even if the appellants' argument based on an implied term was otherwise correct, there would still be considerable force in the contention that it would not exonerate the appellants from complying with their obligations under clause 3(2). It seems clear that, where there is a letting scheme, a tenant can enjoin the landlord from letting a property within the scheme area on terms which are inconsistent with the scheme. However, as far as I am aware, there is no case where the landlord has been held liable to a tenant in damages (or otherwise) for having let a property within the scheme area on such terms, prior to the grant of the tenant's lease.

F 54 Fourthly, even if these arguments are all rejected, the closing words of clause 4(8) clearly permit a degree of variation between the terms of the leases of different chalets. If the second part of clause 3(2) is intended to reflect the level of projected inflation, then the parties may well have regarded it as almost inevitable that any annual or triennial adjustment would vary from time to time. On that basis, there may be no breach of any implied term anyway.

G 55 However, it is unnecessary to address the four points identified in paras 51–54 above, because, in my judgment, there is a fatal flaw in the appellants' argument based on an implied term. In effect, the appellants' case is that the implied term in each of the 21 leases is that the lessor was not asking anything of the lessee which had not been, or would not be, required of lessees of other chalets, whether their leases were in the past or the future. However, it seems to me that, assuming everything else in the appellants' favour, that would not be the correct term to imply. As I see it, if there is an implied term along the lines argued for, it is that the already existing 70 H leases of chalets contain a clause 3(2) identical with that in the appellant's leases—i.e. that the 70 existing leases have service charges which increase at the compound rate of 10% per annum as in the 21 leases.

56 In so far as it relates to the 70 existing leases, the implied term suggested by the appellants is inconsistent with both (a) an express term of

the appellants' leases, namely clause 3(2) itself, and (b) what is implied in relation to future leases. As to point (a), the appellants' suggested implied term means that clause 3(2) involves a 10% increase every three years, whereas there is an express term to the effect that the 10% increase is every year; and it is a fundamental principle that one cannot imply a term which is inconsistent with an express term. As to point (b), any reader of an appellant's lease who was asked what future leases of chalets would contain by way of a service charge provision would answer that it would be the same as that in the instant lease—i.e. £90 pa subject to an increase of 10% per annum compounded; and the implied term applicable to future leases should be the same as that applicable to past leases.

57 If the appellants are right in their contention that there is an implied term, the term which I would favour (as set out at the end of para 55 above) runs into neither of these difficulties. It amounts to saying that, as clause 3(2) of an appellant's lease means that the service charge is to be £90 pa increasing by 10% pa compounded, there is a term implied into the lease that that is what the existing leases provide and it is what future leases will provide.

58 If, as the appellants contend, there is an implied term, but that is its correct characterisation, it is difficult to see how it can help them. An appellant can say that the fact that the 70 existing leases contain a different clause 3(2) means that there is a breach of the implied term, but it is hard to see what damage or other injury has been suffered if the respondent now insists on enforcing clause 3(2) of their leases against the appellants. If an appellant could show that the value of his lease was reduced because the lessor had not granted the first 70 leases with the same clause 3(2) as was in the appellant's lease, the consequent reduction in the value of that lease could well be the appropriate measure of damages. But I cannot at the moment see on what basis the breach can assist an appellant in resisting the full financial consequences of the clause 3(2) he entered into.

59 I should add that, if, contrary to my view expressed in para 43 above, the lessees under the later 21 leases would have been aware of the terms of clause 3(2) of the earlier 70 leases (as Lord Carnwath JSC suggests), it would negative any reliance which the lessees under the 21 leases could place on clause 4(8), as just discussed. This is because the later lessees would have known of, and accepted, the departure from the original clause 3(2).

### Conclusion

60 Accordingly, in agreement with the reasons given by Lord Hodge JSC in this court, Davis LJ in the Court of Appeal and Morgan J in the High Court, I would dismiss this appeal, and I do not consider that the appellants are assisted by the additional argument raised in this court. I should, however, make five final points.

61 First, the Court of Appeal suggested that the only way the lessees under the 25 leases could escape from their problems would be by surrendering or suffering forfeiture. In case this is misinterpreted, it is right to point out that surrender is consensual between lessee and lessor, and forfeiture involves unilateral action by a lessor, and so neither course can be forced on the lessor.

62 Secondly, I have considerable sympathy with Lord Carnwath JSC's conclusion that the appeal should be allowed (not least because it is a much

A more satisfactory outcome in common sense terms, particularly viewed as at today), and I acknowledge that his reasons are as powerful as his conclusion allows. However, for the reasons I have given, I cannot agree with him.

B 63 Thirdly, the fact that four leases were granted to associates of the lessor with the proviso described in para 8 above, and that three of the deeds of variation described in para 9 above were entered into with a lessee who was a close relation of the lessor, is worthy of comment. It suggests that the lessor or her advisers may have appreciated the potential disadvantages of the clause now contained in the 25 leases. However, I do not see how it can assist the lessees on the issue in these proceedings, namely the interpretation of the clause in the 25 leases.

C 64 Fourthly, as Lord Carnwath JSC records in para 155 below, it appears that the respondent realistically recognises the unsatisfactory situation in which the lessees under the 25 leases find themselves, and is prepared to agree appropriate amendments to their leases. I hope that a fair and just amendment can be agreed.

D 65 Finally, as Lord Carnwath JSC also points out in paras 90–93 below, there are various statutory provisions which protect tenants against unreasonable service charges, but none of them applies here. The present case suggests that there may be a strong case for extending such provisions to cases such as the present, even though they involve a fixed sum payable by way of service charge. But that is a policy issue for Parliament, and there may be arguments either way.

#### LORD HODGE JSC

E 66 I agree that the appeal must be dismissed for the reasons which Lord Neuberger of Abbotsbury PSC sets out. But it is a highly unsatisfactory outcome for the chalet tenants who are affected by the annual escalator of the service charge. It is not clear whether there are many long leases containing fixed service charges with escalators which are beyond the reach of statutory regulation. If there are, there may be a case for Parliament to consider extending the provisions that protect tenants against unreasonable service charges.

F 67 Mr Morshead QC for the appellants submitted in his written case that what was important was “(a) that the risk [of inflation falling and remaining substantially below 10%] would have been obvious to the officious, reasonable bystander who must be imagined interrogating the actual parties and (b) that no reasonable person in the position of the parties, looking at the leases in their entirety and in context, would understand them to have intended that the tenants should assume that risk”. He envisaged that in a hypothetical dialogue the officious bystander would warn the parties of the risks of their proposed contract and they would make it clear that that was not their intention.

G 68 In the course of the debate we were referred directly or by reference to several cases concerning the remediation of a mistake by construction or the implication of a term. In my view they do not give the support that H Mr Morshead needs.

69 In *Homburg Houtimport BV v Agrosin Private Ltd (The Starsin)* [2004] 1 AC 715 the mistaken omission of words in a clause was apparent because the bill of lading had been modelled on a standard clause. The person who had transposed the standard clause into the bill of lading had

omitted a phrase in the standard clause in which the same word had appeared at the end of two consecutive phrases. The mistake was clear and it was apparent what correction was called for: paras 22 and 23 per Lord Bingham of Cornhill.

70 In *Chartbrook Ltd v Persimmon Homes Ltd* [2009] AC 1101 a definition, which contained a grammatical ambiguity, made no commercial sense if interpreted in accordance with the ordinary rules of syntax. The background to the deal and the internal context of the contract showed that there was a linguistic mistake in the definition, which the court was able to remove by means of construction. In his speech Lord Hoffmann, at p 1114, referred with approval to the judgment of Carnwath LJ in *KPMG LLP v Network Rail Infrastructure Ltd* [2007] Bus LR 1336. In that case, which concerned a rent review clause in a lease, it was clear from the terms of the clause that its wording did not make sense. The court was assisted by an earlier agreement which set out the then intended clause containing a parenthesis, of which only part had remained in the final lease. It was not clear whether the parties had mistakenly deleted words from the parenthesis, which they had intended to include, or had failed to delete the parenthesis in its entirety. But that uncertainty as to the nature of the mistake, unusually, did not matter as the outcome was the same on either basis.

71 In *Aberdeen City Council v Stewart Milne Group Ltd* 2012 SCLR 114 the internal context of the contract provided the answer. The sale contract provided for the payment to the vendor of a further sum on disposal of the land by the purchaser. Two of the methods of disposal required the parties to ascertain the market value of the property on disposal in calculating the additional payment and the other used the “gross sales proceeds” in calculating that payment. The purchaser sold the site at an under-value to an associated company, a circumstance which on the face of the contract the parties had not contemplated. The courts at each level interpreted the provision, which used the gross sales proceeds in the calculation, as requiring a market valuation where there was a sale which was not at arm’s length. They inferred the intention of the parties at the time of the agreement from the contract as a whole and in particular from the fact that the other two methods of disposal required such a valuation. While this line of reasoning was criticised by Professor Martin Hogg “Fundamental Issues for Reform of the Law of Contractual Interpretation” (2011) 15 Edin LR 406 on the ground that it protected a party from its commercial fecklessness, it seems to me to be the correct approach in that case as the internal context of the contract pointed towards the commercially sensible interpretation.

72 The context, whether internal to the contract or otherwise, provides little assistance in this case. Beyond the words of the relevant clauses, there is the context of the other provisions of each of the 25 individual leases which are at issue. They are long leases, having a term of 99 years. The court in interpreting the leases can and should take into account the great difficulty in predicting economic circumstances in the distant future and ask itself whether the parties really intended to do so.

73 The court also can and should take into account the economic circumstances which prevailed at the time each lease was entered into. It is clear from the table which Lord Carnwath JSC has set out in para 100 of his judgment that between 1974 and 1988 the use of a 10% annual escalator

A achieved a result which was not far off the diminution of the value of money in the difficult economic circumstances that then prevailed. The future was and is unknown.

74 Little else is known and I do not think that it is appropriate to speculate about the extent to which lessees would have known the terms of earlier leases. In my view there is much to be said for the practice, which  
B Lord Drummond Young and other judges have encouraged in Scotland, of requiring parties to give notice in their written pleadings both of the nature of the surrounding circumstances on which they rely and of their assertions as to the effect of those facts on the construction of the disputed words: *MRS Distribution Ltd v DS Smith (UK) Ltd* 2004 SLT 631, para 14. Such notice of relevant facts, which are either admitted or proved at trial, would avoid disputes on appeal such as whether the affected lessees were aware of the  
C earlier leases.

75 While there are infelicities in the language of the relevant clauses in some of the leases and no clear explanation of minor changes in drafting, I am not persuaded that the meaning of the language is open to question when full weight is given to the very limited factual matrix with which the courts have been presented in this case. We are invited to construe that  
D which reads on a first consideration as a fixed service charge with an escalator to deal with future inflation, as a variable service charge which is subject to a cap to which the escalator applies. I find that very difficult. In my view there is nothing in the relevant context to support the construction of the clause as creating a cap, other than the view, which events have fully justified, that it was unwise of the lessees to agree to a fixed service charge with an escalator based on an assumption that the value of money would  
E diminish by 10% per year.

76 This conclusion is not a matter of reaching a clear view on the natural meaning of the words and then seeing if there are circumstances which displace that meaning. I accept Lord Clarke of Stone-cum-Ebony JSC's formulation of the unitary process of construction, in *Rainy Sky SA v Kookmin Bank* [2011] 1 WLR 2900, para 21:

F "the exercise of construction is essentially one unitary exercise in which the court must consider the language used and ascertain what a reasonable person, that is a person who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract, would have understood the parties to have meant. In doing so, the court must have regard to all the relevant surrounding circumstances. If there are two  
G possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other."

77 This unitary exercise involves an iterative process by which each of the rival meanings is checked against the provisions of the contract and its commercial consequences are investigated: *In re Sigma Finance Corp'n* [2010] 1 All ER 571, para 12, per Lord Mance JSC. But there must be a  
H basis in the words used and the factual matrix for identifying a rival meaning. The role of the construct, the reasonable person, is to ascertain objectively, and with the benefit of the relevant background knowledge, the meaning of the words which the parties used. The construct is not there to re-write the parties' agreement because it was unwise to gamble on future

economic circumstances in a long term contract or because subsequent events have shown that the natural meaning of the words has produced a bad bargain for one side. The question for the court is not whether a reasonable and properly informed tenant would enter into such an undertaking. That would involve the possibility of re-writing the parties' bargain in the name of commercial good sense. In my view, Mr Morshead's formulation (para 67 above), on which his case depends, asks the court to re-write the parties' leases on this illegitimate basis.

78 Nor is this a case in which the courts can identify and remedy a mistake by construction. Even if, contrary to my view, one concluded that there was a clear mistake in the parties' use of language, it is not clear what correction ought to be made. The court must be satisfied as to both the mistake and the nature of the correction: *Pink Floyd Music Ltd v EMI Records Ltd* [2010] EWCA Civ 1429 at [21], per Lord Neuberger of Abbotsbury MR. This is not an unusual case, such as *KPMG* [2007] Bus LR 1336 in which a mistake was obvious on the face of the contract and the precise nature of the correction had no effect on the outcome.

79 My conclusion that the court does not have power to remedy these long term contracts so as to preserve the essential nature of the service charge in changed economic circumstances does not mean that the lessees' predicament is acceptable. If the parties cannot agree an amendment of the leases on a fair basis, the lessees will have to seek parliamentary intervention.

#### LORD CARNWATH JSC

##### *Preliminary comments*

80 The contractual provisions in this case pose unusual interpretative challenges, which may call for unusual solutions. The leases with which we are concerned are of 25 chalets within Oxwich Leisure Park, in south Wales. It is an estate of 91 such chalets first developed in 1974. It is in an attractive holiday location close to Oxwich Beach on the Gower peninsular. The challenges arise from a combination of factors. The intention, stated in the preamble to each lease, was that they should be "upon terms similar in all respects . . .". Yet we are faced with five forms of service charge provision, agreed over a period of some 20 years, the variations in which at first sight defy rational analysis. As interpreted by the Court of Appeal, they would lead over the course of the leases to supposedly "proportionate" service charges becoming wholly disproportionate to the costs of the relevant services, to extreme and arbitrary differences between the treatment of different groups of leases within the estate, and to the prospect in the foreseeable future of potentially catastrophic financial consequences for the lessees directly concerned.

81 It does not help that, remarkably, the case has come to us with minimal evidence to explain the circumstances, or "factual matrix", in which these variations were agreed at different times, or even simply to add some context or colour to the bare legal and statistical analysis. That applies even to the most recent, and most surprising, of the transactions, effected as recently as 2000, and to which Mrs Arnold the present respondent was herself a party. Nor have we been told anything about how the clauses have been operated in practice at any time: for example how the estate has been

A managed and what costs incurred by the lessor, what service charge payments have been demanded of the various categories of lessee, and what has happened to any surplus.

82 It is to be borne in mind also that in the early 1970s (when this clause was first devised) variable service charge provisions were a relatively “new and modern” addition to the law, prompted in part by rapidly increasing prices: see Mark Wonnacott, *The History of the Law of Landlord and Tenant in England and Wales* (2012), p 105 and *Hyams v Titan Properties Ltd* (1972) 24 P & CR 359. Since then, it is said in the same history (p 106), service charges have caused “more trouble between landlord and tenant than anything else”, but they have in turn been regulated by statute to such an extent as to make it “all but impossible for an amateur landlord to recover [a service charge] in the event of a dispute”. Whether or not that extreme view is justifiable, the need for special measures to safeguard the interests of lessees has been acknowledged by the legislature, which has thus for the most part relieved the courts of responsibility for developing a common law response to the problems.

83 As I shall explain, these leases are a rare example of a category of residential lease which has slipped through the statutory net. That is of no direct relevance to the legal issues before us, save that it may help to explain why no ready solutions are to be found in the authorities. Furthermore, in so far as policy has a part to play in the development of the common law, it may be legitimate to seek guidance in the approaches adopted by the legislature in analogous contexts: see *Johnson v Unisys Ltd* [2003] 1 AC 518, para 37, per Lord Hoffmann.

#### E *The leases*

84 The first lease was granted on 26 October 1974. Of the others most were granted during the 1970s, and are not directly involved in the present dispute. The 25 with which we are concerned were granted (or varied) in the period from 1980 to 2000. Whenever granted, all the leases (with one immaterial exception) were expressed as being for terms of 99 years starting from 25 December 1974, and for a yearly rent of £10, increasing by £5 for every subsequent period of 21 years. Each lease began with a preamble which described the “lessor” as the owner of the land edged pink on the attached lay-out plan (“the estate”) and stated: “(2) It is intended to erect chalets on the estate and to grant leases on terms similar in all respects to the present demise.” The lessees’ covenants (clause 3) limited the use to that of a “holiday residence of a single family” from March to October: clause 3(12).

85 It seems from the examples before us that the earliest leases were granted in return for lessees’ covenants to construct chalets in accordance with plans approved by the lessors (eg chalet 40—lease dated 9 August 1977, clause 3(3)). Later chalets, presumably after erection of chalets by the lessor or others, were granted without such a covenant but for a premium (eg £13,000 for chalet 76—lease dated 22 September 1980; £16,500 for chalet 96—lease dated 1 July 1985). Otherwise no issue arises on the lessee’s covenants other than clause 3(2) relating to service charges, to which I will come.

86 The lessors in turn covenanted to provide various common services. They included constructing and maintaining the roads and footways (unless or until becoming maintainable at public expense), mowing lawns,

maintaining a recreation ground, keeping fences and drains in good repair, issuing regulations, and arranging refuse collection and a regular patrol to discourage vandalism during the unoccupied period: clause 4. By clause 4(8) the lessors covenanted:

“(viii) That the leases granted by the lessors of all other plots on or comprised in the estate shall contain covenants on the part of the lessees thereof to observe the like obligations as are contained herein or obligations as similar thereto as the circumstances permit.”

87 Five leases have been selected for the purpose of showing the different versions of clause 3(2) relevant to the dispute. The principal difference is between the original leases, granted between 1974 and 1980, in which an initial service charge figure of £90 is increased by 10% every three years (“the triennial formula”), and later leases in which it is increased by 10% every year (“the annual formula”). The five versions were applied as follows (the selected lease in each case is indicated in brackets): (i) *Version 1* (Chalet 40, dated 9 August 1977). This was the “original version”, applied to 70 leases granted mainly during the 1970s. The first was granted on 26 October 1974. The rest followed at a steady rate over the next six years at an average of just over 12 per year, until 1980 when seven were granted in this form, the last on 9 July 1980. Four of these leases (granted between August 1977 and July 1980) were varied in 2000 to incorporate the annual formula: see version 5 below. (ii) *Version 2* (Chalet 76, dated 22 September 1980). This version applied to 14 leases granted between August 1980 and February 1983, the first being dated 11 August 1980. (iii) *Version 3* (Chalet 96 dated 1 July 1985). This applied to three leases granted between July 1985 and January 1988. (iv) *Version 4* (Chalet 29 dated 22 March 1991). This applied to four leases granted between December 1988 and March 1991. (v) *Version 5* (Deed of variation dated 20 August 2000). This applied to four leases previously subject to version 1. The lessors for the first three selected leases in this list were Mr A and Mr B Lewis; for version 4, Mrs J Short; and for version 5, Mrs Arnold, the present respondent. In the result the triennial formula now applies to 66 leases on the estate, the annual formula to 25.

88 I now set out the five clauses, emphasising the parts which are material to the dispute:

(i) *Version 1 (triennial (1974–1980))*

“To pay to the lessors without any deductions in addition to the said rent *a proportionate part* of the expenses and outgoings incurred by the lessors in the repair maintenance renewal and the provision of services hereafter set out the yearly sum of £90 and VAT (if any) *for the first three years* of the term hereby granted increasing thereafter *by ten pounds per hundred for every subsequent three year period or part thereof*.”

(ii) *Version 2 (annual (1980–1983))*

“To pay to the lessors without any deductions in addition to the said rent *as a proportionate part* of the expenses and outgoings incurred by the lessors in the repair maintenance and renewal *of the facilities of the estate and the provisions* of services hereafter set out the yearly sum of £90 and VAT (if any) *for the first year of the term* hereby granted increasing thereafter *by ten pounds per hundred for every subsequent year or part thereof*.”

- A Apart from the change from the triennial to the annual 10% rate, other differences are the lengthening of the expression “renewal and the provision of services” to “renewal of the facilities of the estate and the provisions (sic) of services”, and the inclusion of “as” before “a proportionate part”.  
(iii) Version 3 (annual (1985–1988))

- B “To pay to the lessor without any deductions in addition to the said rent *a proportionate part* of the expenses and outgoings incurred by the lessor in the repair maintenance renewal and the provision of services hereafter set out the yearly sum of £90 and VAT tax (if any) *for the first year of the term hereby granted increasing thereafter by ten pounds per hundred for every subsequent year thereof.*”

- C Changes from version 2 are: reversion to the expression “renewal and the provision of services”, the omission of “as” before “a proportionate part”, and the omission at the end of “or part (thereof)”.  
(iv) Version 4 (annual subject to triennial proviso (1988–1991))

- D “To pay to the lessor without any deductions in addition to the said rent *a proportionate part* of the expenses and outgoings incurred by the lessor in the repair maintenance renewal and the provision of services hereafter set out *for the yearly sum of £90 and VAT (if any) for the first year of the term hereby granted increasing thereafter by ten pounds per hundred for every subsequent year thereof.*”

This version was subject to a proviso:

- E “Provided always and it is hereby expressly agreed that *whilst the term hereby created is vested in the said William Richard Short and the said Janice Short or the survivor of them* then maintenance shall be calculated as follows:

- F “To pay to the lessor without any deduction in addition to the said rent *a proportionate part* of the expenses and outgoings incurred by the lessor in the repair maintenance renewal and the provision of services hereafter set out the yearly sum of £90 and value added tax (if any) *for the first three years of the term hereby granted increasing thereafter by ten pounds per hundred for every subsequent three year period or part thereof.*”

The main clause is identical to version 3 save for the insertion of “for” before “the yearly sum”. The proviso had the effect of substituting temporarily the triennial formula as in version 1, but that has ceased to be operative following the disposal of the lease by the Shorts.

- G (v) Version 5 (varied from triennial to annual (2000))

In four of the original 1970s version 1 leases (triennial), a deed of variation dated 20 August 2000, at the same time as revising the extent of land demised, substituted with effect from the beginning of the lease a new clause 3(2) in the form of version 2 (annual formula).

- H 89 Although we have been invited to consider all five versions, the most important for the purposes of interpretation are the first (October 1974) and the second (August 1980), and the circumstances surrounding them. The first is not directly in issue but set the drafting pattern, and provided the background to what followed. The second saw the first incorporation of the controversial annual formula. The later versions are of more limited relevance, save in so far as they throw some light on how the clauses were

interpreted in practice, or help to illustrate the relative merits of the rival interpretations. A

*The statutory provisions*

90 By sections 18 and 19 of the Landlord and Tenant Act 1985, a “service charge” (as defined) payable by a tenant of a “dwelling”, is limited to an amount which reflects the costs “reasonably incurred” in the provision of services. The controls originally applied only to “flats” but were extended by amendment in 1987 to include “dwellings” as defined: see sections 41 and 60 of, and paragraph 1 of Schedule 2 to, the Landlord and Tenant Act 1987. It is not in dispute, in these proceedings at least, that the chalets are “dwellings” for this purpose. The issue is whether the charges are “service charges” as defined by section 18(1): B

“‘service charge’ means an amount payable by the tenant of a dwelling as part of or in addition to the rent— (a) which is payable, directly or indirectly, for services, repairs, maintenance, improvements or insurance or the landlord’s costs of management, and (b) the whole or part of which varies or may vary according to the relevant costs.” C

91 The lessees submit that properly interpreted the clause imposes an obligation to pay a “proportionate part” of the costs incurred, subject only to an upper limit or cap determined by reference to the formula in the second part of the clause. On this footing it is an amount which “varies or may vary according to the relevant costs”: section 18(1)(b). The respondent submits that charge is outside the statutory definition because the annual amount is fixed by that formula, without any reference to the costs actually incurred by the lessor. If the lessees are right, the amount of the charge is limited to the amounts reasonably incurred. If the lessor is right, there is no statutory limit or other control. D

92 Other safeguards for lessees were introduced by the 1987 Act, but none covers the present situation. Thus it introduced a new right for any party to a long lease (not only the lessee) of a “flat” to apply to the court (now the First-tier Tribunal) for an order varying a lease on the grounds that it “fails to make satisfactory provision” in respect of various matters, one being the computation of service charges, but this did not apply to other forms of dwelling such as in this case. There is a more general provision, for application by “a majority of parties” for variation of a number of leases under a single lessor (section 37), but again it applies only to flats. On the other hand, section 40, which allows similar applications for variation of insurance provisions, applies to “dwellings” in general. It is difficult to detect any legislative purposes for these distinctions. The present case illustrates the potentially unfortunate consequences for parties to those rare forms of residential lease which for no apparent reason fall outside any of the protections given by the legislative scheme. E F

93 For completeness, I note also that no issue arises in the present proceedings as to the possible application of other more general protections relating to unfair contractual terms. Sections 2 to 4 of the Unfair Contract Terms Act 1977 do not in any event apply to contracts relating to the creation or transfer of interests in land: paragraph 1(b) of Schedule 1. No such limitation appears in the Unfair Terms in Consumer Contracts Regulations 1999 (SI 1999/2083), which give effect in this country to Council G H

- A Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts. The Directive was first transposed in 1994 Regulations (SI 1994/3159) which were later replaced by the 1999 Regulations. The 1994 Regulations came into effect on 1 July 1995, and therefore would not it seems apply to contracts concluded before that date; regulation 1; *Chitty on Contracts*, 31st ed (2014), para 37-087. Accordingly, it could be relevant if at all only to version 5 (2000).

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*The proceedings*

- 94 We know very little about the background to the present dispute. It first reached the courts in September 2011 in the form of an application by the appellant lessees to the county court for pre-action disclosure. The application was said to be in anticipation of a representative application to resolve an ambiguity in the service charge clause, which “appears to result in a variable service charge but on the other hand create a fixed service charge”. It also spoke of the lessees’ concerns that the sums collected by way of service charge were exceeding the amount of “legitimate” expenditure by “such a substantial amount as to produce a credit balance that should be held in a service charge trust account”; and also that the lessor had disposed of the former clubhouse for the park to provide accommodation for her daughter. They sought disclosure of information about the sums collected as service charge and the amounts expended since 2005.

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- 95 An order for disclosure was made on 20 September 2011, but was quickly met by an application by the lessor for declaratory relief relating to the interpretation of the service charge clause, following which the disclosure order was stayed pending the determination of these proceedings. The application sought in particular a declaration that on the true interpretation of the service charge clause, the sum payable was not a “service charge” within the meaning of section 18 of the Landlord and Tenant Act 1985. In the county court, Judge Jarman QC determined the issue in favour of the lessees. But his decision was reversed on appeal to Morgan J, whose judgment was upheld by the Court of Appeal (Richards, Davis, Lloyd Jones LJ). The lessees appeal to this court with permission granted by the court itself.

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- 96 The issue between the parties has throughout been very narrow: that is, whether the figure of £90 as inflated is to be read as a fixed amount, or as an upper limit or cap. That in turn depends on whether it is permissible and appropriate to read in such words as “limited to” (Judge Jarman’s words) or “up to” before the reference to “£90”. As Mr Morshead submits in his printed case: “There is no need to undertake an elaborate drafting exercise. The necessary effect can be achieved by implying the words ‘up to’ before the words ‘£90’; and, in versions 2 and 5, deleting the word ‘as’.”

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- 97 Giving the single judgment in the Court of Appeal, Davis LJ rejected that approach, holding in substantial agreement with Morgan J that the addition of these words “would involve subverting the proper process of construction of the language actually used and would in truth involve the court rewriting the bargain the parties have made.” (para 45) He rejected the argument that this interpretation would consign the first part of the clause to “mere surplusage”. Its function was to identify “the character of the payment to be made”. The words “a proportionate part” were apt for a situation where “other lessees also are contributing to the overall service

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charge: which is in consequence to be apportioned between them”. Although he accepted that the word “incurred” was “the language of actual outlay”, it was “entirely explicable when one appreciates that this part of the sub-clause identifies the character of the payment being made”: paras 48–49. He also pointed to other difficulties in Mr Morshead’s interpretation, in particular the problems of calculating a “proportionate” amount, and the lack of any protection for the lessor if the inflation regularly exceeded 10%: para 53.

*Inflation calculations*

98 The judge was shown without objection two sets of tables, one showing the annual Retail Price Index (“RPI”) from 1948 to 2012, taken from figures published by the Office of National Statistics (“the inflation table”); the other, the effect of the increases of service charge compounded over the period of the leases in accordance with respectively the annual and the triennial formula (“the compounding table”). As I understand it, the information in these tables is accepted as forming part of the factual matrix against which it is appropriate to judge the parties’ contractual intentions at the relevant dates. There are some minor but apparently immaterial differences between the hard-copy and electronic versions of the compounding table; I have used the latter.

99 It is helpful to focus on the rates which would have been in immediate contemplation of the parties at dates when each of the five versions was first agreed: that is, 26 October 1974 (the date of the first lease on the estate incorporating version 1, rather than the 1977 lease which was used as an example at the hearing); 11 August 1980 (the first version 2 lease); 1 July 1985 (version 3); 1 December 1988 (the first version 4 lease); 20 August 2000 (version 5). The table below includes also the rate in contemplation at the date of the county court hearing (June 2012), and in the last year of the lease (2072). The figures in the compounding table are given for 25 December 1974, the commencement of the lease period, and for the same date in each subsequent year. For illustrative purposes I have taken the rate for the year commencing after each of the identified dates (i.e. 25 December next following each such date), which would have been the rate applicable to the first complete year under each new lease.

100 The resulting figures (rounded) for annual service charges at each such years:

	Triennial	Annual	[Actual inflation]	
1974	£90	£90	£90	G
1980	£109	£159	£219	
1985	£132	£257	£310	
1988	£145	£342	£350	
2000	£212	£1,073	£557	
2012	£311	£3,366	£794	H
2072	£1,900	£1,025,004	N/A	

[The last column shows for purposes of comparison the equivalent figures implied by actual inflation, arrived at by increasing the initial £90 by the recorded price increases over the period from 1974 to each of the selected

A years. Though not in evidence before us, those figures have been taken from the “inflation calculator” on the Bank of England’s website, and are used for illustration only.]

B 101 The rate of price increase during the 1970s can also be contrasted with the pattern in the previous and subsequent decades. Average annual inflation in the 1950s and 1960s was of the order of 3.5–4%. (It had averaged 2.5% in the 50 years from 1900 to 1950.) It then rose sharply to 6.4% in 1970 and 9.3% in 1973, followed by a much steeper rise to 16% in 1974 and an annual peak of 24.2% in 1975. It dropped to 8.3% in 1978 before rising again to 16% in 1980. The annual rate fell to 12% in 1981, and then to around 5–6% in the period 1983–85 (immediately before version 3), 4–5% in 1986–1988 (before version 4), and 3% in 2000 (version 5). It has remained at, or below, that low level ever since.

C 102 The compounding table enables comparisons to be drawn between the contributions made respectively by the 66 “triennial” and the 25 “annual” leases over different periods, if the lessor is correct. For example, on the 1988 figures, the triennial leases would have contributed a total of £8,712 (66 x £132), slightly more than the total contribution of the annual leases (£8,550 = 25 x £342). On the basis of the figures in the third column, D the combined total (£17,262) was still much lower than the figure required to keep pace with actual inflation since 1974 (91 x £350 = £31,850). The figures at or about the time of the hearing show a very different picture. On the 2012 figures the triennial leases would have been contributing a total of £18,612 (66 x £282) compared to £84,150 (25 x £3,366) contributed by the annual leases. The total amount (£102,762) was now substantially more E than that required to keep pace with inflation (91 x £794 = £72,254). (These figures differ slightly from those in the submitted tables due to rounding.)

F 103 The table also shows the amounts that, on the lessor’s interpretation, would be payable under each formula over the whole period from 24 December 2013 to the end of the term (2072). The total amount payable during that period under each “annual” lease would be £11,238,016, compared to £53,386 payable for the same period under each “triennial” lease.

#### *Inflation and the factual matrix*

G 104 There is no difficulty in principle in taking account of the calculations in the compounding table, which require no outside information, and could have been carried out by the parties (or a reasonable observer) at any of the relevant dates. On the Court of Appeal’s interpretation, the figures show increases which appear extraordinary in themselves, in the light of modern conditions of low inflation. No less H importantly, they result in dramatically increasing, and ultimately grotesque, differences between the amounts payable by the two different groups of lessees on the same estate. This consequence could and should have been anticipated at the time, certainly by the lessors who were parties to both groups of leases and responsible for maintaining reasonable equivalence between them.

105 The use to be made of the historic inflation figures raises rather different questions. By agreeing to their use, the parties impliedly ask us to

assume that the figures up to and including those for each of the relevant years (or the then most recently published figures) would have been known to the parties at the time, and therefore must be taken as part of the relevant factual matrix. This is no doubt a reasonable working assumption to indicate the general trend as known to the public.

106 It is however highly artificial to be asked to take account of the bare statistics, without reference to the political and economic circumstances which surrounded them, so far as they were common knowledge at the time. We are not required to assume total ignorance of current events, in the parties or their reasonable observers. It would not have been difficult to obtain information about contemporary perceptions of the direction of inflation, whether from official reports of the time, or from reports in the south Wales press. Even without such evidence, we are entitled in my view to assume knowledge of some of the key events: for example, of the dramatic rise in oil prices at the end of 1973 and again in 1979, each followed by a sharp increase in inflation in the following year; and also of the election in 1979 of a new Conservative government committed to controlling inflation. We are not required to assume that predictions about future inflation were made in a vacuum.

107 We are also entitled, as part of the factual matrix, to take account of the nature and circumstances of the estate, as they would have been perceived by potential purchasers. It was planned as a holiday estate close to a popular beach. Potential buyers were likely to come from people already familiar with the area from previous visits with their families. It is fair to assume also that they would have regarded the acquisition of a holiday chalet, not simply as source of pleasure, but also as a long term investment for them and their families. They would have been keen to avoid undue financial burden or risk. It would be strange if they had not taken the opportunity to talk to existing residents about their own experiences of the estate and its management, and of the associated costs. This will become relevant when considering what knowledge of previous terms should be attributed to the first version 2 lessees.

#### *Approach to interpretation*

108 In an unusual case such as this, little direct help is to be gained from authorities on other contracts in other contexts. As Tolstoy said of unhappy families, every ill-drafted contract is ill-drafted “in its own way”. However, the authorities provide guidance as to the interpretative tools available for the task. The general principles are now authoritatively drawn together in an important passage in the judgment of Lord Clarke of Stone-cum-Ebony JSC in *Rainy Sky SA v Kookmin Bank* [2011] 1 WLR 2900, paras 14–30. As that passage shows, there is often a tension between, on the one hand, the principle that the parties’ common intentions should be derived from the words they used, and on the other the need if possible to avoid a nonsensical result.

109 The former is evident, as Lord Clarke JSC emphasised, in the rule that “where the parties have used unambiguous language, the court must apply it”: para 23. However, in view of the importance attached by others to the so-called “natural meaning” of clause 3(2), it is important to note that Lord Clarke JSC (paras 20–23) specifically rejected Patten LJ’s proposition that “unless the most natural meaning of the words produces a result so

A extreme as to suggest that it was unintended, the court must give effect to that meaning.” In Lord Clarke JSC’s view it was only if the words used by the parties were “unambiguous” that the court had no choice in the matter.

110 He illustrated the other side of the coin by quotations from Lord Reid in *Wickman Machine Tools Sales Ltd v L Schuler AG* [1974] AC 235, 251:

B “The fact that a particular construction leads to a very unreasonable result must be a relevant consideration. The more unreasonable the result, the more unlikely it is that the parties can have intended it, and if they do intend it the more necessary it is that they shall make that intention abundantly clear.”

and Lord Diplock in *Antaios Cia Naviera SA v Salen Rederierna AB (The Antaios)* [1985] AC 191, 201:

C “if detailed and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business common sense, it must yield to business common sense.”

As a rider to the last quotation, Lord Clarke JSC cited the cautionary words of Hoffmann LJ (*Co-operative Wholesale Society Ltd v National Westminster Bank plc* [1995] 1 EGLR 97, 99):

D “This robust declaration does not, however, mean that one can rewrite the language which the parties have used in order to make the contract conform to business common sense. But language is a very flexible instrument and, if it is capable of more than one construction, one chooses that which seems most likely to give effect to the commercial purpose of the agreement.”

E 111 I agree with Mr Morshead (questioning in this respect the approach of Davis LJ (para 35)) that it may be unnecessary and unhelpful to draw sharp distinctions between problems of ambiguity and of mistake, or between the different techniques available to resolve them. In *Chartbrook Ltd v Persimmon Homes Ltd* [2009] AC 1101, para 23, Lord Hoffmann cited with approval a passage of my own (in *KPMG LLP v Network Rail Infrastructure Ltd* [2007] Bus LR 1336, para 50) where I discussed the role of what is sometimes called “interpretation by construction”. I criticised the tendency to deal separately with “correction of mistakes” and “construing the paragraph ‘as it stands’”, as though they were distinct exercises, rather than as “aspects of the single task of interpreting the agreement in its context, in order to get as close as possible to the meaning which the parties intended”. Lord Hoffmann added, at para 25:

H “What is clear from these cases is that there is not, so to speak, a limit to the amount of red ink or verbal rearrangement or correction which the court is allowed. All that is required is that it should be clear that something has gone wrong with the language and that it should be clear what a reasonable person would have understood the parties to have meant.”

112 Another permissible route to the same end is by the implication of terms “necessary to give business efficacy to the contract”. I refer again to Lord Hoffmann’s words, this time in *Attorney General of Belize v Belize*

*Telecom Ltd* [2009] 1 WLR 1988, para 22, explaining the “two important points” underlined by that formulation: A

“The first, conveyed by the use of the word ‘business’, is that in considering what the instrument would have meant to a reasonable person who had knowledge of the relevant background, one assumes the notional reader will take into account the practical consequences of deciding that it means one thing or the other. In the case of an instrument such as a commercial contract, he will consider whether a different construction would frustrate the apparent business purpose of the parties . . . The second, conveyed by the use of the word ‘necessary’, is that it is not enough for a court to consider that the implied term expresses what it would have been reasonable for the parties to agree to. It must be satisfied that it is what the contract actually means.” B

113 *Aberdeen City Council v Stewart Milne Group Ltd* 2012 SCLR 114 is a useful recent illustration in this court of how these various principles may be deployed, to enable the court to achieve a commercially sensible result in the face of apparently intractable language. A contract for the sale of development land gave the council the right to an uplift (described as “the profit share”) in certain defined circumstances, one being the sale of the property by the purchaser. The issue was the calculation of the profit share, which the contract defined as a specified percentage of the “estimated profit” (defined by reference to “open market value”) or “the gross sale proceeds”. The issue was how the definition should be applied in the case of a sale by the purchaser to an associated party at an undervalue. The court held in agreement with the lower courts that, in that event, notwithstanding the apparently unqualified reference to gross sale proceeds, the calculation should be based on open market value. D

114 In a concurring judgment, with which all the members of the court agreed, Lord Clarke JSC, at para 28, referred to his own judgment in *Rainy Sky* as indicating the “ultimate aim”, that is: E

“to determine what the parties meant by the language used, which involves ascertaining what a reasonable person would have understood the parties to have meant; the relevant reasonable person being one who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.” F

As he pointed out, “on the face of it” the reference in the contract to the gross sale proceeds was a reference to the “actual sale proceeds” received by the appellants. It was not easy to conclude “as a matter of language” that the parties meant, not the actual sale proceeds, but the amount the appellants would have received on an arm’s length sale at market value of the property; nor was it easy to conclude that the parties “must have intended” the language to have that meaning. He referred, at para 31, to the comment of Baroness Hale of Richmond JSC in the course of the argument that: G

“unlike *Rainy Sky*, this is not a case in where there are two alternative available constructions of the language used. It is rather a case in which, notwithstanding the language used, the parties must have intended that, in the event of an on sale, the appellants would pay the respondents the H

- A appropriate share of the proceeds of sale on the assumption that the on sale was at a market price.”

He thought the problem should be solved by implying a term to the effect that, in the event of a sale which was not at arm’s length in the open market, an open market valuation should be used. As he explained, at para 33:

- B “If the officious bystander had been asked whether such a term should be implied, he or she would have said ‘of course’. Put another way, such a term is necessary to make the contract work or to give it business efficacy.”

He preferred the use of an implied term to “a process of interpretation”, although “the result is of course the same”: paras 30–33.

- C 115 As Mr Morshead observes, the result in the *Aberdeen* case could probably have been explained equally as a case of correction by interpretation. In any event, this example provides support for his proposition that, where an ordinary reading of the contractual words produces commercial nonsense, the court will do its utmost to find a way to substitute a more likely alternative, using whichever interpretative technique is most appropriate to the particular task.

- D *Residential leases*

- E 116 Long residential leases are an exceptional species of contract, and as such may pose their own interpretative problems. In no other context is a private individual expected to enter into a financial commitment extending for the rest of his or her life, and probably beyond. The original lessee may have been unaware that (at least under contracts before the Landlord and Tenant (Covenants) Act 1995) he was taking on a personal legal commitment which could continue even after he had disposed of any interest in the property itself: *Norwich Union Life Insurance Society v Low Profile Fashions Ltd* [1992] 1 EGLR 86. So far as it relates only to ground rent, the commitment is unlikely to be burdensome, and it may be readily accepted as a necessary incident of a valuable property interest. Service charges are a different matter, since the amounts may be substantial, and, apart from statute, the lessee is likely to have no direct control over the lessor’s expenditure.

- G 117 Where the lease is for one of a number of units in a managed building or estate, provision has to be made for expenditure by the lessor on common services and maintenance, and for the cost to be shared between the lessees. Substantial equivalence of rights and obligations under such leases is normally important for all parties, both for the good management of the building or estate, and for harmony among those living within it. Equivalence can only be achieved by the lessor, who alone is party to them all. After the first lease has been negotiated and granted, later incoming lessees will usually have little choice in practice but to accept the covenants in the form dictated by the lessor. Their reasonable expectation will be that all have been granted in like terms, both in terms of covenants and in terms of sharing financial responsibility for services, with a view to ensuring fair distribution of the overall cost. Often that expectation and the lessor’s responsibility for achieving it, will be expressed in the terms of the lease (as here, in the preamble and clause 4(8)).

118 Mr Daiches submits, correctly in my view, that the effect of such words is to create “a letting scheme, or local law, of negative obligations mutually enforceable in equity between all occupiers of the properties on the estate”. He cites authorities such as *In re Dolphin’s Conveyance* [1970] Ch 654, which related to an estate of freehold properties. Examples of the same principle as applied to leasehold developments are given in the textbooks: see *Megarry & Wade, The Law of Real Property*, 8th ed (2012), para 32-079. As I understand his argument, he asks us to infer that a clause such as 4(8) has to “look to the future not the past”, and that accordingly it is not to be construed as containing any implied representation as to previous leases. I cannot agree. In my view, the existence of such a scheme reinforces the view that each lessee has a legitimate interest in the form and content of all leases within the development, whenever granted. Even if, as in clause 4(8), the lessor’s responsibility is expressed as an obligation in respect of future leases, it should in its context (including the preamble) be read also as containing an implied representation that leases previously granted are also in substantially the same form.

119 Provision for services is normally dealt with by reciprocal covenants, positive in form: by the lessor to arrange and pay for the carrying out of the necessary services, and by the lessees to pay their respective shares of the costs so incurred. There is no common format for such service charge covenants, and they can and do vary greatly between different buildings or estates. Unlike negative covenants, it seems that they are not mutually enforceable as such, but the expectation is that they will have been drafted to ensure that the lessees’ financial obligations are shared fairly between them all. Again this is in the interests of good management and harmony within the development for both lessor and lessees. Differences may be necessary to cater for differences in size of the individual units or other features, but otherwise they will normally be in a standard form in all the leases.

120 In the courts below there was some discussion of the “restrictive” approach said to be appropriate to service charge provisions: *McHale v Earl Cadogan* [2010] HLR 412, para 17, per Rix LJ. I agree, if by this it is meant that the court should lean towards an interpretation which limits such clauses to their intended purpose of securing fair distribution between the lessees of the reasonable cost of shared services.

121 Support for this approach is to be found also in the disparity in practice between the potential remedies available to each party for breach by the other. A lessor who fails to maintain services at the level thought appropriate by the lessees is in principle open to enforcement action in court. But the practical effect of such action for the lessees is uncertain in the absence of a precise definition of what he is required to provide. If there has been a complete breakdown of services, they may be able to obtain injunctive relief or appointment of their own manager. In less extreme circumstances the form of remedy or the extent of any damages may be difficult to define.

122 By contrast, the lessor’s remedies for breach of the service charge clause are all too clear. In the Court of Appeal, Davis LJ was apparently content to assume that the charges might “in extremis, force some of these lessees into surrender or forfeiture”: para 57. However, if by this he intended to imply that either escape-route would be available to the lessees other than by agreement with the lessors, he would have been wrong. Apart

- A from any special provision, the lessee's obligation, once the service charge has been determined, will have crystallised into a contractual obligation to pay a fixed amount. That is in principle enforceable by a simple action through the courts, and ultimately by forfeiture and bankruptcy. The legislature intervened long ago to provide some statutory relief against forfeiture: section 146 of the Law of Property Act 1925. But that provides no protection against enforcement of the personal liability to pay the contractual amount.

- B 123 As already explained, the scope for abuse has been recognised by the legislature in the special provision made for controlling "variable" charges as defined in the 1987 Act. Fixed service charges do not normally give rise to the same risk of abuse. The lessee is given the certainty of a fixed financial commitment, and the lessor has the advantage of simplified administration. Provision is needed to deal with price inflation. But if this is fixed by reference to an independent formula, such as an official inflation index, there is no significant risk to either party. The approach adopted in this case seems highly unusual, if not unique. Even where the legislature has not intervened, the courts have a responsibility in my view to ensure that such clauses are interpreted as far as possible not only to give effect to their intended purpose, but also to guard against unfair and unintended burdens being placed on the lessees.

*Interpretation of clause 3(2)*

- E 124 Against that general background, I come to consider the construction of clause 3(2) in its various versions. At first sight, the main principles seem reasonably clear: (i) The intention was that all the leases should be on terms as "similar . . . as the circumstances permit", and that it was the lessors' responsibility to achieve such equivalence (necessarily, since only they would be party to all of them) (preamble (2); clause 4(8)) (ii) The commercial purpose of clause 3(2) was to enable the lessor to recover from the lessees the costs incurred by him in maintaining the estate on their behalf, the payment by each lessee being intended to represent a "proportionate" part of the expenses so incurred. (iii) Although there was a general description of the services which the lessor was contractually obliged to provide, the extent of those services was not precisely defined by the lessors' covenants (clause 4), which left to them a large measure of discretion as to the amounts to be spent in practice. In themselves, these features are typical and uncontroversial. It is at the next stage, in giving effect to those principles, that the clause becomes problematic.

- G 125 It is clear to my mind that something has gone wrong with the drafting, at least in the original wording, as it appeared in the 1974 version, and (apart from the change of inflation formula) was repeated in 1985 and 1988. The clause imposes an obligation to pay, but contains two different descriptions of the payable amount: by reference, first, to a "proportionate part of the expenses and outgoings incurred by the lessor in the repair maintenance renewal and the provision of services . . .", and secondly, to a
- H "yearly sum" determined by reference to a fixed formula. There are two linguistic problems. First, there is no grammatical connection to show the relationship between the two descriptions. Secondly, they are mutually inconsistent. A figure can be determined as a proportionate part of some other variable amount, or it can be a yearly sum, fixed by a predetermined

formula; but it cannot be both. There is an inherent ambiguity which needs to be resolved. A

126 In the Court of Appeal Davis LJ thought that the first part of the clause was designed simply to identify “the character of the payment to be made”: para 48. I find that unconvincing. If the intention was to indicate no more than the purpose of the payment, one would have expected some such general words as “by way of contribution to the services”, not a detailed and specific formula. Conversely, if the character of the contributions was to be that of payments determined by reference to a fixed formula and nothing else, the description in the first part was neither accurate nor useful. Proportionality had no part to play in such a fixed calculation, nor any relation to reality after 1980 if the court’s interpretation is correct. Nor is it easy to explain the purpose of the specific reference to “expenses and outgoings incurred” by the lessor on a defined range of services, unless it was intended to play some material part in the calculation. B C

127 At this point it is convenient to note the minor differences of wording in some later versions. A change such as the omission of the words “or part . . .” in version 3 can readily be dismissed as a copying error. Others give more room for argument. It would be tempting to read more significance into the word “as”, which appears for the first time in the important 1980 version 2. Grammatically, it may be said (with Davis LJ, at para 54), the insertion of the word “as” implies that the operative text is in the second part of the clause, the first part being merely descriptive. There are two difficulties with that explanation. First, for the reasons I have given, neither the reference to proportionality nor the detail of the formula in the first part is compatible with that limited sense. Secondly, there are linguistic indications the other way. The word “as” did not survive into any of the later versions, except the 2000 deed of variation (version 5), which seems to have been copied directly from version 2. Version 2 itself also saw the introduction of a new reference to expenditure on “the renewal of the facilities of the estate”, which is hard to explain if the detail of the first part had no practical significance. Version 4 added to the mystery by adopting a different connecting word “for”, this time in front of the second description (“for the yearly sum of £90”). That is even more difficult to interpret, but if anything it seems to imply that it was the first part of the clause which was the primary description. In the end I conclude that no persuasive guidance, one way or the other, is to be derived from these minor changes. D E F

128 There are only two realistic possibilities for the second part of the clause, which are those respectively adopted by Judge Jarman, on the one hand, and Morgan J and the Court of Appeal, on the other. Either it is a fixed amount which in effect supplants any test of proportionality under the first part; or it is no more than an upper limit to the assessment of a proportionate amount. I reject the theoretical alternative that it was designed as a lower limit for the benefit of the lessors. That interpretation would have made no sense at all in relation to version 1, agreed at a time when the possibility of inflation falling *below* 3% would have occurred to no-one as a risk requiring special provision, particularly for the lessor who unlike the lessees was in control of the level of his own expenditure. There is thus no doubt that this part of the clause was originally designed for the benefit of the lessees, and I see no reason to think that its purpose had radically changed by the time of version 2. G H

A 129 Davis LJ was concerned as to the practicalities of determining the “proportionate” amount of the qualifying expenditure. Morgan J ([2013] L & TR 174, para 51) described it as “workable but not ideal”. I do not see any great difficulty. The relevant items are precisely defined. The lessor has simply to demonstrate (to the lessees and if necessary to the court) that the expenditure has been properly incurred on those items, and that it has been divided “proportionately” between the lessees.

B 130 I note that in *Hyams v Titan Properties* 24 P & CR 359 (see para 82 above), which was decided two years before the first of these leases, the court had to fix the terms of a new business lease under the Landlord and Tenant Act 1954 taking account of rapid price inflation. Buckley LJ recorded, at p 362, that “the modern practice generally accepted . . . was to make service charges payable on a proportional basis”. In that case (where there were nine units) the court approved a clause “requiring the tenant to pay one-ninth of the cost of providing the services under the covenant in addition to the rent payable under the lease”. There was no suggestion that this formulation was defective in the absence of specific machinery to settle the figure. The first half of clause 3(2) follows the same model, allowing for the fact that the precise number of units was probably not known at the outset, so that it was not possible to put in a specific fraction. The use of the same figure of £90 in all the leases (whatever its precise purpose) would have been a strong indication that equal shares were intended.

C 131 I turn therefore to consider the two alternatives as applied to each of the five versions in its own context. In the words of the authorities, we must inquire “what a reasonable person would have understood the parties to have meant”, that person being one who had “all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract”, and who would have also taken into account “the practical consequences of deciding that it means one thing or the other”. Where necessary the reasonable observer can be invited notionally to take on the more active role of “officious bystander”, in order to interrogate the parties as to their common intentions.

F *The five versions in context*

*Version 1 (October 1974–July 1980)*

G 132 It is impossible to do more than guess at the common intentions of the parties to the first lease in relation to this part of clause 3(2). It is hard at first sight to see any rational basis for selecting a rate of 10% every three years, at a time when annual inflation was running at around twice that rate. At little over 3% per year, it was a little low even by reference to the inflation of the two previous decades, although it was in line with the historic long term average.

H 133 In such inflationary conditions, there is no difficulty in understanding why it was acceptable to the lessees. It is the lessor’s thinking which needs explaining. We know nothing of the first lessors (the Lewises). They may perhaps have been builders, themselves involved in the development of the estate, and so more able to absorb the initial costs of maintenance in their other expenditure. If so, to make the estate attractive to purchasers, they may have gambled on being able to bear the price increases during the early years, in the expectation of inflation falling to more reasonable levels in the near future. (Comparable optimism seems to

have been reflected in their view of ground rent, which was to be increased by only 50% every 21 years.) A

134 In any event, their apparent generosity would be more explicable if, as may have been the case, the figure of £90 was based not simply on an estimate of current costs, but gave a reasonable margin for anticipated inflation in the short term. That possibility is borne out to some extent by the fact that the triennial formula survived, apparently without question, for six years of high inflation. If so, it is certainly possible that, even during that period, it was treated as a cap, the contributions being based on a share of actual expenditure from year to year. (Unlike Morgan J, at para 32, I see no basis, in the absence of evidence, for any positive inference that service charges were paid, then or later, “in accordance with the lessor’s interpretation”.) B

135 Since version 1 is not in issue, it is unnecessary to decide between the alternative interpretations at this stage. Version 1 does however provide the necessary background to the contentious versions which came later. It makes clear that the inclusion of a specific figure for inflation was designed originally for the benefit of the lessees not the lessor. It may also enable one to discount any intention on the part of the Lewises at least to take unfair advantage of their lessees. C D

*Version 2 (August 1980–February 1983)*

136 As I have said, the fact that it took the Lewises six years to react to the apparent disparity between the triennial formula and actual inflation suggests that, one way or another, they were able to maintain expenditure within the initial figure for some time. The change of heart may well have been triggered by the renewed jump in inflation in 1979, which reached its peak in summer 1980, although it is notable that the last version 1 lease was granted as late as July 1980. If the Court of Appeal is right, there was then in August 1980 a dramatic change in their thinking, from the exaggerated optimism which had prevailed over the last six years, to such abject pessimism about the future of the economy that they thought it reasonable to assume continuing 10% inflation for the remaining 93 years of the leases, and to expect their purchasers to share that assumption. E F

137 If that is the correct interpretation, they would have been contemplating an impossibility, even for economists. In *Pennant Hills Restaurants Pty Ltd v Barrell Insurances Pty Ltd* (1981) 145 CLR 625, 639 Gibbs J spoke of the reasons for making no allowance for inflation in awards for future loss: G

“It is unreasonable to suppose that any economist will be able to predict with accuracy the nature and extent of changes in the purchasing power of money during a period extending for several decades ahead. Whether inflation increases or is brought under control depends upon political and economic events and decisions at home and abroad as to whose occurrence it is not possible to do more than conjecture. Predictions as to the economic future in 30 years time may perhaps be made by a soothsayer but expert evidence cannot rationally be given on such a subject.” (cited with approval by Lord Hope of Craighead DPSC in *Simon v Helmot* [2012] Med LR 394, para 45) H

- A If that is unreasonable for an economist, how much less likely is it as an explanation of the thinking of the lessors or lessees of these modest holiday chalets in August 1980?

138 The improbability becomes even more striking when one compares the figures for the new and old groups of lessees. It is true that, even as a cap, the annual formula would result in the new lessees paying more initially than the existing lessees (£159 in 1980, compared to £109 under version 1).

- B But over the period of the lease the differences become grotesque. On the Court of Appeal's interpretation the parties were accepting, as a mathematical certainty, that by the end of the lease period each lessee's service charges would have totalled over £11m, more than 200 times the amounts payable by the existing lessees. Put the other way, if the assumed prediction were correct, the lessees of more than two-thirds of the chalets on the estate would by then have contributed 200 times less than the figure necessary for the lessors' expenditure to keep pace with inflation. Even from the lessors' point of view, that scenario implied commercial disaster.

- C 139 Whatever the lessors' state of mind, it beggars belief that the new lessees would have been content to proceed on that basis. It is particularly improbable for a person of ordinary means investing perhaps limited savings in a holiday home. It is simply inconceivable that such a potential purchaser would have been willing to accept a prediction of continuing inflation at that level for over 90 years, and to take that as a basis for undertaking a contractual obligation lasting for the rest of his life and beyond without any escape route.

- D 140 There has been some discussion before us as to whether the lessees would have known of the comparable clauses in the previous leases. E Mr Daiches asks us (and through us the reasonable observer) to proceed on the basis that the new lessees in 1980 would have been unaware of the triennial formula used in the previous leases, and says that is the basis on which the case has been approached hitherto. I am unwilling to make that assumption, which I regard as wholly unrealistic. It is not on any view an assumption that can be made in respect of versions 4 and 5, where the change was apparent on the face of the documents: see below.

- F 141 Even without direct information in the documents, a potential purchaser in 1980 could be expected to have wanted to satisfy himself about the existing arrangements within the estate, and would have had a legitimate interest in doing so. Absent bad faith, it is hard to see any reason why the lessor would have wished or felt able to hide information about the previous leases. In any event, it could readily have been discovered by talking to other lessees within the estate. In Lord Clarke JSC's words [2011] 1 WLR 2900, para 21 it would have been "background knowledge . . . reasonably . . . available to the parties" in the circumstances of the contract. I would accordingly approach the interpretation of version 2 on the assumption that both parties (like their reasonable observer) would have been aware of the proposed change from the triennial formula, and that they are to be taken as having accepted the change for what they regarded as good reasons.

- H 142 On the basis that it was intended as a cap, the lessees' thinking is understandable. They would have needed persuasion to take the leases on less generous terms than their predecessors. On the other hand, they would have understood that any assumptions made in 1974 about the prospects of an early fall in inflation had been falsified by events. They would have

understood also that the lessor would find it difficult to support reasonable expenditure on services without some adjustment. We do not of course know what if anything may have been said about increasing future contributions from the existing lessees to ensure fair distribution. But from their own point of view, with current inflation at or around 20%, substitution of a limit of 10% might have been seen by them as an acceptable compromise for the immediate future, while allowing for a return to more normal levels in the medium term. That may not be a complete explanation, but it is at least plausible, unlike the alternative.

**143** As in the *Aberdeen* case 2012 SCLR 114, we can imagine the responses of lessor and lessee to questioning by the officious bystander as to the purpose of the clause. Did they really intend to enter into a contract which had the extraordinary long term implications outlined in the previous paragraphs? I find it hard to conceive of any other response than “of course not; it is a cap not a fixed amount”. The alternative would have seemed absurd and unreasonable to both, as much to the lessor as to the lessees.

**144** The Court of Appeal thought they were applying the “natural meaning” of the clause, and that it was not the task of the court to relieve the lessees of a “bad bargain” entered into in different circumstances, albeit possibly without having done their arithmetic. For the reasons I have given, I am not convinced that the “natural meaning” is that adopted by the Court of Appeal, at least once one discounts the inclusion of the word “as” in version 2, or that, even if it is, it relieves the court of the obligation to seek a sensible result. On the other side of the coin, I agree with Mr Morshead that “bad bargain” is a gross understatement of the implications of their interpretation, which as he says were from the outset “not only stark but disastrous”. Nor do I see any reason to assume that these contracting parties, treated (in Lord Hoffmann’s words *Attorney General of Belize v Belize Telecom Ltd* [2009] 1 WLR 1988, para 22) as alive to the “practical consequences” of the alternative interpretations, should have been ignorant of the ordinary principles governing compound interest.

#### *Version 3 (1985)*

**145** By this time inflation had fallen significantly to around 5–6%. Pessimistic thoughts about the future direction of inflation for the foreseeable future would have largely dissipated. If it was difficult in 1980, it would surely be impossible now, for the reasonable observer to imagine the parties committing themselves, even in the medium term, to a fixed inflation figure of almost double the current rate. As a cap, it would hardly have attracted attention.

#### *Version 4 (1988)*

**146** By this time annual inflation had fallen to less than 5%. The annual formula produced a figure more than double that implied by the triennial formula, but one closely comparable to that resulting from actual inflation since 1974 (£342 compared to £350, in the table at para 100 above). If the then lessor, Mrs Short, was still charging her pre-1980 lessees by reference to the lower triennial rate, it raises a question of how she was covering her own expenditure on services, in circumstances where two-thirds of the leases were contributing at only half the rate implied by inflation since 1974. That

A may suggest either that she was able in practice to keep expenditure to a level significantly below that implied by inflation, or possibly that in order to maintain services at a reasonable level some of the pre-1980 lessees had been persuaded to pay more than their strict obligation.

B 147 The only novel feature of this version is that it was subject to a proviso in effect substituting the triennial formula during the tenure of the named lessees. It appears to have escaped notice in the courts below that the example used for this version was in a lease between the lessor, Mrs J Short, and herself and a Mr W R Short (her husband) as joint lessees. Since the hearing it has been confirmed that she had the same interest in the other three “proviso” leases granted between 1988 and 1991. They were clearly not arms-length transactions.

C 148 We know nothing about Mrs Short, or her thinking. It is difficult to understand how this special personal protection could have been reconciled with her obligation to the other post-1980 lessees (under clause 4(8)) to ensure that the covenants in these leases were as “similar . . . as the circumstances permit”. It is even more difficult, at least on the Court of Appeal’s interpretation, to understand how she would have explained the change to her future assignees, who were to lose that protection. The contrast between the two versions could not have been drawn more clearly to their attention. On the basis that the revised percentage figure was no more than a cap, they may plausibly have been content to accept an obligation to keep pace with inflation, in line with other post-1980 lessees. The alternative assumes that, at time when inflation rates were less than 5% and apparently falling, they knowingly accepted a continuing obligation to pay service charges increasing at twice that rate for the rest of the term. On any view that is absurd.

*Version 5 (2000)*

F 149 By this time inflation had fallen to about 3%. The clause 3(2) figure was by now more than five times greater under the annual formula than under the triennial formula. As Mr Daiches accepts, the parties to these transactions were fully aware of the differences between the two versions. In those circumstances, whatever the changes in the extent of their holdings, there is on the face of it no rational explanation for four lessees agreeing not only to the loss of the protection of version 1, but to the substitution of a permanent obligation to pay service charges increasing at a rate three times the then current rate of inflation.

G 150 Since these variations were agreed only 15 years ago, and since by this time the respondent, Mrs Arnold, was herself directly involved, it might have been thought that she at least would be able to throw some light on these extraordinary transactions. After the hearing, the parties were put on notice of the court’s concern on this point, and invited to comment. It has emerged that three out of the four variations were agreed between Mrs Arnold and her daughter, Mrs Fraser (signed under a power of attorney by Mrs Arnold’s son). The fourth was a Mrs Pace, of whom no information has been provided, save that she is apparently still the owner of the chalet, and she is named as one of the defendants in these proceedings.

H 151 If there was in Mrs Arnold’s thinking a rational explanation for these particular variations, she has not taken the opportunity to disclose it. Instead of such direct evidence, Mr Daiches remarkably asks us to imagine a

series of “inferences” drawn by the parties (including his client and her daughter) and the reasonable observer. They would have inferred, he says, that version 1 lessees were paying less than the rates required by inflation and that there were in consequence “historic shortfalls” in the lessor’s service charge income; and that the multiplier was to be increased, not only to take account of actual inflation since 1974, and to reflect the fact that it might once again rise to levels above that implied by the triennial formula, but also to compensate the lessor both for past shortfalls, and for the risk that he or she might not be able to persuade other lessees to agree to similar increases in the future.

152 With respect to Mr Daiches I have to say that, even in this extraordinary case, I find these submissions quite astonishing. Given that his client and her daughter were the principal parties to these transactions, why on earth should the court be expected to draw “inferences” as to what was in their minds? Why should we speculate as to the extent of any “historic shortfalls”, when she presumably has access to the actual accounts, and has resisted the lessees’ requests for disclosure? What evidence is there that by 2000 anyone was seriously concerned about an imminent risk of return to double-digit inflation? Finally, what possible reason would these lessees have had for wishing to “compensate” the lessor for the past or future financial consequences of imperfections in leases for which they were not responsible?

153 With regard to the only independent party, Mrs Pace, Mr Daiches asks us to note that her variation was agreed shortly after the sale of the lease to her by the respondent herself. It should not be difficult, he says, to “infer that the purchase price paid by her to the respondent reflected her agreement to increase the multiplier”. Although she is apparently one of the appellants represented by Mr Morshead, he has not volunteered any specific explanation on her behalf. He merely points to the difficulty of imagining any price reduction or other inducement sufficient to compensate her for “the devastating implications” of the multiplier if it operates as Mrs Arnold contends.

154 In the absence of further evidence from either side, it is impossible to draw any clear conclusions about the purpose of these curious transactions. It is enough to observe that, viewed objectively, they are at least consistent with an interpretation which limits the lessees’ future exposure to actual inflation, within a defined limit. On the lessors’ interpretation, as with version 4, they make no sense at all.

### *Conclusion*

155 The true explanation for these wretchedly conceived clauses may be lost in history, but the problems for the parties are all too present and deeply regrettable. No doubt in recognition of such considerations, Mr Daiches, on behalf of Mrs Arnold, indicated that his client “fully understands the appellants’ predicament and is sympathetic to it”, and that if the appeal fails there would have to be a re-negotiation of the leases “for pragmatic if not for legal reasons”. She wished it to be stated openly that:

“she is willing for the appellants’ leases to be renegotiated on terms that would, among other things, involve the leases being varied by

- A substituting an adjustment linked to the Consumer Price Inflation index instead of the current fixed adjustment of 10% per annum.”

156 Although on its face this indication seems helpful and realistic, it is not clear what it would mean in practical terms. It rightly acknowledges that the problems may well be incapable of truly satisfactory resolution by conventional legal analysis. The main obstacle may be that hinted at in Mr Daiches’ post-hearing submission. That is the need to find some way of making good the shortfall resulting from the unrealistically low contributions required from more than two-thirds of the lessees under the pre-1980 leases. Even if the lessees’ interpretation prevails, it will still leave an unhappy imbalance between these lessees, and the version 1 lessees, who will be left paying substantially less than their proportionate share.

157 Whatever the strict legal position, the other lessees may perhaps be persuaded that they have a common interest in the good management of the estate, and at least a moral obligation to contribute their fair share of its costs. A long-running dispute of this kind can hardly be conducive to the atmosphere appropriate to a holiday location, even for those not directly involved. It is to be hoped that some way can be found of bringing them into the discussions. On any view, the case seems to cry out for expert mediation, if it has not been attempted before, preferably not confined to the present parties. If thought appropriate, one possibility might be an application by consent to the President of the First-Tier Tribunal (Property Chamber—Residential Property) to appoint as mediator a senior judge of that tribunal, with the benefit of that tribunal’s experience of dealing with service charge issues under statute. However, that must be a matter for the parties not this court.

158 It is necessary therefore to return to the essential question: what in the view of a reasonable observer did clause 3(2) mean? It will be apparent from my detailed analysis that I regard the consequences of the lessor’s interpretation as so commercially improbable that only the clearest words would justify the court in adopting it. I agree with Judge Jarman QC that the limited addition proposed by the lessees does not do such violence to the contractual language as to justify a result which is commercial nonsense.

159 For these reasons, in respectful disagreement with the majority, I would have allowed the appeal and restored the order of Judge Jarman QC.

*Appeal dismissed.*

COLIN BERESFORD, Barrister

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