Practice and Precedents Editor's Notes

Correcting a mistake in an RPI rent review clause

Rent review clauses and their drafting have provided a steady stream of disputes between the parties to leases over the years and this year is no exception. The Court of Appeal in *MonSolar IQ Ltd v Woden Park Ltd*[1] has now considered RPI rent review provisions in a commercial lease where the drafting had clearly gone wrong. The landlord's appeal against the decision of the High Court that an index linked rent review provision, which when read literally, repeatedly applied the inflation in subsequent years which had already been applied in earlier years, should be corrected was dismissed.

Background

The landlord, Woden Park Ltd, owns a 15 acre site at Woden Park near Cardiff. In 2013 it granted a lease of the site to MonSolar IQ Ltd for a term of 25 years and 6 months from 8 July 2013 for use as a solar farm. The circumstances surrounding the grant of this lease were rather unusual. The lease was drafted by a Mr Feakins, who was the sole director of Woden Park Ltd, using precedents he found on the internet. He was also the sole director of MonSolar IQ Ltd which was a single purpose vehicle incorporated to hold the lease and which was owned by companies ultimately owned by or on behalf of Mr Feakins. The grant of the lease was therefore not an arms' length transaction and there were none of the usual negotiations of the lease terms. Mr Feakins also executed the lease on behalf of both parties. Control of MonSolar IQ Ltd subsequently passed to others.

Relevant provisions in the lease

The lease provided that the rent was to be reviewed annually using a formula that operated by reference to the Retail Prices Index (RPI). The formula set out in the lease was:

$$\text{Revised Rent} = \text{Rent payable prior to the Review Date (disregarding any suspension of Rent)} \times \frac{\text{Revised Index Figure}}{\text{Base Index Figure}}$$

The Revised Index Figure was defined to be RPI published in respect of the month two months before the relevant Review Date and the Base Index Figure was defined to be RPI published in respect of the month two months before the commencement of the term of the lease.

Applying these definitions to the rent review provisions means that the provisions can be expressed more simply as follows:

$$\text{Revised Rent} = \text{Previous year's Rent} \times \frac{\text{May RPI for current year}}{\text{May 2013 RPI}}$$

There was no dispute between the parties as to how these provisions, applied literally, operated. Fancourt J in the High Court[2] clearly described their operation as follows:

---

[1] *Monsolar IQ Ltd v Woden Park Ltd* [2021] EWCA Civ 961.

[2] *Monsolar IQ Ltd v Woden Park Ltd* [2020] EWHC 1407 (Ch) at paras 8 to 11.

> "8. It is accepted by the Tenant that, read literally, the indexation clause operates as follows. On the first anniversary date, the rent is increased by the RPI increase over the first year of the term. On the second anniversary date, that Revised Rent is further increased by the aggregate RPI increase over the first and second years of the term. On the third anniversary date, that further Revised Rent is further increased by the aggregate RPI increase over the first, second and third years of the term. And so on during the 25 years and six months of the term, so that at the end of year 24 the Revised Rent currently payable would be further increased by the aggregate RPI increase over the first twenty-four years of the term and a year later it would be further increased by the aggregate RPI increase over the first twenty-five years of the term.
> 9. Assuming RPI increases of 5% in each of the first three years of the term, the rent of £15,000 would thereby increase to £15,750 at the end of year one; to £17,325 (i.e. £15,750 + 10%) at the end of year two; and to £19,923.75 (i.e. £17,325 + 15%) at the end of year three. Thus, increases in rent upon the sequential annual rent reviews are not merely compounded, in the sense that it is the current, previously increased rent that is further increased on each Review Date; the current rent is also increased once more by the same factor by which the rent was previously increased, not just by a new factor reflecting the subsequent increase in the RPI index.
> 10. Departing from the arithmetically simple example based on successive 5% annual RPI increases, the Tenant's evidence is that if an annual rate of increase equal to the average RPI increase over the 20 years before the date of grant of the Lease (2.855% p.a.) is applied according to the formula in the Lease on each Review Date during the term of the Lease, the rent payable by year 25 of the term will be just over £76,000,000, as compared with less than £30,000 if non-cumulative RPI increases at that same average rate are applied to the reserved rent of £15,000 p.a.
> 11. It is of course the case that the RPI index is capable of decreasing as well as increasing - this in fact happened, for a single year only, in 2009 - and that the rate of increase (or decrease) over time cannot accurately be predicted. The Landlord's evidence is that if annual RPI increases of 1% p.a. were assumed over the length of the term of years, the annual rent would increase to only £380,660 in year 25. Neither side disputes the other's arithmetic but the appropriate assumptions to make to examine the effect of the indexation clause are very much disputed."

The dispute

MonSolar claimed in the High Court[3] that the rent review provisions contained a drafting mistake which the court should correct so that the annual rent is indexed in line with RPI. MonSolar relied on *Westpac Banking Corporation v Tanzone Pty Ltd*[4], a decision of the New South Wales Court of Appeal. This case involved a very similar rent review clause where on each rent review the rent was capable of being increased by reference to increases in the index that had already been used to increase the rent on a previous review date. The result was an exponential growth in the rent claimed by the landlord. The court held that the clause produced an absurdity and should be reinterpreted. It concluded that it was clear that the parties meant to provide for a compounded increase in rent, in that any increase in the index during the two years immediately before the current review date was to be applied to the previously increased current rent.

---

[3] *Monsolar IQ Ltd v Woden Park Ltd* [2020] EWHC 1407 (Ch).
[4] *Westpac Banking Corporation v Tanzone Pty Ltd* [2000] NSWCA 25.

Woden Park argued that there was not an obvious mistake in the rent review provisions when understood in the context of its grant. The lease had a reduced starting rent and it was a flat rent rather than a profit share which was common in the solar farm market. It was anticipated that the price for electricity would increase in value far in excess of inflation. Woden Park also argued that when assessing whether an obvious mistake had been made, the court should disregard the effects of possible inflationary scenarios.

MonSolar's claim succeeded. Fancourt J found that the rent review provisions did contain a clear drafting mistake which did not represent the intentions of the parties and could be corrected so that the rent increased, or decreased, in line with RPI.

In reaching this decision, the judge applied the approach of Lord Hoffmann in *Chartbrook Ltd v Persimmon Homes Ltd*[5] which concerned an ambiguous overage provision. These provisions were written as text rather than as a formula and this meant that different results could be obtained in the calculation. Lord Hoffman confirmed the basis on which a court would interpret a document to have a different meaning than its literal words:

> "..... 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."[6]

Thus, this principle operates if, first, it is clear that a mistake has been made, and, secondly, it is clear what the provision was meant to say.

The Supreme Court subsequently followed this approach in *Arnold v Britton*[7] where the natural meaning of a service charge clause in a long-lease of a holiday chalet was that the charge was £90 in the first year, rising by 10 per cent per annum thereafter. The fact that, after a number of years, the charge would significantly exceed the cost of providing the services was no reason to depart from the natural meaning of the clause.

In *Trillium (Prime) Property GP Ltd v Elmfield Road Ltd*[8] the Court of Appeal interpreted a rent review clause in a 2010 lease which provided for the rent to be reviewed by reference to RPI using a base index figure in 2005. There was no ambiguity in the language of the clause which precluded the court from applying its literal meaning, and no drafting error which could be corrected as a matter of interpretation. According to Lewison LJ the reference to the 2005 figure could be explained on the grounds that the rent under a previous lease had been reduced with retrospective effect from 2005 as part of the agreement for the new lease.

The appeal

Woden Park appealed on the ground that it was not clear that the provisions contained a drafting mistake and that, if there was a drafting mistake, it was not clear how the mistake should be corrected. It argued that the approach in *Chartbrook Ltd v Persimmon Homes Ltd*[9] required

---

[5] *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38.
[6] *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38 at para 25.
[7] *Arnold v Britton* [2015] UKSC 36.
[8] *Trillium (Prime) Property GP Ltd v Elmfield Road Ltd* [2018] EWCA Civ 1556.
[9] *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38.

modification in the light of the Supreme Court's decision in *Arnold v Britton*[10] so that no account could be taken of the rationality of the clause's operation when deciding whether a mistake had been made. It also argued that, even if there was a mistake, it was not obvious what the parties meant. As the lease referred to increases in the rent, the parties might have intended the rent review provisions to be upwards only.

The decision

The Court of Appeal dismissed the appeal. Nugee LJ (with whom Baker and Males LJJ agreed) rejected the argument that *Arnold v Britton*[11] had modified the approach in *Chartbrook Ltd v Persimmon Homes Ltd*[12]. The court held that the reasoning in *Arnold v Britton*[13] did not apply where the parties had made a drafting mistake. Nugee LJ confirmed that there is:

> "a distinction between a case which concerns a provision which seems merely imprudent and one which appears irrational."[14]

The court concluded that:

> "There is nothing in *Arnold v Britton* which suggests that this dividing line between on the one hand a provision which is unduly favourable to one side, imprudent or unreasonable, and on the other hand one that produces irrational, arbitrary, nonsensical or absurd results has been redrawn."[15]

Ground 1: is it clear that there was a mistake?

The Court of Appeal held that it was:

> "abundantly clear that the Formula contains a drafting error, and that it is about as plain a case of such a mistake as one could find."[16]

The court agreed with Fancourt J's decision that applying the rent review formula literally was arbitrary and irrational. The formula conflicted with other provision in the lease which indicated that the formula was meant to track RPI. This ground of appeal was therefore dismissed.

Ground 2: is it clear how the mistake should be corrected?

The Court of Appeal agreed with Fancourt J's decision that there were two possible ways of correcting the mistake and that both produced the same result. The court rejected the arguments by Woden Park that the review was intended to be upwards only as such a provision would have nothing to do with correcting the mistake. Provisions in the lease did show that it was envisaged that rents would increase at each review date, but that was not surprising as price

---

[10] *Arnold v Britton* [2015] UKSC 36.
[11] *Arnold v Britton* [2015] UKSC 36.
[12] *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38.
[13] *Arnold v Britton* [2015] UKSC 36.
[14] *Monsolar IQ Ltd v Woden Park Ltd* [2021] EWCA Civ 961 at para 31.
[15] *Monsolar IQ Ltd v Woden Park Ltd* [2021] EWCA Civ 961 at para 33.
[16] *Monsolar IQ Ltd v Woden Park Ltd* [2021] EWCA Civ 961 at para 35.

inflation had been a constant of the UK economy since the 1940s. The fact that the draftsman envisaged that rents would increase on each review did not mean that he made any provision to that effect. As Nugee LJ said:

> "It is easy enough to draft a clause providing that the rent payable after a review date shall never be less than that payable before, or that it should be the higher of the passing rent and that produced by the relevant formula."[17]

The draftsman had not done so and this ground of appeal was therefore also dismissed.

Precedent

So, what how should an RPI rent review be drafted? The following precedent has been drafted on the basis that the rent will be reviewed annually in line with changes on the RPI.

> **Rent Review**
>
> 1. *Definitions*
>
> The following definitions apply in this Schedule:
>
> 1.1 'Base Figure' means on the first Rent Review Date, [*insert figure*] (being the Index figure for the month three months preceding the date of the commencement of the term of the Lease) and on each succeeding Rent Review Date, the Current Figure for the preceding Rent Review Date;
> 1.2 'Current Figure' means the Index figure for the month three months preceding the Rent Review Date; and
> 1.3 'Index' means the "all items" figure of the Index of Retail Prices published by the Office for National Statistics or any successor Ministry, Department or Government Agency.
>
> 2. *Rent Review*
>
> 2.1 On each Rent Review Date, the Annual Rent is to be reviewed to the higher of:
> 2.1.1 the Annual Rent reserved by this Lease immediately before that Rent Review Date; and
> 2.1.2 the revised Annual Rent calculated in accordance with the following formula:
>
> $$\text{revised Annual Rent} = \text{Annual Rent reserved immediately before the relevant review date} \times \frac{\text{Current Figure}}{\text{Base Figure}}$$
>
> 3. *Notice of Annual Rent*
>
> If the Annual Rent is increased, the Landlord must notify the Tenant as soon as possible after the Rent Review Date.
>
> 4. *Effect of delay in notifying the revised rent*

[17] *Monsolar IQ Ltd v Woden Park Ltd* [2021] EWCA Civ 961 at para 54.

Following any Rent Review Date until the Landlord has notified the Tenant of the revised Annual Rent:

4.1 the Annual Rent payable under this Lease immediately before that Rent Review Date will continue to be payable until the revised Annual Rent has been notified to the Tenant;
4.2 following the notification of the revised Annual Rent, the Landlord will demand the difference (if any) between the amount the Tenant has actually paid and the amount that would have been payable had the revised Annual Rent been notified before the Rent Review Date; and
4.3 the Tenant must pay that difference to the Landlord within 10 Working Days after that demand and interest at the base rate for the time being in force of [*insert name of bank*] calculated on a daily basis on each instalment of that difference from the date on which such instalment would have become payable to the date of payment. If not paid such sums will be treated as rent in arrear.

5. *Changes in the Index*

5.1 If the Index is no longer published or if there is any material change in the way it is compiled or the date from which it commences then a new arrangement for indexation or a rebasing will be substituted for the calculation of the Annual Rent to reflect increases in the cost of living on a similar basis to that originally set out in this Lease.
5.2 If the parties are unable to agree a basis for such new arrangement for indexation or rebasing then, if either party requests it, the parties must make a joint application to the President of the Institute of Chartered Accountants in England and Wales to appoint an arbitrator to do so. The parties must accept the identity of the nominated arbitrator and jointly appoint them to conduct the arbitration. The arbitration must be conducted in accordance with the Arbitration Act 1996.

The definitions of 'Base Figure' and 'Current Figure' use a date three months before the rent review date in order to ensure that there has been sufficient time for the relevant index figure to be published and so avoid delays in implementing the rent review arising from the relevant figures being unavailable.

Changes to RPI

Whilst the precedent above uses RPI, the Government has acknowledged that RPI will be phased out or aligned to CPIH (Consumer Prices Index including owner occupiers' housing costs) from 2030 though the Chancellor has indicated that he is thinking about bringing that date forward to 2025.

RPI increases have tended to be higher than CPIH by around 1%, even after CPIH became the benchmark for inflation. When RPI is brought in line with CPIH, rent increases will therefore drop. Landlords may try to pre-empt this change by seeking to agree new leases and renewals by reference to CPIH plus 1% or impose a higher minimum floor on the increase but even if this is commercially acceptable to the Tenant, they will need to be mindful of any Stamp Duty Land Tax implications.

Rent reviews which take place after the fifth year of the term of a lease are not taken into account when calculating SDLT. Where leases contain a rent review linked to RPI during the first five years, any increase in the rent as a result of such a review will still be ignored for SDLT purposes[18]. However, where the review is linked to another index or where the review contains its own artificial adjustment, this will not be ignored. Consequently, if there are any such reviews in the first five years of the term, the effect on the rent will need to be taken into account for SDLT purposes. Hopefully, if RPI is phased out the Government will update the legislation to exclude CPIH increases.

Russell Hewitson

[18] Finance Act 2003, Sch. 17A, para 7(5).