

**RENT AND INTERIM RENT UNDER PART II OF THE LANDLORD AND TENANT ACT 1954:  
AN OVERVIEW AND UPDATE**

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1. It was difficult to give this talk any sort of “snappy” or witty title, so (as you have seen) I didn’t try. There is (as you will see) little that is new to say about the ascertainment of rent under section 34 of the 1954 Act. The relevant provisions have been around for over 50 years and are generally well understood. There have been, however, one or two recent interesting cases on interim rent.

**RENT**

2. The first key point to note is that the rent under a renewed lease is the last matter to be determined. If there is any dispute about the terms or the term then these must be resolved before a court will decide upon the level of rent-see CARDSHOPS V DAVIES [1971] 1 WLR 591.

3. The relevant statutory provision is section 34 of the act. This reads as follows:

*“The rent payable under a tenancy granted by order of the court under this Part of this Act shall be such as may be agreed between the landlord and the tenant or as, in default of such agreement, may be determined by the court to be that at which, **having regard to the terms of the tenancy (other than those relating to rent), the holding might reasonably be expected to be let in the open market by a willing lessor, there being disregarded—***

*(a) any effect on rent of the fact that the tenant has or his predecessors in title have been in occupation of the holding,*

*(b) any goodwill attached to the holding by reason of the carrying on thereat of the business of the tenant (whether by him or by a predecessor of his in that business),*

*(c) any effect on rent of an improvement to which this paragraph applies,  
(d) in the case of a holding comprising licensed premises, any addition to its value attributable to the licence, if it appears to the court that having regard to the terms of the current tenancy and any other relevant circumstances the benefit of the licence belongs to the tenant.”*

I have emphasised the most significant passage.

“Open market” valuation: basic principles

4. The first and fairly basic point to note about this provision is the nature of the court’s task here. As the House of Lords pointed out in O’MAY V CITY OF LONDON [1982] 2 WLR 407, whereas the court has an element of discretion in deciding upon the term and the terms of the new lease under sections 33 and 35 respectively, its decision under section 34 is a matter of valuation rather than discretion.
5. The valuation date is technically the commencement date of the new tenancy (see LOVELY & ORCHARD V DAEJAN [1978] 1 EGLR 44). By reason of section 64 of the act, that date is technically some months after the date of any hearing. In practice the court will determine the issue on the evidence before it and will, effectively, determine the rent as at the hearing date unless there is, on the evidence, any reason to suppose that the market will alter in the supervening months.

6. The statutory formulation is, as I have stated, familiar and well understood. Very many commercial leases contain rent review provisions in similar if not identical terms. The courts have, over the years, elucidated certain key principles which bear repetition.

7. Despite the fact that there is no specific mention of there being a “willing lessee” (as opposed to a “willing lessor”) it is taken as read that there is such a creature, being implied from the fact that the hypothetical letting is on the open market. In DENNIS & ROBINSON V KIOSSOS ESTABLISHMENT [1987] 1 EGLR 133 (a rent review case) Fox LJ said that one had to assume that:

*The landlord is willing to let the premises. Equally, the supposed tenant is willing to take the premises. The notion of a letting in the open market between an unwilling lessor and an unwilling lessee (or between a willing lessor and an unwilling lessee) for the purpose of determining a reasonable rent makes no sense*

Dillon LJ said:

*The lease uses the phrases 'full yearly market rent' and 'rent . . . at which the property might reasonably be expected to be let in the open market'. These phrases assume that there is a market in which agreement will be reached for a hypothetical letting of the premises to a hypothetical tenant. That necessarily imports a hypothetical landlord who is willing to let the premises and a hypothetical tenant who is willing to take the premises on the terms prescribed by the rent review clause, ie a willing lessor and a willing lessee”*

8. The courts have also emphasised the hypothetical nature of the exercise. The “willing landlord” and the “willing tenant” are thus abstractions without necessarily having the personal

characteristics of the actual landlord or the actual tenant. In FR EVANS (LEEDS) V ENGLISH

ELECTRIC (1977) 36 P&CR 185 Donaldson J had this to say:

*“The first, and perhaps the most important, conflict between the parties is whether, in the application of the clause, the willing lessor is to be identified with the landlords and the willing lessee with the tenants...for the purposes of the clause the landlord is an abstraction—a hypothetical person with the right to dispose of the premises on an 18-year lease. As such, he is not afflicted by personal ills such as a cash-flow crisis or importunate mortgagees. Nor is he in the happy position of someone to whom it is largely a matter of indifference whether he lets in October 1976 or waits for the market to improve. He is, in short, a willing lessor. He wants to let the premises at a rent which is appropriate to all the factors which affect the marketability of these premises as industrial premises—for example, geographical location, the extent of the local labour market, the level of local rates and the market rent of competitive premises, that is to say, premises which are directly comparable or which, if not directly comparable, would be considered as viable alternatives by a potential tenant. Similarly, in my judgment, the willing lessee is an abstraction—a hypothetical person actively seeking premises to fulfill needs which these premises could fulfill. He will take account of similar factors, but he too will be unaffected by liquidity problems, governmental or other pressures to boost or maintain employment in the area and so on. In a word, his profile may or may not fit that of the English Electric Co. Ltd., but he is not that company.”*

9. However neither party is deemed to be desperate to do a deal. In the EVANS case the judge continued:

*“whilst the hypothetical tenant is a willing lessee, he is not an importunate one. He wishes to take a lease of the premises, but he is operating in a commercial field and in deciding what to offer by way of rent will take account, covertly or overtly, of the alternative of taking a lease of two or more other premises.”*

10. It thus does not matter that, in fact, the present tenant would very likely be the only bidder:

*“The fact that it is very likely that the English Electric Co. Ltd. would have been only the potential lessee is relevant, but its relevance is indirect. It does not matter whether the only potential lessee was this company or the XYZ Co. Ltd. What matters is that in the state of the*

*market there was not likely to be more than one willing lessee. The effect of this fact is not, however, decisive because this single potential lessee is to be assumed to be a willing lessee—neither reluctant nor importunate, but willing. Just as the hypothetical lessor cannot rely overmuch on the fact that no property similar to the Walton Works is available on the market, so the hypothetical lessee cannot rely too much upon the fact that he has no competitors—he is, and is known to be, a willing lessee.”*

11. The corollary of this is that the landlord cannot seek to extract any “ransom value” from the premises. NORTHERN ELECTRIC V ADDISON (1997) 77 P&CR 168 was a claim by the tenant for a new lease of an electricity sub-station. The agreed lease (as had the old lease) contained a clause restricting the user of the premises to an electricity sub-station. On the hearing to determine the rent payable under section 34 the landlord contended that the rent should be increased by a “ransom” element in that no landlord would be willing to let the premises for that use without payment of a premium to reflect the other potential uses to which the site could be put. The Court of Appeal rejected that argument. Potter LJ stated:

*“...the judge was required to assume a willing lessor of premises limited to use as an electricity sub-station, the term already agreed between the parties. That combination of considerations necessarily precluded a notional lessor unwilling to let the premises for such restricted use, unless a premium was paid to take into account other potential uses. That is because (a) such an approach would represent a qualification on the overall notion of a willing lessor whose willingness falls to be judged on the assumption that it relates to the lease before the court; (b) because taking into account other potential uses involves ignoring what are in fact terms providing for one use and one use only.”*

12. However, the court *can* take into account the fact that there might, in the market, be a special purchaser, for example an adjoining occupier, who would be especially keen to acquire a tenancy

of the premises. This might well raise the rent which the notional willing tenant would pay. The court is however not entitled to take into account any overbid by such a special bidder. By the same token, the court has to assume that there is or would be a market even where, in reality, no one would actually want to take the premises-see (albeit in another context) CRAVEN (BUILDERS) LTD V SECRETARY OF STATE [2000] 1 EGLR 128).

13. As Nourse LJ said in the KIOSSOS case:

*“...though it is assumed that there is a market, there is no assumption required as to how lively that market is. The strength of the market and the rental value of the premises in the market are matters for the valuer's discretion based on his own knowledge and experience of the letting value of such premises.”*

#### Practicalities

14. In the vast majority of cases the rent will be arrived at by a valuation based on comparable transactions. As to this, in MARKLANDS V VIRGIN RETAIL [2004] 2 EGLR 43, Lewison J said as follows:

*“Valuation essentially proceeds by analogy. The valuer looks for an analogue which is as close as possible to that which he has to value, and which has been the subject matter of a real transaction. He then works on the premise that if the subject matter of his valuation were to be the subject of a similar transaction, it would command the same value as the analogue. Since the analogue will never be identical to the subject matter of the valuation, the valuer will have to make adjustments to the value revealed by the analogue in order to reflect the differences between the analogue and the subject matter of his own valuation. In the case of a property valuation the analogues are usually called “comparables”. In the case of a property valuation typical adjustments will reflect differences between the comparables in location, terms of letting and so on. One obvious difference between different properties is that they will be of different sizes. As a first step towards eliminating the differences in size between a comparable and the subject matter of the valuation the valuer will not take the rent of the comparable and apply it to the subject property. Rather, he will divide the rent of the comparable by the area of the comparable to produce a rate per square foot. The area can be calculated in a variety of different ways, depending on the nature of the property. The RICS*

*publish a Code of Measuring Practice to guide practitioners, and it is that Code that the lease refers to. This process of division is called “devaluation”. Having devalued the comparable, the valuer can then apply the rate per square foot to the subject property (if necessary making adjustments for the factors I have mentioned). He will then multiply the rate per square foot by the area of the subject property and thus arrive at a rental value. Sometimes, however, the valuer will think it appropriate to make a further adjustment for size, over and above the process of devaluation. This is because the subject property may be considerably larger than the comparable (in which case an end allowance or discount for size may be appropriate); or because a particular comparable may be so small as to produce an extremely high rent if looked at as a rate per square foot (often known as “kiosk rents”). This is essentially the “overall” method of valuation.”*

If the current audience will forgive my sloth: I could not have put it better myself and will not therefore try.

15. There are a number of points which arise from this.
16. A point which is frequently overlooked is that comparable transactions technically have to be proved by admissible evidence (see ENGLISH EXPORTERS V ELDONWALL [1973] 1 Ch 415). In modern litigation in which courts will much more readily admit hearsay evidence, this becomes less of a problem. Frequently each party’s respective valuers will agree a schedule of comparables which will include agreement as to the material facts of each. In such cases the difference between them will revolve around valuation matters such as which is the closest or most appropriate transaction or how one should devalue a particular comparable in order to arrive at the rent for the relevant premises. Occasionally however, one can get cases in which the facts relating to a supposed comparable transaction are not agreed. In such cases, if one or other party wants to rely on a particular comparable, then admissible evidence will have to be called. For example in HOTT V ABP [2012] EWHC 1336 (a case to which we shall have to return more than

once), there was a dispute about the terms of a particular comparable relied upon by the landlord who had to call evidence from someone who had been involved in the negotiations leading up to the deal.

17. A further point is that the valuers and the court will only be able to rely on evidence which would have been available to the hypothetical parties at the date of the hypothetical letting. They cannot either seek to obtain disclosure of, or rely on, material which would not have been in the public domain. CARDGRANGE V CORNWALL COAST [1987] 1 EGLR 146 involved a rent review of premises used as a casino. The landlord argued that the rent could be assessed by reference to the trading accounts of the tenant and the actual income generated and profits made in the premises. Scott J rejected this argument. He stated that the hypothetical negotiation was to be assumed to be taking place in the real world in which the tenant's trading accounts were private and would not be available to either the hypothetical landlord or the hypothetical tenant. Thus such information was irrelevant.

18. This approach was upheld more recently by Morgan J in an earlier instalment of the HOTT V ABP case ([2011] EWHC 1184 Ch). As we shall see, that case involved the assessment of an interim rent in respect of an oil jetty. The landlord was the Harbour Authority and was entitled to charge ships and cargo dues under the Harbours Act 1964. The lease which had expired contained a clause exempting the tenant from having to pay such dues. The landlord argued that this was a valuable exemption and thus that the rent which the hypothetical tenant would pay would be increased to take this into account. The tenant denied this. It further alleged that any ships and



cargo dues which would otherwise be chargeable would be calculated by reference to the landlord's costs of running the harbour. In advance of the hearing, the tenant sought disclosure of information about the landlord's costs. Morgan J rejected this application. Following Cardgrange and the House of Lords case of LYNALL V IRC [1972] AC 680, he held that the information was irrelevant as there was no reason to suppose that the hypothetical tenant negotiating the amount of rent would be aware of it. The authorities established that:

*“when one carries out an open market valuation of an asset, one can take into account information which would be available in the open market to the notional purchaser but one cannot take into account information which would not be so available.”*

19. Finally it is worth noting that there may be the odd case where the type of premises is so unusual there is no comparable evidence. In such cases the valuers have to rely on other methods of valuation.

20. One such case was the HOTT case. As I have stated, this involved the determination of an interim rent for an oil jetty. Oil jetties are not that common and leases of oil jetties are even less common. Although there was one other oil jetty in the UK which had been leased, the valuers on both sides accepted that there was, effectively, no market and no comparable evidence. They both agreed that the only appropriate valuation method to adopt was the Depreciated Replacement Cost (or DRC) method. This is the subject of some RICS Guidance which was discussed in the judgment of Sales J. This is a method for ascribing a capital value to an asset. It is based on the economic theory of substitution. The theory is that the hypothetical buyer (or

lessee) of the asset will not pay more to acquire (or rent) it than the cost of acquiring an equivalent new one. Thus one starts with the cost of constructing a modern equivalent of the asset to be valued. One then devalues it by a percentage to take into account the age of the current asset (a depreciation allowance). This gives you a capital value of the present asset. In addition, one then has to devalue this figure to arrive at an annual rental sum. In the HOTT case the depreciation allowance was agreed at 40%. However there were disagreements as to: the nature and cost of the modern equivalent asset and the percentage applicable to derive an annual rental figure.

21. I don't suppose that the discussion on these topics in the judgment of Sales J will have any impact on future cases being very much related to the unusual facts of that case. However if you want to wile away an hour or two the judgment contains an interesting discussion of certain of the more obscure corners of property valuation.

#### Disregards

22. As set out above, in all but licensed premises, there are three express disregards set out in section 34. Those in section 34 (1)(a) and (b) are clear cut and cause little controversy in practice. They are, to recap, as follows:

*“(a) any effect on rent of the fact that the tenant has or his predecessors in title have been in occupation of the holding,*

*(b) any goodwill attached to the holding by reason of the carrying on thereat of the business of the tenant (whether by him or by a predecessor of his in that business”*

23. The concept behind both is clear. They are to prevent the tenant having to pay an increased rent due to any increased value the premises has by reason of its own previous occupation. In effect they direct the court to ignore the “sitting tenants overbid”.

24. So far as the disregard of improvements in subsection (c) is concerned, this applies to:

- (i) An improvement:
- (ii) Carried out by the tenant or by someone who was the tenant at the time;
- (iii) During the current tenancy or (if during a previous tenancy) not more than 21 years before the application to the court;
- (iv) Otherwise than in pursuance of an obligation to the immediate landlord.

25. There is no definition of “improvement” but the case law under section 19(2) of the Landlord and Tenant Act 1927 would indicate that an improvement is a physical alteration which improves the premises from the tenant’s point of view.

26. There are two further interesting points.

27. The first is that, following the HOTT case there now appear to be three conceptually separate, but potentially overlapping, classes of items the presence of which has to be disregarded on an assessment of the market rent under section 34. These are:

- (i) Improvements within the statutory definition in section 34 above;

- (ii) Tenants fixtures which are “those fixtures which the tenant himself fixed into the premises for the purpose of his trade...but which do not become part of the structure itself” (per Lord Denning in NZ GOVNT. CORP. V HM&S [1982] 1 QB 1145) and which the tenant has a right at common law to remove. In the NZ GOVNT case the Court of Appeal made it clear that section 34 of the 1954 act applied to items which were otherwise landlord’s fixtures and that items which were tenants fixtures were ignored in fixing the market rent at common law in any event.
- (iii) Items which the tenant has a contractual right to remove. In his judgment in the HOTT case Sales J holds that, whatever their status otherwise, any item which the tenant has a contractual right to remove set out in the lease, is separately to be disregarded in calculating the market rent.

28. Of course the principle behind each of these disregards is the same: the tenant should not have to pay an increased rent which results from works which he himself has carried out to the premises at his own cost.

29. A more interesting question is exactly how one gives effect to these disregards. In particular does one value the premises as if they were not there or does one assume that they are present (as they are in reality) but discount the rent to account for the fact that the tenant is beneficially using the premises but should not have to pay for the benefit of his own works. In other words: does one disregard the existence or simply the rental value of the improvements? The point has

been touched on by Forbes J in the case of G.R.E.A. V WILLIAMS [1979] 1 EGLR 121 which was a rent review case. He said (at 122L):

*“[the intention of the parties was that] the rental equivalent of the tenant’s works was to be eliminated from the rent to be agreed at the reviews. In approaching any valuation here the valuers must use some method of valuation which carries out the intention of the parties that the rent payable to the landlord should keep pace with inflation and that from such rent should be eliminated the rental equivalent (itself affected by inflation) of the tenant’s works.”*

And:

*“To value premises by assuming that the tenant must pay for the improvements at the time of the review is to disregard the existence of the improvements and not necessarily their rental value.”* (emphasis in original)

He emphasised that, ultimately, it was a matter of valuation evidence.

30. In most cases it will not matter. If a tenant has installed partitioning or air conditioning or heating which has to be disregarded, the valuers will be able to find comparable properties which have similarly been let without those items.

31. However occasionally acute problems arise. One returns (almost inevitably in this paper) to the HOTT case.

32. As set out already, that case involved a lease for a term of 40 years of an oil jetty in Immingham.

The lease was granted in 1970 and expired (as the judge held) on 1<sup>st</sup> January 2010. As eventually constructed, the jetty consisted of two elements:

- (i) the concrete and steel jetty structure which had been constructed by the landlord prior to the grant of the lease and at its cost; and
- (ii) the system of pipes pumps and valves attached to that structure by which oil was discharged from or pumped into ships and which had been constructed by the tenant at its own cost prior to the grant of the lease and pursuant to an agreement to do so with the landlord.

As the Judge noted, neither element was economically valuable without the other. Under the terms of the lease, the equipment installed by the tenant expressly became part of the demised premises. However, the tenant had an express right under the lease to remove the equipment which it has installed at the end of the term. The Judge held therefore that the rental value of the tenant's equipment had to be disregarded for the purposes of assessing the rent.

33. However that left a problem. The tenant asserted that, as one had to disregard the tenants equipment, what had to be valued for the purposes of assessing the interim rent was in effect a bare jetty. One had to disregard the presence of the equipment. As such the assessed rent was in fact lower than the passing rent as one had to assume that the hypothetical willing tenant would have to re-equip the jetty and this was not something any sensible tenant would do given the yearly tenancy assumption. This was of course despite the fact that, in reality during the relevant

period, the tenant had actually been using the jetty and pumping 20 million tonnes of oil and oil products over it annually. A discussion of how the Judge dealt with this conundrum leads us neatly towards the topic of interim rent.

## **INTERIM RENT**

34. Interim rent is a creature of statute. It was originally introduced as section 24A of the 1954 Act by the Law of Property Act 1969 and subsequently amended to encompass the present sections 24A to 24D by the Regulatory Reform (Business Tenancies) (England and Wales) Order 2003.

35. The purpose behind its original introduction is tolerably clear and was explained by Nourse LJ in the case of CABTELL V FOLLETT [1987] 2 EGLR 88 as follows:

*“By 1969 it had been demonstrated that a tenant, in times of inflation, could readily spin out the steps prescribed by the 1954 Act and the rules of court, so as unfairly to prolong the continuation of the old rent under section 24. The defeat of such practices was the primary legislative purpose of section 24A”.*

36. However, if the original basic intention was clear, the statutory language implementing it is much less clear.

37. Following the amendments made in 2003, there are now in effect two regimes for interim rent: section 24C and section 24D.

38. The provisions are introduced by section 24A which provides that either landlord or tenant can apply to have an interim rent determined if either: the landlord has served a section 25 notice; or the tenant has served a section 26 request. The interim rent is one which:

*“the tenant is to pay while the tenancy (“the relevant tenancy”) continues by virtue of section 24 of this Act”.*

39. Section 24B defines the date from which the interim rent is payable as either:

- (i) the earliest date of termination which could have been specified in the landlords section 25 notice; or
- (ii) the earliest date that could have been specified in the tenants section 26 request as the date from which the new tenancy is to begin.

40. The regime under section 24C applies if, and only if, a number of conditions are fulfilled:

- (i) The landlord has served a section 25 notice indicating that he will not oppose the grant of a new tenancy; and
- (ii) The tenant is in occupation of the whole of the property demised in the relevant tenancy;

Alternatively:

- (iii) The tenant has served a request under section 26 at a time when he is in occupation of the whole of the property comprised in the relevant tenancy; and
- (iv) The landlord has not given notice that he will oppose the grant of a new tenancy under section 26 (6);



And in either case

- (v) The Landlord grants a new tenancy of the whole of the property comprised in the relevant lease (following agreement or order).

41. Thus section 24C effectively only applies to unopposed renewals of the whole of the premises originally demised.

42. In such cases the interim rent is the same as the rent payable at the commencement of the new tenancy (section 24C(2)) save in two exceptional circumstances. These are set out in section 24C(3) and (4) as follows:

*“Subsection (2) above does not apply where–*

*(a) the landlord or the tenant shows to the satisfaction of the court that the interim rent under that subsection differs substantially from the relevant rent; or*

*(b) the landlord or the tenant shows to the satisfaction of the court that the terms of the new tenancy differ from the terms of the relevant tenancy to such an extent that the interim rent under that subsection is substantially different from the rent which (in default of such agreement) the court would have determined under section 34 of this Act to be payable under a tenancy which commenced on the same day as the new tenancy and whose other terms were the same as the relevant tenancy.*

*(4) In this section “the relevant rent” means the rent which (in default of agreement between the landlord and the tenant) the court would have determined under section 34 of this Act to be payable under the new tenancy if the new tenancy had commenced on the appropriate date (within the meaning of section 24B of this Act).”*

43. This rather convoluted drafting is intended to allow the court to assess an interim rent different from the rent agreed or assessed under the new lease basically where either:

- (i) There has been such a great delay between the service of the notice and the grant of the new tenancy that it would be unjust for the tenant to have to pay the newly agreed or assessed rent for the entirety of the interim rent period; or

- (ii) There is such a difference between the original terms and the newly agreed terms that it would be unjust (to one or other party) for the rent payable at the commencement of the new lease to be that payable while the old lease continued.

44. In any other case the regime under section 24D applies. This is very similar to the original section 24A as introduced by the 1969 act. The current provision provides as follows:

- (i) 24D(1) provides:

*“The interim rent in a case where section 24C of this Act does not apply is **the rent which it is reasonable for the tenant to pay while the relevant tenancy continues** by virtue of section 24 of this Act.”*

- (ii) s. 24D(2) provides:

*“In determining the interim rent under subsection (1) above the **court shall have regard—***

*(a) **to the rent payable under the terms of the relevant tenancy;**  
and*

*(b) **to the rent payable under any sub-tenancy of part of the property comprised in the relevant tenancy***

*but **otherwise subsections (1) and (2) of section 34 of this Act shall apply to the determination as they would apply to the determination of a rent under that section if a new tenancy from year to year of the whole of the property comprised in the relevant tenancy were granted to the tenant by order of the court.”***

- (iii) As a reminder s. 34(1) provides:

*“(1) **The rent payable under a tenancy granted by order of the court under this Part of this Act shall be such as may be agreed between the landlord and the tenant or as, in default of such agreement, may be determined by the court to be that at which, having regard to the terms of the tenancy (other than those relating to rent), the holding might reasonably be expected to be***

*let in the open market by a willing lessor, there being disregarded...”*

(emphasis added).

45. It is the interrelationship between the three highlighted elements which has caused conceptual and occasionally practical difficulty. The original s. 24A was described as “somewhat obscure” (per Stamp J in REGIS PROPERTY V LEWIS & PEAT [1970] Ch 695 (at 698) and Megarry J in ENGLISH EXPORTERS V ELDONWALL [1973] 1 Ch 415 (at 428)), “extremely difficult to construe and apply” (per Goff LJ in FAWKE V VISCOUNT CHELSEA [1979] 1 EGLR 89 (at 91)) and “notoriously difficult” (per Stephenson LJ in HALBERSTAM V TANDALCO [1985] 1 EGLR 90 (at 92)).

46. A further difficulty is caused by the reference to rent being assessed on the basis of the tenancy from year to year. Whereas some premises (such as shop premises) may occasionally (or frequently even) be let on tenancies from year to year, most commercial property is not let for such a term as it suits neither landlord nor tenant. Thus the valuer assessing the interim rent normally has difficulty finding any comparable evidence.

47. As Sales J set out in the HOTT case, there are three elements of the statutory definition:

- (i) The rent which it is reasonable for the tenant to pay (section 24D(1));
- (ii) The injunction to have regard to the rent payable under the current tenancy (section 24D(2)(a)); and
- (iii) The market rent assessed under section 34 on the basis of a yearly tenancy.

48. In the ELDONWALL case, Megarry J emphasised that the reference to the “rent which it is reasonable for the tenant to pay” did not give the court a “roving commission” or discretion to assess what was reasonable. A further explanation was that given by Nourse LJ in the CABTELL case in which he agreed with Megarry J and said that Parliament had:

*“...recognised that, while inflation benefits the tenant during the currency of a lease at an uninflated rent, it exposes him to an inordinate shock if its consequences are visited on him in full directly the lease has determined. The legislative purpose of the requirement that regard should be had to the old rent was, where appropriate, to cushion the tenant against that shock... the purpose of the requirement is, where appropriate, to cushion the tenant against the shock which I have described...”*

49. This was the accepted view until two recent cases. It was no doubt an adequate explanation in times of non-stop rent inflation.

50. In NEALE V WITNEY ELECTRIC THEATRE [2011] EWCA Civ 1032, however, the court was concerned with an assessment of interim rent under section 24D of premises used as nightclub. The passing rent under the relevant tenancy was £43,000 per annum. The judge had held that the section 34 market rent under a tenancy from year to year would have been lower by some 25%. Nevertheless he awarded an interim rent as the same level as the passing rent. The (by now former) tenant appealed and relied on ELDONWALL and CABTELL to make the submission that the reference to the passing rent was intended to benefit the tenant by allowing a cushion if necessary and that the judge should have awarded the much lower yearly tenancy market rent figure.

51. The Court of Appeal dismissed the appeal. Laws LJ described the assessment of “the rent which it is reasonable for the tenant to pay” in section 24D(1) as “*the overriding provision*”. Etherton LJ stated that, at least in that case, the judge was exercising “*a broad discretion to fix what he considered as a reasonable rent*”.

52. The dicta in this case were applied and amplified by Sales J in the HOTT case. I have already stated the facts. On the question of interim rent the parties adopted starkly divergent positions. The passing rent under the old lease was £4,045,244. This had not really been increased since 1995. The tenant asserted that the interim rent should be substantially less than this, a figure of £2,300,000. This was based on the fact that: one had to assess the rent of a bare jetty (without the tenant’s equipment); one had to assess the open market rent on the basis of a tenancy from year to year (and no tenant would take such a tenancy and put new equipment onto the bare jetty). Alternatively the interim rent should be no more than the passing rent. The landlord submitted that the interim rent should be £24,903,000 which was the figure its valuer assessed as the open market rent for a fixed term tenancy of the jetty and the equipment less a 10% end allowance to take into account the yearly tenancy assumption.

53. The Judge carried out a careful deconstruction of the provisions of section 24D. He held that the “*governing obligation*” was that in section 24D(1), that is the rent which it was reasonable for the tenant to pay. It was the “*main guiding principle*”. The other two elements fall to be read and applied in the light of that obligation. He described the tenant’s position as “*utterly divorced from reality*”. The court was not compelled to value on the basis of a bare jetty particularly when in

reality during the interim rent period the tenant had been making substantial use of a fully operational jetty. He stated:

*“Where a tenant holds over in possession of premises by virtue of continuation of the relevant tenancy under the 1954 Act, the rent which it is reasonable for him to pay should be assessed in a practical and fair way, having regard to the actual circumstances which it is contemplated at the start of the interim rent period will apply during the period for which the rent is to be paid”.*

54. It also seems to me that this is consistent with Parliamentary intention. It seems clear that the purpose behind the reference to a tenancy from year to year in the statutory formulation is simply to reflect the indeterminate and uncertain length of the tenant’s holding over under s. 24. The tenant continues to enjoy exclusive possession of the premises as they are but the length of this occupation is uncertain until the renewal proceedings are finally determined: see Law Commission Report No. 17 (1969) (at paras 24 and 25), Law Commission Working Paper No. 111 (1988) (at 3.4.5) and Law Commission Report No. 208 (1992) (at paras 2.68 to 2.70). The intention is not to give the tenant a windfall based on an assessment of rent which is wholly divorced from reality.

55. Having held that the tenants’ equipment was to be disregarded, he applied the DRC valuation method and calculated the rent by devaluing the cost of construction of the jetty structure alone. However he agreed with the landlord that there would be an additional element in the rent to reflect the exemption from ships and cargo dues. In this sense he reflected the reality of a

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functioning jetty during the interim rent period and refused to accept the tenants “bare jetty” assumption. Thus he applied his “governing obligation” in choosing between the competing valuation methodologies.

56. The other interesting point is his adoption of the landlord’s surveyor’s 10% end allowance. Having assessed the section 34 rent on the basis of a fixed term, he then reduced it by 10% to reflect the annual tenancy assumption. Ultimately how one arrives at a rent for a tenancy from year to year is a valuation question. However the 10% end allowance is a very common and conventional approach and it is interesting to see it endorsed in a case with unusual and complex facts.

57. Finally: a word of warning. The HOTT case is going to the Court of Appeal. I would perhaps urge you to “watch this space” rather than “hold you breath”.

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