Neutral Citation Number: [2020] EWHC 3367 (Ch)

Case No:PT-2019-MAN-000098

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN MANCHESTER
PROPERTY TRUSTS AND PROBATE LIST (ChD)

Date: 9th December 2020

Before :

His Honour Judge Halliwell sitting as a Judge of the High Court

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Between :

(1) MANCHESTER AIRPORT
(2) MAG INVESTMENT ASSETS LIMITED

Claimants

- and -

(1) RADISSON HOTEL MANCHESTER LIMTED
(2) UNION INVESTMENT REAL ESTATE GmbH

Defendants

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- -

Mr Martin Hutchings QC (instructed by **Eversheds Sutherland LLP**) for the **Claimants**
Mr Adam Rosenthal QC (instructed by **Marriott Harrison LLP**) for the **First Defendant**
Mr Simon Atkinson (instructed by **Travers Smith LLP**) for the **Second Defendant**

Hearing dates: 23rd - 24th November 2020

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APPROVED JUDGMENT

This judgment was handed down remotely by circulation to the parties' representatives by email. It will also be released for publication on BAILII. The deemed date and time for hand-down is 2.30 pm on 9th December 2020.

HHJ Halliwell:

(1) Introduction

1. This is my judgment following the trial of a preliminary issue ("the Preliminary Issue") in relation to the interpretation of one of the covenants of an underlease dated 5th October 2000 ("the Lease") between the First Claimant ("MA") and the First Defendant ("Radisson") in respect of a hotel at Manchester Airport. The issue is as to the meaning of the covenant, in Clause 5.3.2 of the Lease, for Radisson, as original tenant, to pay for electricity and gas "at no more than…the…*prevailing commercial rates*…"

2. On the basis that the relevant supplies are each from a private utilities network, the Claimants contend that the covenant requires Radisson to pay for them at no more than the prevailing commercial rates for such supplies from a *private* utility supplier. Radisson contends that it should be based on the prevailing commercial rates for the supply of electricity and gas from a *public* network

3. The Preliminary Issue is as follows.

   "On the true construction of [the Lease] does the phrase in clause 5.3.2: "prevailing commercial rates" as it applies to the charging by the landlord, for (inter alia) gas and electricity supplied to the tenant from time to time, pursuant to the landlord's obligations in clause 6.11 of the lease, mean:

   (i) prevailing commercial rates for such supplies by a private utility supplier, using its own private network and benchmarked against other major UK Airport private utility network operators; or

   (ii) such rates as are payable for the supply of gas and electricity from a public network to commercial premises of a similar size and type in the North West of England; or

   (iii) some other meaning, and if so, what?"

(2) Background

4. MA is the reversionary leasehold owner of land at Manchester Airport under leases dated 1st April 1986 and 16th November 1995 ("the 1995 Lease"). On 30th October 1996 it entered into an agreement for lease ("the 1996 Agreement") with Radisson (then named Finlaw Forty-Five Limited) and SAS International Hotels AS under which MA agreed to carry out enabling works and Radisson agreed to build a hotel on the basis that, once the

building works were complete, the hotel would be let upon the terms of an appended draft lease.

5. The hotel ("the Hotel") was constructed and, pursuant to the 1996 Agreement, MA and Radison entered into the Lease. The Lease was for a term of 55 years from 22nd September 1998. By Clause 4.1, it was recorded that the Hotel had been erected pursuant to the 1996 Agreement and there was a declaration against merger in respect of the provisions which remained to be performed or observed.

6. On 29th October 2001, Radisson entered into a sale and lease-back transaction with Quillem Limited ("Quillem") under which the Lease was assigned by Radisson to Quillem and Quillem granted a sub-underlease to Radisson. MA gave Radisson licence to assign and Quillem covenanted to comply with the Lease. At the same time, MA and Quillem entered into a Deed of Variation ("the Deed of Variation") with modifications to some of the covenants and the proviso for re-entry.

7. On 26th May 2004, Quillem assigned the Lease to the Second Defendant ("Union") and, on 29th March 2018, MA granted the Second Claimant ("MAG") an intermediate lease of land which included the Hotel.

8. Although MA and Radisson ceased to have privity of estate following the 2001 transaction, MA continued to supply electricity and gas to the Hotel and invoice Radisson directly. Moreover, Radisson covenanted to pay for the same and indemnify Quillem in respect of its liability for such services under the provisions of the Sub-underlease.

9. The issues in the present case are thus between the Claimants and Radisson. Whilst represented at the hearing before me, Union have taken a neutral stance.

(3) Witnesses

10. Subject to issues about the date for consideration of the admissible background and the qualifying evidence, I heard evidence from three witnesses.

11. On the Claimants' behalf, Mr Michael Curry gave evidence, as an Airport employee since July 1988, about the Airport's private utilities network and the facilities available to the Hotel for the supply of electricity and gas. The Claimants also called as a witness Mr Kevin Maynard, a semi-retired energy consultant, who worked for Manchester City Council during the period, 1989-1998. Mr Maynard gave evidence about the

development of the energy market from the 1990s and the utilities network at the Airport from 1989-2017.

12. On the Radisson's behalf, Mr Bahram Sadr-Hashemi, gave evidence. Mr Sadr-Hashemi has long experience as an employee of what is now the Radisson group of companies and he was a signatory to the 1996 Agreement. He confirmed that in 1996, Radisson only operated "one or two hotels" in the UK and the Hotel was its first hotel at a UK airport. He also sought to give evidence about Radisson's own internal arrangements for the assessment of costs in relation to utilities although there is an issue about the admissibility of this aspect of his evidence to which I shall turn later.

13. I am satisfied that, in giving their evidence, each of the witnesses provided an honest and accurate account and, to the extent their evidence is admissible and has a material bearing on the factual background, it is reliable.

(4) The Lease

14. The Lease contained provisions for the payment of rent with reference to formulae based on Hotel revenue and interest.

15. By Clause 5.2, Radisson covenanted as tenant, to pay and indemnify MA in respect of all rates, taxes, assessments, duties, charges, impositions and outgoings.

16. By Clause 5.3, Radisson covenanted, under the heading "electricity, gas and other services consumed", as follows.

> "5.3.1 To pay the suppliers from time to time and to indemnify the Landlord against all reasonable and proper charges for electricity gas the water sewage drainage and other services consumed or used at or in relation to the Premises (including any meter or line rents) where not supplied by the Landlord
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> 5.3.2 To pay to the Landlord within fourteen days of demand at not more than at (sic) the then prevailing commercial rates for all electricity and gas respectively supplied to the Tenant by the Landlord pursuant to its obligations in clause 6.11 and for water sewage drainage and other services when supplied by the Landlord".

17. By Clause 6.11, Radisson covenanted, under the heading "Electricity and Gas", as follows.

"Subject to the payment of the sums referred to in Clause 5.3.2 to procure a constant supply of electricity and gas to the Premises subject to interruption by 'Force Majeure' [as defined] whilst such Force Majeure exists."

18. "Pipes" was defined so as to mean "all pipes sewers drains mains ditches ducts conduits gutters watercourses wires cables channels flues and all other conducting media and includes any fixings louvres cowls and any other ancillary apparatus which are in on or under or which serve the Premises". By Paragraph 2 of the Second Schedule, a right was granted to the Tenant in the following terms.

    "The right at all time to connect into the Pipes (except the Landlord's gas pipes and electricity pipes in respect of which the Tenant shall have no rights of connection except as may be necessary to take the supplies of gas and electricity to be provided by the Landlord from time to time in existence)".

19. The Lease contained a break clause exercisable in the event of damage owing to the occurrence of certain Insured Risks. There was also a proviso for re-entry exercisable in the event of arrears of rent or any breach of covenant the Landlord reasonably considered material.

20. The Deed of Variation made several amendments to the Lease. It also contained provision for a new break clause and option to renew. However, it made no amendments to the covenants that are in issue in the present proceedings.

(5) Principles of construction

21. In *Investors Compensation Scheme Ltd v West Bromwich Building Society [1998] 1 WLR 896* at *912,* Lord Hoffman observed that "interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having 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". In *Arnold v Britton [2015] AC 1628 at [15]*, Lord Neuberger confirmed that this "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 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".

22. In this way, the document is interpreted in one unitary exercise in which the words used are construed in the light of the admissible background, *Rainy Sky v Kookmin Bank [2011] 1 WLR 2900* at [21] (Lord Clarke). However, it also involves an iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences investigated, *Arnold v Britton [77]* and *Wood v Capita [2017] 2WLR 1095 [12]*. In *Wood v. Capita Insurance Services Limited [2017] AC 1173 at [10]*, Lord Hodge confirmed that "this is not a literalist exercise focused solely on a parsing of the wording of the particular clause but that the court must consider the contract as a whole and, depending on the nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to that objective meaning."

23. It is not open to the court to re-write the parties' bargain. Moreover, the clearer the natural meaning, the more difficult it is to justify departing from it and "a court should be very slow to reject the natural meaning of a provision…simply because it appears to be a very imprudent term for one of the parties to have agreed, *Arnold v Britton* (*supra),[17]-[20]*. However, if the contract is susceptible of more than one interpretation, the court may prefer the construction which is consistent with business common sense and reject the other, *Rainy Sky v Kookmin Bank [2011] 1 WLR 2900*, Lord Clarke at [21].

(6) Date for ascertainment of the admissible background or factual matrix

24. In *Investors Compensation Scheme v West Bromwich BS [1998] 1 WLR 896 at 912H-913A*, Lord Hoffman stated that the admissible background or factual matrix includes information about "absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man" if "reasonably available to the parties" subject to the well-established exception in relation to the contractual negotiations and the parties' declarations of intent. It encompasses all information reasonably available to the parties but not information known or available to one party only. In *Arnold v Britton (supra)*, Lord Neuberger confirmed, at [21], that "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".

25. In the present case, there is an issue as to the date for ascertainment of the admissible background. The Lease is dated 5th October 2000. In the absence of evidence to the contrary, it is presumed to have been executed that day. However, the parties maintain that the admissible background should be ascertained on a different date. On the Claimant's behalf, Mr Martin Hutchings QC submits that it should be ascertained on 29th October 2001 on the basis the Deed of Variation operated as a surrender and re-grant. Conversely, Mr Adam Rosenthal QC, for Radisson, submits that it should be ascertained on 30th October 1996, when the parties entered into the 1996 Agreement.

26. On this issue, I am satisfied that Radisson's case is logically correct and the admissible background is thus to be ascertained on 30th October 1996. By the 1996 Agreement, MA and Radisson agreed to enter into a lease upon the terms of an appended draft lease. In all material respects, the Lease was ultimately on the same terms as the appended draft lease. This included the provisions of Clause 5.3.1 and 5.3.2. It is implicit that the parties entered into the Lease pursuant to their respective obligations under the 1996 Agreement. There is nothing to suggest that there was any material re-negotiation or agreement to vary the draft lease. When the parties entered into the Lease, the term was back-dated so as to commence on 22nd September 1998. If, as appears likely, Radisson was in possession prior to 5th October 2000, it was no doubt in possession pursuant to the provisions of the 1996 Agreement.

27. Mr Rosenthal relies on a passage from *"the Interpretation of Contracts" (Lewison) (6th edition) (2015), 3.17*, endorsing the view taken by Briggs LJ in *BlueCo Ltd v BWAT Retail Nominee (1) Ltd [2014] EWCA Civ 154* about the date for ascertainment of the admissible background in the case of a lease made pursuant to a contract or agreement for lease. Briggs LJ's view was that it was "strongly arguable" that the admissible background was to be ascertained on the date of the antecedent contract since this was the date of the relevant bargain and there had been no material alteration to the parties' contractual rights. This is no more than a view. It also contradicted the approach of the Chancellor who adjudged, in the same case, that the lease was to be construed in the light of the admissible background facts at the time it was executed rather than at the time of the antecedent contract. However, it is open to me to adopt Briggs LJ's view and follow his alternative approach since it is not possible to discern a collective ratio to the contrary. There was nothing to suggest that the differences between the Chancellor and Briggs LJ

were ultimately material to the collective decision and Proudman J simply confirmed that she was in agreement.

28. Mr Rosenthal also referred me to Chadwick LJ's observation in *Portsmouth City FC Ltd v Stellar Properties (Portsmouth) Ltd [2004] EWCA Civ 760 (at [47])* that a provision incorporated by amendment was to be construed "in the light of the background knowledge reasonably available at the time when the amendment is agreed". He submitted that in taking, as the operative date, the date of the agreement or instrument under which the relevant contractual commitment was assumed, this observation is consistent with Briggs LJ's view in *BlueCo (supra*). I agree.

29. On the basis that Briggs LJ's view is based on sound logical foundations and is thus to be preferred in a case such as this where the contractual commitment is entirely a function of the antecedent agreement, I am satisfied that the admissible background is to be ascertained as at 30th October 1996 when the parties entered into the 1996 Agreement. This is so regardless of the scope of the declaration against merger in Clause 4.2 of the Lease.

30. Mr Hutchings submitted that the Deed of Variation took effect as a surrender and re-grant and the admissible background is thus to be ascertained as at 29th October 2001. On the hypothesis that the Deed of Variation did take effect as a surrender and re-grant, this submission would be correct. However, where the parties to a lease choose to enter into a deed of variation rather than a new lease, the court will not treat the deed of variation as a surrender and re-grant unless this is dictated by the changes. A change to the extent of the demise or the length of the term will suffice but generally nothing else, *Friends Provident Life Office v British Railways Board [1996] 1 AER 336*.

31. In the present case, the Deed of Variation amended a covenant in relation to the use of adjacent land. It added a new break clause and option to renew and it made some modest amendments to the other covenants including the proviso for re-entry. However, in my judgment, none of these provisions require the Deed of Variation to be treated as a surrender and re-grant. Moreover, it did not make any amendment to the material covenants in the present case, particularly the covenants in Clause 5.3. It follows that it can have no bearing on the date for ascertainment of the admissible background.

(7) The admissible background

32. MA is the leasehold owner of most, if not all, the land at Manchester Airport. The Airport was first opened in 1938. Following the Second World War, it accommodated increasing numbers of passengers and, in subsequent years, the initial runway and terminal facilities were developed and extended. During 1991, proposals were published for the expansion of the Airport and the construction of a second runway. In 1993, a new terminal and a new railway station were opened and, in 1997, planning approval was obtained for the new runway. This was opened in February 2001.

33. In his evidence, Mr Curry confirmed that, to the best of his knowledge, the Airport has always been served by a private utilities network and this was certainly in operation when he commenced work at the Airport in July 1988. Since before 30th October 1996, when MA and Radisson entered into the 1996 Agreement, this has been a requirement of the Civil Aviation Authority Rules. Throughout that time, the network has been subject to special safety rules in relation to the electricity supply to ensure higher resilience than a public network. Partly for this reason, the private utilities network for the Airport is subject to infrastructure costs and expenses which are significantly higher than the public network. These costs and expenses are taken into account when invoicing customers. Charges for electricity to customers on the private utilities network can thus be expected to exceed prices available on the public network.

34. Throughout the relevant period, the network has served another hotel at the Airport, now the Crown Plaza Hotel, and other retail customers. One hotel at the Airport, the Hilton Hotel, is not served by the network – at least for the supply of electricity. However, unlike the Hotel, this hotel has direct access to public utilities. There has never been any connection from the Hotel to the public utilities or, at least, to the public supply of electricity and gas. During the trial, I was advised that the Hotel does not adjoin a public highway or land with a connection to these public utilities and Radisson has never been entitled to a right of connection. There is also no evidence to suggest that steps were ever taken to provide the Hotel with a public connection to these utilities.

35. Mr Curry stated that, on a yearly basis, MA circulates to its customers (including the hotels) details of the rates at which it charges its customers for services. To the best of his knowledge, it has always done so. This ranges from its charges for electricity to landing fees, aircraft storage and charges in relation to the baggage system.

36. In his evidence, Mr Maynard confirmed that other airports, including Heathrow, Gatwick, Stansted and East Midlands, have historically invoiced internal tenants, in the same manner as Manchester Airport, for electricity from their respective private utilities networks so as to encompass "infrastructure and maintenance costs" in addition, as he put it, to the "fiscal meter costs". There is nothing to suggest that this was any different on 30th October 1996.

37. By 30th October 1996, the electricity and gas utilities had been privatised for several years. On that date, Manchester Airport straddled the historic boundary between two regional electricity companies, MANWEB and NORWEB. However most of the supply to the Airport was from NORWEB. The private electricity network at the Airport is now supplied by Electricity North West which, for material purposes, has succeeded to the undertaking of NORWEB. Since privatisation, there has been a significant increase in competition for the supply and generation of electricity, much of which has occurred since 30th October 1996.

38. To the extent that this state of affairs had evolved by 30th October 1996, each material aspect was reasonably available to both parties when they entered into the 1996 Agreement; at least, it has not been suggested otherwise. However, evidence about one parties' internal arrangements and decision-making is not admissible as part of the factual matrix if undisclosed or unavailable to the other party, *Arnold v Britton (supra)*, at *[21*]. I have thus excluded from consideration Mr Sadr-Hashemi's evidence in relation to Radisson's internal methodology for estimating the costs of utilities and selecting comparable reference hotels.

(8) The rival contentions

39. Although Clause 5.3.2 of the Lease requires the Tenant to pay for electricity and gas at no more than the prevailing commercial rates, it does not identify the market in which such rates are to ascertained.

40. The Claimants submit that the prevailing commercial rates are to be discerned from the amounts charged by private utility suppliers using their own private network benchmarked against other major UK Airport private utility network operators. In their Skeleton Argument dated 19th November 2020, they have identified as "the appropriate comparator…airports operating similar private networks against which the relevant

charges at the Airport could be benchmarked". According to their case, this can be taken to be the market in which the prevailing commercial rates are to be assessed.

41. In support of this proposition, Mr Hutchings submitted this most closely reflects the reality of the parties' position when they entered into the relevant transactions. Relying on the judgments of the Court of Appeal in *Co-operative Wholesale Society v National Westminster Bank (17th November 1994)* and passages from the dissenting judgment of Lewison LJ in *Harbinger Capital v Partners [2013] EWCA Civ 492 (at [21]-[22]),* he maintained that the presumption of reality should be applied. He also referred me to a passage from "*the Construction of Commercial Contracts" by JW Carter Paras 7-18* about the admission of evidence in the commercial context of a transaction when interpreting valuation covenants. In doing so, he relied, in particular, on references to *Charrington & Co v Wooder [1914] AC 71*, in which the House of Lords admitted evidence about the price of beers charged to tied houses when interpreting the meaning of the words "fair market price" in a lease of such a business.

42. Mr Hutchings identified substantial differences between private and public networks for the supply of electricity, particularly in relation to airports, including the requirements of the Civil Aviation Authority and the special safety rules governing the supply of electricity of which the parties could each be expected to have been aware. He also observed that all major UK airports would have had private utility networks at the time of the relevant transactions since they were required to do so by the Civil Aviation Authority Rules. The parties could be expected to have been mindful of the potential advantages of such an arrangement from Radisson's perspective since MA would have greater bargaining power than Radisson in purchasing supplies, and the private network would involve greater resilience.

43. Mr Rosenthal took issue with much of this analysis. He submitted that there was no room for the presumption of reality since Clause 5.3.2 simply sets a maximum price; it does not require an excursion into the world of "make believe" or assumptions about a hypothetical transaction. He submitted that no parallel could be drawn with *Charrington v Wooder (supra)* since the latter required a comparison between a lease of tied and other premises. Whilst he accepted that there were substantial differences between private and public networks for the supply of electricity, it was not to Radisson's advantage to obtain its supply through the private network at the Airport. The requirements of the Civil Aviation Authority and the special safety rules did not, in any real sense, benefit his client

and there was no evidence to suggest MA should be perceived to have greater bargaining power than Radisson in purchasing supplies or, indeed, that this could be of any relevance.

44. Mr Rosenthal emphasised that the restriction, in Clause 5.3.2, on the rates at which Radisson could be charged for electricity and gas was plainly for the protection of Radisson itself. More specifically, he submitted that the critical issue was as to the meaning of the word "commercial". Since there are no residential premises at the Airport which are charged for the use of electricity and gas, the word "commercial" cannot have been used so as to distinguish domestic or non-commercial premises and the obvious purpose of the restriction was thus to limit the charges to an objectively ascertainable yardstick by which the cap on rates could be measured. He submitted that the obvious point of reference was the supply of gas and electricity from a public network to commercial premises of a similar size and type in the North West of England. This can be regarded as the comparable market with "prevailing commercial rates".

(9) Analysis

45. In addition to electricity and gas, Clause 5.3.2 provides for Radisson to pay for "…water sewage drainage and other services when supplied by the Landlord". Before me, counsel were in agreement that payment for these services should be treated separately from electricity and gas so as to reflect the syntax of Clause 5.3.2 itself. On this basis "the prevailing commercial rates" limitation applies to "electricity and gas" but not other services. If more consistent with the syntax, the distinction is quite subtle. The formulae have apparently been separated so as to clarify that, unlike payments for other services, the payments in respect of "electricity and gas" are pursuant to the Landlord's obligations in Clause 6.11. However, there is no issue between the parties on this aspect of the case and neither party has adduced evidence on it. On this basis, I am content to assume that the limitation, in Clause 5.3.2, on payments for "electricity and gas" is limited to these services.

46. Turning now to the Preliminary Issue itself, I am satisfied that the "prevailing commercial rates" in Clause 5.3.2 means the "prevailing commercial rates" of the private utility networks of the major UK Airports, defined so as to include the UK Airports which receive international passenger flights in addition to internal passenger flights. It is thus

in similar, but not identical, terms to formulation (i) of the Preliminary Issue itself. I have reached this conclusion for the following reasons.

47. Firstly, in order to ascertain the "prevailing commercial rate" it is necessary to identify a market or comparator. The market or comparator should accommodate or approximate, as closely as possible, the contractual arrangements between the Claimants and Radisson in respect of the Hotel.

48. The covenant is in simple terms. It does not identify a hypothetical market to which the "prevailing commercial rate" is applicable nor does it provide that it is to be assessed with reference to assumptions. In these circumstances, the court should avoid, so far as possible, an excursion into the world of "make believe" rather the Lease should be construed so as to reflect the factual position of the parties and the state of affairs in existence at the time they entered into the 1996 Agreement. This is consistent with the natural and ordinary meaning of the words used. It is also consistent with business common sense in the sense to which Lord Clarke referred in *Rainy Sky (supra)* at [21] and it fully reflects the three authorities on which Mr Hutchings relies in relation to this issue.

    48.1. In *Charrington & Co Ltd v Wooder [1914] AC 71*, the tenant of a public house – a tied house - covenanted to purchase his supplies from the landlord brewery subject to a proviso that the brewery would supply certain wet stock at a "fair market price". An issue arose as to whether "fair market price" meant the price at which such stock could be obtained on the open market or the price generally payable by a tenant of a tied house. Free tenants were generally able to negotiate lower prices. The Court of Appeal adjudged that "fair market price" meant the price at which the tenant could buy on the open market if not tied to the brewery. The House of Lords allowed the brewery's appeal. At 79, Viscount Haldane stated that "the fallacy in the view taken by the Court of Appeal appears to me to have been that they endeavoured to interpret the covenant without reference to the circumstances of the particular trade and of the situation of the parties who entered into the contracts contained in the leases". Since the covenant was contained in a tenancy of a tied house, the "fair market price" was the price generally payable by a tenant of a tied house.

    48.2. In *Co-operative Wholesale Society v National Westminster Bank plc (17th November 1994)*, the Court of Appeal considered four appeals about the interpretation of rent review provisions in leases. In each case, the issue was whether

rent free periods for incoming tenants were to be taken into account when determining the current market rent according to the hypotheses stipulated in each lease. After referring to the so-called "presumption of reality", Hoffman LJ (as he was) stated that "in the absence of clear words or necessary implication, it is assumed that the hypothetical letting…is of the premises as they actually were, on the terms of the actual lease and in the circumstances as they actually existed". Similarly, Leggatt LJ stated that "departures from reality…are to be examined critically. So the Court will lean against a construction which would require payment of rent upon an assumption that the tenant has received the benefit of a rent-free period which he has not in fact received." The Court of Appeal construed the rent review provisions so as to reflect reality to the extent it was possible to do so consistently with the words used and thus achieve a discount on the rents that would have been achieved on a more literal interpretation of some of the leases.

48.3. In *Harbinger Capital Partners v Caldwell [2013] EWCA civ 492*, the Court of Appeal construed a statutory formula for the payment of compensation arising from the compulsory transfer of shares. Mr Hutchings relies on propositions from the dissenting judgment of Lewison LJ on issues of valuation arising from hypothetical transactions. He relies, in particular, on the following sub-paragraphs from Lewison LJ's judgment at [23], namely:

> "(i) The hypothesis is only a mechanism for enabling one to arrive at a value of particular property for a particular purpose. It does not entitle the valuer to depart from the real world further than the hypothesis compels: *Hoare v National Trust*, 380 (Schieman LJ). The various hypotheses must be taken no further than their terms make necessary: *Cornwall Coast County Club v Cardrange Ltd* [1987] 1 EGLR 146, 152. It is necessary to adhere to reality subject only to giving full effect to the hypothesis: *Hoare v National Trust*, 387 (Peter Gibson LJ).
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> (iii) The world of make-believe should be kept as near as possible to reality: *Trocette Property Co Ltd v GLC (1972) 28 P&CR 408, 420* (Lawton LJ): *Hoare v National Trust*, 386 9Peter Gibson LJ). Reality must be adhered to so far as possible, *Cornwall Coast County Club v Cardrange Ltd* (Scott J). The valuer should depart from reality only when the hypothesis so requires: Hoare v National Trust, 388 (Peter Gibson LJ).

49. In his submissions for Radisson, Mr Rosenthal submitted that *Charrington & Co Ltd v Wooder (supra)* was distinguishable on the basis that it applied to a tied house. It is certainly true that, in those days, tied houses were already a well established vehicle for breweries to let out premises for the in-house consumption of beers or other liquors in return for covenants requiring the tenant to purchase their beers from the brewery. No doubt, under these arrangements, the tenant's initial overheads were typically lower than they would otherwise have been. However, there is nothing in *Charrington & Co Ltd v Wooder (supra)* to suggest that Viscount Haldane's analysis was limited to tied houses or that, in other cases, it would be permissible to interpret the covenant without reference to the situation of the parties.

50. Mr Rosenthal distinguished *Co-operative Wholesale Society v National Westminster Bank plc (supra*) on the basis that the "presumption of reality" is limited to assessments based on specific hypothetical assumptions. It is, again, correct that the presumption of reality is intended to limit the extent to which the parties can legitimately depart from reality when giving effect to hypothetical assumptions. It is also correct that the Lease does not contain any such assumptions. However, if anything, this underlines the need to avoid excursions from reality. If the parties are to avoid departing further from reality than is necessary to give effect to a hypothetical assumption, there is every reason to avoid departing from reality when there is no contractual requirement to do so.

51. Lewison LJ's relevant observations, in *Harbinger Capital Partners v Caldwell (supra)* at [23(i) and (iii)] were made in a dissenting judgment and do not form part of the collective ratio. However, they are consistent with established principle and I am satisfied that they are an accurate statement of the law.

52. Secondly, in my judgment, the private utility networks of the major UK Airports can collectively be regarded as an identifiable market or comparator and, when viewed in that way, they accommodate or more closely approximate the parties' contractual arrangements than any other appropriate comparator. In evidence, Mr Maynard confirmed that other major airports, including Heathrow, Gatwick, Stansted and East Midlands, operate private utilities networks in which they invoice tenants and occupiers in a similar manner to Manchester. In all likelihood, they were doing so on and before 30th October 1996. In my judgment, if there is any uncertainty about the identity of the major airports, they include all UK Airports which receive international passenger flights in addition to internal passenger flights and operate private utilities networks.

53. Manchester Airport has a private utility network and, according to the evidence of Mr Curry, it has charged customers and tenants for the supply of electricity for many years. It might thus be possible to regard the tenants and customers of Manchester Airport as a market in which MA fixes the prevailing rates. However, as Mr Rosenthal observed in his closing submissions, the restriction on the rate at which Radisson could be charged for electricity and gas was specifically imposed for its own protection and, if Manchester Airport is entitled to unilaterally fix the rates at which Radisson is charged for electricity and gas, the restriction affords Radisson minimal protection.

54. Radisson postulates, as an alternative market or comparator, the prevailing rates payable for the supply of gas and electricity from a public network to commercial premises of a similar size and type in North West England. In support of this alternative, Mr Rosenthal pointed out that, whilst the electricity utilities were privatised in December 1990 or thereabouts, the market for electricity was much less developed in October 1996 than it became subsequently and that, whilst Manchester Airport straddled the areas of NORWEB and MANWEB, it was primarily supplied by NORWEB from which, no doubt, it would have been possible to obtain commercial rates for premises of a similar size and type from the public network. However, no steps were ever taken to connect the Hotel to the public network for the supply of gas and electricity and Radisson did not negotiate any rights to do so when it entered into the 1996 Agreement or, indeed, the Lease. It follows that, as a comparator, the public network – whether in the North West or any other geographically defined area - does not and did not reflect the reality of the arrangements for which MA and Radisson contracted.

55. Mr Rosenthal submitted that, if the private utility network at Manchester Airport did, indeed, enjoy a more resilient supply of electricity so as to comply with the Civil Aviation Authority Rules, this is unlikely to have provided Radisson with a substantial benefit as the operator of a hotel. The additional expense in ensuring a more resilient supply was thus unjustifiable. However, it would have been open to Radisson to negotiate for the acquisition of rights to connect to the public network and, if declined, to withdraw. In any event, had it sought to limit MA's charges for gas and electricity to the amounts payable on the public network, this could and should have been provided for expressly in the 1996 Agreement.

56. There are also difficulties in Radisson's formulation of its alternative market or comparator. If the parties had intended that the prevailing commercial rates would simply

be based on the amounts charged for comparable premises by NORWEB or its successors, if any, they could have been expected to provide for this expressly. If not, it is difficult to see why the prevailing commercial rates should be defined with reference to the "North West" which is presumably intended to extend North from Manchester to Scotland, thus including Carlisle, but not towns and cities in much closer proximity in West Yorkshire, Cheshire and Staffordshire. Mr Rosenthal submitted that this issue could be addressed by re-defining the geographical boundaries. However, it raises difficulties and ambiguities which were not addressed in evidence.

(10) Disposal

57. I shall thus determine the Preliminary Issue as follows, namely that on the true construction of the Lease, the "prevailing commercial rates" in Clause 5.3.2 in relation to gas and electricity supplied to the tenant from time to time pursuant to the landlord's obligations in Clause 6.11 means the prevailing commercial rates of the private utility networks of the major UK Airports defined so as to include the UK Airports which receive international passenger flights in addition to internal passenger flights. I shall hear further from counsel on all consequential matters.